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INTERNATIONAL INVESTMENT LAW AND ARBITRATION, SUSTAINABLE DEVELOPMENT, AND RIO+20: IMPROVING CORPORATE INSTITUTIONAL AND STATE GOVERNANCE

by Perry E. Wallace*

INTRODUCTION

The 2012 United Nations Conference on Sustainable Development (“Rio+20”) will provide “a historic opportunity to define pathways to a safer, more equitable, cleaner, greener and more prosperous world for all.”¹ Rio+20 comes twenty years after the 1992 Earth Summit in Rio, where participating governments agreed to several historic accords to promote a more sustainable environment.² Subsequent conferences followed suit with more accords aimed at improving and augmenting preceding commitments.³

One of the most important documents that resulted from the 1992 Earth Summit was Agenda 21,⁴ a planning-oriented framework on redefining economic growth while also promoting social equity and ensuring environmental protections.⁵ The United Nations (“UN”) has affirmed and seeks to expand upon this and similar accords in pursuing its action plan for Rio+20.⁶ Reflecting upon these past efforts, participants at Rio+20 should come to the conference wiser than ever in planning to meet the challenges of sustainable development, which is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁷ Most commentators agree that although some of these steps in sustainable development have been “deeply inspiring examples of progress,” they have also faced setbacks due to challenges such as food insecurity, biodiversity loss, and climate change.⁸ Rio+20 seeks to improve this record by creating a consensus among international governments and institutions on ways to reduce poverty, promote sustainable jobs, clean energy, and create an equitable distribution of resources.⁹

International investment law and arbitration are increasingly the source of major decisions about national and regional development policies and practices. Consequentially, emerging institutions in this field can enable activities that have impacts on the economic, social, political, and environmental well being of communities around the world. Not surprisingly, developing countries and emerging economies, because of their circumstances and needs, tend to experience the greatest amount and intensity of these impacts. At the same time, however, these nations may also be least able (or inclined, as the case may be) to strike a just balance and array of benefits and burdens of development in their investment agreements with other nations and

with corporate partners. Significantly, this calculus lies at the heart of the sustainable development concept.

For these reasons, the major actors and institutions in this arena should be brought together at the Rio+20 conference for purposes of “secur[ing] ... [their] political commitment for sustainable development, reviewing progress and remaining implementation gaps and assessing new and emerging challenges.”¹⁰ This article examines the status of international investment law and arbitration in the framework and dynamics of sustainable global development. Specifically, the article highlights the interrelationship of sustainable development and investment, the challenges and threats posed to sustainable development by international investment law and arbitration, and recommends key issues for discussion at Rio+20. A useful start would be to make international investment law and arbitration one of the topics for discussion at the June “Corporate Sustainability Forum” meetings.¹¹ This Forum, which is a collaborative effort intended to enhance the progress made at the actual Rio+20 conference,¹² presents the proverbial “golden opportunity.” Given the dominant role that business and industry play in the world’s development activities, in particular through international investment law and arbitration, other actors such as national governments and non-governmental organizations should be and will be present be at the table in these discussions and planning regarding sustainability.¹³ With this beginning step, investment law and arbitration could become part of a very important process in international environmental governance, one promising significant benefits from the intelligent, committed exploration and planning for sustainable development that will take place at Rio+20.

SUSTAINABLE DEVELOPMENT AND THE ROLE AND IMPACT OF INVESTMENT

In charting a path toward agreement, the UN has identified the conference’s objective as “secur[ing] renewed political commitment for sustainable development, reviewing progress and remaining implementation gaps and assessing new and emerging challenges.”¹⁴ This objective will be pursued “through the

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lenses” of the conference’s two themes: 1) a green economy in the context of sustainable development and poverty eradication; and 2) the institutional framework for sustainable development.¹⁵ Achieving the objective of Rio+20 through these two themes will require the concerted and collaborative efforts of all stakeholders in a well-functioning, sustainable world. In addition to national governments, the UN has also identified “major groups” that comprise particularly important stakeholders.¹⁶ These major groups include “women, children and youth, indigenous peoples, non-governmental organisations, local authorities, workers and trade unions, business and industry, the scientific and technological community, and farmers.”¹⁷ In focusing on the role of business and industry in promoting this initiative, the UN recognizes that the private sector plays an important role in moving towards sustainable development, specifically in building a green economy and to eradicating poverty.¹⁸

The UN has also recognized that investments by business and industry are fundamental to sustainable development. For example, Agenda 21 describes the central role of international investments in providing financial assistance for developing countries:

Investment is critical to the ability of developing countries to achieve needed economic growth to improve the welfare of their populations and to meet their basic needs in a sustainable manner ... Sustainable development requires increased investment, for which domestic and external financial resources are needed.¹⁹

While the pivotal role of investment in fueling development is generally well established, modern (particularly post-Earth Summit) formulations of this basic precept often invoke some expanded notion of “sustainability.” This includes pronouncements by such august bodies as the 2002 World Summit on Sustainable Development in its Johannesburg Plan of Implementation (seeking “an enabling environment for investment”);²⁰ the G8 Heads of State 2009 declaration Responsible Leadership for a Sustainable Future (“[F]oreign direct investments ... represent an important source of financing and a driver of [sustainable] economic growth and integration”); and the 2009 G20 Heads of State declaration on Core Values for Sustainable Economic Activity (“We ... are partners in building a sustainable and balanced global economy in which the benefits of economic growth are broadly and equitably shared.”).²¹ Thus, the “hard” and “soft” law and policy of sustainability have been rather thoroughly established and accepted.²²

In contrast to sustainable development law and policy, however, investment law and policy have not been as solicitous to the notion of sustainable development. The general consensus is that foreign direct investment is necessary for sustainable development.²³ However, considerable work remains to guarantee that the current regulatory framework for international investment law properly promotes sustainable development.²⁴ As commentators point out:

[I]n international investment law, sustainable development remains challenging to implement. The challenge is to ensure that new international and domestic rules that are being developed to encourage investment by providing additional protection for investors from capital exporting States also provide sufficient policy flexibility and incentives to encourage sustainability.²⁵

As noted above, there has been some difficulty in bringing the policies and practices of sustainability and investment law (including arbitration) together.²⁶ The next section describes the rationale and structure of investment law and the section after that one elaborates on this problem.

INVESTMENT LAW AND ARBITRATION; RATIONALE AND STRUCTURE

Foreign investment, in some form or another, “likely dates back to the days of the pharaohs in Egypt with investment being made by the state itself or by merchants from Egypt, Phoenicia and Greece in other countries.”²⁷ Its historical course parallels that of the history of many civilizations, great and small, and has often been a fateful element in those histories.²⁸ Fast forward to modern foreign direct investment (FDI) in the mid-nineteenth century, two significant phenomena revolutionized methods of raising and spending capital: rapid technological invention and the growth of major corporations.²⁹

Thus enabled, foreign companies and their investments boomed and began contributing to expansive economic growth and development around the world, including the finance, construction, and operation of large infrastructure projects. As this happened, conflicts frequently arose between investors and either host countries or other internal political forces.³⁰ Often these major undertakings were interdependent with the welfare and security of the host country and its citizens, and this at times sparked nationalist concerns about the dangers of foreign control.³¹ Expropriation and other forms of interference with investments became a major problem. However, the traditional remedies have proven woefully inadequate, namely resort to national courts, diplomatic protection, and military force.³²

In the great series of initiatives and attempts to develop solutions to global investment conflicts, international treaties and contracts providing for specific relevant protections have emerged as one of the better alternatives, such as dispute resolution by an independent body. Investment treaties include thousands of bilateral investment treaties (“BITs”) and investment chapters in broader trade and economic cooperation accords, began to appear. Numerous well-known frameworks for foreign investment protection and arbitration of disputes have emerged by the 1990s. They include:

- BITs between nations;
- World Bank Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID” Convention or “Washington Convention”);
- International Chamber of Commerce, International Court of Arbitration, Rules of Arbitration;

- International Centre for Dispute Resolution (“American Arbitration Association”);
- United Nations Commission on International Trade (“UNCITRAL”) Model Law on International Commercial Arbitration and UNCITRAL Arbitration Rules;
- North American Free Trade Agreement (“NAFTA”);
- Energy Charter Treaty (“ECT”);
- Asia-Pacific Economic Cooperation (“APEC”) Non-Binding Investment Principles; and
- Association of Southeast Asian Nation (“ASEAN”) Framework Agreement on the ASEAN Investment Area.

While investment treaties differ in their specific terms, there are certain core provisions that are common to most of them. The following are core commitments that host countries and foreign investors tend to agree to:

- Fair and equitable treatment/ minimum standard of treatment;
- Full protection and security;
- Compensation in case of direct or indirect expropriation;
- National treatment (treatment no less favorable than that given to domestic investors);
- Most-favored nation treatment (treatment no less favorable than that given to investors from other countries);
- Freedom from “performance requirements” as a condition of entry or operation (e.g., requirements to transfer technology, to export a portion of production, or to purchase inputs domestically);
- Free transfer of capital;
- A blanket obligation, or “umbrella clause,” to respect any legal or contractual obligations it may have to the investor; and
- The right to bring arbitration claims against the host country.³³

A number of the these protections afforded investors in investment law, as well as certain aspects of international investment arbitration, have at times created tensions and conflicts for attainment of sustainable development. The next section analyzes the challenges posed by these rights that directly affect implementation of sustainable development policies and principles.

INVESTMENT LAW AND ARBITRATION: CHALLENGES TO SUSTAINABLE DEVELOPMENT

FAIR AND EQUITABLE TREATMENT/MINIMUM STANDARD OF TREATMENT

The fair and equitable treatment provision is as prominent as it is controversial in investment agreements. It has been called a “catch-all” clause, not only because of its breadth but also because it has often been invoked as the basis of claims where expropriation, non-discrimination, and other claims could not fairly be advanced.³⁴ Its broad and opaque language has resulted in arbitral tribunals rendering differing interpretations of its scope and applicability.³⁵

One example of an interpretation applying a strict, high standard for host countries can be found in *Tecmed vs. Mexico*.³⁶ There, the arbitral panel stated that a host country must conduct itself in such a manner as to “not affect the basic expectations

that were taken into account by the foreign investor to make the investment” and that is consistent, “free from ambiguity[,] and totally transparent.”³⁷ On the other hand, various panels appear to have endorsed a somewhat different standard for this concept. UNCITRAL opined that the standard should not be applied in a way that imposes “inappropriate and unrealistic” obligations on the host country, and that investor expectations should be reasonable and legitimate “in light of the circumstances prevailing in the host country.”³⁸

From a sustainable development perspective, the fair and equitable treatment clause and the decisions interpreting it have created uncertainty about how states should apply the concept and about what would be the outcome of a potential arbitral claim. Indeed, states fear that the clause “could act as a black box within which [investment agreements] might contain unwanted surprises.”³⁹ To the extent a more strict, *Tecmed*-like standard applies, developing countries might not have the financial, technical, and human resources to comply since their regulatory regimes are, essentially, works-in-progress.⁴⁰ Furthermore, the true worry is that the specter of a hefty arbitral award against it might have a chilling effect on the healthy evolution of that country’s regulatory evolution — particularly to the extent it seeks to protect environmental and other similar values in the public interest.⁴¹

Some progress has been made in addressing these concerns regarding the fair and equitable treatment clause. For example, several countries have chosen not to include the clause at all, as exemplified in the investment chapter of the trade agreement between Singapore and India.⁴² Others have sought to align its interpretation with that of the customary international law “minimum standard” for the treatment of aliens, which sets a basic floor for country conduct.⁴³ Unfortunately, these measures have hardly served to add true clarity and certainty to the matter. Therefore, the challenges for host countries — and for sustainable development — continue as there is no definite framework to guide their conduct.

EXPROPRIATION

States may legally take possession and ownership of property lying within their jurisdiction under certain circumstances.⁴⁴ Historically, the taking of an investor’s property by a host country was one of the main reasons for the creation of protective investment regimes.⁴⁵ The central issue in these cases is whether the state has “expropriated” the property such that it must compensate the investor for the taking.⁴⁶

Although some investment treaties do not make this distinction, expropriations can be classified as “direct” and “indirect.”⁴⁷ Direct expropriation takes the form of a physical taking of ownership of property (such as the nationalization of a company by a state), whereas indirect (including regulatory) expropriation, usually referring to a state’s interference in one’s enjoyment of the benefits of property even without a physical taking, is a more complex and elusive concept.⁴⁸ The definition and scope of indirect expropriation is important to achievement of sustainable development. Thus, where the state engages in regulatory

activity to protect the environment or the public welfare, that state may well implement its laws much more restrictively under a broad definition of indirect expropriation.⁴⁹ That is, the threat and expense of an expropriation could diminish the political will of the state to regulate assertively.⁵⁰

Tribunals have applied different methods in analyzing the applicability of the indirect expropriation concept. For example, the “sole effect” approach looks at the end result of the government’s measure on the investor and *not* at the purpose for which the measure was intended.⁵¹ An example of this approach can be found in the case *Waste Management v. United Mexican States*,⁵² where the arbitral tribunal rejected a claim of expropriation by a waste disposal services company based on the reasoning that the “effect” of governmental action was not to cause an indirect expropriation.⁵³ Notwithstanding that particular outcome, however, it could be problematic from a sustainable development standpoint to have a test that does not allow consideration of a governmental purpose for expropriation, which could include environmental regulation.⁵⁴ Thus circumstances where the “sole effect” test is applied can constrict a government’s ability to promote beneficial environmental regulation.

The “purpose” or “proportionality” approach requires a comparison of the benefits of a government’s expropriation action with the negative impact, or burden, on the investor. For example, in the *Tecmed* case, the tribunal determined that purpose of a governmental denial of a hazardous waste facility license (which was ostensibly for environmental protection purposes but was actually due to social and political pressures) outweighed the burden on the investor, and ordered Tecmed to completely shut down the plant.⁵⁵ This is in contrast with *Metalclad Corporation v. United Mexican States*, where the arbitral tribunal found that Mexico had, through the environmental regulatory acts of a local municipality, effectively expropriated the property of a U.S. investor that had secured all required permits from Mexican federal authorities to construct and operate a hazardous waste facility.⁵⁶ Ironically, although the parties all agreed that the “purposes” test would apply, the tribunal completely ignored this mutual agreement, stating that it “need not decide or consider the motivation or intent of the adoption of the Ecological Decree.”⁵⁷

Another concept that may come into play in regulatory expropriation cases is that of “police powers.” In *Methanex v. United States*, an executive order by the governor of California required that gasoline additive methyl tertiary butyl ether (“MTBE”) be removed from gasoline by the end of 2002.⁵⁸ Methanex was the Canadian parent of a U.S. subsidiary and a producer of MTBE.⁵⁹ Methanex commenced an arbitration proceeding against the United States on July 2, 1999, charging that this order and related measures were tantamount to an expropriation of that investment under Article 1110 of NAFTA.⁶⁰ The tribunal rejected Methanex’s claim and provided the following explanation:

[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which

affects, *inter alia*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.⁶¹

Thus, the police powers “carve-out” holds some promise as a basis for defending sustainable development regulatory measures.⁶² However, much of the implementation of this carve-out depends on the nature of the facts and the government’s approach to regulation. Obviously, sound policies that are fairly applied are more likely to yield positive results in the event of a challenge. These would be particularly important elements, given the relatively difficult task of defining what is an indirect expropriation.

It is worth noting that some countries have restricted the scope of this concept and provided factors to be considered in determining the existence of indirect expropriation. Prominent examples are the Canadian and American Model Acts; the 2009 ASEAN Comprehensive Investment Agreement; the 2007 Investment Agreement for the COMESA Common Investment Area (“COMESA CCIA”); the 2008 Austrian Model Investment Treaty and subsequent treaties that have imitated them.⁶³ These are examples that not only improve the law generally, but reflect some willingness on the part of states to provide at least for the possibility of progressive sustainable development measures.

NATIONAL TREATMENT

At first blush, the national treatment obligation for host countries to treat domestic and foreign investors the same seems rather simple and direct. A typical example is Article 3 of the 2004 U.S. Model Bilateral Investment Treaty:

Article 3: National Treatment

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.⁶⁴

This non-discrimination provision, however, is more complex than might appear. Among other things, the determination of what are “like circumstances” can vary. Such a determination is important because it directly bears on how free governments are to differentiate between foreign and domestic entities.⁶⁵ For example, a broad interpretation of the term allows a tribunal to consider the circumstances of more foreign and domestic investors to be “like,” and thus captures a broader variety of regulations with which to take issue.⁶⁶ This broad interpretation, however, would limit a state’s ability to apply different rules to foreign companies — perhaps even if the difference is

grounded in a legitimate public purpose.⁶⁷ Thus, some commentators have expressed the concern that:

[A] distinct leaning towards expansive interpretations has been detected within the reasoning of arbitral awards in investor-State disputes, the effect of which is to create standards of protection that go well beyond shielding investors from arbitrary or bad conduct, and instead operate as a form of insurance against the impact of future legitimate public welfare regulation.⁶⁸

In the arbitral partial award of *S.D. Myers, Inc. v. Canada*, the tribunal observed that the “phrase ‘like circumstances’ is open to a wide variety of interpretations in the abstract and in the context of a particular dispute.”⁶⁹ There, the tribunal found that Canada had violated its national treatment obligations under the investment chapter of NAFTA (or “Article 1102”) when it made certain decisions purportedly to protect the environment.⁷⁰ The American company claimant, SDMI, had established a subsidiary in Canada to export a certain hazardous waste product (“PCBs”) into the United States for remediation at its Ohio facilities.⁷¹ SDMI enjoyed a competitive advantage over both American and Canadian competition because of its low prices and expertise.⁷²

Although the tribunal’s decision in favor of the American investor was disappointing to environmentalists, the case may have a few positive features. The tribunal was fully willing to consider a wide range of pertinent elements and policies — including a favorable embrace of the NAFTA environmental “side agreement” and other relevant environmental measures — and not merely a more narrow range of just commercial considerations.⁷³ Even in the absence of a *stare decisis* principle in arbitration, the tribunal’s willingness to acknowledge such a range of considerations should be noted for further efforts to encourage greater awareness and inclusion of such an approach in future arbitral deliberations.⁷⁴

Additionally, one should consider other factors that may have tipped the balance in favor of the investor, such as the dealings between the principal Canadian competitor and the Canadian government as well as the particular way the government handled this matter.⁷⁵ Looking at those facts, one could reasonably query whether the tribunal members may have discerned some impropriety — or perhaps even collusive behavior that suggested discrimination. Canada, in fact, may have come within the prescription of *Pope & Talbot v. Canada*, which stated that a government’s differential treatment violates its national treatment obligation, unless it established a rational nexus between this treatment and government policies that do not discriminate between foreign or domestic companies or violate the spirit and objectives of NAFTA.⁷⁶

The point for consideration here is whether some aspects of *S.D. Myers* provide any insight in its analysis that, on a more favorable set of facts and circumstances, a court might yield a decision more supportive of sustainable development. In light of some of the difficulties inherent in the analysis of national treatment provisions, some countries have specifically inserted

relevant reservations and limitations in their treaties. This includes such approaches as placing exceptions allowing more favorable treatment for certain persons, groups, or industries.⁷⁷ The potential benefit of this approach is that the deliberative process for consideration of it would be *open and democratic* — more so than an arbitral proceeding,⁷⁸ thus providing opportunities for public participation and advocacy — again, more so than exists in an arbitral proceeding.

MOST-FAVORED NATION TREATMENT

Like national treatment, most-favored nation (“MFN”) treatment is a non-discrimination obligation, although a MFN obligation applies to prevent more favorable treatment to other foreign states and their investors. This is an example of such a provision taken from the investment chapter (“Chapter 10”) of the Dominican Republic-Central America-United States Free Trade Agreement:

Article 10.4: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.⁷⁹

Like national treatment, the “like circumstances” language in the MFN obligation not only provides a qualifying effect but also introduces interpretive challenges. One of the most recent challenges in the MFN investment area is the phenomenon whereby investors may seek to “import” rights against host states based on *other* investment treaties.⁸⁰ Perhaps the best-known case is *Maffezini v. Spain*, in which the tribunal allowed an Argentinean investor claimant, based on the MFN clause of the Spain-Argentina BIT, to avail himself of dispute resolution provision of the Spain-Chile BIT.⁸¹ The *Maffezini* decision, as well as others like it, has been the source of some concern. This practice of “cherry-picking” arbitration rights is seen by some as distorting the treaty negotiation process and introducing much greater uncertainty in the obligations host countries owe to investors.⁸² For this reason, a number of tribunals have rejected investor requests for similar treatment.⁸³ Some states have taken steps to preclude the practice, in some instances by excluding MFN clauses entirely, and in others by drafting in specific exceptions or limitations.⁸⁴

PERFORMANCE REQUIREMENTS

Host countries attach performance requirements as a pre-condition to a business’s establishment, operation, or enjoyment of an opportunity or privilege to invest in a host state. Performance requirements can also be offered as significant incentives rather than as mandatory obligations.⁸⁵ They may relate to sales, production, percentage of ownership by host nationals, transfer of technology, domestic purchases, local hiring, etc.⁸⁶ Structurally, investment treaties take varying

approaches to incorporating performance requirements, such as not mentioning them in some instances or specifically addressing them in others.⁸⁷ While most treaties do not mention this topic, member states of the World Trade Organization (WTO) do include performance requirements and are limited by the structures that the WTO Agreement on Trade-Related Investment Measures (TRIMS) imposes on a number of types of performance requirements.⁸⁸

Notwithstanding TRIMS, states have the legal right to strike a wide range of bargains, such as affirming the applicability of TRIMS, rejecting some or all of its strictures, or even adding to them.⁸⁹ From a sustainable development perspective, a state that preserved its right in an investment treaty to require the transfer of technology can avail itself of the kinds of environmental technology that would accelerate its progress in attaining sustainable development goals.⁹⁰ This perspective also applies to various other relevant standards, such as those concerning research and development.⁹¹

UMBRELLA CLAUSES, STABILIZATION CLAUSES, AND THEIR INTERPLAY

To understand the umbrella clause, it is useful to pose this question: can an investor, in arbitration proceedings brought based on the terms of an *investment treaty*, also make claims for violations of a specific *investment contract*? The following is an example of an umbrella clause, taken from the US-Argentina Treaty: “Each Party shall observe any obligation it may have entered into with regard to investments.”⁹²

Tribunals have answered the question in various ways, ranging from limited acceptance of the right to make a contract claim only upon clear and convincing evidence of mutual consent in the contract to do so, to a broader acceptance of the of the contract claim itself as transformed into a treaty claim.⁹³ Importantly, however an umbrella clause may come to be included in treaty arbitration, it may have considerable implications.⁹⁴ An umbrella clause provides an investor the estimable machinery of international investment arbitration to enforce contract claims, which might themselves obligate the state under a range of domestic legislative, contractual, and treaty measures.⁹⁵ This can cut both ways for sustainable development purposes. Whether such a clause expands or contracts the public space available for a state to promote sustainable development depends directly on what obligations and duties are incorporated through that clause.

Stabilization clauses in investment contracts may (1) “freeze” the law of a host state throughout the duration of a contract; (2) provide for “economic equilibrium” by requiring investors to comply with new laws, but providing compensation for compliance costs; or (3) include some “hybrid” form of the first two.⁹⁶ Obviously, such a clause could thwart the evolution of environmental and other sustainable development regulations. Further, in regard to actual treaty rights, stabilization clauses could alter or diminish the police powers of the state to regulate and help frame, and thus weaken, the “legitimate expectations” that undergird the fair and equitable treatment obligation.⁹⁷ Finally, the combination of umbrella and stabilization clauses poses a

particular concern for any true progress in achieving sustainable development.

INTERNATIONAL INVESTMENT ARBITRATION

International investment arbitration is crucial to investment treaty and contract regimes, as arbitral tribunals resolve disputes and questions between states and investors about the applicability of those investment measures. Given the significant nature of the kinds of projects involved, their interrelation with the governance of the host countries involved, as well as the numerous challenges posed to efficacious interpretation of treaty provisions as discussed herein, one can begin to appreciate the gravity of the tasks placed before the arbitrators in these disputes.

Notwithstanding the challenges that inhere in the investment treaties and contracts themselves, international investment arbitration itself has given rise to significant questions and controversies. The following list identifies major areas of concern and criticism, particularly as raised by advocates in the environmental and human rights communities:

- Exclusion of preliminary requirements to exhaust local remedies, while avoiding potential problems of unfairness to the investor, diminishes valuable opportunities for the development and nurturing of legal institutions and the rule of law, particularly in developing countries;⁹⁸
- Arbitrators may have “perverse incentives” to encourage arbitrations and conflicts of interest that compromise their judgments and decisions;
- They may be tempted to encourage investor claims, for example, by deciding overwhelmingly in favor of investors or by broadly interpreting their jurisdiction to make claims;
- They often serve as arbitrators in some cases and legal counsel in other cases (and their law firms may specialize in arbitration matters)⁹⁹
- The parties to the arbitration typically each choose one arbitrator, raising questions about arbitrator impartiality and independence;¹⁰⁰
- The mechanisms for choosing arbitrators has resulted in an elite and narrow coterie of persons, and the lack of diversity — whether of gender, ethnicity, geography, culture, ideology or race — impairs their ability to decide cases properly and justly in an increasingly complex world with increasingly myriad stakeholders in the outcome of arbitral cases;¹⁰¹
- There are limited mechanisms for challenging arbitral awards, and often errors of law or fact cannot be corrected;¹⁰²
- Arbitral decisions can be highly inconsistent, and there is no binding rule of precedent or meaningful appeals process to lend consistency to them;¹⁰³
- Access to information about arbitrations is typically limited, and much information is unavailable to the public;¹⁰⁴
- Public participation in arbitrations is very limited, usually being confined to the acceptance of *amicus curiae* briefs by outside parties. The limitation is most consequential where a host state lacks the political will to act properly in the public interest, yields to the often-superior “bargaining power” of a more powerful state or company, or is simply corrupt.¹⁰⁵

While this list does not purport to be exhaustive, it provides a sense of the tone of the growing debate about the nature and effects of international arbitration. Advocates of sustainable development and other causes seeking social and economic justice are active participants in that debate.

CONCLUSION

The Corporate Sustainability Forum is being held in conjunction with Rio+20, and its objectives are to strengthen the business contribution to sustainable development globally — seeking to bring greater scale to responsible business practices, to advance and diffuse sustainable innovation, and to stimulate broader collaboration between companies, governments, civil society and the UN.¹⁰⁶

This article has discussed the dynamics between sustainable development and international investment law and arbitration. Modern phenomena, including the powerful march of economic globalization, have vested international law and arbitration with unprecedented power to affect and shape international development. If that development is to be “sustainable,” it will not happen by accident, or by continued isolation of the stakeholders in their own worlds, but through concerted, collaborative action by all affected interests. Beginning with participation in the Corporate Sustainability Forum, and continuing into Rio+20, those responsible for the creation and implementation of these investment institutions should grasp this special opportunity to address and overcome challenges, including those presented in this article.



Endnotes: International Investment Law and Arbitration, Sustainable Development, and Rio+20: Improving Corporate Institutional and State Governance

¹ See United Nations, *THE FUTURE WE WANT* 5 (Sept. 2011), http://www.un.org/en/sustainablefuture/pdf/conf_brochure.pdf.

² See United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992), http://www.unesco.org/education/information/nfsunesco/pdf/RIO_E.PDF.

³ See United Nations, *The History of Sustainable Development in the United Nations*, UNCS2012.ORG (2011), <http://www.uncsd2012.org/rio20/history.html> (setting out UN sustainable development initiatives and accords occurring both before and after the Earth Summit).

⁴ INTERNATIONAL UNION FOR CONSERVATION OF NATURE AND NATURAL RESOURCES COMMISSION ON ENVIRONMENTAL LAW, AGENDA 21: EARTH'S ACTION PLAN §38.1 (Nicholas A. Robinson ed., 1993), <http://www.un.org/esa/sustdev/documents/agenda21/english/Agenda21.pdf> (hereinafter AGENDA 21).

⁵ THE FUTURE WE WANT at 2.

⁶ United Nations, *The Future We Want — zero draft of the outcome document*, <http://www.uncsd2012.org/rio20/futurewewant.html> [hereinafter *Zero Draft*].

⁷ U.N. World Comm'n on Env't & Dev., *Report of the World Commission on Environment and Development: Our Common Future; Annex 1: Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development Adopted by the WCED Experts on Group Environmental Law*, U.N. Doc. A/42/427 (Aug. 4, 1987), <http://www.un-documents.net/a42-427.htm>.

⁸ See *Zero Draft*, *supra* note 5, at ¶10-16; Implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21 and the outcomes of the World Summit on Sustainable Development, G.A. Res. 64/236, U.N. Doc. A/RES/64/236 (Mar. 31, 2010), <http://www.uncsd2012.org/files/OD/ARES64236E.pdf>.

⁹ *Id.* at 2.

¹⁰ U.N. Secretary General, *Objectives and Themes of the United Nations Conference on Sustainable Development*, p.3, U.N. Doc. A/CONF.216/PC/7 (Dec. 22, 2010), <http://www.uncsd2012.org/rio20/content/documents/N1070657.pdf>.

¹¹ *Innovation and Collaboration for the Future We Want*, RIO+20 CORPORATE SUSTAINABILITY FORUM, <http://csf.compact4rio.org/events/rio-20-corporate-sustainability-forum/custom-125-251b87a2deaa4e56a3e00ca1d66e5bfd.aspx> (last visited Apr. 18, 2012).

¹² See United Nations Global Compact, *Corporate Sustainability Forum*, RIO+20 CORPORATE SUSTAINABILITY FORUM, <http://csf.compact4rio.org/events/rio-20-corporate-sustainability-forum/custom-121-251b87a2deaa4e56a3e00ca1d66e5bfd.aspx> (last visited May 10, 2012) (“With over 2,000 expected participants, the Rio+20 Corporate Sustainability Forum will give business and investors an opportunity to meet with governments, local authorities, civil

society and UN entities in dozens of highly focused workshops and thematic sessions linked to the Rio+20 agenda.”).

¹³ Markus Gehring & Andrew Newcombe, *An Introduction to Sustainable Development in World Investment Law*, in *SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW* 6, 9 (Marie-Claire Cordonier Segger, Markus W. Gehring, & Andrew Newcombe eds., 2011).

¹⁴ U.N. Secretary General, *Objectives and Themes of the United Nations Conference on Sustainable Development*, p.3, U.N. Doc. A/CONF.216/PC/7 (Dec. 22, 2010), <http://www.un-documents.net/ocf-a1.htm> [hereinafter *Our Common Future*].

¹⁵ *Id.*

¹⁶ *Zero Draft*, *supra* note 5, at ¶17-20.

¹⁷ *Id.* at ¶17.

¹⁸ *Id.* at ¶19.

¹⁹ AGENDA 21, *supra* note 4, at ¶2.23.

²⁰ Plan of Implementation of the World Summit on Sustainable Development, Sept. 4, 2002, U.N. Doc. A/Conf.199/20, Annex I, Ch. XI, http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf.

²¹ G8 Ministers, Responsible Leadership for a Sustainable Future ¶49 (2009), http://www.g8italia2009.it/static/G8_Allegato/G8_Declaration_08_07_09_final_0.pdf; G20 Heads of State, Core Values for Sustainable Economic Activity (2009), <http://www.reuters.com/article/2009/09/25/us-g20-communicue-annex-sb-idUSTRE5806W520090925>.

²² Marie-Claire Cordonier Segger, *The Role of International Forums in the Advancement of Sustainable Development*, *SUSTAINABLE DEV. L. & POL'Y*, Fall 2009, at 4.

²³ Markus Gehring & Andrew Newcombe, *supra* note 9.

²⁴ *Id.*

²⁵ *Id.* at 6.

²⁶ *Id.*

²⁷ *A Brief History of Foreign Investment*, in *FOREIGN INVESTMENT DISPUTES* 2 (R. Doak Bishop, James Crawford, & W. Michael Reisman eds., 2005).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 3.

³³ Nathalie Bernasconi-Osterwalder et al., *Investment Treatment Treaties & Why They Matter to Sustainable Development*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (2012), http://www.iisd.org/pdf/2011/investment_treaties_why_they_matter_sd.pdf [hereinafter IISD].

³⁴ *Id.* at 17.

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L. & TECH. REV. (2009) (explaining the unique hurdle that intellectual property rights create).

⁷ See Rasmus Lema and Adrian Lema, *Whither Technology Transfer? The Rise of China and India in Green Technology Sectors*, paper prepared for the 8th GLOBELICS International Conference, Kuala Lumpur, Malaysia 17 (2010).

⁸ TRIPS Agreement, 1869 U.N.T.S. 313.

⁹ See Eco-Accord, United Nations Conference on Sustainable Development, Proposals for Rio+20: Sustainable Development Needs a New Impetus ¶ 15 (Nov. 1, 2011).

¹⁰ See Robert Fair, *Does Climate Change Justify Compulsory Licensing of Green Technology?*, 6 INTERNATIONAL LAW & MANAGEMENT REVIEW 21, 26 (2009); for how to cite this decision- http://www.wto.org/english/tratop_E/TRIPS_e/implem_para6_e.htm.

¹¹ See Fair, *supra* note 9, at 28.

¹² See Wong, *supra* note 8.

¹³ See generally TIM WILSON, INSTITUTE OF PUBLIC AFFAIRS, UNDERMINING MITIGATION TECHNOLOGY: COMPULSORY LICENSING, PATENTS AND TARIFFS (2008) (claiming that compulsory licensing would have a negative effect on economic growth and green technology innovation).

¹⁴ See Bronwyn H. Hall and Christian Helmers, *The Role of Patent Protection in (Clean) Technology Transfer*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 487, 492 (2010).

¹⁵ See *id.* at 493.

¹⁶ See TRIPS Agreement, 1869 U.N.T.S. 313; Veronique Greenwood, *Who Owns Green Tech?*, SEED MAGAZINE (Jul. 30, 2009), http://seedmagazine.com/content/article/intellectual_property_who_owns_green_tech/.

¹⁷ See JEROME REICHMAN ET AL., CHATHAM HOUSE, INTELLECTUAL PROPERTY AND ALTERNATIVES: STRATEGIES FOR GREEN INNOVATION 30 (2008) (noting that compulsory licensing is especially useful when companies refuse to make the technology affordable in a particular country).

¹⁸ Rasmus Lema and Adrian Lema, *Whither Technology Transfer? The Rise of China and India in Green Technology Sectors*, paper prepared for the 8th GLOBELICS International Conference, Kuala Lumpur, Malaysia 19 (2010) (noting the importance of licensing to spur more competition and innovation in China and India).

¹⁹ See Cameron Hutchison, *Does TRIPS Facilitate or Impede Climate Change Technology Transfer into Developing Countries?*, 3 U. OTTAWA L. & TECH. J. 517, 527-28 (2006) (recognizing that inflexible intellectual property rights regimes can stifle follow-on innovations).

²⁰ Katy Daigle, Associated press, Rising powers say new bank can help development <http://www.google.com/hostednews/ap/article/ALeqM5jcvOCTIx57W9v4p85bhFNfSckqA?docId=951a797b59ab4a289d0ac09128eef0c6>.

²¹ See Robert Fair, *Does Climate Change Justify Compulsory Licensing of Green Technology?*, 6 INTERNATIONAL LAW & MANAGEMENT REVIEW 21, 22 (2009).

²² See Joanna I. Lewis, *Building a National Wind Turbine Industry: Experiences from China, India, and South Korea*, 5 INT'L J. TECH. & GLOBALISATION 281, 283-90 (2011); Lema and Lema, *supra* note 18, at 8-13; Uciilia Wang, *Chinese Manufacturers Cement Their Hold on Global Solar Market*, FORBES (Feb. 27, 2012, 1:10 PM), <http://www.forbes.com/sites/uciliawang/2012/02/27/chinese-manufacturers-cement-their-hold-on-global-solar-market/>.

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³⁵ Roland Kläger, 'Fair and Equitable Treatment' and Sustainable Development, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 241-42 (Marie-Claire Cordonier Segger, Markus W. Gehring, & Andrew Newcombe eds., 2011).

³⁶ See generally *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003).

³⁷ *Id.* at ¶154 (cited in *MTD v. Chile*, ICSID Case No. ARB(AF)/01/7, Award, ¶112; *Occidental Exploration and Production Co. v. Ecuador*, LCIA Case No. UN3467, Award, ¶185 (July 1, 2004)).

³⁸ *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, ¶304-05 (Mar. 17, 2006). See, IISD, at 17-18.

³⁹ Kläger, *supra* note 37, at 242.

⁴⁰ *Id.*

⁴¹ See IISD, *supra* note 35, at 18-19.

⁴² See Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore, India-Sing., June 29, 2005.

⁴³ *Id.*

⁴⁴ Restatement (Third) of Foreign Relations Law § 206 (1987).

⁴⁵ See generally United Nations Conference on Trade and Development, *Taking of Property*, U.N. Doc. UNCTAD/ITE/IIT/15 (2000), <http://www.unctad.org/en/docs/psiteitd15.en.pdf>.

⁴⁶ *Id.*

⁴⁷ OECD, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, *International Investment Law: A Changing Landscape* (2005).

⁴⁸ *Id.* at 46-47.

⁴⁹ *Id.* at 44.

⁵⁰ *Id.*

⁵¹ Caroline Henckels, *Indirect Expropriation and the Right to Regulate*, 15 J. INT'L ECON. L. 223, 225 (2012) (Fn. 4).

⁵² *Waste Management v. United Mexican States (Waste Management II)*, ICSID Case No. ARB(AF)/00/3, Award (April 30, 2004), <http://www.state.gov/documents/organization/34643.pdf>.

⁵³ *Id.* at ¶¶ 159, 160.

⁵⁴ Henckels, *supra* note 53, at 225.

⁵⁵ *Tecnicas Medioambientales S.A. v. Mexico (TECMED)*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC602_En&caseId=C186.

⁵⁶ *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC542_En&caseId=C155.

⁵⁷ *Id.* at ¶ 111.

⁵⁸ *Methanex Corporation v. United States* at Part II, Chap. D, ¶ 16.

⁵⁹ *Id.* at Part I, ¶ 1.

⁶⁰ *Id.*

⁶¹ *Methanex*, Part IV, Chap. D, ¶ 7.

⁶² IISD, *supra* note 35, at 22, 23.

⁶³ See IISD, *supra* note 35, at 23-24.

⁶⁴ UNITED STATES MODEL BILATERAL INVESTMENT TREATY, Article 3(1), (2004), <http://www.state.gov/documents/organization/117601.pdf>. Article 3(2) sets forth the same language, with the exception that the word "investments" is substituted for the word "investors" as it appears in Article 3(1).

⁶⁵ Kate Miles, *Sustainable Development, National Treatment and Like Circumstances in Investment Law* in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 265, 268-269 (Marie-Claire Cordonier Segger, Markus W. Gehring, Andrew Newcombe eds., 2011).

⁶⁶ See *id.* at 269 (describing a broad interpretation of the term, which in turn captures a range of regulation and governmental decision-making that is virtually limitless).

⁶⁷ *Id.*

⁶⁸ Miles, *supra* note 67, at 269.

⁶⁹ *S.D. Myers, Inc. v. Government of Canada*, First Partial Arbitral Award, ¶ 243 (Nov. 13, 2000), 8 ICSID Rep. 3 at 52-53.

⁷⁰ *Id.* at 55, ¶ 256.

⁷¹ *Id.* at 26, ¶¶ 89-93.

⁷² *Id.* at 29, ¶¶ 109-112.

⁷³ *Id.* at 54, ¶¶ 250.

⁷⁴ *Id.* at 76, ¶¶ 241-56.

⁷⁵ *Id.* at 54, ¶¶ 251, 255.

⁷⁶ *Pope & Talbot v. Canada*, Award on the Merits of Phase 2, ¶ 78, Arbitral Tribunal (April 10, 2001) available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Award_Merits-e.pdf.

⁷⁷ IISD, *supra* note 35, at 29.

⁷⁸ See IISD, *supra* note 35, at 50.

⁷⁹ Central American-Dominican Republic-United States Free Trade Agreement, Article 10.4(1), Aug. 5, 2004, http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf (last visited Apr. 18, 2012). Article 10.4(2) contains similar language, but it applies to “covered investments” rather than “investors” as in Article 10(4)(1).

⁸⁰ See IISD, *supra* note 35, at 29-30.

⁸¹ Emilio Augustin Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, (Jan. 25, 2000) 16 ICSID Rev. (2001), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC565_En&caseId=C163.

⁸² See IISD, *supra* note 35, at 30.

⁸³ See, e.g., *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC521_En&caseId=C24; *Salini Costruttori S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (Nov. 29, 2004), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC635_En&caseId=C218.

⁸⁴ IISD, *supra* note 35, at 32.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 33.

⁸⁸ *Id.*

⁸⁹ See *Id.* at 34 (describing the variety of approaches states take to ensure their policy goals).

⁹⁰ See *id.* at 33 (stating that in fact states use performance requirements to gain technology).

⁹¹ *Id.* at 32.

⁹² Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Art. 2(2)(c), concluded on 14 Nov. 1991.

⁹³ Nigel Blackaby and Constantine Partasides, with Alan Redern and Martin Hunter, REDERN AND HUNTER ON INTERNATIONAL ARBITRATION 506-08 (Oxford, 5th ed. 2009).

⁹⁴ See *id.* at 482-83 (stating that umbrella clauses may elevate contractual rights to the level of treaty rights).

⁹⁵ *Id.* at 482-83.

⁹⁶ Andrea Shemberg, *Stabilization Clauses and Human Rights*, vii (Ma. 11, 2008) (Research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights), [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf).

⁹⁷ See *id.* at 35-36 (discussing the use of stabilization clauses to exempt companies from regulation).

⁹⁸ Blackaby, *supra* note 95, at 483.

⁹⁹ IISD, *supra* note 35, at 68.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² IISD, *supra* note 35, at 48.

¹⁰³ *Id.* at 49.

¹⁰⁴ *Id.* at 50.

¹⁰⁵ IISD, *supra* note 35, at 51-52.

¹⁰⁶ See *Innovation and Collaboration for the Future We Want*, RIO+20 CORPORATE SUSTAINABILITY FORUM, <http://csf.compact4rio.org/events/rio-20-corporate-sustainability-forum/custom-125-251b87a2deaa4e56a3e00ca1d66e5bfd.aspx> (last visited Apr. 18, 2012).

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⁴⁹ Under this Program, the European Union issued a series of important “framework directives” such as this Council Directive on ambient air quality assessment and management. The new regulation model called for the issuance of framework directives to revise and codify older directives and to leave the technical details of implementing such directives to a series of “daughter directives” such as Council Directive 1999/30/EC of 22 April 1999 laying down limit values for sulfur dioxide, nitrogen dioxide, nitrogen oxides, particulates, and lead in the ambient air. See Council Directive 96/62, 1996 O.J. (L 296) (EC).

⁵⁰ Council Decision No. 2179/98, of 24 Sept. 1998, O.J. (L 275) (EC) 1.

⁵¹ *Communication from the Commission to the Council and European Parliament, Ten years after Rio: Preparing for the World Summit on Sustainable Development in 2002*, at 2, COM (2001) 53 final (June 2, 2001), http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0053en01.pdf.

⁵² Victoria Jenkins, *Communication from the Commission: A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development (Commission's Proposal to the Gothenburg European Council) COM (2001) 264 Final*, 14 J. ENVTL. L. 261, 262-263 (2002).

⁵³ *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions On the Sixth Environment Action Programme of the European Community, 'Environment 2010: Our future, Our choice' — The Sixth Environment Action Programme COM/2001/0031 final*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001DC0031:EN:HTML>; Council Decision (EC) No. 1600/2002 of 22 July 2002, O.J. (L 242) 1.

⁵⁴ *Consolidated Version of the Treaty on the Functioning of the European Union*, art 11, May 9, 2008, 2008 O.J. (C 115) 53.

⁵⁵ *Id.*

⁵⁶ Jenkins, *supra* note 52, at 263-64.

⁵⁷ SIRINI WITHANA, ET. AL., INST. FOR ENVTL. POL'Y, STRATEGIC ORIENTATIONS OF EU ENVIRONMENTAL POLICY UNDER THE SIXTH ENVIRONMENT ACTION PROGRAMME AND IMPLICATIONS FOR THE FUTURE FINAL REPORT 2 (May 2010), http://www.ieep.eu/assets/556/Strategic_Orientations_of_6EAP_-_Revised_report_-_May_2010.pdf.

⁵⁸ *Id.* at 95-96.

⁵⁹ *Consolidated Version of the Treaty on European Union* art 3(3), May 9, 2008, 2008 O.J. (C 115) 17 [hereinafter TEU].

⁶⁰ TEU art. 3(3).

⁶¹ CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* 21 (2nd ed. 2007).

⁶² TEU art. 3(3).

⁶³ *Id.*

⁶⁴ TEU art. 3(5).

⁶⁵ TEU art. 21(2)(d).

⁶⁶ TEU art. 21(2)(f).

⁶⁷ TEU art. 6(1).

⁶⁸ Charter of Fundamental Rights of the European Union, 2000/C 364/01, art. 37, 2000 O.J. (C 364) 1.

⁶⁹ Gillroy, *supra* note 26, at 12.

⁷⁰ Meaning that EU institutions will be able to rely on Article 11 framework provisions to determine how best to ensure that development activities respect and account for environmental impacts.

⁷¹ TFEU art. 11.

⁷² See TFEU art. 191 (declaring the objectives and the policy that should be followed to achieve them).

⁷³ TFEU art. 191(1).

⁷⁴ TFEU art. 191(2).

⁷⁵ See Marko Ahteensuu, *Defending the Precautionary Principle against Three Criticisms*, 11 TRAMES 366, 366 (2007) (submitting a “standard formulation of the [precautionary] principle” from the Science and Environment Health Network, which stated that “[w]hen an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically”).

⁷⁶ The principal form of legislation issued by the EU comes in the forms of Regulations, which are directly binding on Members States through Directives. Directives must be properly transposed into the national laws of Members States within the time frame provided in the Directive. See TFEU art. 288.

⁷⁷ EUROPEAN COMMISSION (DG ENVIRONMENT), WATER NOTE 1: JOINING FORCES FOR EUROPE'S SHARED WATERS: COORDINATION IN INTERNATIONAL RIVER BASIN DISTRICTS, 3 (Mar. 2008), http://ec.europa.eu/environment/water/participation/pdf/waternotes/water_note1_joining_forces.pdf

⁷⁸ See SCHRIJVER & WEISS, *supra* note 20, at 574.

⁷⁹ See Hans Vedder, *The Treaty of Lisbon and European Environmental Law and Policy*, J. ENVTL. L., 285, 287-288 (2010) (noting that EU environmental objectives specifically reference relations between the EU and the rest of the world, especially regarding global sustainable development focused on equity and prudent management of global natural resources).