THE ROLE OF INTERNATIONAL INVESTMENT LAW IN FOSTERING SUSTAINABLE INVESTMENT IN THE MARINE ENVIRONMENT: AN ANALYSIS ON THE MOST RECENT TRENDS IN TREATY DRAFTING AND INVESTOR-STATE DISPUTE SETTLEMENT

***Ngan K. Vu*[1]**

Abstract

The inclusion of sustainable development provisions in international investment agreements (IIAs) has proliferated. Compared with the initial purpose of investment protection, the creation of IIAs has been moving towards balancing the interest of investors and the right of states to regulate for public purposes. Of these, the environment, including marine environment, has been indicated among the public interests that states aim to protect. Yet, however, the extent to which IIA provisions could foster responsible investment remains unclear, given the different approaches reflected in IIAs and the limited reference to domestic law and regulations in this area. At the same time, even if sustainable development provisions could provide the legal basis for the tribunal to consider environmental protection when settling investor-state disputes (ISDS), there has not been a uniform approach to tackle these provisions or the concept of public interest. Furthermore, given the fact that the marine environment is increasingly affected by climate change whilst investment could contribute to the mitigation and adaptation of climate change adverse effects, there is a need to promote sustainable investment in this field. On such a basis, this paper aims to conduct an analysis on the most recent trends in IIA treaty drafting as well as investor-state dispute settlement to assess the role of international investment law in fostering sustainable investment in the marine environment, thereby providing recommendations to further promote such role in future IIAs and ISDS cases.

Keywords: *Sustainable investment, marine environment, treaty drafting, investor-state dispute settlement*

.

1. WHEN BITS ARE NOT JUST ABOUT INVESTMENT PROTECTION

1.1. Trends of IIAs

There are two types of IIA, including plain investment agreements, regularly in the form of bilateral investment treaties (BITs) and other international treaties inclusive of clauses related to investment (TIPs). According to UNCTAD, until 2023, there are a total of 2584 IIAs in force, of which BITs account for a dominant number with 2219 treaties.

The first IIAs in the world in the form of BITs were recognized in 1959[2]. Then, the world witnessed a continuing increase in the number of signed IIAs, until reaching the peak at 1285 treaties in the period of 1990-1999 (Fig.1). However, in recent years, the quantity of signed IIAs suffered a noticeable downswing to 539 treaties recorded in 2022 (Fig.1). The World Investment Report 2023,

[1] Foreign Trade University, Vietnam.

[2] Sauvant & Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows*, Oxford University Press, Oxford and New York, 2009.

executed by UNCTAD, also identified the dominance of treaty terminations over new IIAs for the third consecutive year. The dominant explanation for the aforementioned trend is the fact that a growing number of nations are reviewing their existing international investment agreements in a critical manner, motivated in part by the fact that the increasingly contentious practice of ISDS is driving the current change: the practice enables foreign investors to file lawsuits in international tribunals against their host governments and claim compensation when they reckon the host has violated the agreements of the treaty, turning governments against them[3].

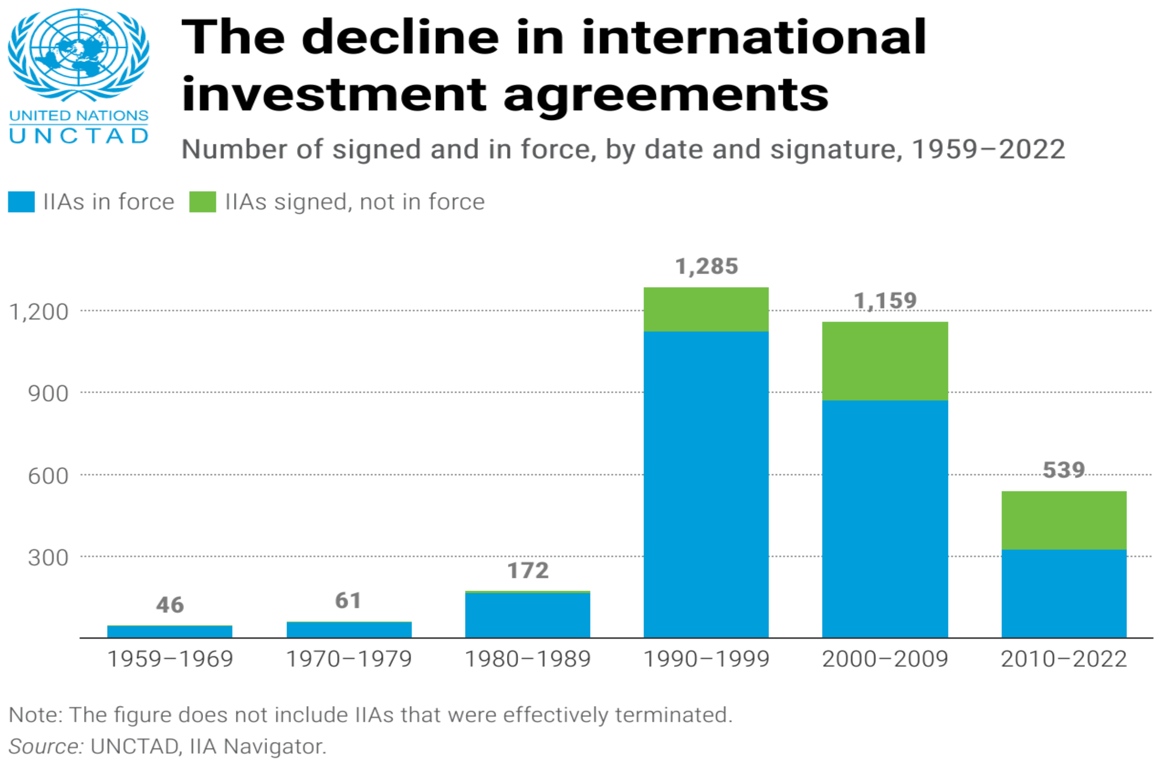

Fig 1. Number of signed IIAs and inforce, by date and signature, 1959-2022[4]

Work to reform the IIA regime has been continuing in 2023 with the creation of new types of investment-related agreements, the termination of existing bilateral investment treaties, and ongoing multilateral negotiations on reforming investor-state dispute settlement **("ISDS")** mechanisms.

1.2. Serious damages caused by investment activities

Since the 1990s, environmental degradation has been acknowledged as a serious threat globally, mainly caused by increasing economic activity, including foreign direct investment **("FDI")**[5]. Notwithstanding a variety of benefits brought by FDI to host states, it can also generate several negative externalities, especially environmental pollution and natural resource exploitation[6], with devastating effects on the host states' environment and even global climate change. In addition, it

---

[3] Waibel, 2010; Haftel & Thompson, 2018; Thompson et al., 2019.

[4] UCTAD, World Investment Report 2023, Available online: https://unctad.org/conference/ntfc-global-forum-2022/publication/world-investment-report-2023

[5] Nick Mabey and Richard McNally, *Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development*, WWF-UK, UK, 1998, page 3.

[6] Andrew Jorgenson, "The Sociology of Ecologically Unequal Exchange, Foreign Investment Dependence and Environmental Load Displacement: Summary of the Literature and Implications for Sustainability", *Journal of Political Ecology*, 2016, Vol. 32, page 334–341.

can be obviously inferred that investment inflows nowadays have been shifting to developing nations with lax regulations on environmental protection. The hidden agenda of the aforementioned tendency lies on the initial intention of a group of foreign investors who seek to avoid the cost of observing environmentally friendly standards.

To demonstrate the former affirmation, three particular cases, including Union Carbide vs. India, Gabriel Resources vs. Romania, and Biwater vs. Tanzania, shall be provided as solid evidence of severe damages caused by investment activities to both the environment and the inhabitants of host countries.

Union Carbide vs. India: In 1984, the methyl isocyanate (MIC) gas leak from the factory, owned by the U.S. multinational Union Carbide Corporation, located in Bhopal, India, was the worst industrial catastrophe in history. At least 40 tonnes of toxic gas were released from the factory, immediately killing at least 3,800 people, with lasting consequences in the subsequent two decades, including significant morbidity and premature deaths for about 15,000 to 20,000 people, as reported.

Gabriel Resources vs. Romania: This is an outstanding dispute between a foreign investor and a state under the ISDS mechanism regarding an open-pit gold/silver mine in Rosia Montana, Romania. This project encountered strong protests from non-government organizations and local opposition due to its severe potential impact on the environment and residential value. If approved, it was estimated that tens of thousands of tonnes of cyanide, an extremely toxic chemical, would be discharged annually into the environment. Moreover, nearly 1,000 houses and churches would be destroyed, including many national treasures, and many residents would lose their homes.

Biwater vs. Tanzania: The World Bank financed Tanzania for a project to renovate the water infrastructure in Dar es Salaam, provided that Tanzania shall nominate a private company to operate this project. Biwater Gauff, a British-German company, was designated and then entered into sub-contracts with local companies in Tanzania. Later, the assets of one such sub-contractor, City Water, were seized and overtaken by the Tanzanian Government due to its financial inability to perform infrastructure improvements, causing a danger to public health and welfare.

From the lessons in the past, within the scope of recent IIAs, saved for provisions on investment issues, there are also incorporated provisions on non-investment matters such as sustainable development, environment, human rights, etc (hereinafter referred to as sustainable development provisions – SDPs).

2. PROTECTION OF SUSTAINABLE INVESTMENT IN THE MARINE ENVIRONMENT: TREATY DRAFTING PRACTICE

2.1. The inclusion of SDPs in IIAs

There could be some underlying explanations for the inclusion of SDPs in IIAs.

First, the inclusion of SDPs is deemed to be a reaction to the demand to reform old-generation investment agreements towards a more balanced approach between investors' benefits and host states' interests. The first BIT (Germany-Pakistan) signed in 1959 created a solid foundation for a "treatification" process of international investment law, which has primarily aimed at the protection and promotion of foreign investment. It was indicated by various standards of the treatment created, including most-favoured nation (MFN), national treatment (NT), and fair and equitable treatment (FET), under the form of binding obligations for host states towards investment protection, with a few exceptions, and without reciprocal obligations for investors. Obviously, the idea of protecting foreign investors, regardless of the actual or potential advantages that foreign investment could contribute to the economic development of host states, may cause severe damage to local communities in the host states. Acknowledging the high-important necessity to confront the sustainability challenges associated with foreign investment, there have been calls for reforms of the global investment regime to be sustainable development-oriented[7], highlighted by the United Nations Sustainable Development Goals 2023 and the UNCTAD Investment Policy Framework Roadmap for IIA Reform, which specifies its first element as "an orientation towards sustainable development"[8].

Second, the inclusion of SDPs helps limit the risks of host states' measures being taken for the purpose of public policy or sustainable development. The devastating damages from foreign investment incurred by the local communities in the past and sustainable matters force host states to take actions against investors, which could then raise conflicts between host states and investors, and eventually lead to the occurrence of international disputes against host states[9]. Within the scope of old BITs, several host states have been challenged by investors for their measures to protect the national environment, human rights, or public health under the ISDS mechanism. Notably, not only do provisions under old BITs seem biased in favor of investors, but also arbitrators in ISDS mostly emphasize the obligations of states under BITs rather than their duties on international human rights and environmental conservation[10]. In turn, existing treaties specialized in international human rights or environmental law remain insufficient to cover such matters in the context of transnational investment activities[11]. Therefore, the necessity to include SDPs in new IIAs appears to be a high priority to safeguard policy space for host states pursuing sustainable development objectives.

Third, acknowledging the relationship between sustainable development and investment activities, several host states, including both developed nations and developing nations, are all endeavoring to integrate SDPs into an international investment agreement. Even if SDPs are non-investment or non-economic issues by nature, in the context of foreign investment outbreaks, SDPs appear to be indispensable within the framework of an international investment agreement. Especially during the time being of COVID-19, the pandemic has been pushing for SDP reform as an increasing number of government measures are taken to handle the negative impacts caused by the pandemic in a sustainable manner, which have directly affected foreign investors.

To sum up, the ultimate objective of the inclusion of SDPs in IIAs is to promote a more balanced approach between the interests and duties of foreign investors. Simultaneously, it also creates a level playing field between developed countries and developing countries by incorporating a variety of international standards on public health, human rights, or environmental protection into a BIT to govern transnational investment activities.

2.2. Coverage of IIAs

To identify the geographical scope of investment treaties, the terms of the treaties themselves should first be considered. Most initial BITs merely refer to investment "in the territory"[12] or "situated in the territory of"[13] a contracting party, without providing any elucidation about the concept of territory. Even the NAFTA 1992, considered as a new style of investment agreement,

[7] Manjiao Chi, *Sustainable development provisions in investment treaties*, UNESCAP ARTNeT, 2018, page 12-15.

[8] UNCTAD, *International Investment Agreements: Reform Accelerator*, 2020, page 3.

[9] *Ibid.,* supra note 4.

[10] Yulia Levashova, "Role of sustainable development in Bilateral Investment Treaties: recent trends and developments", *Journal of sustainable finance and investment*, 2012, page 1-3. See, for instance: *Bear Creek Mining Corporation vs. Republic of Peru*, ICSID Case No.ARB/14/2.

[11] *Bear Creek Mining Corporation vs. Republic of Peru*, ICSID Case No. ARB/14/2 (dissenting opinion).

[12] E.g. Article 3(2) of Austria – Korea BIT 1991; Article 3 of Germany-Pakistan BIT 1959.

[13] E.g. Article 5 of Belgium – Indonesia BIT 1970.

also states that the investment protection chapter applies to "investments of investors of another Party in the territory of the Party"[14]. The lack of defining "territory" is continuing until the new FTAs, such as the CPTPP, provide the definition of "covered investment" as "an investment in the territory of an investor of another Party"[15].

It is obviously ambiguous to determine the precise geographical scope of these treaties with a general term of "territory". As a matter of fact, the absence of either jurisprudence or literature causes challenges to the application of such treaties to peculiar investment activities such as seabed exercises. Due to the unclear interpretation of the phrase "territory", the governance of investment activities within maritime zones has raised a variety of issues relating to whether "territory" includes other maritime zones whereby states exercise their sovereignty to exploit natural resources[16] or even the seabed, or situations in disputed maritime areas[17].

However, in practice, this issue seems less controversial than in the aforementioned analysis. In Mobile and *Murphy Oil vs. Canada*, an investment dispute with the involvement of two companies with respect to their investment in the continental shelf of Canada[18], an assumption made by the tribunal that "territory" obviously includes the area of the continental shelf under dispute even though NAFTA does not state so.

Though, for the avoidance of inconsistency in each tribunal's perspectives in each case, the term of "territory" needs a sufficient interpretation. Acknowledging the urgency of this matter, more recent developments in treaty drafting also pay attention to broadening the geographical application of international investment law to maritime zones beyond the territorial sea. Practice on this issue early appeared in some IIAs, notably EU BITs, specifying that "*the territory of either of the Contracting Parties, as defined by their respective laws, including the <u>territorial sea</u>, and any <u>other zone</u> over which the Contracting Party concerned exercises, in accordance with international law, sovereignty, sovereign rights, or jurisdiction*"[19]. Regardless of the existing endeavor to include maritime zones within the concept of "territory", it remains deficient to cover seabed investment and investment occurring in areas beyond national jurisdiction (i.e. not within the territory or maritime zones of a coastal state).

[14] Article 1101(1)(b) of NAFTA.

[15] Article 9.1 of CPTPP.

[16] Article 2 of UNCLOS.

[17] Articles 56 and 77 of UNCLOS.

[18] *Mobil and Murphy Oil vs. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, 22 May 2012.

[19] Article 1(4) of Portugal-Korea BIT. See also Article 1(4) of Paraguay-Switzerland BIT.

3. THE ROLE OF INTERNATIONAL INVESTMENT LAW IN FOSTERING SUSTAINABLE INVESTMENT IN THE MARINE ENVIRONMENT: EVIDENCE FROM INVESTOR-STATE DISPUTE SETTLEMENT

3.1. Windstream Energy vs. Canada (UNCITRAL Arbitration rules, PCA)

Windstream Energy vs. Canada is an investment case in which a precautionary approach was raised to justify the protection of the environment. In this case, a US investor challenged a moratorium on offshore wind farms in Lake Ontario, Canada.

Windstream Energy LLC, an US company, submitted an application to the Ontario Feed-in-Tariff ("FIT") Program through its Canadian subsidiary, Windstream Wolfe Island Shoals (WWIS), in order to gain a contract for the establishment of an offshore wind energy facility[20]. The FIT Programme set a 20-year fixed-premium price for renewable energy producers by the Ontario Power Authority ("OPA") to attract investors. The FIT Program assisted energy project developers in obtaining financing. In 2010, OPA offered Windstream a FIT Contract for its offshore wind energy project.

In February 2011, the Government of Ontario announced a moratorium on offshore wind projects until further research on the potential environmental impact of those projects was completed and an adequate policy framework was developed. Windstream complained that the government's moratorium on offshore wind projects had rendered its project worthless and not financeable[21]. In 2013, Windstream served a Notice of Arbitration in which it alleged that Canada had breached its obligations under NAFTA.

Windstream contended, inter alia, that Canada breached Article 1105(1) of NAFTA[22] by imposing a moratorium on offshore wind development, which was contrary to the Respondent's representations and commitments made when encouraging the Claimant to invest in the development of offshore wind in Ontario, and by failing to respect its promise to ensure that the Claimant would not be penalized by the moratorium[23].

Canada justified its decision to take *'a **cautious approach** and develop a comprehensive regulatory framework before allowing any offshore wind energy facilities to be built'* as a reasonable use of its regulatory powers[24]. This position was supported by the Tribunal, which accepted that Ontario's policy was *'at least in part driven by a **genuine policy concern** that there was not sufficient scientific support for establishing an appropriate setback, or exclusion zone for offshore wind projects'*[25].

However, the Tribunal found reproachable that following the moratorium, the government did little to address the scientific uncertainty surrounding offshore wind projects that it had relied upon as the main publicly-cited reason for the moratorium. Several of the research projects proposed by the government were not executed, and during the arbitration proceeding, counsel for Canada confirmed that the government did not plan to conduct any additional studies. Significantly, as per the Tribunal's findings, Canada did little to resolve the "legal and contractual limbo" that Windstream encountered subsequent to the imposition of the moratorium. The Tribunal

---

[20] *Windstream Energy vs. Canada*, UNCITRAL Arbitration, Award, 27 Sep 2016, para 5.

[21] *Ibid.*, para 192.

[22] Article 1105(1) of NAFTA: *"Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."*

[23] *Windstream Energy vs. Canada*, UNCITRAL Arbitration, Award, 27 Sep 2016, para 363-364.

[24] *Windstream Energy vs. Canada*, Government of Canada's amended Response to the Notice of Arbitration, 5 Dec 2013.

[25] *Windstream Energy vs. Canada*, UNCITRAL Arbitration, Award, 27 Sep 2016, para 376.

additionally determined that the government did not fulfill its obligation to promptly conduct the necessary scientific research for the development of its policy framework, nor did it exclude offshore wind as a viable source of renewable energy or terminate Windstream's FIT Contract. The Tribunal concluded that the government's failure to promptly implement the required actions following the implementation of the moratorium, in order to address the uncertain regulations surrounding the Windstream project, constituted a violation of fair and equitable treatment under Article 1105(1) of NAFTA.[26]

In this case, the term 'genuine' policy concern emphasizes that the precautionary approach requires a minimum level of evidence. Even if a moratorium would be appropriate, the precautionary approach does not give a state the freedom to postpone a project for as long as it wants. The precautionary approach may justify provisional restrictions on an investment, but a state should gather more scientific evidence to fully assess an activity's environmental impacts. This requires them to seek out additional information in order to conduct a more objective risk assessment and review of provisional measures.

3.2. Metalclad vs. Mexico (ICSID)

A key indicator of SDG 14.5.1[27] on the protection of the marine environment is the establishment of the marine protected area **("MPA")**. However, in fact, the investment activities of foreign investors could be significantly impacted by MPAs. Similar findings can be consulted in some cases concerning the establishment of terrestrial protected areas, such as Metalclad vs. Mexico.

In 1993, Metalclad, an US enterprise, purchased COTERIN, a Mexican company, with the intention of acquiring, developing, and operating COTERIN's hazardous waste transfer station and landfill in La Pedrera Valley, Guadalcazar. COTERIN is the registered owner of the landfill property as well as the permits and licenses that are at the base of this dispute[28].

In September 1997, the governor of the state issued an Ecological Decree designating the land as a Natural Area for the preservation of rare cacti. The Decree created a national or state-level nature reserve or park in the majority of jurisdictions, which had the effect of prohibiting Metalclad from using its facility. Metalclad's claims that the Ecological Decree in itself constituted a breach of Article 1110 of NAFTA[29].

The Tribunal held that the Ecological Decree designating a cacti reserve in the area of the investment constituted an act tantamount to expropriation because it severely restricted the carrying out of any activity within the area. Mexico indirectly expropriated Metalclad's investment without compensating Metalclad for the expropriation, thereby constituting a violation of Article 1110 of the NAFTA. [30]

In the case of a declaration of a MPA, it should be noted that the international community's efforts to promote the development of MPA networks in Sustainable Development Goal (SDG) 14.5[31] will not have an impact on this particular finding. Eventually, states possess significant autonomy in the establishment of MPAs, as well as in the types of activities they opt to regulate within these areas. Furthermore, it must be understood that international investment law would not prevent the establishment of a MPA, but the state would be required to pay compensation to investors that are

[26] *Ibid.*, para 378 – 382.

[27] SDG's indicator 14.5.1: *"Coverage of protected areas in relation to marine areas".*

[28] *Metalclad vs. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 Aug 2000, para 2.

[29] *Ibid.*, para 1.

[30] *Ibid.*, para 109–112.

[31] SDG 14.5: *"By 2020, conserve at least 10 per cent of coastal and marine areas, consistent with national and international law and based on the best available scientific information".*

prevented from continuing activities that they had been previously authorized to conduct in that area[32].

3.3. EnCana Corporation vs. Ecuador (LCIA)

EnCana Corporation vs. Ecuador was an arbitration against Ecuador under a BIT. The case revolves around the issue of value-added tax (VAT) refunds within Ecuador's oil industry, in which the tribunal considered the impacts of environmental protection measures on the investor's project.

EnCana acquired Pacalta Resources Limited in 1999, thereby becoming the indirect parent company of AEC and COL, specializing in the exploration and exploitation of marine oil and gas reserves in Ecuador[33]. This case arose out of a Reform to the Ecuadorian Tax regime. Prior to this law, foreign oil companies in Ecuador, like the other export oriented units, were receiving refunds for VAT paid on inputs. Thereafter, from 2000, the Ecuadorian tax authorities passed certain resolutions denying the refunds for the public purposes. EnCana commenced arbitration on 14 March 2003[34].

Article VIII.1 of United States-Ecuador BIT stipulates: *"Investments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation…"*

The Claimant alleged, inter alia, that although it is assumed that the subsidiaries did not have a legal entitlement to a tax refund according to Ecuadorian law, the sudden denial of VAT credits and refunds starting in August of 2001, followed by a retroactive denial of previously granted VAT credits and refunds to foreign owned oil companies, had such a significant impact on the subsidiaries as to be equivalent to expropriation of the investment. Furthermore, this action represents an unjustifiable intrusion that hinders the Claimant and the Companies from exercising their economic rights and reaping the associated advantages. Therefore, Ecuador has failed to comply with its obligations under Article VIII of the BIT.[35]

The Tribunal rejected the claim that the subsidiaries were victims of indirect expropriation due to the following reason: Although the EnCana subsidiaries suffered financially from the denial of VAT and the recovery of VAT refunds wrongly made, they were nonetheless able to continue to function profitably and to engage in the normal range of activities, extracting and exporting oil (the price of which increased during the period under consideration). There is nothing in the record which suggests that the change in VAT laws or their interpretation brought the companies to a standstill or rendered the value to be derived from their activities so marginal or unprofitable as effectively to deprive them of their character as investments.[36]

Through this dispute, this allegation of the claimant was rejected because the state's measures did not greatly affect the investor's business activities. However, it is important to acknowledge that there may be situations in which investment rules will require protection to be afforded to an investor, despite the environmental concerns of a state. This may be particularly true in the case of

[32] James Harrison, *Chapter 20 International Investment Law and the Regulation of the Seabed - The Law of the Seabed*, Brill | Nijhoff, 2020, page 501.

[33] *EnCana Corporation vs. Ecuador*, LCIA Case No. UN 3481, Award, 3 Feb 2006, para 21.

[34] Evashish Krishan, "Introductory Note to Encana Corporation v Republic of Ecuador", *International Legal Materials*, 2006, Vol. 45, No. 4, page 895.

[35] *EnCana Corporation vs. Ecuador*, LCIA Case No. UN 3481, Award, 3 Feb 2006, para 171.

[36] *Ibid.*, para 174.

regulatory measures which ***'[render] the value to be derived from their activities so marginal or unprofitable as to effectively deprive them of their character as an investment.'***

3.4. Santa Elena Development Company vs Costa Rica (ICSID)

Santa Elena Development Company vs Costa Rica is a dispute involving the expropriation of coastal real estate. In this case, the Tribunal determined the compensation obligation for property expropriation.

In 1970, Compañia del Desarrollo de Santa Elena **("CDSE")**, was founded in Costa Rica by a majority of shareholders who were US citizens. The primary purpose of this establishment was to purchase "Santa Elena", which included more than 30 km of Pacific coastline, for the development of tourism and residential communities. Following the acquisition of the Property at an estimated cost of around USD 395,000, CDSE initiated the formulation of a land development program and conducted comprehensive financial and technical assessments of the Property in order to facilitate its future development.[37] In 1978, Costa Rica issued an expropriation decree for Santa Elena (the "1978 Decree") in order to use Santa Elena for environmental purposes. Costa Rica proposed to pay CDSE the amount of approximately USD 1,900,000 as compensation for the planned expropriation of the Property.[38]

The Claimant informed the Respondent that it had no objection to the expropriation but contested the price fixed by the Respondent. CDSE then claimed, as compensation, the sum of approximately USD 6,400,000, based on its own appraisal of the Property. During the subsequent twenty-year period, the parties were involved in litigation before Costa Rican courts, with the amount of compensation remaining unresolved. In response to political pressure from the US Government, Costa Rica agreed to submit this issue to ICSID arbitration in 1995[39].

The Tribunal held that International law permits the Government of Costa Rica to expropriate foreign-owned property within its territory for a public purpose, provided that it offers the prompt payment of adequate and effective compensation. While an expropriation or taking for ***environmental reasons*** may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the property was taken for this reason ***does not affect either the nature or the measure of the compensation to be paid for the taking***. In other words, the expropriation of the Property for environmental purposes does not change the legal character of the taking, for which adequate compensation must be paid.[40] Then, the central objective of the arbitration was to determine the valuation of the expropriated property and the amount of compensation that had to be paid to CDSE by Costa Rica.

4. RECOMMENDATIONS

With the goal of fostering sustainable investment in the marine environment, the aforementioned analyses of practice in treaty drafting and ISDS cases are the basis for providing the below recommendations to further promote such a role in future IIAs and ISDS cases.

4.1. The extent to which IIAs could foster responsible investment in the marine environment

[37] *Santa Elena Development Company vs. Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 Feb 2000, para 16.
[38] *Ibid.*, para 17.
[39] *Ibid.*, para 19-20.
[40] *Ibid.*, para 71.

As analyzed in Item 2.2 herein, even when IIAs could be used to apply to investments in maritime zones of coastal countries, the extent to which IIAs could foster responsible investment in the marine environment remains unclear. It is noted that international law regulates obligations on the coastal state to "adopt laws and regulations to prevent, reduce, and control pollution of the maritime environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations, and structures under their jurisdiction"[41]. This provision clearly encourages the host state to exercise its regulatory powers in the first instance to carry out due diligence to minimize the risk of causing damage to the marine environment[42]. To clarify, it has been emphasized on a precautionary approach to regulation from seabed industries in the context of uncertainties concerning the impact of new technologies on the marine environment, implying that states should adopt measures to prevent potential harm even in cases of unclear background evidence evidencing that possibility.

4.2. Different approaches from investment cases

Based on aforementioned cases, different approaches could be utilized in different investment cases in relation to the protection of the marine environment:

<u>*Cautious approach:*</u>

The precautionary approach may be invoked to justify taking action to safeguard the environment, even in the absence of definitive evidence of potential environmental harm. Nevertheless, the precautionary approach itself has inherent limitations. To invoke the precautionary approach, it is necessary for states to provide evidence at a minimum threshold, demonstrating a "genuine" policy concern. Even a precautionary approach requires that "there are plausible indications of potential risks". Such an understanding ensures that environmentalism is not used as a pretext for measures that substantially interfere with investment activity[43].

The interpretation of the precautionary approach should follow the "precautionary principle" in the WTO SPS Agreement. Article 5.7 of the SPS Agreement[44] allows states to provisionally adopt restrictive measures to deal with scientific uncertainty, but states must ***"seek to obtain the additional information necessary for a more objective assessment of risk and review the measures accordingly within a reasonable period of time"***. The instance of Canada, in the case of *Windstream Energy vs. Canada* mentioned above, is a typical example of the state's failure to carry out the requisite research within a reasonable period of time, thereby constituting a breach of the FET standard.

<u>*The establishment of an MPA:*</u>

As analyzed in the case of *Metaclad vs. Mexico*, international investment law would not prevent states from establishing MPAs, however, it would require protection to be afforded to the investor, despite the environmental concerns of the state. In such circumstances, the state is unable to argue

---

[41] Article 208(1) of UNCLOS.

[42] On the due diligence standard, see South China Sea Arbitration, PCA Case No. 2013–19, Merits Award, 12 Jul 2016, para 944. See also James Harrison, *Saving the Oceans through Law: The International Legal Framework for the Protection of the Marine Environment*, Oxford University Press, 2017, page 209–225.

[43] James Harrison, *Chapter 20 International Investment Law and the Regulation of the Seabed - The Law of the Seabed*, Brill | Nijhoff, 2020, page 500.

[44] Article 5.7 of the SPS Agreement: *"In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time."*

exemption from compensating investors for impeding their business activities, even if the rationale behind such impediment is environmental protection.

It is important to note that coastal states must consider the effects of international investment law when performing their regulatory responsibilities regarding marine activities and the establishment of MPAs. Additionally, it is suggested that coastal states should prioritise the identification of ecosystems that necessitate protection before granting authorization for investments in the corresponding regions, with the aim of mitigating conflicts.

Regarding expropriation, the state needs to consider whether its measures will seriously affect investment activities, and avoid falling short of the original objective of generating profits for international investors (see the aforementioned case of *EnCana Corporation vs. Ecuador*). Moreover, to promote environmental protection measures, the state must take this into account when developing an IIA, which should delimit the cases of expropriation and set forth specific factors to be considered by investment tribunals in order to restrict the cases in which host states are liable to pay compensation.

4.3. The interaction between international law and international investment law

While the first generation IIAs barely considered environmental protection, subsequent generations have included more detailed provisions regulating their relationship with host states' other international obligations. In that context, the interaction between international law and international investment law with respect to the protection of the sea remains unresolved.

The clearest proof of these increasing interactions between these branches of international law is the surge in investment disputes relating to environmental issues. There is a growing concern that the expansive interpretation of investment protection disciplines may contradict the implementation of international environmental duties. In particular, international investors frequently dispute host states' environmental protection regulations, arguing they violate investment protection obligations. These normative interactions can cause a genuine conflict when the host state cannot meet all investment and environmental obligations at once and chooses to prioritize one over the other.

In light of this, international investment law cannot exist apart from the larger international legal framework governing the environmental impacts of investment plans. Furthermore, the obligations of States under the United Nations Convention on the Law of the Sea (UNCLOS) and several environmental agreements on the protection of the marine environment against risks from investment activities have significant implications for the regulation of marine investments.

In addition, investment tribunals generally have a great deal of discretion in determining the rules that apply to investment disputes under most IIAs. But even when the relevant applicable law clauses in IIAs limit the ability of tribunals to apply other rules of international law, the provisions of IIAs can still be interpreted in light of environmental obligations. Due to its mandate, an investment tribunal must interpret the IIA under examination in light of all other applicable rules of international law.[45]

The proposed solution entails the construction and modernization of IIAs in order to strengthen the synergistic interaction between investment activities and marine environmental responsibilities. This approach aims to provide host governments with increased flexibility in protecting and conserving the marine environment, towards sustainable development in investment. The refining of IIAs, including preambles, substantive provisions, and exception clauses, is a necessity to limit

---

45 Nikolaos Giannopoulos, "International Protection of Foreign Investments in Offshore Energy Production and Marine Environmental Protection: Birds of a Feather or Frenemies Forever?", *Netherlands International Law Review*, 2021, No. 68, page 254-255.

the interpretative discretion of arbitral tribunals. Greater precision in the formulation of the IIAs enables states to exert greater control over the interpretation of the IIAs and encourages investment tribunals to engage in a balancing exercise taking into account the right and obligation of the host state to implement environmental measures. This balance is particularly important when investment disputes involve environmentally sensitive industries, such as the offshore energy sector[46].

5. CONCLUSION

In the current context of IIAs, achieving a balance between interests is indispensable to accomplishing a sustainable result and reconciling marine environmental protection with foreign investment protection. Protecting investments has always played an important role in attracting foreign capital and expertise. In that respect, it is crucial to view investment protection as a matter of public interest rather than solely as a measure to safeguard the interests of private entities. Simultaneously, the preservation of the marine environment and the conservation of biodiversity hold equal significance for the sustainability of not only marine investments but also all other economic endeavors worldwide.

Despite the obvious tensions, the interactions between investment protection rules and rules on the protection of the marine environment should be neutral or synergistic. This means they can co-exist without giving rise to any conflict. In such a case, host states will be able to fully comply with both their investment and marine environmental obligations simultaneously.

The enhancement of new generation IIAs, along with endeavors to improve the ISDS mechanism, contributes to enhancing the legal autonomy of states in implementing international marine environmental measures, as well as the ability to promote sustainable development of the marine environment in international investment activities.

References

1. Andrew Jorgenson, "The Sociology of Ecologically Unequal Exchange, Foreign Investment Dependence and Environmental Load Displacement: Summary of the Literature and Implications for Sustainability", *Journal of Political Ecology*, 2016, Vol. 32.
2. Austria – Korea BIT 1991
3. *Bear Creek Mining Corporation vs. Republic of Peru*, ICSID Case No. ARB/14/2 (dissenting opinion).
4. Belgium – Indonesia BIT 1970.
5. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).
6. *EnCana Corporation vs. Ecuador*, LCIA Case No. UN 3481, Award, 3 Feb 2006.
7. Evashish Krishan, "Introductory Note to Encana Corporation v Republic of Ecuador", *International Legal Materials*, 2006, Vol. 45, No. 4.
8. Germany-Pakistan BIT 1959.

[46] *Ibid.*, page 271.

9. James Harrison, *Chapter 20 International Investment Law and the Regulation of the Seabed - The Law of the Seabed*, Brill | Nijhoff, 2020.
10. James Harrison, *Saving the Oceans through Law: The International Legal Framework for the Protection of the Marine Environment*, Oxford University Press, 2017.
11. Manjiao Chi, *Sustainable development provisions in investment treaties*, UNESCAP ARTNeT, 2018.
12. *Metalclad vs. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 Aug 2000.
13. *Mobil and Murphy Oil vs. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, 22 May 2012.
14. Nick Mabey and Richard McNally, *Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development*, WWF-UK, UK, 1998.
15. Nikolaos Giannopoulos, "International Protection of Foreign Investments in Offshore Energy Production and Marine Environmental Protection: Birds of a Feather or Frenemies Forever?", *Netherlands International Law Review*, 2021, No. 68.
16. Paraguay-Switzerland BIT.
17. Portugal-Korea BIT
18. *Santa Elena Development Company vs. Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 Feb 2000.
19. Sauvant & Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows*, Oxford University Press, Oxford and New York, 2009.
20. South China Sea Arbitration, PCA Case No. 2013–19, Merits Award, 12 Jul 2016.
21. The North American Free Trade Agreement (NAFTA).
22. UCTAD, World Investment Report 2023, Available online: https://unctad.org/conference/ntfc-global-forum-2022/publication/world-investment-report-2023
23. UNCTAD, *International Investment Agreements: Reform Accelerator*, 2020.
24. United Nations Convention on the Law of the Sea (UNCLOS).
25. *Windstream Energy vs. Canada*, Government of Canada's amended Response to the Notice of Arbitration, 5 Dec 2013.
26. *Windstream Energy vs. Canada*, UNCITRAL Arbitration, Award, 27 Sep 2016.
27. WTO SPS Agreement.
28. Yulia Levashova, "Role of sustainable development in Bilateral Investment Treaties: recent trends and developments", *Journal of sustainable finance and investment*, 2012.