MASTER THESIS

Titel der Master Thesis / Title of the Master‘s Thesis

“Attraction of Foreign Investment or Environmental Protection? A Sustainability Dilemma in Light of Chile’s Ratification of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership”

verfasst von / submitted by

Ignacio Alejandro Reyes Gajardo

angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M.)

Wien, 2023 / Vienna 2023

Studienkennzahl lt. Studienblatt / Postgraduate programme code as it appears on the student record sheet:	UA 992 628
Universitätslehrgang lt. Studienblatt / Postgraduate programme as it appears on the student record sheet:	International Law
Betreut von / Supervisor:	August Reinisch, Univ.-Prof. MMag. Dr, LL.M.

Contents

Introduction

Development processes have been at the centre of each country's goals and, consequently, of their public policies. Furthering the development of a country requires an assessment of what is, at the relevant point in time, necessary for the society while also considering the resources available to that state.

Although policies seeking to further the development of a country might fail due to a variety of reasons, an important pillar to achieve success is the management of those available resources. These, as the economic maxim states, are scarce while our necessities are unlimited. This led to the realisation by the international community that mercantilist tendencies for economic development and close markets were not to be the proper approach to satisfy a country's necessities, but rather, the members of the international community needed one another to satisfy them.

It is by now clear, and a consensus exists on the fact that the opening of markets and engaging in international trade have led countries to be better off than they were with mercantilism and closed markets. The improvement was not only in an economic perspective, but in almost all aspects of life. The worldwide engagement in international trade goes hand in hand with the improvement of the overall world's economy, life expectancy, education, and child mortality just to name a few aspects.

From a legal perspective, the opening of markets and engagement in international trade has been crowned by a proliferation in the conclusion of international agreements allowing trade, getting rid of restrictions, and permitting and protecting foreign investment into one's country.

Despite all these positive facets, and up until the last few decades, environmental aspects were forgotten, or at least, dismissed when looking for development and when carrying the according policies. Chile, a country leading the economic scenario in Latin America, forms part of a group of countries where the obsession for furthering economic growth has resulted in a dismissal of important environmental considerations, allowing very extractive forms of foreign investment that involves minimal or no environmental protection regulations.

This matter has become part of the central debate in Chile and the conclusion of an increasing number of such international agreements on trade and investment are now a controversy in Chile's society. The negative environmental impact of the country's economic policies is visible regardless of the presence of environmental laws in the country. The protection of the environment is not a mere whim of Chilean society, but is fundamental, considering that the Earth is not a scarce resource, but a unique one. Scientific developments in the field of environmental protection have strongly warned the international community of the dangers that the current world policies and model of development pose to our environment.

It is in this context, that the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (hereinafter CPTPP), a trade agreement between countries of the Asia-Pacific region –including Chile– has been considered an innovation in the area of trade and investments, that is said to balance the two interests at stake, namely, the pursuit of development and environmental protection. A portion of the political debate in Chile revolves around the ratification of this agreement making Chile a full member.

The set of rules regarding foreign investment, however, has created uncertainty in Chile concerning the ability of the state to further implement and enforce its environmental laws or to continue developing rules on environmental protection. In this context, it has been affirmed that the ratification of this agreement will lead to the country's waiver of sovereignty related to the protection of the environment.

This restriction of Chile's sovereignty would be particularly due to two aspects of the foreign investment chapter of the CPTPP, namely, the rules on expropriation and those on investor-state dispute settlement. The CPTPP, however, is said to be an innovative instrument regarding environmental protection, as it contains a comprehensive chapter on environment, and environmental rules within the investment chapter, which are claimed to balance the promotion of foreign investment and with the preoccupations for environmental concerns.

The current topic has been framed by the Chilean society as the right and obligation of Chile to pursue its development in a sustainable way. The concept of sustainable development, also referred to as sustainability, relates to a balance between economic and social development on the one hand, and environmental protection on the other. With it, this thesis seeks, first and foremost, to examine the concept of sustainable development, its meaning, and legal status to reach a conclusion on whether Chile is legally bound to comply with it in light of the ratification of the CPTPP.

With the analysis of the notion of sustainable development, this thesis will then enter the examination of the text of the CPTPP determining its compliance with the requirements of sustainability. This will lead to the determination of how and if the ratification of the CPTPP allows the Chilean State to balance these elements of economic and social development with environmental protection.

Understanding the topic at hand requires a brief look at the recent history of the politics and developmental policies in Chile as well as the country's investment regime and its environmental considerations. This will provide a perception of the current debate in the country concerning the pursuit of sustainable ways of furthering Chile's development process.

Then as mentioned, this work will turn into an extensive analysis of the concept of sustainable development, its meaning, scope and whether this notion has created obligations to be complied with by Chile. Finally, the consequences drawn from the analysis of the concept of sustainable development will be put into perspective with the CPTPP to determine their complementarity and balance, to conclude with the determination of whether the CPTPP is, in light of the concept of sustainability, a feasible possibility for Chile's development.

It is important to observe that this research limits itself to the determination of international consequences and responsibilities that the ratification of the CPTPP might produce only with respect to its foreign investment rules. As such, the analysis and study of possible violations of Chilean national legislation fall outside the scope of this work.

1. An Overview into Politics, Investment Regime and Environmental Protection in Chile

1.1. Historical Overview of Chilean Politics and Political Regime

Ever since the return to democracy in the early 1990s after the tortuous Pinochet's dictatorship, Chile has acclaimed for itself a pole position in the levels of economic development in Latin America. Economists have explained this boom by the opening of the Chilean economy to the world and the adoption of a neo-liberal system with a market economy, aspects that have been enshrined in the 1980 Chilean Constitution, the legacy of the Pinochet's era.[1]

This process of reorientation of Chilean politics and economics –moving away from the previous communist system established in the country under Salvador Allende – leading to the exponential economic growth of Chile in the last decades has been qualified as "the Chilean miracle".[2] This notion adopted by the American economist Milton Friedman, encompasses the idea that the growth of the Chilean economy was caused by a comprehensive liberalisation and the opening of the economy and trade regimes,[3] and where participation of the central government in everyday life was left only to those aspects essential for the common good to ensure the people's freedom, e.g. the aspects related to education, healthcare, law and order, etc.[4]

Being one of the first countries to install such a stern neo-liberal system, this sternness has been embodied in the so-called principle of subsidiarity incorporated in article 1(3) of the 1980 Constitution. According to Jaime Guzman, one of the main drafters of the Charter, this principle encompasses the idea that the state or central government is not supposed to interfere in those activities that might as well be carried out by the private sector.[5] The practicality of this can be seen in the fact that in Chile, the state can only carry activities when three strict requirements are met.

[1] KURTZ (2001), p. 4

[2] FFRENCH-DAVIS and TAPIA (2001), p. 73

[3] KURTZ (2001), p. 1

[4] FRIEDMAN (1962), p. 2

[5] ROJAS SÁNCHEZ *et al* (1996), p. 54

First and foremost, the state can only carry out the above-mentioned activities that are essential for the common good and that as such are within the very nature of a state (e.g., law and order); second, the state can carry out these activities only against the negligence, impossibility, or unwillingness of private individuals to carry them out and; finally, only once the state has exhausted all its efforts, so that private individuals assume those activities themselves.[6]

The liberalisation of the Chilean economy did not only require an internal economic *laissez-faire* led by private individuals and supported by the principle of subsidiarity but was also to be accompanied by the implementation of a similarly liberal foreign economic policy. In this context, the return to a democratic form of government in the 1990s helped the nation to re-establish its international relations with other countries. This resulted also in the commencement of negotiations for creating commercial relations internationally to reinforce Milton's ideas in Chile's economy and politics and to strengthen the economic development.[7]

The re-establishment of international relations resulted in the conclusion of several free trade agreements (FTAs) and preferential trade agreements (PTAs) with many countries, including all those that are now members of the CPTPP. This re-establishment had coincidentally also taken place during the proliferation of bilateral investment treaties (BITs), which induced Chile to the conclusion of more than thirty agreements of this type.[8]

The practice of developing countries seeking the conclusion of BITs, particularly with developed countries, neither came as a surprise nor as an innovation of Chile's liberal policies. Moreover, such a practice for Chile was not solely the result of Milton's neo-liberal ideas, but rather it obeyed the worldwide rise of "legal internationalism" as Professor Waibel recognises.[9] This notion presupposes the idea that the adoption of international instruments and the commitment to international norms and institutions would contribute to a country's ability to engage in liberalising policies,[10] something Chile was keenly pursuing at the time. In addition, and intrinsically connected to Chile's desire to continue its development, the view of developing countries was that the conclusion of BITs would also result in a higher flow of

[6] FERMANDOIS VÖHRINGER (2006), p. 90-91, cited in LAGOS (2020), p. 96-97

[7] VAN KLAVEREN (2011), p. 155

[8] DOLZER *et al* (2012), p. 7

[9] BONNITCHA *et al* (2017), p. 10

[10] *Ibid.*, p. 10-11

inward foreign direct investment.[11] In 1991 President Aylwin made explicit this view and goal of the Chilean government when stating that:

> "[…] the accession of Chile to this type of treaties [BITs] would permit the country to keep an advantaged position in order to attract foreign investment."[12]

Somehow expected, not all developing countries had the same fortune, but be that as it may, the expectation of the former president of Chile was positively met leading to a high attraction of foreign investments in comparison with the other countries in the region.[13] Whereas the fortune of Chile to attract foreign investment is not exclusively owed to the country's ability to conclude BITs, these are, undoubtedly, a very important contributing factor to the increase of the inflow of foreign investment. This is because ever since the conclusion of Chile's first BIT in 1991 the foreign direct investment (FDI) inflow in the country has progressively increased alongside the increase of BITs concluded.[14] This correlation can be explained by the fact that investors see in these instruments a safety tool for their rights and a vindication of the country's insurance of investors rights, that were, during Chile's communist time with Allende, severely violated. Furthermore, this attraction of foreign investment would, at the same time, lead to improvements in the country's overall economy.

Chile's reality shows so, in fact, FDIs in Chile have been a major component of the country's overall productivity, something that has been endorsed in academic articles of the United Nations Economic Commission for Latin America and the Caribbean (ECLAC).[15] The relevance of investments is demonstrated by the fact that FDI inflows in Chile represented 73% of the country's GDP in 2020,[16] – one of the highest GDPs in Latin America notwithstanding its comparatively small population –[17] vastly outperforming competitors such as Brazil and Argentina.

---

[11] *Ibid.*, p. 208

[12] *Ibid.*, p. 208-209, quoted in MONTT (2009), p. 115

[13] SALCEDO and AKOORIE (2013), p. 124

[14] PONIACHIK (2002), p. 3

[15] E.g., FFRENCH-DAVIS and DIAZ (2019)

[16] OECD DATA

[17] WORLD BANK DATA

These paragraphs have shown that the continuous application of strict neo-liberalism has made Chile a strong economic actor in the region. However, despite the fact that the positive impact of foreign investment in the development process of Chile is undeniable, recent preoccupations have shown certain defects of such a strong liberalisation as the one experienced by Chile. After all, Chile is still considered a developing country and has not been able to overcome that categorisation.

But again, the so-called “Chilean miracle” and the continuance of the strong neo-liberal system characterised by the lack of action taken by the public sector in Chile was shielded by the outstanding macro-economic numbers, leaving Chile as a leading economy in the Latin American region.

In other words, Chile, in its last thirty years has lived under this neo-liberal system showing clear signs of exponential economic growth. However, the overall macroeconomics of the Chilean economy are said to have blindfolded the country’s political class, who have turned a deaf ear and ignored social demands from Chile’s lower class in the past decades.

The social unrest experienced by the country in 2019 unleashed and exposed a series of problems faced by Chile’s lower class, which constitute the vast majority of the population in the country. A great deal of the demands in 2019 required a reform to the strict neo-liberal system that had, for decades, prevented them from economic and social well-being due to the practical absence of or deficient state-participation in certain essential areas, leaving the people with less economic resources with no access to the costly services provided by the private sector or only access to those few deficient services provided by the state.

The explanations of the social problems brought along by liberalisation and market opening in Chile which were exposed in 2019 are manifold and can, accordingly, be seen from different perspectives. For the sake of this work, only two of them will be examined. These are the prevalence of the principle of subsidiarity in Chile and the establishment of an extractive economy in the country.

First and foremost, the already-mentioned principle of subsidiarity, the backbone of Chile’s neo-liberal system, enshrined in the 1980 Constitution, states in its article 1(3) that

> "[t]he State recognizes and protects the intermediate groups through which society organizes and structures itself and guarantees them the necessary autonomy to fulfil with their own specific purposes".[18]

At this point is important to remark that the principle of subsidiarity finds its origins in the catholic tradition. Thomas Aquinas held that a subsidiary state is one which creates all necessary external conditions upon which all members of society can develop and contribute to the common good, and where the common good is seen collectively and in solidarity of the members of the society.[19]

By taking a different approach than Aquinas, Jaime Guzmán, a neo-liberal himself, explained what this principle actually entails as it is not explicitly stated in the provision. Guzmán expressed that

> "[t]his principle is that no larger society (i.e., the state) can invade or absorb the field that is proper to a smaller society, nor to particular individuals. The rationale is that the larger society was not born to do what the smaller ones can do, but rather they arise to do what the smaller ones cannot do. Consequently, the state cannot absorb the activities that can be adequately developed by individuals, either alone or grouped in intermediate societies […]".[20]

As such, the difference of Aquinas' subsidiarity and the strict application of it in Chile is owed mainly to the interpretation given to this principle, that lies particularly in the philosophical understanding of the common good. This, in the Chilean neo-liberal tradition led by Guzmán, is nothing but the sum total of the individuals' good, granting this concept an individualistic and utilitarian approach.[21]

[18] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE (1980), art. 1(3)

[19] BARNIER-KHAWAM (2021), p. 200

[20] ROJAS SÁNCHEZ *et al* (1996), *op. cit.*, p. 54

[21] BARNIER-KHAWAM (2021), *op. cit.*, p. 200

Guzmán's broad view of subsidiarity became the hegemonic interpretation of the principle in Chile, adhered to in many cases also by the Chilean Constitutional Court.[22] This has resulted in it having an extensive scope of application, where the principle relates, thus, to the prohibition of intervention of the state in many possible areas of action, unless the area in question belong to those that are connatural functions of a state or when this acts subsidiarily after strict requirements are met.[23] These connatural functions are, according to the interpretation, those regarding the representation of the society (e.g., foreign relations, national defence) and those that relate to the normative regulation of intermediate societies and the society as a whole (e.g., norms of behaviour).[24]

The accomplishment of such a strict version of the subsidiarity principle has given place to a poor regime of social rights provided by the Chilean state. This is marked by the existence the above-mentioned copulative requirements for state action, which are that the action in question must be performed in such a way that it does not intervene with the freedom of action given to individuals in that same area; that the action carried out by the state must be performed aiming at creating the necessary opportunities to private individuals in that particular area of action to act so as to reduce as much of the participation of the state in the given activity as possible; and finally, that the activity in question contributes to the common good of the society.[25]

Put in a different way, the practical implication of this strict interpretation in the country resulted in an absent or deficient state ensuring social rights for its individuals and in the ineffective system of social institutions administered by the state, whose aim is to reduce its participation so as to allow private individuals to take over.

This scenery created in Chile the discontent of its population, and in 2019, a social unrest where four essential social interventions by the Chilean state have been largely

---

[22] E.g., TRIBUNAL CONSTITUCIONAL DE CHILE (2013), 2358-12, 19th consideration.

GARCÍA and VERDUGO (2015), p. 224, acknowledge, however, that the principle of subsidiarity in Chile, due to rather recent jurisprudence, recognises a sphere where individuals and intermediate societies can be compelled to promote and respect fundamental rights, creating thus obligations to particulars. This is what the authors refer to as the positive dimension of subsidiarity

[23] FERMANDOIS VÖHRINGER (2006), *op. cit.*, p. 90-91

[24] *Ibid.*

[25] *Ibid.*

acclaimed: education, health care, pension system and environmental protection, this last area being the focus of this work.

Therefore, whilst international data seems to endorse Chilean politics at a macro level, the reality is different for the country's lower class. To exemplify this, with regard to the area of retirement pension, Chile's pension system was regarded as the 16th best in the world in 2021,[26] and nevertheless, 50% of the pensions paid amounted to less than 230 euros per month.[27] And while recognising that disastrous numbers are not the result solely of the pension system in Chile, it is indeed the lack of regulation by the state in areas such as formal employment and taxes, that have contributed to Chile's poor social development.

Whereas the areas of education, health care and pension system in Chile have been constantly under scrutiny, environmental considerations were not, up until a few years ago, a relevant matter in the society's discourse.

The second and final aspect is the developmental system in Chile, guided by the principle of subsidiarity and the richness of the country's land, namely, a predominantly extractive model for economic development in Chile based on the exploitation of natural resources mainly by private entities under the supervision of the Chilean state. In this regard, Viviana Vega expresses that:

> "[t]his pressure on resources has allowed a relative national capitalization. Without a doubt, the figures show an expansion in many ways: population growth, decrease in infant mortality and malnutrition, illiteracy; life expectancy has increased, the GDP, means of transportation […], in short, a large number of indicators tell us about the positive impact this development model has had. But the indicators say nothing about the dark aspects of growth."[28]

The dark aspects that Vega refers to are precisely the environmental damage of the extractive model of development in Chile. The different environmental regulations that have throughout history been enacted in the country were not primarily concerned with the protection of the environment as such, but rather with ensuring the prolongation of a given

[26] MERCER CFA INSTITUTE (2021), p. 5

[27] GÁLVEZ and KREMERMAN (2021), p. 5. Exchange rate of August 3, 2022 (EUR 1 = CLP 864.703)

[28] PASCHUÁN and VEGA (2004), p. 268

resource as an economic good for present and future generations, enshrining thus a utilitarian and anthropocentric view of the environment.[29] Moreover, the extractive model of development undertaken in Chile, which has carried the environmental damage, is to a great extent, carried out by foreign investors. Therefore, Chilean society has brought to the fore the relevance of the ratification of the CPTPP regarding environmental protection in the country, particularly, with those rules in the treaty concerning foreign investment.

In the Chilean scenario, therefore, the ratification of the CPTPP with its extensive rules on foreign investment has created the uncertainty of Chile's capacity to face foreign investors in cases where the environment is at stake.

The emergence of environmental considerations and the continuous desire of Chile's development process presented in this work encompasses the idea of a dilemma in which the country finds itself. That is, the balancing of the attraction of foreign investment to further the country's economic development and the environmental protection in light of the ratification of the Trans-Pacific Partnership.

On a final note, it is important to observe that constitutional history in Chile, ever since the imposition of the 1980 Constitution by the Pinochet regime, has been and still is in constant development. Fundamental rights included in the Charter, such as the right to education and the right to a clean environment, have been extensively interpreted on numerous occasions by the Constitutional Court or have been amended by the enactment of laws, which have progressively added more social elements to the core of some fundamental rights.[30]

But although the original text of the 1980 Constitution has received over forty amendments,[31] its backbone, the principle of subsidiarity of the state, has remained untouched. The question might then arise regarding the possibility to reform once more the Charter to get rid of this principle, pointing towards a possible inclusion of social actions by the state, which would then lead to a stronger regulation in the areas of education, health care, pensions and, relevant to this paper, environmental protection.

---

[29] *Ibid*., p. 267

[30] Examples of this "socialisation" of some fundamental rights are the enactment of the Constitutional Reform Law 19,876 that establishes a compulsory and free primary and secondary education in Chile provided by the state, or the Law 21,419 the establishes the "Guaranteed Universal Pension" that is, an additional amount to low pensions in Chile, provided by the state

[31] NAVIA (2018), p. 485

The answer to this question is not simple. Historically fundamental differences in Chilean society play an important role, but that requires a separate in-depth analysis that, as such, falls outside the scope of this work. Nevertheless, two practical points can be drawn to understand the difficulty for a change in Chile's regime.

First, the Chilean Constitution sets out a high quorum for amendments. Article 127 of the Charter requires for the approval of an amendment a quorum of three-fifths of the senators and deputies in exercise.[32] Additionally, where the reform refers to certain core provisions of the Constitution, as it is the case of the principle of subsidiarity, the quorum required raises to two-thirds of the senators and deputies in exercise.[33]

Nonetheless, the elevated quorum that the Constitution lays out has not prevented the high number of reforms to the Charter that have already taken place. Here is where the second point arises, namely, the lack of political will in Chile's ruling class that precludes the achievement of social advancements, including environmental protection, and that is owed to the referred historical discrepancies present in Chilean society.

Therefore, the lack of a firm protection of the environment is not solely owed to the subsidiarity principle. The incapability of Chile's political class to reach agreements in important areas such as environmental protection has contributed to the continuance of the country's environmental unfriendly model of development.

Moving forward, this work will now turn to the overview of the investment policy in Chile to see how this is linked with environmental protection rules produced in the country, entering later into the profound analysis of the concept of sustainable development and its legal implications.

1.2. General Outlook of the International Investment Regime and its Environmental Considerations in Chile

[32] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE (1980), art. 127

[33] *Ibid.*, The Chilean Senate is composed of 50 senators, and the Chamber of Deputies is composed of 155 deputies. Accordingly, the quorum of two-third requires the vote of at least 34 Senators and 104 Deputies in exercise. The quorum of three fifths requires the vote of at least 30 of Senators and 93 Deputies in exercise.

1.2.1. Investment Regime in Chile

This section provides an overview of the current Chilean investment regime. This encompasses what has been referred to as the "investment treaty regime" composed of the investment treaties, in this case, concluded by Chile; the treaties, rules and institutions governing investment treaty arbitration and finally, the awards of investment tribunals.[34] This section is complemented by the environmental considerations and commitments undertaken by Chile within its investment regime.

The success of Chile regarding the attraction of FDI and its relevance to the overall economic growth of the country is highly owed to the country's investment regime.[35] As pointed, Chile holds a network of more than forty international investment agreements (IIAs), that includes the mentioned extensive network of more than thirty BITs, which have, throughout time, been complemented by comprehensive policies in favour of investors as well as by the presence of a stable legal framework and national politics.[36]

Opposed to most developed countries whose investment policies were originally based on the concept of protection of their investors abroad, Chile's investment policy was mainly carried to attract foreign investment and as a means to open its market reinserting itself into the world's economy after the return to democracy.[37]

Apart from the renegotiation of its BIT with Uruguay in 2010, replacing the previous 1995 Chile/Uruguay BIT, the period of conclusion of these treaties by Chile took place between 1991 and 2003, when the country concluded its last BIT with Iceland.[38]

By following closely the "Dutch gold standard" BIT model, which is said to be highly favourable to foreign investors,[39] Chilean BITs encompass a broad protection of foreign investments.[40] This entails short treaties with an extensive definition of "investments" and of "investor", provisions enshrining the most-favoured-nation clause (MFN), national treatment (NT) and fair and equitable treatment (FET), a prompt, adequate and effective compensation

[34] BONNITCHA *et al* (2017), *op. cit.*, p. 3

[35] *Vid. supra* notes 16 and 17

[36] POLANCO (2012), p. 203

[37] POLANCO (2017), p. 100

[38] *Ibid.*, p. 112-113

[39] ARCURI and VERBEEK (2019), p. 40

[40] POLANCO (2017), p. 116

in case of expropriation and the envisagement of investor-state dispute settlement (ISDS).[41] A difference is, however, marked by the lack, in many of the country's BITs, of an umbrella clause and of full protection and security.[42]

After the Chile/Iceland BIT, the trend in Chile post-2003 was the one initiated by Chapter 11 of NAFTA, namely, the inclusion of an investment chapter in PTAs. This is now the case of almost all PTAs concluded by Chile as well as of the CPTPP.[43] The following of this trend also obeys to the continuity of Chile's open market policies, as PTAs contain broader commitments in practically all areas of the economy (e.g., goods and services), including more comprehensive rules on investment.[44]

But Chile's success in attracting foreign investment and positioning itself as an economic competitor in the Latin American region is not only the result of its extensive network of IIAs also including the free trade agreements. The area of dispute settlement constitutes a relevant aspect for other countries and foreign investors in deciding whether to conclude an IIA and whether to invest in the country respectively. In this context, Chile, casting away the "Calvo doctrine",[45] is also a member of the 1995 ICSID Convention that established the International Centre for Settlement of Investment Disputes (ICSID) giving standing to foreign individuals who could now bring a claim against a state.[46]

This attraction for foreign investors to be able to bring claims against states is also complemented by Chile's compliance with its treaties and of the decisions awarded by investment tribunals. The data regarding ISDS illustrate these points. Of all ICSID cases, the geographic distribution shows that the South American region makes up 22% of them, positioning itself in second place after the Eastern Europe and Central Asia region with 26%.[47]

---

[41] ARCURI and VERBEEK (2019), p. 40

[42] POLANCO (2017), p. 116

[43] *Ibid*., p. 110-111

[44] *Ibid*., p. 113

[45] In short, the Calvo doctrine refers to a doctrine predominant in Latin-America imposing the requirement that the dispute arising, in this case, between a foreign investor and the host state be resolved by the national courts of the latter. Cf. BAKER and YODER (1989), p. 75. The doctrine had been used by Latin American countries to lower the standard of treatment of foreign investors compared to the standard granted by international tribunals.

[46] POLANCO (2012), *op. cit.*, p. 221

[47] ICSID (2022), p. 12

This 22% represents 199 cases brought against nine different South American states.[48] This high number concentrated in a few countries manifests a rather high likelihood for a foreign investor to engage into judicial settlement as a result a controversy between the investor and the state in a traditionally economically and politically unstable region. Out of these 199 cases, Chile was a respondent state in only six of them, plus one additional case administered by the Permanent Court of Arbitration (PCA).[49] Moreover, of the seven cases, three have been decided in favour of the Chilean state, two are still pending and the resting two cases have been in favour of the foreign investor.[50] It is important to highlight that the award against Chile imposing the payment of compensation was also promptly complied with by the state.[51]

The conclusion to be drawn from here is twofold. First, the few investment disputes to which Chile was a respondent party, as well as the fact that the international agreements relating to foreign investment include provisions on ISDS show the overall respect by Chile for its investment agreements and the rights contained therein, and the openness of the country to peaceful solutions of controversies. Finally, as a signatory of the 1995 ICSID Convention and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Chile affirms its acceptance and commitment to comply with awards rendered by investment tribunals, which has seen positive results in practice. This has resulted in the success and attractiveness of the country as an investment destination when compared with other countries in the region.

In addition to its comprehensive international investment regime, Chile possesses a strong national favourable investment local laws and regulations. It is worth noting here the Law 20,848, which sets the investment regime in Chile as of 2015. This law contains the definition of investment and investor as well as comprehensive rights granted to them, such as national treatment and the benefit of exemption to pay value added tax on the import of capital goods.[52]

[48] ICSID, Caseload Database

[49] UNCTAD, Investment Dispute Settlement Navigator

[50] *Ibid.*

[51] U.S. DEPARTMENT OF STATE (2021):

[52] LEY 20848 (2015)

1.2.2. Environmental Considerations in Chile's Investment Regime

The question arises as to how Chile attends the environmental considerations in its investment regime to promote environmental protection and prevent environmental damage. The upcoming chapter will illustrate that substantial environmental considerations have emerged as a concern within the international community rather recently. A real impact of these considerations enshrined in binding legal documents was, accordingly, also at a recent stage.

This late impact is represented by the fact that none of the BITs concluded by Chile between 1991 and 2003 include environmental provisions. The only exception is found in the renegotiated BIT of 2010 with Uruguay,[53] which allows for a party to adopt, maintain and enforce measures, within its environmental powers, to ensure that the investment is carried out in a way according to these environmental prerogatives, providing that the measures are consistent with the BIT.[54]

The trend of adding binding environmental provisions arose hand in hand with the proliferation of the inclusion of investment chapters in trade agreements. Chile counts thirty-two trade agreements in force, twenty-one of which contain environmental provisions or chapters in them. Professor Rodrigo Polanco recognises, moreover, that of the ten trade agreements that contain a chapter on foreign investment, the investment chapter contains environmental rules in seven of them.[55] Additionally, the brand-new agreement with Brazil of 2022 also contains an investment chapter with environmental rules therein.[56] The CPTPP also contains an environmental chapter, an investment chapter, and environmental rules within the investment chapter.

Whereas the comprehensiveness of the environmental rules varies amongst the different agreements, a commonality can be found. The investment chapters recognise the right of the state parties to enact, amend or enforce measures to ensure that the investment is carried out in such a way that the environmental powers and rules of the party in question are not being affected, provided that the measure itself is compatible with the investment chapter.

---

[53] POLANCO (2017), *op. cit.*, p. 121

[54] CHILE-URUGUAY BIT (2010), art. 14

[55] POLANCO (2017), *op. cit.*, p. 121

[56] SUBSECRETARÍA DE RELACIONES EXTERIORES

Furthermore, a possible lack of such a rule confirming the right of the Chilean state to ensure compliance with its environmental regulations, does not prevent the state from doing so. Foreign investors are bound by the national legislation of the country in the same way Chilean nationals are.[57] In this context, Law 20,417 established the Environmental Assessment Service (EAS) in Chile as the entity in charge of carrying out the environmental impact assessment (EIA).[58] Foreign investors are bound to submit their projects to the EAS for the study of possible environmental consequences the project might bring along.

Additionally, this law creates the Superintendence for the Environment and allows public participation for the continuous scrutiny of the environmental compliance in the country, which is applicable to foreign investments too.[59] The body is also able to impose the sanctions accordingly.[60]

The legal framework presented here, where the protection and promotion are carried without prejudice of Chile's environmental treaties, laws and regulations, seems an appropriate theoretical balance between foreign investment and environmental protection. But whether this appropriate legal framework has also translated into a practical impact and actual balance is a matter of dispute.

The following pages will address the concept of sustainable development, that as it will be illustrated, represents the requirement of a proper balance between development – as carried for example, by foreign investments – and environmental protection. The analysis of this concept and its legal implications will provide us with a helpful insight to later examine whether the CPTPP in itself achieves this balance.

---

[57] REINISCH (2020), p. 75

[58] RODRÍGUEZ-LUNA *et al* (2021), p. 2

[59] LEY 20417 (2010), Title I, arts. 2 and 3

[60] *Ibid*.

2. Sustainable Development: Concept, Normative Status, and Implications

2.1. Evolution and Meaning of Sustainable Development

Although strong environmental preoccupations and considerations are said to have emerged in the early 20th century, only the environmental disasters in the 1980s, in addition to the environmental damage caused by the debt crisis in underdeveloped countries, revealed that the international community had, up until then, generally taken reactive responses toward environment protection, disregarding therewith the necessity for preventive measures.[61]

This situation led the UN General Assembly (UNGA) to consider taking steps further in the development of environmental protection. In 1984, the UNGA decided accordingly to create a new commission called the World Commission on Environment and Development, the so-called Brundtland Commission. The Commission's main objective was to formulate a "global agenda for change" considering the protection of the environment.[62] Until 1987, the Commission conducted research around the world, and on that basis, it launched its 1987 report named "Our Common Future".

The report called upon states to rethink the relationship and interaction between environment and development, which until then, had always been seen in a hierarchical way giving preference to (economic) development.[63] This is due to the realisation by the international community that environmental protection could not be carried out in isolation from the process of economic development and *vice-versa*.[64]

This balance between development and environmental protection was to be achieved through the concept of "sustainable development". This notion, thus, was first launched and promoted by Brundtland Commission in "Our Common Future".[65] In the report, the

---

[61] MANULAK (2022), p. 139

[62] WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT (1987), p. 11

[63] *Ibid.*, p. 48-49, para. 42

[64] *Ibid*.

[65] References to a concept of sustainable development can be dated back to the 18th century. Nevertheless, its launching as a concept of international environmental law that pave the way to the rapid and constant evolution of this field was the innovation of the Brundtland Commission. Cf. GEHRING and NEWCOMBE (2010), p. 6

Commission sought intergenerational equity by means of sustainable development.[66] With this, the Commission, by taking an anthropocentric approach, understood and defined sustainability as an intergenerational equity objective, to make sure that present generations can satisfy their needs without compromising those of future generations.

> "Humanity has the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs".[67]

Whereas the acknowledgement of the interdependence between environmental protection and development was a favourable step, the approach taken in "Our Common Future" in the definition of sustainability doubtfully attains a balance between the two objectives. This is because the definition provides for environmental protection, but emphasising in it, the needs of humanity, its present and future generations, prioritising development.

Five years later, during the 1992 UN Conference on Environment and Development the international community elaborated the homonymous Rio Declaration on Environment and Development[68] that came to address the shortcomings of the man-centred single definition of sustainable development drafted by the Brundtland Commission.

The Rio Declaration entailed a fragmentation or plurality of the meaning of sustainable development. There are at least three different approaches and meanings of sustainability in the Rio Declaration. First, Principle 1 provides an anthropocentric approach by recognising that human beings are at the centre of the concept of sustainable development.[69] Therefore, sustainability results in a right to a healthy environment for human beings. Then, Principle 3 of the Declaration proscribes the human-centred sustainable development envisaged by the Brundtland Commission, as intergenerational equity, ensuring the needs of present and future generations.[70]

---

[66] WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT (1987), p. 24, para. 27

[67] *Ibid.*

[68] UNITED NATIONS (1992)

[69] *Ibid*., Principle 1

[70] *Ibid*., Principle 3

Finally, the turning point comes in the third and last approach taken in Principle 4, which is the integration of economic development and environmental protection.

> "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".[71]

The dissimilarity lies on the one hand, on the fact that Principles 1 and 3 focus on the protection of the environment as a means for the safeguarding of human rights, connected with the anthropocentric idea of sustainable development, such as the human right to life. On the other hand, the definition of Principle 4 does not insist on a human rights dimension. Rather, the perspective in this approach is more state-centred, thus focusing on how states would have the right to conduct activities seeking economic development making sure that these activities integrate environmental protection. This aspect is further narrowed down by other principles in the Rio Declaration, such as Principle 11 which refers to the enactment of effective environmental legislation as an example of a way of integration between these two areas.[72]

The aftermath of the Rio Declaration led to a discussion on the idealism behind the text. Some have argued that the Declaration consolidated an anthropocentric view of the process of environmental protection, particularly, due to Principles 1 and 3, and by seeing, for example, Principle 5 on eradication of poverty as a goal of sustainable development that is based on human needs. In the view of this author, the Rio Declaration, however, constituted arguably a step forward in the development of international law of sustainability.

Giving context to the Principles 1 and 3, these are the results of dense negotiations at the time, particularly with reluctant developing nations who saw in the Declaration, a barrier and hurdle to their process of development by making it more complex with the environmental limitations. This was particularly so when these countries considered that, up until the Rio Declaration, environmental damage had been to a great extent, the result of the development

[71] *Ibid*., Principle 4

[72] *Ibid*., Principle 11. Cf. SCHRIJVER (2008), p. 70

policies carried previously by the developed nations.[73] As such, the anthropocentrism seen in some of the principles of the Declaration constitute a deal to get developing nations on board.

This is, nevertheless, not a triumph of the anthropocentric view of the environment, but quite the contrary. The Rio Declaration as a whole marks the recognition of what is called "global environment", not very present before in the international discourse regarding environment, by acknowledging in its preamble, the interdependency in the integral nature of Earth and its components.[74]

With this, the Rio Declaration presents an "ecosystemic" perspective too, centred in human and economic development and environmental protection as an indivisibility. In addition, the Rio Declaration was not only global in the sense of interconnecting development and environment, but also by pushing forward and emphasising this idea of a "global environment", expanding therewith the old-fashioned focus on transboundary environmental damage to a universal preoccupation of the environment.[75]

Another element of shifting is that the Rio Declaration called for the negotiation of a new generation of international agreements also with a global perspective.[76] With this, the Declaration sought to enhance and complement the prevalence existing up until then, of sectoral the agreements, having with this, also an implication in the treaty-making.

Finally, with regard to Principle 5 focusing on the eradication of poverty, this encompasses the intrinsic connection as well that exists between development and environmental protection. The increase or decrease of poverty around the world correlates with the increase or decrease of environmental pollution. Therefore, though the eradication of

---

[73] The compromise on this matter was illustrated in Principle 7 of the Rio Declaration, which states that "[…] In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command". Such compromise reflects not only a duty to bear bigger responsibilities according to the capabilities of each state, but also bigger responsibilities due to the bigger deterioration caused by developed countries. Cf. *Ibid*., p. 4, Principle 7

[74] *Ibid*., p. 3

[75] E.g., UNITED NATIONS (1992), p. 3 and Principles 7 and 12.

[76] UNITED NATIONS (1992), p. 3

poverty is inherently connected to the well-being of human beings, according to this author Principle 5 puts this well-being at the same level of environmental protection.

This shows, that ever since the launching of the definition of sustainable development by the Brundtland Commission, the notion has positively evolved from a man-centred protection of the environment, where such process was seen as a means to achieve the well-being of mankind, to an eco-centric conception where environment and development are but one interdependent component.

Years later, in 2002, by synthesising the broad conception of sustainable development achieved until then, the International Law Association (ILA) drafted the New Delhi Declaration on the Principles of International Law Related to Sustainable Development (ILA Declaration),[77] containing the principles governing sustainability, which were said to encompass the integration of development with environmental protection (see Annex A).[78]

By narrowing down the previous advances of the concept of sustainability, the ILA Declaration shows steps forward in the recognition of the necessity to protect the environment by the intrinsic value of its different ecosystems in the fourth principle.[79] Additionally, the ILA Declaration points out the respect and promotion of human rights as a core practice to accomplish sustainable development.[80]

As a result of years of research and the recognition of the essential role played by human rights, the ILA Declaration recognises that the notion of sustainable development did not only reveal an imbalance between economic development and environmental protection, but also between the search for economic development and the rights of people.[81] Hence, the ILA Declaration expresses the existence of social, political, economic and environmental parameters under the sustainability notion. These parameters were, thus, to be attained by compliance with the seven principles of the ILA Declaration.[82]

---

[77] INTERNATIONAL LAW ASSOCIATION (2002)

[78] *Ibid*., p. 2; GEHRING and NEWCOMBE (2010), *op. cit.*, p. 7-8

[79] *Ibid*., p. 5

[80] SCHRIJVER (2008), *op. cit.*, p. 172

[81] *Ibid*., p. 172

[82] INTERNATIONAL LAW ASSOCIATION (2002), *op. cit.*, p. 3

Later on in the same year, and as a way to reinforce the implementation of the Rio Declaration and the commitment of the international community to sustainable development, which had until then failed in practice,[83] the UNGA organised in Johannesburg, the World Summit on Sustainable Development to commemorate the 10 years of the Rio Declaration.

The consensus reached in the 2002 World Summit was embodied in the Johannesburg Declaration on Sustainable Development.[84] The Declaration, while recognising the idea of sustainable development established in Rio, also added some complexity to its meaning, showing with it a certain continuity of the ideal and research behind the ILA Declaration. Previous to the Johannesburg Declaration, the Rio Declaration considered development and environmental protection as interdependent, but that referred mainly to an economic type of development. The Johannesburg Declaration, thus, added a third pillar to sustainable development, all of which were to be balanced, namely, economic development, environmental protection and the new pillar, social development.[85]

This novelty meant at the time the recognition that the international community had created an imbalance not only with respect to economic development and environmental protection, but that this imbalance had also caused damage to social aspects of life.

The question rapidly emerged as to what was to be understood by social development. As stated, the aftermath of the Rio Declaration showed a failure in its implementation, particularly by industrialised countries.[86] This is generally explained by the fact that the members of the international community had first, given priority to the development pillar of sustainable development, and second, they had understood the notion of development solely as the conduct of macro-economic developmental policies leaving aside social components.

Therefore, in terms of the well-being of individuals, the international community had to a great extent disregarded this aspect, again, shielded in macro-economic development, a scenario well-known by Chile as seen previously. The addition, thus, of social development in the meaning of sustainability allows for a better incorporation of this well-being balanced and integrated with economic development and environmental protection. Therefore, the pillar of

---

[83] SCHRIJVER (2008), *op. cit.*, p. 76

[84] UNITED NATIONS (2002)

[85] *Ibid.*, para. 5

[86] *Ibid.*

social development is intrinsically connected with human rights that ensure the well-being of the individuals by protecting social factors (e.g., right to health, right to life, etc.).[87] Additionally, the social pillar does not refer only to the individual by itself, but recognises in the configuration of our societies, the importance of social relations among individuals protecting factors that are attributable to such groups (e.g., cultural rights, political rights, etc.)[88]. Consequently, the social development dimension allows the expansion of the concept of sustainable development to protection and promotion of human rights alongside economic development and environmental protection.[89]

Once again, in 2012, the UNGA organised a new Conference on Sustainable Development in Rio de Janeiro – as a way to commemorate the twenty years since the redaction of the Rio Declaration –to seek the renewal of the international community's commitments to sustainable development to balance its three pillars.[90] The compromise reached in the conference was embodied in a document named "The Future We Want", where the international community reaffirmed the existence of three dimensions or pillars in sustainable development.[91] Moreover, the document specifies certain clear requirements that are essential to achieve the balance of these pillars.[92]

Whilst recognising requirements such as the promotion of sustainable consumption and production, reducing inequalities, raising basic standards of living, the conduct of an eco-centred management of natural resources, etc. as essential to achieve a development in a sustainable way, The Future We Want emphasises and focuses on the eradication of poverty as the main and indispensable requirement and a means to sustainable development.[93]

The advances regarding the evolution of sustainability in the Rio Conference of 2012 went even further so as to provide another significant means to achieve the above-mentioned requirements in the pursuit of sustainability. Paragraph 56 of The Future We Want, whilst acknowledging the presence of different development models among the members of the

---

[87] MISIŪNAS and BALSYTĖ (2009), p. 62

[88] *Ibid.*

[89] GEHRING and NEWCOMBE (2010), *op. cit.*, p. 6.

[90] UNITED NATIONS (2012), p. 1, para. 1

[91] *Ibid.*, para. 3

[92] *Ibid.*, para. 4

[93] *Ibid.*, para. 2

international community as well as the fact that their capacity to act towards sustainable development differs, proposed the conduct of a "green economy" as another important tool to sustainable development, in addition to the eradication of poverty.[94]

The characteristics of a "green economy" were also set out. The document expresses that such an economy is directed to the overall improvement of human welfare through sustained economic growth, while, at the same time, keeping the proper functioning of the different ecosystems.[95] The instrument goes on to list certain requirements in paragraphs 57 and 58 regarding how green economy's policies are to be conducted, putting emphasis on the compliance with the Rio and the Johannesburg Declaration of 1992 and 2002 respectively, considering social development too.[96]

It could be argued that the addition of the notion of "green economy" as a means to achieve sustainable development, with the requirements of paragraphs 57 and 58, encompasses an apparent shift towards a more developmental approach to sustainability as the conduction of the policies in compliance with those requirements, seem to be more concerned with the developmental dimension of sustainability. Nevertheless, although that statement is partly true, it does not follow that The Future We Want dismisses the environmental pillar.

This can be explained by the fact that the success of these developmental policies, in the frame of a green economy, carries with them environmental advances, as it is, for example, the case of the eradication of poverty and its correlation with environmental damage. Of course, correlation does not imply a causality, but in this case many studies have proven the causal link between poverty and environmental degradation.[97] Thus, in the end, The Future We Want sought with this the achievement of a proper balance between all three pillars through this type of economy.

A final important point in the development of sustainability was accorded in 2015 during a meeting organised by the UNGA focused on a development agenda to be carried post 2015. Here the international community adopted the so-called "2030 Agenda for Sustainable Development: Transforming our World". As a result, the international community established

[94] *Ibid.*, p. 14, para. 56

[95] *Ibid*.

[96] *Ibid.*, p. 14-15, para. 57-58.

[97] See COMIM (2009)

that sustainable development, in practice, was narrowed down into seventeen sustainable development goals (SDGs) that are said to balance the three pillars of sustainability.[98] Thus, the global fulfilment of sustainable development was now focused on the fulfilment of all these goals (see Annex B).

The development of the concept of sustainability has seen, throughout the years, the unprecedented increase of the overall environmental damage. As stated, the Earth is but a single resource, and the alarming reports of the scientific community of the irreversible character of certain damages have shaped the notion of sustainable development. From a vague and anthropocentric concept to a more balanced approach, taking into account the environment as an integral part of our development process, the concept has been constricted to a balance of three main pillars, to be achieved through seventeen SDGs. A shortcoming, however, finds itself in this constant development of the concept and the different approaches by different nations of what is to be understood by it. This also justifies the many debates between states on the proper approach to achieve sustainable development.

With this, whilst the current agreement on the SDGs seems a step forward, in practice, the international community still struggles in the achievement of sustainability and to protect the environment. Be it by their lack of commitment or by their incapacity, the 2030 Agenda will hardly be completed at the foreseen time.

What is now undoubted is that the concept of sustainability, ultimately, is composed of three pillars which require a proper balance. The international community has, throughout time, recognised certain principles and actions that are essential to achieve such balance.[99] These include the principles of the Rio Declaration, summarised in the ILA Declaration, such as the no-harm rule, the precautionary principle and many more whose compliance reveals a proper balance between development and environmental protection, and now also the SDGs.

The continuous development of sustainable development seen in this section has, in the opinion of this author, led to the qualification of sustainability as an umbrella term which encompasses and requires a proper balance and integration of economic development, social

[98] United Nations (2015), p. 3

[99] Most notably the principles recognised in the Rio Declaration and the ILA Declaration

development and environmental protection.[100] This is further specified by the many principles and goals (e.g., ILA Declaration) all of which form the content under this umbrella of sustainable development.

Given the broad notions of these three pillars and its principles and SDGs, is that the actions involved in sustainable development are not unidimensional but cover a whole range of different areas within international law, such as human rights law (e.g., SDGs 1 and 2), international economic law (e.g., SDGs 8 and 9), international law of state responsibility (e.g., third principle of the ILA Declaration, or Principles 18 and 19 of the Rio Declaration), etc.[101]

The field of international investment law is no exception, and a relationship between the three pillars of sustainability is also present in this area. The relationship between sustainable development and foreign investment will be analysed at a later stage. At this point, it is essential to repeat that the reality regarding environmental damage is that this irreversible situation calls upon immediate and inexcusable action by the international community. And it is in this context that the question regarding the legal status of sustainable development has acquired more importance, so as to impose on states the obligations stemming from this broader concept or to hold them accountable for their unsustainable actions.

2.2. Legal Status of Sustainable Development

It has been illustrated that sustainability is not a mere elaboration of international law but constitutes a broad world objective encompassing all areas of human action.[102] But entering into the legal aspects of this objective, the general history of international law has shown that the implications of a recognition of certain plans as world objectives imply a certain degree of compliance by the subjects of international law to that end. With this, it has been traditionally understood that those who act or go against such a world objective set in a consensual manner, are to be corrected and held responsible for the damage caused in the way to the objective.

Whereas the development of the notion of sustainability has been mainly focused on its meaning and principles upon which the notion is built, less but dense debate has been held with

[100] LOWE (1999), p. 31. Hereinafter, the further use of the word "development" is to be understood as encompassing economic and social development.

[101] MBENGUE (2020), p. 176

[102] UNITED NATIONS (2002), *op. cit.*, p. 2-3, para. 8-15

regard to its legal status. Has such a broad concept acquired a normative power able to impose, by means of the law, a change in the states' behaviour? Or on the contrary, is this concept a mere guideline to state-action, but without compromising them to forcefully comply with its mandate? The answers to the questions here posed require an analysis of whether the international community has granted the notion of sustainable development normative prerogatives, making it a concept of international law creating rights and imposing obligations to states.

With the objective of determining the legal status granted to sustainability by the members of the international community, three elements will be of importance, namely, how sustainability is treated in legal instruments, how it is treated in case-law and, finally, how it is treated by different authors.

2.2.1. Sustainable Development in International Instruments

It was seen in the previous section that the development of the concept of sustainable development was achieved through its incorporation in many documents, some of which carry legal effects.

The launching of the concept of sustainability by the Brundtland Commission in 1987, led five years later to its incorporation, during the Earth Summit in Rio de Janeiro, in three legal documents, namely, the Rio Declaration, the UN Convention on Biological Diversity (CBD) and the UN Framework Convention on Climate Change (UNFCCC).[103] The essence of these documents, particularly of the Rio Declaration, entails that sustainability requires the integration of development and environmental protection. The UNFCCC goes a step ahead when declaring in its article 3 that the parties have a right to sustainable development.[104]

But attention must be given to the documents themselves. The discussion lies then on whether these documents are hard-law instruments imposing legally binding obligations to the parties, or soft-law instruments encompassing mere agreements, principles, and declarations, that as such, are not binding in nature.[105]

The 1992 Rio Declaration is, as it names portraits, only a declaration of principles on environment and development. As such, they present a guideline of desired behaviour of the

---

[103] WIDIJOWATI (2019), p. 513

[104] UNITED NATIONS (1994), article 3

[105] EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS

members of the international community, as well as certain common grounds with regard to the particular topic with which the Declaration deals. With this, it is agreed that the Rio Declaration is a soft-law instrument.[106]

The characterisation of the Declaration as a non-legally binding instrument is by no means inductive of a document whose legacy remains irrelevant in international law. Soft-law instruments, as the case of the Rio Declaration, are said to illustrate advancements in the field they cover.[107] The principles contained therein are the result of a consensus among the more than 170 members present during the Conference on Environment and Development, of their view on how to approach the relevant topic. This guiding power of the Rio Declaration as its illustration of the advancements of the field of international law of sustainability are fully visible. The following years were marked by the enactment of different instruments and declarations built upon it,[108] some of which, even with binding force.[109] This is what has often been referred to as the incremental or gradual approach of soft law.[110]

Additionally, soft-law has also been argued to be an initial step towards the creation of international customary law.[111] With this, soft law does not only illustrate and project the development of a certain field of law but constitutes a first step towards the modification of states' behaviour in line with the guidelines set out by it, which is expected to amount to considerable state practice.[112]

In the particular case of the Rio Declaration, its impact on the development of the concept of sustainable development in terms of its importance as a world's objective was rapidly translated into binding documents. As mentioned, during the Conference in Rio, the UNFCCC, a legally binding instrument, was enacted. Its article 3 expresses the right of the parties to sustainable development in such a way that climate change measures are to be integrated with national development actions.[113]

---

[106] ORELLANA (2014), p. 9

[107] WIDIJOWATI (2019), *op. cit.*, p. 513

[108] An example is the so-called Johannesburg Declaration where the states reaffirmed their commitment made in the Rio Declaration. Cf. United Nations (2002), *op. cit.*, p. 8, para. 1

[109] Notable instruments are, among others, UNFCCC, Aarhus Convention, or the Escazú Agreement.

[110] GODÍNEZ (2011), p.310, cited in ORELLANA (2014), p. 8

[111] ORELLANA (2014), p. 8

[112] *Ibid.*

[113] UNITED NATIONS (1994), *op. cit.*, article 3

The subsequent ILA Declaration and Johannesburg Declaration of 2002, as soft-law documents, have contributed further to the development of sustainable development and its inclusion in different legally binding documents, both at a universal and regional level. It has been illustrated that the ILA Declaration is built under the ideal of sustainable development as an umbrella concept, which is built upon certain principles with a rather specific wording in regard to what they entail and whose compliance leads to sustainability.[114] It is in this context, that many universal and regional treaties have been concluded having a binding force with particular principles within the notion of sustainable development.

For example, two very important regional conventions have created binding commitments to the parties with respect to the matter with which the fifth principle of the ILA Declaration deals (see Annex A). The 1998 *Aarhus* Convention and the 2018 *Escazú* Agreement – to which Chile is a member – are two legally binding regional treaties imposing obligations with respect to access to information, public participation and justice in environmental matters. Finally, in the particular field of international investment law, as mentioned, the inclusion of binding environmental chapters seeking a balance between the attraction and conduct of foreign investments and environmental protection are growing as well, showing a tendency to crystallise the soft law instruments on the matter of environment and sustainability into legally binding commitments.

These examples illustrate how sustainable development has been enshrined in legally binding documents. Soft-law thus plays an important role in the development of international law of sustainability. Many instruments have been drafted since the launching of the notion of sustainability which, to a great extent, provides a clear consensus in the international community about the necessity to carry development in a sustainable way. For it is also the only way to combat the irreversible damages to the environment about which the scientific community has warned, without compromising the development processes, particularly of developing countries.

Since environmental protection had, throughout the evolution of sustainability law, been seen as an impediment to development, a view particularly shared by developing countries, soft law instruments came to the scenery to avoid a strong-coming legal instruments on the matter with the risk of the participation of only few states. As stated, the warnings given by the scientific community as well as the realisation of different methods for furthering

[114] *Vid. supra* note 100

development has led these instruments to be the backbone of the trend to add binding character to instruments dealing with sustainable development. As such, the proliferation of binding treaties on this matter is highly owed to the initial tendency to launch soft law instruments in the first place.

2.2.2. Sustainable Development in Case-Law

The advancement by the inclusion of the concept of sustainable development in binding and non-binding instruments has been supported and accompanied by its treatment in different cases. Various courts and tribunals have dealt with sustainability, either generally, or taking into account certain particular aspects and principles.

The case-law that will be analysed here deals in one way or another with the legal status and the normative power of the concept of sustainable development and the different principles and rules of this umbrella concept.

2.2.2.1. Gabčíkovo-Nagymaros Case

The first dispute to be analysed, and considered the first dispute concerning sustainable development, is the *Gabčíkovo-Nagymaros* case before the International Court of Justice (ICJ) in 1997 between Hungary and Slovakia.[115] This dispute occurred because of a treaty concluded by both countries in 1977 for the building of a system of dams over the Danube River—in an era of still economic development prevalence over environmental protection— in order to increase the production of energy in both countries.

Whilst the Slovakian Republic complied with the treaty and built the dams, Hungary became, at the time, more aware of the protection of the environment and considered that the dam project would damage the ecosystem in and surrounding the Danube River. Therefore, Hungary decided to unilaterally terminate the 1977 treaty. As a response, Slovakia built another dam depriving Hungary of over 80% of the water of the Danube. Being a sustainable development dispute, Slovakia claimed the lawfulness of its actions and the upholding of the treaty based, in part, on its right to development (through the production of energy). On the other hand, Hungary claimed environmental protection considerations, based on the precautionary principle, that is an integral part of sustainability (included also in the ILA Declaration), as relevant to prohibit the execution of the treaty.

[115] MBENGUE (2020), *op. cit.*, p. 166

Though not directly mentioning sustainability in a general context, the Court took a step forward in favour of granting normative power to an important aspect of sustainable development, namely, the no harm principle.[116] In paragraph 53 of the judgement, the ICJ recognises a general obligation to prevent harm to the environment as a result of the conduct of an activity as an integral part of international law.[117]

But a novel and essential part came later in the judgement with the inclusion, for the first time, of the concept of sustainable development. The ICJ stated in paragraph 140 that:

> "[t]hroughout 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. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards 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".[118]

Some important aspects can be drawn from this reasoning, The ICJ expresses hereby a change in the international community in an era of sustainability, that as it has been seen, can be traced back to the 1980s. Moreover, it also remarks the need to reconcile economic development with environmental protection, which up until 1997, was already established in international documents, including the Rio Declaration.

The court refers to sustainable development merely as a concept and not as a legal principle. Nonetheless, the Court recognises and attains that this concept has anyways

---

[116] Included within the context of the Fourth Principle of the ILA Declaration. Cf. GABČÍKOVO–NAGYMAROS PROJECT (HUNGARY/SLOVAKIA) (1997), p. 7, para. 53

[117] *Ibid.*

[118] *Ibid.* p. 78, para. 140

impactful effects as the court expresses in the paragraph ("give proper weight", "take into account").

Another important point is that the ICJ, additionally grants retroactive effect to the concept of sustainable development, establishing therewith a total shift in the paradigm around which economic activities were until then conducted. The continuance of past activities, thus, is dependent on whether that given activity takes into consideration the new norms and standards developed with and within the concept of sustainability.

The reasoning of the Court reaffirms, in the opinion of this author, the idea that sustainability in its entirety is an umbrella concept requiring a certain standard to be considered (i.e., the reconciliation of development and environmental protection), and able to create norms of which due consideration is owed when assessing conflicts between these pillars. However, whether these standards and norms are legal and binding in nature is a matter not stated by the Court.

As such, the question arises as to whether the Court actually envisaged a normative power when referring to the "new norms and standards" that had been developed. In this regard, the wording of the Court's reasoning, by considering sustainable development as a concept, seems to suggest a lack of decisive normative power, at least, in the resolution of the *Gabčíkovo-Nagymaros* case. The Court arguably falls short in its qualification of sustainability just as a concept. In this regard, this author agrees with the dissenting opinion of Judge Weeramantry in the sense that sustainability had already in 1997 developed as a principle that is integral part of international law.[119]

Judge Weeramantry follows a twofold logical approach to reach his conclusion. In 1997, scientific reports were already of extreme preoccupation and warning towards the protection of the environment. As such, by reason of the inescapable logical necessity by virtue of the urgency of the matter, a fundamental approach balancing the right to development and the right to environmental protection, is provided by sustainable development. With this, considering that in Judge Weeramantry's view, the rights to development and environmental protection were principles of international law, a major term balancing them is *mutatis mutandis* also a principle of international law.

[119] *Ibid.*, p. 85-92. Separate Opinion of Vice-President Weeramantry

Finally, Judge Weeramantry, just as the Court in its entirety, recognises the existence of substantial practice so as to crystallise this principle into a rule of customary international law. For the ICJ in the case does not only induce the generations of new norms from international binding treaties pointing directly that way, but also indirectly expresses that the emergence of these new rules and standards are due to the realisation of the members of the international community of the importance of the awareness in environmental matters and of the scientific insights. In Judge Weeramantry's own words,

> "The principle of sustainable development is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community (…)"[120]

Indeed, the Court accepted the relevance of the state practice regarding the development of sustainability. With its paragraph 140, the ICJ concedes Hungary the argument that, already at the time, practice since the 1980s had been robust enough to carry with it a certain normative development.[121] Such robust practice is represented by the adoption of universal soft-law and hard-law instruments, and by intention to amend the states' behaviour towards a more sustainable one. Just to name a few, Hungary bases its claim of development of new rules under sustainability by relying most notably on the 1992 Rio Declaration, the CBD and the UNFCCC and a 1990 Declaration on Sustainable Development of the UN Economic Commission for Europe.[122] Moreover, the modification of states' behaviour was justified by Hungary by the enactment of thousands of national laws worldwide.[123] These aspects are a strong illustration of the existence of *opinio iuris* in respect to the rules on sustainability.

At this point it is essential to remark that the Court did not deny any normative power to sustainable development. If anything, the Court, rather in a shy manner, took a step forward by acknowledging the emergence of new norms and standards under this notion. Professor Mbengue moreover recognises in the Court's reasoning a timid elucidation of a level of normativity in sustainability when the ICJ remarked not only that sustainability reconciles

[120] *Ibid.*, p. 92. Separate Opinion of Vice-President Weeramantry

[121] McGarry (2020), p. 208

[122] Gabčíkovo–Nagymaros Project (Hungary/Slovakia) (1997), Memorial of Hungary, p. 201

[123] *Ibid.*, p. 198

development and environmental protection, but also that such reconciliation is a "need".[124] The shortcoming came, thus, with the silence regarding the specific legal status and normative power of those norms. In that sense, it is correct to admit that the ICJ, though taking a novel and very important step, also failed to further clarify and concretise the field of environmental and sustainability law regarding its legal status.[125]

2.2.2.2. Iron Rhine Arbitration Case

The second important case is the Iron Rhine arbitration between Belgium and the Netherlands which took place in 2005. The dispute was in relation to the 1839 Treaty between the two countries relative to the Separation of their Respective Territories providing Belgium with a right of transit. The exercise of this right of transit was later specified by the 1873 Iron Rhine treaty, where it was agreed that Belgium would make use of the Iron Rhine, a railway track connecting the port of Antwerp in Belgium with the Rhine River in Germany, passing through Dutch territory.[126]

More than 70 years later, Belgium and the Netherlands agreed to the reconstruction of the tracks after them being destroyed during World War II.[127] Since then only light use was made of the railway until 1991 when the use for through traffic connecting Belgium and Germany had fully stopped.[128]

The problem arose when the governments of both countries started negotiations for the reactivation of the Iron Rhine based on the transit right of Belgium.[129] This was owed to the designation by the Netherlands of areas of natural conservation, some of which laid across the railway, resulting in short, in the Dutch opposition to a full reactivation due to environmental considerations.[130]

This shows again a clash between, in this case Belgium's claim seeking to further the country's development process, and the Netherlands's claim seeking the protection of the

---

124 MBENGUE (2020), *op. cit.*, p. 187

125 MCGARRY (2020), *op. cit.*, p. 227

126 ARBITRATION REGARDING THE IRON RHINE RAILWAY (BELGIUM/NETHERLANDS) (2005), para. 18

127 *Ibid.*, para. 19

128 *Ibid.*

129 *Ibid.*, para. 20

130 *Ibid.*, paras. 20-25

environment. In paragraph 58, the arbitral tribunal acknowledges the complexity of the case and of the field of environmental law.

> "[…] There is considerable debate as to what, within the field of environmental law, constitutes "rules" or "principles"; what is "soft law"; and which environmental treaty law or principles have contributed to the development of customary international law. Without entering further into those controversies, the Tribunal notes that in all of these categories "environment" is broadly referred to as including air, water, land, flora and fauna, natural ecosystems and sites, human health and safety, and climate. The emerging principles, whatever their current status, make reference to […] sustainable development […]".[131]

The Tribunal recognises here the continuous development of the field of environmental law and the debate surrounding this area. However, without entering in the controversies, it acknowledges the existence of emerging principles, and that whatever their status is they all make reference to sustainability, prevention and protection of future generations. So, one of these emerging principles we find is that of sustainability.

The undeniable development of the field of international environmental law in addition to the mentioned acknowledgement of the tribunal of the fact that the emerging principle of this field make reference to sustainable development, supports the idea sustainability is a core concept surrounding this field and that as such, that the tribunal considers sustainable development as an integral part of international law. This was explicitly addressed by the Tribunal in paragraph 59:

> "Since the Stockholm Conference on the Environment in 1972 there has been a marked development of international law relating to the protection of the environment. Today, […] international law requires the integration of appropriate environmental measures in the design and implementation of economic development activities. Principle 4 of the Rio Declaration […], which reflects this trend, provides that "environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it" Importantly, these emerging principles now

[131] *Ibid.*, para. 58

> integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm. This duty, in the opinion of the tribunal, has now become a principle of general international law".[132]

The tribunal uses customary language when saying that international law requires the integration of environmental measures and economic development when perceiving that this is due to the marked continuous development of international law since 1972. Therefore, the tribunal is attaching customary duties to the principle of sustainable development. The tribunal refers to Principle 4 of the Rio Declaration as enshrining this trend to establish customary duties to states to integrate environmental protection and development.

Furthermore, just as in Judge Weeramantry's dissenting opinion, the Tribunal recognises herewith not only the customary character of sustainability, but also its status as general principle within international law. The idea of sustainable development as an umbrella concept is also recognised when the tribunal states that it presupposes the need to integrate environmental protection and development processes and that this presupposition requires, among other things, the duty to prevent environmental harm possibly caused by development as one of the nuances of the bigger principle of sustainability.

In this context, Professor Mbengue concludes logically that including the duty to prevent environmental harm within the concept of sustainable development and recognising this duty as a general principle of international law permits to establish that the tribunal grants sustainable development normative power as a customary rule and a general principle of international law as well.[133] This, at the time, came to complement the ICJ in the *Gabčíkovo-Nagymaros* case, to concretise the specific status of sustainability within international law.

2.2.2.3. Pulp Mills on the River Uruguay Case

One year after the Iron Rhine arbitration, a landmark environmental case was brought before the ICJ. In short, Argentina initiated proceedings against Uruguay claiming a breach of

[132] *Ibid.*, para. 59

[133] MBENGUE (2020), *op. cit.*, p. 190

the 1975 Statute of the River Uruguay that sets the regime for the use of the waters of the river. Uruguay's unilateral decision to build two pulp mills on the River Uruguay, which constitutes both parties' joint boundary, was considered to be in violation of the 1975 Statute that required due notice of such decision.[134] In addition, Argentina claimed that this violation of that procedural requirement led consequently to substantive violations of the Statute, for the pulp mills would harm the ecosystem of the river as well as the quality of its waters, resulting in transboundary environmental damage produced by Uruguay.[135]

The Court reaffirmed the application of sustainable development in the dispute, where the need to reconcile environmental protection with developmental activities is required. In this context, the Court recognised that sustainable development was intrinsically connected with a cooperation between two countries.[136] As such, a proper cooperation created the duty of Uruguay to have informed Argentina about the project, which was the way by which a proper balance between development and environmental protection could be achieved.[137]

Having in mind the umbrella character of sustainability, the Court refers to the principle of prevention, which is part and parcel of sustainable development, [138] and according to the Court an integral part of international law.[139] The ICJ held, moreover, that the cooperation required in this case at hand is also connected with this principle of prevention in such a way that a late or no notification of such projects as the one carried by Uruguay might in instances lead to environmental damage, allowing thus, only for an *ex post* remedy.[140]

And at this point, the same logical approach followed in the cases previously analysed can be taken. By inductive method, the consideration of the prevention principle, which is part of sustainable development as an integral part of international law, it follows that sustainable development as such, has acquired that characteristic too. Moreover, in the opinion of this

---

[134] PULP MILLS ON THE RIVER URUGUAY (ARGENTINA V. URUGUAY) (2010), p. 92, para. 282

[135] *Ibid*., p. 30, para. 47

[136] *Ibid*., p. 38-39, paras. 75-76. This intrinsic connection acknowledged by the Court, is contained also in the 17th SDG, embracing with this the idea of the umbrella notion of sustainable development that counts with different relevant aspects in different areas.

[137] PULP MILLS ON THE RIVER URUGUAY (ARGENTINA V. URUGUAY) (2010), *op. cit.*, p. 39, para. 77

[138] See for example, the fourth principle of the ILA Declaration in Annex C

[139] PULP MILLS ON THE RIVER URUGUAY (ARGENTINA V. URUGUAY) (2010), *op. cit.*, p. 45-46, para. 101

[140] *Ibid*., para 101 & 188

author, the different principles within the realm of sustainable development are not individual legal expressions but interact with each other. Therefore, the compliance of sustainability within international law requires the proper application of its different principles simultaneously. In the case at hand, two areas of sustainability were linked by the Court, namely, cooperation (SDG 17) and prevention (Fourth principle of ILA Declaration).

In a more practical way, another important element which represents the prevention and precautionary principles stemming from sustainable development was also addressed by the Court. The ICJ recognised the existence of an obligation under international law to carry out an environmental impact assessment (EIA) for projects that might carry adverse transboundary environmental effects.[141] The EIA as a component of the prevention and precautionary principles and as such, is part and parcel of the realm of sustainable development while at the same time dealing with another component of sustainability, namely, the carriage of good governance by the relevant state.

Nevertheless, all these conclusions were not enough for the Court to state in a clear way that the violation of the procedural obligation of Uruguay to inform Argentina about the projects would lead to a prohibition to construct the pulp mills in this case. In other words, the ICJ did not consider that the violation of the procedural obligation by Uruguay, by failing to inform Argentina in a given period of time, could extend in time so as to prohibit the construction of the pulp mills. This shows a contradiction in the reasoning of the Court.

Favourable advances can be seen then when the ICJ concluded that within sustainable development, the principles of prevention and that of cooperation were essential for the case at hand, and even integral part of international law. Nonetheless, the non-extension of the violation of the procedural obligation by Uruguay to a prohibition to construct could lead to a *carte blanche* to carry unsustainable projects where the principles of cooperation and prevention, which fall within the realm of sustainability, are being eluded.[142]

Though the judgement did not analyse the connection between the effect of violation of procedural obligations, which were according to the ICJ expressive of the prevention principle, on the substantive obligations, The Court still analysed the environmental

[141] *Ibid.*, p. 72-73, para. 204

[142] TLADI (2017), p. 247

substantive rules, but in isolation with the other aspects of sustainability, namely, in this case at hand, prevention principle and that of cooperation.

Being an environmental dispute in its essence, the Court, besides attending to certain specific aspects of sustainability, such as the principles of prevention and that of cooperation, missed an immense opportunity to continue the development of sustainability development as the umbrella concept that it is. The judgement mentions on several occasions "sustainable development" but repeats the now mainstream idea behind it, that is, the reconciliation of environmental protection and development, without entering into a deeper analysis as to the application to the legal principle of sustainable development to the case as an entirety, integrating it into the legal reasoning of the judgement.[143]

2.2.3. Sustainable Development in Scholarly Discussions

The discussions surrounding sustainable development have not been solely to the attention and interests of international courts and tribunals or World Summits. International lawyers have dedicated numerous publications to this topic, and as admitted by the arbitral tribunal in the Iron Rhine case, considerable debate can be seen as to what constitutes what in the field of international environmental law.[144] Therefore, the question arises as to how sustainable development is treated by different experts, what normative status is granted to it and what disagreements exist towards this notion.

Alhaji Marong envisages four main positions concerning the normative status of sustainable development.[145] First, the view that sustainable development is too vague to count with a normative status. Second, that the notion of sustainable development has already gained its due place in international law to reconcile two principles, and therefore, the question is not about the normative status, but rather how to apply it in practice. Thirdly, the view that sustainability has already acquired the character of international customary law, and, finally, that it does not satisfy the requirements of a customary rule, and therefore sustainability is, at best, an interstitial norm.

ICJ Judges Weeramantry and Cançado Trindade's dissenting opinions in the *Gabčíkovo-Nagymaros* and the Pulp Mills cases respectively provide arguments encompassing

[143] *Ibid*.

[144] *Vid.* supra note 131

[145] MARONG (2003), p. 44

that sustainability has already acquired normative force and is an integral part of international law.[146] Cançado Trindade, following closely the logical approach taken by Judge Weeramantry expresses that sustainable development came to be understood as a connecting bridge between the rights of development and that to a healthy environment.[147] Given the necessity, now widely recognised, to reconcile these two rights, it follows that this link, that is sustainable development, is to be perceived as a norm in international law. Moreover, both judges perceive the progressive use of the word "principle" of sustainable development in international instruments as well as by memorials submitted by parties to the ICJ as strong evidence also supporting the customary character of sustainable development.[148]

Moreover, as seen, Judge Weeramantry also argues that sustainable development, by reconciling two potentially conflicting principles of international law, embodies a principle in itself.[149] A view to the contrary, Weeramantry holds, would mean that international law endorses the juxtaposition of two colliding principles, leading to a "normative anarchy" where these two principles could constantly operate in collision with each other.[150] These arguments led to the judge's view that sustainability is not a mere concept, but a principle of international law, which given its wide recognition has also become a rule of customary nature.

Opposing Judge Weeramantry's views, Professor Lowe perceives sustainable development merely as a concept in international law, without normative power.[151] To Lowe, the concept of sustainable development as such might be arguably an interstitial norm, given the lack of normative language in its definition and rejects Weeramantry's argument that sustainability has acquired normative status by logical necessity.[152] The absence of normative language leads to the impossibility of the concept to create binding norms in international law, and as such its purpose is solely to encompass the need to reconcile two principles of international law, namely, development and environmental protection without subjecting the

[146] GABČÍKOVO–NAGYMAROS PROJECT (HUNGARY/SLOVAKIA) (1997), Separate Opinion of Vice-President Weeramantry, *op. cit.*, p. 85-92; PULP MILLS ON THE RIVER URUGUAY (ARGENTINA V. URUGUAY) (2010), *op. cit.*, Separate opinion of Judge Cançado Trindade, p. 128, para. 6

[147] Separate opinion of Judge Cançado Trindade, para. 132

[148] *Ibid.*, paras.139 and 141-144; Separate Opinion of Vice-President Weeramantry, p. 90-91

[149] Separate Opinion of Vice-President Weeramantry, p. 87

[150] *Ibid.*

[151] LOWE (1999), *op. cit.*, p. 20-21

[152] *Ibid.*, p. 22-23

action of states to legal prerogatives.[153] Sustainability as an interstitial norm then, does not in itself create legal norm, but modifies existing rules in the field of development and environmental protection to establish a reconciled relationship between the two. The specific modifications made by sustainability to other legal norms is to be determined in the exercise of judicial reasoning for a particular case.[154]

Professor Lowe's conclusion could be regarded as perfectly logical. Moreover, his argument could be supported by the shy, albeit innovative, judgments of the ICJ in environmental disputes. It has been illustrated before that the Court tends to resolve environmental disputes by relying on different norms and instruments using sustainable development as a complementarity concept for its reasoning. Nevertheless, the opinion of this author is that Professor Lowe oversees the fact that the ICJ and other tribunals have explicitly referred to the "principle" of sustainable development and that other rules with which environmental disputes have been resolved, such as the prevention principle, are integral part of the umbrella concept of sustainable development.

The Iron Rhine tribunal explicitly recognised the principle of prevention as part of sustainable development and a duty that is integral part of international law.[155] From this follows two things. First, that sustainable development, regardless of its non-legal language, can create binding norms upon the members of the international community, and that this has been received and recognised by these members.[156] Second, that sustainable development has become an integral part of international law.

This idea is supported also by Professor Sands, who draws from many international instruments, certain recurrent legal elements of sustainable development.[157] This illustrates the capacity of sustainability to create international norms based on the idea of reconciliation of development and environmental protection. This is because these recurrent legal elements are now part of most binding international agreements relating to sustainable development.[158]

---

[153] *Ibid.*, p. 33

[154] *Ibid*., p. 19

[155] ARBITRATION REGARDING THE IRON RHINE RAILWAY (BELGIUM/NETHERLANDS) (2005), *op. cit.*, para. 59

[156] See for example, PULP MILLS ON THE RIVER URUGUAY (ARGENTINA V. URUGUAY) (2010), Memorial of Argentina, para. 3.177

[157] SANDS (2003), p. 253

[158] *Ibid*.

In addition, sustainable development is not only a principle of international law, but it is also seen as a world objective.[159] Given its broad character, sustainability may thus not establish a strict and clear rule in international law to be applied, but by means of its meaning it imposes certain practical legal obligations, such as the no-harm rule or cooperation in environmental matters. Therefore, the sustainable development principle is further specified in stricter and concreter legal terms, such as the ILA Declaration provides.

In other words, the principle of sustainable development is a world objective requiring the balance of three pillars, but indeed some vague and, in some parts, a lack of precise legal language is present in this notion. That is not to say that sustainable development has not transformed its related principles and SDGs into legal obligations incumbent upon the members of the international community. These are more precise in their content and contain a degree of normative power as illustrated previously in different case-law. This is, for example, the case of the Iron Rhine arbitration, where the tribunal recognised the importance of sustainable development as requiring a balance of the conduction of economic activities with environmental considerations, building the normative power in a more specific rule, namely, the prohibition to cause harm to the environment when carrying economic activities. This at the same time supports the idea of sustainability as an umbrella principle.

Therefore, as to the notion of sustainable development as such, regardless of its rather vague language, something not accustomed in international law, it is now possible to establish that sustainable development has acquired its place in international law, and that importance must be given as to how to apply it in practice. However, it is also of importance to determine the normative status of sustainability itself, given that its particular principles, that count with normative status are not to be applied in isolation from each other, but rather in an integrational manner among them, encompassed under the single concept of sustainable development.

As regard to the acquisition of customary nature by sustainable development, Marong states that regardless of the wide recognition of sustainability by means of instruments and state practice, there is still a substantial amount of state conduct infringing the reconciliation of development and environmental protection.[160] However, this author is of the view that the definition of a customary rule is to be determined by the existence of positive elements, namely,

---

[159] UNITED NATIONS (2002), *op. cit.*, p. 2-3, para. 8-15

[160] MARONG (2003), *op. cit.*, p. 48-49

general practice recognising the norm accompanied by the psychological element of *opinio iuris*, that is, the belief that the practice is seen as mandatory by the existence of the norm.[161] As such, the argument put in the negative, that many states have not lived up to their responsibilities under sustainable development, does not preclude the existence of the elements required for the norm to be a customary rule.

Additionally, Marong, when arguing against the customary nature of sustainability, refers only to the principle of common but differentiated responsibilities as a tool to implement sustainability,[162] and even further, he specifies his argument only on the lack of compliance by many industrialised countries of their obligation to contribute 0.7 percent of their GDP towards development assistance.[163] Therefore, sustainability, he argues, creates only a legitimate expectation to be lived up to by the members of the international community, but not a legal obligation.[164]

In this regard, it is undeniable that some countries have not fully complied with this particular obligation, or that sustainable development has created legitimate expectations of behaviour. Nonetheless, the portion of behaviour used by Marong is relatively small, considering the broad application of sustainability, to conclude that it has not acquired customary status. It is true that not only in the obligation pointed out by Marong there is a degree of non-compliance, but so it is the case in many other areas of law. This does not preclude the consistent and uniform practice among states to engage in sustainable development. This has been so not only by means of international instruments, but by the sovereign enactment of extensive national legislation towards this end, as Hungary pointed out in its memorial in the *Gabčíkovo-Nagymaros* case.[165]

Furthermore, the principles of sustainable development, as that of prevention or of common but differentiated responsibilities, present the obligations that are necessary to achieve sustainability. Therefore, it seems more appropriate to conclude that the legitimate expectation that Marong refers to relates to an even further step of what is necessary. Those legitimate expectations, thus, are the engagement into an enhanced cooperation towards international

---

[161] NORTH SEA CONTINENTAL SHELF (FEDERAL REPUBLIC OF GERMANY/NETHERLANDS) (1969), para. 77

[162] MARONG (2003), *op. cit.*, p. 49

[163] *Ibid*. Obligation set forth at the Monterrey Conference for Financing for Development.

[164] *Ibid*.

[165] *Vid.* supra note 123

commitments in creating environmental consciousness. The legitimate expectation to go beyond what is legally required is explained by the logical necessity that Judge Weeramantry pointed out, of the protection of the environment as a whole in the current context of the environmental crisis.

This section illustrates the debate concerning the legal status and normative power of sustainable development that is likely to continue in the following years. Sustainable development is a complex concept which is not unidimensional in nature but relates to different areas of conduct of the actors at the international level.

Its recognition has been progressively growing, to the point that it seems easier to conclude its customary nature rather than denying it. Nowadays, sustainable development and its different aspects have arguably acquired the status of customary law. This encompasses the idea that sustainability is confirmed by state practice and *opinio iuris*. The development of the custom of sustainability is the result of what René-Jean Dupuy refers to as *coutume sauvage* or wild custom.[166] A wild custom consist of the development of customary international law from the will of the actors of the international community,[167] to create a legal norm.[168] With this, the recurrent and repetitive negotiations regarding sustainability of several documents either universal, multilateral, regional or bilateral leads is the result of a previous process of the moulding of the legal mentalities of these actors, resulting in the formation of *opinio iuris* before the practice exists. It is, therefore, this transformation that naturally leads to the state practice in accordance. The idea of Dupuy is visible in the development of the notion of sustainable development but can also be explained by the logical and urgent necessity to protect the environment as Judge Weeramantry foresaw.

As an umbrella concept, sustainable development can also be considered a principle of international law, as it has been by different courts and tribunals and members of the international community. Furthermore, the generality of this principle is enshrined in its wide

---

166 DUPUY (1974), p. 76

167 Though States are the main actors, the participation of non-state actors as well as the members of the civil society play a relevant role.

168 DUPUY (1974), *op. cit.*, p. 76. Dupuy's *coutume sauvage* also provides a basis to dismiss one of Lowe's proposed arguments that necessity, as invoked by Judge Weeramantry, does not in itself create a rule of international law. And while agreeing with the premise, it is indeed not necessity that creates the international norm but constitutes, however, the first step towards the realisation of a *coutume sauvage*.

application to different areas of international law. This broad principle encompasses the reconciliation of two other principles at times where these might collide. Indeed, the non-legal language of sustainable development resulted in the different principles that narrow down and concretise the requirements for such reconciliation.

The existence of these diverse principles narrowing down the notion of sustainable development to achieve a balance among its three pillars enshrines the idea that, as some have argued, sustainability binds the subjects of international law to an obligation of means.[169] In such an umbrella concept as sustainable development, this is the most logical result. As repeatedly mentioned, the notion of sustainable development refers to the reconciliation and integration of development and environmental protection. It follows from this, that the norms derived from this concept provide the means for such integration. The compliance of these norms is, accordingly, to result in sustainability.

By way of conclusion, it has to be pointed out that sustainable development is not a static notion. As many other integral parts of international law, it is susceptible to amendments and further evolution and interpretation. Further clarification of the notion itself and its different principles is still in continuous progress. In this context, the words of Virginie Barral make more sense than ever in the fight against the current climate crises, where sustainable development is not a way, but by logical necessity, the only way. Barral holds that

> "States are under an obligation to pursue sustainable development; they are bound by an obligation of means, and by implementing these countless treaties [*on sustainable development*] they contribute, day after day, to progressively making sustainable development requirements real".[170]

Thus far, the status of sustainable development, as recognised by Professor Sands, has reflected in the emergence of both procedural and substantive commitments. Sands mentions intergenerational equity considering the need of present and future generations, environmental protection allowing to place limits upon states' behaviour (within which we find principles like prevention or no harm), the existence of common but differentiated responsibilities and the need to apply and interpret these rules in an integrated and systemic manner.[171]

---

[169] See for example, BARRAL (2012), p. 390

[170] *Ibid.*, p. 398

[171] SANDS (2003), *op. cit.*, p. 266

These, according to Sands, are not the exclusive commitments drawn from the principle of sustainable development.[172] It is by now clear, given the analysis carried in this Chapter, that the different principles addressed in the Rio Declaration, the ILA Declaration and those used by different courts and tribunals are now part and parcel of sustainability, and as such, impose a duty on the members of the international community. This does not mean that sustainable development will be the determinant element in all cases where international laws are at stake, but rather, that courts, tribunals, states and all subjects of international law are to give due and proper consideration to sustainability when acting.

2.3. The Relation between Sustainable Development and Investment

It was mentioned earlier that sustainability is a broad concept, where the reconciliation of its three pillars requires integrated action in different areas. International investment law is therefore also subject to scrutiny under the principle of sustainability.

Nonetheless, it is important to remember that sustainability also counts with a development pillar and therefore, from a different angle, environmental protection needs also to be balanced with a due weight given to the development aspect. There is in this sense, a wide consensus that foreign investment, its attraction and promotion are necessary for sustainable development.[173]

It follows that the regimes, both national and international, dealing with foreign investment also need a proper balance between the developmental aspect of investments with environmental protection.[174] What exactly is required is elucidated, albeit in general words, by the Monterrey Consensus reached during the 2002 United Nations International Conference on Financing for Development, which expresses

> "[…] transparent, stable and predictable investment climate, with proper contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions that allow businesses, both domestic

[172] *Ibid*.

[173] NEWCOMBE (2007), p. 357

[174] GEHRING and NEWCOMBE (2010), *op. cit.*, p. 9

> and international, to operate efficiently and profitably and with maximum development impact."[175]

The Monterrey Consensus, in other words, reflects the need to have within the investment regime rules on full protection, national treatment and most favoured nation, ensuring with it transparency, stability and the predictability for the investor of the treatment owed to her by the host country. Moreover, contract enforcement refers to the existence of rules, within the investment regime, for a proper dispute settlement process, and finally, the presence of rules on expropriation to ensure a due respect for the property rights of foreign investors. As such, sustainable development relates both to procedural and substantive rules within the investment regime.

All of the above elements to be present in the investment regime are to be accompanied by a strong institutional framework, able to attain the maximum developmental impact. Considering that it has been extensively agreed that development is now integrated with environmental protection, the Monterrey Consensus refers here to a set of rules ensuring the full extent of development within the notion of sustainability, thus where development is already considered in integration with environmental protection and not in isolation from it.

As stated, the Monterrey Consensus recognises the presence of certain elements as necessary to engage into a sustainable foreign investment, though in rather general terms. In this context, experts have engaged into an interesting analysis of what actually is specifically required in IIAs to allow investments to be carried out in a sustainable way. The answer to this question serves the purposes of this thesis and will be next analysed to continue with the posterior analysis of the compliance by the CPTPP with sustainable development requirements.

2.3.1. Sustainable Development and Investment Procedural Law

A first important element required by sustainable development is the contemplation of an impact assessment mechanism to address the results of the conduct of an investment project. Particularly because these refer to the point in time before the investment is carried, which allow compliance with the prevention and precautionary principles.

Though these were traditionally to determine possible environmental damage of investment projects, the worldwide context of sustainability has extended their purpose also to

[175] UNITED NATIONS (2003), para. 20

determine the social and economic impact of these projects.[176] Given their extended scope, these are often referred to as Sustainability Impact Assessment (SIA).

The existence of SIA contemplating all three pillars of sustainable development constitutes an important tool to assess *ex ante* implications of investment projects. As such, it is not only an instrument that *per se* introduces elements of sustainability in an investment regime, but also introduces them in the practice of, for example, an IIA. Avoiding thereby the existence of cases where a IIA is in accordance with sustainability, but the impact of the project in the practice results in the imbalance of its pillars. Markus Gehring argues, therefore, that this process of SIA actually by itself achieves sustainable development in an investment regime.[177]

It is undeniable the positive effects that SIA can have in the pursuit of sustainability, as the SIA comprises the fulfilment of different obligations arising from sustainability. For example, SIAs allow, as mentioned, *ex ante* examinations of the effects of investments, fulfilling therewith the precautionary principle, by anticipating environmental risks in a situation of uncertainty. With a SIA, thus, states would take measures in the conduct of investment activities to protect the environment when seeking development, with respect to uncertain risks, particularly, because sometimes it can take decades until the impact of certain economic activities can be seen.

Nevertheless, to argue that SIAs by itself is a process where sustainable development is achieved seems far-fetched. The premise of Gehring is correct in remarking the importance of SIAs and that its application fulfils many duties related with sustainability. It was seen, however, that sustainable development is not a static concept but evolves constantly, particularly, when it comes to the specific measures that are to be applied. The requirements of sustainability, given the current environmental contingency, have become more burdensome. Therefore, whilst acknowledging the importance of SIAs, the development of a certain investment throughout time is always uncertain. As such, this author is of the opinion that SIAs must also be complemented by other rules seeking sustainability in the investment regime. Being a pioneer country in the development of SIAs, Canada envisages the possibility, although

[176] GEHRING (2010), p. 149

[177] *Ibid.*, p. 150

not mandatory, of monitoring assessments during the conduct of an investment, which would mitigate the possibility of a posterior imbalance occurring during the conduct of investments.[178]

The use of the word mitigation implies that imbalances within the three pillars of sustainable development might still occur. Therefore, in such situations, *ex post* mechanisms are also to be available so that the balance is once again restored. More specifically, this relates to the possibility of dispute settlement mechanisms.

The question then arises as to how the rules on dispute settlement could point towards sustainable development. It was seen in the past, that tribunals have dealt with environmental and sustainability disputes, such as it was during the Pulp Mills case. However, tribunals have not put much emphasis in deciding entirely based on sustainable development and the duties arising therefrom. Rather, tribunals have used the notion of sustainable development as an argumentative support of their reasoning.

Professor Chester Brown states that the few progressive, but rather shy development of sustainability in the context of dispute settlement is also due to the fact that states themselves do not raise the sustainability concerns in the dispute, but focus rather on other legal aspects (e.g., specific treaty violations).[179]

Naturally, the problem does not arise where the parties to the dispute actually raise the environmental or sustainability issues to the dispute, so that the tribunal deals with the case around that perspective. But given that reality does not always illustrate that scenario, there is a need for participation of third parties raising the sustainability issue.[180]

Other options envisaged by Brown to place sustainability within the records of a case are, for example, the inclusion of explicit provisions to that effect, or allowing direct participation of third parties as *amicus curiae*. The 2007 Norwegian Model BIT envisages such possibility, making the submissions of these *amici* directly relevant to the factual and legal issues of the case.[181]

[178] *Ibid.*, p. 157

[179] BROWN (2010), p. 176

[180] *Ibid.*, p. 177-178

[181] *Ibid.*, p. 179-180

Going back to the work carried by the tribunals, who have also had their share in the rather slower development of sustainable development, Brown also acknowledges the possibility to raise the sustainability issues in a dispute in an *ex officio* manner. These possibilities refer to the exercise of the inherent powers of the tribunal and to the raising of sustainability issues *propio motu.*[182]

These options are not oblivious to the field of investment law. The notion of inherent powers refers to those prerogatives of the tribunal that are not included in the constitutive instrument but that are implied to belong to it in order to properly fulfil its functions of administration of justice to a dispute.[183] Investment tribunals have made use of these prerogatives, precisely to admit the participation of *amicus curiae*.[184] The NAFTA Tribunal allowed the submission by *amicus curiae* in the *Methanex v. United State*s after the International Institute for Sustainable Development (IISD) had sought its participation, even though the procedural rules applicable to the dispute were silent on this matter.[185] The participation of the IISD in the case was based on the interpretation of the Tribunal of its powers in accordance with article 15(1) of the UNCITRAL Arbitration Rules.[186]

Even in the absence of submissions by the parties to the dispute or *amicus curiae* submissions raising the sustainable development issues to the dispute, there is still the possibility that the tribunal by its authority raises the issue. Brown explains that based on the principle *iura novit curia*, according to which courts are deemed to know the law and therefore supposed to examine applicable law even when particular legal issues are not brought up by the parties.[187] This principle, however, holds certain limitations.[188]

What this section has illustrated is that there is a real relationship between procedural aspects of investment law and sustainable development. This section only exemplifies this relationship with certain tools developed or to be developed for sustainable development in

---

[182] *Ibid.*, p. 181-185

[183] *Ibid*., p. 182

[184] *Ibid*.

[185] METHANEX CORPORATION V. UNITED STATES OF AMERICA (2001), paras. 47-52; see BROWN (2010), p.183-184 for further examples.

[186] *Ibid.*

[187] BROWN (2010), *op. cit.*, p. 184-185

[188] *Ibid*., p. 185

investment law. However, sustainability considerations can be applied to a range of procedural rules so as to achieve a proper sustainable investment regime.

2.3.2. Sustainable Development and Substantive Rules on Investment

Sustainability also holds a relationship with the substantive rules in investment law seeking that these are applied in such a way that social and economic development is balanced with environmental protection. This section, as the previous one, will provide a general overview of the relationship between sustainable development and substantive investment rules, and how the latter may work in such a way that sustainability is achieved. This will serve for the analysis of the CPTPP and its compliance with sustainable development requirements.

Some have argued that sustainable development considerations should not only be included in the substantive obligations of states and investors, but also in the actual definition of investments as this notion does not only encompasses economic development, but also social development and environmental aspects.[189]

In this context, the definition of investment has been the object of analysis. The lack of *stare decisis* doctrine in investment law has resulted in various interpretations as to what the notion of "investment" entails. To address this, in quite an interesting proposal, Marek Jezewski argues that a shift of paradigm is needed so that the famous *Salini* criterion for the definition of investment portraying that these are to be contributing to the host state development be included as a conceptual framework for the entire investment regime.[190] This developmental criterion, should moreover, be framed within sustainability, so that it includes not only economic development but also address "issues of good governance and social policy" that have, sometimes, been disregarded, or ignored by tribunals and IIAs.[191]

The benefits of such a proposal, Jezewski argues, can be seen in different areas. But generally speaking, by considering that a state's development comprises the integral connection of economic development, social development, and environmental protection, this shift of paradigm will lead to the consideration, by tribunals, of sustainability aspects when assessing whether a given activity deserves protection under an IIA.[192] Moreover, investors

[189] JEŻEWSKI (2010), p. 215-216

[190] *Ibid.*

[191] *Ibid.*

[192] *Ibid.*

will also be incentivised to conduct sustainable projects so that they are able to be subjected to the protection given by the relevant agreement. That is not to say that foreign investors are to be tied to actively promote social development and environmental protection. From a negative perspective, it also translates in the omission to, among other things, harm the environment, or produce social damage.[193]

Other important substantive aspects to be connected with sustainable development relate to the areas of FET, NT, MFN and expropriation. Within these substantive rules, sustainable development related considerations may arise in the tug of war between the regulatory functions of a state and the rights of investors.[194] For, as it will be seen, investment tribunals have at times upheld these standards of protection disregarding legitimate social policies as justifications, diminishing therewith the regulatory authority of host states.

But from the point of view of foreign investors, the standards of FET, NT and MFN as well as the rules on expropriation are closely linked with principles stemming from sustainable development (Annexes A and B), such as good governance and transparency.[195] For these standards seek the protection investment –which has been recognised in itself as an important tool for the economic pillar of sustainable development– against acts carried by host states in bad faith, which are therefore against the aforementioned sustainability principles.

As such, the most notable threats that these substantive rules pose to sustainable development correspond on the one hand, to the disregard, in its application, of the regulatory powers of host states seeking to address legitimate public objectives.[196] On the other hand, an under estimation of these rules due to their wording in IIAs or interpretation, may impair investor's rights creating also an imbalance among the pillars of sustainable development, affecting its economic aspect. Consequently, a precise text in the IIAs of what is to be understood by these standards and how they are to be applied, can thus, lead to its proper application safeguarding the principles of sustainability at stake.

What is clear is that given the current environmental crisis and the rise of sustainable development as a customary rule, investment law and instruments are facing new challenges

---

[193] *Ibid.*

[194] KLÄGER (2010), p. 239

[195] *Ibid.*, p. 250

[196] *Ibid.*, p. 251

in incorporating sustainability considerations and elements. This does not imply the existence of rules favouring environmental protection, but rather the creation of norms where the elements of development and environment protection are balanced in such a way that all pillars move forward.

The duty of all members of the international community thus, is to engage into the necessary debate to determine the steps to be followed so that sustainability is properly achieved, and that this principle is concretised and crystallised in investment instruments.

3. The CPTPP's Investment Chapter and Sustainability

The previous chapter has provided a full picture of the notion of sustainability and its implications under international law. This work will now turn to the assessment, with the gathered elements, of whether the ratification of the CPTPP will allow a proper balance of investment and environmental protection, and overall, of the three pillars of sustainable development in Chile.

That said, an examination of the text of the CPTPP will take place to see whether it complies with the international law of sustainable development to allow Chile to further its sustainability path. At this point, it is important to remind the reader that the analysis of the CPTPP as well as its effects on Chile, limits itself to the CPTPP's chapter on investment.

3.1. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership

In its origins, the TPP12 (as it was formerly known considering the number of countries involved in the negotiations, that originally contemplated the inclusion of the United States), was an agreement to liberalise trade and foreign investment in leading nations of the Asia-Pacific region. After harsh criticism to the agreement of the United States during the negotiation process, President Trump at the time decided to permanently withdraw the U.S. from the treaty and its further negotiations.[197] The U.S. withdrawal, however, did not stop the remaining eleven countries from continuing the negotiation rounds which would finally lead to the adoption of the text in 2018 under the name that it currently has.[198]

The CPTPP[199] (referred to sometimes as TPP11) today is an extensive and as its name states, comprehensive agreement on international trade in the Asia-Pacific region. The agreement intends to further deepen the trade arrangements among eleven nations: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.[200]

---

[197] CHOW *et al* (2018), p. 37

[198] GANTZ and HUERTA-GOLDMAN (2021), p. 2

[199] COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP (CPTPP) (2018)

[200] Recently, China has expressed their desire to join the CPTPP. The United Kingdom has formally requested accession in 2021 and negotiations are in process.

The agreement signed in Santiago de Chile in 2018 entered into force that same year due to its ratification by Australia, Canada, Japan, Mexico, New Zealand, and Singapore. Their ratification was followed up by that of Vietnam and Peru in 2019 and 2021 respectively.

The CPTPP does not only deal with foreign investment, but covers a range of different topics, focusing also on international trade, including rules on market access and the activity of trade itself, as well as the inclusion of an innovative chapter dedicated to the protection of the environment. Economically speaking, the signatory countries represent about 13% of the world's GDP and 15% of global trade, opening a market of around 500 million people in the Asia-Pacific region.[201]

It has been analysed that Chilean society finds itself divided regarding the ratification of this agreement. The concerns base themselves on the idea that the CPTPP, recognising lightly its developmental characteristics, will be detrimental to Chile's conduct of that development in a sustainable way. This comprehensive agreement counts with an investment chapter, that has not been the exception to the sustainability criticisms.

The following paragraphs will focus on the provisions of this chapter as well as their relationship with specific environmental provisions within the CPTPP so as to determine their compliance with the requirements, under international law of sustainable development.

3.2. CPTPP's Investment Rules and Sustainable Development

The idea of foreign investment, its attraction and promotion are an important tool for sustainable development, as it was mentioned earlier. Nevertheless, the opposite sought results are also possible, and thus concerns in the way countries engage into this promotion and attraction of foreign investment do exist. This illustrates the important relationship that exists between foreign investment rules and sustainable development.

It was seen in Chapter 2 that both substantive and procedural rules need to attend to the requirements of sustainability for an instrument to be in accordance with it. These refer to all aspects of investment rules, from the initial definition of investment all the way through the provisions on dispute settlement.

When it comes to IIAs, the main concern regarding sustainability comes from the possibility of an imbalance between, on the one hand, the rights and expectations of foreign

[201] MATSUURA (2021)

investors when investing in the host state and, on the other hand, the sovereign right of states to exercise regulatory powers seeking the common good of the society.[202]

The next pages, thus, will illustrate that for the CPTPP to be in accordance with sustainability, the two interests at stake need to be properly treated, namely, the statutory powers of a state and the rights of the foreign investor, and whether in this case, the CPTPP incurs into a proper balance of those interests.

3.2.1. Definition of Investment

Chapter 9 of the CPTPP on Investment counts with a so-called "asset-based"[203] definition of investment, which includes as such every asset alongside a non-exhaustive illustrative list of examples of investments in article 9.1.[204] Such a traditional type of definition may not seem to play a significant role in the balancing of the rights of foreign investors and those of the host state. However, practice has shown that such open-ended definitions have carried undesired results concerning sustainable development.[205]

One needs to understand that the definition of investment is an integral part of the agreement, and as such, it requires an analysis in light of other relevant provisions. In this context, two important articles deal with the possible effects of the definition of investment on sustainable development. First, article 9.3 expresses that in case of inconsistency between the investment chapter and any other chapter of the agreement, the latter will prevail to the extent of the inconsistency. And second, article 20.2 of Chapter 20 of the CPTPP relates to the environment and states that environmental protection in a context of cooperation and sustainable development are objectives of the CPTPP.

From these provisions, it follows that the definition of investment cannot be interpreted in such a way that an inconsistency with the objective of sustainable development is created, either at the moment of granting access or during the conduct of the investment. For such an interpretation would trigger article 9.3 giving prevalence to environmental protection within

[202] SALGADO LEVY (2015), p. 59

[203] REINISCH (2020), *op. cit.*, p. 12

[204] COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP (CPTPP) (2018), see Annex C for this and the following articles referred to in this work.

[205] SALGADO LEVY (2015), *op. cit.*, p. 62. The author exemplifies with case-law that such open-ended definitions have led to the granting of protection of investments that have disregarded national laws and regulations.

the objective of sustainability of article 20.2 over the application of the definition of investment.

This arrangement of prevalence of the environmental pillar of sustainable development could arguably lead, to some extent, to a dismissing or, at least, a diminishing of the other pillars of sustainability. Because it is important here to remark that foreign investments are also essential tools to the economic pillar as seen by Chile in the past decades.

The question, therefore, arises as to what is the extent to which the notion of sustainable development may limit the definition of investment under the CPTPP so that the environmental pillar does not prevail over the social and economic pillar, and with it, that the rights of foreign investors are not diminished in the name of sustainability.

The intention of the parties of the CPTPP seems to differ from this presumable prevalence of environmental protection. The preamble of the agreement highlights the CPTPP not only as a tool to promote environmental protection but also to bring "economic growth and social benefits" within sustainability.[206]

With this, the CPTPP recognises that environmental protection is but one of the pillars of sustainability, and that this coexists alongside its economic and social aspects. Therefore, the existence of a prevalence of environmental protection over the investment definition needs also to be assessed against the two other pillars of sustainability, so that no imbalance is created by a possible prevalence of article 20.2. In other words, for an investment to be qualified as such under the CPTPP, the activity must, first and foremost, comply with the "asset-based" definition, and second, may not create an inconsistency among the three pillars of sustainability.

Yet, problems also arise regarding the wording of the definition of investment. The issue relates to the fact that an "investment", subject to protection under the agreement, must possess the "characteristics of an investment". The CPTPP lists among them, "the commitment of capital and other resources, the expectation of gain or profit, or the assumption of risk".[207] The absence, however, of the criterion of contribution to the host state's development, may lead in the interpretation of the notion to a diminished responsibility of the investor when an imbalance in the pillars of sustainability is created by his activity. This is because the

[206] CPTPP (2018), preamble

[207] *Ibid.*, art. 9.1

investment is to be granted protection regardless of its possible liability in cases where it affects the developmental process of the host state. The risks, thus, of an investment affecting sustainable growth seem to be laid on the side of the host state, whereas the risk assumed by the investor is only a monetary one should the investment fail. But again, tribunals should not, in the first place, interpret the notion of investment contravening sustainability due to the mentioned article 9.3.

The absence of this criterion developed by the *Salini* tribunal has been the trend in case-law over the last decade.[208] In such cases, the participation of third parties, particularly non-state actors, is crucial for the mitigation of possible adverse effects to sustainability. As Brown envisaged,[209] the CPTPP allows the participation of third parties in ISDS who can make relevant submissions to the tribunal.[210]

The other solution offered by Marek Jezewski of a unitary definition of investment within the entirety of the international investment regime is unfortunately not yet a reality.[211] Nevertheless, with this *amicus curiae* participation the CPTPP seeks to mitigate as much as possible this problem of the absence of the *Salini* criterion and of adverse effects to sustainability.

The inclusion of a full *Salini* criteria could, thus, arguably contribute to the fact that in the qualification of an investment, developmental concerns are present, as it incentivises foreign investors to carry activities that could actually contribute to the host state's development to be granted protection under the CPTPP. But the element of contributing to the host state development also requires an in-depth analysis of what is actually meant by "contributing to host state's development". Such a notion if incorrectly analysed may as well limit the protection of foreign investors only to cases where it has been proven a contribution to the host state's development, conditioning the protection only to projects of foreign investors that are successful. And this is also a concern of sustainability, particularly of its economic pillar.

The arbitral tribunal in *Pey Casado v Chile* expressed an appropriate conclusion regarding the presence of this *Salini* criterion. The tribunal held that the contribution to

---

[208] REINISCH (2020), *op. cit.*, p. 108

[209] BROWN (2010), *op. cit.*, p. 178-178

[210] CPTPP (2018), arts. 9.23.2 and 9.23.3

[211] *Vid. supra* note 189

development is not in itself a condition for the existence of an investment, rather, it belongs to other elements that are present in an investment.[212] The tribunal refers to the contribution to the host state's development as a possible consequence of foreign investment and not as a requirement.[213]

The tribunal's understanding has been shared by scholars. In its BIT Model, the International Institute for Sustainable Development recognises in this *Salini* criterion, not an obligation *per se* of the investment to create positive and tangible contributions to the host state's development, but rather that the investment counts with the capacity of creating such contributions, therefore, envisaging also the possibility of subsequent failure.[214] With this, the CPTPP could be interpreted as making clear that in the conduct of an activity undesired outcomes are a possibility, framing the definition of investment to the goal of sustainability, regardless of the success of the activity.

Questions also arise as to the meaning of "development". In the case of the CPTPP this nomenclature is explicitly elucidated in a particular chapter given to the topic of development. The CPTPP clarifies here that this notion, particularly in the context of foreign investments, refers to the broader concept of sustainable development so as to include among other things, the reduction of poverty (part of the social pillar), environmental protection and economic growth.[215]

This is not an innovation of the CPTPP, and now IIAs are directly specifying this requirement in their definition of investment.[216] For instance, the Morocco-Nigeria BIT expresses that

> "Investment means an enterprise within the territory of one State established, acquired, expanded or operated, in good faith, by an investor of the other State in accordance with the law of the Party in whose territory the investment is made taken together with the asset of the enterprise which contributes to sustainable development of that Party […]"[217]

---

[212] VICTOR PEY CASADO AND PRESIDENT ALLENDE FOUNDATION V REPUBLIC OF CHILE (2008), para. 232

[213] *Ibid*.

[214] MANN *et al* (2006), p. 7

[215] CPTPP (2018), article 23.1

[216] MAHMUTAJ (2022), p.4

[217] MOROCCO-NIGERIA BIT (2016), article 1

The doubt emerges as to whether this recent construction of IIAs of limiting the definition of investment with the general goal of sustainable growth might lead to a loss of protection granted to foreign investors. In principle, the answer to this question is, in the context of the CPTPP, a speculative one given the lack of case law on the matter. Therefore, once a tribunal faces a problem regarding this topic, much will depend on the interpretation given to the concept of sustainable development. This is problematic because, as recognised by the United Nations Conference on Trade and Development (UNCTAD), the unclarity to the term might lead to undesired results during the interpretation of an IIA and unpredictability for the state parties and foreign investors.[218]

In this context then, the adoption of sustainable development in recent IIAs is a positive step towards this goal. Nevertheless, to avoid undesired results of an impairment of the rights of the foreign investors or that of the host state, the notion of sustainable development should, in as much as possible, be explained or defined in the respective IIA in addition to precise definitions of the substantive rules promoting this goal.[219] The CPTPP establishes in article 27.2(2) a Commission composed of government representatives to elaborate binding interpretations on the agreement. Thus, this matter could be solved by the willingness of the parties to establish a definition for the notion of sustainability to be followed by tribunals.

Additionally, as seen in the previous chapter, the concept of sustainable development has been clarified and concretised in the past decades. The pillars of sustainability do not only relate to the environment but also to human rights (social pillar) and economic development. As such, foreign investment has been recognised, even by the CPTPP itself, as an essential tool for sustainable development, particularly, when it comes to economic growth.[220]

Quite the contrary to what one might think, the text of the CPTPP, by recognising in foreign investments their capacity to contribute to economic growth as part of sustainability, makes it less burdensome for investors to fall under the protection of the agreement. This is because, such a capacity of contribution to, at least, the economic development of the host state is assumed *prima facie* by the text of the CPTPP when the characteristics of an investment are present, and would, therefore, only need to be balanced against the social and environmental pillars of sustainability.

[218] UNITED NATIONS (2018), p. 43

[219] MAHMUTAJ (2022), *op. cit.*, p.4

[220] See for example, article 23.1(2) CPTPP (2018)

In this way, the definition of investment when read and interpreted in conjunction with the agreement as a whole, portrays and seeks proper balance between the rights of the investors and their expectations of protection under the CPTPP and the rights of the host states and their expectations of sustainable growth.

But the risk still exists that interpretations by tribunals of the notion of investment lead to undesired results. The existence of inconsistencies present in the case-law of different investment tribunals raises the question of the possibility of having an improper interpretation of the agreement that could eventually lead to an imbalance of the pillars of sustainable development. Much will depend on the specific rules on dispute settlement that will be later discussed.

It is, nonetheless, possible to see considerable progress made by the CPTPP in this regard, ensuring that due attention to sustainability is given when assessing the notion of investment. This is done by the presence of the aforementioned articles 9.3 and 20.2 and by clarifying that the notion of development encompasses, under this agreement, the broader concept of sustainable development. Finally, it is important to point out that the definition of investment, as well as all other provisions are framed under this objective of sustainable development set forth in the preamble of the agreement. Now it is only a matter of willingness of the parties to further specify the definition of sustainability through the Commission.

Furthermore, an interesting insurance for host states assuming the risk that foreign investments might not – once accepted as investment – contribute in practice or result in an impairment of sustainable development is found in article 9.10 on Performance Requirements. This provision allows a host state to adopt measures, including environmental measures imposing requirements to foreign investors that are necessary to secure compliance with national legislation, for the protection of life and health of animals, humans and plants, and the conservation of exhaustible resources.

The characteristics here presented of the CPTPP constitute a step forward towards a full promotion of sustainability worldwide, where the field of investment law should no longer be seen from the investor's perspective, but also as an active means to achieve sustainable development as a national goal. In the words of Nadia Sánchez, "important policy objectives such as the protection of human rights and the environment, gender equality, climate change mitigation and realising the Sustainable Development Goals cannot remain abstract commitments in the context of foreign investment. On the contrary, IIAs could be used to strengthen international and national commitment to policy objectives and their implementation through the inclusion of provisions such as those described above”,[221] which is precisely what the Comprehensive Agreement portrays.

In conclusion, the definition of investment within Chapter 9 of the CPTPP is a crucial element that requires careful analysis in the context of sustainable development. While the traditional asset-based definition may not initially appear to play a significant role, its interpretation and potential inconsistencies with sustainability goals can have far-reaching consequences. The CPTPP, therefore, provides provisions aiming at preventing these inconsistencies giving prevalence to environmental protection within the objective of sustainability. This emphasis on environmental protection, however, should be evaluated alongside the economic and social pillars to avoid an imbalance that diminishes the rights of foreign investors. The preamble of the CPTPP recognises the importance of economic growth and social well-being, in addition to environmental protection as integral elements of sustainability and with it, requires a proper balance of these pillars.

The wording of the investment definition in the CPTPP also presents challenges, particularly regarding the absence of a criterion for the contribution to the host state's development. While some argue for the inclusion of such a criterion, tribunals have declared that contribution to development is not a condition for investment but rather a possible consequence. Thus, protection is not granted on the basis of an active contribution to sustainability, but it is rather based on avoiding protection of activities creating an imbalance among its pillars.

In this context, the participation of third parties and the availability of amicus curiae submissions raising sustainability concerns in arbitration proceedings help mitigate adverse effects on its pillars. However, the interpretation of sustainable development remains a critical issue, as its ambiguity may lead to unpredictability in IIA interpretation and potential undesired outcomes. To address this, IIAs should provide precise definitions of sustainability and incorporate explanations within the agreement to clarify the concept. The presence of articles 9.3 and 20.2 in the CPTPP demonstrates progress toward addressing sustainability concerns in investment matters. Nevertheless, further specification of concept sustainability within the CPTPP is needed to avoid conflicting interpretations.

[221] SÁNCHEZ CASTILLO-WINCKELS and CORTÉS (2021), p. 7

Article 9.10 on Performance Requirements provides an additional safeguard for host states, allowing the adoption of measures necessary to secure compliance with national legislation and protect life, health, and resources. These characteristics of the CPTPP represent a significant step forward in promoting sustainability and redefining investment law as a means to achieve sustainable development. By incorporating provisions that strengthen commitments to policy objectives, such as environmental protection, the agreement embraces a holistic approach to investment and its definition.

3.2.2. Fair and Equitable Treatment, National Treatment and Most-Favoured Nation

More than entering into the analysis of what exactly these standards entail, which will be briefly touched upon, what is of the essence for the sake of this thesis is the examination of how the application of these standards can take place in such a way that the regulatory powers of a state are not impaired, and that on the other hand, the rights of the foreign investor are not diminished under the false pretensions of environmental or social grounds so that the economic pillar of sustainability is not affected.

The task of IIAs as well as investment tribunals, therefore, is to be able to distinguish correctly between a non-compensable and legitimate social and environmental regulatory conduct by the host state in the public interest and a regulatory conduct that, violating these standards, triggers the payment of compensation to the foreign investor.[222]

3.2.2.1. Fair and Equitable Treatment

From the perspective of the CPTPP, the starting points are articles 9.6 on FET and 9.16 on Investment and Environmental, Health and other Regulatory Objectives. With respect to the former, much debate exists as to what FET actually means. Various cases have developed certain elements present in this concept. These are due process, stability and predictability, transparency, legitimate expectations, and non-discrimination.[223] Todd Weiler synthesises the notion of FET as a standard that balances the dilemma between "good faith/non-discrimination and sovereignty", where the interests of foreign investors are based on the assumption that the host state will act in good faith, and the interests of the host state are based on the assumption

[222] ZHU, Ying (2018), p. 319

[223] REINISCH (2020), *op. cit.*, p.51-63

that it will be able to exercise its sovereignty to adopt the necessary public policies and measures internally.[224]

In an attempt to avoid conflicting interpretations by investment tribunals, the CPTPP has concretised the concept of FET by clarifying important aspects. Firstly, the treatment owed requires no additional protection than that offered by the customary law of international minimum standard. Secondly, FET includes the duty to ensure foreign investors access to justice and due process. Finally, in a rather innovative wording, the actions carried by the host state which are inconsistent with the investor's legitimate expectations do not, by that mere fact, breach FET.[225] It must be stated that it is just the mere fact that an action is inconsistent with the investor's legitimate expectations what does not lead to a breach of FET. Therefore, a state must still act in a non-discriminatory way, transparently, and allow access to justice and due process.

Moreover, the CPTPP progresses in terms of not diminishing the regulatory power of the state in favour of the investor's rights. Article 9.16 expresses that the rights of the investors provided for in the CPTPP shall not impair the sovereign right of host states to adopt, maintain and enforce any measure to ensure that the investment is carried out in a way that environmental objectives – environmental pillar of sustainable development –, health or regulatory objectives – social and economic development pillar – are affected.[226]

These measures must, nevertheless, be balanced with the rights of the individual guaranteeing that the elements of FET are respected (i.e., transparency, non-discrimination, stability, predictability, and due process). The FET, thus, constitutes and serves as a benchmark for evaluating claims related to the principle of good faith and non-discrimination against foreign investors, against claims by host states of their legitimate exercise of sovereignty.[227]

It is then possible to see that the CPTPP seeks a proper balance of the pillars of sustainable development by avoiding that the regulatory powers of the state, particularly in social and environmental areas, are fully impaired by the legitimate expectations of the investor. And on the other hand, safeguarding the rights of foreign investors and with it the

[224] WEILER (2013), p. 287

[225] CPTPP (2018), art. 9.6

[226] *Ibid*.

[227] WEILER (2013), *op. cit.*, p. 332

economic pillar of sustainability, by requiring the measures taken to follow the requirements imposed by the FET standard.

The measures, therefore, included in article 9.16 and FET constitute elements safeguarding the goal of sustainability.[228] This methodology applied by the CPTPP corresponds to the proposal of Professor Zhu, who expressed that

> "The methodology is, without a specific commitment made by a host state to a foreign investor, the host state's environmental regulation does not violate the FET standard, as long as such regulation is reasonable to achieve a genuine environmental objective and is applied non-discriminatorily and with due process."[229]

In principle thus, in the CPTPP the faculty left to host states to adopt, maintain or enforce measures and the protection rights given to the investors may very well coexist, provided that a certain balance is created in practice. This means that the host state's pursuit of sustainable growth should not violate the requirements of the FET standard of protection, and at the same time, the standard should not impair the state's regulatory authority.

This methodology presented in the CPTPP is, however, not a novelty of this agreement, and most importantly, does not ensure that in given cases certain investment tribunals will not declare violations of the FET standard against the legitimate exercise of regulatory powers of the host state.

After all such risks of misinterpretation have been, to a great extent, responsible for the existence of regulatory chills.[230] And it is not only the risk of losing in court what in many cases demands, particularly from developing countries, to incur regulatory chills, but also the mere threat by foreign investors to engage in arbitration alleging a violation of FET what creates animosity between the parties, given the monetary costs of these proceedings.

This problem requires an analysis of how arbitral tribunals have so far dealt with similar FET provisions and whether this has resulted in a balance between the rights of the foreign investor under FET and the regulatory authority of states. At this point, it is important to

[228] KLÄGER (2010), *op. cit.*, p. 250. See also Sixth Principle of ILA Declaration in Annex C

[229] ZHU, Ying (2018), *op. cit.*, p. 353-354

[230] TIENHAARA (2011), p. 606

mention the lack of a rule of *stare decisis* in the realm of investment arbitration, and in consequence, what previous tribunals have dictated are merely an indicator of certain trends, but in no way secure a given outcome in the future.

That said, in the *Methanex v United States of America* case before a NAFTA arbitral tribunal, the Canadian investor alleged, among other things, a breach of the FET standard after a U.S. ban on "the sale and use of the gasoline additive known as "MTBE" (methyl tertiary-butyl ether)".[231] The FET is under NAFTA, following the binding interpretation by the Free Trade Commission (FTC), essentially the same as the one applicable under the CPTPP, where fair and equitable treatment amounts to protection not going beyond what is required by customary international law on the matter.[232]

Within FET, the element of discrimination was assessed, and in this context, the tribunal held a rather high burden of proof for those alleging violation of FET. The tribunal considered that discriminatory acts are *per se* not directly in violation of the standard, and thus, host states are given a freer leeway to adopt public policies, even differentiating within these between national and foreign investors.

With this, some have argued that the tribunal upheld the low standard of protection set in 1926 by the *Neer* arbitral tribunal,[233] which considered FET to be violated against a "shocking, egregious, and outrageous" conduct of the host state. Though this is partly true given the reasoning of the tribunal, parties to the NAFTA themselves have recognised that the FET term and the customary law on the matter evolve and with it, what was considered "shocking, egregious, and outrageous" in 1926 might differ today, without denying that the standard has been kept high.[234] The same approach was followed by the NAFTA tribunal in *ADF Group Inc. V. United States of America*, which expressed

> "[…] what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the Neer case was rendered. For both customary international law

[231] METHANEX CORPORATION V. UNITED STATES OF AMERICA (2005), preface, para. 1

[232] See CPTPP (2018), article 9.6 and METHANEX CORPORATION V. UNITED STATES OF AMERICA (2005), Part IV, para. 10

[233] DOUGHERTY (2007), p. 751

[234] OECD (2004), p.11-12

> and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development".[235]

But the rationale behind the *Methanex* tribunal's reasoning, though seemingly striking the balance in favour of the regulatory authority of the host state, is based merely on the fact that a differentiation in treatment might not always be catalogued as discrimination. But this does not mean that when such a differentiation is considered arbitrarily discriminatory and without justification, the FET standard is not violated.

After all, nowadays, and by making use of the evolutionary approach accepted by the members of NAFTA and some tribunals , it is hardly refused the fact that non-discrimination, at least without justification,[236] has acquired the status of a principle of customary law on the protection of foreign investment – although it might have not yet been one during the *Neer* case –,[237] and is, therefore, applicable to the FET under the CPTPP's investment chapter.[238]

This recognition is an important tool to strike the balance between the interests of the investor to receive due protection and those of the host state to be able to exercise its regulatory powers. It is, precisely this evolutionary approach that has somehow centred the radical approach taken by the *Neer* tribunal. Something that could be replicated in all areas of investment law so that a proper balance between the interests of foreign investors and those of the state could be achieved.

However, it could still be argued that there is a high threshold to acquire protection under FET in the CPTPP. This can be seen in the fact that the agreement includes an example of a violation of the FET standard in article 9.6. This provision regards the denial of justice or of proceedings based on due process as conducts that – being in themselves grossly unlawful conducts – violate the FET.[239] On the contrary and from the opposite perspective, CPTPP rejects as violations of the FET in the same provision light claims of foreign investors merely based on their expectations. These examples are thus indicators of the level of conduct required to breach the FET under the agreement.

---

[235] ADF GROUP INC. V. UNITED STATES OF AMERICA (2003), para. 179, as cited in OECD (2004), p. 17

[236] REINISCH (2020), *op. cit.*, p.63 & CMS GAS TRANSMISSION COMPANY V. THE REPUBLIC OF ARGENTINA (2005), para 290.

[237] UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS (1988), p.31

[238] CPTPP (2018), Annex 9-A "Customary International Law"

[239] CPTPP (2018), article 9.6

But that is, lightly put, just taking the two ends of the spectrum. In between there is still a wide range of possibilities of conduct that could be subjected to scrutiny under the standard of FET. Therefore, it would be wrong to assume that the CPTPP has definitively and unquestionably adopted a high standard of proof for FET violations or to the contrary, imposed a low standard of protection on the part of the host state, comparable the one adopted in the *Neer* case, or later in the *Waste Management v Mexico* case.[240]

An interesting input is given by *The Rompetrol Group N.V. v. Romania* tribunal that dealt with the element of due process, included too in article 9.6 of the CPTPP. This case puts into perspective how the tribunal dealt with and struck the balance between the regulatory powers of the host state against the interest of the investor when assessing possible violations of FET. The tribunal held that

> "[…] a State may incur international responsibility for breaching its obligation under an investment treaty to accord fair and equitable treatment to a protected investor by a pattern of wrongful conduct during a criminal investigation or prosecution, even where the investigation and prosecution are not themselves wrongful. The provisos are however that the pattern must be sufficiently serious and persistent, that the interests of the investor must be affected, and that there is a failure in these circumstances to pay adequate regard to how those interests ought to be duly protected."[241]

With it, the arbitral tribunal made clear that the matter does not merely lie on whether the exercise of authority by the host state is in itself legal. This might well be in accordance with the laws of the state in question, but it needs anyway to be confronted with the interests of the foreign investor so that a proper balance exists between the two aspects. Something that is characteristic and sought by the notion of sustainable development.

[240] WASTE MANAGEMENT, INC. V. UNITED MEXICAN STATES (2004), The tribunal held that the FET standard "(…) is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process (…)"

[241] THE ROMPETROL GROUP N.V. V. ROMANIA (2013), para. 278

However, the CPTPP has been said to have a shortcoming for investors given that the interests that the tribunal referred to cannot solely be based on the investor's expectations but rather on more formal commitments, as stated in Article 9.6(4). In the author's opinion, this clarification aims at preventing tribunals from broadly interpreting legitimate expectations, which could set aside significant policies carried out by the host state. Rather than a shortcoming, therefore, this clarifies the use of the notion of legitimate expectation, that as the IISD has recognised, tends to "maintain room for broader interpretations".[242]

With this, the approach taken by the agreement seems closer to that taken by the arbitral tribunal in the *MTD Equity v Chile* case where, also partly based on the preamble of the relevant BIT, it was held that

> "[…] FET should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement – "to promote", "to create", "to stimulate" – rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors".[243]

This approach appears to be more in line with a proper balance between the rights of the investors and the regulatory powers of the host state, in a framework of promotion of sustainable development. The proposition of the *MTD Equity* tribunal is said to portray a difficult scenario for host states to comply with.[244] While this may make some sense, the idea to be understood is that FET serves not only to protect investments but also to contribute to sustainable development. It cannot be reduced to a passive behaviour of the host state to avoid imbalances among the pillars of sustainability but also requires an active effort to keep them balanced at all times.

A final important consideration relates to the element of stability and predictability, and whether these notions can affect the regulatory authority of host states in such a way that they are precluded from modifying their legal framework to avoid violations of the FET standard. It can be noted that various cases have dealt with these elements, where they have not been interpreted as an imposition of immutability of the host state's legal framework.[245] The words

[242] SARMIENTO and NIKIÈMA (2022), p.2

[243] MTD EQUITY SDN. BHD. AND MTD CHILE S.A. V. REPUBLIC OF CHILE (2004), para 113

[244] REINISCH (2020), p.49

[245] ELECTRABEL S.A. V. REPUBLIC OF HUNGARY (2012), para. 7.77. As cited in: REINISCH (2020)

of the *Sempra Energy International v. Argentina* investment tribunal, in this sense, make clear that the purpose of these elements is not to cancel the possibility of the host state to adopt public measures, but rather, to frame the amendments concerning matters where the relevant treaty applies, to the treaty, and its object and purpose. The arbitral tribunal expressed that

> "[w]hat counts is that in the end the stability of the law and the observance of legal obligations are assured, thereby safeguarding the very object and purpose of the protection sought by the treaty".[246]

What the tribunal means is that when signing international treaties, sovereign states somehow waive part of their sovereignty, and thus, limit their actions to those that are in accordance with what they have themselves signed. Amendments to national legislation cannot be, therefore, carried out in violation of the international commitments undertaken by the CPTPP parties, including the agreement itself and its provisions on foreign investment and sustainability. As the *Electrabel S.A. v. Republic of Hungary* tribunal stated

> "[…] the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently, the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably, taking into account the circumstances of the investment".[247]

The construction of FET in the CPTPP portrays a balanced scheme for the protection of the rights of the investors, whose interests are not to be subjected to arbitrary, discriminatory, and non-transparent conduct on the part of the host state. On the other hand, the agreement permits also to safeguard the intrinsic rights of host states to enact public policies. This proper balance is, at the same time, in line with the requirements of sustainable development represented by the foreign investment (economic pillar) and the host state's public policies (social and environmental pillars).

And yet, the existence of this balance between the two interests at stake when reading the FET provision in conjunction with the CPTPP as a whole does not solve all issues in this

---

[246] SEMPRA ENERGY INTERNATIONAL V. THE ARGENTINE REPUBLIC (2007), para. 300. As cited in: REINISCH (2020), p. 55

[247] *Vid. supra* note 244

regard. Problems still exist as to the interpretation conducted by tribunals. It has been explained here how the CPTPP has added a greater level of precision to FET compared to other IIAs.[248] Henckels, however, correctly concludes that the more precise language used by the CPTPP still holds no capacity in itself to fully avoid broad interpretations by investment tribunals risking therewith the use of the regulatory power of host states.[249]

Furthermore, the practice of foreign investors threatening to resort to investor-state arbitration, and the consequent costs involved therewith, may still have the undesired effect of regulatory chill, especially in developing nations. This could potentially upset the balance of the pillars of sustainable development.[250]

One might argue accordingly that the text of the CPTPP on the standards of protection presents, in this regard, two shortcomings that are in one way or another related to the FET and other standards of protection.

Firstly, the consequence of regulatory chills due to the use of the FET standard by foreign investors is not dependent on whether, in the end, the relevant tribunal establishes the existence of its violence, but also, as expressed, on the mere threat of these investors to resort to the investor-state arbitration. The text of the CPTPP only prohibits regulatory chills as a mechanism to attract foreign investments in article 20.3(6) but does not relate to a general prohibition.

This proven-to-be-costly-mechanism has led in certain cases a level of deterrence on the part of host states to adopt certain measures or policies for the public interest. Kara Dougherty exemplifies this consequence with the *Ethyl Corporation v. Canada* case, where a U.S. Corporation claimed $200 million from Canada, alleging that the ban on its gasoline additive MMT was discriminatory and constituted expropriation under multiple Chapter 11 provisions, threatening to initiate proceedings before an arbitral tribunal. The case was resolved after Canada had lost the jurisdictional decision before the NAFTA tribunal, with Canada settling and lifting the ban and compensating Ethyl with $13 million to avoid costly legal proceedings.[251]

---

[248] HENCKELS (2016), p. 27

[249] *Ibid.*

[250] SARMIENTO and NIKIÈMA (2022), *op. cit.*, p. 5

[251] DOUGHERTY (2007), p. 753

The solution to this problem, as it will be analysed at a later stage, lies also on the inclusion of stricter rules on ISDS to avoid giving investment tribunals broad room for interpretation of IIAs. This, in turn, is said to keep away these threats to arbitration and the initiating of proceedings based on unfounded claims.[252] This is explained by the elements of transparency and legitimacy of the ISDS. The legitimacy has been called into question because arbitrators are chosen and tribunals are formed on an *ad hoc* basis, leading to inconsistent and at times, flawed rulings given the lack of precise rules ensuring independence and impartiality.[253]

Additionally, there is traditionally a lack of transparency in the proceedings themselves. The absence of transparency means that awards cannot be subjected to adequate scrutiny, making it difficult for the public to view ISDS as a reliable and consistent system.[254] All of these flaws have contributed to the usage of threats by foreign investor to make use of ISDS. For the concerns arise not only from the outcome of the case, but also from mere the ability to bring a claim against the host state enacting legislation.

Connected with the first shortcoming, the second shortcoming refers to the lack of a concrete rule imposing a *stare decisis* doctrine. This leads to a wide range of different, and sometimes, conflicting interpretative results during investor-state arbitration. Therefore, standards such as FET might not fulfil their purpose if no assurance exists for the foreign investor and the host state of uniformity and consistency in its application.

One must, however, recognise the current state of art and admit a high degree of convergence among tribunals dealing with FET when it comes to the core common elements.[255] This is accompanied by a wave of new IIAs containing more precise language such as the case of the CPTPP.

And yet, the problem might come again. Judicial practice in the field of investment law has seen this over the years with different results in the interpretation process of one same element within FET. Again thus, the issue does not only lie only on how precise the definition of FET may be. After all, tribunals dealing with the CPTPP are, in one way or another, obliged

[252] REINISCH (2013), p. 3

[253] BERNASCONI-OSTERWALDER, JOHNSON and MARSHALL (2010), p. 1

[254] SCHILL (2015), p. 3

[255] HENCKELS (2016), p. 33-34

to follow the exact same standard enshrined in the text. It is, therefore, also expected from tribunals to keep a more unified interpretation of those rules.

This idea was expressed by the *Mondey International LTD* tribunal, which expressed

> "Article 1105 (1) did not give a NAFTA Tribunal an unfettered discretion to decide for itself, on a subjective basis, what was 'fair' or 'equitable' in the circumstances of each particular case…the Tribunal is bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals. It may not simply adopt its own idiosyncratic standard of what is 'fair' or 'equitable' without reference to established sources of law".[256]

In other words, the FET standard in the CPTPP as much as in NAFTA, given the similarity of their provisions, should in principle, lead to the same or at least similar and not opposite results. Additionally, the CPTPP Commission that can provide binding interpretations of provisions of the agreement may also collaborate, as it will be illustrated later, with the element of consistency in ISDS.

To conclude, it is important to understand that the FET standard, particularly in modern IIAs that consider sustainable development as one of their aims, is not a unidirectional notion. This entails that the concept of fair and equitable treatment does not solely benefit foreign investors. It constitutes a tool that allows a balanced approach promoting both investment protection and the regulatory authority of host states.[257] The *Saluka* tribunal acknowledged the importance of this balanced approach within the protection provisions of an IIA and held in this context that

> "The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign

[256] MONDEV INTERNATIONAL LTD V. UNITED STATES OF AMERICA (2002), para. 119

[257] KLÄGER (2010), *op. cit.*, p. 254

> investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations".[258]

Again thus, the FET in the CPTPP should thus not be seen as a tool impairing the regulatory authority of the host state but as a balancing mechanism between this authority and the protection of foreign investments, both of which are essential parts of sustainable development, one of the aims of the Trans-Pacific Agreement. The concretisation of some important aspects of FET such as the notion of legitimate expectations certainly points towards a clearer approach for investors and host states regarding their faculties under the CPTPP.

But as much as the use of precise language in the FET provision can do, Kläger recognises that ultimately the practical application of the balanced approach portrayed by the FET standard in the CPTPP will still be "dependent upon the quality of legal reasoning of arbitral Tribunals" addressing a given case.[259] In consequence, the precise language used on substantive rules needs to be complemented by stricter procedural rules, something that in the context of the CPTPP will be addressed at a later stage in this thesis.

3.2.2.2. <u>National Treatment and Most-Favoured Nation</u>

As recognised by the CPTPP and scholars, foreign investment constitutes an important tool to achieve sustainable development.[260] But foreign investment can also produce undesired results in the host state's pursuit of sustainability. The rules governing this area need, accordingly, to be directed into the modalities required by sustainable development so that its three pillars are considered and balanced.[261]

The NT and MFN standards relate to the prohibition of arbitrary discrimination between national and foreign investors or between foreign investors from different nationalities in measures taken by host states. To comply with sustainable development, these standards also need to have sustainability-friendly provisions so that an impairment of the legitimate rights of the foreign investor and the regulatory authority of host states does not occur. In the context of NT and MFN, Kate Miles points out that the element at stake in the discussion of sustainability

---

[258] SALUKA INVESTMENTS B.V. v. THE CZECH REPUBLIC (2006), para. 300

[259] KLÄGER (2010), *op. cit.*, p. 259

[260] *Vid. supra* note 173

[261] MILES (2010), p. 265

is the notion of "like circumstances".[262] This notion constitutes an essential requirement to grant foreign investments protection under the NT and MFN standards.

As expressed by Miles, the recurring issue with this concept is that essential sustainability requirements, such as environmental protection, may be restricted by the interests of foreign investors.[263] This raises the question of whether assessing the "like circumstances" concept for granting NT and MFN protection requires due consideration of the purpose of the relevant measure adopted by the host state.[264]

In this context, it has occurred that interpretations of "like circumstances" by tribunals have led to unsought results where the core part of the reasoning merely lies in questions such as are both exporters? do they have a different nationality? and so on.[265]

A proper definition, limiting the spaces for such general interpretations is, therefore required, so that the rights of the investor are accurately protected, balancing at the same time certain public interests in the context of sustainability. The IISD provides an interesting Model BIT where the concept of "like circumstances" requires in its interpretation the equal consideration of all circumstances surrounding the measure taken by the host state, including *inter alia*, "its effects on third persons and the local community; its effects upon the local, regional or national environment, or the global commons", etc.[266]

More concrete definitions as the one provided by the IISD Model BIT can have impactful consequences. First, they can lead to an avoidance of light interpretations of the notion of "like circumstances" that create undesired results where legitimate public objectives are not being considered. Second, the consideration of all circumstances does not affect the core element of this notion, namely, that the measure in question needs to be non-discriminatory. Finally, such definitions provide for a bigger range of potential justifications for host states' measures, particularly regarding the protection of the environment, safeguarding the legitimate regulatory authority of host states.

---

[262] *Ibid.*, p. 274

[263] *Ibid.*, p. 293

[264] HENCKELS (2016), p. 44

[265] MANN *et al* (2006), p. 13

[266] MANN *et al* (2006), *op. cit.*, p. 12

The CPTPP, though not identically copying the environmentally friendly provision of the IISD Model BIT, also enshrines a concretisation of the notion of "like circumstances". In a footnote to article 9.4 on NT, it is further clarified that "like circumstances" in NT and MFN "depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives".[267]

This clarification forces investment tribunals to carry a profound analysis of all circumstances surrounding the measure taken by the host state, including legitimate public welfare interests that may involve social development and environmental protection. In addition, the CPTPP recognises with this how burdensome the standards of national treatment and most-favoured-nation may be to the regulatory authority of host states, and thus, puts the rationale behind a given measure taken by states in the centre of the analysis of these standards.

But concerns might still arise from the perspective of an investor who can now see that the relevance of the purposes of a given measure adopted by a host state might undermine the NT or MFN standards. However, these doubts are resolved by the fact that the measure adopted still needs to comply with the requirement of not being arbitrarily discriminatory, an element that has been widely accepted by investment tribunals. This element refers to the treatment given by a measure or an act of the state, which must not be less favourable than that offered to nationals of the host state. As the arbitral tribunal expressed in *Alpha Projektholding GmbH v Ukraine*,

> "In order to prove a national treatment violation, it is necessary first and foremost to establish that a government action or inaction has discriminated between domestic and foreign investors, i.e., that it has accorded "less favourable" treatment to foreign as opposed to domestic investors".[268]

But is any treatment less favourable in nature discriminatory? Tribunals have thoroughly addressed this question. In the *Joseph Charles Lemire v Ukraine* case, the tribunal expressed that

[267] CPTPP (2018), footnote to article 9.4

[268] ALPHA PROJEKTHOLDING GMBH V. UKRAINE (2010), para. 426

> "[d]iscrimination […] requires more than different treatment. To amount to discrimination, a case must be treated differently from similar cases without justification; a measure must be 'discriminatory and expose[s] the claimant to sectional or racial prejudice'; or a measure must 'target[ed] Claimant's investments specifically as foreign investments'."[269]

Therefore, not just any treatment that results less favourable will be automatically discriminatory. The non-discrimination element refers to acts that are "unreasonable and lacking proportionality" so that they are, for instance, clearly excessive "to achieve an otherwise legitimate objective of the State" as the tribunal held in the *Parkerings-Compagniet AS v. Republic of Lithuania* case.[270]

Under the CPTPP, a step forward is taken by the parties in this context. A drafter's note on the interpretation of the notion of "like circumstances" was issued confirming the intentions of the member states on this matter and ensuring that tribunals interpret the notion in NT and MFN accordingly. This note, by making reference to many NAFTA judgements, explains that the parties intend that articles 9.4 and 9.5, i.e., NT and MFN respectively, do not aim at completely banning all actions that cause differentiated treatment, instead they aim at guaranteeing that foreign investors or their investments are not discriminated against based on their country of origin.[271]

The element of non-discrimination proper of NT and MFN remains, therefore, to be an important aspect of these standards, which safeguards important sustainability principles such as good governance and equity.[272] This is because the element seeks to safeguard legitimate state measures alongside the rights of investors.[273] With this, the rationale behind the public policy taken constitutes a type of justification in cases of differentiating treatment.[274] This idea was also expressed by the *Parkerings-Compagniet AS* tribunal, and taking into account important environmental considerations, the tribunal held that

---

269 JOSEPH CHARLES LEMIRE V. UKRAINE (2010), para. 261

270 PARKERINGS-COMPAGNIET AS V. REPUBLIC OF LITHUANIA (2007), para. 368

271 DRAFTER'S NOTE ON INTERPRETATION OF "IN LIKE CIRCUMSTANCES" UNDER ARTICLE II.4 (NATIONAL TREATMENT) AND ARTICLE II.5 (MOST-FAVOURED-NATION TREATMENT)

272 KLÄGER (2010), *op. cit.*, p. 250

273 *Ibid*.

274 REINISCH (2020), p. 84

> "[t]he situation of the two investors will not be in like circumstances if a justification of the different treatment is established. […] The historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the project".[275]

Finally, this note by the parties, just as with the provision of the IISD Model, allows that justifications of differentiating treatment based on sustainable development are considered by tribunals. It is important to remember that sustainability is not only a public objective worldwide, and a rule of customary international law, but also an explicit objective of the CPTPP.[276]

Consequently, the NT and MFN provisions under the CPTPP should be interpreted similarly to the approach taken by the *Pope & Talbot* tribunal in NAFTA, particularly regarding the assessment of discriminatory elements in the NT and MFN standards.

> "Differences in treatment will presumptively violate Article 1102(2), unless they have 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".[277]

This reaffirms the idea that differences in treatment might exist without them being discriminatory as long as the two points mentioned by the tribunal are complied with. In the context of the CPTPP, the same applies and is recognised by the parties in the drafter's note on the notion of "like circumstances",[278] and in particular, with regard to the second point, sustainable development forms part of the objectives of the agreement that should not be undermined.

This reasoning safeguards also the legitimate rights of foreign investors under NT and MFN, by creating a necessary nexus between the act or measure adopted by the host state and the objective of that act or measure so much that, as Henckels expresses, the act in question

---

[275] PARKERINGS-COMPAGNIET AS V. REPUBLIC OF LITHUANIA (2007), para. 375 & 392

[276] CPTPP (2018), preamble

[277] POPE & TALBOT INC. V. THE GOVERNMENT OF CANADA (2001), para. 78

[278] DRAFTER'S NOTE ON INTERPRETATION OF "IN LIKE CIRCUMSTANCES" UNDER ARTICLE II.4 (NATIONAL TREATMENT) AND ARTICLE II.5 (MOST-FAVOURED-NATION TREATMENT)

must be "rationally connected to or necessary to achieve the objective".[279] Thus not just any act with a legitimate objective will justify differentiating treatment. The act must also be closely connected to the objective sought with it.

Therefore, within the standards of MFN and NT, the element of non-discrimination, prohibits the presence of arbitrariness in given measures or acts carried out by host states. This provides another safeguard to foreign investors with respect to their rights, re-ensuring that public policies are not a tool to purposely hide less favourable treatment. Tribunals have accepted Professor Schreuer's definition of arbitrariness which includes, among other things

> "(a) measure that inflicts damage on the investor without serving any apparent legitimate purpose; (b) a measure that is not based on legal standards but on discretion, prejudice or personal preference; (c) a measure taken for reasons that are different from those put forward by the decision maker […]"[280]

These points illustrate that the CPTPP strives to establish a sustainability balance to future interpretations carried by investment tribunals. This objective, as clarified in the intention of the parties to the CPTPP, seeks to ensure that the standards of NT and MFN do not become a burden for proper public policies that host states can carry out in their capacity. And on the other hand, it constitutes a safeguard against malicious acts of states against foreign investors under the discourse of the public interest.

There's traditionally one last issue concerning the MFN standard that might result in an impairment of the regulatory authority of host states. This issue relates to the possibility of foreign investors to rely on, from their point of view, more beneficial procedural rules regarding dispute settlement mechanisms or substantive rules of protection.

As to the former set of rules, the CPTPP responds clearly to this possibility by stating in its article 9.5(3) that the MFN does not apply to rules regarding dispute resolution procedures as it does not consider them "treatment". With this clarification, the CPTPP seeks to avoid a full "Maffezini doctrine" where, due to lack of precise disposition, tribunals have allowed the

[279] HENCKELS (2016), p. 44

[280] EDF (SERVICES) LIMITED V. ROMANIA (2009), para. 303

reliance on more favourable procedural rules by foreign investors affecting certain objectives of IIAs.[281]

But the issue of relying on more advantageous substantive provisions is still in question, which could be problematic for sustainable development and compliance with the CPTPP. It is undeniable that Chile's prior BITs might have more favourable regulations for foreign investors, with little regard for the environmental and sustainable development concerns addressed by the CPTPP today. If foreign investors can always rely on rules from other IIAs that Chile has concluded, it could weaken the CPTPP and the country's regulatory authority, potentially leading to a regulatory chill and disrupting the balance of sustainability.

But even the *Maffezini* tribunal set limitations to its broad interpretation so that the transposition of more favourable rules is not an automatic process, and due consideration is to be given to other elements. In this context, the tribunal held that

> "[…] there are some important limits […]. As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight".[282]

This aims at making sure that important considerations, as are the environmental and sustainability ones present in the CPTPP, are not impaired by a "treaty-shopping" behaviour that could be adopted by foreign investors. At the same time, this contributes to ensuring that no regulatory chill takes place. For it provides a greater certainty to states that public policy measures are not endangered by more favourable provisions, usually coming from older BITs concluded by developing countries.

Again, this is complemented by the fact that tribunals have also recognised, as a core element of the MFN and NT standard, the avoidance of arbitrary discrimination. And with this, tribunals seek to avoid that host states attempt against the purpose of the treaty when different

[281] REINISCH (2020), p. 89

[282] EMILIO AGUSTÍN MAFFEZINI V. THE KINGDOM OF SPAIN (2000), para. 62

treatment exists. And once again, not all differentiated treatment is arbitrarily discriminatory. By expressing a similar idea, the *Parkerings* tribunal held that

> "[…] all the requirements, be they NT, MFN or non-discrimination at large, will in effect bar discrimination against foreign nationals investing in the country concerned. […] Discrimination […] involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues of fact where a State unduly treats differently investors who are in similar circumstances. Whether discrimination is objectionable does not in the opinion of this Tribunal depend on subjective requirements such as the bad faith or the malicious intent of the State. […] However, to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inappropriate or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases. It would be necessary, in each case, to evaluate the exact circumstances and the context".[283]

The tribunal, therefore, acknowledges that differentiated treatment does not in itself lead to a violation of the MFN or NT treatment, but rather, the standard imposes the previous analysis of the existence of discriminatory acts, as defined by the *Parkerings* tribunal, and whether that discriminatory act was given in "like circumstances". This notion, as seen, requires the assessment of, among other things, legitimate objectives of the host state. Such an approach by the CPTPP reaffirms the idea of MFN and NT as tools for the balancing of the protection of foreign investment with legitimate objectives sought in host states.

To conclude, foreign investment is considered an essential tool to achieve sustainable development, but it can also have undesired effects. Therefore, the rules that govern foreign investment should aim to balance and consider the three pillars of sustainability. The NT and MFN as part of these rules need to follow a sustainable development approach to prevent impairments of legitimate rights of foreign investors or regulatory authority of host states.

Within these standards, the interpretation of the "like circumstances" concept should consider the purpose of the relevant measure adopted by the host state. The CPTPP provide

[283] PARKERINGS-COMPAGNIET AS V. REPUBLIC OF LITHUANIA (2007), para. 367-368

such concrete definitions of "like circumstances" that require the equal consideration of all circumstances surrounding the measure taken by the host state, including its effects on the environment and local communities. This definition avoids undesired results, where legitimate public objectives are disregarded and provide a range of potential justifications for host states' measures. Moreover, a full “Mafezzini Doctrine” is not envisaged to be applied under the CPTPP ensuring that MFN and NT are not used to override legitimate public policies. But the requirement of not being arbitrarily discriminatory must still be fulfilled by measures in question, which refers to acts that are unreasonable and lacking proportionality also safeguarding the rights of investors, safeguarding therewith the interests of foreign investors.

It is yet to be seen how tribunals apply these standards in practice. Nonetheless, the intention of the parties to the CPTPP can be clearly distinguished. This is the imposition to tribunals to give due consideration to the rationale behind the usage of regulatory authority by host states, so that legitimate public objectives are not disregarded or overridden in favour of foreign investors.

3.2.3. Expropriation

The two interests at stake (i.e., protection and promotion of foreign investors and regulatory authority of the host state) are also present in the area of expropriation. As a starting point, direct forms of expropriation pose less of a problem in the balancing of these interests. Where a state directly expropriates the property of the foreign investment, even when this is done in a legal manner (i.e., in compliance with the requirements of doing it in the public interest, in a non-discriminatory manner, with the existence of a due process of law and the existence of a prompt, adequate and effective compensation),[284] it becomes clear to the host state and the foreign investor that the latter’s rights are affected and thus, compensation is due.

Professor Reinisch acknowledges that the trouble of the matter lies in the difficulty to distinguish between the existence, on the one hand, of mere regulatory measures adopted by the state, and on the other hand, indirect expropriation that requires the payment of compensation.[285] Understanding that under the CPTPP, indirect expropriation is “an action or series of actions by a Party [that] has an effect equivalent to direct expropriation without formal

[284] *Ibid.*, art. 9.8

[285] REINISCH (2020), *op. cit.*, p. 38

transfer of title or outright seizure".[286] This dichotomy, furthermore, is said to disincentive the adoption of regulations seeking sustainable development by host states due to the uncertainty of this distinction.[287] This dichotomy has by and large been recognised by investment tribunals. The Iran-United States Claims Tribunal has expressed in this context that

> "[…] it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner".[288]

Sustainable development requires in this context, that the regulatory powers of the host state are not impaired in such a way that, particularly, the social and environmental pillars are imbalanced with economic development and, on the other hand, that the rights of the foreign investor are protected in a way that, mainly, the economic development pillar is not affected.

Following the trend of some BITs of the first decade of the 21st century,[289] the CPTPP contains a shared understanding by its member states on how the existence of indirect expropriations is to be assessed. This concretisation in the definition collaborates with the host state and the foreign investor regarding what can be expected in terms of the latter's protection rights and the exercise of regulatory powers by the former. Moreover, it clears somewhat the way to avoid lenient interpretations by investment tribunals.

In a quite straightforward fashion, the shared understanding included in Annex 9-B expresses that the existence of a non-discriminatory regulatory action by the host state designed and applied to protect legitimate public welfare objectives, including environmental protection will not constitute indirect expropriation.[290] With this clear wording, the CPTPP displays the shift from a "sole effect" doctrine to the "policy powers" doctrine.

A shortcoming of the shared understanding is that Annex 9-B only refers to "non-discriminatory measures designed and applied to protect legitimate public welfare objectives"

---

[286] CPTPP (2018), Annex 9-B

[287] SALGADO LEVY (2015), *op. cit.*, p. 68

[288] STARRETT HOUSING CORPORATION, STARRETT SYSTEMS, INC. AND OTHERS V. THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN (1983), para. 66

[289] REINISCH (2020), *op. cit.*, p. 23

[290] CPTPP (2018), Annex 9-B

but remains silent as to whether the measures need also to comply with other essential requirements for the safeguarding of the foreign investor's rights, namely, requiring the measure to be taken in good faith and in accordance with a due process of law.[291]

Though the requirements of *bona fide* and due process of law are not explicitly mentioned by the CPTPP when carving out expropriations in favour of the regulatory power of the host state, one could as well argue that these requirements belong already to the realm of international law. The tribunals in the *Methanex v. US* and the *Saluka v. Czech Republic* cases made use of customary language to recognise that due process and *bona fide* respectively are now an integral part of international law, creating thereby a positive insight for foreign investors. [292] In the words of The *Saluka* tribunal

> "[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare".[293]

But the explicit absence of these elements might still create animosity among foreign investors towards the rules of expropriation. Based on these concerns, foreign investors still have the so-called "expropriation light" tool, where they instead turn to the already mentioned FET standard in cases of conflict.[294] To ensure, thus, that the rights of foreign investors and host states are both protected and balanced in accordance with sustainability principles in the context of expropriation, it's necessary to consider the entire text of the CPTPP. This agreement offers various mechanisms and provisions that prevent either party from excessively affecting the other's rights and powers.

Most importantly, the CPTPP's shared understanding and the requirements drawn from the case-law constitute important instruments to reduce the possibility of regulatory chill of states,[295] which endangers sustainability.[296] For, it provides host states with a greater level of

---

[291] PAPARINSKIS (2010), p. 321

[292] METHANEX CORPORATION V. UNITED STATES OF AMERICA (2005), Part IV, Chapter D, para. 7; SALUKA INVESTMENTS B.V. (THE NETHERLANDS) V. CZECH REPUBLIC (2006), para. 255

[293] SALUKA INVESTMENTS B.V. V. THE CZECH REPUBLIC (2006), para. 255. As cited in: REINISCH, p. 38

[294] REINISCH (2020), *op. cit.*, p. 41

[295] PAPARINSKIS (2010), *op. cit.*, p. 322

[296] TIENHAARA (2018), p. 232.

certainty that well-founded non-discriminatory measures of public policy will not derive in compensation to foreign investors. Furthermore, this effect is additionally complemented by the prohibition of regulatory chill used by states to attract foreign investment in article 20.3 of the agreement.

As a final point, Annex 9-B excluding that non-discriminatory measures adopted to protect legitimate public welfare objectives amount to expropriation accepts exceptions "in rare circumstances".[297] In such rare circumstances the measure or measures adopted will be considered an indirect expropriation subject to the payment of compensation to the foreign investor.

Now the question arises as to what those rare circumstances are and how lenient or strict they should be. The lack of case-law on the matter makes this topic rather speculative. What seems clear from the point of view of the investment tribunal is that the CPTPP imposes, in any case, the obligation of a "case-by-case, fact-based inquiry",[298] which entails, at least the assessment of the economic impact of the action on the relevant investment, the extent to which the government action interferes with reasonable investment-backed expectations, and the character of the government action.[299]

Important points can be drawn from this. According to Rachel Edsall, the vagueness of the concept could lead to a rather broad exception when compared with a presumption of the existence of a non-discriminatory action.[300] This author, however, believes that the word "rare" supports the idea that a tribunal facing a *prima facie* non-discriminatory action seeking to protect a legitimate public welfare objective should regarded it on the first impression as not constituting an indirect expropriation, and that for the rare exceptions to exist a high threshold is required for the tribunal to decide so. This would be, for instance, the case where an act of a host state complies with all requirements, but where the prejudice to the foreign investment is

---

[297] CPTPP (2018), Annex 9-B

[298] *Ibid.*

[299] *Ibid.*

[300] EDSALL (2006), p.958

such, that the purposes of the CPTPP (e.g., promotion of foreign investment, sustainable development, etc.) might be strongly impaired in the long-term.[301]

The idea that the threshold for the existence of those “rare circumstances” is high, is supported by the tightened-up language used by the CPTPP in the determination of indirect expropriations in the first place. Such strict text can be seen firstly, in the fact that the existence of economic impact on the investment by the measure – as one of the elements to be assessed – standing alone does not imply indirect expropriation. Secondly, the interference of the government measure with not just any expectation of foreign investors plays a role, rather, the existence of reasonable expectation of the investor is required, which depends “on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector”[302]. Finally, the character of the action taken is also to be assessed, so that legitimate public interests might exclude the existence of indirect expropriation.

Thus, a rare exception requires a sum of rather heavy elements present in the adoption of the measure. Nevertheless, the end decision on the matter will still depend on the relevant arbitral tribunal, and in this regard, the wording of Annex 9-B still leaves open some room – though in principle not much given the word “rare” in the provision – to keep doubts between an exercise of the regulatory powers not amounting to expropriation and indirect expropriation.[303]

But a positive point can be taken from this “rare circumstances” wording. Ursula Kriebaum proposes a change in the “all or nothing” modality that the topic of expropriation presents.[304] Kriebaum[305] expresses that even in the presence of a non-discriminatory act to protect legitimate public welfare objectives –which would discard the presence of indirect expropriation under the CPTPP – a proportionality test should be required to balance the interest of the state and those of the investor. This would avoid the one-takes-it-all fashion impeding a balanced situation that could also affect sustainable development. Tribunals could,

[301] Having a similar wording, the Canadian Model BIT exemplifies that such a rare circumstance would occur “when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith (…)”

[302] CPTPP (2018), footnote 36 to Annex 9B

[303] MONARDES, NOVIK and PORTALES (2021), p. 306

[304] KRIEBAUM (2007), p. 744

[305] *Ibid*.

accordingly, read and interpret the notion of “rare circumstances” in this context, to determine the existence of those exceptional situations, so that in cases, for instance, of severe detriment to the foreign investment, a certain degree of compensation could be granted.

Nonetheless, as opposed to Kriebaum’s proposal that the proportionality test’s starting point should be full compensation to the foreign investor,[306] this author is of the idea that the starting point should be no compensation, and depending on the result of the test, a payment could be considered. This starting point would reduce the possibility of regulatory chills, particularly in developing countries such as Chile, given that it is in many cases the high amount of money of full compensation that restrains host states from enacting public policy measures.

Thus, it is possible to see that the text of the CPTPP makes the high expectations of the investor less determinant by the inclusion of a stricter and clearer provision on expropriation. This, at the same time, seeks to achieve proper balance between the regulatory power of the state and the investor’s rights. By less determinant it is not meant to be useless, but these need to be backed up by formal forms of commitments to be considered by tribunals.

Again, the concretisation of the text is but one part of the steps that the member states have carried in order to push a proper balance among the sustainable development pillars. The interpretation of the CPTPP is ultimately dependent on the task carried out by investment tribunals. And there is a long-standing debate as to how effective arbitration in this foreign investor-state dichotomy is, and particularly, how this dispute settlement system can contribute to sustainability.

It is possible to see that the issue of expropriation is complex, with both the regulatory authority of the host state and the protection and promotion of foreign investors' interests at stake. The dichotomy in this area, between regulatory measures and indirect expropriation, contributes to this complexity. The CPTPP's Annex 9-B, however, clarifies that non-discriminatory regulatory actions designed and applied to protect legitimate public welfare objectives will not constitute indirect expropriation.

But this particular annex does not explicitly mention the requirements of good faith and due process of law, which could create animosity among foreign investors, although these elements are arguably integral part of international law. Even so the CPTPP offers various

[306] *Ibid*.

mechanisms and provisions that prevent either party from excessively affecting the other's rights and powers. The CPTPP's shared understanding and the requirements drawn from case-law are important instruments to reduce the possibility of regulatory chill, providing host states with greater certainty that non-discriminatory measures of public policy will not lead to compensation to foreign investors.

In conclusion, the issue of expropriation involves a delicate balance as well between the regulatory authority of host states and the protection of the interests of foreign investors. The CPTPP's Annex 9-B provides clarity by stating that non-discriminatory regulatory actions aimed at protecting legitimate public welfare objectives do not amount to indirect expropriation. However, the annex does not explicitly address the important requirements of *bona fide* and due process of law, which may raise concerns among foreign investors.

In this context, the CPTPP includes the so-called "light expropriation" mechanisms that contribute to the safeguard of the interests of both parties. The shared understanding and case-law-derived requirements help prevent regulatory chill as offer host states greater certainty in implementing non-discriminatory public policy measures. Overall, Annex 9-B and related provisions contribute to a more balanced approach aligned with sustainable development. For the text draws a clearly distinguishes legitimate state action from expropriations subject to compensation. Nonetheless, the final interpretation and application of the CPTPP rest in the hands of investment tribunals, which will play a crucial role in achieving the sought-after balance.

3.2.4. Investor-State Dispute Settlement

Probably the most sensitive set of rules regarding sustainability. The concern exists mainly due to the unpredictability of the interpretations carried out by the tribunals given the lack of *stare decisis* doctrine in the ISDS system. Historically, ISDS[307] was conceived as a safeguard for foreign investors against illegal conduct by host states given the lack of trust, particularly in developing nations, towards domestic courts, avoiding thereby a diplomatic conflict.[308]

Ensuring that the ISDS also considers sustainability when deciding investment disputes is a matter that requires more than just amending the rules on dispute settlement. It requires

---

[307] ISDS and investor-state arbitration are hereinafter used interchangeably.

[308] BONNITCHA *et al* (2017), p. 22

that sustainability is staked at the centre of the investor-state relationship in such a way that regardless of the matter to the dispute, sustainability considerations are present. A very favourable step is adding sustainability objectives to the relevant treaty as is the case of the CPTPP. Just like in the substantive standards of protection, the sustainability matter in the context of arbitration also concerns the balancing of the regulatory authority of states with the interests of foreign investors.

More precisely, sustainability concerns regarding investment arbitration relate to the lack of procedural safeguards to ensure that the text of IIAs is applied according to the intention of the contracting parties in an autonomous, impartial and consistent fashion. In the context of the CPTPP, therefore, doubts emerge as to whether the concretisation and clarification of its substantive provision will also be crystallised in the interpretation carried out by investment tribunals.

It has been argued that the concretisation of the text of the CPTPP, clarifying the scope of application of substantive standards of protection against the legitimate actions of host states, should also lead to limiting the scope of action of investment tribunals when interpreting the agreement.[309] However, the problematic of broad interpretations requires a combination of those concrete substantive rules with clear rules regarding the judicial process itself. The combination of stricter substantive rules and those on the judicial process could help to tackle the main problems of ISDS regarding sustainability, namely, the autonomy and impartiality of arbitrators, the transparency of the proceedings and the inconsistency in case-law.

Additionally, the existence of such a set of stricter procedural rules may lead to the reduction of unfounded claims by investors as well as the pointless rising of jurisdictional objections by host states.[310] This is of help in the context of sustainable development, for such consequences would save the parties' time and resources spent on long proceedings, putting the focus only on the substantive matter of a dispute.[311] This is important because those jurisdictional obstacles may also conflict with sustainable development in such a way, that the resolution of the merits of a case, which solution might contribute to sustainability, is excluded or delayed.

[309] CHIONG-MARTINSON (2017), p.99

[310] REINISCH (2013), p. 26

[311] *Ibid.*

But how exactly does the CPTPP address the requirements of autonomy and impartiality, transparency, and consistency in its ISDS provisions? and do the formulas presented in the agreement effectively guarantee the fulfilment of these requirements?

Regarding the independence and impartiality of arbitrators, these requirements have not been a matter of concern in the CPTPP alone, but they remain a concern of investment arbitration as a whole. Situations of "double-hatting" are produced by the *ad-hoc* modality present in investor-state arbitration.[312] This happens when an individual serves in two different capacities within ISDS cases concurrently or within a brief timeframe.[313] This can include simultaneously serving as an arbitrator and counsel in parallel cases. This, at the same time, creates a conflict of interest among arbitrators who may now, for example, use their role as arbitrator for the benefit of its interest as counsel in another case affecting their impartiality.

Additional concerns exist regarding the independence of arbitrators. These concerns are raised by the influence that arbitrators can have by the party appointing them. It is believed that appointed arbitrators will favour those appointing them to the detriment of other parties.

In this context, the CPTPP contains provisions and mechanisms that intend to tackle these concerns, so that no party is benefited by the lack of impartiality and autonomy of arbitrators. For such a situation would disrupt the balance sought by the substantive provisions between the rights of foreign investors and those of host states.

As starting point, the CPTPP has established a Code of Conduct, which requires that arbitrators be independent and impartial and avoid conflict of interests.[314] Moreover, arbitrators must comply with ethical guidelines and disclose any potential conflicts of interest that may arise during the proceedings.[315]

The Code of Conduct precludes arbitrators to act as counsel or expert in any other proceeding arising from an international agreement.[316] This, however, is only for the duration of the proceedings upon which the individual was appointed or is a candidate to arbitrate.

---

[312] TAYAR (2019), p. 117

[313] HRANITZKY AND SILVA ROMERO (2010)

[314] CPTPP (2018), Code of Conduct art. 3(a), Annex COM/2019/D004

[315] *Ibid.*, art 3(c)

[316] *Ibid.*, art 3(d)

The agreement requires that arbitrators be selected by the disputing parties from a roster of qualified individuals who have been nominated by the CPTPP countries. This roster is established and maintained by the CPTPP Commission, which is composed of high-level representatives from each country. This process helps to ensure that arbitrators are selected based on their expertise and experience, rather than their personal connections or affiliations.

In addition to the selection process, the CPTPP includes provisions that allow for the removal of arbitrators who do not meet the required standards of independence and impartiality. Specifically, the agreement allows either party to challenge an arbitrator if they have doubts about the arbitrator's independence or impartiality. The challenge will be decided by a three-member tribunal, composed of one arbitrator selected by each party and a third arbitrator selected by agreement between the parties. This provision helps to ensure that arbitrators who do not meet the required standards of independence and impartiality are removed from the proceedings.

The CPTPP rules on ISDS, therefore, address the independence and impartiality of arbitrators through a rigorous appointment process, ethical guidelines, and mechanisms for the removal of arbitrators who do not meet the required standards. The transparency of the proceedings, as it will be analysed, further, enhances the fairness and effectiveness of the ISDS mechanism.

These measures are not a revolution, and though adding legitimacy to the ISDS as a more formal mechanism, they do not fully address the main concerns when it comes to independence and impartiality. Parties are still able to appoint their arbitrator creating thereby a sense of influence over the individual to decide in their favour. Arbitrators are still able to act as counsel or experts once the dispute they arbitrate has come to an end.

Analysing an arbitrator's mind to determine the presence of influences is not possible. However, there are external mechanisms that allow to get rid as much as possible of any ties connecting the arbitrator with a party to the dispute. The measures adopted by the CPTPP in this regard fail to do so. Concerns regarding the arbitrator's independence and impartiality are, therefore, still unsolved although attempts have been taken to enhance these qualities. But the rather traditional measures taken by the CPTPP are not in themselves able to ensure that the precise substantive provisions are going to be interpreted under the framework of sustainable development.

This has direct consequences to sustainability. An arbitrator whose independence and impartiality cannot be guaranteed may produce a biassed reasoning favouring one of the parties to the dispute. This affects the balance between the rights of foreign investors and the regulatory authority of host states sought by the substantive provisions. These consequences have led particular parties to the CPTPP, most notably New Zealand,[317] to negotiate side-letters excluding ISDS as a mechanism for the resolution of disputes under the CPTPP, in what seems to be a valid alternative to ensure independence and impartiality by other means.

It can be stated, however, that this flaw of the CPTPP is somehow remedied by the clearer and precise substantive provisions, which could be complemented by the work carried by the Commission enacting binding interpretations, so that even in the presence of signs of impartiality, the CPTPP reduces the possibility for broader interpretations. Moreover, the possibility of review of the draft award contributes also to tackle cases of impartiality. All these positive characteristics do not, however, work on the independence and impartiality of arbitrators, but are rather remedies to solve a problem that the CPTPP has not been able to fully tackle.

Now, in addition to the rules seeking independence and impartiality of arbitrators, the CPTPP includes provisions to increase transparency in the ISDS process. For instance, the agreement requires hearings to be open to the public unless the tribunal determines that there are exceptional circumstances. Moreover, parties to the dispute must disclose all relevant documents and information, subject to limited exceptions. This contributes not only to a practical transparency, but also on a psychological aspect, so as to create a sense of scrutiny upon the arbitrators.

These elements attend to important principles of sustainable development such as public participation and access to information as recognised in the ILA Declaration. Thus, transparency and the participation of the civil society are essential elements within the realm of sustainability that are envisaged in the CPTPP. With regard to the latter element, Brown also perceives that this participation is of tremendous importance to raise sustainability objections in an investment dispute.[318]

---

[317] UNCTAD (2019), p. 16

[318] *Vid. supra* note 180

The CPTPP allows, in this context, non-disputing parties to make submissions regarding the interpretation of the agreement. In addition, after previous consultation with the disputing parties, the tribunal may also accept *amicus curiae* submissions regarding a matter of fact or law from interested parties.[319] The importance of this tool has been acknowledged by tribunals themselves. The *Methanex* tribunal stated that given the character of the case, involving public policy measures,

> "[t]here is an undoubtedly public interest in this arbitration. [...] There is also a broader argument [...]: the Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.[320]

The admission of *amicus curiae* submissions is, however, not unidirectional and, thus, does not prevent the presence of groups whose interest might attempt against sustainability. But the purpose is not to prevent such groups from submitting their arguments. Rather, the benefit of this tool comes from the amplification of the legal and factual considerations that might be present in each case and that, for whatever reason, tribunals might have overlooked.

These few steps taken by the CPTPP pretend to tackle the traditional secrecy surrounding the dispute settlement and the interpretation of IIAs respectively by specifying the terms within the text and narrowing down their meaning. And while contributing to sustainability, concerns are still present, and a full solution is not provided in the treaty.

Finally, when it comes to ensuring consistency of ISDS, the CPTPP contains also certain provisions. For example, tribunal decisions must be binding and based on the provisions of the agreement and applicable law. The agreement also has a mechanism for the review of awards to ensure that they comply with the provisions of the agreement.

But these provisions are standard in many investment agreements, leading to no, or little improvement in terms of the consistency of the rulings. The International Bar Association (IBA) lists certain elements that contributes to achieve consistency within ISDS. These are firstly, the existence of substantive provisions that guide interpretations, secondly, the

[319] CPTPP (2018), arts. 9.23.2 and 9.23.3

[320] METHANEX CORPORATION V. UNITED STATES OF AMERICA (2001), *op. cit.*, para 49

existence of a mechanism of joint interpretations, and finally, allowing non-disputing party submission by states.[321]

As to the first element, the extensive analysis carried up until this point illustrates that the level of precision of the substantive provisions of the CPTPP as well as of its annexes, narrow down the possibilities of broad and inconsistent interpretations by concretising the language and thereby limiting the scope of interpretative manoeuvres of tribunals.

Secondly, though not envisaging a joint interpretation mechanism, the CPTPP establishes a Commission able to enact binding interpretations to be followed by tribunals. Nevertheless, this requires a wide consensus by the parties of the CPTPP. An interpretative decision by the Commission complements the already detailed substantive provisions of the agreement and could, therefore contribute further to the consistency of the tribunal's rulings.

Finally, the CPTPP contains a provision allowing non-disputing party submissions that could highlight certain points that could have been overlooked in the interpretations of provisions. This are non-binding in nature, and do not, however, solve the problem of consistency by themselves. As the IBA recognises, the ability of tribunals within multilateral treaty to identify shared, harmonious, and coherent statements among a multitude of parties is still uncertain if all of these differ in their content.[322]

It is important to point that the CPTPP does not include a permanent body or appellate institution that could eventually follow one line of interpretation, and with it, contribute to consistency. Moreover, problems in this regard may persist in the realm of ISDS as a whole, where Chile and the other contracting parties of the CPTPP may still see inconsistency in cases of parallel proceedings where two or more international instruments are at stake.[323]

Therefore, whether the CPTPP and its provisions attempt to guarantee autonomy and impartiality, transparency, and consistency in the ISDS, their effectiveness remains a matter of debate. Some critics argue that the ISDS process remains biassed in favour of foreign investors and lacks transparency, while others argue that the CPTPP's provisions represent a significant improvement over previous ISDS agreements.

---

[321] INTERNATIONAL BAR ASSOCIATION (2018), p. 10-11

[322] *Ibid.*

[323] *Ibid.*, p. 15

In the past, ISDS rules in previous agreements have led to undesirable results undermining essential public measures in favour of foreign investors. The *Bilcon of Delaware, Inc. v. Canada* case, is one of the many examples where tribunals have found violations of investment chapters by the enactment and conducting, in this case by Canada, of environmental rules.[324]

However, the CPTPP contains certain innovations that point towards – but cannot guarantee – a more sustainability-friendly dispute mechanism. As opposed to other ISDS rules, including those of NAFTA, the CPTPP, for example raises the procedural bar for the admission of investor's claims by dismissing and punishing so-called frivolous claims, [325] referring to those that have no sound legal basis and can lead to costly and lengthy trials and that eventually lead to a regulatory chill on the part of the host state.

This, however, will not avoid the existence of founded claims that might still be inconsistent with sustainability. But here is where the concise substantive rules play a role in the case of the CPTPP.

Other important elements that seek to avoid diminishing the regulatory authority and regulatory chills of states relate to the clarification by the CPTPP that the burden of proof of all elements making up the claim lies solely on the claimant.[326] In this context, the investors will have to prove the alleged violations in light of the CPTPP, including its article 9.16 and the chapter on the protection of the environment.

The analysis of the different provisions in the investment chapter of the CPTPP, which have particularly been under scrutiny in Chilean society for their possible adverse effects on sustainable development, can be summed up by affirming that the investment chapter of the CPTPP does not in itself create an imbalance among the pillars of sustainability.

In this context, the CPTPP portrays an innovative agreement seeking to deepen the economic ties among its members while taking, besides this developmental approach, a social and environmental perspective. These aspects create, at least in its investment chapter, a proper and due balance to pursue, comply and impose sustainable development obligations for its intrinsic value and status within the field of public international law.

---

[324] WANG (2017), p. 163

[325] CHIONG-MARTINSON (2017), *op. cit.*, p. 102

[326] *Ibid*., art. 9.26(7)

Indeed, the behaviour of investment tribunals interpreting the CPTPP is yet to be seen, and to that extent, a certain degree of uncertainty still exists. Nonetheless, with the concretisation of many concepts and the inclusion of sustainability elements within the investment chapter, the CPTPP seeks to frame future interpretations within a sustainability context so that both investors and states may know what to expect.

Accordingly, while the investment provisions of the CPTPP are theoretically in compliance with sustainable development, the future will tell whether the parties have the political will to further enhance sustainability within the agreement. In this context, it remains to be seen if the CPTPP can bring, in practice, the desired results for the countries, particularly Chile, in terms of sustainability.

As to the dispute resolution mechanism, it is also required strict procedural rules to ensure a "careful evaluation of each individual case by an investment arbitration panel"[327] so that the protection standards granted to foreign investors and the regulatory freedom left to states are properly balanced. The CPTPP, procedural provisions do not ensure a sustainability approach. However, the right steps have been taken thus far. The intention of the parties is to keep on working on advancements in this field to make it as close as possible in line with the requirements of sustainable development within international law. Chile, together with Canada and New Zealand have made this intention explicit when launching a joint statement expressing that they

> "[…] intend to work together on matters relating to the evolving practice of ISDS, including as part of […] the CPTPP. In this work, New Zealand, Canada and Chile together: Reaffirm the right of each Party to regulate within its territory to achieve legitimate policy objectives […]; Recognise the strong procedural and substantive safeguards that are included in the Investment Chapter of the CPTPP; Recognise the important role of civil society and other interested groups on public policy matters relating to ISDS; Intend to consider evolving international practice and the evolution of ISDS including through the work carried out by multilateral international fora; Intend to

[327] *Ibid*.

> promote transparent conduct rules on the ethical responsibilities of arbitrators in ISDS procedures […]"[328]

The words of a U.S. Trade Representative best express the innovation of the CPTPP, its purpose and objective balancing sustainable development pillars seen in a way that promotion of foreign investment and environmental protection need not be a dilemma, but they can coexist with each other.

> "[CP]TPP's chapter on Investment strengthens the rule of law in the Asia-Pacific region, deters foreign governments from imposing discriminatory or abusive requirements on American investors, and protects the right to regulate in the, and building on U.S. experience since NAFTA, the innovations take investment agreements to a new level in terms of protecting host state discretion in such areas as guarding the government's regulatory discretion in such areas as public and the environment".[329]

[328] CANADA–CHILE–NEW ZEALAND JOINT DECLARATION ON INVESTOR STATE DISPUTE SETTLEMENT (2018)
[329] GANTZ, D (2021), p. 321

Conclusion

The current environmental and climate crises have constantly seen the failure of state authorities in fighting them. Chile is no exception, and such failure is even exacerbated by the narrative of the macro-economic growth that the nation has experienced over the last 30 years.

The social unrest of 2019 positioned the Chilean society as pioneers in the country over the leading authorities on the importance of environmental and social aspects and how to balance these with economic development. The discourse of Chilean society is, therefore, one of sustainable development.

The logical necessity of a proper balance between these three pillars and the practice of the members of the international community (guided by the members of the civil society) have led to the inclusion of sustainability as an integral part of international law. With it, this author concludes that states are now bound to pursue their development in a sustainable way, and as such, new models of development need to be assessed under this notion.

Moreover, the complexity of the situations contributing to the environmental and climate crises are multidimensional and, therefore, their proper treatment also requires a multifocal response. It was seen in the case law, how courts and tribunals have, for example, appealed to different principles to solve environmental disputes. In this context, thus, sustainability is not only a rule of international, but is an umbrella notion that allows the simultaneous application of these principles, which, by themselves, would not acquire the desired results. Sustainable development, therefore, imposes and allows this interdependency to properly create a balance between economic development, social development, and environmental protection.

In the case of Chile, the Comprehensive and Progressive Trans-Pacific Partnership has been at the centre of attention of the society with critics. These are based on the fact that its ratification would lead to unsustainability and the incapacity of the state to impose environmental measures and legislation, giving prevalence to the economic development pillar. Given the current legal status of sustainable development under international law, should these concerns be proven, Chile would not only be dangerously exacerbating the environmental and climate crisis, but also infringing its international obligations stemming from sustainability.

Harsh criticism has been formulated with special regard to Chapter 9 of the CPTPP on investment. The rationale behind these criticisms is understandable, after all, Chile's highly liberal investment policies have contributed to establishing extractivism as its model of development.

The analysis carried in this thesis has assessed how the different provisions of the investment chapter balance the pillars of sustainability and whether the CPTPP creates a prevalence on the protection rights of the foreign investor to the detriment of Chile's regulatory capacity to impose its environmental and social policies, or *vice-versa*.

From an overall perspective, the CPTPP investment chapter contains innovative elements that are in line with the current world context of environmental awareness. The different rules, and particularly those facing major criticism do not, when read as an integral part of the agreement, create an imbalance in the pillars of sustainability.

Whilst some of them, by themselves, adopt a passive character towards these pillars, and as such, do not create an imbalance in sustainable development, like the provision on the definition of investment; others portrait an active promotion to sustainability (e.g., the provisions on expropriation).

But again, the investment chapter's rules are not to be read in isolation from one another, and the chapter in its integrity protects and further promotes sustainable development for its state parties. In addition, when it comes to the historically inconsistent practice of investment tribunals, the agreement contains different mechanisms that mitigate in as much as possible the room for contradictory and most importantly unsustainable interpretations of the text.

The economic and social consequences left by the social unrest in 2019 and the posterior COVID-19 pandemic have resulted in an aggressive handbrake to the country's historical levels of economic growth. Chilean society claims for more environmental protection, but now also for the reactivation of the country's economy. The CPTPP constitutes a perfect instrument towards that goal.

It can be concluded that with the CPTPP Chile is not facing a dilemma to choose between economic development or to protect the environment, but is rather facing an excellent opportunity to strengthen international ties with members of the Asia-Pacific region with this innovative agreement, that will allow, in the long-term, to reposition the country back on track to its way to become a developed nation considering social development, economic growth and environmental protection.

Undoubtedly, the ratification of the CPTPP represents a significant step towards sustainability in Chile. Nevertheless, it is crucial to acknowledge that substantial efforts are still required to fully embrace and implement this direction. Moreover, the current global challenges, both economic and environmental, should serve as a wake-up call for the authorities. These difficult times, particularly in Chile, should instigate the necessary political will to drive the country's sustainable development forward, as it is not just one option among many, but rather the sole viable path to progress—and an obligation under international law.

Annexes

Annex A: ILA Declaration Principles[330]

Principle	Heading
First Principle	Duty of States to ensure sustainable use of natural resources.
Second Principle	Equity and eradication of poverty.
Third Principle	Common but differentiated responsibilities.
Fourth Principle	Precautionary approach to human health, natural resources and ecosystems.
Fifth Principle	Public participation and access to information and justice.
Sixth Principle	Good governance.
Seventh Principle	Integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

Annex B: Sustainable Development Goals[331]

Number	Heading	Goal
1°	**No Poverty**	End poverty in all its forms everywhere.
2°	**Zero Hunger**	End hunger, achieve food security and improved nutrition and promote sustainable agriculture.
3°	**Good Health and Well-Being**	Ensure healthy lives and promote well-being for all at all ages.
4°	**Quality Education**	Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all.

330 INTERNATIONAL LAW ASSOCIATION (2002)

331 UNITED NATIONS: Department of Economic and Social Affair, Sustainable Development Goals

5°	**Gender Equality**	Achieve gender equality and empower all women and girls.
6°	**Clean Water and Sanitation**	Ensure availability and sustainable management of water and sanitation for all.
7°	**Affordable and Clean Energy**	Ensure access to affordable, reliable, sustainable and modern energy for all.
8°	**Decent Work and Economic Growth**	Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.
9°	**Industry, Innovation and Infrastructure**	Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation.
10°	**Reduced Inequalities**	Reduce inequality within and among countries.
11°	**Sustainable Cities and Communities**	Make cities and human settlements inclusive, safe, resilient and sustainable.
12°	**Responsible consumption and Production**	Ensure sustainable consumption and production patterns.
13°	**Climate Action**	Take urgent action to combat climate change and its impacts.
14°	**Life Below Water**	Conserve and sustainably use the oceans, seas and marine resources for sustainable development.
15°	**Life on Land**	Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.
16°	**Peace, Justice and Strong Institutions**	Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and

		build effective, accountable and inclusive institutions at all levels.
17°	**Partnership for the Goals**	Strengthen the means of implementation and revitalize the global partnership for sustainable development.

Annex C: CPTPP Selected Provisions[332]

Preamble

The Parties to this Agreement, resolving to:

(…) ESTABLISH a comprehensive regional agreement that promotes economic integration to liberalise trade and investment, bring economic growth and social benefits, create new opportunities for workers and businesses, contribute to raising living standards, benefit consumers, reduce poverty and promote sustainable growth; (…)

PROMOTE high levels of environmental protection, including through effective enforcement of environmental laws, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices; (…)

Article 9.1: Definitions

For the purposes of this Chapter: (…)

investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;

(b) shares, stock and other forms of equity participation in an enterprise;

(c) bonds, debentures, other debt instruments and loans;

(d) futures, options and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;

(f) intellectual property rights;

(g) licences, authorisations, permits and similar rights conferred pursuant to the Party's law; and

[332] COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP (CPTPP) (2018)

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges, but investment does not mean an order or judgment entered in a judicial or administrative action.

Article 9.3: Relation to Other Chapters

1. In the event of any inconsistency between this Chapter and another Chapter of this Agreement, the other Chapter shall prevail to the extent of the inconsistency.

2. A requirement of a Party that a service supplier of another Party post a bond or other form of financial security as a condition for the cross-border supply of a service does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to such cross-border supply of the service. This Chapter shall apply to measures adopted or maintained by the Party relating to the posted bond or financial security, to the extent that the bond or financial security is a covered investment.

3. This Chapter shall not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 11 (Financial Services).

Article 9.4: National Treatment [14]

1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. For greater certainty, the treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.

14: For greater certainty, whether treatment is accorded in "like circumstances" under Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

Article 9.5: Most-Favoured-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B (Investor-State Dispute Settlement).

Article 9.6: Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

5. For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

Article 9.8: Expropriation and Compensation [16]

1. No Party shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (expropriation), except:

(a) for a public purpose;[17]

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate and effective compensation in accordance with paragraphs 2, 3 and 4; and

(d) in accordance with due process of law.

2. Compensation shall:

(a) be paid without delay;

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the date of expropriation);

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realisable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid, converted into the currency of payment at the market rate of exchange prevailing on the date of payment, shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date; plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article shall not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation or creation of intellectual property rights, to the extent that the issuance, revocation, limitation or creation is consistent with Chapter 18 (Intellectual Property) and the TRIPS Agreement.

6. For greater certainty, a Party's decision not to issue, renew or maintain a subsidy or grant, or decision to modify or reduce a subsidy or grant,

(a) in the absence of any specific commitment under law or contract to issue, renew or maintain that subsidy or grant; or

(b) in accordance with any terms or conditions attached to the issuance, renewal, modification, reduction and maintenance of that subsidy or grant,

standing alone, does not constitute an expropriation.

16: Article 9.8 (Expropriation and Compensation) shall be interpreted in accordance with Annex 9-B (Expropriation) and is subject to Annex 9-C (Expropriation Relating to Land).

17: For greater certainty, for the purposes of this Article, the term "public purpose" refers to a concept in customary international law. Domestic law may express this or a similar concept by using different terms, such as "public necessity", "public interest" or "public use".

Article 9.10: Performance Requirements

1. No Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking:

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory; (…)

(f) to transfer a particular technology, a production process or other proprietary knowledge to a person in its territory; (…)

2. No Party shall condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, on compliance with any requirement:

(a) to achieve a given level or percentage of domestic content;

(b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory; (…)

3. (d) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), 1(c), 1(f), 2(a) and 2(b) shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;

(ii) necessary to protect human, animal or plant life or health; or

(iii) related to the conservation of living or non-living exhaustible natural resources.

Article 9.16: Investment and Environmental, Health and other Regulatory Objectives

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

Article 9.17: Corporate Social Responsibility

The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.

Article 9.23: Conduct of the Arbitration

2. A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.

3. After consultation with the disputing parties, the tribunal may accept and consider written amicus curiae submissions regarding a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party but has a significant interest in the arbitral proceedings. Each submission shall identify the author; disclose any affiliation, direct or indirect, with any disputing party; and identify any person, government or other entity that has provided, or will provide, any financial or other assistance in preparing the submission. Each submission shall be in a language of the arbitration and comply with any page limits and deadlines set by the tribunal. The tribunal shall provide the disputing parties with an

opportunity to respond to such submissions. The tribunal shall ensure that the submissions do not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

Article 9.24: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:

(a) the notice of intent;

(b) the notice of arbitration;

(c) pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 9.23.2 (Conduct of the Arbitration) and Article 9.23.3 and Article 9.28 (Consolidation);

(d) minutes or transcripts of hearings of the tribunal, if available; and

(e) orders, awards and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. If a disputing party intends to use information in a hearing that is designated as protected information or otherwise subject to paragraph 3 it shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect such information from disclosure which may include closing the hearing for the duration of the discussion of that information.

3. Nothing in this Section, including paragraph 4(d), requires a respondent to make available to the public or otherwise disclose during or after the arbitral proceedings, including the hearing, protected information, or to furnish or allow access to information that it may withhold in accordance with Article 29.2 (Security Exceptions) or Article 29.7 (Disclosure of Information).

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

(a) subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to any non-disputing Party or to the public any protected information if the disputing party that provided the information clearly designates it in accordance with subparagraph (b);

(b) any disputing party claiming that certain information constitutes protected information shall clearly designate the information according to any schedule set by the tribunal;

(c) a disputing party shall, according to any schedule set by the tribunal, submit a redacted version of the document that does not contain the protected information. Only the redacted version shall be disclosed in accordance with paragraph 1; and

(d) the tribunal, subject to paragraph 3, shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that the information was not properly designated, the disputing party that submitted the information may:

(i) withdraw all or part of its submission containing that information; or

(ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c).

In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under subparagraph (d)(i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under subparagraph (d)(ii) of the disputing party that first submitted the information.

5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should endeavour to apply those laws in a manner sensitive to protecting from disclosure information that has been designated as protected information.

Annex 9-A Customary International Law

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 9.6 (Minimum Standard of Treatment) results from a general and consistent practice of States that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens.

Annex 9-B Expropriation

The Parties confirm their shared understanding that:

1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

2. Article 9.8.1 (Expropriation and Compensation) addresses two situations. The first is direct expropriation, in which an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.

3. The second situation addressed by Article 9.8.1 (Expropriation and Compensation) is indirect expropriation, in which an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations;[36] and

(iii) the character of the government action.

(b) Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.

36: For greater certainty, whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.

Article 20.2: Objectives

1. The objectives of this Chapter are to promote mutually supportive trade and environmental policies; promote high levels of environmental protection and effective enforcement of environmental laws; and enhance the capacities of the Parties to address trade-related environmental issues, including through cooperation.

2. Taking account of their respective national priorities and circumstances, the Parties recognise that enhanced cooperation to protect and conserve the environment and sustainably manage their natural resources brings benefits that can contribute to sustainable development, strengthen their environmental governance and complement the objectives of this Agreement.

3. The Parties further recognise that it is inappropriate to establish or use their environmental laws or other measures in a manner which would constitute a disguised restriction on trade or investment between the Parties.

Article 20.3: General Commitments

1. The Parties recognise the importance of mutually supportive trade and environmental policies and practices to improve environmental protection in the furtherance of sustainable development.

2. The Parties recognise the sovereign right of each Party to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt or modify its environmental laws and policies accordingly.

3. Each Party shall strive to ensure that its environmental laws and policies provide for, and encourage, high levels of environmental protection and to continue to improve its respective levels of environmental protection.

4. No Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement for that Party.

5. The Parties recognise that each Party retains the right to exercise discretion and to make decisions regarding: (a) investigatory, prosecutorial, regulatory and compliance matters; and (b) the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities. Accordingly, the Parties understand that with respect to the enforcement of environmental laws a Party is in compliance with paragraph 4 if a course of action or inaction reflects a reasonable exercise of that discretion, or results from a bona fide decision regarding the allocation of those resources in accordance with priorities for enforcement of its environmental laws.

6. Without prejudice to paragraph 2, the Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties.

7. Nothing in this Chapter shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party.

Article 20.6: Protection of the Marine Environment from Ship Pollution

1. The Parties recognise the importance of protecting and preserving the marine environment. To that end, each Party shall take measures to prevent the pollution of the marine environment from ships.

2. The Parties also recognise the importance of public participation and consultation, in accordance with their respective law or policy, in the development and implementation of measures to prevent the pollution of the marine environment from ships. Each Party shall make publicly available appropriate information about its programmes and activities, including cooperative programmes, that are related to the prevention of pollution of the marine environment from ships.

(…)

Article 27.2: Functions of the Commission

2. The Commission may:

(…) (e) seek to resolve differences or disputes that may arise regarding the interpretation or application of this Agreement;

(f) issue interpretations of the provisions of this Agreement.

List of Abbreviations

BIT	Bilateral Investment Treaty
CBD	Convention on Biological Diversity
CETA	European Union-Canada Comprehensive Economic and Trade Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
EAS	Environmental Assessment Service
ECLAC	Economic Commission for Latin America and the Caribbean
EIA	Environmental Impact Assessment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
FTC	NAFTA Free Trade Commission
GDP	Gross Domestic Product
IBA	International Bar Association
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
ILA	International Law Association
ISDS	Investor-State Dispute Settlement
MFN	Most-Favoured Nation
NAFTA	North American Free Trade Agreement
NT	National Treatment
PCA	Permanent Court of Arbitration
PTA	Preferential Trade Agreement
SDG	Sustainable Development Goal
SIA	Sustainability Impact Assessment
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
UNFCCC	United Nations Framework Convention on Climate Change

Abstract

The last 30 years have seen the exponential economic growth of Chile through the implementation of liberal policies, without, however, much consideration of environmental protection. Only the past few decades have seen the raise of environmental concerns, particularly due to the current climate crisis.

In this context, the world economic order has been called into question and has faced criticism from the civil society. Chile is no exception, and the process of furthering its development has been at the centre of the political debate within the society.

The COVID-19 Pandemic has added extra pressure on Chile's economy and environment. The Comprehensive and Progressive Partnership for Trans-Pacific Partnership, an international trade and investment agreement, therefore raised as a valid option for the country to further engage in international trade and investment with partners of the Asia-Pacific region as a means to attend the current economic crisis faced by the country.

The CPTPP, however, has been criticised by a considerable sector of the society and politicians. The criticisms revolve around the notion of sustainable development, in such a way that the ratification of this agreement would affect environmental protection disallowing Chile to carry development in a sustainable way. This, some argue, also constitutes a breach of Chile's international obligations given the acquisition of sustainable development of normative status in international law.

This thesis, therefore, addresses these two subject-matters, namely, the assessment of the notion of sustainable development, its meaning and legal status, and the analysis of the CPTPP, particularly of its investment chapter, which is the concern, for most parts, of the criticism that this agreement faces.

Abstrakt

In den letzten 30 Jahren hat Chile das exponentielle Wirtschaftswachstum durch die Umsetzung einer liberalen Politik erlebt, ohne sich dabei viele Gedanken über den Umweltschutz zu machen. Erst in den letzten Jahrzehnten sind Umweltbedenken aufgekommen, insbesondere aufgrund der aktuellen Klimakrise.

In diesem Zusammenhang wird die Weltwirtschaftsordnung in Frage gestellt und von der Zivilgesellschaft kritisiert. Chile bildet dabei keine Ausnahme, innerhalb der chilenischen Gesellschaft stehen die Entwicklungsprozesse im Mittelpunkt der politischen Debatte.

Die COVID-19-Pandemie hat die chilenische Wirtschaft und Umwelt zusätzlich unter Druck gesetzt. Das Comprehensive and Progressive Agreement for Trans-Pacific Partnership, ein internationales Abkommen für Handel und Investition, wurde daher als gültige Alternative für ein weiteres Zeichen des Engagements im internationalen Handel und bei Investitionen mit Partnern der asiatisch-pazifischen Region, als Mittel zur Heilung der aktuellen Wirtschaftskrise, mit der das Land konfrontiert ist, ins Leben gerufen.

Das CPTPP wurde jedoch von einem beträchtlichen Teil der chilenischen Gesellschaft und Politiker und Politikerinnen kritisiert. Die Kritiken bezogen sich meistens auf den Begriff der nachhaltigen Entwicklung, sodass die Ratifizierung dieses Abkommens den Umweltschutz beeinträchtigen würde, was es Chile verbieten würde, die Entwicklung auf nachhaltige Weise voranzutreiben. Einige argumentieren, dass dies auch einen Verstoß gegen die internationalen Verpflichtungen Chiles darstellt, da der nachhaltigen Entwicklung ein normativer Status im Völkerrecht zuerkannt wurde.

Die folgende Masterarbeit befasst sich daher mit diesen beiden Themen, nämlich der Bewertung des Begriffs der nachhaltigen Entwicklung, seiner Bedeutung und seines rechtlichen Status, um dann mit der Analyse des CPTPP fortzufahren, insbesondere seines Investitionskapitels, das in den meisten Teilen das Anliegen der Kritik ist, welches dieses Abkommen von der chilenischen Gesellschaft erfährt.

Bibliography

ADF GROUP INC. V. UNITED STATES OF AMERICA (2003): ICSID Case No. ARB (AF)/00/1, Award.

ALPHA PROJEKTHOLDING GMBH V. UKRAINE (2010): ICSID Case No. ARB/07/16, Award.

ARBITRATION REGARDING THE IRON RHINE RAILWAY (BELGIUM/NETHERLANDS) (2005): Reports of International Arbitral Awards, Volume XXVII, 27 RIAA 35

ARCURI, Alessandra and **VERBEEK**, Bart-Jaap (2019): "The New Dutch Model Investment Agreement. On the Road to Sustainability or Keeping up Appearances?", *Erasmus Law Review*, Vol.12(4), p. 37-49.

BAKER, James and **YODER**, Lois (1989): "ICSID and the Calvo Clause a Hindrance to Foreign Direct Investment in LDCs", *Journal on Dispute Resolution*, Vol.5(1), p. 75-95.

BARNIER-KHAWAM, Pablo (2021): "Subsidiariedad y educación en Chile: estudio histórico de un principio político polisémico", *Revista Iberoamericana de Educación Superior*, vol.12 (33), p.197-212.

BARRAL, Virginie (2012): "Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm", *European Journal of International Law*, Vol.23(2), p.377-400.

BERNASCONI-OSTERWALDER, Nathalie; **JOHNSON**, Lise and **MARSHALL**, Fiona (2010): "Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel", *Annual Forum for Developing Country Investment Negotiators*, available at: https://www.iisd.org/system/files/publications/dci_2010_arbitrator_independence.pdf, (last accessed, April 24, 2023).

BONNITCHA, Jonathan; **POULSEN**, Lauge N. Skovgaard and **WAIBEL**, Michael (2017): *The Political Economy of the Investment Treaty Regime*, (Oxford, Oxford University Press, 1st edition).

BROWN, Chester (2010): "Bringing Sustainable Development Issues before Investment Treaty Tribunals", p.175-188; in: Cordonier Segger, Marie-Claire; Gehring, Markus and Newcombe, Andrew (eds.), *Sustainable Development in World Investment Law*, (Netherlands, Kluwer Law International).

Canada–Chile–New Zealand Joint Declaration on Investor State Dispute Settlement (2018): Available at: https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/CPTPP-Joint-Declaration-ISDS-Final.pdf, (last accessed, February 9, 2023).

Chile-Uruguay BIT (2010): Investment Agreement between the Republic of Chile and the Oriental Republic of Uruguay, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/877/chile---uruguay-bit-2010-, (last accessed, October 17, 2022).

Chiong-Martinson, Ai-Li (2017): "Environmental Regulations and the Trans-Pacific Partnership: Using Investor-State Dispute Settlement to Strengthen Environmental Law", *Seattle Journal of Environmental Law*, Vol.7(1), p. 76-105.

Chow, Daniel; **Sheldon**, Ian and **McGuire**, William (2018): "How the United States Withdrawal from the Trans-Pacific Partnership Benefits China", *University of Pennsylvania Journal of Law & Public Affairs*, Vol.4(1), p. 37-80.

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

Comim, Flavio; **Kumar**, Pushpam and **Sirven**, Nicolas (2009): "Poverty and Environment Links: An Illustration from Africa", Journal of International Development, Vol.21(3), p.447-469.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018)

Constitución Política de la República de Chile (1980), translation available at: https://constituteproject.org/constitution/Chile_2021.pdf?lang=en, (last accessed, October 12, 2022).

Dolzer, Rudolf; **Kriebaum**, Urusula and **Schreuer**, Christoph (2012): *Principles of International Investment Law*, (Oxford, Oxford University Press, 2nd edition).

Dougherty, Kara (2007): "Methanex v. United States: The Realignment of NAFTA Chapter 11 with Environmental Regulation", *Northwestern Journal of International Law & Business*, Vol.27(3), p.735-754.

Drafter's Note on Interpretation of "In Like Circumstances" Under Article II.4 (National Treatment) and Article II.5 (Most-Favoured-Nation Treatment), available at: https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/Interpretation-of-In-Like-Circumstances.pdf, (last accessed, February 8, 2023).

Dupuy, René-Jean (1974): "Coutume sage et coutume sauvage", p.75-87; in: Rousseau, Charles (ed.), *Mélanges Offerts à Charles Rousseau: La Communauté Internationale*, (Paris, A.Pedone).

EDF (Services) Limited v. Romania (2009): ICSID Case No. ARB/05/13, Award.

Edsall, Rachel (2006): "Indirect Expropriation under NAFTA and DR-CAFTA: Potential Inconsistencies in the Treatment of State Public Welfare Regulations", *Boston University Law Review*, Vol.86(4), p. 931-962.

Electrabel S.A. v. Republic of Hungary (2012): ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability.

Emilio Agustín Maffezini v. The Kingdom of Spain (2000): ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction.

European Center for Constitutional and Human Rights, available at: https://www.ecchr.eu/en/glossary/hard-law-soft-law/#:~:text=Soft%20law%20instruments%20are%20predominantly,legally%20enforced%20before%20a%20court, (last accessed, October 18, 2022).

Fermandois Vöhringer, Arturo (2006): *Derecho Constitucional Económico*, (Santiago de Chile, Ediciones Universidad Católica de Chile, 2nd edition, Vol.1).

Ffrench-Davis, Ricardo and **Diaz**, Alvaro (2019): "La Inversión productiva en el Desarrollo Económico de Chile: Evolución y Desafíos", *CEPAL Review*, Vol.127, p. 27-53.

Ffrench-Davis, Ricardo and **Tapia**, Heriberto (2001): "Políticas Macroeconómicas y la Cuenta de Capitales", p. 61-98; in: Ffrench-Davis, Ricardo and Stallings, Barbara (eds.), *Reformas, Crecimiento y Políticas Sociales en Chile desde 1973*, (Santiago de Chile, Editorial LOM, 1st edition).

Friedman, Milton (1962): *Capitalism and Freedom*, (Chicago & London, University of Chicago Press, 40th edition).

GABČÍKOVO–NAGYMAROS PROJECT (HUNGARY/SLOVAKIA) (1997): Judgment, ICJ Reports.

GÁLVEZ, Recaredo and **KREMERMAN**, Marco (2021): *Pensiones bajo el Mínimo: Los Montos de las Pensiones que paga el Sistema de Capitalización Individual en Chile*, Fundación Sol, available at: https://fundacionsol.cl/cl_luzit_herramientas/static/adjuntos/6770/PBM2021.pdf, (last accessed, October 12, 2022).

GANTZ, D (2021): "Protecting Investment under NAFTA, the Trans-Pacific Partnership and the Comprehensive and Progressive TPP", p.314-326; in: Huerta-Goldman, J and Gantz, D (eds.), *The Comprehensive and Progressive Trans-Pacific Partnership: Analysis and Commentary*, (Cambridge, Cambridge University Press).

GANTZ, David and **HUERTA-GOLDMAN**, Jorge (2021): "Introduction: The Trans-Pacific Partnership Becomes the Comprehensive and Progressive Agreement for TPP", p. 1-4; in: Jorge A Huerta-Goldman, Jorge and Gantz, David (eds.), *The Comprehensive and Progressive Trans-Pacific Partnership: Analysis and Commentary* (Cambridge, Cambridge University Press).

GARCÍA, José and **VERDUGO**, Sergio (2015): "Subsidiariedad: Mitos y Realidades en torno a su Teoría y Práctica Constitucional", p. 205-225; in: Ortúzar, Pablo (ed.), *Subsidiariedad: Más allá del estado y del Mercado*, (Santiago de Chile, Instituto de Estudios de la Sociedad, 1st edition).

GEHRING, Markus (2010): "Impact Assessments of Investment Treaties" Markus W. Gehring, p.145-170; in: Marie-Claire Cordonier Segger, Marie-Claire; Gehring, Markus and Newcombe, Andrew (eds.), *Sustainable Development in World Investment Law*, (Netherlands, Kluwer Law International).

GEHRING, Markus and **NEWCOMBE**, Andrew (2010): "An Introduction to Sustainable Development in World Investment Law", p. 3-12; in: Cordonier Segger, Marie-Claire; Gehring, Markus and Newcombe, Andrew (eds.), *Sustainable Development in World Investment Law*, (Netherlands, Kluwer Law International).

GODÍNEZ, Rodolfo (2011): "Negociaciones ambientales multilaterales", p. 307-322; in: Sindico, Franceso; Fernández, Rosa and Borràs, Susana (eds.), *Derecho internacional del medio ambiente: una visión desde Iberoamérica*, (Cameron May, London).

Henckels, Caroline (2016): "Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP", *Journal of International Economic Law*, Vol.19(1), p.27-50.

Hranitzky, Dennis and **Silva Romero**, Eduardo (2010): "The 'Double Hat' Debate In International Arbitration", *New York Law Journal*, available at: https://www.dechert.com/knowledge/publication/2010/6/the-double-hat-debate-in-international-arbitration.html, (last accessed, June 30, 2023).

ICSID (2022), *The ICSID Caseload Statistics*, Issue 2022-2, available at: https://icsid.worldbank.org/sites/default/files/publications/The_ICSID_Caseload_Statistics_2022-2_ENG.pdf, (last accessed, October 13, 2022).

ICSID, Caseload database, available at: https://icsid.worldbank.org/cases/case-database, (last accessed, October 13, 2022).

International Bar Association (2018): *Consistency, Efficiency, and Transparency in Investment Treaty Arbitration*, Report, available at: https://uncitral.un.org/sites/uncitral.un.org/files/investment_treaty_report_2018_full.pdf, (last accessed, July 16, 2023).

International Law Association (2002): New Delhi Declaration on the Principles of International Law Related to Sustainable Development, United Nations World Summit on Sustainable Development, A/CONF.199/8.

Jeżewski, Marek (2010): "Development Considerations in Defining Investment", p.215-235; in: Cordonier Segger, Marie-Claire; Gehring, Markus and Newcombe, Andrew (eds.), *Sustainable Development in World Investment Law*, (Netherlands, Kluwer Law International).

Joseph Charles Lemire v. Ukraine (2010): ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability.

Kahn, Jordan (2009): "Striking NAFTA Gold: Glamis Advances Investor-State Arbitration", *Fordham International Law Journal*, Vol.33(1), p. 101-155.

KLÄGER, Roland (2010): “Fair and Equitable Treatment and Sustainable Development”, p. 241-259; in: Cordonier Segger, Marie-Claire; Gehring, Markus and Newcombe, Andrew (eds.), *Sustainable Development in World Investment Law*, (Netherlands, Kluwer Law International).

KRAJEWSKI, Markus and **CEYSSENS**, Jan (2007): “Internationaler Investitionsschutz und innerstaatliche Regulierung”, *Archiv des Völkerrechts*, Vol.45(2), p.180-216.

KRIEBAUM, Ursula (2007): “Regulatory Takings: Balancing the Interests of the Investor and the State”, *The Journal of World Investment & Trade*, Vol.8(5), p.717-744.

KURTZ, Marcus (2001): “State Developmentalism Without a Developmental State: The Public Foundations of the ‘Free Market Miracle’ in Chile”, *Latin American Politics and Society*, Vol.43 (2), p.1-26.

LAGOS, Alejandro (2020): “El Vilipendiado Principio de Subsidiariedad en Chile: Antología de Malentendidos”, *Derecho Público Iberoamericano*, Vol.16, p. 69-105.

LAVRANOS, Nikos (2013): “The New EU Investment Treaties: Convergence towards the NAFTA Model as the New Plurilateral Model BIT Text?”, available at: https://ssrn.com/abstract=2241455, (last accessed August 15, 2022).

LEY 20417 (2010): Crea el Ministerio, el Servicio de Evaluación Ambiental y la Superintendencia del Medio Ambiente, Republica de Chile, available at: https://www.bcn.cl/leychile/navegar?idNorma=1010459&idParte=8848126&idVersion=, (last accessed, October 17, 2022).

LEY 20848 (2015): Establece Marco para la Invesrión Extranjera Directa en Chile y Crea la Institucionalidad Respectiva, República de Chile, available at: https://www.bcn.cl/leychile/navegar?idNorma=1078789, (last accessed, 14 October, 2022).

LOWE, Vaughan (1999): “Sustainable Development and Unsustainable Arguments”, p.19-37; in: Boyle, Alan and Freestone, David (eds): *International Law and Sustainable Development: Past Achievements and Future Challenges*, (Oxford, Oxford University Press).

MAHMUTAJ, Klentiana (2022): "Right to Development in International Investment Law: Overview of the ongoing study by the Expert Mechanism on the Right to Development", *Office of the United Nations High Commissioner for Human Rights*, A/HRC/EMRTD/5/CRP.2, available at, :https://www.ohchr.org/sites/default/files/2022-03/A_HRC_EMRTD_5_CRP2.pdf, (last accessed, February 7, 2023).

MANN, Howard *et al* (2006): *IISD Model International Agreement on Investment for Sustainable Development*, (Canada, International Institute for Sustainable Development, 2nd edition).

MANULAK, Michael (2022): *Change in Global Environmental Politics: Temporal Focal Points and the Reform of International Institutions*, (Cambridge, Cambridge University Press).

MARONG, Alhaji (2003): "From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development", *Georgetown International Environmental Law Review*, Vol.16(1), p.21-76.

MATSUURA, Hiroshi (2021): "Why joining the CPTPP is a smart move for the UK", *Chatham House*, available at: https://www.chathamhouse.org/2021/03/why-joining-cptpp-smart-move-uk, (last accessed, October 29, 2022).

MBENGUE, Makane (2020): "On Sustainable Development: A Conversation with Judge Weeramantry", p. 166-192; in: Forlati, Serena; Mbengue, Makane and McGarry, Brian (eds.), *The Gabčíkovo-Nagymaros Judgment and Its Contribution to the Development of International Law*, (Boston, BRILL).

MCGARRY, Brian (2020): "Norms, Standards, and the Elusive Nomenclature of the Gabčíkovo-Nagymaros Judgment", p. 207-228; in: Forlati, Serena; Mbengue, Makane and McGarry, Brian (eds.), The Gabčíkovo-Nagymaros Judgment and Its Contribution to the Development of International Law, (Boston, BRILL).

MERCER CFA INSTITUTE (2021), *Global Pension Index 2021: Pension Reform in Challenging Times*, available at: https://www.mercer.com/content/dam/mercer/attachments/private/gl-2021-global-pension-index-mercer.pdf, (last accessed, October 12, 2022).

Methanex Corporation v. United States of America (2001): NAFTA Arbitral Tribunal, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae".

Methanex Corporation v. United States of America (2005): NAFTA Arbitral Tribunal, Final Award on Jurisdiction and Merits.

Miles, Kate (2010): "Sustainable Development, National Treatment and Like Circumstances in Investment Law", p. 265-294; in: Cordonier Segger, Marie-Claire; Gehring, Markus and Newcombe, Andrew (eds.), *Sustainable Development in World Investment Law*, (Netherlands, Kluwer Law International).

Misiūnas, Algimantas and **Balsytė**, Ieva (2009):" The Essence of Sustainable Social Development and Possibilities for Measuring it", *Intellectual Economics*, Vol.1(5), p. 61–71.

Monardes, R., **Novik**, A., and **Portales**, C. (2021): "Addressing the Right to Regulate in the CPTPP Investment Chapter: Identifying New Treaty Practice", p. 288-313; in Huerta-Goldman, J and Gantz, D (eds.), *The Comprehensive and Progressive Trans-Pacific Partnership: Analysis and Commentary*, (Cambridge, Cambridge University Press).

Mondev International LTD v. United States of America (2002): ICSID Case No. ARB(AF)/99/2, Award.

Montt, Santiago (2009): *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation*, (Oxford, Hart Publisher).

Morocco-Nigeria BIT (2016): Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download, (last accessed, February 3, 2023).

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile (2004): ICSID Case No. ARB/01/7, Award.

NAVIA, Patricio (2018): “¿Si puedes repararla, para qué reemplazarla? Democratizar la Constitución de Pinochet en Chile”, *Revista Política y Gobierno*, Vol.25(2), p. 485-499.

NEWCOMBE, Andrew (2007): “Sustainable Development and Investment Treaty Law”, *Journal of World Investment and Trade*, Vol.8(3), p.357-408.

NORTH SEA CONTINENTAL SHELF (FEDERAL REPUBLIC OF GERMANY/NETHERLANDS) (1969): Judgement, I.C.J. Reports 1969.

OECD (2004): "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, No. 2004/03, *OECD Publishing*, available at: https://doi.org/10.1787/675702255435, (last accessed, February 5, 2023).

OECD DATA, OECD Chart: FDI stocks, Inward, % of GDP, Annual, 2018-2021, available at: https://data.oecd.org/chart/6Qk2, (last accessed, October 12, 2022).

ORELLANA, Marcos (2014): *Typology of Instruments of Public Environmental International Law*, ECLAC, Environment and Development Series No. 158.

PAPARINSKIS, Martins (2010): “Regulatory Expropriation and Sustainable Development”, p. 299-327; in: Cordonier Segger, Marie-Claire; Gehring, Markus and Newcombe, Andrew (eds.), *Sustainable Development in World Investment Law*, (Netherlands, Kluwer Law International).

PARKERINGS-COMPAGNIET AS v. REPUBLIC OF LITHUANIA (2007): ICSID Case No. ARB/05/8, Award.

PASCHUÁN, Alberto and **VEGA**, Viviana (2004): “La Evolución del Derecho Ambiental en Chile, 1810-1990”, *Revista de Historia y Geografía,* Vol.18, p. 233-270.

POLANCO, Rodrigo (2012): “Legal Framework of Foreign Investment in Chile”, *Law and Business Review of the Americas*, Vol.18(2), p. 203-234.

POLANCO, Rodrigo (2017): “The Chilean Experience in South-South Investment and Trade Agreements”, p. 47-94; in: Morosini, Fabio and Sanchez Badin (eds.), *Reconceptualizing International Investment Law from the Global South*, (Cambridge, Cambridge University Press).

PONIACHIK, Karen (2002): "Chile's FDI Policy: Past Experience and Future Challenges", presented at: *OECD Global Forum on International Investment Law: Attracting Foreign Direct Investment for Development*, pp. 1-22, available at: https://www.oecd.org/investment/investmentfordevelopment/2764423.pdf, (last accessed, September 10, 2022).

POPE & TALBOT INC. V. THE GOVERNMENT OF CANADA (2001): UNCITRAL, Award on the Merits of Phase 2.

PULP MILLS ON THE RIVER URUGUAY (ARGENTINA V. URUGUAY) (2010): Judgment, ICJ Reports.

REINISCH, August (2013): "The Scope of Investor-State Dispute Settlement in International Investment Agreements", *Asia Pacific Law Review*, Vol.21(1), p.3-26.

REINISCH, August (2020): Advanced Introduction to International Investment Law, (Cheltenham and Northampton, Edward Elgar Publishing).

RODRÍGUEZ-LUNA, Dante *et al* (2021): "The environmental impact assessment in Chile: Overview, Improvements, and Comparisons", *Environmental Impact Assessment Review* Vol.86, available at: https://doi.org/10.1016/j.eiar.2020.106502, (last accessed, August 16, 2022).

ROJAS SÁNCHEZ, Gonzalo; **ACHURRA**, Marcela and **DUSSAILLANT BALBONTÍN**, Patricio (eds.) (1996): *Derecho Político: Apuntes de las clases del profesor Jaime Guzmán Errázuriz*, (Santiago de Chile, Ediciones Pontificia Universidad Católica de Chile, 1st edition).

SALCEDO, Carolina and **AKOORIE**, Michèle (2013): "Foreign Direct Investment in Chile: Historical Process, changing political ideologies and the responses of MNEs", *AD-Mnister*, Vol.23, p. 103-129.

SALGADO LEVY, Claudia (2015): "Drafting and Interpreting International Investment Agreements from a Sustainable Development Perspective", *Groningen Journal of International Law*, Vol 3(1), p. 59-84.

SALUKA INVESTMENTS B.V. (THE NETHERLANDS) V. CZECH REPUBLIC (2006): UNCITRAL Partial Award.

SALUKA INVESTMENTS B.V. V. THE CZECH REPUBLIC (2006): UNCITRAL, Partial Award.

SÁNCHEZ CASTILLO-WINCKELS, Nadia and **CORTÉS**, Paula (2021): Input for Working Group on Business and Human Rights' report on "Human Rights-compatible International Investment Agreements (IIAs)", available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Business/WG/Submissions/CSOs/Input-Human-Rights-compatible-IIAs-Sanchez-and-Cortes.pdf, (last accessed, February 2, 2023).

SANDS, Philippe (2003): *Principles of International Environmental Law*, (Cambridge, Cambridge University Press, 2nd edition).

SARMIENTO, Florencia and **NIKIÈMA**, Suzy (2022): "Fair and Equitable Treatment: Why it Matters and What can be Done", *IISD Best Practices Series*, Policy Brief.

SCHILL, Stephan (2015): "Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward", *International Centre for Trade and Sustainable Development/World Economic Forum*, available at: https://www.narcis.nl/publication/RecordID/oai:dare.uva.nl:publications%2Fccd751bd-b2b4-4b19-84eb-0f335ed02289, (last accessed, June 30, 2023).

SCHRIJVER, Nico (2008): *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, (Leiden & Boston, Martinus Nijhoff Publishers).

SEMPRA ENERGY INTERNATIONAL V. THE ARGENTINE REPUBLIC (2007): ICSID Case No. ARB/02/16, Award.

STARRETT HOUSING CORPORATION, STARRETT SYSTEMS, INC. AND OTHERS V. THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN (1983): IUSCT Case No. 24, Interlocutory Award.

SUBSECRETARÍA DE RELACIONES EXTERIORES, Economic and Commercial Agreements in Chile, available at: https://www.subrei.gob.cl/acuerdos-comerciales/acuerdos-comerciales-vigentes, (last accessed, October 17, 2022).

TAYAR, Joshua (2019): "Safeguarding the Institutional Impartiality of Arbitration in the Face of Double-Hatting", *McGill Journal of Dispute Resolution*, Vol.5, p. 106-117.

THE ROMPETROL GROUP N.V. V. ROMANIA (2013): ICSID Case No. ARB/06/3, Award.

Tienhaara, Kyla (2011): "Regulatory chill and the threat of arbitration: A view from political science", p. 606-628; in: Brown, Chester and Miles, Kate (eds.), *Evolution in Investment Treaty Law and Arbitration*, (Cambridge, Cambridge University Press).

Tienhaara, Kyla (2018): "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement", Transnational Environmental Law, Vol.7(2), p. 229-250.

Tladi, Dire (2017): "The principles of sustainable development in the case concerning Pulp Mills on the River Uruguay", p. 242-254; in: Cordonier Segger, Marie-Claire and Weeramantry, C.G. (eds.), *Sustainable Development Principles in the Decisions of International Courts and Tribunals*, (London, Routledge, 1st edition).

Tribunal Constitucional de Chile (2013): Sentencia Rol 2358-12, Requerimiento presentado por un grupo de diputados, que representan la cuarta parte de los miembros en ejercicio de la Cámara de Diputados, respecto de la inconstitucionalidad del N° 9 del artículo único del proyecto de ley que permite la introducción de la televisión digital terrestre.

U.S. Department of State (2021): *2021 Investment Climate Statements: Chile*, available at: https://www.state.gov/reports/2021-investment-climate-statements/chile, (last accessed, 18 October, 2022).

UNCTAD (2019): *Reforming Investment Dispute Settlement: A Stocktaking*, IIA Issues Note, issue 1, available at: https://unctad.org/system/files/official-document/diaepcbinf2019d3_en.pdf, (last accessed, June 30, 2023).

UNCTAD, Investment Dispute Settlement Navigator, available at https://investmentpolicy.unctad.org/investment-dispute-settlement/country/41/chile, (last accessed, October 13, 2022).

United Nations (1992): *Report of the United Nations Conference on Environment and Development*, United Nations General Assembly, document A/CONF.151/26/Rev.l (Vol. l).

United Nations (1994): *United Nations Framework Convention on Climate Change*, United Nations General Assembly, document A/RES/48/189.

UNITED NATIONS (2002): *Report of the World Summit on Sustainable Development*, United Nations General Assembly, document A/CONF.199/20.

UNITED NATIONS (2003): *Financing for Development: Monterrey Consensus of the International Conference on Financing for Developmen*, United Nations, document A/CONF.1987/11.

UNITED NATIONS (2012): *Report "The Future We Want": Outcome Document of the United Nations Conference on Sustainable Development*, Rio+20 United Nations Conference on Sustainable Development, available at: https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf, (last accessed, October 18, 2022).

UNITED NATIONS (2015): *Transforming our World: The 2030 Agenda for Sustainable Development*, United Nations, document A/RES/70/1.

UNITED NATIONS (2018): *UNCTAD's Reform Package for the International Investment Regime*, United Nations Conference for Trade and Development, available at: https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf, (last accessed, February 3, 2023).

UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS (1988): *Bilateral Investment Treaties*, (New York, United Nations Publications).

UNITED NATIONS: Department of Economic and Social Affair, Sustainable Development Goals, available at: https://sdgs.un.org/, (last accessed, November 25, 2022

VAN KLAVEREN, Alberto (2011): "La política exterior de Chile durante los gobiernos de la Concertación (1990-2010)", *Revista Estudios Internacionales*, Vol.44 (169), p. 150-170.

VICTOR PEY CASADO AND PRESIDENT ALLENDE FOUNDATION V REPUBLIC OF CHILE (2008): ICSID Case No ARB/98/2, Award.

WANG, J. (2017): "Trans-pacific partnership and domestic environmental protection: seeking an alternative standard of review in investor-state dispute settlement", *George Washington Journal of Energy and Environmental Law*, Vol.8(2), p. 163-173.

Waste Management, Inc. v. United Mexican States ("Number 2") (2004): ICSID Case No. ARB(AF)/00/3, Award.

Weiler, Todd (2013): *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context*, (Leiden, Brill).

Widijowati, Dijan; **Sujatmiko**, Bambang; **Yuspan Zalukhu**, Amrullah and **Sugiarto**, Edy (2019): *"Sustainable Development: Legal Status and Formulation"*, *Social Sciences on Sustainable Development for World Challenge: The First Economics, Law, Education and Humanities International Conference*, p. 506–534, available at: https://knepublishing.com/index.php/KnE-Social/article/view/4334/8950#:~:text=The%20preservation%20of%20environmental%20capability,Law%20number%2023%20of%201997, (last accessed, October 18, 2022).

World Bank Data, and OECD National Accounts data files, GDP Comp. available at: https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2020&locations=CL-AR-BO-CO-BR-PE-PY-VE-EC-UY-MX-GT-PA-CR-SV-HN&start=2020&view=bar, (last accessed, September 10, 2022).

World Commission on Environment and Development (1987): *Our Common Future*, United Nations General Assembly, document A/42/427, available at: https://digitallibrary.un.org/record/139811/files/A_42_427-EN.pdf, (last accessed, October 17, 2022).

Zhu, Ying (2018): "Fair and Equitable Treatment of Foreign Investors in an Era of Sustainable Development", *Natural Resources Journal*, Vol.58(2), p. 319-364.