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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

The concept of sustainable development in investment arbitration: A disconnect from investment policymaking and international adjudication

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Abstract

Amidst initiatives and international agreements that call for a stronger consideration of sustainable development in international investment law, there is a need to assess whether the concept has found its way in decisions rendered by investment arbitration tribunals. References to the concept of sustainable development in investment arbitration can eventually make the adjudication of investment disputes more consistent with an increasingly important aspect of the context in which the terms of international investment agreements are embedded. Have arbitration tribunals acknowledged the relevance of the concept of sustainable development when adjudicating international investment disputes? To answer this question, this article adopts an exploratory research design and relies on a content analysis of 91 decisions that include at least one reference to the term 'sustainable development'. It argues that the use of sustainable development by tribunals is both marginal and problematic, thus showing a strong disconnect from efforts deployed in investment policymaking and international adjudication. The article proceeds in three steps. First, it focuses on international initiatives encouraging the consideration of sustainable development in investment policymaking. Second, it briefly explores the reliance on sustainable development that has emerged in international adjudication, outside investment arbitration. Third, by analysing express references to sustainable development in international investment arbitration, it shows that these decisions demonstrate a general lack of engagement with the concept in the tribunals' findings and a failure to fully acknowledge its integrative nature.

Keywords: international adjudication; investment arbitration; investment policymaking; investor-state dispute settlement; sustainable development

1. Introduction

The examination of the relationship between international investment law and sustainable development has taken many forms. For example, in an early analysis of the tensions between the international investment regime and sustainable development, Andrew Newcombe assessed

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whether international investment agreements act as a structural impediment to sustainable development by relying on the International Law Association's New Delhi Declaration of Principles of International Law Relating to Sustainable Development.[1] While maintaining that international investment agreements are not a serious impediment, he stressed that 'there is considerably more that the [international investment agreement] regime could do to actively promote sustainable development'.[2] Subsequent analyses have focused on how investment agreements have evolved to reflect the consideration of sustainable development or specifically called for states to integrate sustainable development when negotiating international investment agreements.[3]

As far as investment arbitration is concerned, the majority of analyses and scholarly contributions have primarily focused on how tribunals have addressed sustainable development 'issues', 'concerns' or 'elements'.[4] Investment claims pertaining to waste management,[5] water tariff regulation,[6] the prohibition of dangerous products,[7] environmental regulation,[8] or the protection of cultural sites[9] have been analysed to examine whether tribunals have rendered decisions that demonstrate a form of responsiveness towards sustainable development concerns.[10] Moreover, in

[1]A. Newcombe, 'Sustainable Development and Investment Treaty Law', (2007) 8 JWIT 357.

[2]Ibid., at 359.

[3]See, e.g., J. Chalker, 'Making the Investment Provisions of the Energy Charter Treaty Sustainable Development Friendly', (2006) 6 *International Environmental Agreements* 435; M. W. Gehring and A. Kent, 'International Investment Agreements and Sustainable Development: Future Pathways', in E. J. Techera (ed.), *Routledge Handbook of International Environmental Law* (2012), 561; M. W. Gehring and A. Kent, 'Sustainable Development and IIAs: From Objective to Practice', in A. de Mestral and C. Lévesque (eds.), *Improving International Investment Agreements* (2013), 284; J. A. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (2013); H. Mann, 'Reconceptualizing International Investment Law: Its Role in Sustainable Development', (2013) 17 *Lewis & Clark Law Review* 521; Z. Huaqun, 'Balance, Sustainable Development, and Integration: Innovative Path for BIT Practice', (2014) 17 JIEL 299; M. Chi, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications* (2018); G. M. Zagel, 'Achieving Sustainable Development Objectives in International Investment Law', in J. Chaisse et al. (eds.), *Handbook of International Investment Law and Policy* (2020), 1933.

[4]See, e.g., E. Kentin, 'Sustainable Development in International Investment Dispute Settlement: The ICSID and NAFTA Experience', in N. Schriver and F. Weiss (eds.), *International Law and Sustainable Development: Principles and Practices* (2004), 309; C. Brown, 'Bringing Sustainable Development Issues before Investment Treaty Tribunals', in M.-C. Cordonier Segger et al. (eds.), *Sustainable Development in World Investment Law* (2011), 175; C. Henckels, 'Balancing Investment Protection and Sustainable Development in Investor-State Arbitration: The Role of Deference', in A. K. Bjorklund (ed.), *Yearbook on International Investment Law & Policy 2012–2013* (2014), 305; R. Moloo and J. J. Chao, 'International Investment Law and Sustainable Development: Bridging the Unsustainable Divide', in Bjorklund, ibid., at 273; K. Berner, 'Reconciling Investment Protection and Sustainable Development', in S. Hindelang and M. Krajewski (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016), 178; P. Acconci, 'Sustainable Development and Investment: Trends in Law-Making and Arbitration', in A. Gattini et al. (eds.), *General Principles of Law and International Investment Arbitration* (2018), 290; M. Chochorelou and C. Espaliu Berdud, 'Sustainable Development in New Generation FTAs: Could Arbitrators Further the Principle through ISDS?', (2018) 27 RECIEL 176.

[5]See, e.g., *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award of 2 June 2000.

[6]See, e.g., *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006.

[7]See, e.g., *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005; *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award of 2 August 2010.

[8]See, e.g., *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award of 17 February 2000.

[9]See, e.g., *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award of 8 June 2009.

[10]See, e.g., Newcombe, *supra* note 1, at 403 ('Despite the overwhelming lack of express textual references to sustainable development principles in IIAs, investment treaty tribunals have – within the bounds of the specific treaty in question – integrated sustainable development principles by allowing *amici curiae* to participate in investment treaty arbitrations, holding that non-discriminatory regulation is not expropriatory, and emphasizing good governance principles such as the rule of law, transparency and accountability and prohibitions on arbitrary and discriminatory conduct'); see Henckels, *supra* note 4, at 325 ('Investment tribunals' review of measures adopted to promote sustainable development – in terms of environmental, social and cultural measures – displays varying approaches to deference'); Berner, *supra* note 4, at 190 ('A critical review of cases raising sustainable development concerns reveals, however, that arbitral tribunals tend not to approach interpretation as a

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a fact-finding survey, Kathryn Gordon and her collaborators have focused on the identification of sustainable development-sensitive keywords that are mentioned by tribunals (i.e., 'environment', 'corruption', 'labour conditions', 'labour standards', 'labour law' and 'human rights').[11] Despite a clear interest in the way investment arbitration is tackling sustainable development, these analyses do not provide an examination of how tribunals have expressly referred to the concept when adjudicating investment disputes.

This article contributes to the literature examining the intersection between sustainable development and investment arbitration in a very specific way. To be sure, it does not focus on decisions where the reasoning of the tribunal may have been implicitly influenced by sustainable development concerns. When adopting the 17 Sustainable Development Goals (SDGs) and 169 related targets, the General Assembly of the United Nations made clear that private investment can play a crucial role in achieving sustainable development.[12] It has also been argued that international investment agreements are policy tools that can affect several connections between SDGs and foreign direct investment, constituting both solutions and challenges.[13] Given the breadth of issues that relate to SDGs, inferring how tribunals have been inspired by these goals in their reasoning leads to methodological challenges when identifying relevant cases. By contrast, the more limited objective of this article is to explore how tribunals have actually used the term 'sustainable development' when adjudicating investment disputes. While decisions that are consistent with SDGs might evidence an implicit consideration of the concept, a more targeted analysis of instances where tribunals have expressly engaged with sustainable development remains – to the author's knowledge – to be undertaken.

Have arbitration tribunals acknowledged the relevance of the concept of sustainable development when adjudicating international investment disputes? This article draws on exploratory research in order to provide general insights pertaining to the use of sustainable development in investment arbitration.[14] It relies on a content analysis of decisions of investment arbitration tribunals that include at least one reference to the term 'sustainable development'. More specifically, the article relies on a full-text search of dispute documents included in the Investor-State LawGuide database.[15] As of July 2023, a total of 683 dispute documents available in English and with at least one reference to 'sustainable development' were retrievable from the

single combined operation. What is more, arbitral tribunals often refrain from disclosing if, how, and to which extent they have taken sustainable development concerns into account'); Acconci, *supra* note 4, at 305 ('Sustainable development issues have been brought before a relevant number of investment treaty-based arbitration tribunals giving rise to different conclusions').

[11]K. Gordon et al., 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey', (2014) *OECD Working Papers on International Investment* 2014/01.

[12]United Nations General Assembly, Transforming our World: The 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1 (2015), para. 67.

[13]See, e.g., L. Johnson, 'FDI, International Investment Agreements and the Sustainable Development Goals', in M. Krajewski and R. T. Hoffmann (eds.), *Research Handbook on Foreign Direct Investment* (2019), 126, at 148 ('The SDGs also provide a useful and essential framework for analyzing [international investment agreements] as a policy tool for influencing [foreign direct investment] flows … and ensuring that [international investment agreements] are designed to meet modern needs and priorities'); L. Johnson et al., 'Aligning International Investment Agreements with the Sustainable Development Goals', (2019) 58 *Columbia Journal of Transnational Law* 58, at 63 ('The SDGs provide a framework against which today's analysts can evaluate the features and effects of existing [international investment agreements], and consider the role such agreements could play'). For a more critical perspective see E. U. Petersmann, *Transforming World Trade and Investment Law for Sustainable Development* (2022), at 3–4 ('[P]rotecting the SDGs requires going beyond the social idealism of UN General Assembly Resolutions, political declarations, and intergovernmental power politics by promoting legal and constitutional reforms … so that world trade and investment law can contribute to transforming our world through limiting environmental pollution and other abuses of public and private power').

[14]For an example of explorative research focusing on references to human rights in investment arbitration see S. Steininger, 'What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration', (2018) 31 LJIL 33.

[15]Investor-State LawGuide, available at new.investorstatelawguide.com.

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database. Given that actual decisions rendered by investment arbitration tribunals constitute the primary focus of the analysis, the search has been refined by considering the following document types: 'awards on costs'; 'decisions on rectification, supplementary reasons or interpretation'; 'decisions of annulment committee'; 'decisions on arbitrator/counsel challenges'; 'decisions on consolidation'; 'decisions on interim measures of protection'; 'decisions on jurisdiction or preliminary questions'; 'decisions on place of arbitration'; 'decisions on stay of execution'; 'final awards on jurisdiction, merits or damages'; 'partial awards or decisions on the merits'; 'procedural orders'; and 'separate opinions'. Decisions on counterclaims have also been identified from the 'other' category, and orders from tribunals have been retrieved from the '*amicus curiae*/non-party submissions' category of documents. By relying on these search criteria, all documents submitted by respondent states, claimants, *amicus curiae*, experts or states acting as third parties have been excluded from the analysis. Overall, 91 decisions have been selected and are listed in the Appendix.

The analysis demonstrates that the use of sustainable development in international investment arbitration is both marginal and problematic, thus showing a strong disconnect from efforts deployed to include the concept in investment policymaking and broader international adjudication. The article proceeds in three steps. First, it highlights initiatives – from the United Nations Conference on Trade and Development (UNCTAD), the G20 and recent international investment agreements – that are encouraging the consideration of sustainable development in investment policymaking. Second, it briefly explores the use of sustainable development in international adjudication, outside investment arbitration. Third, through the analysis of the content of decisions in international investment arbitration, it demonstrates that tribunals have generally failed to expressly engage with sustainable development in their findings and to fully consider its integrative nature.

2. Sustainable development in investment policymaking

Before exploring references made by investment arbitration tribunals to sustainable development, it is worth contextualizing the analysis by shedding light on calls for a stronger consideration of the concept in international investment law. While it is clear that international investment agreements 'were never intended to be comprehensive sustainable development treaties',[16] efforts deployed at the international level to establish sustainable development as a cornerstone of investment policymaking suggest that it has definitely integrated a broader discourse on international investment law. In other words, the expectation that tribunals explicitly use sustainable development when adjudicating investment disputes is partly anchored within the broader investment policymaking context in which tribunals evolve.

UNCTAD has been at the forefront of the elaboration of initiatives that seek to integrate sustainable development in international investment law. After an initial version that was launched in 2012,[17] it published a revised version of the Investment Policy Framework for Sustainable Development in 2015.[18] The document is an initiative of UNCTAD's secretariat and was not negotiated between states. It nevertheless includes a set of 'core principles' that serve as design criteria for investment strategies, policies and treaties.[19] At the international level, it emphasizes the negotiation of 'sustainable-development-friendly' international investment agreements that incorporate concrete commitments to promote and facilitate investment for

[16]See Newcombe, *supra* note 1, at 402.

[17]UNCTAD, *Investment Policy Framework for Sustainable Development* (2012). See also J. Zhan, 'Investment Policies for Sustainable Development: Addressing Policy Challenges in a New Investment Landscape', in R. Echandi and P. Sauvé (eds.), *Prospects in International Investment Law and Policy* (2013), 13, at 29.

[18]UNCTAD, *Investment Policy Framework for Sustainable Development 2015* (2015).

[19]Ibid., at 6–7.

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sustainable development, balance state commitments with investor obligations, ensure regulatory space for development and reform the investor-state dispute settlement mechanism.[20]

Some authors have highlighted the contribution of the initiative regarding broader issues in international investment law. For example, when arguing that sustainable development now constitutes the main purpose of international investment agreements, Federico Ortino partly relies on the Investment Policy Framework for Sustainable Development.[21] According to him, the relevance of sustainable development for investment policy results from its wide acceptance as a policy objective for the global community and is further evidenced by the formulation of the initiative by UNCTAD.[22] The growing emphasis on sustainable development that states are pursuing through initiatives such as this framework can be considered as having shifted the 'object and purpose' of investment treaties from economic prosperity to sustainable development.[23] Moreover, Wolfgang Alschner and Elisabeth Tuerk stress that states must be more proactive in fostering a more sustainable investment law system.[24] In order to achieve this, they suggest that policymakers can take guidance from UNCTAD's Investment Policy Framework for Sustainable Development to address the broader nexus between investment treaties and sustainable development.[25]

More recently, UNCTAD also launched the International Investment Agreements Reform Accelerator.[26] Considering that the reform of international investment agreements has not taken off on a large scale, the document seeks to help accelerate the reform of 'old-generation treaties' by encouraging the consideration of sustainable development. According to UNCTAD:

> [International investment agreements] were not designed to undermine the legitimate regulatory function of the state, especially in emergency situations. However, they were concluded, for the most part, during a different era with less consideration for today's global challenges relating to public health, the environment and sustainable development goals more broadly. [International investment agreements] concluded 20 to 60 years ago do not reflect today's global challenges.[27]

The initiative focuses on eight provisions – i.e., definition of investment; definition of investor; national treatment; most-favoured-nation treatment; fair and equitable treatment; full protection and security; indirect expropriation; and public policy exceptions – that are typically found in international investment agreements and for which a trend of reform that is in line with SDGs has been identified. For each provision, UNCTAD 'identifies sustainable development-oriented policy options ... and proposes ready-to-use model language that implements these options'.[28]

Other international forums have also promoted the consideration of sustainable development in the context of international investment law, although in a less detailed way. One example can be found in the 'Guiding Principles for Global Investment Policymaking' of the G20.[29] These guiding

[20]Ibid., at 77–9.

[21]F. Ortino, 'Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing', (2017) 30 LJIL 71.

[22]Ibid., at 79–81.

[23]Ibid., at 78–9 ('Despite the original focus of investment treaties on "economic" prosperity, there are several reasons supporting the argument that the underlying, long-term purpose of investment policies today is best captured by the ore complex concept of sustainable development understood, for the time being, as involving the simultaneous pursuit of economic prosperity, environmental quality and social equity').

[24]W. Alschner and E. Tuerk, 'The Role of International Investment Agreements in Fostering Sustainable Development', in F. Beatens (ed.), *Investment Law within International Law: Integrationist Perspectives* (2013), 217, at 230.

[25]Ibid., at 229–31.

[26]UNCTAD, *International Investment Agreements Reform Accelerator* (2020).

[27]Ibid., at 3.

[28]Ibid., at 2.

[29]G20, 'Annex III: G20 Guiding Principles for Global Investment Policymaking', available at www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf.

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principles appear in Annex III of a statement adopted at a meeting of the G20 Trade Ministers in July 2016. While the G20 members explicitly characterized the principles as 'non-binding', they identified three objectives to provide general guidance for investment policymaking: '(i) fostering an open, transparent and conducive global policy environment for investment, (ii) promoting coherence in national and international investment policymaking, and (iii) *promoting* inclusive economic growth and *sustainable development*'.[30] The concept of sustainable development is expressly mentioned in paragraph V of the document, which calls for investment policies to be aimed at fostering investment, in a way that is 'consistent with the objectives of sustainable development'.[31]

Given that the broader objective of this article focuses on the consideration of sustainable development in investment arbitration, one point must be clarified. The idea here is not to suggest that these international initiatives are directly relevant for investment arbitration. One does not expect that an investment arbitration tribunal would have to rely on the UNCTAD's Investment Policy Framework for Sustainable Development to determine whether a state has violated its obligations under an international investment agreement. However, these initiatives are useful to show that the concept of sustainable development has integrated investment policymaking. In other words, without expecting that they will be used in investment arbitration, these initiatives become relevant to the extent that they evidence the emergence of a coherent objective pertaining to the inclusion of sustainable development in investment policymaking.

The increasing relevance of sustainable development in investment policymaking is reflected in the adoption of international investment agreements that expressly refer to the concept.[32] Most of these references are included in preambles of bilateral investment treaties (BITs) or in preambles of free trade agreements that include a chapter on investment. One early example can be found in the North American Free Trade Agreement (NAFTA), in which the parties resolved to 'promote sustainable development'.[33] More elaborate language can be found in other agreements. For example, in the Canada-Peru BIT, the parties recognize that:

> the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development.[34]

Similarly, the Denmark-Indonesia BIT relies on the recognition that 'a fair and equitable treatment of investments will stimulate the flow of private capital between the Contracting Parties, and promote sustainable development'.[35]

In addition to preambles, other international investment agreements include a reference to sustainable development in their provisions. In what appears to be the first BIT that includes such a reference, the protocol of the El Salvador-Switzerland BIT provides that 'in accordance with the

[30]Ibid., introductory paragraph.

[31]Ibid., para. V.

[32]The Electronic Database of Investment Treaties found 375 documents that include at least one reference to 'sustainable development' as of July 2023. See Electronic Database of Investment Treaties, available at edit.wti.org/document/investment-treaty/search.

[33]1992 North American Free Trade Agreement (NAFTA), 32 ILM 289 (1993), preamble.

[34]2006 Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments, available at investmentpolicy.unctad.org/international-investment-agreements/treaty-files/626/download, preamble.

[35]2007 Agreement between the Government of the Republic of Indonesia and the Government of the Kingdom of Denmark concerning the Promotion and Protection of Investments, available at investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5638/download, preamble.

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principles set forth in these Articles, the concepts of sustainable development and environmental protection are applicable to all investments'.[36] More recently, provisions pertaining to the definition of investment,[37] the right to regulate[38] and corporate social responsibility[39] also refer to sustainable development. Although not currently in force, the China-EU Comprehensive Agreement on Investment includes an entire section entitled 'Investment and Sustainable Development', in which '[t]he Parties are committed to pursue sustainable development, and recognize that economic development, social development and environmental protection are interdependent and mutually reinforcing dimensions of sustainable development'.[40]

Of course, some references to sustainable development in international investment agreements remain vague and relatively difficult to operationalize. To the extent that they demonstrate an evolution in the outcome of the negotiations between states, the inclusion of these references is nevertheless an important development as far as investment policymaking is concerned. In addition to international initiatives that seek to encourage a stronger consideration of sustainable development in investment policymaking, some states have chosen to adopt agreements that materialize this consideration.

In sum, several international initiatives have emerged to encourage states to take into consideration sustainable development in investment policymaking. In light of the guidance for states in the elaboration of investment policies, the negotiation of investment agreements and the reform of the investment regime, sustainable development appears as a point of convergence to expose a vast number of possibilities. The increasing number of investment agreements referring to this concept provides further evidence that states are considering the concept when negotiating international investment agreements. While it may take time before a critical mass of international investment agreements include such a reference, it is clear that the call for all stakeholders to implement the SDGs has left its mark on investment policymaking.

[36]1994 Accord entre la Confédération suisse et la République d'El Salvador concernant la promotion et la protection réciproque des investissements, available at investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1137/download, Ad Arts. 2 and 3 ('Il est entendu qu'en conformité avec les principes énoncés dans ces articles, les concepts de développement durable et de protection de l'environnement sont applicables à tous les investissements').

[37]See, e.g., 2016 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, available at investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download, Art. 1(3) ('Investment means an enterprise within the territory of one State established, acquired, expanded or operated, in good faith, by an investor of the other State in accordance with law of the Party in whose territory the investment is made taken together with the asset of the enterprise which contribute sustainable development of that Party and has the characteristics of an investment involving a commitment of capital or other similar resources, pending profit, risk-taking and certain duration').

[38]See, e.g., 2021 Acuerdo entre la República de Colombia y el Reino de España para la promoción y protectió recíproca de inversiones, available at investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6373/download, Art. 14(1) ('The Contracting Parties mutually recognize their right to regulate within their Territories through reasonable measures to achieve legitimate public policy objectives, such as security, sustainable development, social security, privacy, data protection, promotion or protection of cultural diversity, human rights, health, education, social services, consumers, natural resources or the environment.' (unofficial translation)).

[39]See e.g., 2020 Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, available at investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5912/download, Art. 12(1) ('Investors and their investments shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article and internal policies, such as statements of principle that have been endorsed or are supported by the Parties').

[40]2021 EU-China Comprehensive Agreement on Investment, available at policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/eu-china-agreement-principle_en, Section IV, subsection I, Art. 1(2).

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3. Sustainable development in international adjudication

Another point worth considering before examining decisions of investment arbitration tribunals is how sustainable development has been taken into consideration in international adjudication more broadly. While an exhaustive analysis of decisions that expressly refer to the concept is beyond the scope of this article,[41] a brief analysis of decisions from the International Court of Justice (ICJ) and the Appellate Body of the World Trade Organization (WTO) hints towards the recognition of the relevance of sustainable development when adjudicating international disputes.

Two judgments of the ICJ explicitly refer to sustainable development. In the *Gabčíkovo-Nagymaros Project Case*, the Court had to address several issues related to the construction and operation of a system of locks on the Danube as a joint investment governed by a treaty signed between Hungary and Czechoslovakia in 1977.[42] When deciding the legal consequences for the parties arising from its judgment, the ICJ concluded that Hungary and Slovakia had an obligation to negotiate and to consider the environmental impact of the project.[43] More specifically, the Court mentioned the following:

> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when states contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.[44]

Even if the treaty of 1977 did not expressly refer to sustainable development, the ICJ relied on the concept to guide the obligation of the parties to negotiate a solution, implicitly suggesting that it was part of the context in which the terms of the treaty had to be interpreted. As emphasized by Philippe Sands, the Court used the concept of sustainable development with a view to achieving 'an accommodation of views and values whilst leaving to the parties the task of fleshing out the harder practical consequences'.[45]

The other judgment of the ICJ which includes a reference to sustainable development is the *Pulp Mills on the River Uruguay* case.[46] The dispute concerned the construction of two pulp mills on the River Uruguay, allegedly in breach of an international treaty signed between Argentina and Uruguay in 1975. Noting that the object and purpose of the treaty was 'to achieve "the optimum and rational utilization of the River Uruguay"',[47] the Court further observed that 'such use should allow for

[41]See, e.g., P. Sands, 'International Courts and the Application of the Concept of "Sustainable Development"', (1999) 3 *Max Planck Yearbook of United Nations Law* 389; L. Trevisan, 'The International Court of Justice's Treatment of "Sustainable Development" and Implications for Argentina v Uruguay', (2009) 10 *Sustainable Development Law and Policy* 40; K. Hagiwara, 'Sustainable Development before International Courts and Tribunals: Duty to Cooperate and States' Good Fate', in C. Voigt (ed.), *International Judicial Practice on the Environment: Questions of Legitimacy* (2019), 167.

[42]*Case concerning the Gabčíkovo-Nagymaros Project* (*Hungary v. Slovakia*), Judgment of 25 September 1997, [1997] ICJ Rep. 7.

[43]Ibid., at 74–5, paras. 139–140.

[44]Ibid., at 75, para. 140.

[45]See Sands, *supra* note 41, at 394.

[46]*Case concerning Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*), Judgment of 20 April 2010, [2010] ICJ Rep. 14.

[47]Ibid., at 48, para. 75.

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sustainable development'.[48] When interpreting another provision of the treaty, the ICJ mentioned the following:

> Regarding Article 27, it is the view of the Court that its formulation reflects not only the need to reconcile the varied interests of riparian states in a transboundary context and in particular in the use of a shared natural resource, but also the need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development ... Consequently, it is the opinion of the Court that Article 27 embodies this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development.[49]

In addition to the ICJ, the Appellate Body of the WTO has expressly used sustainable development in some decisions. One particularly relevant instance is the Appellate Body's decision in *United States – Shrimp*.[50] Having to decide on the legality of a ban on the importation of shrimps and shrimp products imposed by the United States, the Appellate Body interpreted GATT Article XX(g) by considering the reference to sustainable development in the preamble of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement):

> The words of Article XX(g), "exhaustible natural resources", were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the WTO Agreement – which informs not only the GATT 1994, but also the other covered agreements – explicitly acknowledges "the objective of sustainable development".[51]

The Appellate Body thus considered the 'objective of sustainable development' as part of the context from which the terms of the treaty had to be interpreted.[52]

Moreover, when interpreting the chapeau of GATT Article XX, the Appellate Body also referred to sustainable development. At this stage of the analysis, it concluded that inclusion of sustainable development in the preamble of the WTO Agreement 'must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement'.[53] The reference to sustainable development appears here to further inform the object and purpose of the introductory paragraph of GATT Article XX, which the Appellate Body considered as seeking to prevent abuses of the general exceptions.[54] In other words, the reference to the objective of sustainable development in the preamble of the WTO Agreement becomes relevant for the contextual interpretation of the general exceptions included in the GATT.

[48]Ibid., at 48, para. 75.

[49]Ibid., at 74–5, para. 177.

[50]Appellate Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, adopted 12 October 1998, WT/DS58/AB/R.

[51]Ibid., para. 129.

[52]While this approach can be reconciled with the textual approach provided by VCLT Article 31, the Appellate Body considered that its conclusion regarding the interpretation of GATT Article XX(g) was 'in line with the principle of effectiveness in treaty interpretation'. See ibid., para. 131.

[53]Ibid., para. 153.

[54]Ibid., para. 151.

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Ascertaining the legal nature of sustainable development is beyond the scope of this article.[55] To be clear, the argument here is not to suggest that sustainable development has emerged as a binding rule or principle of international law in international adjudication. It must also be highlighted that the scope of the concept has often been limited to its economic and environmental dimensions, without a clear consideration of social aspects. As further examined below, such a narrow understanding fails to fully acknowledge the integrative nature of sustainable development and is problematic in itself. Yet, the analysis of the use of sustainable development in international adjudication outside investment arbitration reveals that it remains relevant as a 'concept' or an 'objective' in international law.[56] Both the ICJ and the Appellate Body of the WTO have thus developed a reasoning – sometimes even when the concept was not expressly mentioned in the applicable treaty – that articulates the relevance of sustainable development as an integral part of the context in which international obligations are embedded.

4. A marginal and problematic use in investment arbitration

Having highlighted that sustainable development has left a mark in both investment policymaking and international adjudication, one can expect that arbitration tribunals have also considered this concept when adjudicating investment disputes. The concept of sustainable development bears implications for the interpretation of international investment obligations by arbitration tribunals, at least for some treaty-based disputes. Article 31(1) of the Vienna Convention on the Law of Treaties provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of their object and purpose'.[57] While older international investment agreements do not include any references to sustainable development, the fact that preambles of more recent treaties explicitly refer to this concept must be taken into consideration as part of the contextual interpretation of (at least some) investment treaty obligations.[58]

The idea here is not to suggest that investment arbitration tribunals have a legal obligation to expressly refer to sustainable development in their awards. As long as a tribunal provides a reasoned decision on every question submitted by the parties to a dispute, there is no actual requirement for it to engage with sustainable development in the content of the award.[59] Moreover, there is no expectation to see sustainable development overriding any substantive

[55]See, e.g., N. J. Schriver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (2008); V. Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm', (2012) 23 EJIL 377; R. E. Kim, 'The Nexus between International Law and the Sustainable Development Goals', (2016) 25 RECIEL 15.

[56]See Sands, *supra* note 41, at 393 ('[A]s a "concept" it has both a procedural/temporal aspect ... and a substantive aspect'); Schriver, ibid., at 24 ('Sustainable development or elements thereof were also discussed in judgments of the International Court of Justice, by the WTO dispute settlement and by law of the sea tribunals. This is not to say that the meanings of the concept of sustainable development and its legal status are unambiguously clear'); Barral, ibid., at 387 ('Although this fell short of granting it customary nature, sustainable development is now more than just a concept; it is an objective, and an objective with which specific state conduct ... must be consistent').

[57]1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 31(1).

[58]See Henckels, *supra* note 4, at 306 ('The absence of textual signaling as to the importance of sustainable development and related objectives may explain the reluctance of tribunals to refer to the concept in their decision-making. More recent investment agreements referring to these objectives have thus far generated few cases, so the extent to which these references will influence future decisions and shape the interpretation of international investment law is unclear'); G. Sacerdoti, 'Investment Protection and Sustainable Development: Key Issues', in S. Hindelang and M. Krajewski (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016) 19, at 21; Zagel, *supra* note 3, at 1948 ('Broadening the object and purpose of an [international investment agreement] from a mere economic to a sustainable development perspective induces a sustainable development-friendly application and interpretation ... in the light of Art. 31(1) VCLT').

[59]See, e.g., 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159, art 48(3) ('The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based').

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obligations included in international investment agreements or providing a clear-cut solution when deciding investment disputes. Yet, a failure to acknowledge the relevance of the concept is quite problematic when the applicable investment agreement includes an express reference to sustainable development (e.g., NAFTA or the Energy Charter Treaty (ECT)). Interestingly, out of the 91 decisions that are included in the present analysis, 42 relate to disputes based on a treaty that refers to sustainable development (mostly in their preamble).[60] At the very least, one could expect a consideration of the concept as part of a contextual interpretation of treaty obligations in the adjudication of this subset of investment disputes.

The objective of this section is to critically appraise how tribunals have used the concept of sustainable development when adjudicating a dispute, regardless of whether it was included in the applicable treaty. Relying on the content of the decisions as a starting point and following an exploratory research design, this section explores the extent to which the term 'sustainable development' has been integrated in international investment arbitration. An empirical observation of these decisions suggests that tribunals generally do not recognize the relevance of the concept of sustainable development when adjudicating investment disputes. Decisions of tribunals demonstrate both a weak engagement with the concept and a failure to fully acknowledge its integrative nature.

4.1 Weak engagement with sustainable development

Out of the 91 decisions that have been identified, 41 decisions mention 'sustainable development' without referring to this term as a distinctive concept. For example, there are 23 decisions in which such references are strictly limited to citations of decisions in the case between *PNG Sustainable Development Program Ltd.* v. *Independent State of Papua New Guinea*.[61] In 18 other instances,

[60]See Appendix. By contrast, 42 decisions relate to disputes that are based on a treaty that does not refer to sustainable development. The seven decisions for which 'N/A' appears under the column 'Reference to "sustainable development" in the treaty' refer to disputes that are not based on an international investment agreement.

[61]See *Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35, Award of 24 November 2021, note 1065; *Alicia Grace and others v. United Mexico States*, ICSID Case No. UNCT/18/4, Decision on the Claimants' Application for Interim Measures of 19 December 2019, note 64; *Almasryia for Operating & Maintaining Touristic Construction Co., LLC v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent's Application Under Rule 41(5) of the ICSID Arbitration Rules of 1 November 2019, note 45; *Almasryia for Operating & Maintaining Touristic Construction Co., LLC v. State of Kuwait*, ICSID Case No. ARB/18/2, Dissenting Opinion on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules of 1 November 2019, note 1; *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Final Award of 3 September 2019, note 1151; *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21, Award of 30 November 2017, note 2; *BSG Resources Limited v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 3 of 25 November 2015, note 63; *Dominion Minerals Corp. v. Republic of Panama*, ICSID Case No. ARB/16/13, Decision on the Respondent's Applications for the Stay of Enforcement of the Award and under Arbitration Rule 41(5) of 21 July 2022, note 146; *Eskosol S.p.A. in Liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5) of 20 March 2017, note 43; *Espíritu Santo Holdings, LP and L1bre Holding, LLC v. United Mexican States*, ICSID Case No. ARB/20/13, Procedural Order No. 3 of 3 June 2022, note 173; *Espíritu Santo Holdings, LP and L1bre Holding, LLC v. United Mexican States*, ICSID Case No. ARB/20/13, Procedural Order No. 8 of 5 November 2022, note 67; *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Decision on Claimants' Second Request for Provisional Measures of 22 November 2016, note 27; *Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Claimants' Request for Provisional Measures of 30 April 2015, notes 101, 106, 115, 124; *Gerald International Limited v. Republic of Sierra Leone*, ICSID Case No. ARB/19/31, Decision on the Claimant's Request for Provisional Measures of 28 July 2020, notes 133, 145, 158, 168, 169, 177, 215; *Grenada Private Power Limited and WRB Enterprise, Inc. v. Grenada*, ICSID Case No. ARB/17/13, Decision on Provisional Measures of 26 September 2018, note 7; *Mr. Nasib Hasanov v. Georgia*, ICSID Case No. ARB/20/44, Decision on Claimant's Application for Provisional Measures of 14 June 2022, paras. 77, 80, 89; *Hela Schwarz GmbH v. People's Republic of China*, ICSID Case No. ARB/17/19, Procedural Order No. 2 of 10 August 2018, note 38; *Hydro S.r.l. and others v. Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures of 3 March 2016, notes 60–1; *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 5 of 19 September 2019, note 14; *Kompozit LLC v. Republic of Moldova*, SCC Arbitration EA No. 2016/095, Emergency Award in Interim Measures of 14 June 2016, paras. 82, 87; *Mainstream Renewable Power Ltd and others v.*

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references are limited to the name of a governmental agency (e.g., Ministry of Sustainable Development),[62] the name of a non-governmental organization (e.g., International Institute for Sustainable Development)[63] or the title of a document that is referred to by the tribunal.[64] These references thus appear to be more accidental than providing an actual use of sustainable development in the adjudication of investment disputes.

In 20 other decisions, tribunals have expressly referred to sustainable development only when reproducing the content of another document that includes such a reference, without further engaging with the concept in their reasoning.[65] For example, in *Canadian Cattlemen for Fair Trade* v. *United States of America*, the sole reference to sustainable development can be found in the section of the Award on Jurisdiction that presents legal provisions relevant to the dispute and the content of the preamble of NAFTA.[66] A tribunal responsible for the resolution of four investment disputes between foreign investors and Czech Republic cited a provision of a domestic

Federal Republic of Germany, ICSID Case No. ARB/21/26, Decision on the Respondent's Application Under ICSID Arbitration Rule 41(5) of 18 January 2022, note 84; *Rizzani de Eccher S.p.A., Obrascón Huarte Lain S.A., and Trevi S.p.A. v. State of Kuwait*, ICSID Case No. ARB/17/8, Decision on Provisional Measures of 23 November 2017, note 135; *State General Reserve Fund of the Sultanate of Oman v. Republic of Bulgaria*, ICSID Case No. ARB/15/43, Award of 13 August 2019, note 6.

[62]See *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction of 29 June 2018, para. 62; *Festorino Invest Limited and others v. Poland*, SCC Case No. V2018/098, Award of 31 June 2021, paras. 412, 441; *Gardabani Holdings B.V. and others v. Georgia*, SCC Case No. V2018/039, Partial Award of 19 April 2021 at ix, paras. 1, 13, 16, 22, 31 and note 2; *Gardabani Holdings B.V. and others v. Georgia*, SCC Case No. V2018/039, Second Partial Award on Damages of 23 November 2021 at vi, paras. 2, 8; *Gardabani and Silk Road v. Georgia*, ICSID Case No. ARB/17/29, Award of 27 October 2022, at ix, paras. 2, 13, 22, 31; *Misen Energy AB (PUBL) and Misen Enterprises AB v. Ukraine*, ICSID Case No. ARB/21/15, Decision on the Respondent's Proposal to Disqualify Dr. Stanimir A. Alexandrov of 15 April 2022, para. 53; *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award of 16 September 2015, paras. 25–26, 180; *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12 Procedural Order No. 2 of 18 January 2021, Annex A; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Award of 9 April 2015, para. 47.

[63]See *Methanex Corporation v. United States of America*, Procedural Order of 19 March 2004, para. 1; *Methanex Corporation v. United States of America*, Procedural Order of 6 April 2004, para. 1; *Methanex v. USA*, Final Award, *supra* note 7, Part II-C-15 to Part II-C-17, Part II-C-23, and Part IV-B-13; *Santa Elena v. Costa Rica*, *supra* note 8, para. 46.

[64]See *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016, para. 48; *David Aven et al. v. Republic of Costa Rica*, Case No. UNCT/15/3, Final Award of 18 September 2018, at vi; *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award of 19 September 2013, para. 1836; *ESPF Beteiligungs GMBH, ESPF NR. 2 Austria Beteiligungs GMBH, and Infraclass Energie 5 GMBH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award of 14 September 2020, note 479; *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction of 4 December 2017, note 523.

[65]In addition to the decisions discussed in this paragraph, see *AHG Industry GmbH & Co. KG v. Republic of Iraq*, ICSID Case No. ARB/20/21, Award on the Respondent Application under ICSID Rule 41(5) of 30 September 2022, paras. 48, 79 and note 93; *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 11 of 28 January 2020, at 2; *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à R.I. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award of 4 May 2017, para. 100; *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award of 3 June 2021, para. 557; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award of 16 May 2018, para. 116; *Natland Investment Group N.V. (Netherlands) and others v. Czech Republic*, PCA Case No. 2013-35, Partial Award of 20 December 2017, paras. 92, 105; *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SCIAR v. Kingdom of Spain*, SCC Arbitration No. 2015/063, Final Arbitral Award of 15 February 2018, paras. 98, 130, 217, 513; *SD Myers Inc v. Government of Canada*, Separate Opinion by Dr. Bryan Schwartz of 12 November 2000, note 8, paras. 95, 107; *Sevilla Beheer and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum of 11 February 2022, paras. 212, 253, 445, 448, 692, 840; *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award of 31 July 2019, para. 103; *Adel A. Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award of 3 November 2015, note 777; *Watkins Holdings S.À.R.L., Watkins (NED) B.V., Watkins Spain S.L., Repdier S.L., Northsea Spain S.L. Parque Eólico Marmellar S.L., and Parque Eólico La Boga S.L. v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award of 21 January 2020, at 30; *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award of 4 October 2006, para. 145.

[66]*Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction of 28 January 2008, para. 32.

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legislation adopted by the respondent state that includes a reference to sustainable development.[67] Likewise, when detailing the factual and regulatory background, the tribunal in *Silver Ridge Power BV* v. *Italian Republic* cited a directive adopted by the European Parliament and the Council, which provides that '[t]he Community recognizes the need to promote renewable energy sources as a priority measure given that their exploitation contributes to environmental protection and sustainable development'.[68] All these instances include references to sustainable development that have been copied by the tribunal from the text of another source, without being echoed when the tribunal has provided its own reasoning.

Such a lack of consideration for sustainable development is problematic. Of course, the inclusion of the concept in the preamble of an investment agreement or in the text of domestic legislation is sometimes done in fairly broad terms and is often limited to the 'promotion' of sustainable development.[69] Yet, when a tribunal reproduces the text of the provisions that it considers relevant without actually engaging with what the reference to sustainable development entails for the resolution of an investment dispute, it misses an opportunity to explain the articulation of the concept with investment obligations. To reiterate, there is no expectation that the tribunal will decide the outcome of the case solely by relying on the reference to sustainable development. It is nevertheless striking that these tribunals have acknowledged the concept as an integral part of the legal background, without explaining how it should be taken into consideration in their analysis.

The 30 other decisions identified in this research are characterized by at least one reference to sustainable development in the text provided by the tribunal itself. In eight decisions, references are provided in the sections of the decisions summarizing the factual background or the arguments of the parties, without appearing in the tribunal's analysis afterwards.[70] For example, in addition to multiple references included in the name of organizations and in provisions of domestic legislation, the tribunal in *Eco Oro Minerals* v. *Colombia* presented the position of the respondent state by recalling its consideration to preserve the environment:

> According to Colombia, it has 'a particularly significant moral responsibility to conserve and preserve its environment for the benefit of the planet and mankind.' Articles 8, 58, 79 and 80 of the Political Constitution establish … the state's duty to plan the management of natural resources *to guarantee sustainable development*, their preservation and restoration and prevent and oversee environmental impairment factors.[71]

[67]See *WA Investments-Europa Nova Limited (Cyprus) v. Government of the Czech Republic*, PCA Case No. 2014-19, Award of 15 May 2019, para. 136; *I.C.W. Europe Investment Limited (United Kingdom) v. Government of the Czech Republic*, PCA Case No. 2014-22, Award of 15 May 2019, para. 136; *Photovoltaik Knopf v. Czech Republic*, PCA Case No. 2014-21, Award of 15 May 2019, para. 135; *Voltaic Network GmbH (Germany) v. Government of the Czech Republic*, PCA Case No. 2014-20, Award of 15 May 2019, para. 136.

[68]*Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award of 26 February 2021, para. 113. See also *Sunreserve Luxco Holdings S.À.R.L. (Luxembourg), Sunreserve Luxco Holdings II S.À.R.L. (Luxembourg) and Sunreserve Luxco Holdings III S.À.R.L. (Luxembourg) v. Italian Republic*, SCC Arbitration V No. 2016/32, Final Award of 25 March 2020, para. 104.

[69]See, e.g., NAFTA, *supra* note 33, preamble ('The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to … PROMOTE sustainable development … HAVE AGREED as follows').

[70]In addition to the decisions cited in this paragraph, see *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award on Jurisdiction of 13 June 2014, para. 38; *CMC Muratori Cementisti CMC Di Ravenna SOC. Coop, CMC Muratori Cementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa Austral, LDA v. Republic of Mozambique*, ICSID Case No. ARB/17/23, Award of 24 October 2019, para. 233; *Eni International BV and others v. Nigeria*, ICSID Case No. ARB/20/41, Procedural Order No. 4 of 7 March 2023, para. 31; *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum of 22 May 2012, para. 125; *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Stay of Enforcement of the Award of 21 February 2020, para. 27.

[71]*Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum of 9 September 2021, para. 85 (emphasis added).

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Similarly, in *Gold Reserve Inc.* v. *Bolivarian Republic of Venezuela*, the tribunal summarized the position of the parties regarding the claimant's mining rights in a concession in the following terms:

> Respondent claims that under Articles 91 and 109 of the Organic Law on the Environment, the Revocation Order was lawful because it was "founded" upon the Ministry's authority to revoke annual permits that are contrary to Venezuela's environmental laws and its constitutional obligation to protect the environment, *promote a sustainable development* and protect the rights of indigenous people. Claimant says this argument is misplaced.[72]

Some tribunals have also referred to sustainable development when parties made an argument regarding its promotion by a foreign investor.[73]

One aspect of decisions that has generated several references to sustainable development relates to the participation of *amicus curiae* in investment arbitration proceedings. Some tribunals have referred to sustainable development when describing the expertise of petitioners or their interests in the arbitration, often by citing the petitioners' own words.[74] Other references have been made when summarizing the content of an *amicus curiae* brief.[75] However, across seven decisions, such references have not led to further consideration in the tribunal's analysis. For example, after emphasizing that the Fundación para el Desarrollo Sustentable's objectives are to promote sustainable development, the tribunal in *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A.* v. *Argentine Republic* considered that the petition 'fails to provide … specific information to judge whether the [organization] possesses the expertise and experience to qualify as an appropriate *amicus curiae* in this case'.[76] The tribunal also considered that the petitioners did not state their specific interests in the particular case.[77] Ultimately, while granting an opportunity to apply for leave to make a submission, the tribunal denied the petitioners' request to attend the hearings and to access documents.[78] No reference to sustainable development was made in the subsequent Decision on Liability by the tribunal.[79]

While these references reflect the use of the concept by parties and third parties, the fact that tribunals have not subsequently referred to sustainable development considerably limits its relevance in investment arbitration. At best, these decisions demonstrate that sustainable

[72]*Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of 22 September 2014, para. 318 (emphasis added).

[73]See *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award of 31 January 2014, para. 128 ('The purpose of the project—apart from obtaining better economic and financial results—was to *enhance the sustainable development of Bolivia* through the development of state-of-the-art combined cycle technology, in accordance with the United Nations Framework Convention on Climate Change' (emphasis added)).

[74]See, e.g, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Procedural Order No. 6 of 21 July 2016, paras. 2, 15; *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (II)*, PCA Case No. 2009-23, Procedural Order No. 8 of 18 April 2011, para. 7; *Eco Oro Minerals Corp v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 6 of 18 February 2019, para. 15; *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Procedural Order No. 19 of 7 December 2018, para. 19; *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amicus Curiae' of 15 January 2001, para. 5.

[75]See, e.g, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award of 14 October 2016, para. 3.29.

[76]*Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae of 17 March 2006, para. 30.

[77]Ibid., para. 31.

[78]Ibid., para. 38.

[79]*Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability of 30 July 2010.

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development has been strategically used by the parties to a dispute to advance arguments while leaving the meaning of the concept open. As far as the arguments of the parties are concerned, this practice is particularly problematic. Depending on how the arguments have been articulated, one wonders if the absence of consideration for sustainable development by tribunals reflects a failure to take into consideration one of the arguments raised by the parties. With respect to *amicus curiae*, the refusal to consider the sustainable development expertise of an organization when disqualifying a petitioner to act as an *amicus curiae* clearly suggests that some tribunals have chosen to regard sustainability issues as beyond the scope of the disputes.

This leaves only 15 decisions which include a reference to sustainable development in the portion of the decision providing the actual findings of the tribunal (i.e., beyond the presentation of the parties' arguments or submissions by *amicus curiae*).[80] In some instances, such a reference is very succinct and appears only once throughout the entire decision.[81] For example, in *AES Corporation and TAU Power B.V.* v. *Republic of Kazakhstan*, the tribunal presented the ECT as establishing 'a multilateral framework for cross-border co-operation in the energy industry' that 'plays an important role as part of an international effort to build a legal foundation for energy security, based on the principles of open, competitive markets and sustainable development'.[82] In *El Paso Energy International Company* v. *Argentine Republic*, the tribunal's sole reference to sustainable development occurred when discussing the investor's legitimate expectations, stressing that 'an investor cannot pretend to have legitimate expectations of stability of environmental regulations … where concern for the protection of the environment and of sustainable development are high'.[83]

Other tribunals relied more extensively on sustainable development throughout their decisions and referred to the concept as an integral part of their findings. In addition to other references made when summarizing the arguments of the parties,[84] the tribunal in *Burlington Resources Inc* v. *Republic of Ecuador* recalled that sustainable development was enshrined in the constitution of the respondent state when determining the relevant legal framework.[85] In *Lone Pine Resources Inc.* v.

[80]See *AES Corporation and TAU Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award of 1 November 2013; *William Ralph Clayton, William Richard Clayton, Douglas Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009/04, Award on Jurisdiction and Liability of 17 March 2015; *William Ralph Clayton, William Richard Clayton, Douglas Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009/04, Dissenting Opinion of Professor Donald McRae of 10 March 2015; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No 5 of 2 February 2007; *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008; *Burlington Resources Inc v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims of 7 February 2017; *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award of 15 March 2016; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award of 31 October 2011; *Lone Pine Resources Inc. v. Government of Canada*, UNCITRAL, Final Award of 21 November 2022; *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim of 11 August 2015; *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Respondent's Objections under Rule 41(5) of the ICSID Arbitration Rules of 28 October 2014; *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures of 21 January 2015; *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award of 5 May 2015; *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award of 9 January 2015; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016.

[81]In addition to the decisions mentioned in the paragraph see *Levy and Gremcitel v. Peru*, ibid., para. 23; *Urbaser and CABB v. Argentina*, ibid., para. 838.

[82]See *AES v. Kazakhstan*, *supra* note 80, para. 144.

[83]See *El Paso v. Argentina*, *supra* note 80, para. 361.

[84]See *Burlington v. Ecuador*, *supra* note 80, paras. 80, 195.

[85]Ibid., paras. 164, 195, 207. A more extensive discussion of the role of the Ecuadorian Constitution can be found in other decisions. See *Perenco v. Ecuador*, Interim Decision on the Environmental Counterclaim, *supra* note 80, paras. 319–352; *Copper Mesa v. Ecuador*, *supra* note 80, para. 4.39.

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Government of Canada, the tribunal took several elements into account to determine that the host state did not violate the minimum standard of treatment under NAFTA, such as:

> the absence of work undertaken in the permits affected by the passage of the impugned Act, the Québec Government's intention to *encourage the sustainable development of natural resources* with a view to protect the environment of the St. Lawrence River, the refund by the Government of a portion of the annual fees paid by the affected permit holders, and the possibility to attribute the research expenditure incurred on the affected permits to other research permits of the affected permit holders.[86]

In other words, instead of using the concept to interpret the investment obligation included in NAFTA Article 1105, the tribunal in *Lone Pine Resources Inc.* v. *Government of Canada* considered the encouragement of sustainable development as a relevant fact for determining whether the conduct of the respondent state complied with this obligation.

Sometimes, the broader consideration of the concept in the tribunal's findings has occurred in the context of the participation of *amicus curiae*. For example, the tribunal in *Biwater Gauff (Tanzania) Ltd.*, v. *United Republic of Tanzania* allowed five non-governmental organizations to submit a brief.[87] While the claimant argued that 'the arbitration raised no issues of sustainable development',[88] the tribunal considered that the organizations had particular qualifications and that they could address 'broad policy issues concerning sustainable development, environment, human rights and governmental policy'.[89] Although the tribunal mentioned that the observations provided by the *amicus curiae* 'have informed the analysis of claims',[90] no reference to sustainable development was included in the rest of the analysis of the claim.

Even among decisions which include several references to the term 'sustainable development', a high number of references does not entail that the tribunal has thoroughly engaged with the concept in its findings. For example, given the environmental nature of the measures adopted by the respondent state, it is quite unsurprising that the tribunal's Decision on Jurisdiction, Liability and Directions on Quantum in *Eco Oro Minerals Corp.* v. *Republic of Colombia* includes 46 references to sustainable development.[91] However, throughout the entire decision, references to these terms are limited to direct quotes from other documents,[92] references to the content of governmental authorities and legislation identified by the tribunal,[93] references to the name of governmental agencies or functions,[94] as well as summaries of the arguments by the parties.[95] While sustainable development was clearly an important component of the issues that were raised by the parties and the content of the documents that were submitted to the tribunal, the latter reached a decision without actually referring to this concept in its findings.

It is clear that one cannot deny that some tribunals have expressly relied on sustainable development when adjudicating investment disputes. Decisions that include express references to the concept when articulating findings regarding the violation of investment obligations or to stress that the expertise of *amicus curiae* on sustainable development has been useful and cannot be neglected. Nevertheless, characterizing the engagement of investment arbitration tribunals with sustainable development as marginal results from the relatively low number of decisions that

[86]See *Lone Pine v. Canada*, *supra* note 80, para. 631 (emphasis added).
[87]See *Biwater v. Tanzania*, Procedural Order No 5, *supra* note 80, para. 55.
[88]Ibid., para. 34; *Biwater v. Tanzania*, Award, *supra* note 80, para. 357.
[89]See *Biwater v. Tanzania*, Procedural Order No 5, *supra* note 80, para. 64; *Biwater v. Tanzania*, Award, ibid., para. 366.
[90]See *Biwater v. Tanzania*, Award, ibid., para. 392.
[91]See *Eco Oro v. Colombia*, Decision on Jurisdiction, Liability and Directions on Quantum, *supra* note 71.
[92]Ibid., paras. 60, 141, 147, 493, 638, 676, 780, 809.
[93]Ibid., paras. 89-90, 102, 127, 134, 158, 498.
[94]Ibid., paras. 92, 205, 452.
[95]Ibid., para. 85.

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include express references to the concept in the tribunal's findings *and* the lack of explanation pertaining to its relevance. Even in the limited number of decisions where tribunals have expressly referred to sustainable development in their analysis, this is often done tangentially without any clarification regarding the nature of the concept and the extent to which it has been considered by the tribunal.

Explaining this weak explicit engagement from tribunals with sustainable development requires an analysis that is beyond the scope of this article. One can nevertheless propose some hypotheses at this point. For example, it could be suggested that tribunals have not considered sustainable development when deciding investment disputes because of the 'socio-cultural distance' between international investment law and sustainable development.[96] Alternatively, some tribunals could have found that the concept is too broad and too hard to operationalize in the context of an investment dispute. Testing these hypotheses would require further empirical analysis and access to the decision-making process of investment arbitration tribunals.

4.2 The need to recognize the integrative nature of the concept

In addition to the weak engagement of tribunals with sustainable development, the content analysis of investment arbitration decisions sheds light on a more profound issue. When adopting the 2030 Agenda for Sustainable Development, the General Assembly of the United Nations stressed its commitment 'to achieving sustainable development in its three dimensions – economic, social and environmental – in a balanced and integrated manner'.[97] Beyond the marginal consideration of sustainable development, the fact that some tribunals have relied on a narrow understanding of the concept also has an impact on its relevance in international investment arbitration. While sustainable development encompasses three dimensions, the use of the concept in investment arbitration should support them all. When a tribunal strictly takes into consideration the economic and environmental aspects of an investment dispute, it precludes the consideration of social matters that may also play an important role in explaining the measures challenged by the claimant.

Such a narrow understanding of sustainable development can be found in *William Ralph Clayton, William Richard Clayton, Douglas Clayton and Bilcon of Delaware, Inc.* v. *Government of Canada*.[98] Interestingly, the members of the tribunal engaged quite extensively with the concept in comparison to decisions discussed in the previous subsection. In the Award on Jurisdiction and Liability, the tribunal referred to sustainable development when summarizing the essence of the investors' case[99] and the arguments of the claimants.[100] The tribunal also referred to sustainable

[96]A similar argument was proposed by Moshe Hirsch with respect to the application of human rights law to investment disputes. See M. Hirsch, 'The Sociology of International Investment Law', in Z. Douglas et al. (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (2014), 144, at 152 ('The principal argument is that legal interactions among branches of international law may also be analysed as *social interactions* between the relevant communities. Thus, the *socio-cultural distance* between the particular international legal settings affects the inclination of relevant decision-makers to incorporate or reject legal rules developed in other branches of international law' (emphasis in original)).

[97]See United Nations General Assembly, *supra* note 12, para. 2.

[98]See *Clayton/Bilcon v. Canada*, Award on Jurisdiction and Liability, *supra* note 80; *Clayton/Bilcon v. Canada*, Dissenting Opinion, ibid.

[99]See *Clayton/Bilcon v. Canada*, Award on Jurisdiction and Liability, ibid., para. 10 ('Bilcon submits that the Province of Nova Scotia had a publicly stated policy of encouraging investment in its mining industry. Its political and technical officials were informed of the interest by Bilcon in developing a mining quarry and marine terminal at Whites Point, in Digby County, Nova Scotia. They welcomed Bilcon's interest and provided political and technical support. The overall regulatory framework in place in Nova Scotia and federal Canada includes requirements for environmental assessment and approval. Both jurisdictions have legislated policies of "*sustainable development*". The core of this philosophy is to *encourage and promote economic development while conserving and promoting environmental quality*' (emphasis added)).

[100]Ibid., para. 214.

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development in several instances when analysing the merits of the investors' claims under NAFTA Article 1105, including when referring to the purpose of the Canadian Environmental Assessment Act,[101] the objective of the relevant provincial statute[102] and the content of various other documents.[103]

Despite these noteworthy references to sustainable development, it appears that the majority of the tribunal often relied on an understanding of the concept that is strictly limited to its economic and environmental dimensions. When concluding that the approach of the environmental assessment adopted by Canada resulted in a breach of NAFTA Article 1105, the tribunal expressly relied on the endorsement of the 'principle of sustainable development' in the preamble of NAFTA to justify its findings:

> The concepts of promoting both *economic development* and *environmental integrity* are integrated into the Preamble's endorsement of the *principle of sustainable development*. Environmental regulations, including assessments, will inevitably be of great relevance for many kinds of major investments in modern times. The mere fact that environmental regulation is involved does not make investor protection inapplicable. Were such an approach to be adopted – and states parties could have chosen to do so – there would be a very major gap in the scope of the protection given to investors. The Laws of Canada and Nova Scotia, as well as the NAFTA itself, expressly acknowledge that *economic development* and *environmental integrity* can not only be reconciled, but can be mutually reinforcing.[104]

The limitation of the concept to only two of its dimensions is even more explicitly acknowledged by the majority of the tribunal at the very end of the award, in the paragraph preceding the dispositif:

> The [Canadian Environmental Assessment Act] prescribes finding ways to promote *both dimensions of sustainable development*, that is to say, *environmental protection* and *economic growth* ... Whether or not their case would have prevailed if appropriately evaluated, the Investors' case was that this particular project could in fact be constructed and operated in a way that would satisfy *both economic and environmental concerns* ... The [t]ribunal's respectful conclusion is that in all the particular and unusual circumstances of this case, the Investors were denied an expected and just opportunity to have their case considered on its individual merits.[105]

In a context where the social impact of the project proposed by the investors was particularly important, it is useful to recall the disagreement between the majority of the tribunal and Professor Donald McRae. On the one hand, the majority of the tribunal concluded that the 'community core values' approach adopted by the Joint Review Panel was unprecedented and outside its mandate to analyse the potential effects of the investors' project.[106] While acknowledging that the standard

[101] Ibid., para. 476 ('The purpose of the Act is to ensure "careful consideration" of the environmental effects of projects before responsible authorities take actions in connection with them. Such actions should "promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy"').

[102] Ibid., para. 485 ('The objectives of the provincial statute in many ways match those of the federal act. The provincial statute embodies the principle of "sustainable development". It affirms "the linkage between economic and environmental issues, recognizing that long-term economic prosperity depends upon sound environmental management and that effective environmental protection depends on a strong economy"').

[103] Ibid., paras. 515, 542.

[104] Ibid., paras. 596–597.

[105] Ibid., para. 741 (emphasis added).

[106] Ibid., paras. 446–454.

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found in NAFTA Article 1105 involves a high threshold, it considered that the conduct of Canada rose to that threshold partly in light of:

> the fact that the [Joint Review Panel]'s distinctive approach in adopting the concept of community core values was not proceeded by reasonable notice; and the fact that the approach of the [Joint Review Panel] departed in fundamental ways from the standard of evaluation required by the laws of Canada rather than merely being controversial in matters of detailed application.[107]

On the other hand, Professor McRae maintained that the majority of the tribunal only showed a possible breach of Canadian law that could have been subjected to judicial review by a Canadian federal court.[108] Treating this potential violation of Canadian law as a violation of NAFTA amounted to granting damages for violations beyond what is provided under international investment law.[109]

At first glance, the disagreement seems to concern the assessment of facts and whether an allegation of a breach of domestic legislation can meet the threshold to conclude that a state has violated the minimum standard of treatment. However, here it is argued that the consideration of the integrative nature of sustainable development allows for a different reading of the diverging views adopted in the Award on Jurisdiction and Liability, and the Dissenting Opinion. While it is clear that the majority of the tribunal limited the concept to its economic and environmental dimensions, the dissenting opinion by Professor McRae extensively relied on the social dimensions underlying the environmental impact assessment conducted by Canada. For example, the opinion includes a section that clarifies the approach adopted by the Joint Panel Review regarding 'community core values', stressing that the officials 'were concerned with the *socio-economic effects* of the project on their communities'.[110] According to Professor McRae, the communities had articulated a vision 'that encourages economic development, but provides a balanced approach combining economic, *social* and *cultural* issues'.[111]

When addressing the implications of the decision, Professor McRae further stressed that the majority decision will limit the ability of a review panel to consider the effect of a project on the human environment. According to him,

> subjugation of *human environment concerns* to the scientific and technical feasibility of a project is not only an intrusion into the way an environmental review process is to be conducted, but also an intrusion into the environmental public policy of the state.[112]

Arguing that the decision will impose a chill on environmental review panels that are worried about the socio-economic considerations of a project, Professor McRae concluded that 'the decision of the majority will be seen as a remarkable step backwards in environmental protection'.[113]

To a certain extent, the importance of recognizing the integrative nature of sustainable development relates to a proposal by Federico Ortino regarding the reasonableness review in international investment arbitration.[114] In light of the integrative decision-making character of sustainable development, he argues that investment tribunals should not review the respondent

[107]Ibid., para. 594.
[108]See *Clayton/Bilcon v. Canada*, Dissenting Opinion, *supra* note 80, para. 40.
[109]Ibid., para. 43.
[110]Ibid., para. 20 (emphasis added).
[111]Ibid., para. 21 (emphasis added).
[112]Ibid., para. 49 (emphasis added).
[113]Ibid., para. 51.
[114]See Ortino, *supra* note 21.

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state conduct according to a strict proportionality analysis. More specifically, given that it rests upon a balancing exercise between three pillars, sustainable development offers considerable freedom to decision-makers when determining the appropriate balance.[115] According to Ortino:

> the reasonableness-type standards imposed on host states for the protection of foreign investment do not impose any restraints on states' balancing among those values. Accordingly, an interpretation of investment treaty provisions requiring reasonableness in light of the object and purpose of the investment treaty will exclude a review based on the measure's proportionality in the strict sense.[116]

In other words, the latitude underlying the integrative nature of sustainable development must be taken into consideration when assessing the reasonable character of measures adopted by the respondent state.

Of course, the engagement of the tribunal with the concept of sustainable development is more present than in the overwhelming majority of international investment arbitration decisions. The tribunal in *Clayton/Bilcon* v. *Canada* actually relied on the reference to sustainable development in the preamble to interpret the obligations included in NAFTA Article 1105. However, this consideration appears only when articulating the conclusions of the tribunal regarding the violation of NAFTA Article 1105. It actually follows a much earlier reference to the preamble of NAFTA when discussing the jurisdiction of the tribunal, when the latter stressed that the NAFTA Parties 'in the interest of ensuring "a predictable commercial framework for business planning and investment" established protections for investors'.[117] In other words, in addition to the narrow understanding of the concept, the tribunal chose different portions of the preamble at different stages of its decision when relying on the context of the treaty to interpret its terms.

Overall, when examining express references to sustainable development made by tribunals, it appears that they have generally failed to recognize the relevance of the concept in the adjudication of investment disputes. The analysis above does not demonstrate that tribunals have constantly failed to address sustainable development 'concerns' or 'issues'. However, in light of their weak engagement with the concept and the failure to fully acknowledge its integrative nature, it is plain that tribunals have not upheld its relevance when resolving international investment disputes.

5. Conclusion

While international obligations must be interpreted by taking into consideration the context in which they are embedded, the consideration of sustainable development when adjudicating investment disputes is a crucially needed development in international investment arbitration. However, a content analysis of decisions from investment arbitration tribunals suggests that the marginal and problematic use of sustainable development in investment arbitration demonstrates a strong disconnect. While the concept has certainly percolated investment policymaking and international adjudication, there is a weak explicit engagement with it in decisions of investment arbitration tribunals and a failure to fully recognize its integrative nature.

To a great extent, the findings of the exploratory research presented above are consistent with the emergence of old outcomes despite the negotiation of investment treaties that include new language.[118] When examining different phases of treaty design innovation, Wolfgang Alschner

[115]Ibid., at 85–6.
[116]Ibid., at 89.
[117]See *Clayton/Bilcon v. Canada*, Award on Jurisdiction and Liability, *supra* note 80, para. 228.
[118]See W. Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (2022).

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identifies a phase that corresponds to the signature of NAFTA in 1992.[119] Amidst more recent efforts to address sustainable development in investment policymaking, it is worth noting that express references to this concept in international investment agreements also began with NAFTA. Perhaps the use of sustainable development in investment arbitration does not amount to tribunals that are 'rolling back normative innovations in new [international investment agreements]'.[120] Yet, the disconnect between policymaking and adjudication that is highlighted above is problematic. The general failure of tribunals to engage with the three dimensions of sustainable development is undoubtedly a missed opportunity to give meaning to one of these normative innovations.

Express references to the concept of sustainable development when adjudicating investment disputes reach beyond semantic issues and the language used by tribunals. The analysis presented above demonstrates that investment arbitration tribunals appear to be generally insulated from a crucially important stake that benefits from a broad international consensus. While some tribunals have (somehow tangentially) acknowledged that the protection of foreign investment should be reconciled with sustainable development, the marginal consideration of the concept nevertheless suggests that their decisions have not taken into consideration the broader context in which the international community is evolving. This weak consideration suggests that tribunals have been obfuscating a concept that will necessarily become more relevant as more agreements are referring to it. The failure to recognize the integrative nature of sustainable development ultimately leads to decisions that will continue to be criticized as 'a remarkable step backwards'.[121]

[119] Ibid., at 98–105.

[120] Ibid., at 2.

[121] See *Clayton/Bilcon v. Canada*, Dissenting Opinion, *supra* note 80, para. 51.

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Appendix – Investment arbitration decisions including at least one reference to the term 'sustainable development'

Decisions	Reference to 'sustainable development' in the treaty	Number of references in the decision
Addiko Bank v. Montenegro, ICSID Case No. ARB/17/35, Award, 24 November 2021.	No	1
AES v. Kazakhstan, ICSID Case No. ARB/10/16, Award, 1 November 2013.	Yes	1
AHG v. Iraq, ICSID Case No. ARB/20/21, Award on the Respondent Application under ICSID Rule 41(5), 30 September 2022.	Yes	4
Al Tamimi v. Oman, ICSID Case No. ARB/11/33, Award, 3 November 2015.	Yes	1
Alicia Grace and others v. Mexico, ICSID Case No. UNCT/18/4, Decision on the Claimants' Application for Interim Measures, 19 December 2019.	Yes	1
Allard v. Barbados, PCA Case No. 2012-06, Award on Jurisdiction, 13 June 2014.	No	1
Almasryia v. Kuwait, ICSID Case No. ARB/18/2, Award on the Respondent's Application Under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019.	No	1
Almasryia v. Kuwait, ICSID Case No. ARB/18/2, Dissenting Opinion on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019.	No	1
Aven et al. v. Costa Rica, Case No. UNCT/15/3, Final Award, 18 September 2018.	Yes	1
Ballantine v. Dominican Republic, PCA Case No. 2016-17, Final Award, 3 September 2019.	Yes	1
Bear Creek Mining v. Peru, ICSID Case No. ARB/14/21, Procedural Order No. 6, 21 July 2016.	Yes	3
Bear Creek Mining v. Peru, ICSID Case No. ARB/14/21, Award, 30 November 2017.	Yes	1
Biwater v. Tanzania, ICSID Case No. ARB/05/22, Procedural Order No 5, 2 February 2007.	No	9
Biwater v. Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008.	No	8
BSG Resources v. Guinea, ICSID Case No. ARB/14/22, Procedural Order No. 3, 25 November 2015.	N/A	1
Burlington v. Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017.	No	15
Canadian Cattlemen v. USA, UNCITRAL, Award on Jurisdiction, 28 January 2008.	Yes	1
Casinos Austria v. Argentina, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018.	No	1
Chevron and TexPet v. Ecuador (II), PCA Case No. 2009-23, Procedural Order No. 8, 18 April 2011.	No	4

(*Continued*)

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(*Continued*)

Decisions	Reference to 'sustainable development' in the treaty	Number of references in the decision
Clayton/Bilcon v. Canada, PCA Case No. 2009/04, Award on Jurisdiction and Liability, 17 March 2015.	Yes	10
Clayton/Bilcon v. Canada, PCA Case No. 2009/04, Dissenting Opinion of Professor Donald McRae, 10 March 2015.	Yes	2
CMC v. Mozambique, ICSID Case No. ARB/17/23, Award, 24 October 2019.	No	3
Copper Mesa v. Ecuador, PCA Case No. 2012-2, Award, 15 March 2016.	No	3
Cordoba Beheer and others v. Spain, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022.	Yes	6
Crystallex v. Venezuela, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016.	No	1
Dominion Minerals v. Panama, ICSID Case No. ARB/16/13, Decision on the Respondent's Applications for the Stay of Enforcement of the Award and under Arbitration Rule 41(5), 21 July 2022.	No	1
ECE v. Czech Republic, PCA Case No. 2010-5, Award, 19 September 2013.	No	1
Eco Oro v. Colombia, ICSID Case No. ARB/16/41, Procedural Order No. 6, 18 February 2019.	Yes	1
Eco Oro v. Colombia, ICSID Case No. ARB/16/41, Procedural Order No. 11, 28 January 2020.	Yes	1
Eco Oro v. Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021.	Yes	46
Eiser and Energia Solar v. Spain, ICSID Case No. ARB/13/36, Award, 4 May 2017.	Yes	1
El Paso v. Argentina, ICSID Case No. ARB/03/15, Award, 31 October 2011.	No	1
Eni and others v. Nigeria, ICSID Case No. ARB/20/41, Procedural Order No. 4, 7 March 2023.	No	1
ESPF et al. v. Italy, ICSID Case No. ARB/16/5, Award, 14 September 2020.	Yes	1
Eskosol v. Italy, ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), 20 March 2017.	Yes	1
ES Holdings and L1bre v. Mexico, ICSID Case No. ARB/20/13, Procedural Order No. 3, 3 June 2022.	Yes	1
ES Holdings and L1bre v. Mexico, ICSID Case No. ARB/20/13, Procedural Order No. 8, 5 November 2022.	Yes	1
Europa Nova v. Czech Republic, PCA Case No. 2014-19, Award, 15 May 2019.	Yes	1
Festorino and others v. Poland, SCC Case No. V2018/098, Award, 31 June 2021.	Yes	2
Gabriel Resources v. Romania, ICSID Case No. ARB/15/31, Decision on Claimants' Second Request for Provisional Measures, 22 November 2016.	No	1

(*Continued*)

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(*Continued*)

Decisions	Reference to 'sustainable development' in the treaty	Number of references in the decision
Gabriel Resources v. Romania, ICSID Case No. ARB/15/31, Procedural Order No. 19, 7 December 2018.	No	1
Gardabani and others v. Georgia, SCC Case No. V2018/039, Partial Award, 19 April 2021.	No	8
Gardabani and others v. Georgia, SCC Case No. V2018/039, Second Partial Award on Damages, 23 November 2021.	No	4
Gardabani and Silk Road v. Georgia, ICSID Case No. ARB/17/29, Award, 27 October 2022.	No	7
Gavrilović v. Croatia, ICSID Case No. ARB/12/39, Decision on Claimants' Request for Provisional Measures, 30 April 2015.	No	4
Gerald v. Sierra Leone, ICSID Case No. ARB/19/31, Decision on the Claimant's Request for Provisional Measures, 28 July 2020.	No	7
Gold Reserve v. Venezuela, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014.	No	3
Grenada Private Power v. Grenada, ICSID Case No. ARB/17/13, Decision on Provisional Measures, 26 September 2018.	N/A	1
Guaracachi v. Bolivia, PCA Case No. 2011-17, Award, 31 January 2014.	No	1
Hasanov v. Georgia, ICSID Case No. ARB/20/44, Decision on Claimant's Application for Provisional Measures, 14 June 2022.	No	3
Hela Schwarz v. China, ICSID Case No. ARB/17/19, Procedural Order No. 2, 10 August 2018.	No	1
Hydro and others v. Albania, ICSID Case No. ARB/15/28, Order on Provisional Measures, 3 March 2016.	No	2
I.C.W. v. Czech Republic, PCA Case No. 2014-22, Award, 15 May 2019.	Yes	1
Infinito Gold v. Costa Rica, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017.	No	1
Infinito Gold v. Costa Rica, ICSID Case No. ARB/14/5, Award, 3 June 2021.	No	3
Ipek v. Turkey, ICSID Case No. ARB/18/18, Procedural Order No. 5, 19 September 2019.	No	1
Kompozit v. Moldova, SCC Arbitration EA No. 2016/095, Emergency Award in Interim Measures, 14 June 2016.	No	2
Levy and Gremcitel v. Peru, ICSID Case No. ARB/11/17, Award, 9 January 2015.	No	1
Lone Pine v. Canada, UNCITRAL, Final Award, 21 November 2022.	Yes	26
Mainstream Renewable and others v. Germany, ICSID Case No. ARB/21/26, Decision on the Respondent's Application Under ICSID Arbitration Rule 41(5), 18 January 2022.	Yes	1
Masdar v. Spain, ICSID Case No. ARB/14/1, Award, 16 May 2018.	Yes	1
Methanex v. USA, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amicus Curiae', 15 January 2001.	Yes	3
Methanex v. USA, Procedural Order, 19 March 2004.	Yes	1

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Decisions	Reference to 'sustainable development' in the treaty	Number of references in the decision
Methanex v. USA, Procedural Order, 6 April 2004.	Yes	1
Methanex v. USA, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005.	Yes	6
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Pac Rim v. El Salvador, ICSID Case No. ARB/09/12, Award, 14 October 2016.	Yes	2
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Photovoltaik Knopf v. Czech Republic, PCA Case No. 2014-21, Award, 15 May 2019.	Yes	1
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Suez and Vivendi v. Argentina, ICSID Case No. ARB/03/19, Award, 9 April 2015.	No	1
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Sunreserve v. Italy, SCC Arbitration V No. 2016/32, Final Award, 25 March 2020.	Yes	2
Urbaser and CABB v. Argentina, ICSID Case No. ARB/07/26, Award, 8 December 2016.	No	1
Voltaic Network v. Czechia, PCA Case No. 2014-20, Award, 15 May 2019.	Yes	1
Watkins and others v. Spain, ICSID Case No. ARB/15/44, Award, 21 January 2020.	Yes	1
World Duty Free v. Kenya, ICSID Case No. ARB/00/7, Award, 4 October 2006.	N/A	1

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