

INTERNATIONAL ARBITRATION AND THE PROTECTION OF THE ENVIRONMENT: SHOULD THE EXISTING LEGAL INSTRUMENTS EVOLVE?

INTRODUCTION¹

A common concern for the environment has led to the emergence of a complex regulatory network of international, regional and national regimes, designed to address the challenges of protecting the environment. Since (i) the 1972 Stockholm Declaration,² which emphasised on the State's role in protecting the environment;³ (ii) the 1992 Rio Declaration,⁴ in which private corporations were given some mention;⁵ and (iii) the 2002 Johannesburg Conference⁶ in which the private sector was at the forefront of environmental protection,⁷ a true paradigm shift has occurred where it “no longer seems controversial to state that the private sector has a very significant role to play in protecting the environment.”⁸

¹ I would like to thank Tejas Shiroor, Jérémy Faivre and John Belinga for their strong and active support in the conduct of this research project.

² Stockholm Declaration on the Human Environment, June 16, 1972, U.N. Doc. A/CONF.48/14/Rev.1 11 I.L.M. 1417 (1972) (hereinafter, the *Stockholm Declaration*). The Stockholm Declaration is also known as the 1972 UN Declaration on the Human Environment, and is generally recognized as the birth of international environmental law.

³ See, Francesco Francioni, “*The private sector and the challenge of implementation*”, in *Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards*, 24, Pierre-Marie Dupuy and Jorge E. Viñuales eds., 2013; Sandrine Maljean-Dubois and Vanessa Richard, “*The applicability of international environmental law to private enterprises*”, in *Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards*, 69, Pierre-Marie Dupuy and Jorge E. Viñuales eds., 2013 (maintaining that the private sector was almost absent from the Stockholm Declaration).

⁴ Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc. A/CONF.151/5, 31 I.L.M. 8744 (1992) (hereinafter, the *Rio Declaration*). The Rio Declaration is also known as the 1992 UN Declaration on Environment and Development.

⁵ See, Sandrine Maljean-Dubois and Vanessa Richard, “*The applicability of international environmental law to private enterprises*”, in *Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards*, 69, Pierre-Marie Dupuy and Jorge E. Viñuales eds., 2013 (maintaining that the private sector was almost absent from the Stockholm Declaration and adding that “Agenda 21 mentioned the role of ‘business and industry’”).

⁶ The Johannesburg Conference is also known as the UN World Summit on Sustainable Development. See, Report of the World Summit on Sustainable Development (the “Johannesburg Declaration”), Sept. 4, 2002, U.N. Doc. A/CONF.199/20 (2002).

⁷ See, Sandrine Maljean-Dubois and Vanessa Richard, “*The applicability of international environmental law to private enterprises*”, in *Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards* 69, Pierre-Marie Dupuy and Jorge E. Viñuales eds., 2013, at pp. 69-70 (stating that the primary role of the Johannesburg Declaration was to promote the role of business rather than to regulate their activities).

⁸ See, Pierre-Marie Dupuy and Jorge E. Viñuales, “*Introductory observations*”, in *Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards*, 1, Pierre-Marie Dupuy and Jorge E. Viñuales eds., 2013.

Environmental law is a particularly illustrative example of the needs of our legal and regulatory framework to evolve in the 21st century. Indeed, efforts should be made to ensure that States no longer have a monopoly, as far as the protection of the environment and environmental rights are concerned. To be more precise, environmental law is perceived in many countries as a question of public interest. It is largely up to the State to address the difficulties it can generate. However, the multiplicity of legal instruments and supervisory mechanisms that compete to settle environmental-related disputes shows that corporations, NGOs and civil society at large are “*indispensable stakeholders in the prevention and reduction of environmental degradation.*”⁹ It is therefore the need of the hour to rethink the traditional means of resolving environmental conflicts, so as to give non-State actors a say in the matter.

In this context, arbitration emerges as a particularly useful mechanism, as it was created to handle extra territorial issues relating to different legal frameworks. The 2014 IBA Report on *Achieving Justice and Human Rights in an Era of Climate Disruption (IBA Report)* recommends international arbitration, specifically under the Permanent Court of Arbitration’s (*PCA*’s) 2001 Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (*PCA Optional Rules*), as the preferred mechanism to handle international environmental disputes.¹⁰ David W. Rivkin, President of the International Bar Association (*IBA*), has observed that international fora such as international arbitration are better equipped to settle disputes involving parties from multiple jurisdictions.¹¹

On the heels of the 50th anniversary of the United Nations Commission on International Trade Law (*UNCITRAL*) and the Paris Agreement negotiated at the 2015 United Nations Climate

⁹ See, Francesco Francioni, “*The private sector and the challenge of implementation*”, in *Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards* 24, Pierre-Marie Dupuy and Jorge E. Viñuales eds., 2013 at p. 24; see also, Pierre-Marie Dupuy, “*International environmental law: looking at the past to shape the future*”, in *Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards* 9, Pierre-Marie Dupuy and Jorge E. Viñuales eds., 2013, at p. 16 (discussing the institutional mechanisms dealing with environmental questions).

¹⁰ See, International Bar Association Climate Change Justice and Human Rights Task Force, Report on *Achieving Justice and Human Rights in an Era of Climate Disruption*, 2014, at p. 142.

¹¹ Akhlaq Choudhury and Khaled Moyeed, “*Spotlight on International Arbitration as a Means of Settling Disputes Arising from Climate Change*”, Kluwer Arbitration Blog, 26 January 2016, <<http://kluwerarbitrationblog.com/2016/01/26/spotlight-on-international-arbitration-as-a-means-of-settling-disputes-arising-from-climate-change/>> (alluding to the IBA Report on *Achieving Justice and Human Rights in an Era of Climate Disruption*, 2014 “which recommended the use of arbitration as a means of settling disputes arising from climate change”).

Change Conference (commonly referred to as COP 21) the aim of this paper is to examine the role that international arbitration could play in the protection of the environment.

Accordingly, this paper will first examine the existing framework for resolving environmental disputes, (I) and subsequently assess arbitration as a means for settling such disputes (II), before suggesting the ways in which arbitration could be adapted to address environmental concerns more effectively (III).

I. THE EXISTING FRAMEWORK FOR RESOLVING ENVIRONMENTAL DISPUTES

A. State-to-State Disputes

The International Court of Justice (*ICJ*) was initially the only permanent international tribunal dealing with environmental disputes.¹² Since its establishment in 1946, the ICJ (and before it, its predecessor the Permanent Court of International Justice) has played a pivotal role in the development of international environmental law. The jurisprudence of the ICJ has addressed important environmental issues such as “*the existence of customary duties to assess and monitor the impact of large projects, the limits of the right to economic development and, more fundamentally, the relations between treaty and customary law in an area of environment, or the specific contents and relative hierarchy of customary [international environmental law].*”¹³

Subsequently, the second half of the 20th century saw the creation of other international *fora* for the settlement of State-to-State disputes involving environmental concerns. Since 1994, environmental concerns have arisen in State-to-State disputes under the United Nations Convention on the Law of the Sea (*UNCLOS*). Under the UNCLOS, States are granted alternative *fora* to settle their dispute.¹⁴ These include the International Tribunal for the Law of the Sea (*ITLOS*),¹⁵ which has contributed greatly to the development of the law of the sea in environmental matters. For example, its case law includes the provisional measures it ordered in the *Southern Bluefin Tuna case*, where it ruled on Japan’s unilateral scientific

¹² Phillippe Sands, “*Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law*”, 37 Environmental Policy and Law, 2007, at p. 67.

¹³ Jorge E. Viñuales, “*The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment*”, Fordham International Law Journal, Volume 32, Issue 1, at pp. 257-258; The ICJ’s most important cases include its advisory opinion on the *Legality of the Use of Nuclear Weapons*, its judgment in the *Gabcikovo/Nagymaros* dispute, its provisional measures ordered in *Pulp Mills on the River Uruguay* case.

¹⁴ UNCLOS, Articles 286 and 287; Malcolm N. Shaw, *International Law*, Cambridge University Press, 6th Edition, at pp. 635-636.

¹⁵ See, UNCLOS, Articles 153 and 187; Malcolm N. Shaw, *International Law*, Cambridge University Press, 6th Edition, at p. 639.

experimental fishing measures. The ITLOS also heard the *Mox Plant case*, where Ireland challenged the permission granted by the United Kingdom for the construction of a nuclear facility at Sellafield, as well as the *Land Reclamation case* concerning Singapore's land reclamation activities.¹⁶

Within the framework of the World Trade Organisation (*WTO*), the Dispute Settlement Body is competent to settle disputes relating to trade policies and environmental measures.¹⁷ One of the most important decisions of the WTO Appellate Body on issues concerning trade and environment is the *Shrimp-Turtle case*.¹⁸ India, Malaysia, Thailand and Pakistan challenged a measure by the United States, whereby the latter had implemented a ban on shrimp imports from countries whose fishing fleets were not equipped with "turtle excluder devices", and as a result killed endangered sea turtles in the shrimping process. While the Appellate Body found that the manner in which the United States had implemented the ban was discriminatory, and ordered the United States to end the ban, it nonetheless highlighted that: "*In reaching these conclusions, we wish to underscore what we have not decided in this appeal. We have not decided that the protection and preservation of the environment is of no significance to the WTO. Clearly, it is. We have not decided that sovereign nations that are members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do*".

Finally, various international human rights courts, such as the European Court of Human Rights and the American Court of Human Rights, often adjudicate on environmental issues in their specific human rights context.¹⁹

¹⁶ Philippe Sands, "*Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law*", 37 *Environmental Policy and Law*, 2007, at p. 68.

¹⁷ See, the website of the World Trade Organization, <https://www.wto.org/English/thewto_e/whatis_e/tif_e/displ_e.htm>.

¹⁸ See, the website of the World Trade Organization, <https://www.wto.org/english/tratop_e/envir_e/edis08_e.htm>.

¹⁹ Philippe Sands, "*Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law*", 37 *Environmental Policy and Law*, 2007, at p 67.

B. Investment Arbitration

Environmental concerns may also arise in investor-State disputes. A framework of various autonomous international treaties has progressively emerged in the second half of the 20th century, which contain undertakings by their contracting States to confer substantive protections to foreign investors of the other contracting party. They also provide in investor-State dispute settlement clauses the ability to foreign investors to directly sue the host State, usually through arbitration. This web of international investment agreements includes multilateral treaties (1), as well as bilateral agreements (2).

1. Investor-State arbitration in multilateral treaties

Two of the main multilateral treaties providing for investor-State arbitration are the North American Free Trade Agreement (*NAFTA*) and the Energy Charter Treaty (*ECT*). The protections granted by NAFTA and the ECT may clash with a host State's regulations aimed at protecting the environment, where this creates adverse effects for foreign investors.²⁰

NAFTA, signed in 1994, establishes a trade block between Canada, Mexico and the United States. Chapter 11 of the agreement is dedicated to the protection of foreign investors. It grants them substantive protections, as well as an investor-State dispute settlement clause at Article 1120. The contracting States have consented to foreign investors initiating arbitration against them for breaches of the protections awarded by Chapter 11. Article 1120 provides alternatively for arbitration under the ICSID Convention, the ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules. NAFTA investor-State arbitrations occasionally address environmental concerns. For instance, in *Methanex v USA*, a Canadian corporation sued the United States following the decision by the state of California to ban the use of an additive, which contaminated drinking water supplies.²¹

The ECT, signed in 1994, is a multilateral treaty in force between a number of European and Asian States which establishes a framework for cross-border cooperation in the energy industry. It grants foreign investors a number of substantive protections where their investment falls within the scope of the treaty, defined at Article 1(6) as any investment “associated with an economic activity in the energy sector”. Article 26 of the ECT provides

²⁰ Howard Mann and Konrad von Moltke, “*NAFTA’s Chapter 11 and the Environment – Addressing the Impacts of the Investor-State Process on the Environment*”, IISD, 1999, at p. 6; Nathalie Bernasconi, “*Background paper on Vattenfall v Germany arbitration*”, IISD 2009.

²¹ *Methanex Corporation v United States of America*, NAFTA.

for investor-State arbitration alternatively under the ICSID Convention, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules or before the Arbitration Institute of the Stockholm Chamber of Commerce (*SCC*). As a consequence of the focus of the ECT on energy, environmental concerns regularly arise in arbitrations initiated under Article 26. Recently, in a highly publicised dispute, a Swedish company sued Germany before an arbitral tribunal against the City of Hamburg's decision to impose restrictions intended to protect the environment on the construction permit for a coal-fired power plant.²²

2. *BITs and FTAs*

The number of bilateral investment treaties (*BITs*) has grown exponentially over the second half of the 20th century. BITs are international treaties by which the two contracting States undertake to grant substantive protections to investors of the other contracting State, and for the most part provide for investor-State arbitration.

States have also concluded bilateral free trade agreements (*FTAs*), such as the United States-Chile FTA of 2003, containing a chapter dedicated to investment protection. Such FTAs provide for substantive protections for foreign investors, as well as investor-State arbitration.

The broad number of BITs and FTAs containing investment chapters entails a wide range of investor-State dispute settlement mechanisms. The scope of arbitrable disputes can include any investment falling under the scope of application of the treaty, or be restricted to issues of compensation. The treaty can provide alternatively or exclusively for arbitration under the ICSID Convention, the ICSID Facility Rules, before the Arbitration Institute of the SCC, or *ad hoc* arbitration under the UNCITRAL Rules of Arbitration.

Over the past fifteen years, foreign investors have regularly relied on investment arbitration under BITs to challenge or request compensation for a State's environmental policies causing them adverse effects. Recently, a new influx of investment arbitration emerged “*springing from shifts in governmental policies on renewable energy, fracking, biodiversity, and climate change mitigation.*”²³

²² The dispute was eventually settled by the parties. See *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/09/6, Award, 11 March 2011.

²³ Christina L. Beharry and Melinda E. Kuritzky, “*Going Green: Managing the Environment Through International Investment Arbitration*”, *American University International Law Review* 30 no. 3 (2015): 383-429, at pp. 384-386.

C. Commercial Arbitration

Environmental disputes arise in a commercial context in cases concerning drilling and oil spills, hazardous waste transport and disposal, shipping of toxic materials, contaminated foodstuffs, etc.²⁴ Chemical plants, landfills and other industrial projects are often involved in disputes relating to pollution control, environmental clean-up or chemical regulation.²⁵ While the parties to commercial arbitrations involving environmental issues are usually private entities, such arbitrations can also involve State entities acting as commercial contracting parties.²⁶

Commercial arbitration has been used by citizens to bring claims against polluting corporations.²⁷ For example, in *Anderson et al. v PG&E*, the residents of Hinkley, a town in California, instituted private arbitration proceedings against the Pacific Gas and Electric Company (*PG&E*), alleging that the company had been discharging toxic water contaminated by chromium, a carcinogen, into the groundwater system for more than forty years.²⁸ *PG&E* eventually settled the case with the claimants after two years of binding arbitration.²⁹

Commercial arbitration in an environmental context has also largely developed through niche forms of arbitration, such as maritime arbitration, which also deals with polluting activities (e.g. oil spills). In the aftermath of the 1967 Torrey Canyon oil spill, where the Torrey Canyon oil tanker ran aground and dumped 119,328 tonnes of crude oil into the Atlantic,³⁰ the tanker owners of the world created the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (*TOVALOP*), a voluntary scheme to ensure that oil pollution

²⁴ Lisa B. Bingham and David Cameron Prell, “*Arbitration of Environmental Disputes That Cross National Boundaries*”, Conflict Resolution, edited by Keith William Hipel, Volume II, 2009, at p. 81.

²⁵ See, the website of the American Arbitration Association, <https://www.adr.org/aaa/faces/aoe/cre/environmental?_afWindowId=12pq21edhs_84&_afLoop=1749319849576829&_afWindowMode=0&_adf.ctrl-state=12pq21edhs_4> (last accessed on 11 January 2017).

²⁶ Lisa B. Bingham and David Cameron Prell, “*Arbitration of Environmental Disputes That Cross National Boundaries*”, Conflict Resolution, edited by Keith William Hipel, Volume II, 2009, at p. 80.

²⁷ Fan Kun, “*Chapter 18 : Expansion of Arbitral Subject Matter : New Topics and New Areas of Law*”, in *The Evolution and Future of International Arbitration*, Stavros L. Brekoulakis, Julian D. Lew, et al. (eds.), International Arbitration Law Library, Volume 37, at pp. 299-320.

²⁸ See, Frank Clifford, “*Utility to Pay \$333 Million to Settle Suit*”, published in the Los Angeles Times, 3 July 1996.

²⁹ Frank Clifford, “*Utility to Pay \$333 Million to Settle Suit*”, published in the Los Angeles Times, 3 July 1996.

³⁰ See, Partick Barkham, “*Oil spills : Legacy of the Torrey Canyon*”, published in the Guardian, 24 June 2010, available at <<https://www.theguardian.com/environment/2010/jun/24/torrey-canyon-oil-spill-deepwater-bp>>.

victims receive compensation.³¹ The TOVALOP Standing Agreement provided that, in the event of a dispute between an oil pollution victim and a TOVALOP participating tanker owner, claimants could commence International Chamber of Commerce (*ICC*) arbitration proceedings, “*which would be the exclusive means of enforcing a participating owner’s liability under the agreement*”.³² Although the TOVALOP scheme was terminated in 1997,³³ it is an illustration of the use of commercial arbitration early on to address issues resulting from environmental damage.

In addition to the ICC, which has administered environmental disputes for decades, as discussed above, other institutions are also involved in environment-related arbitrations. The American Arbitration Association (*AAA*) lists environmental disputes as one of its areas of expertise.³⁴ The AAA assists parties in resolving environmental disputes involving a range of issues including multi-party and multi-jurisdiction disagreements, and may assist them with the appointment of an arbitrator with environmental experience.³⁵ It maintains a “*National Roster of Neutrals that have a broad range of environmental and law expertise which they use in the dispute resolution process.*”³⁶ Additionally, other institutions such as the SCC and the London Court of International Arbitration (*LCIA*) also administer commercial arbitrations involving environment related issues.³⁷

As commercial arbitration is usually confidential, the nature of the dispute is private, and awards issued by tribunals are not always published, it’s ability to shape of environmental policy and law is rather limited, as compared with that of investment arbitration. While the primary focus of this paper is on the role of investment arbitration, it will nonetheless address commercial arbitration where relevant.

³¹ See, the website of The International Tanker Owners Pollution Federation Limited (ITOPF), a non-profit organisation that was originally established to administer the TOVALOP scheme, <<http://www.itopf.com/about-us/our-history/>>.

³² See, Patrick O’Donovan, “*Claims for Oil Pollution Damage - Arbitration and Alternative Dispute Resolution*”, 1991 Oil Spill Conference, available at <<http://ioscproceedings.org/doi/pdf/10.7901/2169-3358-1991-1-691?code=ampi-site>>.

³³ See, the website of The International Tanker Owners Pollution Federation Limited (ITOPF), a non-profit organisation that was originally established to administer the TOVALOP scheme, <<http://www.itopf.com/about-us/our-history/>>.

³⁴ See, the website of the American Arbitration Association, <https://www.adr.org/aaa/faces/aoe/cre/environmental?_afWindowId=12pq21edhs_84&_afLoop=1749319849576829&_afWindowMode=0&_adf.ctrl-state=12pq21edhs_4>.

³⁵ See, the American Arbitration Association, <https://www.adr.org/aaa/faces/aoe/cre/environmental?_afWindowId=12pq21edhs_84&_afLoop=1749319849576829&_afWindowMode=0&_adf.ctrl-state=12pq21edhs_4>.

³⁶ See, the American Arbitration Association, <https://www.adr.org/aaa/faces/aoe/cre/environmental?_afWindowId=12pq21edhs_84&_afLoop=1749319849576829&_afWindowMode=0&_adf.ctrl-state=12pq21edhs_4>.

³⁷ Lisa B. Bingham and David Cameron Prell, “*Arbitration of Environmental Disputes That Cross National Boundaries*”, Conflict Resolution, Keith William Hipel (ed.), Volume II, 2009, at p. 81.

II. A CRITICAL ASSESSMENT OF ARBITRATION AS A MEANS OF SETTling ENVIRONMENTAL DISPUTES

States have historically used State-to-State arbitration as a means to settle environment related disputes. As early as in 1893, in the *Bering Fur Seals* case, the United Kingdom and the United States submitted a dispute relating to the United States' interference with British fishing activities to arbitration pursuant to a treaty concluded between the two States. In 1941, in the *Trail Smelter* case, Canada and the United States resolved a dispute concerning cross-border pollution originating in Canada to the United States through arbitration.³⁸ Similarly, in 1957, an arbitral tribunal rendered a decision in the *Lake Lanoux Arbitration*, a dispute between France and Spain concerning the use of the waters of Lake Lanoux in the Pyrenees. More recently, in 2010, Pakistan instituted arbitration proceedings against India under the Indus Waters Treaty 1960, in the *Indus Waters Kishenganga* case involving the construction of a Hydro-Electric Project on the Kishenganga river, which diverted the river water and interfered with Pakistan's use of the water downstream.³⁹

However, unlike State-to-State arbitration, commercial and investment arbitration of environmental disputes is a much more recent phenomenon.⁴⁰ The NAFTA case of *Lone Pine Res. Inc. v Canada*, concerning Canada's decision to revoke Lone Pine's fracking license, and the ECT case of *Vattenfall AB v Germany*, based on Germany's decision to phase out its use of nuclear power plants, are both illustrative of the increasing use of arbitration by investors in environmental disputes.⁴¹

Arbitration is increasingly used to resolve environmental disputes owing to the shortfalls of relying solely on States to develop environmental law (A) and correspondingly, the inherently accommodating and flexible nature of arbitration (B).

³⁸ See, Philippe Sands, "Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law", 37 Environmental Policy and Law, 2007, at p. 66 (tracing the historical context of environmental arbitration).

³⁹ See, *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Permanent Court of Arbitration, 2013, available at <<https://pcacases.com/web/view/20>>.

⁴⁰ See, Christina L. Beharry and Melinda E. Kuritzky, "Going Green: Managing the Environment Through International Investment Arbitration", American University International Law Review 30 no. 3 (2015): 383-429, at p. 384 (indicating that most cases involving environmental policies have only emerged in the last fifteen years).

⁴¹ See, *Lone Pine Res. Inc. v. Canada*, Notice of Arbitration, (UNCITRAL 2013), available at <<http://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf>>; *Vattenfall AB v. Fed. Republic of Germany*, ICSID Case No. ARB/12/12, Decision Pursuant to ICSID Arbitration Rules 41(5) (July 2, 2013), <http://www.iareporter.com/articles/20130704_2> (discussing the tribunal's decision).

A. The Shortfalls of State Monopoly on Environmental Law

Under international law, the “*most spectacular form of privatization has taken place through the invention of the nation State and the consequent appropriations of portions of the physical space of the world and its resources under the mantle of ‘territorial sovereignty.’*”⁴² Given this notion of territorial sovereignty, “*understood as the dominion and power of government over the physical space subject to national jurisdiction,*”⁴³ two potential tensions can be observed with respect to a State’s willingness to adhere to international law: (i) a normative conflict between two competing international norms – the environment and investment; and (ii) a legitimacy conflict between domestic (environmental) measures and international (investment) norms.⁴⁴ The protection of the environment suffers from the fragmentation of international law due to such legitimacy conflicts and normative conflicts. This is a result of the lack of inter-State and regional coordination in the promulgation of environmental norms (domestic and international), as well as the political challenge of establishing a general consensus on “*what constitutes a ‘good’, ‘safe’ or ‘healthy’ environment.*”⁴⁵

Regarding the normative conflicts between environmental and investment norms, one must be mindful that international environmental law was “*originally concerned with and was intended to regulate spaces that lay at the heart of the idea of joint ownership.*”⁴⁶ However, modern international environmental law is premised on the idea that the general environment must be protected as an international public good maintained in the general interest of

⁴² See, Francesco Francioni, “*The private sector and the challenge of implementation*”, in *Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards*, 24, Pierre-Marie Dupuy and Jorge E. Viñuales eds., 2013, at p. 30.

⁴³ See, Francesco Francioni, “*The private sector and the challenge of implementation*”, in *Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards*, 24, Pierre-Marie Dupuy and Jorge E. Viñuales eds., 2013, at p. 30.

⁴⁴ Jorge E. Viñuales, “*Environmental Regulation of FDI Schemes*”, in *Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards*, 275, Pierre-Marie Dupuy and Jorge E. Viñuales eds., 2013.

⁴⁵ Pierre-Marie Dupuy, “*International environmental law: looking at the past to shape the future*”, in *Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards* 9, Pierre-Marie Dupuy and Jorge E. Viñuales eds., 2013, at p. 20 (Dupuy states that in a context characterized by lack of coordination between public authorities, the “*protection of the environment suffers **not** from the fragmentation of international law **but from** the partitioning of legal orders.*” (emphasis supplied)); See also, Francesco Francioni, “*The private sector and the challenge of implementation*”, in *Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards*, 24, Pierre-Marie Dupuy and Jorge E. Viñuales eds., 2013, at p. 26.

⁴⁶ Pierre-Marie Dupuy, “*International environmental law: looking at the past to shape the future*”, in *Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards* 9, Pierre-Marie Dupuy and Jorge E. Viñuales eds., 2013, at p. 11.

humanity, which “*underlies the development of the category of erga omnes obligations.*”⁴⁷ Despite this premise, the obligations arising from international sources of law remain generally addressed to States. This neglects the fact that “*private investors are often [the] direct vectors of environmental protections.*”⁴⁸ Without the contribution of the private sector, many environmental protection initiatives would be beyond the economic capabilities of States.⁴⁹

Environmental protection, as reflected in international conventions, is often the result of compromise by States, which results in the use of vague and imprecise language in the conventions.⁵⁰ Moreover, environmental claims are rarely, if ever, raised in isolation of other international legal arguments.⁵¹ Given the often vague and hortatory language of environmental protections provided in international conventions and the current relative absence of environmental protections in investment treaties,⁵² tribunals have had little “*guidance on how to weigh the ecologic aims of governmental measures.*”⁵³

While it is generally accepted that international law, if incorporated in a State’s legal system, supersedes domestic law, these legitimacy conflicts cannot be confined to simple academic discourse. It remains the case that the growing number of investment claims brought against States in connection to the adoption of environmental measures are often on a purely domestic legal basis.⁵⁴ It bears reminding that arbitration is but a tool that can be employed to enforce

⁴⁷ Francesco Francioni, “*The private sector and the challenge of implementation*”, in *Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards*, 24, Pierre-Marie Dupuy and Jorge E. Viñuales eds., 2013, at pp. 30-31.

⁴⁸ See, Pierre-Marie Dupuy, “*International environmental law: looking at the past to shape the future*”, in *Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards* 9, Pierre-Marie Dupuy and Jorge E. Viñuales eds., 2013, at p. 21 (Dupuy gives the example of when the private investors are put in charge of managing water resources or waste disposal).

⁴⁹ See, Francesco Francioni, “*The private sector and the challenge of implementation*”, in *Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards*, 24, Pierre-Marie Dupuy and Jorge E. Viñuales eds., 2013, at p. 25.

⁵⁰ Philippe Sands, “*Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law*”, 37 *Environmental Policy and Law*, 2007, at p. 67.

⁵¹ Philippe Sands, “*Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law*”, 37 *Environmental Policy and Law*, 2007, at p. 67.

⁵² See generally, Gordon, K. and J. Pohl (2011), “*Environmental Concerns in International Investment Agreements: A Survey*”, OECD Working Papers on International Investment, 2011/01, OECD Publishing, <<http://dx.doi.org/10.1787/5kg9mq7sctjh-en>>.

⁵³ Christina L. Beharry and Melinda E. Kuritzky, “*Going Green: Managing the Environment Through International Investment Arbitration*”, *American University International Law Review* 30 no. 3 (2015): 383-429, at p. 403.

⁵⁴ Jorge E. Viñuales, “*Environmental Regulation of FDI Schemes*”, in *Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards*, 275, Pierre-Marie Dupuy and Jorge E. Viñuales eds., 2013 at pp. 275-76 (adding that these measures are in some cases “induced” (required or authorised) by environmental standards”).

substantive domestic and international policy goals. Misgivings about international arbitration's ability to protect the environment profoundly misunderstands the nature of arbitration. Moreover, there are understandable differences of view between developed and developing countries as to what the priorities should be, and the "*international community does not yet have a common appreciation of where environmental objectives stand in the general legal and political hierarchy.*"⁵⁵

Given the fragmentation of international law and the partitioning of legal orders, it is unsurprising that arbitration has emerged as the preferred dispute resolution alternative to address environmental disputes.

B. The Accommodating and Flexible Nature of Arbitration

Given that protecting the environment requires a coordinated effort by the international community and that environmental harm is not limited to territorial boundaries, State courts can hardly be a viable forum for resolving disputes involving parties from multiple jurisdictions. "*The deficiencies of national and international adjudication of environmental disputes lend support to the proposition that judicial protection of the environment, especially of environmental rights, must be strengthened at the international level.*"⁵⁶ Echoing the IBA Report's recommendation that environmental related disputes be administered pursuant to the PCA Optional Rules, it is clear that arbitration offers important advantages.

1. A venue to claim against States

Arbitration offers investors the chance to file claims directly against States. Unlike the ICJ, which is only accessible to States, the ICSID Convention, UNCITRAL Arbitration Rules, and the PCA Optional Rules, allow private parties, subject to certain conditions, to submit environmental related disputes to arbitration. Arbitration thus gives individuals and non-governmental organisations the opportunity to decide on questions of interpretation, implementation and enforcement of multilateral environmental agreements.⁵⁷

⁵⁵ Philippe Sands, "*Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law*", 37 *Environmental Policy and Law*, 2007, at p. 67.

⁵⁶ Eckard Rehbinder and Demetrio Loperena, "*Legal Protection of Environmental Rights: The Role and Experience of the International Court of Environmental Arbitration and Conciliation*", 31 *Environmental Policy and Law*, 2001, at p. 285.

⁵⁷ Eckard Rehbinder and Demetrio Loperena, "*Legal Protection of Environmental Rights: The Role and Experience of the International Court of Environmental Arbitration and Conciliation*", 31 *Environmental Policy and Law*, 2001 at p. 286.

Environment related arbitrations are diverse: claimants can institute investment treaty arbitrations to enforce existing climate-related laws which bind States or even when a climate change law is in breach of BIT protections that the investor is entitled to.⁵⁸ Similarly, parties can initiate commercial arbitrations pursuant to contracts entered into with the State. Parties also have the flexibility of choosing between institutional and *ad hoc* arbitration.

2. *Nominating experienced and specialised arbitrators to adjudicate the dispute*

Arbitration enables the parties to the dispute to nominate individuals experienced in environmental law and policy as arbitrators. Parties thereby have the option of selecting arbitrators who would have an understanding of the issues and technicalities specific to their dispute. It has been opined that institutionalised arbitration with a limited list of arbitrators that are conversant with the evolution of environmental law and policy is an efficient way of guaranteeing the structured development of environment law.⁵⁹

3. *The ability to choose flexible procedural rules*

Arbitration allows the parties to choose flexible rules that would grant them the possibility of consolidating proceedings or joining parties to the arbitration. For example, the new 2017 Arbitration Rules of the SCC as well as the 2012 Rules of Arbitration of the ICC contain provisions related to the consolidation of arbitrations, joinder of additional parties and affords parties the option of making claims arising out of multiple contracts in a single arbitration.

The PCA Optional Rules have also set a specific framework with the aim of balancing confidentiality and transparency.⁶⁰ As will be seen below, lack of transparency has been a contentious issue in disputes involving environmental harm, and thus public interest.⁶¹ The 2013 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration may also prove useful in disputes involving environmental concerns. Indeed, this set of rules was

⁵⁸ Valentina Vadi, “*Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals?*”, 48 *Vanderbilt Journal of Transnational Law*, 2015, at p. 1291.

⁵⁹ Eckard Reh binder and Demetrio Loperena, “*Legal Protection of Environmental Rights: The Role and Experience of the International Court of Environmental Arbitration and Conciliation*”, 31 *Environmental Policy and Law*, 2001, at p 286.

⁶⁰ PCA optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, 2001, Article 15(4) to (6).

⁶¹ Ramani Garimella, “*Environmental Dispute Resolution, ADR Methods and the PCA Arbitration Rules*”, *ILI Law Review*, Summer 2016, at p. 216.

designed for arbitrations between a State party and private persons, which is often the case of environmental disputes.⁶²

III. ADAPTING ARBITRATION TO ADDRESS ENVIRONMENTAL CONCERNS

Scholars and practitioners alike have proposed several avenues to adapt the framework of both commercial and investment arbitration to better take into account environmental concerns. A first set of proposals focuses on changing certain procedural aspects of commercial and investment arbitration in order to ensure that environmental concerns can be understood and taken into account during arbitral proceedings (**A**). A second set of proposals is concerned with the substantive content of investment arbitration instruments: BITs, FTAs or other types of International Investment Agreements (*I*IAs) should be redrafted to allow arbitral tribunals to counterbalance the rights of the investor with the right of the host State to bring in regulations aimed at safeguarding the environment (**B**).

A. Improving procedural aspects of arbitration

Several procedural improvements to arbitration have been put forward, which could assist in better taking into account environmental concerns in both commercial and investment arbitration. Commercial arbitration could be adapted to address environmental disputes (1). Admitting counterclaims by the respondent State could redress the current asymmetry in investment arbitration, which favours the foreign investor (2). Allowing third parties to participate to arbitral proceedings as *amici curiae* would also assist commercial and investment arbitration tribunals in better analysing complex cases involving environmental protection (3).

1. Adapting commercial arbitration to address environmental disputes

Professor Gary Born has put forward that States could adopt bilateral arbitration treaties (**BATs**) providing for arbitration as a default mechanism for the resolution of defined

⁶² NGOs dedicated to environmental law, such as the Center for International Environmental Law and the International Institute for Sustainable Development, were influential in the preliminary works on the 2013 UNCITRAL Rules on Transparency. See Jean Kalicki and Anna Joubin-Bret, “*UN Commission on International Trade Law and Multilateral Rule-Making – Consensus, Sovereignty and the Role of International Organizations in the Preparation of the UNCITRAL Rules on Transparency*” (2014) 11(1) Transnational Dispute Management, at p. 5.

commercial disputes between their respective nationals.⁶³ He suggests that BATs could apply to arbitration proceedings, not only between nationals of contracting States, but also to disputes between investors and government agencies, when the subject matter of the dispute would not qualify as an “investment”, as defined by the States’ BIT,⁶⁴ or any other relevant IIA. While the arbitral subject matter defined in Professor Born’s proposed model BAT⁶⁵ does not include disputes relating to the environment, this framework could prove effective in adapting commercial arbitration to suit the needs of environmental disputes.

As discussed above, commercial arbitration is often used to resolve environmental disputes. However, as commercial arbitration proceedings are not always public, critics fear that the arbitration of issues where public welfare is at stake, such as environmental issues, “*in closed, secret and private proceedings subject to no publication requirement is a significant departure from the past where they would be resolved in public, judicial forums.*”⁶⁶ As has been noted, “*the trouble with civil arbitrations [to resolve such environmental disputes] is that public welfare issues can in effect be decided secretly between corporations and high-powered plaintiffs’ attorneys who represent unsophisticated victims.*”⁶⁷

BATs would be an efficient solution to streamline the use of commercial arbitration to settle environmental disputes in a transparent manner. States could insert transparency provisions in BATs for arbitrations relating to issues of public welfare, such as the environment.⁶⁸ Instruments, such as the 2013 UNCITRAL Rules on Transparency in Treaty-based Investor-

⁶³ Gary Born, “*BITs, BATs and BUTs, Reflexions on the International Dispute Resolution*”, 14 *Young Arbitration Review* 1, 6-13, 2014.

⁶⁴ Gary Born, “*BITs, BATs and BUTs, Reflexions on the International Dispute Resolution*”, 14 *Young Arbitration Review* 1, 6-13, 2014.

⁶⁵ The Model BAT is accessible at: <https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/News/Documents/Draft-Model-BAT.pdf>.

⁶⁶ Claire Cutler, “*The Privatization of Global Governance and modern Law Merchant*” 140, *Common Goods: Reinventing European Integration Governance*, in Adrienne Héritier (ed), Rowman & Littlefield, 2002, quoted in Fan Kun, “*Chapter 18 : Expansion of Arbitral Subject Matter : New Topics and New Areas of Law*”, in *The Evolution and Future of International Arbitration*, Stavros L. Brekoulakis, Julian D. Lew, et al. (eds.), International Arbitration Law Library, Volume 37, at p. 11.

⁶⁷ Fan Kun, “*Chapter 18 : Expansion of Arbitral Subject Matter : New Topics and New Areas of Law*”, in *The Evolution and Future of International Arbitration*, Stavros L. Brekoulakis, Julian D. Lew, et al. (eds.), International Arbitration Law Library, Volume 37, at p. 11.

⁶⁸ Fan Kun, “*Chapter 18 : Expansion of Arbitral Subject Matter : New Topics and New Areas of Law*”, in *The Evolution and Future of International Arbitration*, Stavros L. Brekoulakis, Julian D. Lew, et al. (eds.), International Arbitration Law Library, Volume 37, at p. 12.

State Arbitration, may be adopted to ensure openness in proceedings where matters of public interest, such as the environment, arise.⁶⁹

Increased transparency is already an emerging trend in investment arbitrations. For example, the ICSID revised its arbitration rules in 2006, instating a rebuttable presumption that the proceedings will be transparent.⁷⁰ Hence, the arbitral tribunal is authorised to make the hearings public.⁷¹ Additionally, although the publication of the award remains subordinated to the consent of both parties, the ICSID Secretariat is under an obligation to, at the very least, publish the legal reasoning of the arbitral award.⁷² Other institutions have also adapted to the call for transparency where matters of public interest are involved.⁷³

Similarly, the recent re-emergence of State-to-State arbitration under IIAs⁷⁴ has led to the same issue to arise in this specific context. As is the trend in investor-State arbitration, the drafters of treaties providing for State-to-State arbitration now attempt to include transparency in the proceedings in order to satisfy the legitimate public interest of civil society. For example, the EU-Canada Comprehensive Economic and Trade Agreement (*CETA*), recently concluded in 2016, provides for submissions in the context of State-to-State arbitration to be publicly available and for hearings to be open to the public. The CETA provides for an exception to these rules regarding confidential business information.⁷⁵

BATs could also suggest the application of the PCA Optional Rules as the applicable Rules, unless parties wish to opt out of using these Rules. BATs could thus make commercial arbitration available for the settlement of environmental disputes in an effective and transparent manner.

⁶⁹ Fan Kun, “Chapter 18 : Expansion of Arbitral Subject Matter : New Topics and New Areas of Law”, in The Evolution and Future of International Arbitration, Stavros L. Brekoulakis, Julian D. Lew, et al. (eds.), *International Arbitration Law Library*, Volume 37, at p. 314.

⁷⁰ William Kenny, “Transparency in Investor State Arbitration”, *Journal of International Arbitration*, Volume 33, Issue 5, 2016, pp. 471-500, at p. 477.

⁷¹ ICSID Arbitration Rules, Article 32.

⁷² ICSID Arbitration Rules, Article 48(4).

⁷³ See, in particular, the PCA optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, 2001, Article 15(4) to (6); The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2013, Articles 1 to 6.

⁷⁴ Anthea Roberts, “State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority”, *Harvard International Law Journal*, Volume 55, Number 1, Winter 2014, at pp. 2-3.

⁷⁵ EU-Canada Comprehensive Trade Agreement, 2016, Annex 29A, paras. 38-39.

2. *Counterclaims as a means for the State to defend public policy*

Admitting counterclaims allows the respondent State to seek to engage the foreign investor's own responsibility in an investment arbitration. This procedural option presents several advantages for host States seeking to have their commitment to protect the environment taken into account in the arbitral tribunal's analysis of the case.

First and foremost, the ability for the respondent to bring counterclaims would enhance the legitimacy of investor-State arbitration. Currently, most investment agreements impose obligations on the contracting States, while granting rights and remedies to foreign investors. Admitting the ability for host States to bring counterclaims would redress this asymmetry by providing the respondent with active means to defend its right to regulations taken in the public interest.⁷⁶ It can also be a way to address regulatory concerns, social impact and human rights effects, more closely linked to the local context, and bring those elements to the attention of the tribunal.

In the context of environmental protection, counterclaims allow the arbitral tribunal to hold a foreign investor liable for the environmental damage it may have caused. At the very least, a successful counterclaim could lead the arbitral tribunal to mitigate the compensation awarded to the foreign investor in proportion to any damage caused.⁷⁷

However, current IIAs are usually silent on the issue. Any attempt by the respondent State to bring a counterclaim imposes on the arbitral tribunal to enter into lengthy considerations on the consent of the contracting parties and the foreign investor to this possibility. Therefore, an explicit reference to the ability of respondent States to bring counterclaims closely connected to the dispute in future investment agreements guarantee that public authorities can ensure foreign investors are held accountable for the environmental damage they cause.⁷⁸ This evolution of the regulatory tools and BITs is closely linked to the modern approach of investment. Analysed in the past as a way to emerge structured and economically balanced countries, these texts now need to reflect the potential impact of human private activities on the environment.

⁷⁶ Andrea K. Bjorklund, "*The Role of Counterclaims in Rebalancing Investment Law*", Lewis & Clark Law Review, Volume 7, No. 2, 461, 2013 at p. 476.

⁷⁷ Andrea K. Bjorklund, "*The Role of Counterclaims in Rebalancing Investment Law*", Lewis & Clark Law Review, Volume 7, No. 2, 461, 2013 at pp. 475-477.

⁷⁸ Andrea K. Bjorklund, "*The Role of Counterclaims in Rebalancing Investment Law*", Lewis & Clark Law Review, Volume 7, No. 2, 461, 2013, at p. 480.

In the context of commercial arbitration, the fact that parties, including States, have the possibility of making counter-claims is another reason why commercial arbitration is suitable for settling environmental disputes.

3. *Assisting the arbitral tribunal through amicus curiae participation*

Arbitration is founded on the consent of the parties to the dispute. This entails privity of the proceedings, i.e. in principle third parties to the dispute cannot participate in the process. As previously discussed, arbitral proceedings are often confidential. Privity and, sometimes, confidentiality are also characteristics of investor-State arbitration. Where environmental concerns arise in particular, these characteristics are problematic, as there is a public nature to the dispute. Therefore, public interest and civil society are likely to be impacted by the arbitral award. Yet third parties were originally deprived of any access to the arbitral proceedings.⁷⁹

Some commercial arbitration rules explicitly allow the participation of *amicus curiae*, if the parties so agree. The Procedural Rules of the Court of Arbitration of Sport state that, “[a]fter consideration of submissions by all parties concerned, the [tribunal] may allow the filing of *amicus curiae* briefs, on such terms and conditions as it may fix.”⁸⁰ Even if other arbitral rules do not refer to *amicus curiae* participations explicitly, they grant an arbitral tribunal wide powers to adopt the procedural measures it considers appropriate, provided it is not contrary to the agreement of the parties.⁸¹ This could be seen as including *amicus curiae* participations, subject to the agreement of the parties to the dispute. Thus, while the participation of *amicus curiae* is more predominant in investment arbitration, parties to commercial arbitrations could agree to *amicus curiae* submissions, in arbitrations which arise under a national statute with a public purpose or which involve questions related to public interest.⁸²

As for investment arbitration, the public nature of investment disputes has led third parties such as NGOs to request the right to participate in arbitral proceedings in the capacity of

⁷⁹ Tomoko Ishikawa, “*Third Party Participation in Investment Treaty Arbitration*”, *The International and Comparative Law Quarterly*, Volume 59, p. 373, 2010, at pp. 375-376.

⁸⁰ See, Procedural Rules, Court of Arbitration for Sport, R41.4.

⁸¹ See for example, the ICC Arbitration Rules, 2012, Article 22(2); The LCIA Arbitration Rules, 2014, Article 14.2 and Article 14.4.iii; the SCC Arbitration Rules, 2017, Article 23(1).

⁸² David D. Caron, Lee M. Caplan, “*The UNCITRAL Arbitration Rules: A Commentary*”, Oxford University Press, 2013, at p. 41.

“friends of the court”, or *amicus curiae*. Recent trends have shown arbitral tribunals have been open, to a certain extent, to such participation.⁸³

For example, in *Methanex Corp. v United States*, a dispute arising under NAFTA, two sustainable development and environmental protection NGOs were allowed to present written submissions to the arbitral tribunal. The latter placed heavy emphasis on public interest in the outcome of the dispute in its decision. However, access to oral hearings and case materials was denied, as the parties to the dispute had entered into an express agreement on confidentiality.⁸⁴ During the proceedings, in 2003, the member States of NAFTA issued a statement recognising explicitly the possibility for arbitral tribunals to accept written submissions from *amici curiae*.⁸⁵

In the context of ICSID, *amicus curiae* submissions were accepted for the first time in *Suez/Vivendi v Argentina*. However, the arbitral tribunal refused to grant access to oral hearings absent the consent of both parties,⁸⁶ and eventually did not decide on the issue of granting access to case materials.⁸⁷ Except for rare exceptions, arbitral tribunals have usually followed this trend, by allowing third parties to make *amicus curiae* submissions, but refusing to grant access to oral hearings or case materials due to confidentiality concerns.⁸⁸ The ICSID Arbitration Rules were subsequently amended by the contracting States in 2006, and now expressly recognise the right of the arbitral tribunal to accept written submissions of *amici curiae*,⁸⁹ as well as access to oral hearings except where one of the parties to the dispute objects.⁹⁰ A possible step forward can be to allow *amicus curiae* to give general oral comments to the tribunal, with no access to cross-examination of witnesses and experts or evidence (or limited access if so agreed by the parties). This solution could be drawn from the status of observers allowed by the United Nations in the sessions and the work of the General Assembly.

⁸³ Tomoko Ishikawa, “*Third Party Participation in Investment Treaty Arbitration*”, *The International and Comparative Law Quarterly*, Volume 59, p. 373, 2010, at p. 377.

⁸⁴ *Methanex Corporation v United States of America*, NAFTA, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, 15 January 2001, paras. 41-46, 49.

⁸⁵ FTC, Statement of the Free Trade Commission on non-disputing party participation, 2003.

⁸⁶ As required under the ICSID Arbitration Rules, Rule 32(2).

⁸⁷ *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v The Argentine Republic*, ICSID Case No ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005; Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006.

⁸⁸ Tomoko Ishikawa, “*Third Party Participation in Investment Treaty Arbitration*”, *The International and Comparative Law Quarterly*, Volume 59, p. 373, 2010, at p. 384.

⁸⁹ ICSID Arbitration Rules, Rule 37.

⁹⁰ ICSID Arbitration Rules, Rule 32.

The recent trend in arbitral tribunals warming to third parties intervening as *amici curiae* is a welcome one. First, the intervention of NGOs representing the view of civil society, or actively promoting safeguarding the environment, enhances the waning legitimacy of investment arbitration by ensuring some form of transparency for the public.⁹¹

Moreover, the intervention of *amici curiae* in cases in which complicated facts involving environmental concerns may help to inform the arbitral tribunal: “[w]hen a tribunal is required to assess the appropriateness of environmental measures as an application of such environmental policy, the comprehensive analysis made by expert NGOs (eg international and local NGOs may combine their expertise and knowledge and make a joint submission) will be particularly valuable.”⁹²

However, this trend is only recent, and could be reversed. Indeed, it remains at the arbitral tribunals’ discretion to decide whether or not to allow the participation of third parties in their proceedings, and to what extent. It also remains within the arbitral tribunals’ discretion to decide what weight to give to the evidence submitted by third parties. Nothing prevents an arbitral tribunal from ignoring their findings altogether.⁹³ Nonetheless, this discretion can also be applied to any element of proof submitted by the parties and therefore this equal power of the arbitrators generates a “level playing field” for the entities involved in the arbitral procedure.

Future arbitral tribunals may show, once again, hostility to third parties should they give priority to issues of privity, confidentiality, or the potential increase in costs and delays for the parties to the dispute should *amicus curiae* participation be allowed.⁹⁴ This precarious situation of third parties to arbitrations has been recently illustrated in *von Pezold v Zimbabwe*.⁹⁵ In that case, the arbitral tribunal rejected outright the participation of a third party on two grounds. First, it found that the prospective *amicus curiae* had failed to establish that their participation to the proceedings would assist the arbitral tribunal on legal or factual issues, or their participation flowed from any significant interest in the proceedings. Second,

⁹¹ Tomoko Ishikawa, “*Third Party Participation in Investment Treaty Arbitration*”, *The International and Comparative Law Quarterly*, Volume 59, p. 373, 2010, at pp. 402-403.

⁹² Tomoko Ishikawa, “*Third Party Participation in Investment Treaty Arbitration*”, *The International and Comparative Law Quarterly*, Volume 59, p. 373, 2010, at p. 403.

⁹³ Tomoko Ishikawa, “*Third Party Participation in Investment Treaty Arbitration*”, *The International and Comparative Law Quarterly*, Volume 59, p. 373, 2010, at p. 411.

⁹⁴ Lucas Bastin, “*Amici Curiae in Investor-State Arbitration: Eight Recent Trends*” *Arbitration International*, Volume 30, No. 1, p. 128, 2014, at pp. 140-142.

⁹⁵ *Bernard von Pezold and others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Procedural Order No 2, 26 June 2012.

the arbitral tribunal found that the prospective *amicus curiae* did not demonstrate that they were independent from the respondent State.⁹⁶ The decision in *von Pezold v Zimbabwe* remains an isolated decision; the tribunal did not provide guidance or elements on the basis of which it could determine whether a third party is or is not “independent.”⁹⁷ Should future arbitral tribunals impose such a threshold for allowing the participation of third parties to their proceedings, this would limit the input of *amici curiae* in proceedings involving environmental concerns. However, the factual context of the case explains the arbitral tribunal’s decision to exclude the *amicus curiae*. Independence of *amici curiae* from the parties to the dispute does appear as an indispensable condition to legitimise their participation.

B. Redrafting the substantive content of investment arbitration instruments

The IIAs currently in force generally present a shortfall in environmental language, that is language taking into account environmental concerns. In 2011, a survey conducted in OECD countries found that “*the prevalence of environmental language in [IIAs] is low, but growing*”, identifying that only 8.2% of the sample of 1623 IIAs contained environmental language. The study, however, underlined that 89% of newly concluded treaties referred to environmental concerns, highlighting that climate change had forced States to consider the balance between their commitments to foreign investors and their duty to protect the environment through public policy.⁹⁸

This growing practice seen in newly drafted investment treaties has taken several forms: an emphasis on environmental concerns in preambles to guide arbitral tribunals’ interpretation of substantive protections (1), ensuring the contracting States’ right to regulate environmental matters through exception clauses (2), and the introduction of exemptions to specific substantive protections granted to foreign investors and investments (3).

⁹⁶ Lucas Bastin, “*Amici Curiae in Investor-State Arbitration: Eight Recent Trends*” *Arbitration International*, Volume 30, No. 1, p. 128, 2014, at pp. 138-140.

⁹⁷ Lucas Bastin, “*Amici Curiae in Investor-State Arbitration: Eight Recent Trends*” *Arbitration International*, Volume 30, No. 1, p. 128, 2014, at pp. 138-140.

⁹⁸ Kathryn Gordon and Joachim Pohl, “*Environmental Concerns in International Investment Agreements: A Survey*”, OECD Working Papers on International Investment 2011/01, OECD Publishing, 2011, at p. 8.

1. *Environmental concerns in preambular dispositions*

The primary and most frequently used method by which contracting States to investment treaties introduce environmental language is through preambular provisions.⁹⁹ For example, the United States Model BIT of 2012 reads: “*Desiring to achieve these objectives in a manner consistent with the protection of [...] the environment [...]*.”¹⁰⁰

Other States have implemented similar environmental language in their most recent BITs. This can for example be found in the preamble of the Australia-Chile FTA of 2008, where the contracting States undertook to: “*Implement this Agreement in a manner consistent with sustainable development and environmental protection and conservation.*”¹⁰¹

Introduction of such environmental language in preambles to IIAs has the useful effect of providing guidance to arbitral tribunals when interpreting the treaty’s provisions. Perhaps, more importantly, it prevents arbitral tribunals from concluding that the absence of such environmental language is an indication that the contracting States did not intend environmental concerns to impact interpretation of the investment protections.

However, these preambular dispositions usually present a common shortfall. They do not set any hierarchy between environmental concerns and investment protections. Therefore, they leave the matter of interpretation strictly within the arbitral tribunal’s discretion.¹⁰² That said, arbitrators recognise that these preambular dispositions are guidelines to analyse and interpret the treaty. Therefore, their capacity to impact the international regulatory framework should not be underestimated.

2. *Protecting the right to regulate through general exceptions clauses*

A more potent manner of ensuring investment protections do not prevent contracting States from taking measures to safeguard the environment may be found in so-called “*right to*

⁹⁹ Kathryn Gordon and Joachim Pohl, “*Environmental Concerns in International Investment Agreements: A Survey*”, OECD Working Papers on International Investment 2011/01, OECD Publishing, 2011, pp. 11-14.

¹⁰⁰ United States Model BIT 2012; this language was used in the United States-Uruguay BIT 2005 and the United States-Rwanda BIT 2008.

¹⁰¹ Australia-Chile FTA 2008. For further examples, see also the Netherlands-Surinam BIT 2005 and the Germany-Trinidad and Tobago BIT 2006.

¹⁰² Kathryn Gordon and Joachim Pohl, “*Environmental Concerns in International Investment Agreements: A Survey*”, OECD Working Papers on International Investment 2011/01, OECD Publishing, 2011, at p. 14; Christina L. Beharry and Melinda E. Kuritzky, “*Going Green: Managing the Environment Through International Investment Arbitration*,” American University International Law Review 30 no. 3 (2015): 383-429, at p. 406.

regulate clauses”. The latter consist in exception clauses that explicitly protect the State’s ability to act in environmental matters. They maintain policy space, a margin of discretion for State authorities to act to the detriment of foreign investors without breaching the substantive protections of the investment treaty.¹⁰³

A recent example is contained in Article 12(3) of the United States Model BIT of 2012: “*The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with paragraph 2 where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.*”¹⁰⁴

Contrary to preambular dispositions, which only orientate the arbitral tribunal’s interpretation of treaty provisions, such exception clauses have the benefit of carving out regulatory flexibility explicitly for the contracting States. They may not be lightly ignored by tribunals where the dispute involves environmental concerns.¹⁰⁵ Finally, including such an exception clause in future IIAs could ensure States are not affected by the “regulatory chill effect” on environmental protection.¹⁰⁶

3. Introduction of environmental exemptions to specific substantive investment protections

In conjunction with introducing environmental language in preambular dispositions and general exception clauses, contracting States could further ensure that their investment treaty

¹⁰³ Kathryn Gordon and Joachim Pohl, “*Environmental Concerns in International Investment Agreements: A Survey*”, OECD Working Papers on International Investment 2011/01, OECD Publishing, 2011, at pp. 14-15; Christina L. Beharry and Melinda E. Kuritzky, “*Going Green: Managing the Environment Through International Investment Arbitration*,” American University International Law Review 30 no. 3 (2015): 383-429, at p. 406.

¹⁰⁴ United States Model BIT 2012, Article 12(3).

¹⁰⁵ Christina L. Beharry and Melinda E. Kuritzky, “*Going Green: Managing the Environment Through International Investment Arbitration*,” American University International Law Review 30 no. 3 (2015): 383-429, at p. 407.

¹⁰⁶ The regulatory chill effect refers to the phenomenon by which host States prioritise on avoiding disputes with foreign investors over efficiently serving the public interest when they draft new legislation. See K. Tienhaara, “*Regulatory chill and the threat of arbitration: A view from political science*”, in C. Brown and K. Miles (eds), *Evolution in Investment Treaty Law and Arbitration*, CUP, 2011, pp.606-62, at p. 607.

is not relied upon to prevent them from taking legitimate measures of environmental protection by introducing carve-outs to specific substantive protections.

Indirect expropriation, one of the most contentious investment protections, could provide foreign investors with a means to attack newly introduced environmental regulations. By adding a carve-out stating that measures designed to protect the environment may not be construed as indirect expropriation, contracting States will ensure they keep sufficient flexibility to address environmental concerns through legislative reforms.¹⁰⁷ An example may be found in the Belgium/Luxembourg-Columbia BIT: “[E]xcept in rare circumstances, such as 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, non-discriminatory measures of a Party that are designed and applied for public purposes or with objectives such as [...] environment protection, do not constitute indirect expropriation.”¹⁰⁸

As this provision exemplifies, contracting States will avoid the impression of granting themselves blanket immunity by alleging a measure is taken for environmental protection by circumventing the scope of the exemption to non-discriminatory dispositions taken in good faith.¹⁰⁹

CONCLUSION

While arbitration grants non-State actors the opportunity to participate in and decide upon environmental issues, they are nonetheless bound to do so pursuant to agreements that are negotiated by States. The language used in investment treaties often does not provide arbitral tribunals with the necessary guidance to decide on environmental issues.¹¹⁰ Ambiguous treaty language is of little help to tribunals that have to juggle public interests and investor protections while deciding environmental disputes. Tribunals are thereby forced to decide on a case-by-case basis. That said, recent case law, newly negotiated treaties, and a growing academic work have generated ideas and arguments helpful in interpreting existing treaties in a manner suitable to environmental concerns. In the future, States should factor in environmental concerns in their treaty negotiations,¹¹¹ in order to ensure that international

¹⁰⁷ Kathryn Gordon and Joachim Pohl, “*Environmental Concerns in International Investment Agreements: A Survey*”, OECD Working Papers on International Investment 2011/01, OECD Publishing, 2011, at p. 20.

¹⁰⁸ Belgium/Luxembourg-Columbia BIT 2009, Article IX(3)(c).

¹⁰⁹ Christina L. Beharry and Melinda E. Kuritzky, “*Going Green: Managing the Environment Through International Investment Arbitration*,” American University International Law Review 30 no. 3 (2015): 383-429, at p. 406.

arbitration is substantially and procedurally more effective in addressing environmental concerns. States that are renegotiating their investment agreements (such as, India, Brazil, Canada and the EU), would do well to put environmental concerns on the table, so as to effectively harness the participation of non-State actors in the adjudication of environmental disputes and the development of regulatory policy.

Commercial arbitration, for its part, must no longer be used as a behind-the-scenes method of dealing with environmental disputes. States, private parties and businesses must wake up to the dangers of shrouding environmental disputes in secrecy. The alarming effects of global warming no longer afford us the luxury of making decisions relating to the environment behind closed doors.

The key to using arbitration, whether investor-State or commercial, as a means to promote environmental concerns in dispute resolution, and shape environmental policy, lies in streamlining a number of its substantive and procedural aspects. In this context, there is little doubt that the UNCITRAL, as an institution dedicated to open debate on, and to harmonise international policies, will play a crucial role for the future arbitration of environment-related disputes. UNCITRAL provides an indispensable forum for States to address their concerns, and balance private and public interests in the future international rules they will devise. This cooperation between States will prove invaluable to adjudicate environmental disputes in a manner compatible with sustainable development.

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¹¹⁰ Christina L. Beharry and Melinda E. Kuritzky, “*Going Green: Managing the Environment Through International Investment Arbitration*,” *American University International Law Review* 30 no. 3 (2015): 383-429, at p. 429.

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