



International investment law and natural resource governance

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Abstract

This paper analyses the implications of contemporary international investment law for the regulation of natural resources. Natural resources are unevenly distributed across different regions and countries and that makes access a very important question. In turn, access to resources located in the territory or within the jurisdiction of a country and, more generally, any activities conducted in connection with such resources, are subject to the regulatory powers of the host State. Although such powers are above all a matter of sovereignty, understanding them through this prism alone would miss an important point, namely that the interests of a host State and a foreign investor may be aligned not only in pursuance of public welfare but also to the detriment of it. The latter phenomenon has been called the “resource curse” – i.e. a situation where a rapacious government exploits the country’s natural resources for its own benefit depriving the population of its due. Foreign investors may be involved in such phenomenon either deliberately (i.e. through a close connection with the rapacious government) or as a mere result of their activity in the host State (i.e. by making the exploitation profitable for the government irrespective of any explicit complicity). Thus, questions of 'access', 'sovereignty' and 'distribution' are closely interrelated in ways that require sustained analysis. The first section of the paper provides a brief overview of the basic architecture and building blocks of international investment law, from a structural and dynamic perspective. The focus then turns to the core subject matter, namely the specific implications of this body of law for the governance of natural resources, particularly as regards access, sovereignty and distribution. In conclusion, some observations and recommendations regarding possible avenues for reform are put forward for consideration and future research.

Keywords: *international investment law, natural resources, extractive industries, investment policy*

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Jorge E. Viñuales¹

1. INTRODUCTION

The international law of foreign investment can be approached from a number of different angles. Whether the focus is on promoting, protecting or – as is becoming more necessary – regulating investment or, rather, on the type of foreign investment at stake (direct vs. portfolio investment or capital inflows into specific sectors such as resource extraction, infrastructure, industrial production, services, etc.), the angle must be calibrated to capture those features in the legal topography that are most relevant for a given analytical object. This chapter concentrates on the legal aspects of natural resources, which calls for an appropriate adjustment of the analytical focus on certain legal features of foreign investment law. Specifically, questions of access, sovereignty and distribution deserve special attention, particularly in the light of the historical roots of the modern international regime governing foreign investment.

Natural resources are unevenly distributed across different regions and countries. This makes access a very important question, whether we think of non-living resources (e.g. oil, gas, coal, high-value minerals, water or land) or living resources (e.g. fisheries,

¹ Harold Samuel Professor of Law and Environmental Policy, University of Cambridge, and Director of the Cambridge Centre for Environment, Energy and Natural Resource Governance (C-EENRG). This paper was presented as a think piece for the E15 Initiative on Extractive Industries. I would like to thank Kati Kulovesi and Elisa Morgera, as well as the E15 participants and staff, for helpful comments and editorial assistance.

high-value species, agricultural species or genetic resources). In turn, access to resources located in the territory or within the jurisdiction of a country and, more generally, any activities conducted in connection with such resources, are subject to the regulatory powers of the host State. Although such powers are above all a matter of sovereignty, understanding them through this prism alone would miss an important point, namely that the interests of a host State and a foreign investor may be aligned not only in pursuance of public welfare but also to the detriment of it. The latter phenomenon has been called the ‘resource curse’; a situation where a rapacious government exploits the country’s natural resources for its own benefit depriving the population of its due. Foreign investors may be involved in such phenomenon either deliberately (i.e. through a close connection with the rapacious government) or as a mere result of their activity in the host State (i.e. by making the exploitation profitable for the government irrespective of any explicit complicity). Thus, questions of access, sovereignty and distribution are closely interrelated in ways that require sustained analysis.

The first section of this chapter provides a brief overview of the basic architecture and building blocks of international investment law. The focus then turns to the core subject matter, namely the specific implications of this body of law for the governance of natural resources, particularly as regards access, sovereignty and distribution. In conclusion, some observations and recommendations regarding possible avenues for reform are put forward for consideration and future research.

2. THE ARCHITECTURE OF INTERNATIONAL INVESTMENT LAW

2.1. Structural and Dynamic Perspectives

From a contemporary perspective, the set of norms and arrangements constituting international investment law appears as a powerful tool for foreign investors to protect their interests when operating abroad. In order to assess the role of this body of international law, it is important to look at how it is understood nowadays, with its main sources, components and operation.

One prominent feature of this architecture is a heavy reliance on bilateral investment treaties (BITs) or on investment chapters in free trade agreements (the two together will be referred to as international investment agreements or IIAs). Such treaties have largely overshadowed the role of so-called “State contracts” which, together with domestic investment laws, were perhaps the main focus of foreign investment law until the 1990s.² Their operation has introduced a number of important innovations, including investor-State treaty arbitration in pursuance of treaty claims. A contemporary snapshot of international investment law must pay attention to such features.

However, limiting the presentation to the current structures, upon which international investment law rests, would overlook the process through which a system that was initially a mere exception to the permanent sovereignty over natural resources grew out of proportion, particularly starting in the 1990s, and came to be perceived as the rule at the expense not only of sovereignty but also of other considerations such as human rights and environmental protection. More recently, a divergent trend seeking to recalibrate the regime has become increasingly important in treaty practice. This trend is characterized by reluctance towards investor-State arbitration and the stronger assertion of State regulatory powers.

For present purposes, the foregoing considerations simply mean that one cannot understand international investment law without adopting both a structural and a dynamic perspective.

2.2. Structural Perspective: The Three Pillars of International Investment Law

International investment law regulates certain transactions (investments) made by foreign investors in a host State. It defines certain disciplines or standards of treatment that States agree to accord to foreign investors. In case of dispute, it gives foreign investors the possibility of bringing a claim against the host State before an international arbitration tribunal. These three elements, i.e. the object, the law and the judge, have not always had this specific content and over time there has been much debate as to what/who qualifies as an investment held by a foreign investor, whether international rather than national standards were the appropriate law, as well as to the nature, domestic, international, or mixed,

2 Charles Leben, ‘La théorie du contrat d’Etat et l’évolution du droit international des investissements’ (2003) 302 *Recueil des Cours de l’Académie de Droit International de La Haye* 197.

of the proper judge.³ From a contemporary perspective, the object, law and judge of foreign investment are understood in the way referred to at the beginning of this paragraph. There is, of course, some complexity when these three pillars are analysed in more detail, description of which falls beyond the remit of this think piece.⁴ Some additional comments, however, are necessary to clarify the architecture of international investment law.

The regulatory object of the regime consists of certain types of transactions (investments) and only if attributed to a person, physical or legal, that qualifies as a foreign investor. Although the latter point has received some attention in the case law, the lion's share in terms of attention and controversy belongs to the definition of the term investment.⁵ Such definition must be sought, first and foremost, in the instrument that provides protection, most often the applicable IIA or, less frequently, a law of the host State. Additional definitional requirements may arise from Article 25(1) of the ICSID Convention if the investor brings an arbitration claim under ICSID rules.⁶ At this level, one important debate has concerned the need for the transaction to contribute to the development of the host State to qualify as an investment.⁷ Moreover, even when the transaction qualifies as an investment under the applicable instrument, it may not be a "protected" or "covert" investment for a variety of reasons that may lead a tribunal to decline jurisdiction or admissibility. Thus, the "gate provisions" that govern access to the protections offered

3 Jorge Viñuales and Magnus Jesko Langer, 'Foreign Investment in Latin-America: Between Love and Hatred' in Claude Auroi and Aline Helg (eds), *Latin America 1810-2010: Dreams and Legacy* (Imperial College Press 2011), 319-358.

4 For a concise statement of the contemporary law of foreign investment see Rudolph Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012); On the complexities of the system and their underpinnings see Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds.), *The Foundations of International Investment Law* (Oxford University Press 2014).

5 Among the numerous contributions to this issue see, in particular, Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention. A Commentary* (2nd Edition, Cambridge University Press 2009)

6 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention).

7 This debate is epitomized by the case *Malaysian Historical Salvors v. Malaysia* (Award) (17 May 2007) ICSID Case No ARB/05/10 and its subsequent annulment by an *ad hoc* committee: *Malaysian Historical Salvors v Malaysia* (Decision on the application for annulment) (16 April 2009) ICSID Case No. ARB/05/10, para 62-63, 69, 71-72.

to some transactions are, in fact, a composite array of norms, sometimes derived from different instruments or even customary international law, addressing mostly definitional issues.

Moving to the law of foreign investment, the main source of investment disciplines or standards nowadays are IIAs and to some extent customary international law, although contracts and domestic investment laws may also contain standards of fairness and due process. The main investment protection standards included in IIAs are protection against unlawful expropriation, fair and equitable treatment (FET) clauses, full protection and security clauses, non-discrimination standards (most-favoured-nation, or MFN, and national treatment clauses) and the so-called “umbrella” clauses.⁸ Despite the quasi monopoly that these standards have enjoyed in recent scholarship and practice, the law of foreign investment largely exceeds them in many ways. Firstly, the operation of these standards contained in treaties is governed by the international law of treaties as well as of State responsibility for internationally wrongful acts. Secondly, many questions are not explicitly (or even implicitly) addressed in these treaties and remain applicable either as a matter of general international law or as a matter of systemic or simply contextual interpretation, such as reference to human rights or environmental norms.⁹ Thirdly, IIAs entertain complex and sometimes volatile interactions with investment contracts and domestic law.

Last but not least, the current regime is based on the possibility offered to foreign investors to bring a claim against the host State directly (i.e. without the need to fully exhaust domestic remedies) before an international arbitral tribunal constituted specifically to hear that claim. This possibility arises not only from a relation of privity of contract but also, since a famous award rendered in 1990,¹⁰ from the standing offer appearing in arbitration clauses in treaties or domestic laws. Such offers are deemed to be accepted by investors either explicitly (by a simple letter) or implicitly (by filing a request

8 On the contents of such standards see, among many others, August Reinisch, *Standards of Investment Protection* (Oxford University Press 2008); Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press 2007).

9 On the human rights and environmental dimensions of investment disputes see Ursula Kriebaum, *Eigentumsschutz im Völkerrecht. Eine vergleichende Untersuchung zum internationalen Investitionsrecht sowie zum Menschenrechtsschutz* (Duncker & Humblot 2008); Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009); and Jorge E Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012).

10 *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka*, (Final Award) (27 June 1990) ICSID Case No. ARB/87/3.

of arbitration). Over the last three decades, this possibility has led to a surge of investment arbitration cases, amounting today to more than 560 publicly known treaty-based cases, according to recent estimates.¹¹

The present understanding of the three pillars of international investment law corresponds to one state of the system, largely shaped by the rise of IIAs and an expansive conception of investor-State dispute settlement. As discussed next, when viewed from a historical perspective, this state of the system resulted from a variety of incremental and often unplanned steps and it is currently undergoing changes that may be considered significant to an observer writing one or two decades from now.¹²

2.3. Dynamic Perspective: The Historical Development of the Three Pillars

The protection of foreign investors operating abroad has a long history in international law, with at least two centuries of debate and practice initially spurred by the independence of Spanish colonies in the Americas.¹³ The decolonization process in the aftermath of the Second World War re-ignited the debate between capital exporting countries and capital importing as well as newly independent countries. Enjoying a strong numerical position in the General Assembly of the United Nations, developing and newly independent countries pushed for an important resolution to be adopted in 1962 on “Permanent Sovereignty over Natural Resources” (Resolution 1803).¹⁴ At the heart of this instrument was the attempt at aligning the newly conquered political independence with genuine economic freedom.

Read in context, it seems clear in the text of this resolution that arbitration and foreign investment agreements were exceptions to the principle that peoples and nations have sovereignty over their resources and that the public interest overrides the private

11 UNCTAD, ‘Recent developments in investor-State dispute settlement’ (ILA Issue Note No 1, April 2014) available at <http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf> accessed 5 September 2015.

12 See Joost Pauwelyn, ‘Rational Design or Accidental Evolution? The Emergence of International Investment Law’ in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (n 3).

13 Viñuales and Langer (n 2).

14 *Permanent Sovereignty over Natural Resources*, UNGA Resolution 1803 (XVII) (14 December 1962) (‘Resolution 1803’).

interest.¹⁵ In retrospect, it is also clear that such exception has grown out of proportion, in many ways becoming the rule through the wave of modern IIAs starting in the 1990s. Thus, from a historical standpoint, the instruments that allowed for the expansion of the foreign investment regime are relatively recent. To understand this expansionary process, it is important to look more closely into the trajectory followed over this period by the three pillars – i.e. the object, the law and the judge.

Historically, the paradigmatic example of a foreign investment transaction was either the exploitation of natural resources (hence the target of Resolution 1803) or investment in infrastructure. The reason why capital importing countries accepted to grant enhanced protection to foreign direct investment was *inter alia* the expectation that such investment would contribute to their economic and social development.¹⁶ Over time, and particularly in the last fifteen years, this understanding has been progressively eroded through the operation of two processes. First, States have included broader definitions of what constitutes an investment held by a foreign investor in their IIAs.¹⁷ Second, and perhaps more controversially, investment tribunals have interpreted expansively this term, encompassing portfolio investment or assets such as commercial loans or bonds emitted in foreign financial markets.¹⁸ In some cases, the need for the investment to contribute to the development of the host country has been deemed an unnecessary component of the definition of investment in Article 25(1) of the ICSID Convention, leading to significant controversy.¹⁹

Regarding the standards, the main historical concern, as suggested by the text of Resolution 1803, was the protection against uncompensated expropriation as well as – often relatedly – against potential denials of justice. Over time, a wider variety of investment disciplines or standards were included in IIAs covering impairments of foreign invest-

15 Ibid, (para. 1, 4 and 8).

16 See the preamble of the ICSID Convention (n 4), para 1, considering: “the need for international cooperation for economic development, and the role of private international investment therein.”

17 By way of illustration, assets such as “shares, stocks or other forms of equity”, “bonds [...] other debt instruments, and loans” or “intellectual property rights” feature frequently in the definition of investment included in recent IIAs. See e.g. US Model Bilateral Investment Treaty (2012), Article 1.

18 See e.g. *Ceskoslovenska Obchodni Banka, A.S. v The Slovak Republic* (Award) (24 May 1999) ICSID Case No ARB/97/4, para 76-89; *Abaclat and Others v Argentine Republic* (Decision on Jurisdiction and Admissibility) (4 August 2011) ICSID Case No ARB/07/5, para 373-380. See, however, *Poštová banka, a.s. and Istrokapital s.e. v Hellenic Republic* (Award) (9 April 2015) ICSID Case No ARB/13/8, para 308, 331.

19 See ICSID Convention (n 4).

ments that fell short of expropriation or did not involve a denial of justice. Among these, two deserve particular mention here. First, the ambiguity as to the nature of investment contracts entered between a State and a foreign investor led some capital exporting States, such as Germany, to introduce the so-called “umbrella clauses” in its treaties. The purpose of such clauses was to give an international dimension to the commitments, including contractual commitments, given by a host State to a foreign investor. In the last two decades, the extent to which such clauses “elevate” or “transform” contracts into international obligations has been widely discussed.²⁰ The question is not clearly settled in the case law, although it is generally considered that the solution lies somewhere midway between the two extreme possibilities – i.e. that no term can be elevated or that all terms can be elevated to treaty level.²¹ Second, and perhaps more importantly, virtually any type of State regulatory action is now subject to potential challenges under the broad “fair and equitable treatment” standard. FET clauses merely state that States shall accord fair and equitable treatment, leaving the specific implications of such treatment for arbitral tribunals to interpret. In many ways, the inclusion of FET amounts to a definitional delegation, which, unsurprisingly, has led over time to a wide range of interpretations and much controversy.²² The growing reach and implications of FET, particularly in connection with the investor’s “legitimate expectations,” has come under much criticism and is now being addressed in treaty practice through a variety of tools.²³

20 Jude Anthony, ‘Umbrella Clauses since *SGS v Pakistan* and *SGD v Philippines* – A Developing Consensus’ (2013) 29 *Arbitration International* 607.

21 See *El Paso Energy International Company v The Argentine Republic* (Decision on Jurisdiction) (27 April 2006) ICSID Case No. ARB/03/15, para 81. The tribunal supported its conclusion by reference to three other decisions, namely *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (Decision on Jurisdiction) (27 August 2003) ICSID Case No. ARB/01/13, para 166, 168, 173; *Salini Costruttori S.p.A. & Italstrade S.p.A. v Hachemite Kingdom of Jordan* (Decision on Jurisdiction) (29 November 2004) ICSID Case No. ARB/02/13, para 126; *Joy Machinery Limited v Arab Republic of Egypt* (Award) (6 August 2004) ICSID Case No. ARB/02/11, para 81.

22 On the range of interpretations see, among many other contributions, Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press 2008); Roland Kläger, *Fair and Equitable Treatment’ in International Investment Law* (Cambridge University Press 2011).

23 UNCTAD, *World Investment Report – Towards a New Generation of Investment Policies*. (United Nations, 2012), 116-118; Anthea Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ (2009) 104(2) *American Journal of International Law* 179; Gabrielle Kaufmann-Kohler, ‘Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection?’ in Laurence

As for the third pillar, the main historical development that led to the current state of affairs was the possibility, recognized by the arbitral tribunal in *AAPL v. Sri Lanka*,²⁴ for an investor to bring a claim based solely on an arbitration clause appearing in a BIT, irrespective of any privity of contract between the investor and the host State. Since then, the number of investment claims has grown exponentially. For better or for worse, tribunals have expanded the legal grounds underpinning such claims through a variety of means. These include an expansive interpretation of the MFN clause for jurisdictional purposes²⁵ or the dismissal of the rule – widely acknowledged in inter-State dispute settlement – that consent to jurisdiction cannot be presumed and is to be interpreted restrictively.²⁶ However, investor-State arbitration has come under heavy criticism. There is currently a relatively strong reverse trend tending to impose controls on the operation of such proceedings or even exclude them altogether from new investment treaties. Importantly, this is noticeable even in the attitude of developed countries, as illustrated by the debate on whether to include investor-State dispute settlement in the Transatlantic Trade and Investment Partnership.²⁷

Overall, the system characterized above in its structural and dynamic dimensions plays an important role in connection with the exploitation of natural resources, particularly with respect to extractive industries. In what follows, the paper analyses the major features of international investment law as they concern this sector.

Boisson de Chazournes, Marcelo G Kohen and Jorge E Viñuales, *Diplomatic and Judicial Means of Dispute Settlement*, (Martinus Nijhoff 2012), 305-324.

24 Above (n 9).

25 The starting point of this important and still ongoing debate was the decision in *Maffezini v Kingdom of Spain* (Decision on Jurisdiction) (25 January 2000) ICSID Case No ARB/97/7, para. 64. On this issue see Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2011) 2 *Journal of International Dispute Settlement* 97.

26 See, e.g., *SS Wimbledon* (17 August 1923) PCIJ Series A No 1, 24–25; *SS Lotus* (7 September 1927) PCIJ, Series A No 10, 18; *Free Zones of Upper Savoy and the District of Gex* (7 June 1932) PCIJ Series A/B, No 46, 167. More recently, see Robert Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27 *Columbia Journal of Environmental Law* 491, 519.

27 Markus Krajewski, *Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective* (Friedrich-Ebert-Stiftung 2014) also available at <<http://library.fes.de/pdf-files/bueros/bruessel/11044.pdf>> accessed 5 September 2105.

3. INTERNATIONAL INVESTMENT LAW AND NATURAL RESOURCE GOVERNANCE

3.1. The ‘State-Investor-Population’ Triangle

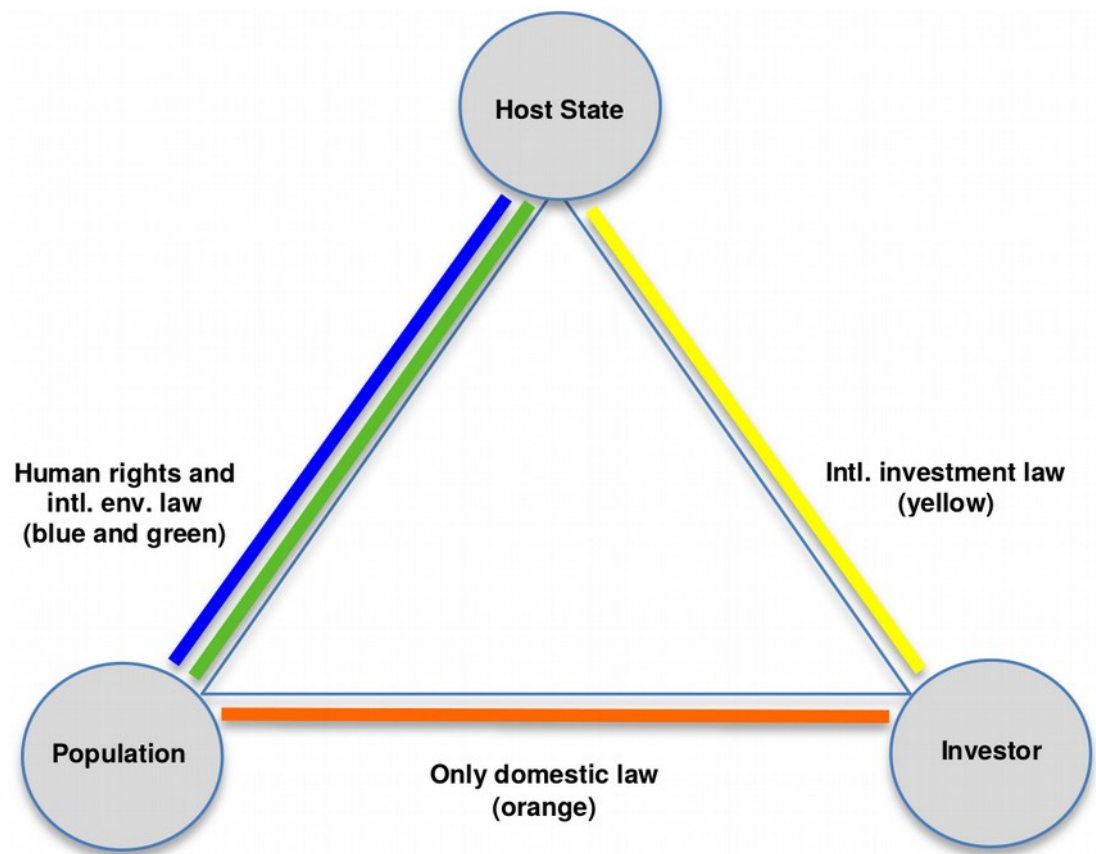
The system described in the preceding paragraphs is of particular importance for the governance of natural resources. The introduction singled out three main areas – access, sovereignty and distribution – where the implications of the system call for further scrutiny. However, before undertaking the analysis, it is useful to clarify the setting in which these questions arise, namely what can be called the ‘State-Investor-Population’ (SIP) triangle.

Natural resources are geographically distributed in ways that do not follow State boundaries. In fact, the definition of the latter has often been influenced, from a political standpoint, by the distribution of the former. Access to such resources is therefore a key consideration both from the perspective of foreign investors (and sometimes their home States) and host States, who seek to harness such resources and investment, to promote their development and growth. At this level, the interests of foreign investors and host States are therefore aligned. But given the extractive nature of many forms of foreign investment in natural resources, the activities promoted by such an alignment of interest may come at the expense of those individuals and communities who live in the area concerned by the project. Depending on the political configuration, the misalignment of interests between the foreign investor (supported by the host State) and the affected population can lead to open confrontations, which, in turn, may in time shift the spectrum of political forces against the investor.

This basic triangular relationship is in practice much more complex. Four nuances can be added to better reflect reality. Firstly, a State is not a monolithic governing structure. In most cases, different political and territorial subdivisions of what is broadly referred to as the host State government may be involved, and their interests will not necessarily be aligned. Tensions between the local and the national government are not infrequent, and they must be taken into account in the analysis of the SIP triangle. Secondly, the host State’s population and even the affected community is also a heterogeneous category. A project that is detrimental for a specific segment of the population may be useful – from a development perspective – for the population of a State as a whole. Moreover, within the affected population, interests may differ depending on who benefits from the project and who does not. Thirdly, although the interests of the home State are often portrayed as closely aligned with those of its foreign investor, the truth is that such

is not always the case. In fact, the home State, as a potential respondent in future investment claims, may share the views of the host State on the scope of protection offered (and not offered) by an IIA. Fourthly, and importantly, the bodies of law governing the different dimensions of the SIP triangle are not the same and they may collide with each other. Indeed, the pursuance of a foreign investment project (protected by international investment law) may come at the detriment of the human or collective rights of the population affected by extractive activities. Also, the protection of the environment in the area concerned by the investment project may be governed by a multilateral environmental treaty, which directs the State to act in a manner inconsistent with the letter or the spirit of a narrow investment protection clause. Different courts and tribunals may potentially have to take position on the same triangle, although from different regulatory perspectives, as will be discussed later. Figure 1 summarizes the SIP triangle highlighting the regulatory *locus* of different bodies of international law:

Figure 1: The SIP triangle and its laws



The SIP triangle, with the above caveats, must be kept in mind when assessing how international investment law operates in natural resource governance. Concisely stated, international investment law, in the current understanding of its object, law and judge, overemphasizes one dimension of the SIP triangle, the protection of foreign investors. A recent study by UNCTAD has unveiled that foreign investors prevail in more than 70% of cases at the jurisdictional level and in 60% of the cases at the merits level.²⁸ These numbers are based on a large pool of cases (255 cases leading to a final award) concerning both developed and developing countries. The unbalance could be potentially stronger in cases against developing countries, where a large part of the activities of extractive industries takes place. Such an unbalance has significant implications for the way in which questions of access, sovereignty and distribution are addressed.

3.2. Access and the Legality of Investments

The term access may be used with a narrower or a broader meaning. Access *sensu stricto* refers to the entry or admission of an investor into the territory and the market of a host State. Access in a broader sense would also encompass the treatment accorded to the resource exploitation activities of the investor. In reality, the activities involved in entering a market and putting natural resources to use lie along a continuum, which is only segmented into access *sensu stricto* and treatment from a regulatory perspective. This distinction is useful to understand the impact of international investment law on natural resource governance.

Generally speaking, most IIAs focus on treatment rather than access *sensu stricto*.²⁹ Unless the State has consented to a limitation in the exercise of its regulatory powers, the basic principle is that the State is free to regulate admission of foreign investment into its territory. Regulation of admission can take a variety of forms, ranging from the simple prohibition of entry to more nuanced frameworks, including licensing requirements, tax arrangements, capitalization and control requirements, requirements of local collaboration, and requirements relating to the protection of the environment (most frequently the con-

28 Howard Mann, 'ISDS: Who Wins More, Investors or States?' *Investment Treaty News* (IISD, June 2015) <<http://www.iisd.org/itn/wp-content/uploads/2015/06/itn-breaking-news-june-2015-isds-who-wins-more-investors-or-state.pdf>> accessed 5 September 2015.

29 Anna Joubin-Bret, 'Admission and Establishment in the Context of Investment Protection' in August Reinisch, *Standards of Investment Protection* (Oxford University Press 2008).

duct of a prior environmental impact assessment).³⁰ Under this prevalent approach, there is ample room for regulating foreign investors at the access stage. However, States may restrict their regulatory freedom by treaty. For example, some treaties extend the scope of the MFN and national treatment clauses beyond post-establishment treatment to cover the issue of admission. This less frequent approach has been followed in the investment treaty practice of Canada, the United States, Japan and, more generally, in many free trade agreements.³¹ The limitation of the right to regulate entry in this hypothesis comes close to the actual granting of a right of admission.³²

One important point relating to the regulation of admission of foreign investors in natural resources is the requirement included in many IIAs that investments are made “in accordance with domestic law.” As noted when characterizing the SIP triangle, natural resource exploitation intervenes in a context where negative externalities on human rights and the environment must, in all reasonableness, be minimized or eliminated altogether. Protection of human rights and the environment is not only a matter of domestic law but also one of international law. Clauses reserving protection of foreign investment to those transactions made “in accordance with domestic law” give an explicit entry point to the regulation of externalities, and they are thus useful to carve-out space for human rights and environmental considerations in the very text of IIAs.

The practical operation of such clauses has been discussed at some length in investment jurisprudence.³³ Generally speaking, a distinction is made between initial illegality (e.g. an investment made in breach of the requirements set by domestic law to enter the market) and subsequent illegality (e.g. investment that, after entry, operates in breach

30 Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2010), 97-116.

31 See Joubin-Bret (n 28), 10, 13-15 referring to the following treaties: (i) investment treaties: United States/Egypt BIT (1992), Art 2(a); United States/Georgia BIT (1994), Art 2; United States/Azerbaijan BIT (2000), Art 2; United States/Uruguay (2005), Art 2; Canada/Peru BIT (2006), Art 3; Japan/Vietnam BIT (2003), Art 2; Japan/Republic of Korea BIT (2002), Art 2; (ii) free trade agreements: United States/Morocco FTA (2004), Art 10.3; United States/Republic of Korea FTA (2007), Art 11.3; United States/Peru FTA (2006), Art 10.3; United States/Australia FTA (2004), Art 11.3.

32 Some treaties explicitly provide for a right of admission. See e.g. Convention Establishing the European Free Trade Association (EFTA) (adopted 4 January 1960, entered into force 3 May 1960) 370 UNTS 3 (EFTA Convention), Art 23(1), referred to in Joubin-Bret (n 28), 14.

33 Zachary Douglas 2014, ‘The Plea of Illegality in Investment Treaty Arbitration’ (2014) 29(1) *ICSID Review* 155.

of domestic law).³⁴ However, from a conceptual standpoint, many important points remain unsettled and, as a result, such clauses have not yet deployed their full potential for the rebalancing of the investment protection regime. It may be useful to mention a few examples of significant open issues. Firstly, it is unclear which domestic laws have to be respected at the time the investment is made. Domestic law may impose several conditions for an investment in the extractive industries to proceed, ranging from obtaining a license to invest (admission) to the authorization to prospect and to an environmental permit based on an environmental impact assessment. Quite debatably, investment tribunals have limited the scope of the relevant domestic laws to the mere foreign investment laws, i.e. those regulating the license to invest,³⁵ as if the other authorizations did not count as part of the process of “making” the investment.³⁶ The latter leads to a more fundamental, and conceptually more difficult question, namely what is to be understood by “making” an investment. Is an investment “made” once the investment license has been granted, irrespective of whether the main permits to conduct the relevant activities (e.g. a permit to explore or an environmental permit) are granted? To use an analogy not related to natural resources but very explicit, can a foreign bank wishing to operate in a State claim to have “made” an investment before it has received a banking license, on the sole grounds that it has received a license to invest? This apparently theoretical question is very important in practice. If a tribunal takes a restrictive stance and considers the mere license to invest sufficient for the investment to be “made,” then, under the current understanding of legality clauses, the proceedings would continue to the merits (which is consistent with the investors’ success rate of more than 70% at the jurisdictional level), which entails of course significant litigation costs. Making legality clauses operate at the jurisdictional (or at the admissibility) level would be more consistent with the deference to domestic law explicitly accorded by such clauses. Conversely, assessing their effects at the merits level would entail

34 See *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines (Fraport v Philippines)*, (Award) (16 August 2007) ICSID Case No ARB/03/25, para 345.

35 See *Saba Fakes v Turkey* (Award) (12 July 2010) ICSID Case No ARB/07/20, Award, para 119.

36 For a contrasting stance see *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine* (Decision on Jurisdiction) (8 March 2010) ICSID Case No ARB/08/8, para 135-145 (reviewing a variety of domestic laws and rejecting the respondent’s objection on the facts); *Gustav F. W. Hamster GmbH & Co KG v Ghana* (Award) (10 June 2010) ICSID Case No ARB/07/24, para 125-139 (reviewing a broader set of laws and rejecting the respondent’s objection on the facts).

that they are no longer relevant to access but to treatment. As will be discussed next, the unbalance introduced by the current understanding of international investment law also affects the post-establishment regulation of foreign investment.

3.3. Sovereignty and Regulatory Powers

Given the important impact of natural resource extraction on both affected communities and the environment, the mainstream understanding of international investment law as a framework protecting foreign investment is problematic. At times, tribunals have considered that the goal of promoting foreign investment, i.e. the contribution to the development of the host State, was also an important part of the system, but some investment arbitration tribunals have challenged such a view in favour of crude investment protection.³⁷ Understanding international investment law as a mere “protective” framework has a particularly significant unbalancing effect if its operation is “detached” from the broader body of domestic and international law governing negative externalities, such as the adverse impact on human rights and the environment. In what follows, the manner in which such insulation affects the ability of States to regulate foreign investment and, more generally, how the public interest, which is not to be equated with the interests of the host State, may be adversely affected, is briefly discussed.

Whereas the current system of investment protection is largely based on investment treaties, remaining at such a level of generality obscures important nuances that must be taken into account to understand how international investment law has turned essentially into a protective framework. One important development that has helped investors avoid specifically negotiated contractual terms and the domestic regulatory framework applicable to such contracts is the move from the contract level to the treaty level. This move found its foremost expression in the *Vivendi v. Argentina* saga³⁸ and, particularly, in the distinction made in this context between “treaty claims” and “contract claims.”³⁹ The interaction between investment contracts and treaties is complex and multi-

37 See the annulment of the sole arbitrator’s award in *Malaysian Historical Salvors v Malaysia* (above n 6).

38 See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic* (‘Vivendi I’ (Award) (21 November 2000) ICSID Case No ARB/97/3; (Decision on Annulment) (3 July 2002); (Decision on Jurisdiction) (14 November 2005); (Award) (20 August 2007) (‘Vivendi II’); (Decision on Annulment) (10 August 2010).

39 Perhaps the most recurrent formulation of this distinction is given in the Award (20 August 2007), at paragraph 7.3.10.

faceted. For present purposes, what must retain our attention is the possibility given to foreign investors to bypass the terms of a contract with the host State (both its substance and the forum selection clause) and bring a fundamentally similar claim as a treaty claim selectively importing into the treaty certain terms of the contract through the so-called umbrella clauses.⁴⁰ Investment arbitration tribunals seem to have condoned this practice leading to what one commentator calls a “boom in parallel proceedings”.⁴¹ Early attempts at exercising judicial restraint in connection with such claims were discouraged by the annulment of the award in the so-called *Vivendi I* case.⁴² The degree of internationalization represented by such a nuance must not be underestimated. The terms of a contractual arrangement, which are project-specific and often embedded in a regulatory framework organized by domestic law, become secondary as mere facts to be assessed under broadly formulated investment protection standards that leave arbitral tribunals a much wider margin of manoeuvre.

The second trend that is worth noting is closely related to the first one. Much like the interactions between investment contracts and IIAs, those between the latter and general international law have received inconsistent interpretations, with significant implications for the expression of sovereignty in foreign investment regulation. Nowhere is this volatility more visible than in the interpretation and application of treaty-based emergency clauses and the customary necessity defence. The initial divide was epitomized by the different stances taken by the arbitral tribunals in *CMS v. Argentina*⁴³ and *LG&E v. Argentina*.⁴⁴ This divide subsequently led to a stream of decisions and, more importantly, to a major debate on the scope of State regulatory powers in emergency situations. In essence, what can be gathered from this debate is the need to rigorously assess the interactions between treaties (in the relevant cases, the treaty-based emergency clauses) and general

40 See the discussion in *El Paso v Argentina* (n 20), as well as in Antony (n 19).

41 Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press 2013).

42 See (n 37) Decision on Annulment (3 July 2002).

43 *CMS Gas Transmission Company v Argentina* (Award) (12 May 2005) ICSID Case No ARB/01/08, paras. 316-331 (necessity), 353-378 (emergency clause), followed by *Enron and Ponderosa Assets v Argentine Republic* (Award) (22 May 2007) ICSID Case No ARB/01/3, para. 314-342; *Sempra Energy v Argentine Republic* (Award) (28 September 2007) ICSID Case No ARB/02/16, paras. 356-391.

44 *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc. v Argentine Republic*, (Decision on Liability) (3 October 2006) ICSID Case No ARB/02/1, paras. 194-200, followed by *Continental Casualty Company v Argentine Republic* (Award) (5 September 2008) ICSID Case No ARB/03/9,, para. 85.

international law (in the relevant cases, the exacting conditions for the availability of the necessity defence). The *CMS* award and those that followed its line wrongly concluded, as several annulment committees subsequently made clear, that the customary requirement for necessity governed the application of a treaty-based emergency clause.⁴⁵ This result was all the more striking from a systemic perspective taking into account that investment treaties were perceived, often with little explicit analysis, as a *lex specialis* displacing the general customary law expressing the regulatory powers of the State. In truth, investment cases are particularly fact-sensitive and the legal reasoning justifying a conclusion often hides an outcome that stems from a more factual reasoning and negotiation between arbitrators. Legally, however, many aspects of foreign investment regulation, starting with the law of treaties and State responsibility, are not addressed in investment treaties. This includes several customary concepts expressing sovereignty but also, more generally, a broad domain that goes beyond the mere promotion or protection of investments and concerns their governance.⁴⁶ Indeed, and this point deserves to be underscored, the analysis of foreign investment law cannot be limited to promotion and protection. It must also focus on the governance of foreign investment. Several claims brought against Argentina,⁴⁷ Costa Rica,⁴⁸ Ecuador⁴⁹ or Mexico,⁵⁰ among others, have been instrumental in sustaining a debate over the proper place of foreign investment within the wider regulatory duties of

45 See *CMS Gas Transmission Company v Argentine Republic* (Decision on Annulment) (25 September 2007) ICSID Case No. ARB/01/08, paras. 137-150; *Enron and Ponderosa Assets v Argentine Republic* (Decision on Annulment) (30 July 2010) ICSID Case No ARB/01/3, paras. 396-417; *Sempra Energy v Argentine Republic* (Decision on Annulment) (29 June 2010) ICSID Case No ARB/02/16, paras. 159-223.

46 Jorge E Viñuales, 'Customary Law in Investment Regulation' (2013) *Italian Yearbook of International Law* 23; Jorge E Viñuales, 'Sovereignty in Foreign Investment Law' in *The Foundations of International Investment Law* (n 3).

47 See *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v Argentine Republic* (Decision on Liability) (30 July 2010) ICSID Case No ARB/03/17; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, (Decision on Liability) (31 July 2010) ICSID Case No ARB/03/19.

48 *Compañía del Desarrollo de Santa Elena S.A. v Republic of Costa Rica*, (Award) (17 February 2000) ICSID Case No ARB/96/1; *Marion Unglaube v Republic of Costa Rica* (Award) (16 May 2012) ICSID Case No ARB/08/1; *Reinhard Unglaube v Republic of Costa Rica* (Award) (16 May 2012) ICSID Case No ARB/09/20. See also the pending pence *International Investments, LLC, Bob F. Spence, Joseph M. Holsten, Brenda K. Copher, Ronald E. Copher, Brette E. Berkowitz, Trevor B. Berkowitz, Aaron C. Berkowitz and Glen Gremillion v The Government of the Republic of Costa Rica*, CAFTA Arbitration (UNCITRAL Rules).

host States.⁵¹ Of particular note are the *Suez v. Argentina* cases, raising the applicability of the right to water, and the *Chevron v. Ecuador* cases, raising matters of environmental pollution.

Overall, these trends suggest that it is very problematic to insulate IIAs from contracts, domestic law and the broader body of international law, as it amounts to exclude not only the main customary concepts expressing sovereignty but also those laws (domestic and international) that protect the public interest beyond the State (human rights and the environment). From the perspective of the aforementioned SIP triangle, moving from an understanding of international investment law as ‘protection’ to one as ‘regulation’ is critical not as a defence of the host State but, more specifically, in order to make adequate room for the public interest. As discussed next, the public interest is not necessarily aligned with the interests of the host State’s government and, in such cases, international law must play a different role – i.e. protecting people and the environment from both the host State and foreign investors.

3.4. Distribution and the “Resource Curse”

Michel Virally once noted that despite the many virtues of recognizing a right of self-determination of peoples with the attendant sovereignty over natural resources, such a right, once exercised, could turn into an instrument of oppression of dictatorial governments over the peoples they govern. Such a situation has often been referred to as the “resource curse” – namely the fact that countries where there is an abundance of natural resources tend to do worse in terms of human and economic development than countries

49 See *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador*, notably the Third Interim Award on Jurisdiction and Admissibility (27 February 2012); First Partial Award on Track I (17 September 2013); Decision on Track 1B (12 March 2015) UNCITRAL PCA Case No 2009-23.

50 See *Robert Azinian, Kenneth Davitian and Ellen Baca v United Mexican States* (Award) (1 November 1999) ICSID Case No ARB(AF)/97/02; *Metalclad Corp. v United Mexican States* (Award) (25 August 2000) ICSID Case No. ARB(AF)/97/1; *Técnicas Medioambientales Tecmed S.A. v United Mexican States* (Award) (29 May 2003) ICSID Case No ARB(AF)/00/2; *Abengoa S.A. y COFIDES S.A. v United Mexican States* (Award) (18 April 2013) ICSID Case No ARB(AF)/09/2.

51 Jorge E Viñuales (2012) (n 8); Pierre-Marie and Jorge E. Viñuales, ‘Human Rights and Investment Disciplines: Integration in Progress’ In Marc Bungenberg, Jorn Griebel, Stephan Hobe and August Reinisch, *International Investment Law* (C.H. Beck/Hart/Nomos 2015).

with less natural resources.⁵² As many observers critical of the international investment regime seem to overlook, the interests of the host State cannot be simply equated with those of its population or its environment, although they should.

The use of the term “should” in the present context has two purposes. Firstly, it would be inaccurate to assert that international law makes it illegal for a State governed by an authoritarian government to validly conclude investment treaties and contracts or otherwise grant concessions. However, and this is the second purpose for using the term “should,” international law has increasingly placed limitations on the use and misuse of natural resources by governments, through a variety of means among which human rights law, environmental law, international criminal law and the many instruments addressing corruption must receive pride of place.⁵³ This point can be illustrated by reference to three cases taking place in different parts of the world. These cases highlight how the other side of the SIP-triangle – i.e. the collision between the interests, on the one hand, of the affected populations and, on the other hand, of the host State’s government and the foreign investor – can be addressed under international law.

In the first case, *Ominayak v. Canada*,⁵⁴ a group of Lubicon Lake Cree Indians brought an application before the Human Rights Committee (HRC) for breach of the International Covenant on Civil and Political Rights (ICCPR).⁵⁵ At stake was the granting of leases by the province of Alberta, in Canada, to certain companies for purposes of oil and gas exploration in the community’s ancestral lands, which according to the applicants threatened their traditional way of life. Interestingly, the application was brought for breach of the collective right to self-determination stated in Article 1 of the ICCPR, although the HRC re-framed the question as a potential violation of the individual right to enjoy one’s culture under Article 27 of the ICCPR.⁵⁶ Because Canada proposed measures to rectify the situation, the HRC offered almost no analysis of the conflict between minority rights and the rights arising from the leases.⁵⁷ But the case clearly illustrates the tensions arising from the SIP triangle and how the same situation that, from the economic

52 Richard Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (Routledge 1993).

53 Jorge E Viñuales and Magnus Jesko Langer (n 2).

54 *Bernard Ominayak and the Lubicon Band v Canada* (26 March 1990) HRC Communication No 167/1984 (*Ominayak v. Canada*).

55 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

56 *Ominayak v. Canada* (n 53), para 13.3 and 13.4.

57 *Ibid*, para 33.

operator's perspective would appear as a set of facts leading to an investment dispute, can be seen through the prism of the affected communities. Characterizing this specific dispute as an example of tensions arising from a resource curse situation would be inaccurate. More accurately, the case shows one of the caveats introduced with respect to the SIP triangle, namely the divergent interests among the host State's population. This is discussed in the short individual opinion appended by commissioner Nisuke Ando where he notes that "the right to enjoy one's own culture should not be understood to imply that the Band's traditional way of life must be preserved intact at all costs."⁵⁸ The second case to be discussed illustrates this point even more clearly showing how different sides of the triangle may rely on different bodies of international law.

In *Sawhoyamaza Community v. Paraguay*,⁵⁹ the applicants claimed that Paraguay had failed to guarantee the community's right over its ancestral land in violation, among others, of their right to property under Article 21 of the American Convention on Human Rights.⁶⁰ Importantly, the Inter-American Court of Human Rights re-stated its position since the seminal *Awas Tingni v. Nicaragua* case⁶¹ according to which,

"the close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving therefrom, must be secured under Article 21 of the American Convention."⁶²

Significantly, one of the arguments raised by the government was that the private owner of the lands claimed, a German investor, was protected under an investment treaty.⁶³ The different legal frameworks applicable to different sides of the SIP triangle were thus laid bare. Although the Court did not consider itself competent to decide on the hierarchy between the titles of two different private entities (the applicants and the investor), its reasoning is sufficiently telling and deserves to be quoted *in extenso*,

58 Individual Opinion of Nisuke Ando, *Ominayak v. Canada* (n 53), Appendix I.

59 *Case of Sawhoyamaza Indigenous Community v Paraguay* (29 March 2006) ICtHR Series C No 146 (*Sawhoyamaza v. Paraguay*).

60 American Convention on Human Rights (adopted 22 November 1969. Entered into force 18 July 1978) 1144 UNTS 123 (ACHR).

61 *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (31 August 2001) ICtHR Series C No 79.

62 *Sawhoyamaza v Paraguay* (n 48), para 118.

63 *Ibid*, para 115(b).

“the Court cannot decide that Sawhoyamaza Community’s property rights to traditional lands prevail over the right to property of private owners or *vice versa*, since the Court is not a domestic judicial authority with jurisdiction to decide disputes among private parties. This power is vested exclusively in the Paraguayan State. Nevertheless, the Court has competence to analyze whether the State ensured the human rights of the members of the Sawhoyamaza Community [...]”

Following this line of thought, the Court has ascertained that the arguments put forth by the State to justify non-enforcement of the indigenous people's property rights have not sufficed to release it from international responsibility. The State has put forth three arguments: [...] 3) that the owner’s right “is protected under a bilateral agreement between Paraguay and Germany[,] which [...] has become part of the law of the land [...]”

with regard to the third argument put forth by the State, the Court has not been furnished with the aforementioned treaty between Germany and Paraguay, but, according to the State, said convention allows for capital investments made by a contracting party to be condemned or nationalized for a “public purpose or interest”, which could justify land restitution to indigenous people. Moreover, the Court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, *their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.*⁶⁴

In casu, the Court found a violation of Article 21 of the ACHR. Such a violation was not due to activities of the foreign investor unchecked by the State but rather from the latter’s inaction to guarantee the right to property to the community. But the importance of this case lies elsewhere, namely (i) in that it once again shows the alignment of interests between host States and investors, and more specifically (ii) in that it lays bare the bodies of law protecting different sides of the SIP triangle.

The third and last case to be discussed, the *Ogoni* case before the African Commission,⁶⁵ clearly addressed a resource curse situation with the complicity of a foreign investor. At stake were both the deprivation of natural resources and the environmental

64 Ibid, para 136, 137 and 140 (italics added).

and health consequences of the oil development activities conducted by a state-owned oil company and a foreign investor, with the approval of Nigeria. The plaintiffs claimed that such practices had led to widespread pollution of their land in violation *inter alia* of the collective rights provided in articles 21 (right to natural resources) and 24 (right to a satisfactory environment) of the African Charter.⁶⁶ The Commission concluded that Nigeria had violated both (as well as other) provisions. Among the reasons it gave for its conclusion, it noted that Article 24 “requires a State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”⁶⁷ It also noted, in connection with Article 21, that:

[c]ontrary to its Charter obligations [...] the Nigerian Government ha[d] given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis [... and that ...] [b]y any measure of standards, its practice falls short of the minimum conduct expected from governments, and therefore, is in violation of Article 21 of the African Charter.⁶⁸

Although, in such a context, the chances of success of a foreign investor challenging redress measures for breach of investment law should be slim, one can never be sure in the volatile context of investment jurisprudence. In the pending dispute between Chevron and Ecuador relating to domestic litigation resulting from Texaco’s massive pollution of the Ecuadorian jungle, this is the foundational issue that lies beneath a thick layer of lawyerly-built technical argumentation relating to a settlement contract as well as to the (mis)operation of Ecuadorian courts.⁶⁹ Even if the Ecuadorian State were to prevail in the last leg of the proceedings (specifically on the investor’s claim for denial of justice), it would not necessarily be a triumph for either the affected populations or the environment as such. As noted earlier, public interest is not to be equated with State sovereignty or governmental interests.

65 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (Communication 155/96) (27 May 2002) ACHPR/COMM/A044/1 (*Ogoni case*).

66 African Charter on Human and Peoples' Rights (27 June 1981) 21 ILM 58 (1982) (African Charter).

67 *Ogoni case* (n 64), para 52. The Commission also read in article 12 of the ICESCR an unstated obligation requiring States “to take necessary steps for the improvement of all aspects of environmental and industrial hygiene.”

68 *Ibid*, para 58.

69 See above (n 48).

4. CONCLUDING OBSERVATIONS AND NEXT STEPS

The three questions analysed in connection with foreign investment in natural resources (access, sovereignty and distribution) suggest that, in its contemporary dynamics, the three pillars of international investment law have played an unbalancing role, by overemphasizing the protection of investors over the authority of the host State and, more importantly, the public interest. Such a conclusion would have been controversial or, at best, it would have been judged as academic ten or even five years ago, when numerous observers were calling for a recalibration of the system under the rather amused look of many supporters of the regime. The current momentum is very different. Important international or regional organizations (e.g. UNCTAD⁷⁰ or the European Union⁷¹) as well as non-governmental organizations (e.g. the International Institute for Sustainable Development, the World Economic Forum and the International Centre for Trade and Sustainable Development⁷²) have complemented efforts conducted in some codification bodies (e.g. United Nations Commission on International Trade Law⁷³ and the Institut de Droit Inter-

70 UNCTAD has launched an International Policy Framework for Sustainable Development, which is aimed at reserving sufficient policy space for States to regulate in pursuance of sustainable development. See UNCTAD, ‘Recent developments in investor-State dispute settlement’ (n 10); UNCTAD, *World Investment Report – Investing in SDGs: An Action Plan* (United Nations 2012), chapter 4.

71 After intervening in several investment disputes as a non-disputing party, the European Commission has taken action to ensure that awards deemed in breach of State aid rules are not enforced or, more generally, to push States to withdraw from so-called “intra-EU” IIAs. These initiatives have been widely reported in the media, see e.g. Borderlex, ‘Commission launches infringement proceedings against 5 EU members for keeping BITs.’ *Borderlex* (18 June 2015) available at <<http://www.borderlex.eu/eu-commission-launches-infringement-proceedings-members-keeping-bits/>> accessed 5 September 2015.

72 These three organizations together launched the Expert Group on Extractive Industries within the E15 Initiative, tending to reform trade and investment policies for sustainable development. See <http://e15initiative.org/>.

73 The United Nations Commission on International Trade Law (UNCITRAL) adopted a set of Rules on Transparency in Treaty-based Investor-State Arbitration, which came into effect in April 2014. This led to the amendment (introducing Article 1(4)) of the UNCITRAL Arbitration Rules. In addition, the work of the UNCITRAL led to the adoption of a United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 10 December 2014 (not yet in force).

national⁷⁴) and supported by several States (both developing, e.g. India, and developed, e.g. Australia) to seriously recalibrate the investor-State dispute settlement (ISDS) system. Two highly visible illustrations of this very different political context are provided by the debate over the opportunity to include ISDS in the Transatlantic Trade and Investment Partnership and the termination of so-called “intra-EU” investment treaties.⁷⁵

The rather extreme oscillation in the meaning and interpretation (but not in the identity) of the three pillars of international investment law is, unfortunately, responsible for such political counter-reaction. However, it would be a mistake to advocate for a similarly extreme oscillation of the pendulum in the opposite direction. Efforts towards recalibration should not lead to an amplification of the oscillation. One must recall here that investment arbitration is but one example of a broader and generally positive global movement towards the application of the rule of law at the international level through the use of international courts and tribunals.⁷⁶ There are avenues for reform that could improve the system significantly. Three of these avenues are mentioned below, while acknowledging that they are by no means the only ones that can be explored.

The first one concerns access to investment arbitration. It is deeply unintuitive and highly debatable that access by foreign investors to *ad hoc* arbitration does not require (or is widely – and in many cases wrongly – interpreted as not requiring) exhaustion of domestic remedies, whereas human rights redress mechanisms do. It is unclear why foreign investors should deserve better protection than humans as individuals, particularly to the extent that – as suggested by the SIP triangle – such higher protection may come at the expense of the public interest (i.e. the human rights of the affected populations and the protection of the environment). Part of the solution would consist of either amending

74 *Legal Aspects of Recourse to Arbitration by an Investor against the Authorities of the Host State under Inter-State Treaties*, Resolution of 13 September 2013, IDI Tokyo Session. See e.g. Articles 6 (transparency), 10 (highlighting the requirement that the investment contributes to the development of the host State), 13 *in fine* (making a clear distinction between compensation for breach of the fair and equitable treatment standard and compensation for expropriation).

75 Markus Krajewski, *Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective* (Friedrich-Ebert-Stiftung 2015) also available at <<http://library.fes.de/pdf-files/bueros/bruessel/11044.pdf>> accessed 5 September 2015, 4-5; See above (n 70).

76 Pierre-Marie Dupuy and Jorge E. Viñuales, ‘The Challenge of Proliferation: An Anatomy of the Debate’ in Cesare Romano, Karen Alter and Yuval Shany, *The Oxford Handbook of International Adjudication*, edited by Cesare Romano, Karen Alter and Yuval Shany (Oxford University Press 2014), 135-157.

existing investment agreements (which is difficult) or introducing an exhaustion of local remedies requirement in future ones. But it is as important to ensure that tribunals do respect such requirements. In many cases, existing treaties expressly require the pursuance of grievances before domestic courts, and yet several tribunals have daringly disregarded the intent of the States parties, referring to overstretched justifications relying on MFN clauses.⁷⁷ This calls for a better control of investment tribunals themselves.

The second avenue for reform concerns the systems of control of investment tribunals. The interpretations given by different tribunals of fundamentally similar points has differed so widely that the very rule of law that investment arbitration is supposed to support has instead been undermined. In the past, one could be sceptical about an appeals mechanism for investment arbitration awards on the grounds that (i) the investment jurisprudence would slowly but surely become more coherent over time, and (ii) the very objective of investment arbitration is to pursue a fast and *ad hoc* resolution of disputes,⁷⁸ the expected coherence has failed to materialize and investment arbitration has become so intrusive into matters of public policy that the speed and *ad hoc* nature of dispute resolution must now be seen and treated as what one commentator saw, some ten years ago, as a form of public adjudication.⁷⁹ An appeals mechanism would provide much needed coherence and help address the great volatility in the application of investment treaty standards. Yet, what is good for coherence may at the same time contribute to further insulation of the investment treaty regime from the necessary interactions with both domestic law and the wider body of international law. From this perspective, the Appellate Body of the WTO offers a mixed, and sometimes disappointing, precedent. The question that arises in this context is two-fold. First, what type of integration of investment law within its broader context would be beneficial? Second, what mechanisms could ensure a sufficient level of integration? One aspect of the first question has already been discussed, namely the need to better integrate domestic law and other norms of international law (e.g. customary concepts expressing sovereignty as well as human rights and environmental law). It should be added that such integration is also important to make investment treaty arbitra-

77 Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2011) 2(1) *Journal of International Dispute Settlement* 97.

78 Frank Spoorenberg and Jorge E. Viñuales, 'Conflicting Decisions in International Arbitration' (2009) 8 *The Law and Practice of International Courts and Tribunals* 91.

79 Gus Van Harten, *Investment Treaty Arbitration and Public Law* Oxford University Press 2007).

tion a two-way process in which investors have obligations too, whether arising from domestic law or contracts or from international soft-law standards to be integrated in the interpretation of investment treaties.⁸⁰

This is precisely the target of the third avenue for reform. Rather than creating new substantive obligations for private parties (as is the case in international criminal law), investor duties could operate as important carve-outs of investment standards linking the level of diligence that an investor may expect to from the host State that it actually displays in its activities. More reckless behaviours calls for – and justifies – tighter regulation. As to the mechanisms that could ensure such integration, they are of several types. One is provided by legality clauses (e.g. “in accordance with domestic laws”), which are far from having shown their full potential. Others include the use of standing commissions consisting of representatives of State parties and tasked with interpreting treaty terms in a legally binding manner. Such standing commissions could also address referrals by investment tribunals on points of law, much in the same way as the Court of Justice of the European Union does when prompted by domestic courts. However, the existence of such commissions may not easily be accommodated with the existence of an appeal mechanism. An appeal mechanism, entrusted perhaps with the additional powers of addressing referrals, would be the best option. However, from a political perspective, it would be much more difficult to achieve as it would require a level of organization (whether horizontal such as in the WTO or the United Nations Convention on the Law of the Sea,⁸¹ or vertical such as in the European Union) that has not been tested in investment agreements so far.

With the exception of the appeals mechanism and, to a lesser degree, the operation of the legality clauses, these proposals for reform have received scant attention from commentators and policy-makers. They are offered here as potential avenues for future research in the hope that the pendulum will be brought somewhere around the middle point rather than being pushed, again, to the extremes.

80 See e.g. *Protect, respect, and remedy: a framework for business and human rights* (7 April 2008) UN Doc A/HRC/8/5. These principles have influenced the practice of several organizations, including the International Bar Association, which has recently prepared a ‘Business and Human Rights Guidance for Bar Associations’, issued in draft form in 2014 available at <<http://www.ibanet.org>> accessed 5 September 2015.

81 See United Nations Convention on the Law of the Sea, (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (particularly part XVI, organizing a dispute settlement system, including – as stated in a recent decision – the possibility for the International Tribunal on the Law of the Sea to issue advisory opinions). See *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* (Advisory Opinion) (2 April 2015), para 219.