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International Investment Law and Natural Resource Governance

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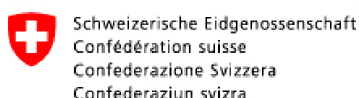

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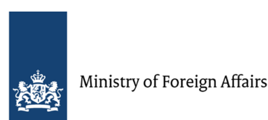

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ABSTRACT

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.

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
BIT	bilateral investment treaty
FET	fair and equitable treatment
HRC	Human Rights Committee
ICSID	International Centre for Settlement of Investment Disputes
ICCPR	International Covenant on Civil and Political Rights
IIA	international investment agreement
ISDS	investor-state dispute settlement
MFN	most favoured nation
SIP	State-Investor-Population
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

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Figure 1: The SIP Triangle and its Laws

INTRODUCTION

The international law on foreign investment can be viewed through different prisms. 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, and so on), the angle must be calibrated to capture those features in the legal topography that are most relevant for a given analytical object. This paper 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, and that makes access a very important question, whether we think of non-living resources (for example, oil, gas, coal, high-value minerals, water, or land) or living resources (for example, fisheries, 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 activity 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," that is, 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 a phenomenon either deliberately (that is, through a close connection with the rapacious government) or as a mere result of their activity in the host state (that is 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. 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 on access, sovereignty, and distribution. In conclusion, some observations and recommendations regarding possible avenues for reform are put forward for consideration and future research.

THE ARCHITECTURE OF INTERNATIONAL INVESTMENT LAW

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 particular 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 (Leben 2003). 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 a 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.

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, that is, 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—of the proper judge (Viñuales and Langer 2011). 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, the description of which falls beyond the remit of this think piece.[1] Some additional comments, however, are necessary to clarify the architecture of international investment law.

Regarding the regulatory object of the regime, it 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.[2] 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 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) if the investor brings an arbitration claim under ICSID rules.[3] At this level, one important debate concerns the need for the transaction to contribute to the development of the host state to qualify as an investment.[4] 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 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 on 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.[5] Despite the quasi monopoly that these standards have enjoyed in recent scholarship and practice, the law on foreign investment largely exceeds them in many ways. First, 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. Second, 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.[6] Third, 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 (that is, without the need to fully exhaust domestic remedies) before an international arbitral tribunal constituted specifically to hear that claim. This possibility arises not only in relation to privity of contract but also, since a famous award rendered in 1990,[7] 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 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 (UNCTAD 2014).

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1 For a concise statement of the contemporary law on foreign investment, see Dolzer and Schreuer (2012). On the complexities of the system and their underpinnings, see Douglas et al. (2014).

2 Among the numerous contributions to this issue, see, in particular, Schreuer et al. (2009).

3 ICSID Convention, 18 March 1965, 575 UNTS 159.

4 This debate is epitomized by the case *Malaysian Historical Salvors v. Malaysia*, ICSID Case No. ARB/05/10, Award, 17 May 2007, where the sole arbitrator declined jurisdiction based on an objective understanding of the term investment in Article 25(1), including the need to take into account the transaction's contribution to the development of the host state. The award was subsequently annulled, albeit not unanimously, by an ad hoc committee; *Malaysian Historical Salvors v. Malaysia,* ICSID Case No. ARB/05/10, Decision on the application for annulment, 16 April 2009), paras. 62–63, 69, 71–72.

5 On the contents of such standards see, among others, Reinisch (2008); McLachlan et al. (2007).

6 On the human rights and environmental dimensions of investment disputes, see Kriebaum (2008); Dupuy et al. (2009); Viñuales (2012).

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

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 (Pauwelyn 2014), and it is currently undergoing changes that may be considered significant to an observer writing one or two decades from now.

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 (Viñuales and Langer 2011). The decolonization process in the aftermath of World War II 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).[8] 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 interest (Resolution 1803, paras. 1, 4 and 8). In retrospective, 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, — that is, 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 granting enhanced protection to foreign direct investment was, among other things, the expectation that such investment would contribute to their economic and social development.[9] Over time, and particularly in the last 15 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.[10] Second, and perhaps more controversially, investment tribunals have interpreted this term expansively, encompassing portfolio investment or assets such as commercial loans or bonds emitted in foreign financial markets.[11] 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.[12]

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 related—against potential denials of justice. Over time, a wider variety of investment disciplines or standards were included in IIAs covering impairments of foreign investments 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 into between a state and a foreign investor led some capital-exporting states, such as Germany, introducing 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 (for example, Antony 2013). 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—that is, that no term can be elevated or that all terms can be elevated to treaty level.[13]

8 UN General Assembly Resolution 1803 (XVII), Permanent Sovereignty over Natural Resources, 14 Dec. 1962 (Resolution 1803).

9 See the preamble of the ICSID Convention, para. 1, considering: "the need for international cooperation for economic development, and the role of private international investment therein."

10 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, for example, US Model BIT (2012), Article 1.

11 See, for example, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic,* ICSID Case No. ARB/97/4, Award, 24 May 1999, para. 76–89; *Abaclat and Others v. Argentine Republic,* ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 Aug. 2011, paras. 373–80. See, however, *Poštová banka, a.s. and Istrokapital s.e. v. Hellenic Republic,* ICSID Case No. ARB/13/8, Award, 9 April 2015, paras. 308, 331.

12 See above note 4.

13 See *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, 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,* ICSID Case No. ARB/01/13, Decision on Jurisdiction, 27 Aug. 2003, paras. 166, 168, 173; *Salini Costruttori S.p.A. & Italstrade S.p.A. v. Hachemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 Nov. 2004, para. 126; *Joy Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/02/11, Award, 6 Aug. 2004, para. 81.

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.[14] 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 (UNCTAD 2014b, 116–18, Roberts 2010, Kaufmann-Kohler 2012).

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*,[15] 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 purposes[16] 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.[17] 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. 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 (for example, Krajewski 2015).

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.

INTERNATIONAL INVESTMENT LAW AND NATURAL RESOURCE GOVERNANCE

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 interests may come at the expense of those individuals and communities who live in the area covered 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,

14 On the range of interpretations see, among other contributions, Tudor (2008); and Kläger (2011).

15 *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka,* see note 7.

16 The starting point of this important and still ongoing debate was the decision in *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 Jan. 2000, para. 64. On this issue, see Douglas (2011: 97–113).

17 See, for example, *SS Wimbledon*, P.C.I.J., Series A, No. 1, 17 Aug. 1923, pp. 24–25; *SS Lotus,* P.C.I.J., Series A, No. 10, 7 Sep. 1927, p. 18; *Free Zones of Upper Savoy and the District of Gex*, P.C.I.J., Series A/B, No. 46, 7 June 1932, 167. More recently, see Howse (2002: 519).

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. First, 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. Second, the host state's population and even the affected community is also a heterogeneous category. A project that is detrimental to 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.

Third, 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. Fourth, and importantly, the bodies of law governing the different dimensions of the SIP triangle are not the same and they may collide with one another. 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 covered 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 positions 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.

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 the United Nations Conference on Trade and Development (UNCTAD) has unveiled that foreign investors prevail in more than 70 percent of cases at the jurisdictional level and in 60 percent of cases at the merits level (Mann 2015). These numbers are based on a large pool of cases (255 cases leading to a final award) concerning developed and developing countries. The imbalance could be potentially stronger in cases against developing countries, where a large part of the activities of extractive industries takes place. Such an imbalance has significant implications for the way in which questions of access, sovereignty, and distribution are addressed.

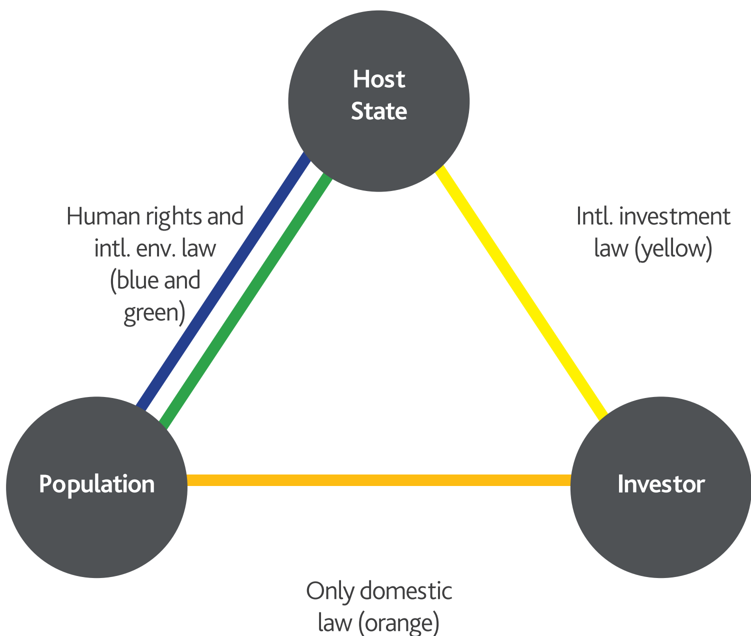

FIGURE 1:

The SIP Triangle and its Laws

ACCESS AND THE LEGALITY OF INVESTMENTS

The term access may be used with a narrower or a broader meaning. Access, in a strict sense (*sensu stricto*), refers to the entry or admission of an investor to 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. But the 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* (Joubin-Bret 2008). 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 conduct of a prior environmental impact assessment (Sornarajah 2010: 97–116). 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.[18] The limitation of the right to regulate entry in this hypothesis comes close to the actual granting of a right of admission.[19]

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. 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 text of IIAs.

The practical operation of such clauses has been discussed at some length in investment jurisprudence (see Douglas 2014). Generally speaking, a distinction is made between initial illegality (for example, an investment made in breach of the requirements set by domestic law to enter the market) and subsequent illegality (for example, investment that, after entry, operates in breach of domestic law).[20] 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. First, 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 extractive industries to proceed, ranging from obtaining a licence 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 relevant domestic laws to mere foreign investment laws, that is, those regulating the licence to invest,[21] as if the other authorizations do not count as part of the process of "making" the investment.[22] 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 licence has been granted, irrespective of whether the main permits to conduct the relevant activities (for example, 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 licence, on the sole grounds that it has received a licence to invest?

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18 See Joubin-Bret (2008: 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; and (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.

19 Some treaties explicitly provide for a right of admission. See, for example, Convention Establishing the European Free Trade Association (EFTA), 4 Jan. 1960, 370 UNTS 3 (EFTA Convention), art. 23(1), referred to in Joubin-Bret (2008, 14).

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

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

22 For a contrasting stance see *Inmaris Perestroika Sailing Maritime Services GmbH v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction. 8 March 2010, paras. 135–45 (reviewing a variety of domestic laws and rejecting the respondent's objection on the facts); *Gustav F.W. Hamester GmbH & Co KG v. Ghana,* ICSID Case No. ARB/07/24, Award, 10 June 2010, paras. 125–39 (reviewing a broader set of laws and rejecting the respondent's objection on the facts).

This apparently theoretical question is very important in practice. If a tribunal takes a restrictive stance and considers the mere licence 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 percent at the jurisdictional level), which entails 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 that they are no longer relevant to access but to treatment. As will be discussed next, the imbalance introduced by the current understanding of international investment law also affects the post-establishment regulation of foreign investment.

SOVEREIGNTY AND REGULATORY POWERS

Given the important impact of natural resource extraction on 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, that is, the contribution to the development of the host state, is also an important part of the system, but some investment arbitration tribunals have challenged such a view in favour of crude investment protection.[23] 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* saga[24] and, particularly, in the distinction made in this context between "treaty claims" and "contract claims".[25] The interaction between investment contracts and treaties is complex and multifaceted. 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.[26]

Investment arbitration tribunals seem to have condoned this practice leading to what one commentator calls a "boom in parallel proceedings" (Van Harten 2013). 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.[27] 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. 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*[28] and *LG&E v.*

23 See the annulment of the sole arbitrator's award in Malaysian Historical Salvors v. Malaysia; see note 4.

24 See *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Award, 21 Nov. 2000 (Vivendi I); Decision on Annulment, 3 July 2002; Decision on Jurisdiction, 14 Nov. 2005; Award, 20 Aug. 2007 (Vivendi II); Decision on Annulment, 10 Aug. 2010.

25 Perhaps the most recurrent formulation of this distinction is given in the Award (20 Aug. 2007), at para. 7.3.10: "Whether there is a breach of contract or a breach of the Treaty involves two different inquiries. Articles 3 and 5 of the BIT do not relate to breach of a municipal contract. Rather, they set an independent standard. A state may breach a treaty without breaching a contract; it may also breach a treaty at the same time it breaches a contract. And, in the latter case it is permissible for the Tribunal to consider such alleged contractual breaches, not for the purpose of determining whether a party has incurred liability under domestic law, but to the extent necessary to analyse and determine whether there has been a breach of the Treaty. In doing so, the Tribunal would in no way be exercising jurisdiction over the contract, it would simply be taking into account the parties' behaviour under and in relation to the terms of the contract in determining whether there has been a breach of a distinct standard of international law."

26 See the discussion in El Paso v. Argentina, above note15, as well as in Antony (2013).

27 Decision on Annulment, 3 July 2002; see note 24.

28 *CMS Gas Transmission Company v. Argentina,* ICSID Case No. ARB/01/08, Award, 12 May 2005, paras. 316–31 (necessity), 353–78 (emergency clause), followed by *Enron and Ponderosa Assets v. Argentine Republic,* ICSID Case No. ARB/01/3, Award, 22 May 2007, paras. 314–42; *Sempra Energy v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 Sep. 2007, paras. 356–91.

Argentina.[29] 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 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.[30] 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 law governing a specific subject matter (*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 (Viñuales 2014; 2013: 14, 23). 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,[31] Costa Rica,[32] Ecuador,[33] and Mexico,[34] among others, have been instrumental in sustaining a debate over the proper place of foreign investment within the wider regulatory duties of host states (Viñuales 2012; Dupuy and Viñuales 2015). 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 excluding 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, 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—that is, protecting people and the environment from both the host state and foreign investors.

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 that countries where there is an abundance of natural resources tend to do worse in terms of human and economic development than countries with less natural resources (Auty 1993). 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. First, it would be inaccurate to assert that international law makes it illegal for a state governed by an

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

30 See CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/08, Decision on Annulment, 25 Sep. 2007, paras. 137–50; Enron and Ponderosa Assets v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Annulment, 30 July 2010, paras. 396–417; Sempra Energy v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010, paras. 159–223. In essence, emergency clauses are subject to less stringent requirements than those governing the availability of the customary necessity defence. Moreover, emergency clauses, if available, operate as carve-outs excluding the existence of a breach, whereas the necessity defence only operates once there is a breach, which can be excused by reference to necessity. According to the aforementioned ad hoc committees, disregarding these differences amounted to an error of law or even to a failure to state reasons.

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

32 *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 Feb. 2000; *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012; *Reinhard Unglaube v. Republic of Costa Rica,* ICSID Case No. ARB/09/20, Award, 16 May 2012. See also the pending *Spence 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. Costa Rica*, CAFTA Arbitration (UNCITRAL Rules).

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

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

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 (Viñuales 2011). This point can be illustrated by reference to four cases taking place in different parts of the world. These cases highlight how the other side of the SIP triangle—that is, 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*,[35] 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).[36] 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.

> The Committee reaffirmed that the Covenant recognizes and protects in most resolute terms a people's right of self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. However, the Committee observed that the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in article I of the Covenant, which deals with rights conferred upon peoples, as such … The Committee noted, however, that the facts as submitted might raise issues under other articles of the Covenant, including article 27. Thus, in so far as the author and other members of the Lubicon Lake Band were affected by the events which the author has described, these issues should be examined on the merits, in order to determine whether they reveal violations of article 27 or other articles of the Covenant.[37]

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.[38] But the case clearly illustrates the tensions arising from the SIP triangle and how the same situation that, from the economic 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."[39] This more reserved view of the conflict seems to have prevailed in subsequent decisions.

In another case before the HRC, *Länsman v. Finland*, the applicants argued that mining operations conducted with the approval of the state in a mountainous region of cultural value to an indigenous people (the mountain at stake had spiritual value for the community and that was where they conducted their reindeer herding practices) constituted a breach of Article 27 of the ICCPR.[40] The HRC rejected the claim considering that the impact of the mining activities was not substantial enough to amount to a denial of the right of the members of the minority to enjoy their own culture.[41] However it noted, in connection with future mining activities,

> If mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors' rights under article 27.[42]

This consideration served as the basis for another individual complaint submitted by a member of the same minority, this time in connection with permits granted to certain companies to conduct logging activities and the construction of roads.[43] This complaint was also rejected on similar grounds but the HRC noted, again,

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

36 International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 UNTS 171 (ICCPR).

37 *Ominayak v. Canada,* note 35, paras. 13.3 and 13.4.

38 *Ominayak v. Canada*, note 37, para. 33.

39 Individual opinion of Nisuke Ando, *Ominayak v. Canada*, above n.38, Appendix I.

40 *Ilmari Länsman and others v. Finland,* HRC Communication No. 511/1992, 8 Nov. 1995, (*Länsman v. Finland*).

41 *Länsman v. Finland*, para. 9.5 and 9.6.

42 *Länsman v. Finland* , para. 9.8.

43 *Jouni E. Länsman et al v. Finland, HRC Communication No. 671/1995, 30 Oct. 1996, (Länsman v. Finland II).*

> If logging plans were to be approved on a scale larger than already agreed to for future years in the area in question or if … the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation of … article 27.[44]

Aware of the mining operations that had been challenged in the preceding complaint, the HRC further noted,

> The State party must bear in mind when taking steps affecting the rights under article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture.[45]

As in the *Ominayak* case, the *Länsman* cases cannot be seen as examples of a resource curse situation, but they do illustrate the competing considerations arising from exploitation of natural resources. The next 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 *Sawhoyamaxa Community v. Paraguay*,[46] 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.[47] Importantly, the Inter-American Court of Human Rights re-stated its position since the seminal *Awas Tingni v. Nicaragua* case,[48] 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.[49]

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.[50] 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 at length.

> The Court cannot decide that Sawhoyamaxa 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 Sawhoyamaxa 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*.[51]

In this case, 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 last case to be discussed, the *Ogoni* case before the African Commission,[52] clearly addressed a resource

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44 *Länsman v. Finland II* , para. 10.7.

45 *Länsman v. Finland II*, para. 10.7.

46 *Case of Sawhoyamaxa Indigenous Community v Paraguay*, ICtHR Series C No. 146 (29 March 2006) (*Sawhoyamaxa v. Paraguay*).

47 American Convention on Human Rights, 22 Nov. 1969, 1144 UNTS 123 (ACHR).

48 *Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* ICtHR Series C No. 79, 31 Aug. 2001.

49 *Sawhoyamaxa v. Paraguay,* note 46, para. 118.

50 *Sawhoyamaxa v. Paraguay,* note 46, para. 115(b).

51 *Sawhoyamaxa v. Paraguay,* note 46, paras. 136, 137 and 140 (italics added).

52 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, ACHPR Communication 155/96, 15th Activity Report of the Acomm HRP (2001–2002) (*Ogoni case*).

curse situation with the complicity of a foreign investor. At stake were both the deprivation of natural resources and the environmental 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, among other things, of the collective rights provided in articles 21 (right to natural resources) and 24 (right to a satisfactory environment) of the African Charter.[53] 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."[54] It also noted, in connection with Article 21, that

> Contrary 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.[55]

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 lawyer-built technical argumentation relating to a settlement contract as well as to the (mis) operation of Ecuadorian courts.[56] 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.

CONCLUSION

The three questions analyzed 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 (for example, UNCTAD[57] or the European Union)[58] as well as non-governmental organizations (for example, the International Institute for Sustainable Development, the World Economic Forum, and the International Centre for Trade and Sustainable Development)[59] have complemented efforts conducted in some codification bodies (for example, the United Nations Commission on International Trade Law[60] and the Institut de Droit International)[61] and supported by several states (both developing, for example, India, and developed, for example, 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 (Krajewski 2015: 4–5) and the termination of so-called "intra-EU" investment treaties.[62]

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

54 *Ogoni case*, note 52, 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."

55 *Ogoni case*, note 52, para. 58.

56 *See Ominayak v. Canada*, note 33.

57 The 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 (2012a, 2012b: Chap. 4).

58 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 for example, Borderlex (2015).

59 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, http://e15initiative.org/.

60 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 Dec. 2014 (not yet in force).

61 *Legal Aspects of Recourse to Arbitration by an Investor against the Authorities of the Host State under Inter-State Treaties*, Resolution of 13 Sep. 2013, IDI Tokyo Session. See for example, 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).

62 See UNCITRAL, note 60.

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 a similarly extreme oscillation of the pendulum in the opposite direction. Efforts towards re-calibration 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 (Dupuy and Viñuales 2014: 135–57). 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 (that is, the human rights of the affected populations and the protection of the environment). Part of the solution would consist of either amending 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 state parties, referring to overstretched justifications relying on MFN clauses (Douglas 2011). 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 (Spoorenberg and Viñuales 2009). However, 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 (Van Harten 2007). 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 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 (for example, customary concepts expressing sovereignty as well as human rights and environmental law). Such integration is also important to make investment treaty arbitration 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.[63]

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 (for example, "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 World Trade Organization [WTO] or the United

63 See, for example, *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, http://www.ibanet.org.

Nations Convention on the Law of the Sea,[64] 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. To facilitate their consideration by relevant bodies and organizations, a concise statement of these and other avenues for reform is appended to this think-piece.

64 See United Nations Convention on the Law of the Sea, 10 Dec. 1982, 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), ITLOS, Advisory Opinion, 2 April 2015, para. 219.

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