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Environmental and Human Rights Justifications in Investment Arbitration: Probing the Limits of ISDS for the Adjudication of Climate-Related Disputes

Caterina Milo | ORCID: 0009-0004-6815-6746
Faculty of Law, University of Trento, Trento, Italy
caterina.milo@unitn.it

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Abstract

This article examines the capacity of investment arbitration to analyze cases concerning complex issues of public international law, focusing on the challenges connected to climate-related cases. Through the analysis of arbitral awards involving environmental and human rights justifications, this article evaluates ways in which non-economic arguments may be effectively raised in investor-State dispute settlement (ISDS) and the extent to which arbitral tribunals may consider them. It is shown that ISDS adopts a binary approach; since tribunals focus primarily on investors' rights, non-economic interests are only relevant for being either in favor or against investment protection. A further consequence of this binary approach is that, in cases where multiple non-economic interests are involved, i.e. cases of 'triangulation', ISDS is ill-equipped to balance competing non-economic interests and, therefore, to handle the complexities of climate-related disputes. This raises concerns about the role of ISDS in addressing cases involving broader issues of public interest.

Keywords

climate change – FET – human rights justifications – investor-State dispute settlement – police powers – right to regulate

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1 Introduction

In recent times, there has been increasing attention to the interaction between foreign direct investment (FDI) and the climate.[1] There is, indeed, an undeniable cause-and-effect relation between many economic activities, potentially falling within the purview of international investment law, and one of the major global challenges of this century,[2] i.e. climate change. For example, about three-quarters of greenhouse gas emissions come from the fossil fuel industry, one of the most significant catalysts of FDI, accounting for 20% of the total known investor-State arbitration cases.[3] At the same time, one of the main pathways to reaching 'net zero' emissions by 2050 is to channel investment into renewable energies and more efficient energy sources.[4]

This interaction is increasingly acknowledged in international instruments. Article 2(1)(c) of the Paris Agreement outlines its aim to 'strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: … Making finance flows consistent with a pathway towards low greenhouse gas emissions

1 See, *inter alia*, Crina Baltag, Riddhi Joshi and Kabir Duggal, 'Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?' (2023) 38(2) ICSID Rev 1; Carlo De Stefano, 'Giving "Teeth" to Climate Change Related Obligations Through International Investment Law' in Sandrine Maljean-Dubois and Jacqueline Peel (eds), *Climate Change and the Testing of International Law* (Brill 2023) 251; Josephine Dooley, 'The Co-Existence of Mitigation and International Investment Law' (2022) 23 JWIT 849; Matteo Fermeglia, 'Cashing-In on the Energy Transition?' (2022) 23 JWIT 982; Diego Mejía-Lemos, 'The Suitability of Investor-State Dispute Settlement and Host State Counterclaims for Implementing Climate Change International Responsibility' (2023) 32 RECIEL 334; Aniruddha Rajput, 'Climate Justice and The Greening of Investment Arbitration' (2021) 52 NYIL 161.

2 See, for example, the data reported in UNCTAD Secretariat, 'Promoting Foreign Investment in the Sustainable Development Goals' (2018) <https://unctad.org/system/files/official-document/diaepcb2018d4_en.pdf> accessed 2 September 2024.

3 Data reported in the International Institute for Sustainable Development Report, 'Investor-State Disputes in the Fossil-Fuel Industry' (2021) <https://www.iisd.org/publications/report/investor-state-disputes-fossil-fuel-industry> accessed 2 September 2024. See also IIA Issues Note, 'Facts and Figures on Investor – State Dispute Settlement Cases' (Issue 3, November 2024) <https://unctad.org/system/files/official-document/diaepcbinf2024d5_en.pdf> accessed 11 February 2025, 7: 'By the end of 2023, claimants had filed at least 235 fossil fuel-related cases'.

4 See the report by the International Energy Agency, 'Net Zero Roadmap. A Global Pathway to Keep the 1.5 °C Goal in Reach' (2023) <https://iea.blob.core.windows.net/assets/9a698da4-4002-4e53-8ef3-631d8971bf84/NetZeroRoadmap_AGlobalPathwaytoKeepthe1.5CGoalinReach-2023Update.pdf> accessed 7 September 2024.

and climate-resilient development'.[5] Moreover, an ever-increasing number of international investment agreements (IIAs) and bilateral investment treaties (BITs) now include clauses concerning the protection of the environment and sustainable development or even explicitly mentioning climate change.[6]

One of the critical questions raised by this interaction concerns the impact of investor-State dispute settlement (ISDS) on climate-related cases. While investment tribunals have often dealt with arguments concerning the environment or human rights,[7] climate-related cases can test the limits of ISDS' room for consideration of interests other than investment protection. This is because, in the broader framework of public international law, climate litigation has resulted in cases where the protection of the environment and human rights do not always go hand in hand. Indeed, these concerns are addressed by distinct legal regimes whose interplay is complex.[8] When cases of this kind are taken to ISDS and investment protection is brought into the fold, the complexities of climate-related cases risk being overlooked, ultimately producing a decision that may be perceived as 'unjust'. This can happen because non-economic interests are traditionally trapped in a binary scheme. As tribunals focus primarily on investors' rights, non-economic interests are only relevant for being either in favor or against investment protection.

This contribution aims to shed light on an often-overlooked issue, i.e. ISDS' ability (or lack thereof) to take on complex matters of public international law, which would require command of one or more legal regimes, aside from the

5 Paris Agreement (adopted on 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79.

6 See infra Section 2.

7 For a review of human rights in ISDS see Silvia Steininger, 'What's Human Rights Got to Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration' (2018) 31 LJIL 33. For further case law see infra sections 3 to 5.

8 The relation between human rights and environmental protection in international law is debated and may depend on the approach adopted (anthropocentric and eco-centric) or on a number of other factors (on the difficulties connected to this relation see Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 EJIL 613). At the intersection of the two lies the recently promoted 'right to a clean, healthy and sustainable environment' (Resolution on The Human Right to a Clean, Healthy and Sustainable Environment (2022) A/RES/76/300), which however does not automatically fix the structural difficulties in reconciling human rights and environmental protection. When 'exported' to other areas of international law this relation becomes even more complex. This issue emerged, for example, in the discussion concerning the 2023 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, criticized for their ambivalent approach to the notions of human rights due diligence and environmental due diligence (see Ekaterina Aristova and others, 'Corporate Climate Change Responsibilities under the OECD Guidelines for Multinational Enterprises' (2024) 73(2) ICLQ 505).

relevant international investment law. Far from being a thought exercise, the answer to this question is key for assessing whether ISDS may lead to an award directly aimed at protecting a non-economic interest in nuanced cases such as those concerning climate change. Since, for the purposes of ISDS, the environment and human rights can both fit in the category of non-economic interests[9] as opposed to investment protection, an award that aims at tackling climate change would have to overcome this traditional dichotomy to fully appreciate the complexity of a case.

To carry out this analysis, it is first necessary to ascertain whether any of the parties to investment arbitration may effectively raise arguments concerning climate change and whether tribunals' reasoning allows full consideration of such arguments. To this end, this article relies on the case law concerning environmental and human rights arguments to flesh out the terms in which the relation between one non-economic interest and investment protection may be dealt with. It should be noted that, although reference is made to 'non-economic interests', these may still be the object of underlying economic considerations, as in the case of employees' or consumers' interests.

Second, the question of whether ISDS tribunals have the necessary tools to take into account and possibly balance competing non-economic interests, including – but not limited to – the necessity to protect the climate needs to be answered. To accomplish this task and to fully evaluate ISDS' ability to tackle these matters even in the most complex circumstances, the article focuses on cases of 'triangulation' of interests, i.e. cases where conflicting non-economic interests – which may, in turn, be governed by different fields of public international law – were brought to the attention of the tribunal. It is only in light of these considerations that an assessment of whether investment arbitration could offer effective avenues for climate litigation can be made.

The structure of the article is as follows: Section 2 lays the theoretical basis for the analysis, proposing a review of the existing scholarship concerning the relation between investment arbitration and climate change. On this basis, the section outlines the article's approach, shifting the focus from the positive or negative effects of ISDS on climate change to ISDS' structural capacity to deal with such complex matters. Section 3 contains the first step of the analysis thus framed, tackling the question of whether and to what extent climate change-related arguments can be effectively raised in investment arbitration, outlining which subject can raise them, the available legal avenues, and the limits of such options. Section 3 highlights the central role played by States as

9 Human rights may also concern economic matters, especially if the right to property is invoked in support of the investor's claim.

the key parties entitled to 'defend' non-economic interests in ISDS, and then Section 4 analyses how the defensive use of non-economic arguments manifests in investment arbitration, i.e. in arguments directed at proposing specific interpretations of the applicable law and in right-to-regulate defenses for cases concerning indirect expropriation or a violation of the fair and equitable treatment (FET) standard. Against this backdrop, Section 5 moves to the central matter of the article, i.e. whether arbitral tribunals have the tools to face the complexities of cases concerning multiple non-economic interests. The section first outlines tribunals' approach to the proportionality test in relation to environmental and human rights justifications. Second, the section shows how the limits of tribunals' binary perspective emerge in cases of triangulation of interests, e.g. cases involving at the same time investment protection and multiple public interests, expressed by environmental or human rights arguments or justifications, all in total or partial tension with each other. Finally, Section 6 draws conclusions from the practice analyzed, showing that while awards with positive effects on the environment or human rights can be the incidental outcome of investment arbitration, the characteristics of ISDS, as well as tribunals' approach to States' public interest defenses, render it ill-equipped to handle the complexities of climate-related disputes, raising doubts about its role in addressing cases concerning broader issues of public interest.

2 The Polarized Scholarship on Investment Arbitration and Climate Change: Proposal for a Focus Shift

As mentioned in the introduction, attention to the relation between measures adopted by States to face climate change and international investment law and arbitration has increased over the past years.[10] On a practical level, this is reflected in the innovations introduced in new generations of IIAs and BITs.

10 Although recent times have seen a spike in attention, the topic had been under discussion for two decades. See eg Anatole Boute, 'Combating Climate Change Through Investment Arbitration' (2012) 35(3) Fordham Intl L J 613; Kate Miles, 'Arbitrating Climate Change: Regulatory Regimes and Investor-State Disputes' (2010) 1 Climate Law 63; Riccardo Pavoni, 'Environmental Rights, Sustainable Development, and Investor-State Case Law: A Critical Appraisal' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 525; Jorge E Viñuales, *Foreign Investment and the Environment in International Law* (CUP 2012); Jorge E Viñuales, 'Foreign Direct Investment: International Investment Law and Natural Resource Governance' in Elisa Morgera and Kati Kulovesi (eds), *Research Handbook on International Law and Natural Resources* (Elgar 2016) 26.

References to the environment appear to have become a standard element of the preamble of any treaty concerning foreign investment.[11] Notably, the Energy Charter Treaty (ECT), criticized for hindering States' environmental policies,[12] expressly refers in its preamble to the United Nations Framework Convention on Climate Change and recognizes the 'increasingly urgent need for measures to protect the environment'.[13] Even more relevant are treaty clauses that relate to non-economic interests,[14] such as non-relaxation clauses[15] or clauses aimed at reaffirming States' obligations, e.g. concerning climate change.[16] Aside from these provisions, which impose or allow specific action, the matter is also affected by clauses broadly referring to States' right to regulate,[17] i.e. 'the legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an

11 See *ex multis* Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments (adopted on 3 June 2014, entered into force 17 April 2015); Agreement between the Government of the Republic of Singapore and the Government of the Republic of the Union of Myanmar on the Promotion and Protection of Investments (adopted on 24 September 2019, entered into force 9 October 2020); Comprehensive Economic and Trade Agreement between Canada and the European Union (adopted on 30 October 2016, provisionally entered into force on 21 September 2017).

12 For a review of the ECT and its 'modernization' see Maria Rosaria Mauro, 'Investment Disputes and Fight Against Climate Change in Light of the Energy Charter Treaty: The Delicate Position of the European Union' (2023) 20(1) TDM 1.

13 Energy Charter Treaty (ECT) (adopted on 17 December 1994, entered into force on 16 April 1998) 2080 UNTS 95, text modified on 3 December 2024, effective from 3 September 2025, paras 15 and 19.

14 For an overview of these treaty clauses see IIA Issues Note, 'The International Investment Treaty Regime and Climate Action' (Issue 3, September 2022) <https://investmentpolicy.unctad.org/publications/1269/the-international-investment-treaty-regime-and-climate-action> accessed 2 October 2024.

15 Clauses meant to reduce the practice of 'relaxing' health or environmental measures to encourage investments. See *ex multis* Canada-Mali Foreign Investment Promotion and Protection Agreement (adopted on 28 November 2014, entered into force 8 June 2016).

16 EU-China Comprehensive Agreement on Investment, Agreement in Principle (adopted on 22 January 2021, not yet entered into force); Article 19bis of the revised text of the ECT (n 13).

17 The right to regulate is often connected in its origin to the exception regime within the protection of property under the European Convention on Human Rights (ECHR). See on the relation between the ECHR and the application of the right to regulate to expropriation Aikaterini Titi, *The Right to Regulate in International Investment Law* (Nomos-Hart 2014) 152–55. It should be pointed out that another exception regime can be inserted in investment treaties through 'non-precluded measures' clauses, which, however, usually 'reserve far-reaching discretion to States in times of emergency and armed conflict' (Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (3rd edn, OUP 2022) 309) and are thus outside of the scope of the present analysis.

investment agreement without incurring a duty to compensate'.[18] For instance, the EU Model BIT – relating to treaties between EU Member States and third countries – includes an article on 'Investment and Regulatory Measures' providing that '[t]he Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of … the environment including climate change'.[19]

These are just recent examples of how States have attempted to accommodate the need to protect and attract investors, with the need to achieve non-economic goals or protect non-economic interests. This trend has been interpreted in different ways by the scholarship interested in the interaction between international investment law and non-economic interests,[20] and it is reflected in the broader phenomenon usually defined as the 'humanization' of international law[21] and, precisely, of international investment law, as some have highlighted novel attention for values 'exported' from human rights law in this field.[22] The opening of international investment law to such concerns has also been referred to as the interaction of this sector of international law with 'community',[23] general[24] or non-economic issues or interests.[25] Many aspects

18 Titi (n 17) 33.

19 EU Model BIT (2023) <https://edit.wti.org/document/show/74fa928b-21bd-4ff6-b80d-e21dda7e13c7> accessed 23 September 2024.

20 Attention has been paid to many aspects of this interaction. Some of the main areas of interest for scholarship in the past years have been sustainable development (Pia Acconci, *Investimenti stranieri sostenibili. Diritto e governance internazionale e dell'Unione europea* (Editoriale Scientifica 2023); Paolo Turrini, 'International Investment Law: The Anarchical Society Where Development and Sustainability Are Frenemies and Participation Plays Gooseberry' in Birgit Peters and Eva J Lohse (eds), *Sustainability through Participation? Perspectives from National, European and International Law* (Brill 2023) 458); community interests and global public goods (Stephan W Schill and Vladislav Djanic, 'International Investment Law and Community Interests' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (OUP 2018) 221; Andreas Kulick, *Global Public Interest in International Investment Law* (CUP 2015)); climate change (see the articles included in the special issue of the Journal of World Investment and Trade 'International Investment Law and Climate Change', edited by Sandrine Maljean-Dubois, Hélène Ruiz Fabri and Stephan W Schill, 2022).

21 Theodor Meron, *The Humanization of International Law* (Brill 2006).

22 Fulvio M Palombino, 'Revisiting the "Humanization of International Law" Argument through the Lens of International Investment Law' (2020) 3 Diritto del commercio internazionale 745.

23 Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 Recueil des Cours de l'Académie de Droit International 217, 233.

24 See the contributions in Giorgio Sacerdoti and others (eds), *General Interests of Host States in International Investment Law* (CUP 2014).

25 Valentina Vadi, 'When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law' (2011) 42(3) Colum Hum Rts L

of this phenomenon are also related to the debate on the fragmentation of international law and the need to harmonize fields like international investment law, international human rights law, and environmental law.[26] As the reasons and fashion of this interaction are subject to diverging explanations, the analysis of relations between investment protection and measures to face climate change has led to opposing views being expressed and to very different solutions being proposed by scholarship.

What is not in question is that international investment law does provide some room for States that are willing to enact environmental regulations. This is evident in the right to regulate[27] and in the specific provisions mentioned above. On the basis of these elements, some have argued that international investment law does not 'chill' State regulation concerning climate change,[28] i.e. that the existence of rules that protect investors does not obstruct States' willingness to enact environmental measures. However, this position usually relies on the fact that international investment law on paper offers leeway for States to pass climate-related measures. The point is whether this 'on paper possibility' then materializes into real measures or whether States tend not to adopt such measures as they fear lengthy and expensive investment arbitration (so-called 'chilling effect').[29]

Others have attempted to propose solutions based on the assumption that IIAs and ISDS may have a chilling effect. Many have looked at better treaty drafting as an option, either aiming at a review of the existing treaties or proposing a 'carve-out' in defense of climate action, i.e. a clause removing climate-related measures from the scope of an IIA or ISDS.[30] These solutions, however, encounter several practical obstacles: while newer treaties, as shown, include climate considerations, renegotiation of existing ones takes time and

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Rev 797; Barnali Choudhury, 'International Investment Law and Noneconomic Issues' (2021) 53(1) Vand J Transnatl L 1.

26 Pierre-Marie Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 45.

27 See infra Section 4.2.

28 Stephan W Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?' (2007) 24(5) J Intl Arb 469.

29 Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7(2) Transnational Environmental Law 229. On the inevitable interaction between ISDS and climate change see Miles (n 10) 66–70.

30 Joshua Paine and Elizabeth Sheargold, 'A Climate Change Carve-Out for Investment Treaties' (2023) 26 JIEL 285.

may fail.[31] Additionally, better IIAs do not necessarily mean climate-friendly decisions in ISDS, especially at the compensation stage.[32] In short, solutions of this kind have a clear limit since they run the tightrope between a call for action and wishful thinking. While these innovations are evident already in the newest IIAs, there are thousands of existing agreements that would need renegotiating.

At the other end of the spectrum are extreme positions such as the one outlined in a Report of 13 July 2023, transmitted to the UN General Assembly and redacted by David R Boyd, Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. In the Report, which focuses on the relation between ISDS, human rights and the environment, the Special Rapporteur aims to present 'compelling evidence that a secretive international arbitration process called investor-State dispute settlement has become a major obstacle to the

31 Mala Sharma, 'Integrating, Reconciling, and Prioritising Climate Aspirations in Investor-State Arbitration for a Sustainable Future: The Role of Different Players' (2022) 23 JWIT 746, 756. Exemplary is the lengthy debate concerning the 'modernization' of the ECT, concluded on 3 December 2024 (Energy Charter Secretariat, 'Amendments to the ECT as set out in Conference decision CCDEC202412', Brussels 3 December 2024 <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2024/CCDEC202412_EN.pdf> accessed 24 March 2025). For the most recent developments on the ECT see Anna De Luca, 'The Withdrawal by the EU and Some Member States from the Energy Charter Treaty: International Protection for Energy Investments and Climate Change Related Carve-outs' (Kluwer Arbitration Blog 2024) <https://arbitrationblog.kluwerarbitration.com/2024/08/05/the-withdrawal-by-the-eu-and-some-member-states-from-the-energy-charter-treaty-international-protection-for-energy-investments-and-climate-change-related-carve-outs/> accessed 4 September 2024; Johannes Tropper, 'The Completion of the Modernisation of the ECT and the Provisional Application of the Modernised ECT' (Kluwer Arbitration Blog 2024) <https://arbitrationblog.kluwerarbitration.com/2024/12/30/the-completion-of-the-modernisation-of-the-ect-and-the-provisional-application-of-the-modernised-ect/#:~:text=The%20modernised%20ECT%20should%20have,as%20of%203%20September%202025>; Johannes Tropper, 'The ECT's Long Road to Modernisation: A Story of Delays and Miscalculations' (Voelkerrechtsblog 2024) <https://voelkerrechtsblog.org/the-ects-long-road-to-modernisation/> both accessed 12 February 2024.

32 Roopa Mathews and Dilber Devitre, 'New Generation Investment Treaties and Environmental Exceptions: A Case Study of Treaty Interpretation in Eco Oro Minerals Corp. v. Colombia' (Kluwer Arbitration Blog 2022) <https://arbitrationblog.kluwerarbitration.com/2022/04/11/new-generation-investment-treaties-and-environmental-exceptions-a-case-study-of-treaty-interpretation-in-eco-oro-minerals-corp-v-colombia/> accessed 4 September 2024.

urgent actions needed to address the planetary environmental and human rights crises'.[33]

Through an analysis of investment arbitration case law and the main characteristics of ISDS, the Report refers to the disastrous consequences of ISDS for human rights and the environment, such as 'regulatory chill' and the absence of protection for human rights in IIAs. The conclusions of the Report ultimately hinge upon the observation that '[t]he ISDS system … is not fit for purpose in the twenty-first century because it prioritizes the interests of foreign investors over the rights of States, human rights, and the environment'.[34] Among the actions suggested by the Special Rapporteur are the States' withdrawal of their consent to arbitration under existing IIAs, the termination of all existing IIAs, and the negotiation of new IIAs.[35]

The Report puts in opposition ISDS on one side and human rights and the environment on the other. This may be a reflection of the typical dichotomy between economic and non-economic interests, which finds footing in the often-held view that investment protection is one of ISDS' primary concerns,[36] and while human rights law and environmental law may interact with international investment law, they are not the focal point of this field of international law. However, it is surprising that this opposition is not played out between different fields of international law but rather between a mechanism for dispute resolution (ISDS) and sectors of law, which are traditionally outside of the purview of ISDS. Here, there may be a missed opportunity. Certainly, ISDS has an important role in this matter. For example, some form of chilling effect is undeniable, as even if the relevant agreements offered States room to adopt climate-related measures, ISDS could still have a confining impact on their willingness to do so. However, the way in which ISDS is presented in the Report seems to frame it as the cause of the existence of conflicting obligations, which exist regardless of any dispute resolution mechanism. For this reason, it is at least doubtful that the removal of ISDS would address all the underlying problems.

Furthermore, it should be noted that an approach that rigidly contraposes economic and non-economic interests may result in some oversimplification. International investment law has its origins in the rules on the treatment of

33 David R Boyd, 'Paying Polluters: The Catastrophic Consequences of Investor-State Dispute Settlement for Climate and Environment Action and Human Rights – Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2023) UN Doc A/78/168, 2.

34 ibid 22.

35 ibid 23.

36 See, on the different 'purposes' of IIAs, infra Section 4.1.

aliens and, historically, there have been clear overlaps with human rights law, be it merely for the protection of the right to property.[37] Similarly, economic activities are both negatively and positively impacted by environmental protection measures. Focusing, for example, on climate change, it is clear that mitigation and adaptation measures may affect the economy, and any choice to reduce greenhouse gas emissions would have an impact on foreign investors' rights. At the same time, since climate action requires investment in, for example, renewable energies,[38] investors are also progressively more interested in States' climate-related policies. They may even profit from them, relying on the protection offered by international investment law.[39] It would thus appear more appropriate to focus on the possible contraposition of investment protection and non-economic interests, if and when they are in contrast.

In short, none of the positions outlined above appears to fully reflect the complex reality of the relation between investments and climate change, showing a tendency to only articulate the issue in terms of the positive or negative effects of the former on the latter. Against this backdrop, this article calls for a shift in perspective, moving the attention from the relation between international investment law and climate change to ISDS' ability to tackle it, departing from the dichotomy between economic and non-economic interests. Rather than reasoning in terms of the positive or negative impact of investment protection over the need to preserve other interests, this article focuses on the aptitude of investment arbitration to appreciate cases concerning competing non-economic interests. This is done by building on the position of those who propose a 'repurposing' of the typical entryways for non-economic interests in investment arbitration, in line with the already mentioned scholarship developed on the interaction between human rights and international investment law.[40] If, as scholars have argued,[41] tribunals may integrate climate-related considerations regardless of the 'openness' of a specific treaty, the issues at hand

37 Ernst-Ulrich Petersmann, 'Human Rights in International Investment Law and Adjudication: Legal Methodology Questions', in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 1707.

38 UNCTAD, 'World Investment Report 2022' (2022) 193 ff <https://unctad.org/publication/world-investment-report-2022>. See also UNCTAD, 'World Investment Report 2024' (2024) 90 ff <https://unctad.org/publication/world-investment-report-2024> both accessed 7 October 2024.

39 See, for example, the investor's position in *Peter A. Allard v The Government of Barbados*, PCA Case No 2012–06, Award (27 June 2016).

40 See, *inter alia*, Dupuy (n 26); Thomas-Nektarios Papanastasiou, 'The Role of Human Rights in International Investment Arbitration: Arguments Raised by the Parties and Procedural Implications' (2022) 21 LPICT 149.

41 Dooley (n 1) and Sharma (n 31). See also infra Section 4.1.

can be appreciated by exploring the possibilities and the limits encountered by ISDS in addressing the built-in safeguards of international investment law.

3 The Different Avenues for the Discussion of Non-Economic Arguments in ISDS

An analysis such as the one highlighted in the previous section, i.e. on the 'non-economic capacity' of investment arbitration, first requires clarity on whether the different subjects involved in investment arbitration, i.e. investors, *amici curiae,* and States, may raise the issue of the protection of non-economic interests, detached from the protection of the investment. Indeed, the role of these interests may vary 'depending on the actor who introduces them into the dispute'.[42]

The first relevant subjects are investors, traditionally endowed with the privileged position of being able to start arbitration.[43] Although, seen from their perspective, ISDS may be considered a mere tool to enforce the protection of foreign investments offered by the substantive rules of international investment law, investors have sporadically included non-economic interests in their claims.[44] Arguments concerning human rights or States' obligations concerning climate change have been presented[45] to support investors' claims, ultimately directed at protecting the economic interest at stake, i.e. the investment. If the investor autonomously invokes non-economic interests, they will probably be dismissed for exceeding the tribunals' jurisdiction *ratione materiae*.[46] An example is the case of *Allard v Barbados*, where the investor claimed damages to its eco-tourism project due to, *inter alia*, Barbados' failure

42 Petersmann (n 37) 1720.

43 According to Francesco Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20(3) EJIL 729, 731, investors have 'an indisputable right of access to international justice'.

44 See, *inter alia*, *Antoine Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability (27 October 1989); *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013); *Allard* (n 39).

45 For a recent review of this practice see Gian Maria Farnelli, 'Investors as Environmental Guardians? On Climate Change Policy Objectives and Compliance with Investment Agreements' (2022) 23 JWIT 887. See also Petersmann (n 37) 1721–26.

46 This article will not take into consideration investors' arguments directed at invoking, for example, human rights as applicable law (Petersmann (n 37)). This possibility, indeed, is highly debated and the proposed focus is on existing and consolidated rules of international investment law which allow for an analysis of non-economic interests.

to comply with its environmental obligations. The case, however, only incidentally concerned the State's environmental obligations since, as noted by one commentator, '[i]t was a claim for enforcing the investor's rights not for protecting the environment'.[47]

This practice does not necessarily reflect the need to balance competing interests. The non-economic interest at stake is relevant only insofar as it is fortuitously connected to the need to safeguard the investment, and its protection will be mostly incidental. For this reason, investors cannot play a key role in the protection of non-economic interests, and any practice of this kind must be excluded from the scope of the present analysis.

The second relevant actors of ISDS are *amici curiae*, whose submissions have, in the past years, brought non-economic matters to the attention of the arbitral tribunal.[48] These submissions undoubtedly constitute a valuable vehicle for public participation in investment arbitration, also offering much-needed additional information to arbitral tribunals.[49] For example, in *Philip Morris v Uruguay*, the Tribunal relied on an *amicus curiae* brief submitted by the World Health Organization (WHO) and the WHO Framework Convention on Tobacco Control (WHO FCTC) Secretariat, which clarified, among other things, the relevant provisions of the WHO FCTC and States' obligations under it.[50]

Although often exclusively aimed at protecting non-economic interests, this practice also has limits that reduce its relevance to the present analysis. First, as noted by many, the *Philip Morris v Uruguay* case is the exception rather than the rule.[51] Tribunals have discretion in admitting *amici curiae* briefs,[52] as evidenced by the recent case of *Eco Oro v Colombia*, where the Tribunal denied such permission to 'a coalition of six community organisations and environmental and human rights non-profit organisations from Colombia, the United

47 Sharma (n 31) 758.

48 See eg *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008); *Pac Rim Cayman LLC v The Republic of El Salvador*, ICSID Case No ARB/09/12, Award (14 October 2016).

49 Sondra Faccio, 'Public Participation in Arbitral Proceedings', in Eric De Brabandere, Tarcisio Gazzini and Avidan Kent (eds), *Public Participation and Foreign Investment Law: From the Creation of Rights and Obligations to the Settlement of Disputes* (Brill 2021) 283, 307.

50 Written Submission (Amicus Curiae Brief) by the WHO and the Secretariat of the Tobacco Control Convention (29 January 2015) <https://www.italaw.com/sites/default/files/case-documents/italaw7422.pdf> accessed 22 September 2024.

51 Schill and Djanic (n 20) 242–43; Papanastasiou (n 40) 162–63.

52 Rule 67 of the ICSID Arbitration Rules (2022).

States, Canada and The Netherlands'[53] on the basis of a lack of sufficient interest in the case. Second, even when admitted, the impact of *amici curiae* depends largely on tribunals' receptiveness to the proposed interpretation of the law or the facts.[54]

The final relevant actors are States, which largely refer to non-economic interests in their arguments and defenses. As stated, for the present analysis, only the use of non-economic interests that are able to raise the autonomous issue of their protection is relevant. States' defenses preliminarily seem to fit this definition. Although with limitations that will be outlined in the next section, States participating in investment arbitration will traditionally play the role of the Respondent, defending the lawfulness of their actions against a complaint of violation of the standards of treatment of the investor. If successful, the instrumental employment of non-economic arguments by States will lead to the autonomous protection of the underlying non-economic interests. This may happen, for example, when a national measure protecting the environment is at stake. Thus, this defensive use of non-economic arguments appears to be a viable route to protect non-economic interests when they do not coincide with the protection of the investment.

It should be noted that States can also raise non-economic interests through their counterclaims. For example, the latter have been used to contest human rights and environmental law violations committed by the investors. Recourse to this procedural mechanism is regarded as an important evolution in the practice of ISDS since it offers States a more active role in introducing their interests before the arbitral tribunal, attempting to rebalance the asymmetric relation typical of international investment agreements.[55] If successful, a counterclaim may lead to an award of compensation in favor of the State due to the encroachment of the investor upon a (public) non-economic interest

53 *Eco Oro Minerals Corp v Republic of Colombia*, ICSID Case No ARB/16/41, Procedural Order No 6 (Decision on Non-Disputing Parties' Application) (18 February 2019) para 9.

54 See Petersmann (n 37) 1730: 'Acceptance and impact of human rights arguments remain subject to the discretion of the arbitrators, which have so far failed to develop a consistent, transparent methodology'; Patrick Dumberry and Gabrielle Dumas-Aubin, 'When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration' (2012) 13 JWIT 349, 370–71; Kulick (n 20) 304–05.

55 Thomas W Wälde, 'Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State' (2019) 26(1) Arb Intl 3, 15–16: 'The first asymmetry is that an investor can sue a government, but not vice versa (*except for counterclaims*)'. Emphasis added.

such as the protection of the environment. This happened, for example, when the *Burlington v Ecuador*[56] and *Perenco v Ecuador*[57] tribunals awarded Ecuador compensation as a result of its environmental counterclaims arising from the damage caused by the investors to parts of the Amazon rainforest.

This practice may, thus, lead to direct protection of non-economic interests, even assisting in the enforcement of domestic law when it touches upon issues of global concern,[58] such as the environment or human rights. Nevertheless, the status of counterclaims in ISDS is still inchoate. The tribunal in *Urbaser v Argentina*[59] was the first to entertain a counterclaim based on human rights,[60] followed by the *Aven v Costa Rica* case, where the Tribunal analyzed Costa Rica's environmental counterclaim but ultimately dismissed it.[61] Although some topical cases, such as those concerning Ecuador, have undoubtedly led to significant steps forward, these cases are still sporadic, and tribunals are often reluctant to find jurisdiction on counterclaims.[62] Moreover, a further obstacle to any counterclaim proposed by States is represented by the debate surrounding the existence of human rights and environmental obligations for investors.[63] For these reasons, counterclaims are excluded from the scope of the present analysis, which instead focuses on entryways for non-economic interests that can currently be considered 'stable' and widely available.

56 *Burlington Resources, Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Counterclaims (7 February 2017).

57 *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No ARB/08/6, Award (27 September 2019).

58 Crina Baltag and Ylli Dautaj, 'Regime Interaction in Investment Arbitration: Counterclaims' (Kluwer Arbitration Blog 2022) <https://arbitrationblog.kluwerarbitration.com/2022/01/11/regime-interaction-in-investment-arbitration-counterclaims/> accessed 6 February 2025.

59 *Urbaser SA and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016).

60 See Fulvio M Palombino, *Il diritto all'acqua. Una prospettiva internazionalistica* (Mondadori 2017); Eric De Brabandere, 'Human Rights Counterclaims in Investment Treaty Arbitration' (2017) 50(2) RBDI 591.

61 *David R Aven, Samuel D Aven, Carolyn J Park, Eric A Park, Jeffrey S Shioleno, Giacomo A Buscemi, David A Janney and Roger Raguso v The Republic of Costa Rica*, ICSID Case No UNCT/15/3, Final Award (18 September 2018).

62 Schill and Djanic (n 20) 244–45.

63 For a review of this issue see Chiara Macchi, *Business, Human Rights and the Environment: The Evolving Agenda* (Springer 2022).

4 Limits and Possibilities of the Protection of Non-Economic Interests through the Defensive Arguments of Host States

The previous section introduced the idea that the main possibility for arguments exclusively in defense of non-economic interests, such as climate action, to be effectively addressed in ISDS lies in States' defensive arguments. This should not come as a surprise. If international investment law and arbitration are asymmetric, i.e. tilted in favor of the investor and, consequently, of the protection of the investment, any other contrasting non-economic interest may be protected by denying the investors' claim.[64] Such a conclusion begs the question of whether non-economic interests are accurately analyzed by tribunals or only incidentally protected when the investor's claim is weak or faulty. To answer this question, it is first necessary to assess whether any of the different ways in which States' defenses may be articulated allows for autonomous consideration of non-economic interests.

4.1 *The Interpretive Relevance of Non-Economic Interests*

The first category of defenses, in the broader sense of pursuing the purpose of defending the position of the State in the face of the claim of the investor, consists of States' invocation of non-economic arguments to propose specific interpretations of the applicable law. This is possible since IIAs can be interpreted in accordance with the criteria of the 1969 Vienna Convention on the Law of Treaties (VCLT).[65] While recourse to non-economic arguments

64 Except for the case of successful counterclaims, which, however, are excluded from the scope of the current analysis as outlined in Section 3.

65 Elise Ruggeri Abonnat, 'International Investment Tribunals and Treaty Interpretation' in Hélène Ruiz Fabri and Edoardo Stoppioni (eds), *International Investment Law. An Analysis of the Major Decisions* (Hart Publishing 2022) 311. See *contra* Gary B Born, 'Should Investment Treaties Have Their Own Rules of Interpretation?' (Kluwer Arbitration Blog 2015) <https://arbitrationblog.kluwerarbitration.com/2015/02/03/should-investment-treaties-have-their-own-rules-of-interpretation/> accessed 29 September 2024. Of the opinion that the VCLT should apply but is often misapplied see Roberto Castro de Figueiredo, 'Interpreting Investment Treaties' (Kluwer Arbitration Blog 2014) <https://arbitrationblog.kluwerarbitration.com/2014/10/21/interpreting-investment-treaties/> accessed 29 September 2024; Trinh Hai Yen, *The Interpretation of Investment Treaties* (Brill 2014) 75–100; Thomas W Wälde, 'Interpreting Investment Treaties: Experiences and Examples' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 724, 729: 'While at least lip-service to the Vienna Rules is now *de rigueur*, it is rare to find a systematic application of Articles 31 to 33 of the Vienna Convention'.

for interpretive purposes in investment arbitration is not a novelty,[66] whether such defenses may end up offering protection to a non-economic interest is to be seen.

The VCLT interpretive criterion traditionally considered relevant to an analysis concerning non-economic interests is the one enshrined in Article 31(3)(c), which provides that '[t]here shall be taken into account, together with the context: … any relevant rules of international law applicable in the relations between the parties'.[67] This interpretive technique, referred to as 'systemic interpretation' or 'systemic integration', offers a gateway for the harmonization of international investment law in light of the observation that an international investment agreement is not 'a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated'.[68]

In this sense, arguments aimed at interpreting the applicable law in light of provisions belonging to international environmental law or international human rights law, can definitely bring non-economic interests within the purview of IIAs which do not, *per se*, include such reference. An example is *South American Silver v Bolivia,* where the respondent State argued that 'the Tribunal should resort to the sources of law that protect the right of Indigenous Communities to provide content to certain concepts that are constantly evolving such as fair and equitable treatment'.[69] In this case, the State attempted to justify its decision to revoke mining concessions by referring, *inter alia*, to the rights of the indigenous populations in the mining area.[70] Still, it is doubtful that this means that non-economic interests find autonomous consideration and, potentially, complete protection.

66 *Tulip Real Estate Investment and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Decision on Annulment, 30 December 2015, para 86: '[t]here is a widespread sentiment that the integration of the law of human rights into international investment law is an important concern'. It should however be noted that this case concerned the interpretation of Article 52(1)(d) of the ICSID Convention, falling within the common practice of resorting to human rights law in an interpretive function in defining essential procedural standards.

67 This article focuses only on the VCLT criteria, but as has been analyzed by Wälde, other interpretation maxims may be used (Wälde (n 65) 733 ff).

68 *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award (27 June 1990) para 21.

69 *South American Silver Limited v The Plurinational State of Bolivia*, PCA Case No 2013-15, Award (22 November 2018) para 195.

70 ibid, para 196.

Perplexities arise, first, due to the fact that tribunals are often wary of requests for systemic interpretation, reaffirming the bounds of their limited jurisdiction *ratione materiae*. A relevant example is the reasoning of the tribunal in *Grand River v United States*, at the juncture of interpretation and application of the law:

> The Tribunal understands the obligation to "take into account" other rules of international law to require it to respect the Vienna Convention's rules governing treaty interpretation. However, the Tribunal does not understand this obligation to provide a license to import into NAFTA legal elements from other treaties or to allow alteration of an interpretation established through the normal interpretive processes of the Vienna Convention. This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA.[71]

Moreover, systemic interpretation may not equate with direct protection of non-economic interests and an expansion of the applicable law since this interpretive technique may not be used to provoke the 'displacement' of the relevant law.[72] Finally, tribunals often consider non-economic interests only insofar as they clearly contrast with an IIA, significantly reducing the room for their protection. This happened, for example, in the already mentioned case of *South American Silver v Bolivia*, where the arbitral tribunal stated that '[t]he Respondent … fails to explain how these rules conflict with the Treaty or why they should prevail over its provisions'.[73]

Other interpretive techniques employed by States encounter similar, if not stricter, limits. For example, the 'object and scope' of an IIA could be read in light of sustainable development or economic prosperity in order to direct IIAs towards greater protection of non-economic interests. This is not new, and while some have held that the primary objective is to promote investment 'as an assumed requirement for (traditionally conceived) economic development',[74] others have argued that IIAs' purpose is to enhance economic prosperity and development in all States parties, notions today best

71 *Grand River Enterprises Six Nations, Ltd, et al v United States of America*, UNCITRAL, Award (12 January 2011) para 71.

72 *Oil Platforms* (*Islamic Republic of Iran v United States of America*) (Judgment of 6 November, Separate Opinion of Judge Higgins) [2003] ICJ Rep 225, para 49.

73 *South American Silver* (n 69) 217.

74 Wälde (n 65) 762.

captured by the concept of sustainable development.[75] This technique could also contribute to an evolutionary interpretation of older IIAs that do not include reference to the environment and human rights.[76] An interpretation of this kind would have the clear benefit of introducing the need to balance competing interests – intrinsic in sustainable development – within international investment law.[77]

It should be noted, however, that the reference to Article 31(1) cannot be used to rewrite a treaty 'in a way [the interpreter] thinks the original drafters should have drafted it had they truly wanted to give maximum effect to their intentions'.[78] Consequently, such an interpretation could, at most, enlarge the room for States' regulatory discretion, reducing tribunals' scrutiny over their choices. Exemplary is the decision in *Eco Oro v Colombia*, where the object and purpose of the relevant Free Trade Agreement were expressly outlined in the Preamble as being to undertake the relevant obligations 'in a manner that is consistent with environmental protection and conservation'.[79] Additionally, Canada presented a non-disputing party submission, explaining that the Parties to the FTA 'did not view their investment obligations as being at odds with the protection of environmental and social goals and their environment and human rights obligations'.[80] Still, the Tribunal limited the centrality of environmental considerations in the treaty, finding that 'neither environmental protection nor investment protection is subservient to the other, they must co-exist in a mutually beneficial manner'.[81]

75 Federico Ortino, 'Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing' (2017) 30 LJIL 71, 78–79. See also Pia Acconci, 'Sustainable Development and Investment: Trends in Law-Making and Arbitration' in Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill 2018) 290; Domenico Pauciulo, *La promozione dello sviluppo sostenibile negli accordi internazionali sugli investimenti esteri* (ESI 2023).

76 Ortino (n 75) 81; Suzanne A Spears, 'Making Way for the Public Interest in International Investment Agreements' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 271.

77 Ortino (n 75) 81. For example, sustainable development was added in paragraph fifteen of the Preamble of the revised text of the ECT (n 13).

78 Wälde (n 65) 758.

79 Free Trade Agreement between Canada and Colombia (adopted on 21 November 2008, entered into force 15 August 2011).

80 *Eco Oro Minerals Corp v Republic of Colombia*, ICSID Case No ARB/16/41, Non-Disputing Party Submission of Canada (27 February 2020) para 24.

81 *Eco Oro Minerals Corp v Republic of Colombia*, ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021) 828.

Similar limits would apply to other interpretive uses of non-economic arguments, e.g. the invocation of agreements concerning the environment or human rights to assess the ordinary meaning of 'environment' or 'human rights' as included in a right-to-regulate clause.[82] These elements, together, lead to the conclusion that interpretation may not systematically lead to the protection of non-economic interests. A final award may incidentally achieve this objective, but the limits of the interpretive techniques of Article 31 VCLT, as well as tribunals' approach to them, do not offer sufficient bases for envisaging interpretation as an effective means of protection of such interests.

4.2 *The Strictly Defensive Use of Non-Economic Arguments: The Right to Regulate*

The last entryway for non-economic interests in investment arbitration is through the defenses of States that employ non-economic interests as justifications for their actions. Indeed, States have always referred to the need to protect their public interests in an effort to maintain a residual area of sovereign prerogatives within investment protection. This is in line with the discourse on the humanization of international investment law being vehiculated by States,[83] which bring forward the interests of the many to be balanced against those of the investors.

This is possibly the most frequent way of introducing non-economic interests in investment arbitration. For example, a 2018 analysis concerning human rights references in investment arbitration found that, in most cases, the respondent State referred to human rights.[84] These references mainly served the purpose of justifying the States' actions on the basis of their human rights obligations.[85] A similar analysis can be carried out with respect to ICSID awards containing the wording 'climate change'. Over the period 2015–2024, this wording has appeared in twenty-one ICSID public and final awards. Seventeen of these awards are not relevant to the present analysis since climate change is only mentioned as part of a broader factual quote concerning a climate policy or an environmental impact assessment[86] or because the United Nations

82 See infra Section 4.2.

83 See Palombino (n 22).

84 Steininger (n 7) 41–45.

85 ibid 51. The author also notes at page 53 that 'it is likely that non-investment concerns are creeping up on the side-lines of investment arbitration, for instance through state parties that wish to justify their "right to regulate"'.

86 *Unión Fenosa Gas, SA v Arab Republic of Egypt*, ICSID Case No ARB/14/4, Award (31 August 2018) para 8.51; *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, Award (12 July 2019) paras 710 and 722; *OperaFund Eco-Invest SICAV*

Framework Convention on Climate Change is cited in passing in the factual background or elsewhere.[87] Of the remaining four, one concerns the particular issue of the qualification of emission allowances in Canada as an investment,[88] and three involve reference to climate change as part of tribunals' analysis of State defenses.[89] Notably, in *Encavis and others v Italy*, the Tribunal stated that:

> States enjoy a sovereign right to amend their laws and regulations and to adopt new ones in furtherance of the public interest. In the global energy transition necessary to achieve the climate change mitigation and adaptation goals pursuant to the UNFCCC and agreements thereunder, it is critical that States are understood to continue to enjoy such sovereign right.[90]

The sample of ICSID final awards mentioning climate change, although small, is in line with the broader trend noted with respect to human rights: when

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PLC and Schwab Holding AG v Kingdom of Spain, ICSID Case No ARB/15/36, Award (6 September 2019) paras 169 and 651; *WalAm Energy Inc v Republic of Kenya*, ICSID Case No ARB/15/7, Award (10 July 2020) para 144; *Infinito Gold Ltd. v Republic of Costa Rica*, ICSID Case No ARB/14/5, Award (3 June 2021) para 467; *Westmoreland Mining Holdings, LLC v Government of Canada*, ICSID Case No UNCT/20/3, Final Award (31 January 2022) para 78; *ACF Renewable Energy Limited v Republic of Bulgaria*, ICSID Case No ARB/18/1, Award (5 January 2024) para 1418; *Gabriel Resources Ltd and Gabriel Resources (Jersey) v Romania (I)*, ICSID Case No ARB/15/31, Award (8 March 2024) paras 972 and 1007.

87 *Eiser Infrastructure Limited and Energía Solar Luxembourg Sàrl v Kingdom of Spain*, ICSID Case No ARB/13/36, Award (4 May 2017) para 101; *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain*, ICSID Case No ARB/14/1, Award (16 May 2018) para 103; *Infrastructure Services Luxembourg Sàrl and Energia Termosolar BV v Kingdom of Spain*, ICSID Case No ARB/13/31, Award (15 June 2018) para 82; *Aven v Costa Rica* (n 61) para 390; *Stadtwerke München GmbH and others v Kingdom of Spain*, ICSID Case No ARB/15/1, Award (2 December 2019) para 51; *Watkins Holdings Sàrl and others v Kingdom of Spain*, ICSID Case No ARB/15/44, Award (21 January 2020) para 71; *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia (I)*, ICSID Case No ARB/13/32, Award (5 July 2022) para 448; *Rockhopper Exploration Plc, Rockhopper Italia SpA and Rockhopper Mediterranean Ltd v Italian Republic*, ICSID Case No ARB/17/14, Final Award (23 August 2022) para 109; *Lone Pine Resources Inc v Canada*, ICSID Case No UNCT/15/2, Final Award (21 November 2022) para 472.

88 *Koch Industries, Inc and Koch Supply & Trading, LP v Canada*, ICSID Case No ARB/20/52, Final Award (13 March 2024).

89 *Red Eagle Exploration Limited v Republic of Colombia*, ICSID Case No ARB/18/12, Award (28 February 2024) paras 168 and 242; *Encavis and others v Italian Republic*, ICSID Case No ARB/20/39, Award (11 March 2024) para 652; *Montauk Metals Inc (formerly known as Galway Gold Inc) v Republic of Colombia*, ICSID Case No ARB/18/13, Award (7 June 2024) paras 524 and 885.

90 *Encavis and others* (n 89) para 652.

non-economic interests are more than mere factual background, they are mostly raised by States in their defenses, as a way to give tangible content to generic references to the need to protect States' public interests.

In more technical terms, non-economic interests, including the protection of human rights and the environment,[91] are invoked in right-to-regulate defenses, i.e. when States refer to the need to protect their public interests, meant as their prerogatives that may justify a compression of investors' rights. Arguments of this kind have thus been employed as veritable 'justifications', i.e. arguments aimed at excluding 'the wrongfulness of conduct', to be distinguished from excuses which 'preclude the responsibility of an actor for wrongful conduct'.[92]

The possibility for right-to-regulate defenses is engineered into international investment law – either through specific treaty clauses[93] or customary international law[94] – and does not strictly depend on a tribunal's evaluation of their admissibility. At the same time, non-economic interests are central to the analysis and enjoy relevance independently of any other economic interest at stake and of the investment. The prospect of giving prevalence to States' regulatory action has progressively materialized in two of the primary defenses at the disposal of States: the police powers argument within the framework of expropriation and the invocation of public interest objectives in the assessment of violations of FET.[95]

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91 This is clear in the latest 'Draft provisions on procedural and cross-cutting issues' issued by UNCITRAL's Working Group III (Investor-State Dispute Settlement Reform) on 8 July 2024 (A/CN.9/WG.III/WP.244). Draft provision 19, at paragraph 1 provides that '[n]othing in the Agreement shall be construed as preventing the Contracting Parties from exercising their right to regulate and to adopt, maintain and enforce any measure that they consider appropriate to ensure that investments are made in a manner sensitive to the protection of public health, public safety, human rights, essentials security interests or the environment, the promotion and protection of cultural diversity, …'.

92 Federica Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (CUP 2018) 23. The author paraphrases Vaughan Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses?' (1999) 10 EJIL 405, 406, who, in turn, borrows from John L Austin's famous 'Plea for Excuses' (1956–1957) 57 Proceedings of the Aristotelian Society, New Series 1.

93 IIA Issues Note (n 14) 3.

94 On the limits of non-treaty-based invocation of the right to regulate and the attitude of arbitral tribunals towards it see Titi (n 17) 275 ff.

95 Although the right to regulate and the police powers are often referred together as interchangeable notions, this article adopts the view expressed *inter alia* by the arbitral tribunal in *Suez v Argentina*: 'the application of the police powers doctrine as an explicit, affirmative defense to treaty claims other than for expropriation is inappropriate, because in judging those claims and applying such principles as full protection and security and

4.2.1 Justifications in Case of Expropriation: The Police Powers Doctrine

The first scenario in which measures to face climate change or concerning any other non-economic interest may need to be defended before an arbitral tribunal is in a case concerning expropriation, as States' actions aimed at protecting such interests can directly impact foreign investments. The phenomenon of expropriation is regulated by one of the fundamental and long-standing rules of international investment law: although permitted under specific requirements, expropriations must be compensated for.[96] The scope of this rule is to limit States' unfettered exercise of their sovereign powers and to protect private property.

As this notion expanded from the typical direct expropriation, i.e. an open taking of property, to the so-called 'indirect' expropriation, i.e. State's action which leaves 'the title untouched but deprives the investor of the possibility to utilize the investment in a meaningful way',[97] the relevance of public interests has increased. On the one hand, pursuing a public interest is one of the requirements[98] – common to both direct and indirect expropriation – for the legality of expropriations. This means that the State will have to pay compensation but will avoid additional payments connected to a violation of international investment law. On the other hand, public interests also assume a peculiar role in connection to indirect expropriations. Here, public interests can be used as a criterion to draw a line between compensable expropriation and non-compensable regulatory action.[99] This doctrine, commonly referred

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fair and equitable treatment … a tribunal must take account of a State's reasonable right to regulate' (*Suez, Sociedad General de Aguas de Barcelona SA, and InterAgua Servicios Integrales del Agua SA v The Argentine Republic*, ICSID Case No ARB/03/17, Decision on Liability (30 July 2010) para 148). In any case expropriation and FET are 'the sole two standards in whose operation regulatory interests have been acknowledged' (Titi (n 17) 276).

96 Dolzer, Kriebaum and Schreuer (n 17) 146 ff.

97 ibid 153.

98 To ascertain the legality of the expropriation, the measure must not only serve a public interest: it must be carried out in accordance with the principles of due process, it must not be discriminatory and must be accompanied by compensation. These four elements must be fulfilled cumulatively (Dolzer, Kriebaum and Schreuer (n 17) 183).

99 Lowe highlighted the emergence of this concept in a 2002 paper, where he analyzed 'whether the corresponding rights [corresponding to the investors' protection] of the State to regulate its economy have fared' as well as the protection offered by investment treaties (Vaughan Lowe, 'Regulation or Expropriation?' (2002) 55(1) CLP 447, 451). The author concludes that 'it is plainly necessary to draw a line further down the road, separating lawful regulation from unlawful interference' (457) and that 'arbitral tribunals adjudicating upon investment disputes are deciding questions that bear directly on profound questions of the allocation of power and authority. There is much more at stake here than simple questions of the construction of commercial agreements' (466).

to as the 'police powers' doctrine, quickly found acceptance in investment arbitration.[100] This approach developed as an alternative to the 'sole-effects' doctrine,[101] i.e. the approach that evaluates expropriations only based on their effects regardless of the purpose pursued.[102] Even though the sole-effects doctrine has far from disappeared from arbitral practice,[103] most BITs now include a clause referring to regulatory takings,[104] and further cases have led many to conclude that such an exception to compensable expropriation has reached customary status.[105]

In any case, admitting that a tribunal is willing to apply it, the exercise of police powers depends, by definition, on the purpose pursued.[106] In this context, non-economic interests may come under the spotlight. Indeed, the broad notion of 'public interest' usually includes the protection of public order,

100 See, on this evolution, L Yves Fortier and Stephen L Drymer, 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or *Caveat Investor*' (2004) 19(2) ICSID Rev 293.

101 This is often presented as a linear evolution but States have always enjoyed some discretion in assessing whether compensation was due. See, on this issue, George C Christie, 'What Constitutes a Taking of Property under International Law?' (1962) 38 BYIL 307, 331–332. A reasoning of this kind can be found already in the *Bischoff* case (Opinion of Duffield, umpire, 1 June 1903, 420), where one of the umpires held that the protection of public health was a reasonable exercise of police powers.

102 Johanne M Cox, *Expropriation in Investment Treaty Arbitration* (OUP 2019) 101 ff. For a review of the case law and on the sole-effects doctrine as competing *in toto* with police powers, see Catharine Titi, 'Police Powers Doctrine and International Investment Law' in Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill 2018) 323, 329–33.

103 On the continued relevance of the sole-effects doctrine see Sondra Faccio, *Indirect Expropriation in International Investment Law. Between State Regulatory Powers and Investor Protection* (Editoriale Scientifica 2020).

104 For a review of the progressive reforms including such clauses see UNCTAD, 'The Changing IIA Landscape: New Treaties and Recent Policy Developments' (2020) <https://unctad.org/system/files/official-document/diaepcbinf2020d4.pdf> accessed 10 October 2024.

105 *Saluka Investments BV v The Czech Republic*, PCA Case No 2001-04, Partial Award (17 March 2006) para 262. On the debate on the nature of police powers see Titi (n 102) 323–27. See also Jorge E Viñuales, 'Sovereignty in Foreign Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 317, 329–31. See *contra*: *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Award (30 November 2017) para 473.

106 See already *Methanex Corporation v United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) para 7. This is one of the cases where the tribunal considered the purpose of the State measure but did not expressly refer to the State's police powers; see Titi (n 102) 334–335.

public health, and the environment.[107] Defenses are presented, for example, through reference to the need to protect the human rights of the individuals in the host State. Although explicit mention of the wording 'human rights' is often omitted,[108] cases on the exercise of police powers often generally relate to the protection of human health.[109] These justifications are frequent and often successful. Notably, the arbitral tribunal in *Philip Morris v Uruguay* recognized that State measures amounted to an exercise of police powers and not to expropriation.[110] Uruguay argued that the measures it took concerning the sale and packaging of tobacco products 'were taken by [it] with a view to protect public health in fulfilment of its national and international obligations'.[111] The State argued, *inter alia*, that the challenged measures were connected to its international obligations concerning the human right to health,[112] thus presenting a clear human rights justification.

Similarly, environmental and human rights considerations have been put forward in tandem by States to justify the exercise of their regulatory powers. An example is the *Chemtura v Canada* case, where Canada claimed that the ban on certain chemical substances was enacted to protect public health and the environment.[113] In this case, the Tribunal acknowledged that the State took measures 'motivated by the increasing awareness of the dangers presented by lindane for human health and the environment'.[114] It thus concluded that '[a] measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation'.[115]

In short, while 'international law has yet to identify in … definitive fashion precisely what regulations are considered "permissible" and "commonly

107 *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v Hungary*, ICSID Case No ARB/17/27, Award (13 November 2019) para 366.

108 On this issue see Ernst-Ulrich Petersmann, 'Can Invocation of Human Rights Enhance Justice and Social Legitimacy in Investment Adjudication?' (2019) 4 EUI Working Paper Law.

109 See eg *Magyar Farming* (n 107).

110 On the peculiarities of the *Philip Morris* award see Giovanni Zarra, 'Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of *Philip Morris v. Uruguay*' (2017) 14(2) Brazilian Journal of International Law 94.

111 *Philip Morris Brand SARL, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016) para 306.

112 ibid, para 304.

113 *Crompton* (*Chemtura*) *Corp v Government of Canada*, PCA Case No 2008-01, Award (2 August 2010) para 254.

114 ibid, para 266.

115 ibid.

accepted" as falling within the police or regulatory power of States',[116] the qualification of a State's interest as a valid public purpose is rarely problematic and can include non-economic interests. Tribunals, moreover, often show deference to States in the definition of public purpose, only second-guessing the legitimacy of the objective pursued by the State if it is manifestly unfounded.[117]

Against this backdrop, there could be, in theory, ample room for consideration of States' climate-related and non-economic arguments. However, other elements of tribunals' approach to the police powers doctrine may reduce the significance of States' justifications and the possibility of giving relevance to – and protecting – non-economic interests in ISDS.

First, the fear of States abusing their right to regulate and of police powers becoming a 'blanket' excuse for States endeavoring in regulatory takings[118] has progressively led to the introduction of an additional requirement for indirect expropriation, i.e. proportionality,[119] the application of which, as will be seen in Section 5, can significantly impact the room for consideration of non-economic interests by tribunals.

Second, as already mentioned, there is always a degree of uncertainty since tribunals may frame ambiguous cases as direct expropriations or choose to apply the sole effects doctrine, thus maintaining the obligation to compensate.[120] This was confirmed by the *Patrick Mitchell v Congo* annulment committee, which was faced with the question of whether the Tribunal's choice to adopt the sole effects doctrine rather than focus on the purpose of the measures was a ground for annulment and stated that 'the Arbitral Tribunal, in apparently opting for the "sole effect" doctrine, was merely exercising its

116 *Saluka* (n 105) para 263.

117 Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (CUP 2015) 130.

118 *Pope & Talbot v Government of Canada*, UNCITRAL, Interim Award (26 June 2000) para 99: 'a blanket exception for regulatory measures would create a gaping loophole' in the international rules protecting foreigners'. On the need to add limitations to the police powers doctrine see *Azurix Corp v The Argentine Republic* (*I*), ICSID Case No ARB/01/12, Award (14 July 2006) para 310.

119 Proportionality is listed as one of the relevant factors to distinguish between legitimate regulation and compensable expropriation by Katia Yannaca-Small ('Indirect Expropriation and the Right to Regulate: Has the Line Been Drawn?' in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd edn, OUP 2018) 562, 588–91).

120 *Compañia del Desarrollo de Santa Elena SA v Republic of Costa Rica*, ICSID Case No ARB/96/1, Award (17 February 2000) para 71.

freedom of judgment'.[121] Such a choice by a tribunal would inevitably reduce the impact of the public interest on the final decision. Repercussions of a similar line of reasoning can be seen, for example, in the *Rockhopper v Italy* case, concerning a denial of the investor's license to exploit an offshore oilfield due to Italy's ban on oil and gas exploration and production concessions within the 12-mile limit of the coastline. The State claimed that its measures were taken '[f]or the purposes of protecting the environment and the ecosystem'[122] and, specifically, served 'the goal of adopting a cautionary approach to the protection of the environment, prohibiting new extractions in the sensitive areas close to the coasts and the protected zones'.[123] The Tribunal, however, laconically stated that it was not persuaded by the Respondent's invocation of police powers and that a direct expropriation had taken place.[124] The – unclear – reasoning of the Tribunal hinged upon a finding of direct expropriation, although no direct taking of property had occurred. While the Tribunal's choice of framing the case as one of direct expropriation has been criticized,[125] it nonetheless led to a disqualification of the police powers defense presented by Italy,[126] with no possibility for discussion on the validity of the non-economic interest pursued by the State. In this case, environmental reasons ended up being fundamentally ignored by the Tribunal, which preferred to focus on more technical matters, such as the qualification of the expropriation. It is not the aim of this article to discuss the merits of the Award in *Rockhopper*.[127] Still, it is an example of how a police powers defense is not a guarantee of a debate centered around the invoked public interest.

121 *Patrick Mitchell v Democratic Republic of the Congo*, ICSID Case No ARB/99/7, Decision on the Application for Annulment of the Award (1 November 2006) para 54.

122 *Rockhopper* (n 87) para 100.

123 ibid, para 189.

124 ibid, para 197.

125 See the points made by Toni Marzal in the blogpost 'Polluter Doesn't Pay: The Rockhopper v Italy Award' (EJILTalk! 2023) <https://www.ejiltalk.org/polluter-doesnt-pay-the-rockhopper-v-italy-award/> accessed 19 September 2024.

126 For an analysis of the police powers doctrine and the *Rockhopper* case see Rhys Carvosso, 'The Precarity of the Police Powers Doctrine in Investment Arbitration: *Rockhopper v Italy*' (2024) 15 JIDS 172.

127 See the comment by Paolo Mazzotti, 'Rockhopper v. Italy and the Tension between ISDS and Climate Policy' (Voelkerrechtsblog 2022) <https://voelkerrechtsblog.org/de/rockhopper-v-italy-and-the-tension-between-isds-and-climate-policy/> accessed 20 September 2024.

4.2.2 Justifications in Case of Violation of FET: The Relevance of the Public Interest

The second scenario where environmental and human rights considerations may be central to the decision of the tribunal is in the adjudication of cases involving alleged violations of FET. This standard is a complex and much-debated notion of international investment law, whose nature and content are widely discussed.[128] While it is predominantly treaty-based, it has also been connected to customary international law[129] and general principles of international law.[130] The content of this standard is not defined by reference to an exterior state of law or fact[131] and is not dependent upon the treatment accorded to other investments or entities.[132] FET may thus be considered to be about unfair treatment, 'variously described over the years'.[133] Nevertheless, FET does not serve the purpose of unquestioningly protecting investors; rather, it aims to balance the interests of the States and the protection of investors. This aligns with the often-proposed conceptualization of FET as an embodiment of the rule of law,[134] assigning FET a quasi-constitutional function in balancing States' regulatory interests and individuals' (i.e. investors') protection.[135]

In any case, a close relation between FET and regulatory action exists and emerges in the case law concerning one of its main elements. Indeed, this

128 See, for a review of the debate on FET, Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP 2008) 53 ff.

129 Patrick Dumberry, 'Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?' (2017) 8(1) JIDS 155.

130 Fulvio M Palombino, *Fair and Equitable Treatment and the Fabric of General Principles* (Asser-Springer 2018).

131 UNCTAD, 'Fair and Equitable Treatment' (1999) <https://unctad.org/system/files/official-document/psiteiitd11v3.en.pdf> accessed 7 October 2024, 15–16.

132 ibid 15.

133 C L Lim, Jean Ho and Martins Paparinskis, *International Investment Law and Arbitration* (CUP 2021) 335.

134 See ibid; Stephan W Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 151; Nicolas Angelet, 'Fair and Equitable Treatment' (2022) Max Planck Encyclopedia of Public International Law; Dolzer, Kriebaum and Schreuer (n 17) 187–88.

135 For a review of this position see Schill (n 134). According to Palombino (n 130) 162, all the elements of FET appear to 'have been forged through the lens of the same "unifying" factor: the need to balance the State power to regulate in the public interest and the investor's concern about having his investment protected other than from prejudice which is part of normal business risk'.

standard protects legitimate expectations arising from national legislation,[136] covering cases in which States adopt new legislation, changing their domestic regime on matters that may impact foreign investments' value or operations.[137] Although attempts have been made to read an obligation of strict stability (akin to a freezing clause) within FET,[138] the protection of legitimate expectations in international investment law is flexible and should be balanced against States' need to pursue their regulatory action.[139] Consequently, FET does not put a halt to States' action but imposes requirements, the presence of which allows to distinguish between legitimate regulation and a violation of investors' legitimate expectations.[140] In short, investors cannot expect a State's regulatory framework to never change or for every modification to be in their favor.[141] At the same time, however, if a violation of investors' legitimate expectations occurred, the mere fact that it was in pursuance of public interest does not exempt the State from a breach of FET since, contrary to what happens, for example, in the framework of the law of the European Union, FET and specifically legitimate expectations do not include an exception for cases of 'overriding public interest'.[142] Even compelling arguments in favor of more attention for public interests still assign them a role in a balancing operation rather than construing an exception.[143]

Non-economic interests may, therefore, assume relevance as justifications for States' regulatory action aimed at protecting the environment or human rights. The considerations carried out above on the inclusion of the environment and human rights among the typical 'public interests' also apply here, as

136 The *Saluka* (n 105) tribunal defined legitimate expectations as 'the dominant element of [FET]' (para 302).

137 Operations of this kind are not *per se* prohibited, as notably stated by the arbitral tribunal in *Urbaser* (n 59) para 628.

138 Federico Ortino, *The Origin and Evolution of Investment Treaty Standards* (OUP 2019) 20–25. The author defines these attempts to flesh out a strict stability obligation as 'underdeveloped'.

139 *Saluka* (n 105) para 306.

140 See *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, Award (11 September 2007) para 333.

141 Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (OUP 2015) 187.

142 For an overview of the role of public interests in the framework of legitimate expectations in the law of the European Union, compared to FET, see Federico Ortino, 'The Public Interest as Part of Legitimate Expectations in Investment Arbitration: Missing in Action?', in Charles N Brower and others (eds), *By Peaceful Means* (OUP 2024) 399.

143 *International Thunderbird Gaming Corporation v The United Mexican States*, UNCITRAL, Award (1 December 2005), Separate Opinion of Mr Thomas Wälde, para 2: 'the balancing that is, in my view, required between legitimate expectations of a foreign Investor and an equally legitimate public interest in preserving a large "regulatory space"'.

many of the mentioned cases saw the invocation of environmental and human rights arguments as relevant public interests as well for the decision on FET.[144] However, since FET serves the purpose of balancing States' interests and investors' protection, invoking the right to regulate in this context does not equate with a guarantee that non-economic interests will enjoy full consideration. This is even more true since proportionality – the impact of which will be seen in the next section – is a key component of FET.[145]

The limits to non-economic interest protection in FET cases are particularly relevant since, even when States successfully present non-economic arguments in regard to indirect expropriation, they may still face adverse awards due to investors' invocation of FET. A case in point here is *Eco Oro v Colombia*,[146] concerning Colombia's choice to implement measures prohibiting mining activities in certain areas for the protection of the local ecosystems and the ensuing alleged violations of the provisions relating to expropriation and FET enshrined in the Free Trade Agreement between Canada and Colombia (FTA). Contrary to what happened in *Rockhopper*, environmental matters were widely discussed in this case and had an impact on the final decision. Indeed, the Tribunal determined that there had been an indirect expropriation,[147] but it also found the police powers doctrine to be applicable (on the basis of the relevant provisions of the FTA) and that the disputed measures were undoubtedly taken for the protection of the environment.[148] The Tribunal went in-depth into the environmental analysis, acknowledging that the local ecosystem was 'under threat from both human intervention and climate change'[149] and ultimately finding that Colombia's measures were a legitimate exercise of police powers.[150] The Respondent was not, however, as successful in its defense concerning the violation of FET and of the Minimum Standard of Treatment (MST). On the basis of the same facts, the Tribunal noted that:

> [Colombia] found itself torn between the competing interests of protecting the páramo and obtaining much needed royalties. It has failed to act coherently, consistently or definitively in its management of the Santurbán Páramo and in so doing has infringed a sense of fairness,

144 See supra Section 4.2.1; in particular, similar reasoning can be found in the awards *Philip Morris* (n 111) and *Chemtura* (n 113).
145 See infra Section 5.1.
146 *Eco Oro* (n 81).
147 ibid, para 634.
148 ibid, para 636.
149 ibid, para 637.
150 ibid, para 698.

> equity and reasonableness and indeed has shown a flagrant disregard for the basic principles of fairness.[151]

The disappointment caused by the decision in *Eco Oro v Colombia* was voiced by Philippe Sands in his dissenting opinion, where he highlighted the complexity of the case, which turned 'on a struggle between competing societal objectives', pulling in different directions: 'on the one hand, the protection of the treaty rights of an international investor; on the other hand, the ability of a community to take legitimate measures to conserve its environment'.[152] The majority decision on the violation of FET and MST was thus deemed as 'likely to undermine the protection of the environment'.[153]

Indeed, the way in which this case unfolded is, to some extent, more worrying for States' environmental action than *Rockhopper*.[154] First, it shows the limits of public interest defenses in case of an alleged violation of legitimate expectations. Even when tribunals acknowledge the non-economic needs pursued by the State, a decision aimed at protecting, for example, the environment is not guaranteed. Moreover, the FTA in *Eco Oro* was one of the so-called 'new generation' agreements, attempting to actively balance States' environmental obligations and investors' rights. Nevertheless, the final decision shows that even careful treaty drafting does not imply an 'environmental friendly' approach,[155] leading some to wonder whether the carve-outs included in new generation investment treaties are 'fit for purpose'.[156]

5 Tribunals' Approach to Non-Economic Arguments: The Limits of a Binary Perspective

The previous sections have shown that non-economic interests may have a central role in States' defenses, in particular in the invocation of their right to regulate in cases concerning expropriation or FET. The right to regulate,

151 ibid, para 821.

152 *Eco Oro Minerals Corp v Republic of Colombia*, ICSID Case No ARB/16/41, Partial Dissent of Professor Philippe Sands QC, para 1.

153 ibid, para 4.

154 On the potentially chilling effect of this decision see Güneş Ünüvar, 'A Tale of Policy Carve-Outs and General Exceptions: Eco Oro V Colombia as a Case Study' (2023) 14 JIDS 517.

155 For an analysis of this case see ibid; Robert Garden, 'Eco Oro v Colombia: The Brave New World of Environmental Exceptions' (2023) 38(1) ICSID Rev 17; Dooley (n 1) 860–68.

156 Mathews and Devitre (n 32).

however, is not a carve-out permitting any State action directed at protecting its interests, vastly relying on tribunals' interpretation of the requirements of police powers and public interest defenses. To complete the answer to the question of whether non-economic interests can be thoroughly analyzed by tribunals, it remains to be seen whether tribunals' approach to the right to regulate can offer sufficient relevance to these justifications.

In practical terms, this is reflected in tribunals' approach to the proportionality test in the analysis of a right-to-regulate defense. As will be shown, a strict approach to proportionality stiffens the binary perspective of tribunals, reducing the non-economic interest to a parameter to assess the regulatory measures' impact on the investment. At the same time, all the options that attempt to depart from a strictly binary approach still present strong limits when tested against complex cases of triangulation of interests.

5.1 *The Varying Impact of the Proportionality Assessment on Right-to-Regulate Defenses*

As already noted, right-to-regulate defenses are characterized by an analysis of the proportionality of the States' measures at stake. This is not surprising since the basic function of proportionality, deriving from the European and, specifically, German constitutional traditions, is one of limitation of discretion, built on the original idea that 'citizens of liberal states should only have their freedom of action limited insofar as is necessary for the public interest'.[157] The principle was then progressively adopted by other jurisdictions and by public international law,[158] acquiring the broader role of a 'mode of balancing between competing rights and interests'.[159]

157 Mads Andenas and Stefan Zleptnig, 'Proportionality: WTO Law: In Comparative Perspective' (2007) 42(3) Tex Intl L J 371, 384.

158 Much has been written on the topic, but the majority of scholarship and practice point to the existence of a general principle of international law. See Enzo Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (Giuffrè 2000); Palombino (n 130). See *contra* Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) 366; Caroline E Foster, *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard, and Due Diligence* (OUP 2021) 249. For a review of all the ways in which proportionality may be applied to investment disputes, and its limits, see Bücheler (n 141) and Henckels (n 117).

159 Benedict Kingsbury and Stephan W Schill, 'Public Law Concepts to Balance Investors' Rights With State Regulatory Actions in the Public Interest – The Concept of Proportionality' Law' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 75, 80. For a review of the approaches of both domestic and international courts to proportionality see Palombino (n 130) 128–33.

Traditionally, a proportionality test comprises three elements: suitability, necessity, and proportionality *stricto sensu*.[160] The first element requires that the disputed measures be adopted for a proper objective and that they are suitable to achieve it; the second concerns the 'intrusiveness' of the measures, which should be the least intrusive or onerous among the alternatives at the disposal of States; the third element is the actual balance between the interests at stake, requiring to ascertain 'to what extent the restriction of a certain interest is actually justified because of the importance of the aim underlying the State action'.[161] Additionally, proportionality presents a 'flexible' side, allowing adjudicators to give changing content to the principle and its key elements on the basis of the normative field at play.[162] The application of proportionality to investment disputes makes no exception since the arbitral practice is extremely fragmented in the application of this test to right-to-regulate defenses.[163]

As for police powers defenses, the need to limit the creation of a blanket exception for States has led to the development of the so-called 'mitigated police powers doctrine',[164] according to which a tribunal would need to take into account 'both the effect of a State measure on the investment and the public purpose for which it was adopted'.[165] This has also been described as the progressive introduction of proportionality among the requirements for expropriation.[166] The leading case on the matter is *Tecmed v Mexico*, where the Respondent presented a police powers defense, claiming that it did not renew a license for a landfill of hazardous industrial waste for reasons of environmental protection and public health.[167] Analyzing this argument, the Tribunal stated that it would consider whether the State's measures were 'proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality'.[168]

160 Emily Crawford, 'Proportionality' (2011) Max Planck Encyclopedia of Public International Law.
161 Palombino (n 130) 128; Crawford (n 160) para 2.
162 Palombino (n 130) 124.
163 Valentina Vadi, *Analogies in International Investment Law and Arbitration* (CUP 2016) 203.
164 Bücheler (n 141) 129–32; Titi (n 102) 334.
165 Bücheler (n 141) 129.
166 Yannaca-Small (n 119) 588–91.
167 *Técnicas Medioambientales Tecmed, SA v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) para 97.
168 ibid, para 122.

This approach is open to interpretation. On a first reading, it recalls the typical elements of a proportionality test, with a first prong to be carried out in terms of achievement of the public interest (whether the measure is proportional to the interest protected) and a second one in terms of balancing of the competing interests at stake (whether the measure is proportional to the damage caused to the investor). This award, however, has also been read as a departure from the police powers doctrine, focusing only on the acts' effects and introducing an additional hurdle for the State attempting to regulate in the public interest.[169] This interpretation may be explained by the fact that the *Tecmed* tribunal focused mostly on an analysis of proportionality *stricto sensu*, i.e. the assessment of whether the impact of the measure on the investor is proportionate to the public interest pursued.[170]

The diverging critiques of the *Tecmed* decision depend mainly on how one sees the application of proportionality. This is not merely a doctrinal spat: this award has been broadly quoted in the application of police powers to push forward a strict proportionality analysis.[171] Such an evolution of police powers significantly reduces the room for analysis of the public interest involved, applying rigid binary reasoning. Indeed, proportionality *stricto sensu*, if applied as the primary test for police powers, centers the analysis around the investors' rights. This may relegate public interest protection to an afterthought of the tribunal since '[a]s with any other measure, the critical question is the extent of the interference with the investor's property'.[172]

Moving to public interest defenses in FET cases, the role of proportionality is clearer and, as already outlined, ingrained in the very nature of this standard, which introduces a balancing test between States' interests and investors' protection.[173] Proportionality has often been considered among the

169 Titi (n 102) 333. See also Dooley (n 1) 857, who presents the case as one of application of the sole effects doctrine.

170 Caroline Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration' (2012) 15(1) JIEL 223, 233.

171 *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/14/32, Award (5 November 2021) para 333; *UP and CD Holding Internationale* (*formerly Le Cheque Dejeuner*) *v Hungary*, ICSID Case No ARB/13/35, Award (9 October 2018) para 370; *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/09/2, Award (31 October 2012) para 522; *El Paso Energy International Company v Argentine Republic*, ICSID Case No ARB/03/15, Award (31 October 2011) para 243.

172 *UP and C.D Holding* (n 171) para 370.

173 See supra Section 4.2.2.

standard's main elements,[174] a prerequisite for the protection of legitimate expectations,[175] or simply as a principle informing tribunals' reasoning, giving rise to a 'proportionality-type analysis'.[176] Be that as it may, this principle finds expression in the analysis of cases concerning FET and has been frequently referred to by tribunals.[177]

Even in reference to FET, however, proportionality has been applied in different ways, oscillating between preference for strict proportionality, thus leaving little room for the public interest, and an analysis of all steps of proportionality, which allows some attention to States' regulatory choices. Evidence of the first approach can be found in *CEF v Italy*, where the Tribunal first carried out an analysis concerning the rationale of Italy's measures and their reasonableness, acknowledging that the measures were not unreasonable[178] and noting that 'the dignity which attaches to sovereigns must be given deference, though that is not infinite'.[179] However, although the initial analysis focused on the reasonableness of the State's measures, this seemed to have almost no impact on the final analysis of proportionality *stricto sensu*,[180] with the Tribunal stating that 'the greater the level of engagement as between a sovereign and an investor, such as here …, the more rigorous the scrutiny must be of acts which, even if reasonable, cut across … legitimate expectations'.[181] The second approach was instead followed in *RWE v Spain*, where the Tribunal devoted an extended analysis to 'disproportionality', articulated in suitability, necessity, and proportionality *stricto sensu*.[182] In the first two steps of the analysis, the Tribunal mentioned that the State must be accorded 'some margin of appreciation … in assessing what measures would successfully address the

174 Palombino (n 130) 134–41.

175 See the arguments made in Ortino (n 142).

176 Kingsbury and Schill (n 159) 98.

177 August Reinisch and Christoph Schreuer, *International Protection of Investments: The Substantive Standards* (CUP 2020) 446 ff. Exemplary is *MTD v Chile*, where the tribunal referred to Judge Schwebel's opinion, according to which fair and equitable treatment is 'a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, nondiscrimination, and proportionality' (*MTD Equity Sdn Bhd and MTD Chile SA v Chile*, ICSID Case No ARB/01/7, Award (25 May 2004) para 109).

178 *CEF Energia BV v Italian Republic*, SCC Case No 2015/158, Award (16 January 2019) para 240.

179 ibid, para 240.

180 On the dangers of merely performing an analysis of proportionality *stricto sensu* see Henckels (n 117) 169–70; Ortino (n 75) 74–75.

181 *CEF Energia* (n 178) para 243.

182 *RWE Innogy GmbH and RWE Innogy Aersa SAU v Kingdom of Spain*, ICSID Case No ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum (30 December 2019) paras 550–600.

complex and acute problem of the Tariff Deficit and the unsustainable electricity sector debt'.[183] This decision shows a more comprehensive analysis of the measures adopted. Still, the Tribunal ultimately focused on whether the investor bore 'an individual and excessive burden relative to the policy objective of the Respondent'.[184]

Proportionality may thus find different applications in relation to States' right-to-regulate defenses. Non-economic arguments may be relevant to an analysis of this kind, but whether they have an impact on the final decision and are actually able to bring about protection for non-economic interests, depends on the way the elements of proportionality are understood and applied.

On the one hand, the relevance of non-economic arguments may be muffled by the very employment of proportionality. If the essential function of proportionality is understood to be the source of 'restrictions on the regulatory freedom of governments',[185] it may become yet another tool in the hands of investors, focused on enhancing the protection of the investment by putting the State through additional hurdles.[186]

On the other hand, in line with the progressive 'humanization' of international investment law, proportionality may be repurposed for a better analysis of non-economic interests. This is particularly true with regard to FET, where an accurate balancing operation is a State's best bet. Provided that it is correctly applied, then proportionality may be a tool to tackle the 'risks of clinical isolation of international investment law'[187] and the 'fears about the dominance of investors' rights over the interests of host states'.[188] A possible way to achieve this goal is for tribunals to (i) comprehensively analyze all the elements of proportionality and (ii) employ deference to 'calibrate the appropriate standard of review to the circumstances and afford a measure of deference to governments in situations of normative or empirical uncertainty'.[189] In more practical

183 ibid, para 567.

184 ibid, para 598.

185 Andenas and Zleptnig (n 157) 384. See also Kingsbury and Schill (n 159) 85.

186 Alessandra Arcuri and Federica Violi, 'Public Interest and International Investment Law: A Critical Perspective on Three Mainstream Narratives' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 2185, 2203.

187 Kingsbury and Schill (n 159) 104.

188 Schill (n 134) 170. See also Stephan W Schill and Vladislav Djanic, 'Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law' (2018) 33(1) ICSID Rev 29, 47; Arcuri and Violi (n 186) 2207.

189 Henckels (n 117) 186. A similar end result may also be achieved by 'due regard' as argued by Caroline E Foster, 'Why Due Regard Is More Appropriate than Proportionality Testing in International Investment Law' (2022) 23 JWIT 388.

terms, tribunals may find a middle ground, where according a minimum degree of deference in the proportionality analysis leads them to focus on the quality of the States' action rather than the investors' perceived damages[190] or individual burden.[191] This can mean relying on the evaluation of the State on the issues of suitability and necessity, changing the test to one of manifest disproportionality,[192] or lowering the standard of proof on certain matters.[193]

Through this approach, tribunals can respect what has been defined as the core of investment treaty law, i.e. 'an embodiment of the balance of public interests between States'.[194] Similarly, deference becomes essential if one considers that when investment protection interacts with fields such as international human rights law or international environmental law, a number of 'inward-looking' international obligations – i.e. obligations that 'enjoin States to undertake certain conduct within their own domestic legal order'[195] – may clash. For example, international investment law may oblige States to follow specific procedures when exercising their regulatory powers and, at the same time, international environmental law may require States to take specific domestic actions in order to curb emissions. In cases like this, attention should be paid to the choice of the State and the method followed rather than to the specific damage caused to the investor.

Much depends, thus, on whether tribunals focus on the States' measures or the investors' interests. As proposed by Lowe, '[i]t is more helpful to accept that the State has the right to regulate its economy, and that the real question is, given the nature and extent of any commitments that the State has made to the investor, "is the regulation in question fair or not?"'.[196] This shift in perspective leads to using proportionality not as a noose around a State's neck but as a neutral method of review. None of the proposed solutions can change the binary nature of a proportionality test, which is interested in the balance between the investors' rights and the States' proposed public interests. However, such an application of deference, offering a bigger stage for

190 Henckels (n 117) 126 ff; Prabhash Ranjan, 'Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law: A Critical Appraisal' (2014) 3(3) CJICL 853.

191 Foster (n 158) 256.

192 ibid 267–72.

193 Henckels (n 117) 45–46.

194 Foster (n 189) 401.

195 ILA, 'Final Report. Mapping the Engagement of Domestic Courts with International Law', 2016, para 12.

196 Lowe (n 99) 460. The author further clarifies at page 462 that 'an analysis focusing on the propriety of the exercise of governmental powers may be more helpful than an analysis focusing on the claimant's rights and interests'.

the States' proposed non-economic interests or justifications, ideally limits the downsides of tribunals' traditional approach and allows for some protection of the underlying non-economic interests. These will not only be analyzed for being strictly in favor or against investment protection but considered on their own as relevant purposes pursued by the State.

5.2 *A Final Test: Tribunals' Approach to Cases of Triangulation of Climate Action, Consumers' Interests, and Investment Protection*

The previous sections have shown that right-to-regulate defenses may allow States to employ justifications based on their public interests, often relating to the protection of the environment or human rights. These defenses offer a good stage for non-economic interests, the relevance of which to the final decision of the tribunal is, however, significantly reduced by the structural limits of the police powers doctrine, the complex content of FET, and tribunals' recourse to proportionality. These limits may be softened by introducing deference into the proportionality analysis. However, the fact that States may employ – and tribunals may welcome – non-economic arguments or justifications in a right-to-regulate defense does not mean that investment arbitration is able to deal with complex cases, taking into account and possibly balancing competing non-economic interests. This implies a further departure from the binary perspective of ISDS: not only would an interest other than the investors' need autonomous consideration, but this interest would have to be balanced against a third, non-economic, interest. In cases of this kind, the 'struggle between competing societal objectives' mentioned by Philippe Sands in his dissenting opinion in *Eco Oro v Colombia*[197] becomes even more complex. If tribunals were to consider all the interests at stake, they would have to juggle investment protection with an evaluation of competing non-economic interests potentially akin to the one usually carried out by national courts.

This is not a purely theoretical point. ISDS is not a fight between the 'bad' investor and the 'good' State and there may be cases in which multiple interests are at stake: the investors' need to have their investments protected, the States' public interest, and another – potentially public – interest which fortuitously coincides with the investors' position. Cases of this kind are less rare than one might expect since whenever an investment pursues a 'public welfare' objective, e.g. employment, more than one non-economic interest may

197 *Eco Oro*, Partial Dissent of Professor Philippe Sands (n 152) para 1. See supra Section 4.2.2.

be at stake.[198] In keeping with this article's focus on climate change, relevant examples are the cases concerning renewable energy sources. In these cases, the investment concerns a more sustainable energy source, in line with the need to reduce fossil fuel use and combat climate change. It thus pursues an underlying non-economic interest. When States adopt measures that negatively impact investments in this sector, they routinely invoke the need to protect consumers as the public interest that justifies their conduct. This justification, always accepted in principle by tribunals as constituting a relevant public interest, is akin to the already mentioned human rights justifications, framed in the sense of protecting the interests of individuals represented by the State before the arbitral tribunal.

An analysis of public awards concerning renewable energy sources issued over a 10-year period (2015–2024)[199] reveals that when tribunals expressly addressed States' right-to-regulate defenses, they mostly decided in two directions in line with the discourse on proportionality and deference outlined in the previous section.

In the first scenario, tribunals limit States' right to regulate. This can happen when tribunals refer to a strict proportionality test, exclusively balancing the public interest against the damage caused to the investment. In *SolEs v Spain*, for example, the Tribunal found that '[t]he question of proportionality can also be addressed by weighing the legitimate policy interest pursued by the State against the impact of the measure on the investment or a class of investments to which the claim belongs'.[200] Similarly, in *ESPF v Italy*,[201] the Tribunal

198 Yannick Radi, 'The Tripartite Dimension of Conflicts of Interests: Workers, Foreign Investors and Host States in the Energy Sector' in Eric De Brabandere and Tarcisio Gazzini (eds), *Foreign Investment in the Energy Sector* (Brill 2014) 216.

199 To this author's knowledge, 54 public awards were issued between 2015 and 2024 in cases concerning renewable energies. These largely coincide with the public decisions included in Annex 3 of IIA Issues Note, 'Treaty-Based Investor-State Dispute Settlement Cases and Climate Action' (Issue 4, September 2022) <https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf> accessed 27 January 2025, with the addition of a few cases decided after 2022.

200 *SolEs Badajoz GmbH v Kingdom of Spain*, ICSID Case No ARB/15/38, Award (31 July 2019) para 328. Of a similar position are the decisions in *Eskosol SpA in liquidazione v Italian Republic*, ICSID Case No ARB/15/50, Award (4 September 2020); *JGC Holdings Corporation (formerly JGC Corporation) v Kingdom of Spain*, ICSID Case No ARB/15/27, Decision on Jurisdiction, Liability, and Quantum (21 May 2021); *Infrastructure Services* (n 87).

201 *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co KG v Italian Republic*, ICSID Case No ARB/16/5, Award (14 September 2020). For a review of the cases concerning renewable energy in Italy see Sondra Faccio, 'The Assessment of the FET Standard Between Legitimate Expectations and Economic Impact

rejected Italy's right-to-regulate defense, finding *inter alia* that the analysis of such defense did not imply a balancing exercise between the State's regulatory powers and FET but rather a specific evaluation of the circumstances of the case.[202]

In the second scenario, tribunals apply deference to the proportionality analysis, giving room to the public interest held by the State. Most recently, in 2024, the Tribunal in *Encavis v Italy* underlined that '[i]nternational arbitral tribunals must give broad deference to States when they regulate matters within their own borders',[203] ultimately finding that the balancing act of tribunals is between the State's right to regulate and the investor's right to a stable legal framework.[204] This is not an isolated case, as tribunals have found in favor of an application of deference[205] to be used as a standard in determining the impact of a regulatory measure.[206]

Certainly, in the first scenario, the public interest of the State may not be fully addressed due to the reasons outlined in the previous sections of this article. However, the centrality of the investors' claims in this scenario does not mean that the underlying non-economic interest to protect the climate will emerge, nor does the claimants' victory imply any mention of matters such as emissions reduction. A rare exception can be found in *OperaFund v Spain*, where in relation to the State's right to regulate in the interest of public health or safety, the Claimants argued that they were not 'investors threatening public health or causing negative externalities to the State. Rather, Claimants contributed to Respondent by providing clean energy'.[207] The Tribunal, however, did not pick up on this argument and, as with the majority of cases concerning

in the Italian Solar Energy Investment Case Law' (2020) 71 Quest Intl L 3; Id., 'Encavis AG and Others v. Italy, Yet Another Award in the Italian Renewable Energy Saga' (Kluwer Arbitration Blog 2024) <https://arbitrationblog.kluwerarbitration.com/2024/06/02/encavis-ag-and-others-v-italy-yet-another-award-in-the-italian-renewable-energy-saga/> accessed 2 October 2024.

202 *ESPF* (n 201) paras 418 ff.

203 *Encavis and others* (n 89) para 692.

204 ibid, para 698.

205 *Eurus Energy Holdings Corporation v Kingdom of Spain*, ICSID Case No ARB/16/4, Decision on Jurisdiction and Liability (17 March 2021) para 338; *Infracapital F1 Sàrl and Infracapital Solar BV v Kingdom of Spain*, ICSID Case No ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum (13 September 2021) para 662; *Hydro Energy 1 Sàrl and Hydroxana Sweden AB v Kingdom of Spain*, ICSID Case No ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum (9 March 2020) para 676; *AES Solar and others* (*PV Investors*) *v Kingdom of Spain*, PCA Case No 2012–14, Award (28 February 2020) para 583.

206 *SunReserve Luxco Holdings SRL v Italy*, SCC Case No 132/2016, Final Award (25 March 2020) para 735.

207 *OperaFund* (n 86) para 535.

renewable energy, the only reference to States' environmental obligations can be found in the section on the factual background of the award, which mentions the State's obligations concerning climate change.[208]

The inescapably binary nature of investment arbitration emerges fully in the second scenario. Even when ample space is granted to the States' public interest, there is no room for discussion of any third (non-economic) interest. In *SunReserve v Italy*, for example, Italy referred to Decision No 16/2017 of the Italian Constitutional Court, which defined the measures reducing the incentives as addressing 'a public interest, in terms of a fair balance between the opposing interests at stake, aimed at combining the policy of supporting renewable energy production with the greater sustainability of the related costs borne by end users of electricity'.[209] The need to balance consumers' needs with fossil fuel reduction, however, does not appear in the Award, where the Tribunal adhered to Italy's submission, which ultimately painted the matter as one of 'drawing a balance between the interests of the end-consumers and the photovoltaic producers'.[210] The underlying non-economic interest, the need to reduce emissions, was not a factor in the Tribunal's decision.

These cases show that tribunals' approach to public interest defenses assigns non-economic interests a particular role: they may be considered by the tribunal and possibly prevail over the investors' interests as part of a State's right-to-regulate defense. Any other non-economic interest will not enjoy as much attention. This does not mean that the final decision will necessarily run against these other interests, which may indirectly enjoy protection if they coincide with the investors' position.

Indeed, any reference to 'balancing' or 'margin of appreciation' found in investment arbitration should not be confused with the role traditionally played by proportionality before the European Court of Human Rights, even in cases concerning expropriation.[211] There is, in fact, a clear difference in the purposes pursued by proportionality in the two systems, since investment

208 ibid, para 126. Mention is usually made of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted on 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.

209 Italian Constitutional Court, Decision No 16/2017 (16 December 2016) para 8.2. Author's translation. For a summary of the decision see Gregorio Salatino, 'Decision of the Italian Constitutional Court No. 16 Adopted on January 24th, 2017: Article 26 of Law Decree No 91/2014 (Remodelling Feed-in Tariffs for Photovoltaic Plants That Have Nominal Power Exceeding 200KW) Is Not Against the Italian Fundamental Law' (2017) 8(1) Renewable Energy Law and Policy Review 30.

210 *SunReserve* (n 206) para 665.

211 Catharine Titi, 'Refining the Expropriation Clause: What Role for Proportionality?' in Julien Chaisse (ed), *China-European Union Investment Relationships. Towards a New Leadership in Global Investment Governance?* (Elgar 2018) 111, 120–22.

arbitration is not traditionally mandated to supervise a multitude of individual rights as may happen before a human rights court.[212] In short, the binary structure of investment arbitration does not allow for coherent consideration of complex cases involving multiple public interests. If deference is applied, the State is the only possible holder of the non-economic interests at stake; if strict proportionality is followed, the matter is one of balance between States' interests and the damage caused to the investors, thus leaving no practical use for the invocation of other interests.

6 Conclusions

This article has analyzed ISDS' ability to deal with cases involving non-economic interests, even in the complex scenario of climate-related disputes. It has attempted to probe the limits of ISDS, answering the question of whether investment arbitration may produce awards directly aimed at protecting the climate or any other non-economic interest. To address this question, the scope of research has been expanded from climate-related cases to include instances where environmental and human rights arguments were employed, on the assumption that a similar model can be proposed for all non-economic interests in ISDS, including climate action. The analysis has revolved around three matters to be clarified, i.e. whether any of the parties to investment arbitration may effectively raise arguments concerning climate change; whether tribunals' reasoning allows room for full consideration of such arguments; and whether tribunals have the necessary tools to take into account and possibly balance competing non-economic interests.

It has been argued that only States have at their disposal an efficient means to pursue non-economic arguments before ISDS tribunals. While interpretive arguments are excluded as an effective way to bring about a decision protecting a non-economic interest, right-to-regulate defenses offer the most opportunities. Indeed, the typical scenarios of police powers defenses and FET-related arguments offer room to environmental and human rights 'justifications', i.e. arguments aimed at excluding the wrongfulness of the conduct.

More complex is the question of whether tribunals can take into account and balance competing non-economic interests. Indeed, it is undeniable that '[i]n the search for balance, and in the face of competing pressures, different arms

212 José E Alvarez, 'The Public International Law Regime Governing International Investment' (2011) 344 Recueil des Cours de l'Académie de Droit International 245; Bücheler (n 141) 146–48.

of the same government may inevitably give expression to different and potentially conflicting priorities'.[213] In such cases, as proposed by Professor Sands, 'tribunals must be sensitive to the difficulties of government decision-making in the face of legitimate objectives that pull in different directions'.[214] However, it is difficult to imagine how this may be achieved in a system that commonly relies on binary reasoning, whereby non-economic interests are relevant only for being either in favor or against investment protection.

As shown, the strict proportionality test often applied is the epitome of this kind of reasoning, focusing on the investors' burden rather than on the relevant States' measures. Deference has been proposed as a partial solution to this problem, allowing for deeper consideration of the States' decision-making. Nevertheless, the case law concerning renewable energies has shown that even if arbitral tribunals fully considered public interests, ISDS' binary nature still would not allow for a balancing of multiple non-economic interests. This limit to ISDS' ability to balance non-economic interests is highly relevant in cases concerning climate change, which, as seen in the introduction, may even imply a conflict between human rights and environmental protection.

The analysis carried out excludes any hostility on the part of ISDS towards climate-related arguments since at least one party can effectively raise non-economic arguments and a degree of deference towards the State is often applied. Nevertheless, more often than not the competing interests will be marginally addressed, raising the perception that States are 'trapped' in international investment law[215] and unable to perform their conflicting obligations under international law.

The first obstacle for non-economic arguments lies in the structural characteristics of ISDS and international investment law. ISDS is still undeniably asymmetric in that arbitral proceedings can almost exclusively be initiated by investors and States' arguments are only presented in a defensive function.[216] Consequently, any debate on non-economic interests will usually arise if measures protecting these interests contrast with investment protection. The latter will always be at the center of any arbitral discussion on international

213 *Eco Oro*, Partial Dissent of Professor Philippe Sands (n 152) para 28.

214 ibid.

215 On this apparent 'trap' see Daniel Rosentreter, *Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the Principle of Systemic Integration in International Investment Law and Arbitration* (Nomos 2015) 363 ff.

216 As explained by Dumberry and Dumas-Aubin (n 54) 349–50, 'foreign investors (overwhelmingly corporations, but sometimes individuals) are being accorded substantive *rights* under these treaties without being subject to any specific *obligations*'. Emphasis in the original.

investment law, as anything different would be promptly accused of exceeding the jurisdiction of an arbitral tribunal. Moreover, tribunals are not equipped to take into account broader community interests and balance them since '[i]n investment disputes … the constant pressure is precisely to *separate* the tribunal from the communities to which the investor and the host State belong, in order to secure the greatest measure of impartiality'.[217] As investment tribunals become concerned only with the investment, they adhere to the mentioned binary reasoning.

Tribunals' choices could provide episodic solutions, adopting less restrictive approaches to the interpretation of the requirements of the right to regulate and exercising deference while carrying out the proportionality test. However, occasional protection of non-economic interests does not justify expectations about a new function of ISDS. This issue is the basis of many recent attempts at reform of ISDS and is related to a broader matter, i.e. the task of investment arbitration and its public or private nature. While this dispute resolution mechanism maintains many points of contact with commercial arbitration and private litigation, it is also increasingly asked to tackle global issues, such as climate change. This raises doubts about whether ISDS is able to fit within the framework of public litigation,[218] fully speaking the language of public international law.[219]

These combined elements make ISDS a less-than-ideal forum for climate action. Stuck in binary reasoning, ISDS can only produce awards that incidentally protect non-economic interests, lacking the means to fully appreciate the complexities of competing non-economic interests whenever they may arise in climate-related cases.

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217 Lowe (n 99) 464, emphasis in the original.

218 For a recent take on this issue see Catharine Titi, 'Investment Treaty Arbitration Caught in the Public-Private Law Divide' (2023) 45(3) Mich J Intl L 441.

219 See, for example, the ICJ's rejection of investment arbitration case law concerning legitimate expectations in *Obligation to Negotiate Access to the Pacific Ocean* (*Bolivia v Chile*) (Judgment) [2018] ICJ Rep 507, paras 160–62.

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