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Balancing Sustainability, the Right to Regulate, and the Need for Investor Protection: Lessons from the Trade Regime

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BALANCING SUSTAINABILITY, THE RIGHT TO REGULATE, AND THE NEED FOR INVESTOR PROTECTION: LESSONS FROM THE TRADE REGIME

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Abstract: Recent initiatives for investment reform demonstrated by the 2016 United Nations Conference on Trade and Development and 2018 World Investment Reports have raised key issues for sustainable development in the context of investment in natural resources and energy. Where there has been increasing convergence between trade and environmental norms as trade regimes confront domestic regulatory measures for environmental protection and climate change mitigation, similarly investment regimes also have had to address such domestic measures but with little progress towards normative convergence. At the same time, there's an increasing skepticism for the traditional models of globalization of the 1990s and more recognition of the need for economic models that foster sustainability and local stability. This Article will analyze four primary areas in which investment law intersects with environmental and climate change policies. Drawing from lessons learned in the trade context, it will examine the following areas in which investment law will need to better address domestic policies: (1) regulation, especially those in the form of direct and indirect taxes; (2) subsidies; (3) labeling schemes; and (4) local content requirements. These will be discussed against the backdrop of today's changing landscape regarding popular attitudes towards globalization and the right to regulate. The Article will conclude with a discussion of the challenges ahead for investment in natural resources and energy, especially in Latin America where some governments are changing the constitutional framework in which nature should be managed.

INTRODUCTION

The Eco-Minerals Angotura gold mining project in Colombia is one of several high altitude *páramo* ecosystems mining projects involving foreign investors that was blocked in 2016 from continuing operations by the Colom-

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bian constitutional court.[1] Investors are complaining that their rights were violated when the court overturned several licenses for such operations because of the irreparable damage caused to several sensitive ecosystems known as the *páramos*.[2] The *páramos* provide water to over seventy percent of Colombians and they are a major carbon sink which helps to combat climate change.[3] Canadian mining operations in Latin America since the 1990s, such as the Eco-Minerals Angotura gold mining project, have raised eyebrows with respect to human rights violations and a lack of environmental concerns.[4]

Recent initiatives for investment reform as discussed in the *United Nations Conference on Trade and Development (UNCTAD) 2016 World Investment Report*, have raised key issues for sustainable development in the context of investment in natural resources and energy.[5] There has been increasing convergence between trade and environmental norms as trade regimes confront domestic regulatory measures for environmental protection and climate change mitigation. Similarly, investment regimes also have had to address such domestic measures, but with little progress towards normative convergence. Foreign direct investment ("FDI") in extractive industries is prevalent in both de-

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[1] Chris Bell, *Colombia's Páramos: What Are They and Why You Must See Them?*, UNCOVER COLOMBIA (Aug. 30, 2017), http://www.uncovercolombia.com/en/item/colombia-paramos-why-see-them [https://perma.cc/S6X7-BSQL] (explaining that *Páramo* ecosystems, found only in South America's northern Andes and in some parts of southern Central America, "are defined broadly as the ecosystem existing above the continuous forest line, but below the permanent snowline").

[2] Eco Oro Minerales Corp., *Eco Oro Files Memorial in Arbitration Against Colombia*, CISON (Mar. 20, 2018), https://www.newswire.ca/news-releases/eco-oro-files-memorial-in-arbitration-against-colombia-677385833.html [https://perma.cc/KD6W-ZBVW].

[3] *Protecting the Colombia Páramo from Eco Oro Mining*, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW: CAMPAIGN UPDATE (Feb. 2017), https://www.ciel.org/project-update/eco-oro/ [https://perma.cc/X7LU-KVEE].

[4] *See generally* MiningWatch & CENSAT-Agua Viva, *Land and Conflict—Resource Extraction, Human Rights, and Corporate Social Responsibility: Canadian Companies in Colombia*, INTERPARES (Sept. 1, 2009), https://interpares.ca/sites/default/files/resources/2009-09LandAndConflictResourceExtractionHumanRightsAndCorporateSocialResponsibility.pdf [https://perma.cc/8JG6-7P4U] (analyzing the human rights and environmental concerns present in four Canadian extractive industry investment projects in Colombia); Working Group on Mining and Human Rights in Latin America, *The Impact of Canadian Mining in Latin America and Canada's Responsibility: Executive Summary of the Report Submitted to the Inter-American Commission on Human Rights*, http://www.dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf [https://perma.cc/W2LE-ATGS] (explaining the various human rights and environmental issues that have arisen from Canadian mining operations in Latin America).

[5] Ban Ki-Moon, *Preface* to U.N. CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2016, INVESTOR NATIONALITY: POLICY CHALLENGES, at iii (2016) [hereinafter 2016 UNCTAD INVESTMENT REPORT] (explaining the report's initatives to "further enhance the enabling environment for investment in sustainable development"). The 2018 *UNCTAD World Investment Report* indicates a decline in foreign direct investment overall, as compared to 2016. *See* Antonio Guterres, U.N. CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2016, INVESTMENT AND NEW INDUSTRIAL POLICIES, at iii (2018) [hereinafter 2018 UNCTAD INVESTMENT REPORT] (explaining that foreign direct investment saw a twenty-three percent decline in 2017 with only a "very modest recovery" anticipated for 2018).

veloping and developed countries and it raises many questions not only regarding human rights and environmental protection, but also the sovereign right to regulate natural resources by the host state. Global FDI inflows rose by thirty-eight percent to $1.76 trillion in 2015, at which point Asia was the largest recipient region of FDI inflows.[6] The top FDI inflows have actually been to developed countries, including the United States, although this has declined somewhat in 2017.[7] With new technologies and sustainable development goals driving new, cleaner industrial policy, FDI provides opportunities for growth. Still, investment regimes must also adjust the balance between the rights of investors and those of the state to regulate in areas of public interest like natural resources and the environment.

This Article will analyze four primary areas in which investment law intersects with environmental and climate change policies. Part I will discuss the legal doctrines and practical implications of the right to regulate.[8] Drawing from lessons learned in the trade context, Part II will discuss ways in which investment law must better address these domestic policies in the following areas: (1) regulatory policies, especially those in the form of direct and indirect taxes; (2) subsidies; (3) labeling schemes; and (4) local content requirements.[9] These will be discussed within the backdrop of today's changing landscape concerning globalization and regulation. Finally, Part III will discuss challenges moving forward regarding investment in natural resources and the right to regulate, especially as some countries in Latin America establish constitutional reforms with respect to environmental protection.[10]

I. RIGHT TO REGULATE

There is much discussion regarding the ability of governments to regulate without the interference of international law, as part of their sovereign rights as nation-states.[11] This is not a new idea, in that both international trade and in-

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[6] 2016 UNCTAD INVESTMENT REPORT, *supra* note 5, at x. The 2018 UNCTAD INVESTMENT REPORT found that FDI inflows decreased overall to $1.43 trillion in 2017, a decrease of 23%; but, inflows to Latin America and the Caribbean remained stable whereas those to developed countries fell, mostly due to decreases to the United States and the United Kingdom. 2018 UNCTAD INVESTMENT REPORT, *supra* note 5, at xi.

[7] *See* 2018 UNCTAD INVESTMENT REPORT, *supra* note 5, at xi. (explaining that FDI inflows to developed countries fell by thirty-seven percent in 2017).

[8] *See infra* notes 11–60 and accompanying text.

[9] *See infra* notes 61–131 and accompanying text.

[10] *See infra* notes 132–182 and accompanying text.

[11] *See, e.g.*, Howard Mann, *The Right of States to Regulate and International Investment Law in* EXPERT MEETING ON THE DEVELOPMENT DIMENSION OF FDI (Nov. 6–8, 2002), https://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf [https://perma.cc/88AH-FKQF]; David Gaukrodger, *The Balance Between Investor Protection and the Right to Regulate in Investment Treaties: A Scoping Paper*, OECD WORKING PAPERS ON INT'L INV. (2017), https://www.oecd-ilibrary.org/finance-and-

vestor-state treaties have contained provisions regarding these issues from the beginning.[12] Only recently, however, with growing concerns in the industrialized world regarding the negative impacts of international trade and investment on local jobs, the ability to pass regulation regarding health and the environment, and a popular distaste for globalization, has the right to regulate discussion had some traction. Recent preferential trade agreements ("PTAs") such as the European Union-Canada Comprehensive Economic and Trade Agreement ("CETA") and the Canada-Colombia Free Trade Agreement ("CCFTA"), contain such a provision.[13] The scope of the right to regulate is less clear, though it would implicate many of the traditional doctrines that deal with regulation.[14] These recent PTAs also emphasize the need for regulatory cooperation among parties so they may mutually agree to regulations that achieve social policy goals while also achieving commitments under trade agreements. In fact, transnational regulatory bodies have become institutionalized in many of the PTAs such as CETA.[15] When comparing trade jurisprudence to that of investment, though, investment tribunals have tended to be more deferential to regulatory structures of the parties than trade dispute settlement bodies, as many of the Chapter 11 North American Free Trade Agreement (NAFTA) cases demonstrate.[16] This may, in part, be due to the fact that a multilateral treaty

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[12] *See infra* notes 29–44 and accompanying text.

[13] Comprehensive Economic and Trade Agreement, Can.-E.U., art. 24.3, Oct. 30, 2016, 2017 O.J. (L 11) 23, 167 (E.U.), http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [https://perma.cc./WTW5-N6BL] [hereinafter CETA]; Canada-Colombia Free Trade Agreement, Can.-Colom., art. 2201(3), Nov. 21, 2008, 2011 Can. T.S. No. 11, art. 2201(3), https://wits.worldbank.org/GPTAD/PDF/archive/canada-columbia.pdf [https://perma.cc/N6F3-P7HE] [hereinafter CCFTA].

[14] *See infra* notes 21–28 and accompanying text.

[15] *See, e.g.*, CETA, *supra* note 13, art. 26.2(1)(g) (creating a transnational regulatory body called the Committee on Trade and Sustainable Development). For more on this growing trend of transnational regulatory bodies in trade, see generally Elizabeth Trujillo, *Regulatory Cooperation in International Trade and Its Transformative Effects on Executive Power*, 25 IND. J. GLOBAL LEGAL STUD. 365 (2018) [hereinafter Trujillo, *Regulatory Cooperation*] (discussing the recent trend towards creating transnational regulatory bodies in international trade agreements).

[16] North American Free Trade Agreement, Can.-Mex.-U.S., arts. 713, 905, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 [hereinafter NAFTA]; *see* Elizabeth Trujillo, *Mission Possible: Reciprocal Deference Between Domestic Regulatory Structures and the WTO*, 40 CORNELL INT'L L. J. 201, 234–49 (2007) (comparing deference to domestic regulatory processes in trade and investment) [hereinafter Trujillo, *Mission Possible*]; *see also* Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48, 58–79 (2008) (comparing the level of deference toward a sovereign's right to regulate in cases from trade tribunals and cases from investment tribunals). The NAFTA is currently under renegotiations. *See* Int'l Ctr. for Trade & Sustainable Dev., *NAFTA Negotiators Close Fifth Round, Prepare to Set Stage for 2018 Talks*, 21 BRIDGES WKLY. 1, 3 (Nov. 2017), https://www.ictsd.org/sites/default/files/review/bridgesweekly21-39.pdf [https://perma.cc/3TDM-TZNU] (discussing the NAFTA renegotiations in the context of the TPP-11). On September 30, 2018, the United States-Mexico-Canada Agreement was signed but still needs to be approved by the respective legislatures. *See* Adam

under the auspices of the World Trade Organization (WTO) governs all trade liberalization and is applicable, though unclear to what extent, to PTAs.[17]

Section A of this Part discusses the legal doctrines that implicate the right to regulate in the investment context.[18] Section B of this Part addresses the application of the right to regulate in PTAs.[19] Finally, Section C of this Part explains how the different levels of deference that trade and investment tribunals give to domestic regulatory schemes contribute towards the development of the concept of the right to regulate.[20]

A. Legal Doctrines Implicating Right to Regulate

In investment treaties, the notion of a right to regulate is contained in legal doctrines such as indirect expropriation, fair and equitable treatment, and national treatment. The following issues are considered when an investment tribunal considers an expropriation. First, investment tribunals consider the degree of economic impact created by expropriation. This has been measured against whether there is substantial interference, depriving an investor of fundamental rights of ownership (not just loss of profits).[21] Second, investment tribunals consider the purpose and context of the expropriatory measure at issue. In assessing the purpose and context of the expropriatory measure, tribunals consider (1) whether the measure is connected to the state's right to promote a recognized social purpose or the general welfare by regulation; and (2) that "there must be a reasonable relationship of proportionality between the charge of weight imposed to the foreign investor and the aim sought to be realized by an expropriatory measure."[22] Similarly, when tribunals consider national treatment issues, they use a balancing test: if there are differences in

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Behsudi, *The USMCA Has Landed*, POLITICO (Oct. 1, 2018), https://www.politico.com/newsletters/morning-trade/2018/10/01/the-usmca-has-landed-358167 [https://perma.cc/H86Z-D3LB]. The discussion on NAFTA in this Article is in accordance with the original NAFTA agreement which, at the time of this Article, is in effect.

[17] *See* General Agreement on Tariffs and Trade art. XXIV, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, 268–72 [hereinafter GATT] (permitting the formation of preferential trade agreements within the auspices of the WTO rules).

[18] *See infra* notes 21–28 and accompanying text.

[19] *See infra* notes 29–44 and accompanying text.

[20] *See infra* notes 45–60 and accompanying text.

[21] *See, e.g.*, Compañía de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, ¶ 7.5.17 (Aug. 20, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0215.pdf [https://perma.cc/9L3K-HE2A] (citing a United Nations study for the proposition that "takings tantamount to expropriation are those that result in a substantial loss of control or value of a foreign investment").

[22] Tecnicas Medioambientales Tecmed S.A. v. Mexico, ICSID Case No. ARB (AF)/00/2, Award, ¶ 122 (May 29, 2003), 10 ICSID Rep. 130 (2003). Tribunals tend to apply a proportionality test, following the European Court of Human Rights, where "there must be a reasonable relationship of proportionality between the means employed and the aim pursued." *See id.* ¶ 122 n.141 (citing *Mellacher v. Austria*, 169 Eur. Ct. H.R. (ser. A) at 4 (1989)).

treatment between domestic and foreign investments, those differences should have "a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies; and (2) do not otherwise unduly undermine the investment liberalizing objectives . . . ."[23]

Third, in assessing indirect expropriation, tribunals consider the police powers of the state; that is, those measures concerning the public interest such as municipal planning, safety, health and environmental issues, as well as areas involving serious fines and penalties.[24] The police powers of the state are also taken into account in deciding whether a measure passes the fair and equitable test, which is a type of due process standard in the investment context.[25] Investment tribunals recognize that it would be unreasonable for investors to use bilateral investment treaties as an "insurance policy against the risk of any changes in the host state's legal and economic framework."[26] Ultimately, it comes down to what is fair and reasonable under the circumstances, for "it is unthinkable that a state could make a general commitment to all foreign investors never to change its legislation whatever the circumstances and it would be unreasonable for an investor to rely on such a freeze."[27]

Finally, tribunals consider the level of interference of the measure with the reasonable investment backed expectations. In other words, a claimant must show that the investment made was based on a current state of affairs that did not include the measure and that it was not reasonably foreseeable that such a measure would be passed. In a case brought under Chapter 11 of NAFTA in 2002, *Feldman v. Mexico*, the tribunal recognized that governments had the power to frequently change their laws and regulations as necessary

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[23] Pope & Talbot v. Canada, Award on the Merits of Phase 2, ¶ 78 (Apr. 10, 2001), 7 ICSID Rep. 102 (2001).

[24] *See Tecnicas Medioambientales*, ICSID Case No. ARB (AF)/00/2, Award, ¶ 119 (stating the principle that "the State's exercise of its sovereign power within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable").

[25] *See* Chemtura Corp. v. Canada, Award, ¶¶ 254, 266 (Aug. 2, 2010) (finding no expropriation where the measures in question were an appropriate use of the state's police powers); *see also* Kenneth J. Vandevelde, *A Unified Theory of Fair & Equitable Treatment*, 43 N.Y.U. J. INT'L L. & POL. 43, 89–96 (2010) (explaining the development of the fair and equitable treatment test as a due process standard).

[26] *See* EDF (Services) Ltd. v. Romania, ICSID Case No. ARB/05/13, Award, ¶ 217 (Oct. 8, 2009); *see also* Continental Casualty v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 258 (Sep. 5, 2008) (stating it would be "unconscionable for a country to promise not to change its legislation as time and needs change").

[27] El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB03/15, Award, ¶ 372 (Oct. 31, 2011).

under economic and social conditions, and that "[t]hose changes may well make certain activities less profitable or even uneconomic to continue . . . ."[28]

B. Right to Regulate in Preferential Trade Agreements

In international trade, recent preferential trade agreements explicitly have included "right to regulate" provisions.[29] However, as in investment law, international trade treaties have always contained specific provisions that address the ability of states to regulate domestically. The WTO Dispute Settlement Body ("DSB") has established jurisprudence on non-tariff barriers intended to balance the principle of trade liberalization with that of domestic social policy, though it has changed in scope and emphasis over time. Some of these cases will be discussed in the next section.[30] Recent PTAs that contain right to regulate provisions span from higher to lower levels of commitments for participating states. For example, the CETA contains provisions on the right to regulate for both trade and for investment.[31] It is less clear what these mean in practice, but the treaty also contains other provisions that allow states to have broad social policy space.[32] For example, the chapters on sustainable development for the environment do not recognize the precautionary principle per se, but they do recognize that the life-cycle of a product, or process and production method ("PPM"), may require regulation and that scientific uncertainty should not postpone "cost-effective measures of prevent[ing] environmental degradation."[33]

The CCFTA and NAFTA have no general right to regulate provision per se, but the CCFTA does include a sovereign right for the state to manage envi-

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[28] Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, Award, ¶ 112 (Dec. 16, 2002), 7 ICSID Rep. 341 (2002).

[29] *See, e.g.*, CETA, *supra* note 13, art. 24.3; CCFTA, *supra* note 13, art. 2201.

[30] *See infra* notes 61–131 and accompanying text.

[31] *See* CETA, *supra* note 13, arts. 8.9, 24.3.

[32] *See, e.g.*, *id.* art. 5.6 (explaining that an importing party shall accept certain measures of an exporting party as long as the exporting party "objectively demonstrates to the importing [p]arty that its measure achieves the importing [p]arty's appropriate level of . . . protection").

[33] *Id.* art. 24.8(2); *see also id.* arts. 23–24 (referring to trade, the environment, and sustainable development more generally). Previous drafts of the CETA did not contain a precautionary principle, but the issue was debated since the EU adheres to the precautionary principle whereas Canada and the United States do not. *See generally* Peter-Tobias Stoll et al., *CETA, TTIP, and the EU Precautionary Principle*, FOODWATCH (June 2016), https://euagenda.eu/upload/publications/untitled-60129-ea.pdf [https://perma.cc/6THZ-WARH]. The EU has given up on the precautionary principle, despite its adoption of it in other free trade agreements, such as with South Korea, Peru, and Colombia. *See, e.g.*, European Union-South Korea Free Trade Agreement, South Korea-E.U., ch. 13, Oct. 6, 2010, 2011 O.J. (L 127) 62, 62–65 (E.U), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22011A0514(01) [https://perma.cc/MR4D-6TBK] (laying out the precautionary principle as it relates to trade and the environment).

ronmental and natural resources.[34] Furthermore, in addition to recognizing the role of corporate social responsibility for promoting environmental, labor, and human rights,[35] the investment chapter of the CCFTA states that "it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures."[36] This chapter, in Annex 811, also lays out the four factors to consider, discussed above, in assessing indirect expropriation.[37] The CCFTA lays out an *Agreement on the Environment*, much like the NAFTA did with the side agreement on *Environmental Cooperation*.[38] However, the CCFTA's *Agreement on the Environment* is more specific than the NAFTA side agreement and includes a commitment "not to derogate from domestic environmental laws in order to encourage trade and investment."[39]

In these PTAs, it is less clear to what extent the right to regulate relates to investment. Because recent PTAs, which include a bilateral investment treaty (BIT), also contain a general right to regulate, that right arguably also applies to the investment chapter. Specific chapters of a PTA may also restate the right to regulate, including the investment chapter. For example, the investment chapter of CETA explicitly recognizes the state's right to regulate in the Prologue and Article 8.9, and clarifies that a modification of laws or regulations (including the continuance or discontinuance of subsidies) does not per se translate into a violation of the treaty.[40] Chapter 24 recognizes the rights of Canada and the European Union to regulate the environment and to pass or

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[34] CCFTA, *supra* note 13, art. 1701. The current version of the United States-Mexico-Canada Agreement contains a chapter on "good regulatory practices" and Article 28.3 of that chapter recognizes the importance of each country's "central regulatory coordinating bodies." *See* United States-Mexico-Canada Agreement, art. 28.3 (unsigned), OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/28%20Good%20Regulatory%20Practices.pdf [https://perma.cc/YP6N-XPLE].

[35] *Id.* art. 816.

[36] *Id.* art. 815.

[37] *See id.* Annex 811. This provision states that indirect expropriation should be assessed on a "case-by-case" basis, but that the following should be considered: (1) "the economic impact of the measure"; (2) "the extent to which the measure interfere[s] with . . . reasonable investment-backed expectations;" (3) "the character of the measure"; and (4) "legitimate public welfare objectives," like environmental protection. *Id.*

[38] CCFTA, *supra* note 13, art. 1703; North American Agreement on Environmental Cooperation, Can.-Mex.-U.S., Sept. 14, 1993, 32 I.L.M. 1480 (1993).

[39] CCFTA, *supra* note 13, art. 1703. Article 1701 states that "each Party has sovereign rights and responsibilities to conserve and protect its environment" and affirms their commitments under domestic and international environmental law. *Id.* art. 1701.

[40] *See* CETA, *supra* note 13, art. 8.9; *see also id.* art. 3 ("Recognising that the provisions of this Agreement protect investments and investors with respect to their investments, and are intended to stimulate mutually-beneficial business activity, without undermining the right of the parties to regulate in the public interest within their territories.").

modify laws and regulations to ensure the highest levels of protection.[41] Furthermore, Article 24.9 specifically recognizes the parties' commitment to protecting the environment in both their trade and investment endeavors, including reducing barriers to environmental goods and services—especially those that further climate change mitigation strategies.[42] Finally, the CETA establishes formal transnational regulatory cooperation through the creation of specific committees on sustainable development for the environment and labor as well as broader regulatory cooperation with the Committee on Sustainable Development in Chapter 22.[43] The Trans-Pacific Partnership (TPP), in its original form, also envisioned similar institutionalized regulatory cooperation.[44]

In sum, CETA is the first free trade agreement to be so specific on transnational regulatory cooperation and to provide so much leeway to parties in deciding the best regulatory strategies for environmental protection. It also leaves much ambiguity, however, as to the extent that the parties may use the right to regulate to justify measures that may impact trade and investment.

C. Deference

The level of deference that an international trade or investment tribunal gives to domestic regulatory schemes has contributed towards providing context to the emerging concept of the "right to regulate." As discussed above, investment tribunals typically balance the legitimacy of regulatory measures with the rights of investors through their interpretation of the fair and equitable treatment, national treatment, and expropriation doctrines.[45] Trade panels, on the other hand, arguably are less deferential towards regulatory measures, unless they are in line with international standards. But, trade panels have increasingly provided more social policy space for environmental protection through their application of *General Agreement on Tariffs and Trade* (GATT) Article III, GATT Article XX, and the *Technical Barriers to Trade* ("TBT") *Agreement*.[46] In trade disputes brought under GATT Article III:4, which ad-

[41] CCFTA, *supra* note 13, art. 24.2 ("The Parties stress that enhanced cooperation to protect and conserve the environment brings benefits that will . . . strengthen the environmental governance of the Parties.").

[42] *See id.* art. 24.9.

[43] *See id.* arts. 22.4(1), 26.2(1)(g) (establishing the Committee on Trade and Sustainable Development, and further establishing the mechanisms for operating the Committee on Trade and Sustainable Development); *see also id.* ch. 25 (discussing trade and sustainable development).

[44] *See* Trans-Pacific Partnership, art. 25.2, Feb. 4, 2016, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text [https://perma.cc/238A-H4B5].

[45] *See supra* notes 21–44 and accompanying text.

[46] *See* GATT, *supra* note 17, arts. III, XX; Technical Barriers to Trade Agreement, art. 2.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf [https://perma.cc/HS7B-S62U] [hereinafter TBT Agreement]; Trujillo, *Mission Possible*, *supra* note 16, at 202–11 (comparing investment and

dresses non-fiscal measures that impact trade, dispute settlement bodies broadly will take into account the least restrictive alternative means of achieving the legitimate objective in terms of the measure's discriminatory impact on trade.[47] For example, the "like circumstances" test for national treatment in the investor-state context takes into account the full scope of economic and social circumstances surrounding an investment.[48] Deference towards regulatory measures can also been seen in international arbitrations addressing state police powers and the use of scientific evidence.[49] In the case brought under NAFTA Chapter 11, *Gami Investments, Inc. v. Mexico*, which addressed whether the Mexican government's subsidies of Mexican sugar mills were discriminating against foreign investors, the tribunal emphasized that "Mexico perceived that mills operating in conditions of effective insolvency needed public participation in the interest of the national economy in a broad sense."[50] The tribunal rejected the claimant's argument of discrimination and instead deferred to Mexico's regulatory structures in place.[51] Further, the tribunal found that the Mexican government was motivated to expropriate some mills for the public interest in salvaging financially troubled mills from insolvency.[52]

Recent WTO cases, however, have been deferential—especially those related to renewable energy policies—where member states need more discretion on policy matters to transition their economies towards cleaner forms of ener-

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trade with respect to the degree of deference both offer to domestic regulatory schemes); *see also* WTO Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 123, WTO. Doc. WT/DS135/AB/R (adopted Mar. 12, 2001) [hereinafter *Asbestos Report*] (allowing the consideration of regulatory measures in the categories of what constitutes "like products" for national treatment); Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove-Cigarettes*, ¶ 282, WTO Doc. WT/DS406/AB/R (adopted Apr. 4, 2012) [hereinafter *Clove-Cigarettes Report*].

[47] *See, e.g.*, Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶¶ 7.409–.437, WTO Doc. WT/DS332/R (adopted June 12, 2007).

[48] Trujillo, *Mission Possible*, *supra* note 16, at 239–40 (discussing the "like circumstances" test as it relates to NAFTA Article 1102).

[49] *See, e.g.*, Int'l Thunderbird Gaming Corp. v. Mexico, NAFTA/UNCITRAL Tribunal, Award, ¶ 127 (Jan. 26, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0431.pdf [https://perma.cc/54W2-QXCG] (finding that the state "can change its regulatory policy and it has a wide discretion with respect to how it carries out such policies by regulation and administrative conduct"); Mesa Power Group, LLC v. Canada, PCA Case No. 2012-17, Award, ¶ 553 (Perm. Ct. Arb. Mar. 24, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7240.pdf [https://perma.cc/N76R-3MJU] (emphasizing that in "interpreting and applying the *'minimum standard*,' a Chapter Eleven tribunal does not have an open-ended mandate to second-guess government decision-making" (emphasis added) (quotations omitted)).

[50] Gami Invs., Inc. v. Mexico, UNCITRAL, 13 ICSID Rep. 147, Award, ¶ 114 (Nov. 15, 2004).

[51] *Id.*

[52] *See id.* ("[The] measure was plausibly connected with a legitimate goal of policy . . . and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity.").

gy.[53] Furthermore, regulatory standards that follow international standards are presumed to comply with trade rules.[54] This is also true for several BITs including in the original NAFTA.[55] The challenge, though, for both trade and investment regimes confronted with issues concerning clean energy or the use of natural resources is the evolving nature of the regulatory schemes in place to incentivize projects that both contribute towards economic development and cleaner forms of energy. Decarbonization strategies at the domestic level are expanding, but regulatory frameworks are not keeping up with this expansion; and therefore, need the flexibility to adapt to less chartered territories like renewable energy. For this reason, trade and investment treaties that can respond to these needs are key to sustainable development.

In the 2016 case brought under NAFTA Chapter 11, *Windstream Energy LLC v. Government of Canada*, the claimant argued that a moratorium by the government of Ontario on offshore wind projects after Ontario had established a feed-in tariff ("FIT") scheme to support the expansion of offshore windpower generation violated the NAFTA's fair and equitable treatment clause.[56] The NAFTA Free Trade Commission interpreted that "fair and equitable treatment" should follow customary international law standard; that is, determining whether the conduct was "egregious."[57] The tribunal in *Windstream Energy* used this interpretation to agree with Windstream that the Ontario government did not act in a fair and equitable manner.[58] However, the tribunal did not find the moratorium itself to constitute a violation of the fair and equitable treatment doctrine. Instead, the tribunal found the Ontario government's treatment afterwards—its lack of addressing the scientific uncertainty of the project on which the government relied to pass the moratorium in the first place—to constitute a violation of fair and equitable treatment.[59] Therefore, some deference was given to the government measure, though it was the treatment of the investor in this context that was found to be a violation.[60]

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[53] *See, e.g.*, Appellate Body Report, *Canada—Renewable Energy Measures Affecting Renewable Energy Generation Sector*, ¶¶ 5.188–.189, WTO Doc. WT/DS412/AB/R (adopted May 6, 2013) [hereinafter *Canada—Renewable Energy Measures*].

[54] TBT Agreement, *supra* note 46, art. 2.4.

[55] NAFTA, *supra* note 16, arts. 713, 905.

[56] Windstream Energy v. Can., PCA Case No. 2013-22, Award, ¶ 296 (Perm. Ct. Arb. Sept. 27, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7875.pdf [https://perma.cc/LNT5-NJ6K].

[57] *See* NAFTA Free Trade Comm'n, *Notes of Interpretation of Certain Chapter 11 Provisions* (July 31, 2001), http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp [https://perma.cc/L96D-Z6LG].

[58] *Id.* ¶¶ 296, 352 (disagreeing that the standard laid out in *L.F.H. Neer & Pauline Neer v. Mexico,* 4 R.I.A.A. 60, 61 (1926) is the standard for fair and equitable treatment).

[59] *Id.* ¶¶ 380–382; *see also id.* ¶ 515 (awarding the claimant CAD $ 25 million in damages and CAD 2.9 million in legal fees).

[60] *See id.*

II. Learning from Trade and Comparable Investment Issues

International trade has been dealing with environmental protection policies for several years through its jurisprudence on non-tariff barriers, and it has evolved in its approach.[61] While early trade cases were more hesitant to allow member states broad social policy space in passing environmental regulations that impacted trade,[62] more recent cases have demonstrated the WTO Appellate Body's willingness to recognize the need for states to address climate change mitigation, especially as it pertains to natural resource extraction and renewable energy policies, while encouraging them to balance these interests with those of trade.[63] Environmentalists have frequently criticized the WTO for being dismissive of the environment; however, sustainable development has been part of the WTO economic framework, albeit always within the context of liberalizing free trade.[64] Investment law differs from international trade frameworks in several ways, but one important difference is that investment law primarily protects the rights of investors, arguably placing it within the realm of private international law.[65] On the other hand, international trade law protects the right of nations to engage in international trade with one another without unreasonably burdensome economic barriers imposed by states.[66] An-

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[61] *See* Elizabeth Trujillo, *A Dialogical Approach to Trade and the Environment*, 16 J. Int'l Econ. L. 535, 548–50 (2013) [hereinafter Trujillo, *Dialogical Approach*].

[62] *See* Panel Report, *United States—Restrictions on Imports of Tuna*, ¶ 7.3, DS21/R (Aug. 16, 1991), GATT BISD (39th Supp.), at 205 (1993).

[63] *See, e.g.*, *Canada—Renewable Energy Measures*, *supra* note 53; Panel Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WTO Docs. WT/DS431/R, WT/DS432/R, WT/DS433/R (adopted Mar. 26, 2014); *see also* Appellate Body Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WTO Docs. WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (adopted Aug. 7, 2014).

[64] The Preamble of the Treaty establishing the WTO states:

> Recognizing that relations in the field of trade and economic endeavor should be conducted with a view to . . . expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development . . . .

See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 154, 33 I.L.M. 1144 [hereinafter Marrakesh Agreement].

[65] *See, e.g.*, Charles N. Brower, *W(h)ither International Commercial Arbitration?*, 24 Arb. Int'l 181, 186–90 (2008) (arguing that international investment arbitration is primarily governed by private international law instead of international public law). *But see* Stephan W. Schill, The Multilateralization of International Investment Law 1–22 (2017) (arguing that globalization is pushing international investment law out of the realm of private international law and towards multilateralization). For further discussion on whether investment law is governed by private international law or international public law, see Julie A. Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 Va. J. Int'l L. 367, 371–72 (2014).

[66] *See, e.g.*, Marrakesh Agreement, *supra* note 64, at 154 ("The Parties to this Agreement . . . [b]eing desirous of contributing to [free trade] by entering into reciprocal and mutually advantageous

other primary difference is that international trade is governed by a multilateral treaty, the General Agreement on Tariffs and Trade (GATT) and other WTO agreements. Nevertheless, there is no comprehensive governing body or treaty that brings together all the investment law and jurisprudence under one umbrella. In comparing the two legal frameworks in the context of the right to regulate and environmental protection, it is helpful to remember that the rights of investors are quite different from those of the state. However, when it comes to the way in which regulation impacts those rights, similar legal issues arise in both legal frameworks. For this reason, it is useful to consider the ways in which international trade has addressed some of these areas.

In international trade, there are four primary areas where sustainable development issues, as they pertain to the environment, arise: (1) direct and indirect taxes; (2) subsidies; (3) labeling schemes; and (4) local content requirements.[67] On the investment side, these are areas where there can also be conflict between the protection of investor rights and those of the environment. The following sections will briefly discuss these areas in both the context of trade and investment.

Section A of this Part discusses sustainable development issues that arise with direct and indirect taxes in the context of international trade and investment.[68] Section B of this Part discusses sustainable development issues that arise with subsidies.[69] Section C of this Part discusses sustainable development issues that arise with labeling schemes.[70] Section D of this Part discusses sustainable development issues that arise with local content requirements.[71]

A. Direct and Indirect Taxes

Taxes or tariffs at the border may have burdensome impacts on international trade. For this reason, the initial negotiations of the GATT focused on the reduction of tariffs.[72] Furthermore, GATT Articles I and III lay out two principles that discourage discrimination between domestic production and imports. GATT

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agreements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations . . . .").

[67] For more on the ways in which these four areas impact the United States' decarbonization efforts, see generally Elizabeth Trujillo, *Chapter on International Trade and Deep Decarbonization in the U.S. (part of U.S. Deep Decarbonization Pathways Project), in* LEGAL PATHWAYS TO DEEP CARBONIZATION IN THE UNITED STATES (Michael B. Gerrard & John C. Dernbach eds., Envtl. Law Inst. Publ'n., forthcoming 2018), *draft available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3238243 [https://perma.cc/PWC4-C4QG] [hereinafter Trujillo, *Deep Decarbonization*].

[68] *See infra* notes 72–96 and accompanying text.

[69] *See infra* notes 97–112 and accompanying text.

[70] *See infra* notes 113–120 and accompanying text.

[71] *See infra* notes 121–131 and accompanying text.

[72] CHAD P. BROWN, SELF-ENFORCING TRADE: DEVELOPING COUNTRIES AND WTO DISPUTE SETTLEMENT 11–12 (2009).

Article I lays out the most-favored nation principle ("MFN"), stating that "any advantage . . . granted by any Member to any product originating in . . . any other country shall be accorded immediately and unconditionally to the like product originating in . . . all other [WTO] Members."[73] GATT Article III lays out the national treatment principle by prohibiting member states from discriminating in arbitrary ways between imports and "like [domestic] products."[74] This principle ensures that domestic and foreign goods and services are treated equally. Article III generally focuses on preserving equal competitive opportunities and encouraging market access, while prohibiting domestic measures intended to protect domestic production over imports.[75]

In determining which measures are protectionist, the focus is on defining which imports are "like" domestic products. In determining likeness, the following four criteria are generally used: (1) the physical characteristics of a product, including its properties, nature, and quality; (2) the end uses of a product in any given market; (3) "consumers' tastes and habits," which may vary; and (4) tariff classification of the products.[76] While these criteria are not mutually exclusive, the DSB arguably has placed the greater emphasis on points two and three, focusing on the "competitive substitutability" of the imports as they compare to like domestic products.[77]

GATT Article III:4 explains that the national treatment principle also applies to non-fiscal measures; that is, for the most part, regulatory measures.[78] While the analysis also turns on the likeness of the products, the primary focus of this section of Article III—as outlined specifically in GATT Article III:2—is to ensure that imports are "accorded treatment no less favourable than that accorded to like products of national origin."[79] Though there has been an unwillingness to consider regulatory purpose within the rubric of likeness in Article III, the *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* case, involving a French moratorium on the importation of asbestos and products with asbestos fibers, somewhat softened this approach.[80] The WTO Appellate Body, in applying Article III(a)(4), focused on

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[73] *See* GATT, *supra* note 17, art. I.

[74] *Id.* at 204–08.

[75] Trujillo, *Mission Possible*, *supra* note 16, at 211–21 (discussing the interpretation and application of GATT Article III). For more discussion on the relationship between domestic production and international trade, see generally Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1 (1999).

[76] *See* Working Party Report, *Border Tax Adjustments*, ¶ 18, L/3464 (Dec. 2, 1970), GATT BISD (18th Supp.), at 101–02 (1972) [hereinafter *BTA Report*] (setting forth in paragraph 18 the criteria for determining likeness set out by the Working Party Report on Border Tax Adjustments).

[77] *See, e.g.*, *Asbestos Report*, *supra* note 46, ¶ 3.439.

[78] *See* GATT, *supra* note 17, art III:4; *see also* Trujillo, *Mission Possible*, *supra* note 16, at 214–21 (comparing Article III's application to fiscal and non-fiscal measures).

[79] *See id.*

[80] *See generally Asbestos Report*, *supra* note 46.

the competitive substitutability between products with asbestos fibers and those without them and reasoned that categories of "like" imported products could take into consideration regulatory measures with a legitimate public purpose.[81] A similar analysis was conducted in the 2012 *United States—Measures Affecting the Production and Sale of Clove-Cigarettes* case involving regulation of the importation of flavored cigarettes.[82]

In the investment context, investor-state treaties, BITs, and investment treaties found within preferential trade agreements typically contain MFN and national treatment clauses to address fiscal and non-fiscal measures impacting FDI.[83] Furthermore, the fair and equitable treatment and expropriation doctrines also address issues pertaining to fiscal and non-fiscal measures impacting FDI. For national treatment in the investment context, rather than assessing the likeness of products in a "like products" framework as in trade,[84] investor-state treaties use a "like circumstances" scheme which is arguably broader in scope than the one used in the context of trade.[85] While the "like circumstances" scheme also considers the competitive substitutability of investments, it further takes into account the totality of the circumstances impacting a particular investment. The comparison is not necessarily based on origin either. As in the context of trade and "like products," it is in the "like circumstances" analysis where the extent of deference to domestic regulatory frameworks becomes particularly relevant.[86]

A recurring question under the national treatment rule is whether essentially identical products can be treated differently because of the PPM used to produce them.[87] This has particular saliency for domestic efforts in climate change mitigation. For example, a variety of decarbonization methods, including carbon pricing, would reduce greenhouse gas emissions needed to produce a particular product. Should a government be able to treat a widget produced with high carbon differently than the same kind of widget produced with less carbon? In the trade context, the WTO DSB has not definitively ruled on the viability of trade discrimination based on differences in PPMs. But, the DSB

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[81] *See id.* ¶ 99.

[82] *See Clove-Cigarettes Report*, *supra* note 46, ¶ 282.

[83] *See, e.g.*, CETA, *supra* note 13, arts. 8.6–.7.

[84] *See* GATT, *supra* note 17, at 205–06.

[85] *See* Trujillo, *Mission Possible*, *supra* note 16, at 244–45 (citing Pope & Talbot v. Can., Award on the Merits of Phase 2, ¶¶ 78–79 (Apr. 10, 2001), 7 ICSID Rep. 102 (2001)).

[86] *Id.* at 221, 225.

[87] *See, e.g.*, Christiane R. Conrad, *Process and Production Methods (PPMs) in* WTO LAW: INTERFACING TRADE AND SOCIAL GOODS 20–31 (2011).

has stated that Article III may, in fact, prohibit discrimination based on differences in PPMs when the final products are otherwise identical.[88]

Trade restrictions based on PPMs remain quite controversial for the WTO, and developing countries like Mexico have been hesitant to accept them as part of the international trade framework.[89] The skepticism is based on the fact that PPMs may advantage industrialized countries over less developed ones. The adoption of cleaner production methods may be expensive, and requiring them could impact the competitiveness of products coming from developing countries.[90] Border Tax Adjustment ("BTA") schemes may also be a way to address these inequalities in competitiveness; however, such schemes must be applied in non-discriminatory ways.[91]

GATT Article XX is the trade provision which allows for an exception to what would otherwise be a trade violation.[92] Several provisions under Article XX relate either directly or indirectly to environmental protection.[93] Though the WTO DSB has become more lenient in recognizing legitimate domestic environmental regulatory measures,[94] no case to date has involved a domestic environmental regulatory measure that has been able to overcome the high threshold under the *chapeau*, or preamble, of Article XX. The *chapeau* of Arti-

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[88] *See* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Product*s, ¶¶ 186–187, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) [hereinafter *US-Shrimp Report*].

[89] *See* Trujillo, *Dialogical Approach*, *supra* note 61, at 551–55 (discussing PPMs in GATT and WTO jurisprudence). Arguably, the "like circumstances" framework provides flexibility for more social policy space. *See supra* notes 45–60 and accompanying text.

[90] Recent WTO jurisprudence has discussed PPMs in the context of technical regulations, like labeling schemes, under the TBT. *See, e.g.*, Appellate Body Report, *United States—Measures Concerning the Importation Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/R (adopted May 16, 2012) [hereinafter *US-Tuna II Appellate Body Report*]; Panel Report, *United States—Measures Concerning the Importation Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/CS381/R (adopted Sept. 15, 2011) [hereinafter *US-Tuna II Panel Report*].

[91] *See* Henrik Horn & Petros C. Mavroidis, *To B(TA) or Not to B(TA)? On the Legality and Desirability of Border Tax Adjustments from a Trade Perspective*, 34 WORLD ECON. 1911, 1914 (2011). For a definition of BTAs, see *BTA Report*, *supra* note 76, at 98.

[92] *See* GATT, *supra* note 17, at 262–65 (laying out "general exceptions"); *see also US-Shrimp Report*, *supra* note 88, ¶¶ 156–159 (interpreting GATT Article XX).

[93] *See* GATT, *supra* note 17, at 262 (citing specifically GATT Article XX:I(a), XX:I(b), XX:I(g)); *see also US-Tuna II Appellate Body Report*, *supra* note 90, ¶ 85 (recognizing an argument that Article XX can be used to protect a member state's environmental measures); *US-Tuna II Panel Report*, *supra* note 90, ¶¶ VII:458–:460 (recognizing that GATT Article XX allows member states to "protect human, animal or plant life or health"); Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (adopted Apr. 29, 1996) (analyzing a dispute over a United States Environmental Protection Agency regulation under Article XX); *Asbestos Report*, *supra* note 46, ¶¶ 5.194–.203 (recognizing the ways in which Article XX relates to environmental protection).

[94] *See, e.g.*, Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶¶ 145, 340–341, WTO Doc. WT/DS332/R (adopted June 12, 2007). For more discussion regarding the evolution of Article XX jurisprudence in the context of environmental regulation, see Trujillo, *Dialogical Approach*, *supra* note 61, at 550–53.

cle XX disallows trade-restrictive measures that are "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[95] Generally, investor-state treaties do not contain such provisions. However, there is a growing trend towards including them, as is seen in the 2014 Australia-Korea Free Trade Agreement.[96]

B. Subsidies

Governments have used subsidies as a means of defraying the costs of transitioning high emission industries towards cleaner production.[97] This is particularly relevant in the context of renewable energy projects and the use of FIT schemes.[98] FIT schemes allow long-term contracts that guarantee payment to renewable energy producers for the energy they produce. They create fixed prices for electricity and lower barriers to entry, incentivizing more investment in renewable energy production.[99] It is unclear under WTO jurisprudence if FIT schemes are viable subsidies under trade law, but at least one case has recognized that FIT schemes may in fact constitute a benefit as defined under the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").[100] The SCM Agreement does not contain a general exception for subsidies enacted to fulfill a legitimate public purpose such as climate change mitigation.[101]

In the investment context, FIT schemes and tax incentives are becoming increasingly relevant as a means to help offset the costs of switching to cleaner production of energy. This was demonstrated in *Charanne B.V. & Construction Investments S.A.R.L. v. The Kingdom of Spain* in 2016, which was brought un-

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[95] GATT, *supra* note 17, at 262.

[96] Korea-Australia Free Trade Agreement, S. Kor.-Austl., art. 11.9(5), Apr. 8, 2014, https://dfat.gov.au/trade/agreements/in-force/kafta/official-documents/Pages/full-text-of-kafta.aspx [https://perma.cc/5S32-FTXN].

[97] *See* Trujillo, *Deep Decarbonization*, *supra* note 67, at 4, 7–8.

[98] *See id.* at 4–5.

[99] *Id.*

[100] *See* Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, ¶ 157, WT/DS70/AB/R (Aug. 2, 1999) (stating that "the marketplace provides an appropriate basis for comparison in determining whether a 'benefit has been conferred'"); *see also* Agreement on Subsidies and Countervailing Measures, art. 1.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, https://www.wto.org/english/docs_e/legal_e/24-scm.pdf [https://perma.cc/Z84L-W8T6] [hereinafter SCM Agreement]. The SCM Agreement defines a subsidy as "a financial contribution by a government or any public body" in which a "benefit" is "conferred." *Id.* arts. 1.1(a)(1), 1.1(b).

[101] *See generally* SCM Agreement, *supra* note 100. Article 8.2 of the SCM Agreement did create exceptions for subsidies connected to research and development, regional development, and environmental compliance costs. *Id.* art. 8.2. However, in 2000, these exceptions expired and they were not renewed. *See* TRACEY EPPS, CHAMPMAN TRIPP & ANDREW GREEN, RECONCILING TRADE AND CLIMATE: HOW THE WTO CAN HELP ADDRESS CLIMATE CHANGE 118 (2010).

der the Energy Treaty Charter ("ETC").[102] Given the costs of setting up renewable energy infrastructures, financial incentives need to be put in place and governments can be helpful in this regard. In *Windstream Energy*, which was brought under NAFTA Chapter 11, the FIT program offered a twenty-year fixed premium price to be paid by the Ontario Power Authority to producers of renewable energy, which in turn would encourage and assist investors to gather the necessary financing to pursue such projects.[103] Windstream was offered a FIT contract in 2010 for an offshore wind project. When the Ontario government passed a moratorium in order to do more research on environmental impacts of such projects and an appropriate regulatory framework was put in place, Windstream could no longer find the necessary financing and it was exposed to the possibility of contract termination.[104]

In cases where governments decide to either modify incentives, update regulatory frameworks, or delay projects due to environmental impact assessments, there may be an indirect expropriation or a fair and equitable treatment violation if it is found that adequate due process is not provided to the investor.[105]

Both claims—indirect expropriation and fair and equitable treatment violation—were made in the *Charanne* case after the Spanish government decided to modify its original FIT scheme that provided economic incentives, including subsidies to the photovoltaic sector to offset the costs of setting up solar energy infrastructure.[106] During the Spanish economic crisis, though, the Spanish government decided to reduce some cost by reducing such incentives and raising costs for investors in the renewable energy sector.[107] Charanne argued that a "significant or substantial interference" with the investment was enough to prove indirect expropriation,[108] and that their legitimate expectations in the investment were disrupted, resulting in a fair and equitable treatment violation.[109] The tribunal disagreed with these arguments finding that legitimate

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[102] Charanne B.V. & Constr. Invs. S.A.R.L. v. Spain, Arbitration No. 062/2012, Final Award, ¶ 283 (Jan. 21, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf [https://perma.cc/WNE7-DN5B] (unofficial English translation). This was the first of twenty six similar cases regarding renewable energy policy reforms. *See, e.g.*, Windstream Energy v. Can., PCA Case No. 2013-22, Award, ¶¶ 380–382 (Perm. Ct. Arb. 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7875.pdf [https://perma.cc/LNT5-NJ6K] (finding that treatment of a FIT scheme motivated by domestic environmental policy violated fair and equitable treatment).

[103] *Windstream*, PCA Case No. 2013-22, Award, ¶ 99.

[104] *Id.* ¶¶ 149–160.

[105] *See, e.g.*, *Vandevelde*, *supra* note 25, at 89–96.

[106] *Charanne*, Arbitration No. 062/2012, ¶¶ 277–307.

[107] *Id.* ¶¶ 148–175.

[108] *Id.* ¶¶ 278–290. The claimant referred to *Vivendi v. Argentina* in making this argument. *See* Compañía de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, ¶ 7.5.17 (Aug. 20, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0215.pdf [https://perma.cc/9L3K-HE2A] (takings tantamount to expropriation are those that result in a substantial loss of control or value of a foreign investment").

[109] *Charanne*, Arbitration No. 062/2012, ¶¶ 291–307.

expectations had not been disrupted and that the lowering of profitability of the shares in question did not amount to expropriation of the investment in this case.[110] While its decision to disagree with Spain's jurisdictional and standing arguments was very important with respect to the scope of the ECT,[111] the tribunal's decision regarding Spain's right to regulate sets an important tone for the future relationship of states' rights with those of investors. It decided that a government's decision to legitimately modify regulatory schemes does not *per se* translate into unfair treatment of investor rights. "[R]egulatory flexibility" should be allowed in order "to respond to changing circumstances in the public interest."[112]

C. Labeling Schemes

The TBT Agreement governs technical barriers to trade, which are allowed within certain parameters.[113] Technical barriers may include regulations regarding the safety and health standards for goods and services, such as licensing standards, labels, conformity assessment measures, and even PPMs.[114] Therefore, a regulation, for example, that places a ceiling on fuel emissions in the production context could be considered a viable technical regulation under the TBT Agreement. However, a technical barrier should not be discriminatory under TBT Articles 2.1 and 2.2.[115] Under TBT Article 2.2, technical regula-

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[110] *See id.* ¶¶ 455–467 (discussing the tribunal's holdings regarding Charanne's expropriation claim); *id.* ¶¶ 476–542 (discussing the tribunal's holdings regarding Charanne's fair and equitable treatment claim).

[111] See *id.* ¶¶ 394–450 (discussing its holding that the tribunal had jurisdiction to hear the dispute).

[112] See *id.* ¶ 500 (internal quotation marks and citations omitted). Of note, there was a dissenting opinion in *Charanne* regarding the legitimate expectations argument. *Id.* ¶¶ 1–13.

[113] *See generally* TBT Agreement, *supra* note 46.

[114] *See Standards & Safety*, WORLD TRADE ORGANIZATION (2018), https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm#TRS [https://perma.cc/AWS4-MU3S] (explaining the importance of technical regulations and standards). The TBT Agreement "aims to ensure that technical regulations, standards, and conformity assessment procedures are non-discriminatory and do not create unnecessary obstacles to trade." *See Technical Barriers to Trade*, WORLD TRADE ORGANIZATION (2018), https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm [https://perma.cc/DD4B-LGNW] (summarizing the purpose of the TBT Agreement); *see also US-Tuna II Appellate Body Report*, *supra* note 90, ¶¶ 344–348 (recognizing that the definition of technical regulation under the TBT Agreement may also apply to a dolphin-free label, the measure in question in this dispute). *See generally* TBT Agreement, *supra* note 46.

[115] *See* TBT Agreement, *supra* note 46, arts. 2.1–.2. The TBT Agreement's Article 2.1 requires that imported products "be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country." *Id.* art. 2.1. Arguably, risks and regulation may be considered in the "like products" analysis under the TBT Agreement. *See, e.g.*, *Clove-Cigarettes Report*, *supra* note 46, ¶ 298 (finding that the cigarettes at issue were "like products" within the meaning of TBT Article 2.1).

tions may "not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create."[116]

Technical regulations are particularly relevant to environmental regulation and trade in the context of eco-labeling. These are labels used on products to inform consumers of the impact of the production of a good on the environment.[117] They address the life-cycle of a product or service, and therefore implicate PPMs. Eco-labeling schemes are a growing trend for environmental regulation, especially those labels that comply with international standards under the International Organization for Standardization ("ISO") and the Global Ecolabelling Network for guidance.[118] Furthermore, eco-labeling schemes fit nicely with the growth of market-driven regulatory schemes, which transfer much of the responsibility of environmental protection from the state to the consumer.

On the investment side, TBTs or Standard Related Measures ("SRMs") are also allowed as long as they are not discriminatory. Furthermore, they tend to be presumed viable under investment treaties if they comply with international standards.[119] One of the more well-known investment cases concerning labeling is the *Australia-Tobacco Labeling* case, concerning Australian regulation regarding the use of specific tobacco labels that showed the grim impacts of smoking, including cancer and other illnesses, and disallowing the use of relevant trademark labels.[120]

D. Local Content Requirements

In trade, local content requirements ("LCRs") have been linked to FIT schemes.[121] They are controversial in trade and investment because they require, "as a condition for financial support," that "renewable electricity genera-

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[116] TBT Agreement, *supra* note 46, art. 2.2.

[117] *See What Is Ecolabelling?*, GLOBAL ECOLABELLING NETWORK, https://globalecolabelling.net/what-is-eco-labelling/ [https://perma.cc/JL49-XNJA] (defining eco-labeling).

[118] *See id.* (explaining the three types of eco-labeling set out by the International Organization for Standardization). For more information on eco-labeling as a transnational regulatory norm, see Trujillo, *Regulatory Cooperation*, *supra* note 15, at 380–85.

[119] *See, e.g.*, NAFTA, *supra* note 16, arts. 904–05.

[120] *See generally* Philip Morris Asia Ltd. v. Australia, PCA Case No. 2012-12, Award on Jurisdiction & Admissibility (Perm. Ct. Arb. Dec. 17, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf [https://perma.cc/H9R5-WMA2]. For the case involving Australian regulation of specific tobacco labeling in the trade context, see generally Panel Report, *Australia—Certain Measures Concerning Trademarks, Geographical Indications, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (adopted June 28, 2018). *See also*, Bryce Baschuk, *WTO Tobacco Ruling Opens Door to New Plain Packaging Laws*, BLOOMBERG (June 28, 2018), https://www.bloomberg.com/news/articles/2018-06-28/wto-tobacco-ruling-opens-door-to-new-plain-packaging-laws.

[121] *See, e.g.*, Trujillo, *Deep Decarbonization*, *supra* note 67, at 15–16. Though much of trade jurisprudence regarding LCRs has also concerned a FIT scheme, the two are mutually exclusive and one does not necessarily require the other.

tors . . . source a previously defined share of components for their final products from local manufacturing or assembly."[122] Though LCRs are usually found to be protectionist under trade rules unless they fall within the government procurement exception under GATT Article III:8,[123] they do allow local governments to garner political support, especially in conjunction with policies intended to create local jobs and for economic incentive packages for new technologies and products needed for viable renewable energy plans.[124] WTO cases addressing LCRs have generally found the LCR in violation of trade rules because they favor the protection of domestic production over that of imports for the sole purpose that it is domestic, thereby violating the market principles underlying free trade liberalization.[125] However, the *Canada—Certain Measures Affecting the Renewable Energy Generation Sector* case also stated that the determination of whether such a competitive relationship exists may also include the "inputs and processes of production used to produce the product," thereby opening the door for PPMs in this context.[126] In the *India—Certain Measures Relating to Solar Cells and Solar Modules* case between the United States and India, India made an argument under GATT Article XX(j) that LCRs were required because India was a developing country. Specifically, India argued that, as a developing country, it needed to break into the renewable energy market because it was essential to its decarbonization goals, and solar cells were in short-supply in India.[127] Though raising interesting questions regarding the ways that free trade may provide opportunities for develop-

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[122] Jan Christoph Kuntze & Tom Moerenhout, *Are Feed-in Tariff Schemes with Local Content Requirements Consistent with WTO Law? in* FRONTIERS OF INTERNATIONAL ECONOMIC LAW: LEGAL TOOLS TO CONFRONT INTERDISCIPLINARY CHALLENGES 151–180 (Freya Baetens & José Caiado eds., 2014).

[123] *See* GATT, *supra* note 17, at 206–08. In *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, Canada defended its LCRs and FIT scheme under this argument. *See Canada—Renewable Energy Measures*, *supra* note 53, ¶¶ 2.1–.9.

[124] For discussion on the political necessity of the LCRs in the context of trade, see generally Tim Meyer, *How Local Discrimination Can Promote Global Public Goods*, 95 B.U. L. REV. 1937 (2015).

[125] *See, e.g.*, *Canada—Renewable Energy Measures*, *supra* note 53, ¶¶ 5.75–.85; *see also* Appellate Body Report, *Canada—Measures Relating to Feed-in Tariff Program*, WTO Doc. WT/DS 426/AB/R (adopted May 6, 2013). The Appellate Body decided these cases together as they related to the same Canadian FIT program, the former case brought by Japan, and the latter by the EU. Japan also alleged that the Ontario law at issue violated Article 2.1 of the Trade-Related Investment Measures ("TRIMS") Agreement. *See generally* Agreement on Trade-Related Investment Measures, art. 2.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186, https://www.wto.org/english/docs_e/legal_e/18-trims_e.htm [https://perma.cc/X779-3CY4] [hereinafter TRIMS Agreement]

[126] *See Canada—Renewable Energy Measures*, *supra* note 53, ¶ 5.63.

[127] *See* Appellate Body Report, *India—Certain Measures Relating to Solar Cells and Solar Modules*, ¶ 5.46, WTO Doc. WT/DS456/AB/R (Sept. 16, 2016) [hereinafter *India—Solar Modules*]; *see also* GATT, *supra* note 17, at 264 ("[N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . essential to the acquisition or distribution of products in general local short supply.").

ing countries, or for countries creating new essential markets, to transition their economies towards cleaner productions of energy, the Appellate Body decided that India did not demonstrate that the renewable energy equipment in question was indeed in short supply domestically.[128]

In the investment context, LCRs are linked to performance requirements, which are generally not allowed in investor-state treaties.[129] Performance requirements provide that the establishment of an investment may not be conditioned on the use of domestic products or services, on achieving a given level of preference for goods or services produced domestically, on conditions, or on levels of exports.[130] Therefore, the trend of imposing LCRs to FIT schemes or other renewable energy incentives would also violate investment law. In fact, several of the above-mentioned WTO disputes on this topic also included arguments on violations under the Trade-Related Investment Measures Agreement ("TRIMS").[131] As in the case of free trade, the question would be whether LCRs become necessary for certain domestic clean energy and climate change mitigation strategies that may not otherwise take place without those LCRs. There are no straight-forward solutions within the context of traditional investment rules.

III. Issues Moving Forward

The right to regulate in the international investment regime, specifically concerning natural resources, will face challenges moving forward. Issues are bound to arise as protectionism continues to spread, especially as some countries in Latin America establish constitutional reforms with respect to environmental protection.[132]

Section A of this Part briefly discusses the rise of protectionism around the world.[133] Section B of this Part seeks to find common ground between the interests of international investors and the interests of domestic environmental policies.[134] Section C of this Part discusses how certain nations in Latin America have enacted constitutional provisions to protect their natural resources, and how this may affect international investment.[135]

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[128] *India—Solar Modules*, *supra* note 127, ¶ 6.4.

[129] *See, e.g.*, NAFTA, *supra* note 16, art. 1106 (stating that "no Party may impose" certain requirements "in connection to the establishment, acquisition, expansion," etc. of an investment, including, "to achieve a given level or percentage of domestic content").

[130] *See id.*

[131] *See, e.g.*, *Canada—Renewable Energy Measures*, *supra* note 53, ¶ 2.65 (explaining how Japan also alleged that the Ontario law at issue violated Article 2.1 of the TRIMS Agreement).

[132] *See infra* notes 136–142 and accompanying text.

[133] *See infra* notes 136–142 and accompanying text.

[134] *See infra* notes 143–162 and accompanying text.

[135] *See infra* notes 163–182 and accompanying text.

A. Rise of Protectionism

Currently, there are several trends impacting investment law, one of which is a popular backlash towards globalization and a return to protecting local production. This backlash is occurring in the midst of a need to reimagine the relationship between regulation and free trade, and in turn, the role of investment in economic development. For a long time, developing countries were concerned with what they considered to be unfair use of investor-state arbitration as a means of pressuring change domestically and pricing out local industry. In some cases, in Latin America, for example, some countries have reacted by exiting the International Centre for Settlement of Investment Disputes ("ICSID").[136] However, recent trends are also occurring in industrialized nations, where rising skepticism is causing the return of populism and a retreat from the desire to come under international governance structures like international arbitration. This was reflected, for example, during the negotiations of the Transatlantic Trade and Investment Partnership ("TTIP") where several European nations reacted negatively to the idea of an investment court with appellate capacities.[137] Under CETA,[138] there were discussions as to implementation of the investment chapter and the applicability of the Investment Court on individual European countries as well as its relationship with the European Court of Human Rights.[139] The Brexit movement is another example of this retreat.[140]

The United States is also facing challenges with regard to the level of participation in global governance. Recent tariffs by the Trump Administration are an indication of a desire to reduce global trading engagements in order to protect local industry. There is little proof that these tariffs will lead to the growth of the domestic manufacturing sectors they are intended to save, especially relative to the long-term costs of such tariffs on the growth of the economy

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[136] *See, e.g.*, Fernando Carbrera Diaz, *Ecuador Continues Exit from ICSID*, INV. TREATY NEWS (June 8, 2009), https://www.iisd.org/itn/es/2009/06/05/ecuador-continues-exit-from-icsid/ [https://perma.cc/YKW2-9RK7] (explaining that Ecuador was "denouncing [ICSID]," an institution Ecuadorian president Rafael Correa called "an atrocity" that "signifies colonialism").

[137] *See, e.g.*, European Parliament Press Release IPR/89/201, The Parliament, MEPs Debate Plans for a Multilateral Investment Court (Nov. 30, 2017) (addressing the debate between members of the European Parliament concerning the creation of an investment court).

[138] *See, e.g.*, CETA, *supra* note 13. Chapter 8 of the CETA addresses issues related to investment. *Id.*

[139] *See generally* Laura Puccio & Roderick Harte, *From Arbitration to the Investment Court System (ICS)*, EUROPEAN PARLIAMENTARY RESEARCH SERV. (June 2017), http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607251/EPRS_IDA(2017)607251_EN.pdf [https://perma.cc/7E8A-GCXY].

[140] One of the issues being discussed in the Brexit negotiations is the extent to which the European Court of Justice would have jurisdiction over Britain. Daniel Boffey, *Brussels Seeks to Tie UK to European Human Rights Court After Brexit*, THE GUARDIAN (June 18, 2018), https://www.theguardian.com/law/2018/jun/18/brussels-seeks-to-tie-uk-to-european-human-rights-court-after-brexit [https://perma.cc/DAC9-N5FC].

which has, for some time, been integrated into a world economy with truly global supply-chains.[141] These protectionist tendencies arguably were already evident before though, especially after the 2009 economic crisis in the United States. The rise of "Buy America" provisions and LCRs in the emerging renewable energy markets, and emphasis on the sovereign right to regulate are indications of this trend, which also has reared its head in Europe.[142] They also reflect the growing sentiment of the need and the desire to address the negative impacts of trade and investment, and in turn globalization, on local economies and the role of government in that context. Despite skepticism regarding globalization, there continues to be a desire for investment to grow and for U.S. companies to have the ability to invest outside its borders. Furthermore, the need to shift high-emission economies toward clean ones brings more opportunities for investment and trade to play key roles in this transition. This can occur only if both international trade and investment regimes are updated to accommodate the need for social policy space at the domestic level. Interestingly, addressing climate change through clean energy projects is one area where trade, investment, and environmental issues may find common ground.

B. Finding Common Ground: New Challenges for Investment

One of the biggest challenges in reconciling the interests of investors with those of protecting the environment is finding common goals and a common language. If economic development includes using natural resources efficiently and the use and investing in more and more energy without consideration to the impacts, the goals of protecting the environment are not necessarily served. However, in order to meet the 2030 Sustainable Development Goals, more FDI is needed, especially in developing countries and in sectors such as power and energy infrastructure.[143] In the last few years, there has been an uptick in in-

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[141] *See* Heather Long, *Trump Has Officially Put More Tariffs on U.S. Allies Than on China*, WASH. POST (May 31, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/05/31/trump-has-officially-put-more-tariffs-on-u-s-allies-than-on-china/?noredirect=on&utm_term=.5f0222d39c33 [https://perma.cc/T5GQ-TWG4]; *The Trump Administration Imposes Tariffs on America's Closest Allies*, THE ECONOMIST (June 1, 2018), https://www.economist.com/finance-and-economics/2018/06/01/the-trump-administration-imposes-tariffs-on-americas-closest-allies [https://perma.cc/558A-F2ZR]; *see also*, Bill Chappell, *China Files Complaint Over U.S. Tariffs on $200 Billion of Imports*, NPR (July 16, 2018,), https://www.npr.org/2018/07/16/629390937/china-files-wto-complaint-over-u-s-tariff-on-200-billion-of-imports [https://perma.cc/9AHU-7MV7].

[142] *See The Green Investment Report*, WORLD ECONOMIC FORUM, http://reports.weforum.org/green-investing-2013/green-investment-current-flows-and-future-needs/ [https://perma.cc/FS4L-3JEA]; *see also* Office of Energy Efficiency & Renewable Energy, *4 Charts That Show Renewable Energy Is on the Rise in America*, DEP'T OF ENERGY (Nov. 14, 2016), https://www.energy.gov/eere/articles/4-charts-show-renewable-energy-rise-america [https://perma.cc/6V54-BDTQ] [hereinafter *Energy Charts*].

[143] *See Sustainable Development Goals*, United Nations Sustainable Development Knowledge Platform, https://sustainabledevelopment.un.org/sdgs [https://perma.cc/BA5B-GSAX].

vestment in green technologies, and government incentives such as subsidies, tax credits, and FIT schemes have been helpful in this regard.[144] When it comes to decarbonization strategies and economic development, common ground between trade, investment, and environmental protection can be found. Evidence suggests that in 2016, renewable energy projects in the United States have been on the rise due to government incentives, thereby bringing down the costs of renewable energy.[145] Recent backpedaling on these incentives, however, will have a perverse effect on these advances.[146]

In trade, dialogue among trade policy makers and environmental regulators in addition to multilateral efforts to negotiate environmental goods agreement has helped to raise awareness of updating trade treaties and trade jurisprudence to accommodate for more social policy space in the area of environmental protection and climate change mitigation. Without the help of government to offset the costs of transitioning towards cleaner markets, the private sector is unlikely to do so. Consumer awareness is also needed in this transition making eco-labeling particularly salient in finding common ground. As UNCTAD continues its International Investment Agreements ("IIA") investment reform, differences in language and the need for more dialogue among regulators, arbitrators, and the private sector, in addition to policy makers, is needed to help reconcile each legal framework's different focus.[147]

One case that brings to light these differences is the *Clayton/Bilcon v. Government of Canada* case brought under NAFTA Chapter 11.[148] This case involved a group of U.S. investors who wanted to begin developing a mining quarry in Nova Scotia for concrete production.[149] The project also included the development of a marine terminal to facilitate shipment of the cement back to

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[144] *See* Bill Maloney, *Renewable Energy Subsidies—Yes or No?*, FORBES (Mar. 23, 2018), https://www.forbes.com/sites/uhenergy/2018/03/23/renewable-energy-subsidies-yes-or-no/#571a152f6e23 [https://perma.cc/M6VZ-R7LM].

[145] *Energy Charts*, *supra* note 142. As of 2016:

> [R]enewable energy capacity now produces 14% of all domestic electricity . . . . With help from federal tax credits, the power purchase agreement price for wind has fallen from roughly ¢ 7 per kilowatt-hour in 2009 to an average of ¢ 2 per kilowatt-hour in some regions of the country today.

Id.

[146] Coral Davenport et al., *What Is the Clean Power Plan? And How Can Trump Repeal It?*, N.Y. TIMES (Oct. 10, 2017), https://www.nytimes.com/2017/10/10/climate/epa-clean-power-plan.html [https://perma.cc/9ZAH-63HU] (explaining the Clean Power Plan, an Obama Administration clean energy plan that has recently been rescinded).

[147] *See, e.g.*, *Reform of the IIA Regime*, UNCTAD INVESTMENT POLICY HUB (2013), http://investmentpolicyhub.unctad.org/IIA/KeyIssueDetails/42 [https://perma.cc/LU3E-RGK2] (setting up dialogue for concerns over the current investor-state dispute system).

[148] *See generally* Bilcon of Del. Inc. v. Government of Canada, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (Perm. Ct. Arb. Mar. 17, 2015).

[149] *Id.* ¶¶ 7–8.

the United States.[150] After receiving encouragement from the provincial and federal governments and a permit to begin the project, the project was denied under a Joint Review Panel ("JRP"), a panel made up of federal and provincial authorities.[151] The JRP rejected Bilcon's Environmental Impact Statement, stating that it did not adequately address the environmental and economic impacts of the project and that it went against the "community core values" of the area.[152] The investors brought a fair and equitable treatment violation claim, in addition to national treatment and expropriation claims, against Canada under NAFTA Chapter 11.[153] Local communities were concerned about the social, environmental, and economic impacts of the quarry in the region, especially on the fishing and eco-tourism industries as well as the local indigenous community.[154] In finding for the investors, the tribunal found a violation of fair and equitable treatment because it found the JRP process to be arbitrary and lacking in transparency.[155] Further, the tribunal found that Bilcon was unfairly induced to invest in the region by government officials.[156] The dissent noted that the tribunal treated the investors' rights in this case as if it were a property zoning issue, rather than one that took into consideration the "human environment effects assessment" and Bilcon's limited community engagement in its project.[157]

The JRP report in question focused on an understanding of sustainable development that "suggests that communities make decisions about the use and commitment of resources while respecting the rights of future generations and other communities to social, economic and environmental health."[158] Bilcon's environmental impact statement did not address these issues but rather focused on the ways that the project would create jobs, albeit jobs that were not necessarily in line with the "community['s] core values."[159] This case is a

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[150] *Id.*

[151] *Id.* ¶¶ 5, 14–15.

[152] *Id.* ¶¶ 371–383. Under Canadian federalism, such assessments are usually done provincially, but in this case, because of the marine terminal, the federal government was also involved. *Id.* ¶ 5.

[153] *Id.* ¶¶ 6–26.

[154] *Id.* ¶ 26.

[155] *Id.* ¶¶ 588–604.

[156] *Id.* ¶¶ 455–487.

[157] *Id.*, Dissenting Opinion, ¶¶ 26–27.

[158] *See* Joint Review Panel Report, *Environmental Assessment of the Whites Point Quarry and Marine Terminal Project*, 3 (Oct. 2007), https://www.novascotia.ca/nse/ea/whitespointquarry/WhitesPointQuarryFinalReport.pdf [https://perma.cc/K29E-ZRVN] (defining "sustainable development" as one of the Joint Review Panel's "five guiding principles" in making its environmental assesments); Douglas A. Kysar, *Sustainability, Distribution, and the Macroeconomic Analysis of Law*, 43 B.C. L. REV. 1, 23–24 (2001) (elaborating on the UN's defintion of sustainable development as "development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs'" (citations omitted)).

[159] *Bilcon*, PCA Case No. 2009-04, Award on Jurisdiction & Liability, ¶¶ 373–376.

good indication of the challenges that lie ahead for investment as governments take into account more sustainable ways of achieving economic development.

Aside from the concern that an investor-state tribunal could effectively adjudicate whether a federal environmental impact assessment is in breach of domestic federal law, as in *Bilcon*,[160] this case highlights that socio-economic impacts will increasingly be taken into consideration in domestic environmental impact assessments.[161] These impacts are harder to quantify scientifically, but they do have lasting effects on local communities and ecosystems. Investment laws influenced by the doctrines of fair and equitable treatment, expropriation, and national treatment do not adequately capture these kinds of socio-economic and environmental impacts. The extent to which investment law will defer to domestic regulatory schemes will be increasingly important for investment tribunals. One way to address these differences in language and legal standards is to increase transnational dialogue in the negotiations processes of treaties and to include in treaties mechanisms of ongoing dialogue through regulatory councils or committees. We have seen some progress in this regard in the context of recent preferential trade agreements that establish formal methods of dialogue through regulatory coordination and the establishment of committees consisting of regulators and trade policy-makers.[162] Important, though, is to also include public participation by all stakeholders, to ameliorate a "fox in the hen-house" problem that could emerge if regulators begin to pursue trade interests rather than the interests of the public.

C. Constitutionalism and Investment: Examples in Latin America

Some countries in Latin America have turned their back to foreign investment under the ICSID framework.[163] Instead, they are addressing the preservation of their own natural resources through constitutional reform. Bolivia and Ecuador, for example, have amended their constitutions to incorporate the right to manage their natural resources.[164] How will investment treaties and investor-state tribunals deal with a constitutionally protected right to regulate the environment moving forward?

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[160] *Id.*, Dissenting Opinion, ¶ 2 (disagreeing with the majority because "it applies the standard in a way that it is met simply by an allegation of a breach of Canadian law").

[161] *See id.* ¶ 27.

[162] *See supra* notes 29–44 and accompanying text.

[163] *See, e.g.*, Diaz, *supra* note 136 (reporting on Ecuador's exit from ICSID).

[164] *See, e.g.*, Arts. 71–74, CONSTITUCIÓN NACIONAL (Ecuador) ("Nature or Pacha Mama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution."); *see also* Arts. 33–34, CONSTITUCIÓN POLÍTICA DEL ESTADO (Bol.) (establishing a "right to a healthy, protected, and balanced environment").

In 2008, Ecuador changed its constitution to include a Right to Nature provision.[165] There have been several cases involving this right,[166] but in 2011, a local court from the Province of Loja decided the first successful case that defended the right of the Vilcabamba River in Southern Ecuador.[167] The case concerned the construction and expansion of a road where no environmental impact assessment was done and the debris was left to pollute the river.[168] The court embraced the Right to Nature provision of the constitution, and established an analytical approach that includes the precautionary principle that future courts will likely follow.[169] It also placed the burden on the defendant to show that its actions would not damage the environment.[170]

Another Right to Nature case that directly involved investors was recently resolved in 2017.[171] The case involved the local community in the Canton of San Lorenzo and Los Andes and Palesema Oil Palm Companies in which the plaintiffs accused Los Andes and Palesema of environmental damages including deforestation, biodiversity loss, pollution, and health and food deterioration in the region due to their plantations for palm oil in the region.[172] They asked the court for Los Andes and Palesema to repair damages and to stop harmful activities.[173] Interestingly, the court concluded that it was primarily the state's responsibility to end the expansion of agricultural oil palm industry in the region, rather than making Los Andes and Palesema pay damages. The companies were ordered to adhere to environmental law in the region, to pay for employees to take a history course on the culture and traditions of the indigenous group of the region, and to retain a good relationship with the earth and the

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[165] Ch. 7, CONSTITUCIÓN NACIONAL (Ecuador).

[166] *See* Craig M. Kauffman & Pamela L. Martin, *Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Others Fail*, INTERNATIONAL STUDIES ASSOCIATION ANNUAL CONVENTION (Mar. 18, 2016), https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/5748568c8259b5e5a34ae6bf/1464358541319/Kauffman++Martin+16+Testing+Ecuadors+RoN+Laws.pdf [https://perma.cc/TY7T-T6UW] (laying out in a table the summaries and results of thirteen cases involving Ecuador's constitutional Right to Nature). *See generally* Craig M. Kauffman & Pamela L. Martin, *Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail*, 92 WORLD DEVELOPMENT 130 (2017).

[167] Natalia Greene, *The First Successful Case of the Rights of Nature Implementation in Ecuador*, GLOB. ALL. FOR THE RIGHTS OF NATURE, http://therightsofnature.org/first-ron-case-ecuador/ [https://perma.cc/6AB8-YDD8]. For further discussion on the case and a copy of the decision in Spanish, see Jim May, *Ecuadorian Court Recognizes Constitutional Right to Nature*, WIDENER ENVTL. L. CTR. BLOG (July 12, 2011), http://blogs.law.widener.edu/envirolawblog/2011/07/12/ecuadorian-court-recognizes-constitutional-right-to-nature/ [https://perma.cc/P44W-7UFM].

[168] Greene, *supra* note 167.

[169] *See id.*

[170] *Id*.

[171] Julianne A. Hazlewood, *Court Issues Ruling in World's First "Rights of Nature" Lawsuit*, INTERCONTINENTAL CRY (Feb. 16, 2017), https://intercontinentalcry.org/court-issues-ruling-worlds-first-rights-nature-lawsuit/ [https://perma.cc/F2LG-MKSQ].

[172] *See id.*

[173] *Id.*

plaintiffs and their families.[174] As interpreted by this Ecuadorian court, the Right to Nature was a responsibility of the state, rather than the private investors.[175] Though there is still much uncertainty as to how to enforce and implement this constitutional right and the extent to which it creates a duty on the state to protect the environment and how this duty interacts with other duties such as the protection of indigenous rights to use their land and to protect commerce, it is also unclear to what extent state action in this context would be allowed under investment law.

Another framework that will increasingly have impact on Latin America and in the discourse of environmental law with human rights is the Inter-American Commission of Human Rights. This was created through the 1948 Charter of Organization of Human Rights as a response to concerns for human rights violations in Latin America and the rise of autocratic governments in the region.[176] In addition to adjudicating human rights violation claims by victims, the Court of Inter-American Human Rights, established under the 1969 American Convention of Human Rights, also issues Advisory Opinions.[177] In November 2017, the Court of Inter-American Human Rights issued an important Advisory Opinion for environmental and human rights at the request of Colombia.[178] It recognized the "irrefutable relationship beween the protection of the environment and the realization of other human rights, due to the fact that environmental degradation affects the effective enjoyment of other human rights."[179] It framed "the human right to a healthy environment" as a right with "both individual and collective connotations."[180] It further stated that the right to a healthy environment was an "autonomous right," with substantive and procedural rights by the state.[181] In doing so, it reiterated the important principle that states have the autonomy to pass better environmental policies, which in-

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[174] *Id.*

[175] *Id.*

[176] *See* Lea Shaver, *The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?*, 9 WASH. U. GLOB. STUD. L. REV. 639, 641–44 (2010). While the United States is a signatory member of the Organization of American States, it has not ratified the Inter-American Convention on Human Rights and has not accepted the jurisdiction of the Inter-American Court of Human Rights. The Commission finds its mandate in the Charter of the Organization of American States and the American Convention of Human Rights; therefore, the U.S. is a member of the Commission. *See* Member States, ORG. OF AM. STATES, http://www.oas.org/en/about/member_states.asp [https://perma.cc/AKY4-B52N].

[177] *Id.* at 640–41.

[178] *See generally* Environment and Human Rights, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017), http://www.corteidh.or.cr/docs/opiniones/resumen_seriea_23_eng.pdf [https://perma.cc/6WBY-PVSP]. The entire text of the advisory opinion is available only in Spanish.

[179] *Id.* at 2.

[180] *Id.*

[181] *Id.* at 2–3.

clude stakeholder participation.[182] This is an important step for sustainable development and the right to regulate, especially in a region with significant natural resources. In framing the right to a healthy environment as a human right and within the obligations of the state to protect, the Court of Inter-American Human Rights has also redefined the regulatory role of the state in this context, which could also impact the way it manages investment in natural resources moving forward.

CONCLUSION

Reconciling environmental protection concerns with the rights of investors through investor-state investment is no easy task. Human rights and environmental rights groups have for a long time questioned the ability of investment treaties to properly address these issues. At the same time, FDI can contribute toward the transfer of much needed technology as developing and developed countries transition their economies toward cleaner methods of production and energy. Where trade jurisprudence has demonstrated a willingness to allow for more social policy space, investment treaties can do the same. A look into some of the challenges trade regulators have faced regarding environmental regulation may provide some perspective as investment law reforms are underway. However, broader constitutional and human rights issues remain relevant, as is becoming increasingly evident in Latin America where many countries are moving away from traditional FDI treaties and looking for more rights-based solutions to protect their natural resources.

[182] *See id. See generally* Elizabeth Trujillo, *Environmental Protection as a Human Right: Implications for Sustainable Development and Investment Law* (working paper) (on file with author).