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Greening regional trade agreements on investment

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Abstract

Greening Regional Trade Agreements on Investment

Shunta Yamaguchi

Many governments are increasingly recognising the need to ensure that trade and investment agreements reflect environmental concerns to help achieve overarching environmental goals and to increase their public acceptability. In particular, investment liberalisation and protection, as well as environmental sustainability are essential elements to consider in these agreements to foster economic integration and require coherent policy approaches.

In this context, this report investigates possible approaches that can help ensure policy coherence between investment and environment related provisions in regional trade agreements (RTAs). As investment related articles appear not only in RTAs but more broadly in bilateral investment treaties (BITs) and in other international investment agreements (IIAs), the work extends to trade and investment agreements that encompass RTAs, BITs and other IIAs.

The report highlights available practices to ensure that investment related provisions reaffirm the domestic environmental policy space. The report also explores available practices to promote green investment in these agreements. A catalogue of potential practices for greening the investment content of trade and investment agreements is also provided.

JEL classification: F18, F53, P45, R11, Q56

Keywords: Regional trade agreements, free trade agreements, trade and investment agreements, international investment agreements, bilateral investment agreements, environmental provisions, trade and environment, green investment, trade policy, investment policy, environment policy.

Résumé

De nombreux gouvernements reconnaissent de plus en plus la nécessité de veiller à ce que les accords de commerce et d'investissement reflètent les préoccupations environnementales afin d'améliorer leur acceptabilité politique tout en contribuant à la réalisation d'objectifs environnementaux globaux. En particulier, la libéralisation et la protection des investissements, ainsi que la durabilité environnementale sont des éléments essentiels à prendre en compte dans ces accords favorisant l'intégration économique et nécessitent des politiques publiques cohérentes.

Dans ce contexte, ce rapport examine de possibles approches qui pourraient contribuer à assurer la cohérence politique entre les dispositions relatives aux investissements et à l'environnement dans les accords commerciaux régionaux (ACR). Étant donné que les articles relatifs à l'investissement figurent non seulement dans les ACR, mais aussi, de manière plus générale, dans les traités bilatéraux d'investissement (TBI) et dans d'autres accords internationaux d'investissement (AII), ce rapport s'étend aux accords de commerce et d'investissement qui englobent les ACR, les TBI et d'autres AII.

Le rapport met en évidence les pratiques disponibles permettant de garantir que les dispositions relatives aux investissements réaffirment l'espace politique national en matière d'environnement. Le rapport explore également les pratiques disponibles permettant de promouvoir les investissements verts dans ces accords et fournit un catalogue de pratiques permettant de rendre le contenu des accords de commerce et d'investissement compatible avec les objectifs environnementaux nationaux.

Classification JEL: F18, F53, P45, R11, Q56

Mots clés: Accords commerciaux régionaux, accords de libre-échange, accords de commerce et d'investissement, accords internationaux d'investissement, accords bilatéraux d'investissement, dispositions environnementales, commerce et environnement, investissement vert, politique commerciale, politique d'investissement, politique environnementale.

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Table of Contents

Tables

Figures

Boxes

Executive Summary

Many Regional Trade Agreements (RTAs) contain chapters and articles that are environmentally specific. However, environmental objectives can also be more broadly incorporated in RTAs to promote an integrated approach and holistically address environmental concerns. Incorporating environmental considerations into trade agreements can contribute to the public acceptability of these agreements and towards achieving overarching environmental goals.

This report surveys key issues and potential approaches that can help ensure policy coherence between investment and environment related provisions in RTAs. This is important as investment liberalisation and protection, as well as environmental sustainability are essential elements to consider for economic integration. The report focuses specifically on the incorporation of environmental objectives in chapters and articles related to investment in RTAs. As investment related articles appear not only in RTAs but more broadly in Bilateral Investment Treaties (BITs) and in other International Investment Agreements (IIAs), this report covers trade and investment agreements that encompass RTAs, BITs and other IIAs. The report aims at providing an overview of available practices. It does not purport to describe positions of OECD member states on specific issues, such as drafting agreements, or to endorse any single approach related to investor-state dispute settlement (ISDS) reform underway in other fora.

The report takes *two angles*. First, it examines available practices to ensure that investment related provisions do not impinge upon the domestic environmental policy space. Second, it explores available practices to promote green investment in these agreements.

Regarding the *first angle*, establishing robust investor protection while asserting policy space for environmental regulation, is essential to ensure policy coherence in trade and investment agreements. Investor protection provisions and ISDS mechanisms are key features of trade and investment agreements to facilitate trans-border capital flows. However, the outcomes of arbitral decisions of ISDS have in some cases raised questions on how governments can pursue environmental regulation consistently with investor protection obligations. This issue goes beyond environmental issues and is often part of a broader discussion on the balance between investor protection and the right to regulate.

A number of regulatory measures, including those stated to be for environmental purposes, have been subject to investor claims under ISDS for allegedly breaching treaty obligations. This present report estimates that 75 out of the known 855 ISDS cases that were brought to arbitration under RTAs, BITs and the Energy Charter Treaty (ECT) between 1987 and 2017 (equivalent to roughly 9%) were directly or indirectly related to the environment. Claims were made against measures, such as changes to environmental laws and regulations, revocation of environmental permits and licences, and withdrawal of concession contracts due to alleged environmental concerns. Treaty breaches were found by the relevant tribunal in nearly one-third of these environment related cases, which have sometimes resulted in

large amounts of monetary compensation, averaging at USD 158 million and up to USD 1.2 billion per award between 1987 and 2017.

The fact that a breach was found for a specific government measure, under a particular treaty provision, does not imply that all such provisions would result in a similar outcome. Arbitral decisions are highly context specific, driven by the implementation of such government measures, rather than their mere existence. Moreover, tribunals can typically only award monetary compensation. However, the application of investor protection provisions to national legislation can raise a number of sensitivities and issues. The varying investor protection commitments across different treaties, their alleged inconsistent interpretation, and the high amount of potential monetary damages, all argue for governments to develop good practices, particularly with regard to precise treaty drafting, that support important public policy objectives including for the environment.

Tribunal decisions, either rendered in favour of the state or the investor, refer to the interpretation of main investment liability provisions. For this reason, careful drafting of the scope of substantive investor protection provisions would support the state's ability to adopt measures to protect the environment. Good practices for emphasising environmental policy space through environment related investment provisions include: reaffirming the right to regulate (including for the environment); clarifying that non-discriminatory measures for environmental regulation do not constitute indirect expropriation, and promoting the relevant technical expertise of the arbitral tribunal for disputes related to environmental measures in ISDS proceedings. Carefully-drafted investor protection provisions can also be examined on: fair and equitable treatment (FET); full protection and security standards; most favoured nation (MFN); national treatment; and umbrella clauses. A strong commitment to transparency, such as those principles reflected in the Mauritius Convention on Transparency, will also serve towards fulfilling the public interest *inter-alia* on environmental protection.

Regarding the *second angle* in examining available practices to promote green investment, trade and investment agreements provide important opportunities to encourage environmentally supportive investment (e.g. for renewable energy deployment) and environmentally responsible investment (e.g. in compliance with environmental requirements). In particular, investment towards renewable energy has grown more rapidly than overall economy-wide investment in the past two decades. This is projected to further accelerate in the coming decades in the attempt to meet global climate and development objectives. Given this increase in green investment, governments should ensure their domestic regulation of both foreign and domestic investors is fair and non-discriminatory.

Promoting green investment through trade and investment agreements is, so far, an area where countries appear to have less experience. Nevertheless, from available practice and research, a few options have been identified. Some RTA parties establish overarching commitments for green investment in the preamble of trade and investment agreements. Some agreements also include commitments to encourage environmentally responsible investment in reference to domestic regulations and internationally available standards (e.g. OECD Guidelines for Multinational Enterprises, and related Due Diligence Guidance for Responsible Business Conduct). Parties to an RTA can also consider promoting environmentally supportive investment through home-state obligations on investment facilitation frameworks, and by including commitments on co-operation and capacity building of investment promotion agencies.

To conclude, policy makers should be aware of the potential linkages between environmental regulation and investment protection obligations in trade and investment

agreements and ensure that domestic regulators are appropriately equipped to regulate within the boundaries of international obligations. Further discussion with trade, investment and environment experts could be useful to improve understanding of different commitments embedded in IIAs as they relate to environmental protection goals.

1. Introduction

Despite the benefits of free trade and economic integration, certain trade agreements and trading relationships are facing criticism due to environmental and social concerns. With the aim to raise the public acceptability of trade agreements and to strengthen overarching environmental goals, many governments are giving priority to ensure that trade agreements are environmentally sustainable.[1]

Investment liberalisation and protection, as well as environmental sustainability are essential elements to consider for economic integration. In this context, this report surveys key issues and potential approaches in securing policy coherence between trade, investment and environment related provisions in Regional Trade Agreements (RTAs). In particular, this report investigates possible ways in which RTAs can support environmental objectives in chapters and articles related to investment.[2] Given that investment related articles appear not only in RTAs but more broadly under Bilateral Investment Treaties (BITs) and other International Investment Agreements (IIAs), the work also identifies notable provisions and issues found in BITs and other IIAs (See Box 1 for the relationship between IIAs, BITs and RTAs).

Box 1. Relationship between RTAs and International Investment Agreements (IIAs)

International Investment Agreements (IIAs) is interchangeably used with the term "investment treaties" or "trade and investment agreements" and encompasses stand-alone Bilateral Investment Treaties (BITs) and broader agreements with investment chapters such as Regional Trade Agreements (RTAs). Indeed, investment chapters in RTAs have emerged under the influence of provisions found in BITs since 1959 (UNCTAD, 2007; Mann 2001). Similarities are observed between BITs and RTAs which both seek to secure investor protection obligations for example through liability provisions or investor-state dispute settlement (ISDS) mechanisms. However, some differences also appear. While BITs typically provide investment protection to investors established in the parties of a treaty, RTAs tend to cover additional disciplines, including investment liberalisation and market access objectives, as well as investment regulation obligations (e.g. prohibition of anti-competitive practices and corporate governance) under a broader trade and investment

[1] The importance of making trade and trade agreements more environmentally sustainable, for example, was discussed as a part of the OECD Ministerial Council Meeting in 2018. This is also part of national and supra-national initiatives including the *trade for all* strategy by the EU since 2015, the *progressive trade agenda* by Canada since 2017, and *trade for all agenda* by New Zealand since 2018.

[2] The report forms part of the project on "Greening RTAs" and should be read in conjunction with the introductory paper [COM/TAD/ENV/JWPTE(2017)1].

framework (WTO, 2016). Many RTAs contain BIT-equivalent provisions, others do not contain investment chapters given the parallel presence of a BIT in the bilateral relationship, and some RTAs with investment chapters exist in parallel with earlier BITs.

The report takes *two angles*. First, the report examines some possible means for ensuring that domestic environmental policy space is supported within trade and investment agreements. Second, it identifies efforts to promote green investment in these agreements, which could result in generating potential synergies between trade, investment and environmental objectives.

Regarding the *first angle*, treaty provisions in IIAs (including RTAs and BITs) can be aligned in a coherent way to the extent possible, in order to secure the mutual supportiveness of trade, investment and environmental policies. A key objective of investment related articles in RTAs, as well as of IIAs and BITs, is to provide stable and favourable conditions to facilitate trans-border capital flows, in particular of foreign direct investment (FDI), and to support the rule of law. For this reason, investment chapters in RTAs, and IIAs more broadly, contain enforceable obligations to grant certain protections to foreign investors. These obligations include, prompt, adequate, and effective compensation in cases of expropriation, non-discrimination through national treatment and most favoured nation (MFN) treatment obligations, and fair and equitable treatment (FET) (Gaukrodger, 2017a; WTO, 2016). These investor protection obligations are most often accompanied by investor-state dispute settlement (ISDS) mechanisms, which allow investors to turn to international arbitration tribunals to seek monetary compensation for damages if the state is found to breach its obligations under IIAs. The system has been designed to protect investors against certain government actions and to provide assurances of high quality governance (Gaukrodger and Gordon, 2012).

However, when national regulators are not well-versed in international treaty commitments, certain measures can raise different issues when pursuing policy goals in key areas such as the environment (Gaukrodger, 2017a).[3] This issue is often framed in broader discussions as the balance between investor protection and the right to regulate (Gaukrodger, 2017a).[4] Some governments are increasingly confronted by arbitration claims filed by foreign investors that are related to the implementation of specific measures with important public policy objectives including environmental protection (Gaukrodger and Gordon, 2012). For this reason, available practices in trade and investment agreements to support environmental policy space in the context of protecting investors are identified in this report.

Regarding the *second angle*, trade and investment agreements - through their disciplines to attract investment, create home-country obligations, and promote co-operation – may provide opportunities to promote green investment to support ambitious sustainable development and environmental goals. This approach in promoting green investment could result in generating positive synergies between trade, investment and the environment.

[3] As discussed by Gaukrodger (2017a) much of the current criticism against IIAs focuses on their alleged impact on the right to regulate. In contrast, advocates of IIAs contend that such treaties can help protect foreign investors from government misrule and non-commercial political risk, and ultimately contribute to general governance improvements. There is little empirical evidence on any of these assumed effects (Pohl, 2018).

[4] As an example, see OECD Conference on investment treaties: The quest for balance between investor protection and governments' right to regulate www.oecd.org/investment/2016-conference-investment-treaties.htm.

While domestic regulation bears the primary role in attracting and enforcing green investment, the possible role of trade and investment agreements to promote green investment is also explored.

The remainder of the report is structured as follows. Section 2 highlights currently available practices in drafting provisions related to investment protection and the environment in RTAs. Section 3 focuses on the *first angle* and gives an overview of certain ISDS cases that are related to environmental measures; furthermore, it identifies possible ways of incorporating environmental objectives in trade and investment agreements, to reaffirm the environmental policy space. Section 4 then turns to the *second angle* and explores in what ways trade and investment agreements promote green investment; it also provides insights into the potential evolution of green investment flows. Section 5 provides a summary of findings and a catalogue of potential practices for greening RTAs' investment content.

It is beyond the scope of this report to examine possible elements for general ISDS reforms that are currently under discussion within the framework of other institutions[5] that set forth detailed rule-sets (see also Section 3). Furthermore, while this report outlines possible approaches in incorporating environmental objectives in investment related chapters and articles in trade and investment agreements, it does not endorse any particular approach.

2. Current practice in RTAs related to investment and environmental protection

International investment agreements (IIAs) contain specific obligations designed to grant investor protection (and investor obligations in certain cases).[6] These IIAs encompass different types of agreements, including BITs, RTAs and other bilateral or plurilateral arrangements, such as the Energy Charter Treaty (ECT). For this reason, available studies that analyse investment agreements not only cover RTAs but frequently focuses on IIAs more broadly (see e.g. Gordon and Pohl, 2011).

This section aims to illustrate current practices in drafting provisions related to investment and environmental protection in RTAs, and IIAs more broadly. It does not aim to draw any holistic conclusions from analysing IIAs, as such conclusions can only be linked to a specific treaty or treaties that share particular commonalities.

A prior OECD study by Gordon and Pohl (2011) investigated the trends of environmental provisions incorporated in IIAs, which include BITs, RTAs and other treaties with investment provisions.[7] Their research, covering IIAs concluded between 1959 and 2010,[8] covered 1,623 IIAs, including 1,593 BITs, 25 RTAs and 5 other treaties. While the study had partial coverage of RTAs and was limited to 25 RTAs between 1997 to July 2010, it

[5] These institutions include, the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL).

[6] Investor obligations are rare however available in a few agreements, such as the COMESA Investment Agreement and the Morocco-Nigeria BIT (further elaborated in Section 3.2.6.).

[7] Other treaties with investment provisions include for example the Energy Charter Treaty (1998). (See footnote 14).

[8] For precision, IIAs are covered between 1959-July 2010 and among them RTAs are covered between 1997-July 2010.

illustrated a generally increasing trend in incorporating environmental provisions in RTAs that were related to investment. The study showed that environmental content is relatively rare in BITs but common in RTAs[9] and suggested that this is partly explained by the fact that RTAs are, on average, more recent than BITs.

The present report builds upon the above-mentioned 2011 study, updating it with the more recent TREND analytics RTA database provided by Morin et al. (2018). The extended analysis in this report covers 691 RTAs signed between 1959 and 2016 to specifically examine the treatment of environment and investment related provisions in RTAs. The analysis solely focuses on RTAs and excludes BITs and other IIAs. Nevertheless, it should capture the main trends since BITs and other IIAs rarely contain environmental content (Gordon and Pohl, 2011). To be clear, the analysis investigates investment and environment related articles in the preamble, general exceptions, the investment chapter and the environment chapter in RTAs. While the analysis does not cover the most recent developments from 2017 to present, it illustrates trends over the past few decades. Figures 1 and 2 show the results.

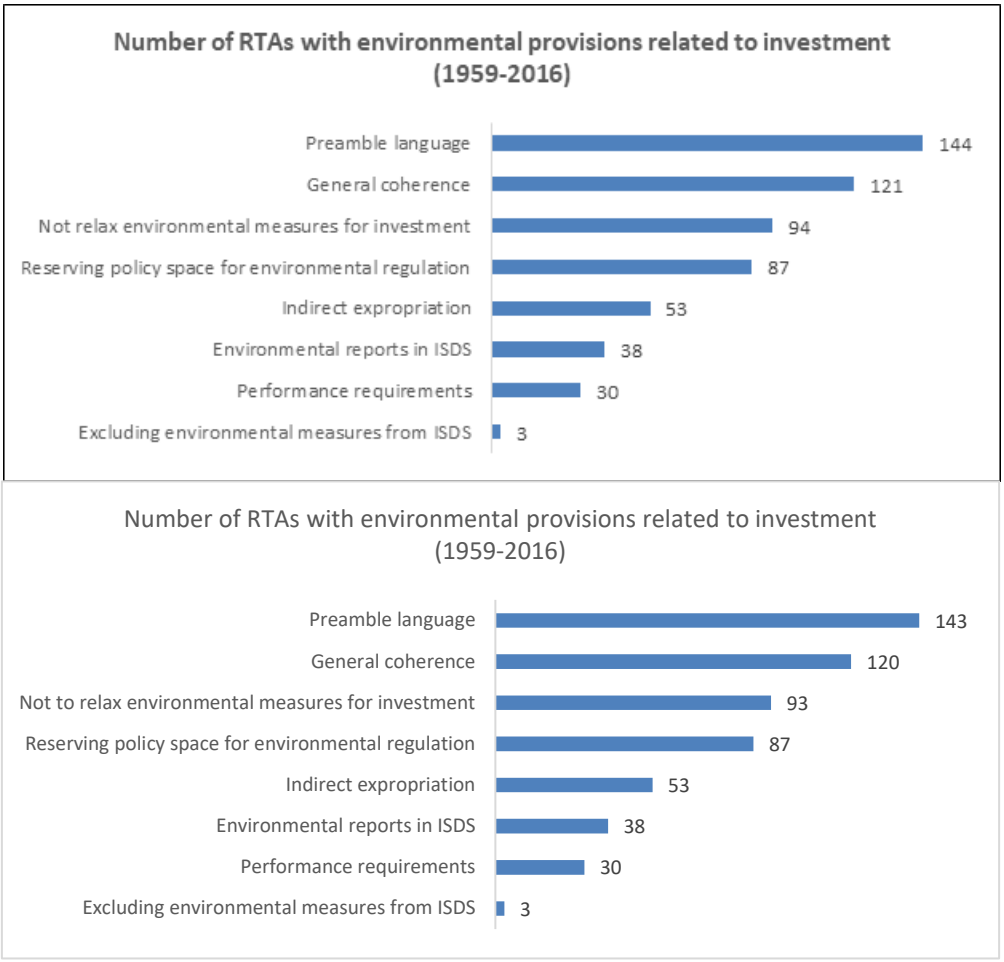
The extended analysis in this report confirms an increasing trend of the inclusion of environmental provisions in RTAs related to investment in the past two decades (see Figures 1 and 2). Eight main types of environmental provisions related to investment are identified within these agreements:

1. General language in preambles – to establish environmental protection as an overall objective;
2. General coherence – trade and/or investment and environmental policies should be mutually supportive;
3. Inappropriate to relax environmental measures to attract investment – to discourage the loosening of environmental regulation for the purpose of attracting investment;
4. Reserving policy space for environmental regulation – to establish general exceptions intended to safeguard environmental regulation in relation to investment;
5. Indirect expropriation – non-discriminatory environmental regulation cannot be considered as a basis for claims of indirect expropriation;
6. Environmental reports in investor-state dispute settlement – to ensure arbitration tribunals have recourse to environmental experts;
7. Environmental safeguards for performance requirements – to reserve policy space for environmental regulation in relation to performance requirements for investment;
8. Excluding environmental measures from investor-state dispute settlement.

Four types of environmental provisions related to investment are observed beyond the preamble, general exceptions, and environment chapters, and are included in the investment chapter. These relatively recent provisions that merit particular attention are: (1) indirect expropriation; (2) environmental reports in investor-state dispute settlement; (3) reserving policy space for environmental measures in relation to performance requirements; and (4) excluding environmental measures from ISDS. Each of these provisions is explained in the following sections.

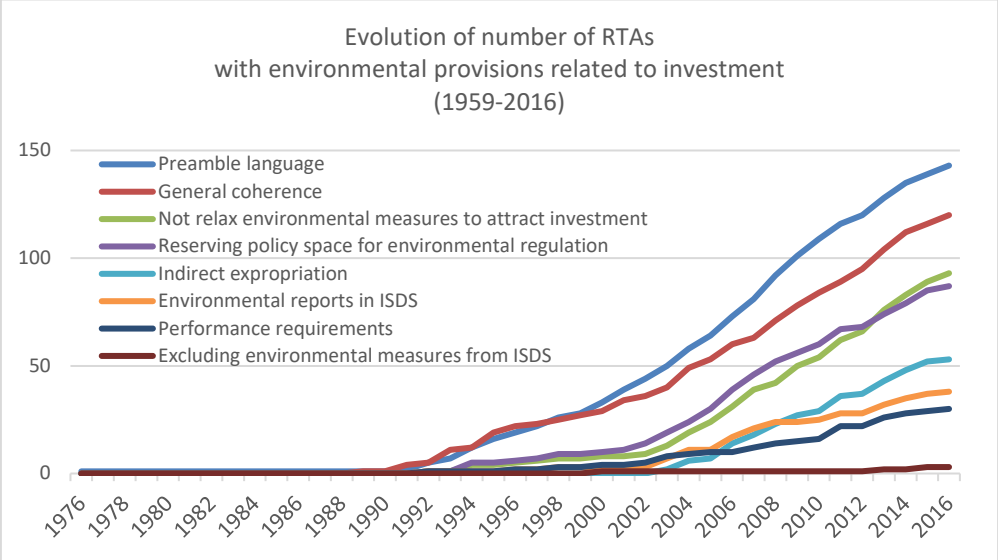
[9] The study by Gordon, Pohl and Bouchard (2014) enlarges the sample and takes additional angles of interpretation including sustainable development. This current report has a detailed scope on the environment rather than sustainable development and therefore will build on the earlier study of Gordon and Pohl (2010).

Figure 1. Main types of environmental provisions in RTAs related to investment



Note: Analysed between 1959-2016, environmental provisions related to investment emerge between 1976-2016.
Source: Author(s) based on Gordon and Pohl (2011) and Morin et al. (2018).

Figure 2. Evolution of environmental provisions in RTAs related to investment



Note: Analysed between 1959-2016, environmental provisions related to investment emerge between emerge between 1976-2016.
Source: Author(s) based on Gordon and Pohl (2011) and Morin et al. (2018).

2.1. Precluding non-discriminatory regulation as a basis for claims of indirect expropriation

From this analysis drawing on the TREND analytics database (Morin et al., 2018), 53 out of 691 RTAs include specific language to define that non-discriminatory regulation to protect the environment does not constitute indirect expropriation[10] (See Annex A for details). These provisions can be seen as attempts to identify the criteria to articulate the difference between indirect expropriation and non-compensable regulation in response to inconsistent interpretation by arbitral tribunals in the past (OECD, 2004). For example:

Korea - Australia Free Trade Agreement (2014) Chapter 11 Investment Annex 11-B Expropriation reads:

> "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."

Canada - Panama Free Trade Agreement (2013) Chapter 9 Investment Annex 9.11: Expropriation reads:

> "Except in rare circumstances, such as when a measure or a series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having

[10] Compared to direct expropriation where the government orders the nationalisation or transfer of private property to the state or a third party, indirect expropriation concerns a similar effect in expropriation or deprivation of investor property through interference of state in the use of that property or with the enjoyment of benefits even where the property is not seized or the legal title of the property is not affected, regardless of the intent (OECD, 2004).

> been adopted and applied in good faith, a non-discriminatory measure of a Party that is designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation."

Korea - New Zealand Free Trade Agreement (2015) Chapter 10 Investment Annex 10-B Expropriation reads:

> "Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate price stabilisation (through, for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations."

2.2. Environmental reports in investor-state dispute settlement

Out of the 691 RTAs reviewed in this analysis, 38 contain explicit provisions to enable arbitral tribunals to refer to reports provided by experts on environmental law (see Annex A for details). Examples include the following:

United States - Chile Free Trade Agreement (2004) Chapter 10: Investment, Article 10.23: Expert Reports reads:

> "Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing Party or, unless the disputing Parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other scientific matters raised by a disputing Party in a proceeding, subject to such terms and conditions as the disputing Parties may agree."

Canada - Panama Free Trade Agreement (2013) Chapter 9 Investment Article 9.33: Expert reports reads:

> "Subject to paragraph 2, a Tribunal may appoint experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing Party, subject to such terms and conditions as the disputing Parties may decide."

2.3. Reserving policy space with respect to performance requirements

From this analysis it appears that 30 of the 691 surveyed RTAs include safeguards for environmental purposes regarding the use of performance requirements in the investment chapter (See Annex A). Typical examples are given below.

Korea - Australia Free Trade Agreement (2014) Chapter 11 Investment Article 11.9 reads:

> "Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), 1(c) and 1(f), and 2(a) and 2(b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures."

Canada - Panama Free Trade Agreement (2013) Chapter 9 Investment Article 9.07 reads:

> "A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements is not inconsistent with paragraph 1(f). For greater certainty, Articles 9.04 and 9.05 apply to that measure."

2.4. Excluding environmental measures from investor-state dispute settlement

In rare instances, the surveyed RTAs exclude environmental measures, either in whole or in part, from the scope of ISDS mechanisms (See Annex A).[11] In particular, the China-Australia FTA in force since 2015 incorporate carve-outs for non-discriminatory and legitimate environmental measures from the scope of ISDS.

China–Australia FTA (2015), Chapter 9 Investment, Article 9.11(4) reads:

> "Measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim under this Section."

In a similar vein, the Mexico-Northern Triangle FTA in force since 2001 between El Salvador, Guatemala, Honduras and Mexico, contained a carve-out on the scope of ISDS mechanisms for environmental measures for one of their parties.

Mexico-Northern Triangle FTA (2001), Chapter 14 Investment, Annex 14-41 reads:

> "They will not be subject to the dispute settlement mechanisms set forth in section B or chapter XIX: a) in the case of Honduras: the resolutions adopted by the Secretary of State in the Industry and Commerce Dispatch pursuant to Articles 11 and 18 of the Foreign Investment Law regarding health, national security and the preservation of the environment (unofficial translation)."

However, the Mexico-Central America FTA (2012) - a broader agreement signed between Costa Rica, El Salvador, Guatemala, Honduras, Mexico and Nicaragua – excluded these commitments and replaced the Mexico-Northern Triangle FTA (2001) in 2012.

In addition, the Colombia - Panama FTA (2013) includes commitments not to weaken environmental measures in order to attract investment and excludes this from the scope of ISDS.

Colombia - Panama FTA (2013), Chapter 14 Investment, Annex 14-D (2) reads:

"Article 14.14 (Measures related to Health, Safety, Environment and Labor Rights) will not be subject to the dispute resolution provisions of Section B of this Chapter or Chapter 21 (Dispute Settlement)." (Unofficial translation)

Nevertheless, these provisions only point to a specific article on non-derogation of environmental law to attract investment, and do not entirely curtail the general application of ISDS mechanisms against measures related to health, safety, environment and labour rights.

[11] This study was only able to identify 3 RTAs.

3. Reaffirming policy space for environmental regulation

Turning to the *first angle* of the report, protecting a government's policy space for environmental regulation while securing effective investor protection in RTAs and BITs is essential to achieve the mutual supportiveness of trade, investment and environmental policies.

The aim of this section is to identify available practices for asserting policy space for environmental regulation, while establishing robust investor protection in such trade and investment agreements at the same time. The following sections first examine the interface between trade, investment and the environment with a focus on investor protection and ISDS mechanisms in trade and investment agreements (Section 3.1), and then explore possible ways to incorporate environmental objectives in these agreement to assert environmental policy space (Sections 3.2 and 3.3). Section 3.2 addresses specific issues related to the environment through environmental provisions or environment related investment provisions; and Section 3.3 addresses generic issues that have implications for environmental regulation through general investment provisions.

For clarification, it is not this report's intention to recommend for or against the inclusion of ISDS mechanisms in trade and investment agreements, or their possible reforms that are under discussions in other forums. Furthermore, this section does not aim to prescribe specific approaches for IIA drafting.

3.1. Interface of trade, investment and environment policies

While trade and investment agreements include commitments to extend investor protections, certain treaties also include environmental provisions to safeguard the environment. Government may seek to align these treaty commitments to be coherent and mutually supportive with domestic environmental regulations, to create a level-playing field between foreign and domestic investors, and to ensure all investment is environmentally sustainable. This section provides a brief overview on the balance between investor protections and a government's right to regulate, and then turns to selected ISDS cases related to the environment under RTAs, BITs and the Energy Charter Treaty (ECT).[12]

[12] The Energy Charter Treaty (ECT) is a multilateral framework for energy cooperation promoting energy security and sustainable development signed in 1994 and in-force since 1998. It comprises of 54 Signatories including: Afghanistan, Albania, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus[14], Czech Republic, Denmark, Estonia, European Union and Euratom, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Mongolia, Montenegro, The Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, The former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom, and Uzbekistan. See: www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/.

[13] 1. Note by Turkey: The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus

3.1.1. Balance between investor protection and a government's right to regulate

IIAs aim to attract foreign capital to the host state, protect investments, and yield economic benefits to the parties to the agreement through specific provisions and mechanisms (Pohl, 2018).[14] One of the purposes of investment chapters within RTAs, and IIAs more broadly, is to oblige parties to an agreement to grant certain standards of treatment and protection to foreign investors in order to facilitate foreign direct investment (FDI). This obligation is secured through the inclusion of investment protection provisions such as protection against expropriation, non-discrimination (national treatment, most favoured nation (MFN) treatment), and fair and equitable treatment (FET) (Gaukrodger, 2017a; WTO, 2016). In addition, under most treaties, foreign investors can bring claims when one or more of these commitments have been infringed upon to an investor-state dispute settlement (ISDS) mechanism. This mechanism is primarily based on ad hoc international arbitration under various rule-sets.[15]

Pohl et al. (2012) found that among 1,660 RTAs and BITs covered in their survey (out of some 3,000 IIAs worldwide) 96% of sample treaties contain a mechanism for ISDS through domestic adjudication or international arbitration, or both.

Recognising that international investment is a critical source of finance and a driver of innovation and technology transfer for countries to promote green growth and sustainable development, securing mutual supportiveness of international investment and environmental law is of strong interest to the international investment and environment policy community.[16] Indeed, the creation of a predictable and stable regulatory environment is identified as one of the key drivers for international investment in clean energy (OECD, 2015).

The availability of ISDS mechanisms could theoretically contribute to improved governance by creating incentives for host states to fulfil their treaty obligations and to secure compensation for harmed investors from government measures (Gaukrodger and Gordon, 2012). Such mechanisms that provide for remedies to government measures breaching IIA obligations can improve governance standards and encourage investment flows (Gaukrodger and Gordon, 2012).

(TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the "Cyprus issue".

2. Note by all the European Union Member States of the OECD and the European Union: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

[14] See Pohl (2018) for a broader discussion on the social benefits and costs of IIAs.

[15] Such rule-sets include the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL). See Gaukrodger and Gordon (2012) for more discussion on available arbitral fora and rule-sets. A court-based system that is established in lieu of international arbitration under certain treaties concluded by the EU and its Member States is currently under preparation.

[16] For example, the nexus between investment and environment policy was discussed at the OECD Freedom of Investment Roundtable 14 (OECD, 2011a).

At the same time, investor protection provisions and ISDS mechanisms made available under RTAs, BITs and other IIAs can also raise questions on how governments can pursue public policy goals consistently with investor protection obligations. This issue has, in some cases, been framed as the balance between investor protection and the right to regulate in trade and investment agreements (Gaukrodger, 2017a). [17] Regulatory measures, including those stated to be made for environmental purposes, have been subject to investor claims under ISDS when perceived as being implemented in a manner that is discriminatory or otherwise unfair (Gaukrodger and Gordon, 2012). OECD reports[18] have identified a number of potential issues in balancing investor protection and the right to regulate in trade and investment agreements as follows.

First, investor protection provisions are included in over 3,000 trade and investment agreements worldwide, that are committed at various levels of drafting precision. They differ from treaty to treaty by different parties, and evolve over time, incorporating the unique experiences of each negotiating party. The evolving nature of investor protection obligations across different treaties might theoretically pose challenges for states to clarify their effective investor protections (Gaukrodger, 2017a; 2017b).

Second, the consistency in decision making in ISDS has been questioned. Consistent interpretation by arbitral tribunals and clear drafting of treaty provisions can contribute to provide a stable and predictable investment environment under IIAs and also help secure public confidence in the system. However, some tribunal decisions have raised questions on whether ISDS tribunals have generated consistent decisions.[19] Gaukrodger and Gordon (2012) argue that these concerns may have emerged from the different level and scope of commitments made across various treaty provisions, as well as the varying interpretation by arbitral tribunals. Some modern investment agreements have introduced reforms to promote coherence in ISDS decisions while others have not.

Third, the high costs related to arbitration and remedies could raise questions about the financial burden to the host country from ISDS as opposed to other forms of dispute settlement. One OECD study (Gaukrodger and Gordon, 2012) highlights that costs of arbitration average at around USD 8 million. These costs can either be covered by each party, or shifted partly or fully to the unsuccessful party according to the ruling by the arbitral tribunal. Some individual cases have led to significantly higher costs including a recent case amounting to over USD 120 million.[20] Moreover, these arbitrations have led to claims up to USD 91.2 billion and awards up to USD 40 billion in ISDS cases brought under IIAs. [21] Under ISDS, investors generally seek pecuniary (monetary) compensation

[17] For example, see OECD conference on investment treaties - the quest for balance between investor protection and governments' right to regulate: www.oecd.org/investment/2016-conference-investment-treaties.htm.

[18] These reports include Pohl (2018), Gaukrodger (2017a, 2017b) and Gaukrodger and Gordon (2012).

[19] See for example: OECD (2011b), "Summary of Roundtable discussions by the OECD Secretariat", Roundtable on Freedom of Investment 15.

[20] *Yukos Universal Limited (Isle of Man) and The Russian Federation*, PCA Case No. AA227, Final Award, 18 July 2014, §1847, §1856, and §1866.

[21] *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA226, Final Award, 18 July 2014, §110 and §1888.

while domestic investors may not have access to such damages through domestic courts (Pohl, 2018; Gaukrodger, 2017a; Gaukrodger and Gordon, 2012).

The varying investor protection commitments across treaties, their alleged inconsistent interpretation, and the high amount of potential monetary damages, can in some cases be perceived to have potential dissuasive implications to achieve important policy objectives, including for the environment. This has led some stakeholders to argue that there is a possibility of a regulatory-chill where governments, confronted by these challenges, may refrain from imposing regulations, including those for environmental protection (Pohl, 2018; Gaukrodger, 2017a). (See Box 2 for a further discussion on the potential impacts of investment treaties on domestic regulation and regulatory-chill.)

Box 2. Potential impact of investment treaties on domestic regulation

As synthesised by the OECD working paper on societal benefits and costs of IIAs by Pohl (2018), investment treaties (including RTAs with investment chapters) may have an impact on domestic regulation in three different ways:

(i) IIAs may encourage parties to undertake domestic legislative reforms as a part of implementing obligations under these agreements;

(ii) IIAs may have an effect on parties to be more cautious in planning and designing regulations under the growing awareness of general litigation risk; and

(iii) IIAs may have an effect on parties to alter regulation and enforcement measures in response to specific expected or declared disputes.

The second and third issues may have dissuasive effects from a public policy perspective, as policies could be implemented in a manner that might be perceived as discriminatory or unfair. These two issues form part of the discussion on the ambiguous term "regulatory-chill". Some academics distinguish this term into subcategories of "anticipatory chill" and "specific response chill" (Tietje and Baetens, 2014). Anecdotal evidence is available for either case where parties react to potential risks (anticipatory chill) or specific disputes (specific response chill). However, there is so far no consensus on whether general or specific litigation risks make governments react and compromise their regulatory or enforcement measures. Furthermore, whether such obligations and commitments drive or hinder general governance improvements, and the extent to which these mechanisms present social benefits or costs remains to be an open question and requires further analysis (Pohl, 2018).

Some governments take the view that carefully-drafted trade and investment agreements do not risk impinging upon the rights of states to implement environmental regulation; states, in fact, can draft the rules in IIAs to protect investors and protect legitimate regulatory interests. In the event of a treaty breach, states may provide monetary compensation for damages to the investor and arbitral tribunals have no power to compel states to change laws.

While recognising that carefully-drafted treaty provisions do not directly limit the legislative or regulatory sovereignty of states, the mere existence of such provisions may be interpreted by some critics to have dissuasive implications to the government's regulatory ability to achieve certain public policy objectives in key areas, such as the

environment, if regulators are not adequately apprised of international treaty obligations (Gaukrodger, 2017a; Pohl, 2018).

Some countries have revised their policies on the inclusion of ISDS in their trade and investment agreements. For instance, Australia considers including ISDS mechanisms in their trade agreements on a case-by-case basis and made this explicit in 2013.[22] Other countries have decided to terminate some of their BITs including India in 2016,[23] Indonesia in 2014,[24] and South Africa in 2012.[25] Other countries, including Brazil, have, so far, not included ISDS mechanisms (Gaukrodger, 2017a; Gordon and Pohl, 2015).

3.1.2. Investor-state disputes related to the environment

Investor-state disputes regarding environmental measures have been brought under investment treaties. The ISDS mechanism affords foreign investors the ability to bring claims against governments that have implemented measures, which allegedly breach investment agreement obligations, such as non-discrimination, expropriation, or fair and equitable treatment. This section explores the extent to which environmental measures have been the subject to claims through ISDS mechanisms provided under RTAs, BITs and the ECT.

The present report compiles ISDS cases that are made against government measures, which are explicitly stated to be made for environmental purposes based on official documentation, such as notice of arbitration and final awards. In other words, cases are not classified as "related to the environment" if such information is not available from official sources, even where identified sectors are potentially related to the environment (such as energy, mining, and waste management). Information is compiled based on the author's expert interpretation of official sources.[26] These include the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL) and the Permanent Court of Arbitration (PCA) that are made available from the italaw website,[27] and other government sources. Box 3 below describes the detailed methodology of this classification process.

[22] The Australian government's policy is to consider ISDS provisions in FTAs on a case-by-case basis. For example, the Australia-Korea FTA (2014), signed in April 2014, contains an ISDS mechanism, while the Japan-Australia EPA (2014) signed in July 2014, does not (Gordon and Pohl, 2015).

[23] In 2016, India sent official notices to terminate BITs to 57 partner countries (IISD, 2016).

[24] In 2014, Indonesia expressed its views to negotiate new modern treaties as existing outdated treaties expire. (OECD, 2014).

[25] South Africa terminated its bilateral investment treaty with Belgium and Luxembourg in 2012 (IISD, 2012) and has begun to establish modernised investment protection regimes since 2013 (Gordon and Pohl, 2015).

[26] As there may be diverging views on the extent to which a certain ISDS case may be related to the environment or not, the classification represents the views of the author and do not represent the official views of the OECD or of its member countries.

[27] See italaw database on investment treaties, international investment law and investor-state arbitration: www.italaw.com.

A summary table of ISDS cases interpreted to be directly or indirectly related to the environment is compiled in Annex B. A separate and detailed analysis for RTAs, BITs and the ECT are respectively given in Annex C, D and E.

Box 3. Methodology of screening environment related ISDS cases

The classification of environment related ISDS cases followed a two-tier process. First, potential cases that could be directly or indirectly related to the environment were pre-screened based on the UNCTAD (2018b) database and their respective case summaries between 1987 and 2017 for RTAs, BITs and the ECT. Cases were long-listed if these respective summaries included an explicit reference to the environment or involved sectors that could be potentially related to the environment, such as energy, mining, and waste and water management.

Second, these pre-screened cases were further cross-checked with official documentation such as notice of arbitration and final awards from official sources including ICSID, UNCITRAL, PCA that are available from the italaw website and other government sources.

If the official documentation explicitly mentioned that the claim was made against a measure that was stated to be made on *inter-alia* environmental grounds, they were classified as *environment-related cases based exclusively on official documentation*. Examples of these environmental measures included the application or modification of environmental laws and regulations, revocation of permits and licences due to environmental criteria including environmental impact assessments, or termination of concession contracts based on alleged inadequate environmental performance of the foreign investor. In very rare cases, environmental responsibility of the host state, such as environmental conservation and environmental remediation activities, were subject to investor-state disputes and these examples were also included in this count. This estimation based on official documentation is used throughout this report (Figures 3 to 7).

If these pre-screened cases were only interpreted to be related to the environment based on unofficial sources, such as news articles and policy briefs made available from the italaw website, these cases were classified as *environment-related cases based exclusively on unofficial documentation* (in Figure 3).

If there was no explicit mentioning of environmental measures or issues in either official or unofficial documents, the case was listed as *no information available* (in Figure 3), even if the related sectors were potentially related to the environment. If these claims were interpreted as clearly unrelated to environmental measures or environmental issues, the related cases were classified as *non-environmental cases* (in Figure 3).

Out of 855 ISDS cases that are recorded between 1987 and 2017 in the context of RTAs, BITs and the ECT, 75 cases have been interpreted as disputes related to measures whose stated purpose includes environmental protection (see Figure 3). This roughly accounts for 9% of the ISDS cases that have been filed during this period. This can be considered as a conservative estimate as they are exclusively based on official sources, which are not made available for many cases (especially in examples of the ECT). When further referring to unofficial sources such as news articles and policy briefs from IGOs and the media, this count doubles (see shaded bars in the bottom panel of Figure 3).

From this review, it appears that foreign investors have raised claims against a range of government measures stated to be made on environmental grounds due to harm suffered from alleged breaches of treaty obligations (e.g. discrimination, expropriation, lack of fair or equitable treatment). First, claims have been made in the context of general changes to regulatory regimes for the environment (such as the introduction of national parks, backfilling requirements imposed on mining activities, or ban on certain chemicals and pesticides) that have been implemented in a manner that allegedly harmed the specific investment. Second, claims have been made against specific authorisation processes such as the denial or revocation of environmental permits and licences as a result of environmental impact assessments and other environmental concerns as in cases of mining and landfill operations. Third, claims have also been made against specific decisions such as the termination of concession contracts due to alleged environmental concerns or poor environmental performance by the foreign investor such as in cases of waste and water management. These measures were implemented in a manner that allegedly breached treaty obligations and caused harm to specific investors.

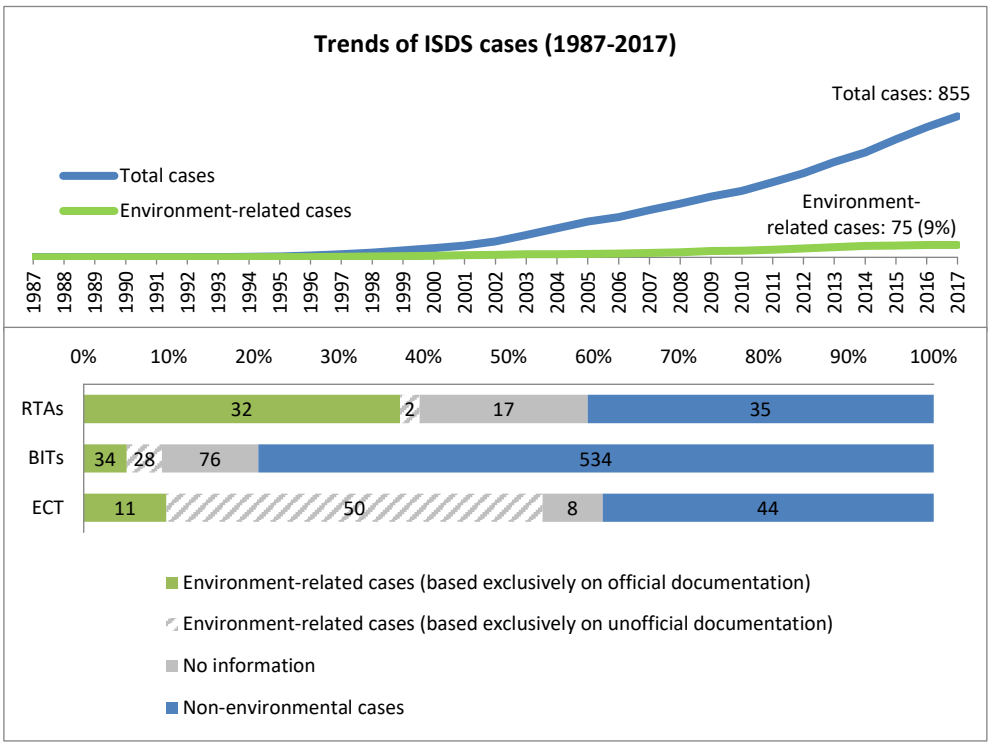
The majority of these measures were intended, as stated by policy makers, to increase environmental stringency, such as through improved environmental regulation. However, some arguably led to reduced environmental stringency, such as the reduction of feed-in-tariffs or other related renewable energy incentives as seen in cases under the ECT. Although very rare, a few cases addressed the environmental responsibility of the host state, such as alleged environmental pollution at an eco-tourism development site [28] and environmental remediation activities for a pre-state-owned oil refinery site.[29]

These cases have led to a range of decisions by ad hoc arbitral tribunals. Based on specific facts, some measures were decided to be consistent with treaty obligations while other measures were found to be inconsistent, unlawful, or discriminatory, or associated with disguised protectionism and nationalisation.

[28] See: *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award, 27 June 2016.

[29] See: *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008.

Figure 3. ISDS cases related to the environment under IIAs – emerging trends

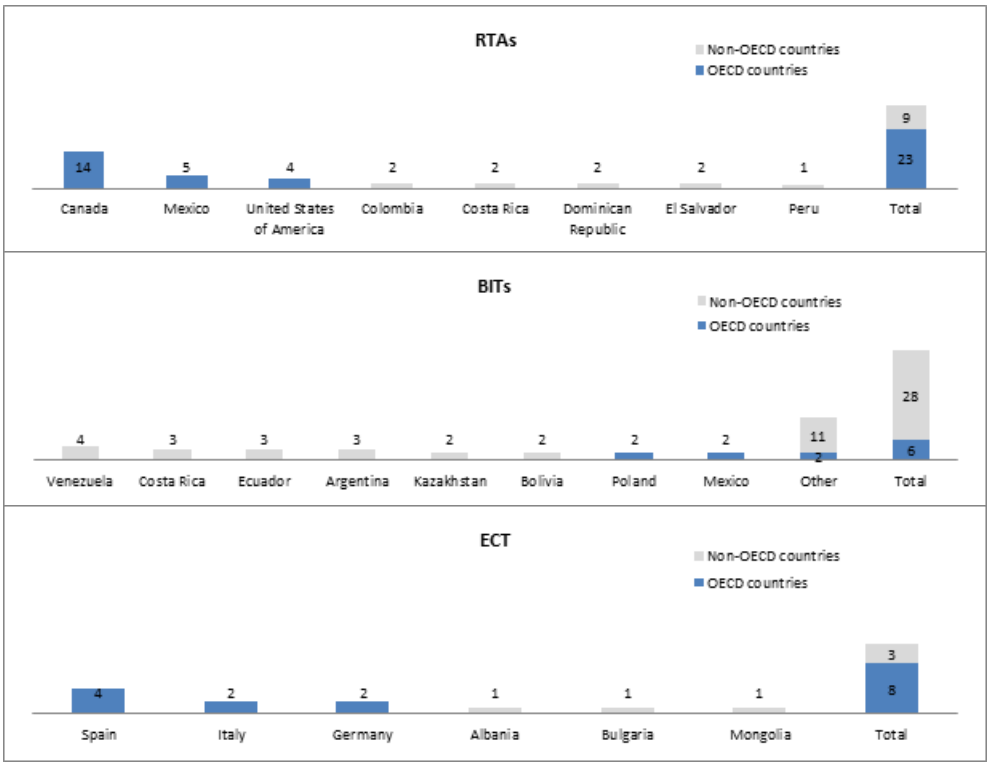


Note: The year shows the year of initiation. The total number of cases may not match those given in the breakdown as one single ISDS case can be brought before several agreements of the host country, such as BITs and ECT, at the same time. "ISDS case related to the environment" represent the views of the authors and do not represent the official views of the OECD or of its member countries.
Source: Author(s) based on italaw website (www.italaw.com).

In terms of geographical coverage, claims are typically brought against respondent states from the Americas under RTAs, against European countries under the ECT, and generally under BITs as applicable. Both OECD and non-OECD member countries have been respondents for ISDS cases related to the environment. More than 72% of ISDS cases concerning environmental measures under the ECT have been brought against OECD members, and similarly over 71% for RTAs. The percentage of claims made against OECD countries drops to 18 % for BITs reflecting that the vast majority of respondent states are from non-OECD countries for environment related cases. See Figure 4 for an overview of the geographical coverage of the respondent states.

Figure 4. ISDS cases related to the environment under IIAs - respondent states

Respondent states by the number of claims

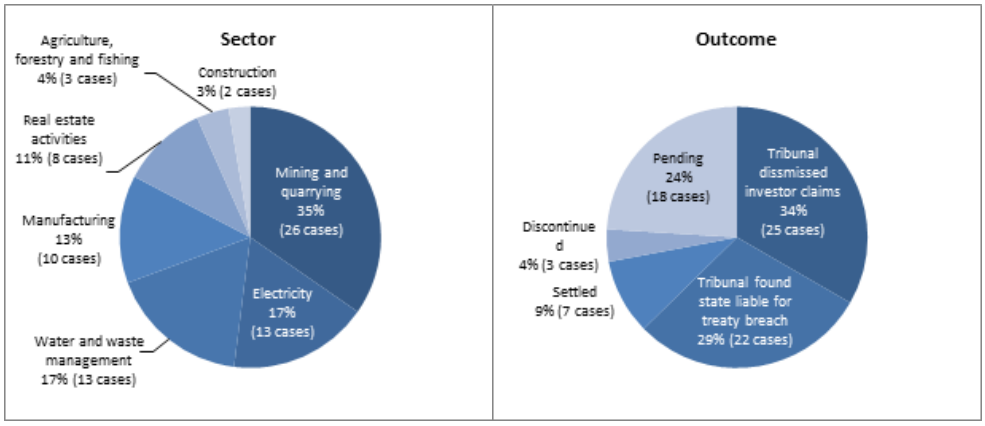


Source: Author(s) based on italaw website (www.italaw.com).

More than one-third of these cases concern the mining and quarrying sector (26 cases, 35%), which is evident in cases brought before RTAs and BITs, and largely arising from the revocation of mining concessions due to stated environmental purposes. Other prominent sectors are the electricity sector, and the water and waste management sector (each representing 13 cases, 17%). Cases regarding the electricity sector largely arise from claims against changes to feed-in tariffs (FITs) and incentive measures related to renewable energy development under the ECT. In parallel, claims related to the water and waste management sector mainly involve the revocation of concession contracts due to stated environmental concerns and alleged poor environmental performance by the foreign investor. This is followed by manufacturing (10 cases, 13%), which involves a spectrum of implementation issues, such as the ban of hazardous materials, chemicals or pesticides, the introduction of environmental measures that can effect production processes, or obligations to conduct remediation activities. Real estate activities (8 cases, 11%) mainly concern the revocation of licences and permits due to stated environmental concerns. Other cases involve agriculture, forestry and fishing (3 cases, 4%), and construction (2 cases, 3%).

The ad hoc arbitral tribunals dismissed investor claims in one-third of these cases (25 cases, 34%), and equally found the state liable for treaty breaches in a similar amount of cases (22 cases, 29%). Some cases were either settled (7 cases, 10%) or discontinued (3 cases, 4%) before reaching any final decision making the outcomes of these cases less transparent. A quarter of these cases are still pending final decision (18 cases, 24%). The sectors and outcomes of these cases are illustrated in Figure 5.

Figure 5. ISDS cases related to the environment under IIAs – sector and outcome



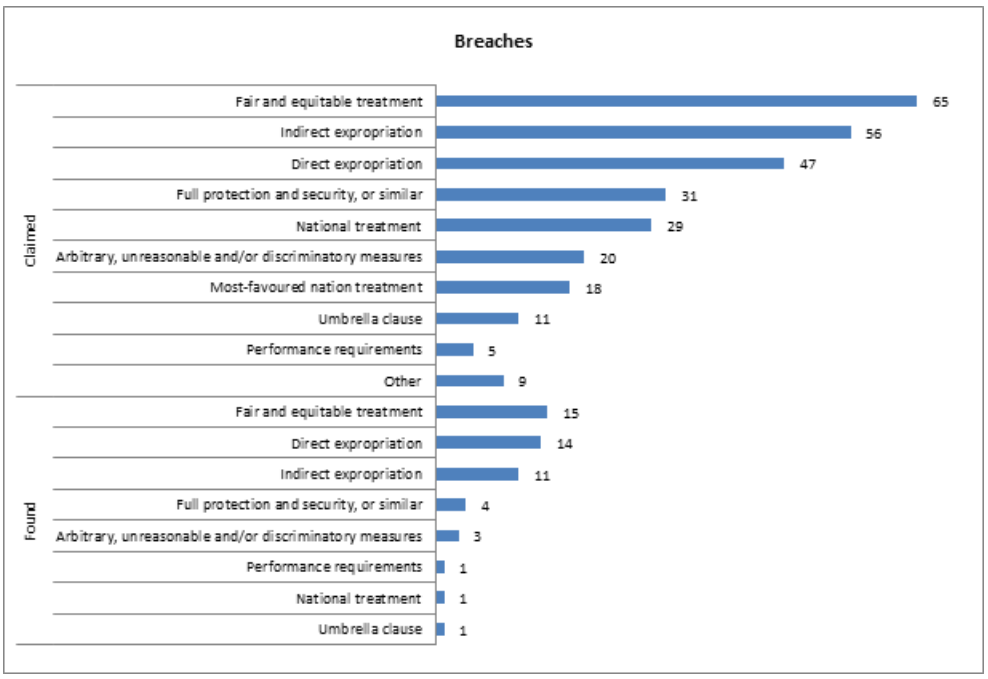
Source: Author(s) based on italaw website (www.italaw.com).

Environment related ISDS cases under IIAs raised claims against breaches of fair and equitable treatment (65 cases), indirect expropriation (56 cases), and direct expropriation (47 cases) and other provisions: full protection and security (31 cases), national treatment (29 cases), arbitrary, unreasonable or discriminatory measures (20 cases), most-favoured nation treatment (18 cases), umbrella clause (11 cases) and performance requirements (5 cases).

Among the 22 cases where the arbitral tribunal found states liable for treaty breaches, breaches were found on fair and equitable treatment (15 cases), direct expropriation (14 cases), indirect expropriation (11 cases), full protection and security (4 cases), and arbitrary, unreasonable or discriminatory measures (3 cases). Breaches against performance requirements, national treatment, and umbrella clauses were relatively rare (1 case each). No cases were reported for breaches against most-favoured nation treatment. See Figure 6 for an overview of breaches claimed by the investor and found by the arbitral tribunal.

While ISDS cases under IIAs can relate to environmental measures, decisions on such cases are based on investment protection provisions. In cases where the tribunal has jurisdiction to hear the claim, decisions turn to the interpretation of main investment liability provisions such as fair and equitable treatment (FET), and direct and indirect expropriation (see Figure 6). Furthermore, decisions on the tribunal's jurisdiction to hear the claim mainly point to the scope of such agreements, such as the definition of covered investors.

Figure 6. ISDS cases related to the environment under IIAs – breaches claimed and found



Source: Author(s) based on italaw website (www.italaw.com).

Finally, the potentially high cost of ISDS - both in terms of amounts claimed and damages awarded – which applies across different sectors, is also relevant for cases related to the environment. Among the cases that were identified in this report, the monetary compensation sought by investors for environment related claims averaged at USD 733 million and elevated to USD 15 billion in the keystone oil pipeline case that was brought before NAFTA.[30] Regarding environment related cases where the tribunal found states liable for an actual treaty breach, awards averaged at USD 182 million, and amounted up to USD 1.2 billion in one case concerning the termination of gold mining concessions and environmental permits in Venezuela.[31] In cases where treaty breaches were actually found and damages were awarded, the average damages awarded were roughly around 30% of the average amounts claimed by investors. See Figure 7 for an overview of monetary claims and awards.

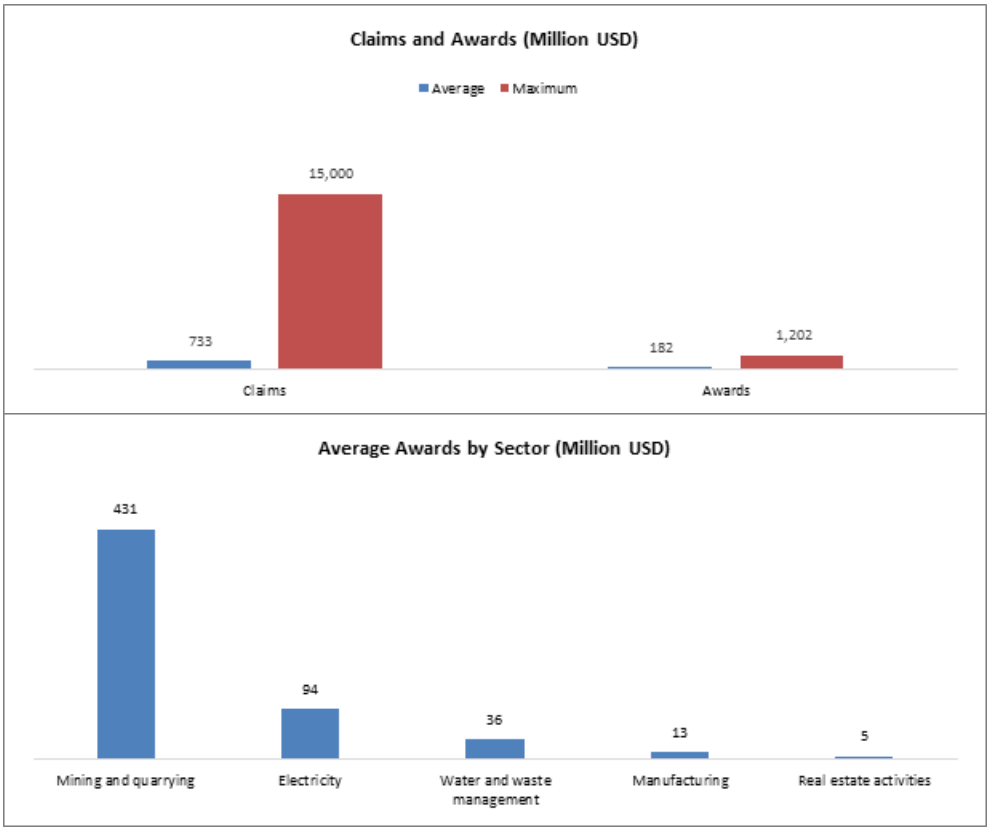
In terms of monetary awards by sector, mining and quarrying are dominant and amount to USD 431 million on average. This is followed by the electricity and gas sector, which average at USD 94 million. Monetary awards in other sectors are in a lower range, in which water and waste management cases average at USD 36 million, manufacturing at USD 13 million and real estate activities at USD 5 million.

It should be noted that these results are based on claims and awards made available to the public. Such information is not always disclosed according to the parties' interest in committing to transparency in their respective trade and investment agreements.

[30] See *TransCanada v. USA*, ICSID Case No. ARB/16/21, Request for Arbitration, 24 June 2016, §91.

[31] See *Crystallex v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, §917.

Figure 7. ISDS cases related to the environment under IIAs – monetary claims and awards



Note: Average amount of monetary claims and awards are averages of ISDS cases related to the environment under RTAs, BITs and the ECT covered in this analysis and whenever the information and data is publically available.
Source: Author(s) based on italaw website (www.italaw.com).

This analysis shows that ISDS cases have been made against an array of environmental measures across different sectors, including mining and quarrying, electricity and gas (mostly renewable energy), water and waste management, and manufacturing, in both OECD and non-OECD countries. Treaty breaches were found in around one-third of environment related cases and they have resulted in large monetary compensation for damages in the range of several million US dollars depending on the sector involved.

Decisions on ISDS cases, including those against environmental measures, are based on investment protection provisions. This points to the importance of careful drafting of particular provisions and the need to implement regulations in light of international obligations. In this respect, it is important for governments to provide local regulators with the resources and expertise to implement environmental regulations in keeping with the government's treaty commitments.

3.2. Reaffirming policy space through environment related investment provisions

An essential way to ensure that trade and investment agreements support environmentally sustainable policies and balance investor protections with a government's right to regulate for legitimate and non-discriminatory measures is to develop good practices in carefully drafting relevant treaty provisions and to ensure that government regulators are equipped

with sufficient awareness of their international treaty obligations. While investment treaties through their investor protection obligations and ISDS mechanisms can help secure a stable and predictable investment environment, policy space can at the same time be protected through carefully-drafted legislation and transparent implementation policies that are fair and non-discriminatory to all investors.

Another way to do so is to make sure that sufficient provisions are incorporated to guide the arbitral tribunal to generate consistent decisions. While RTAs, and IIAs more broadly, can incorporate environmental provisions to enhance environmental benefits (as illustrated in Section 2), the main risk to environmental policies may lie with unexpected tribunal interpretation of poorly-drafted provisions (fair and equitable treatment (FET), and indirect expropriation in particular). IIA joint-party submissions, for example, can help assist future tribunals in interpreting problematic treaty provisions, in cases where tribunals consistently misinterpret the text.

This section highlights approaches taken by some governments to reaffirm the environmental policy space in trade and investment agreements through provisions that are specific to the environment. The following Section 3.3 focuses instead on approaches to reaffirm environmental policy space through general investment provisions. These approaches are identified through existing practice in these agreements as well as insights from currently available literature. To clarify, these approaches to reaffirm environmental policy space generally focus on textual reforms of provisions.

3.2.1. Scope and Definitions

The scope and definitions specified in RTAs, and IIAs more broadly, assign the rights, obligations and coverage of such agreements and comprise the basis on which ad hoc arbitral tribunals consider cases that may be related to the environment. In particular, the definition of environmental law can have potential impact on the decision by the arbitral panel.

As raised at the 2016 OECD Greening RTA workshop (OECD, 2017a), commitments related to environmental protection not only appear in environmental law but also in related laws and regulations. Examples from ISDS cases show that many claims are made against environmental regulation allegedly causing damage to investments in the mining sector. Environmental disciplines to regulate such sectors not only emerge in the environmental law but also in other laws and regulations concerning natural resources and mining. Refining the scope and definitions of IIAs and aligning them to domestic policy frameworks can be an important way to enable an integrated approach and to secure environmental objectives in these agreements (OECD, 2017a; Francis, 2012).

3.2.2. Indirect expropriation

Indirect expropriation is the third most common reason, after fair and equitable treatment and direct expropriation, where arbitral tribunals found states liable for a treaty breach in cases related to the environment under IIAs (see Figure 6). Compared to direct expropriation where the government orders the transfer of private property to the state or a third party, indirect expropriation concerns a similar effect in expropriation or deprivation of investor property through interference by the state in the use of that property or with the enjoyment of benefits, even where the property is not seized or the legal title of the property is not affected, regardless of the intent (OECD, 2004).

Whether government measures can be considered as indirect expropriation or not is viewed by some stakeholders as a factor that can have an impact on the effective ability of a government to regulate. As suggested by a number of studies, a prudential carve-out of environmental measures that do not constitute indirect expropriation, or more detailed provisions on what government measures rise to the level of an indirect expropriation, may provide a better safeguard for governments to effectively regulate on environmental matters (Firger and Gerrard, 2012; Beharry and Kurizky, 2015; UNCTAD, 2015; Tietje and Baetens, 2014; UN Environment and IISD, 2016; OECD, 2004). To specify that non-discriminatory measures for environmental regulation do not constitute indirect expropriation could possibly guide arbitral tribunals in placing final decisions. Indeed, a number of RTAs and BITs have incorporated such an approach (see Section 2.1).

Furthermore, additional criteria and concepts to further clarify or circumscribe measures that constitute indirect expropriation may also increase the consistency of interpretation by the arbitral tribunal. These criteria and concepts can include, for example: the degree of interference with property rights; the character of governmental measures; margin of appreciation; police powers; proportionality of the state measure; and interference with reasonable investment-backed expectations (UN Environment and IISD, 2016; Beharry and Kurizky, 2015; UNCTAD, 2015; Tietje and Baetens, 2014; Firger and Gerrard, 2012; OECD, 2004).

3.2.3. Performance requirements

Performance requirements are measures imposed on investors to achieve certain policy goals, such as environmental protection. They can include a range of conditions attached to particular investments such as the implementation of research and development programmes, training programmes for local capacity development, technology transfer and environmental actions, or, more controversially, the use of local content requirements or quantitative restrictions. While some argue that performance requirements skew the flow of foreign direct investment, others claim that such measures are useful in directing commercial interest towards sustainable development objectives (Nikièma, 2014).

The WTO Agreement on Trade-Related Investment Measures (TRIMs) restricts the use of performance requirements that are discriminatory (e.g. local content requirements) according to the national treatment obligation of Article III:4 of GATT 1994, or those that impose quantitative restrictions, such as trade-balancing requirements, foreign exchange restrictions, or export controls that are prohibited under Article XI:1 of GATT 1994.[32] To note, the TRIMs Agreement only covers trade in goods and excludes trade in services from its scope.

Whereas the majority of BITs do not impose any explicit restrictions on the use of performance requirements, a growing number of BITs disallow the use of such measures in accordance with or in addition to the TRIMs Agreement. One important distinction is that while the performance requirements that are prohibited under the TRIMs Agreement are available to the WTO dispute settlement system for member state parties, parallel disciplines on performance requirements in trade and investment agreements can be subject to investor-state dispute settlement (ISDS) mechanisms (Nikièma, 2014).

In this context, some RTAs and BITs reserve policy space for the use of performance requirements in the environment domain despite the general prohibition (Gordon and

[32] www.wto.org/english/tratop_e/invest_e/trims_e.htm.

Pohl, 2011). Section 2.3 indicates that 40 out of 691 examined RTAs from 1959 to 2016 allow the use of performance requirements for non-discriminatory environmental purposes. Some studies suggest that providing policy space for performance requirements related to environmental measures could be feasible for host countries to promote investment in environmental goods and services and in sustainable forestry (Firger and Gerrard, 2012). Performance requirements, however, may distort the market in ways that discourage investment, including in green sectors.

For WTO members, performance requirements need to be in compliance with the TRIMs Agreement and consistent with the national treatment obligation of Article III:4 of GATT 1994 as well as the prohibition on imposition of quantitative restrictions of Article XI:1 of GATT 1994 (Nikièma, 2014).

3.2.4. General exceptions

As seen in Section 2, environmental protection is frequently included as part of general exceptions in an effort to safeguard the regulatory space for governments to address environmental concerns. Robust exception clauses can indicate intentions to secure the right to regulate for legitimate public policy objectives including for the environment (Tietje and Baetens, 2014; Beharry and Kuritzky, 2015; Meltzer, 2014; UNCTAD, 2015; UN Environment and IISD, 2016; Firger and Gerrard, 2012; Droege et al., 2016).

In practice, a small number of agreements exclude environmental measures from the scope of ISDS mechanisms (see Sections 2.4 excluding environmental measures from ISDS, and 3.2.6. (a) qualifying the scope of ISDS – for a further discussion).

However, careful drafting of other treaty provisions can also serve the purpose of protecting the legitimate public policy space related to the environment. The inclusion of such a general exception may arguably risk implying that such a right does not exist for other sectors.

3.2.5. Right to regulate for the environment

Establishing a balance between investor protection and the right to regulate is a key issue in current discussions and policies around trade and investment agreements (Gaukrodger, 2017a). As illustrated above in Section 3.1.2, ISDS cases have involved claims against measures that are stated to be adopted for environmental protection reasons yet allegedly breach treaty obligations. For this reason, careful drafting of treaty provisions, coupled with providing regulators with the resources to implement policies within international commitments, is crucial to ensuring that such challenges will be dismissed.

Since 2017, several agreements have started to include explicit provisions to reaffirm the right to regulate including for the environment. For example, the CETA agreement between Canada and the EU, signed in 2016 and in force since 2017, includes a specific article in reaffirming the right to regulate including for the environment.[33] While the effectiveness and impact of such provisions is yet to be seen, this could be an additional area for consideration.

[33] **CETA** (2017), Article 8.9(1): "For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity."

3.2.6. Procedural safeguards for ISDS proceedings

The ISDS system is designed to permit foreign investors to bring claims for alleged harms that infringe treaty obligations to an international arbitration mechanism instead of – or in addition to – domestic courts in host countries (Gaukrodger and Gordon, 2012). The rationale for such independent third-party adjudication is to ensure a fair resolution of disputes, particularly in partner countries with less established legal court systems or where there is doubt that a fair proceeding could be obtained in a local judicial system (Mann, 2001). In this regard, this section explores environment related practices in three aspects: (i) qualifying the scope of ISDS; (ii) arbitration rules designed for environmental disputes and technical issues; and (iii) counterclaim provisions and investor obligations.

a. Qualifying the scope of ISDS

Approaches to qualify the scope of ISDS mechanisms may have implications to environmental policy, even if such approaches have been pursued for a broader range of negotiating objectives beyond environmental protection. Some parties have taken measures to apply ISDS only to targeted situations. For example, the new NAFTA, the United States-Mexico-Canada Agreement (USMCA), limits ISDS to investments in the post-establishment phase made between the US and Mexico and to investor protection provisions on national treatment, Most Favoured Nation treatment and direct expropriation.[34] Under the agreement, Canada will no longer be subject to ISDS apart from the three-year transition period.[35]

Furthermore, the scope of ISDS can be restricted to exclude certain areas of interest. Primary examples of carving out specific measures from the scope of ISDS can be seen in sensitive sectors such as the financial sector (see e.g. NAFTA, 1994 [36] and Belgium/Luxembourg-Colombia BIT, 2009).[37] In relation to public health measures, the

[34] See **United States-Mexico-Canada Agreement** (2020), Annex 14-D, Article 3 (1): "In the event that a disputing party considers that a qualifying investment dispute cannot be settled by consultation and negotiation […] the claimant […] may submit to arbitration under this Annex a claim: (i) that the respondent has breached: (A) Article 14.4 (National Treatment) or Article 14.5 (Most-Favored-Nation Treatment), except with respect to the establishment or acquisition of an investment; or (B) Article 14.8 (Expropriation and Compensation), except with respect to indirect expropriation; and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach […]."

[35] To clarify, an ISDS mechanism is available between Canada and Mexico in the CPTPP (2018).

[36] **NAFTA** (1994), Article 1410: "1. Nothing in this Part shall be construed to prevent a Party from adopting or maintaining reasonable measures for prudential reasons, such as: (a) the protection of investors, depositors, financial market participants, policyholders, policy claimants, or persons to whom a fiduciary duty is owed by a financial institution or crossborder financial service provider;(b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions or crossborder financial service providers; and (c) ensuring the integrity and stability of a Party's financial system."

[37] **Belgium/Luxembourg-Colombia BIT** (2009), Article II (5): "Nothing contained in this Agreement shall apply to measures adopted by any Contracting Party, in accordance with its law, with respect to the financial sector for prudential reasons, including those measures aimed at protecting investors, depositors, insurance takers or trustees, or to safeguard the integrity and stability of the financial system."

Comprehensive and Progressive Agreement for the Trans Pacific Partnership (CPTPP) (2018) indicates specific carve-outs related to tobacco control measures from ISDS mechanisms (Bernasconi-Osterwalder, 2015).[38]

With regard to the environment, a small number of RTAs carve out non-discriminatory and legitimate environmental measures from the scope of ISDS mechanisms as in the Mexico-Northern Triangle FTA (2001) and the China- Australia FTA (2015).[39]

b. Arbitration rules designed for environmental disputes and technical issues

Some arbitration procedures can be specialised for serving environment related disputes. For example, in 2001, the Permanent Court of Arbitration (PCA) developed optional arbitral procedures for disputes related to environment and natural resources.[40] These procedures have been developed on the basis of United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. However, they have been tailored to accommodate specific procedures necessary to address scientific or technical issues related to environment and natural resources. The approach institutionalises specific processes, including: (i) the establishment of a specialised list of arbitrators,[41] (ii) the establishment of a list of scientific and technical experts to appoint for developing expert reports,[42] and (iii) the recourse to a non-technical document summarising information and

[38] **CPTPP Agreement** (2018), Article 29.5: "A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed."

[39] **Mexico- Northern Triangle FTA** (2001), Annex 14-41: "They will not be subject to the dispute settlement mechanisms set forth in section B or chapter XIX: a) in the case of Honduras: the resolutions adopted by the Secretary of State in the Industry and Commerce Dispatch pursuant to Articles 11 and 18 of the Foreign Investment Law regarding health, national security and the preservation of the environment (unofficial translation)"; **China–Australia FTA** (2015), Article 9.11 (4) "Measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim under this Section."

[40] PCA, Optional Rules for Arbitration of Disputes Relating to Natural Resources and the Environment, See: https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf.

[41] *IBID*, Article 8 (3): "In appointing arbitrators pursuant to these Rules, the parties and the appointing authority are free to designate persons who are not Members of the Permanent Court of Arbitration at The Hague. For the purpose of assisting the parties and the appointing authority the Secretary-General will make available a list of persons considered to have expertise in the subject-matters of the dispute at hand for which these Rules have been designed."

[42] *IBID*, Article 27 (5): "The Secretary-General will provide an indicative list of persons considered to have expertise in the scientific or technical matters in respect of which these Rules might be relied upon. In appointing one or more experts pursuant to paragraph 1 above, the arbitral tribunal shall not be limited in its choice to any person or persons appearing on the indicative list of experts."

providing background on scientific or technical issues to fully understand the nature of the dispute.[43] This institutional approach can provide a solution to better secure the capacity of arbitral proceedings to deal with scientific and technical issues related to the environment in which past cases show some institutional weaknesses (Beharry and Kuritzky, 2015).

c. Counterclaim provisions and investor obligations

A study by Rivas (2014) points out that among the 314 cases brought forward to the International Centre for Settlement of Investment Disputes (ICSID), only 3% of them constituted a counterclaim brought by the disputing host state against a foreign investor. One reason for this limitation is that it is often difficult for host states to identify investor obligations under IIAs, BITs or RTAs, where such agreements are signed between governments and not the investors. In such situation, tribunals may not be keen to acknowledge investor obligations related to environmental protection (Rivas, 2014; Beharry and Kuritzky, 2015).

While government measures that undermine investor protection need to be avoided, governments have legislative power and consequently have opportunities to introduce legitimate non-discriminatory obligations for investors based on public interests. Should investor obligations be set forth, counterclaims from state to investors could potentially be made more easily and address a perceived imbalance by some, between state and investors.

Investor obligations can be explicitly written or stated in reference to investment related national laws including those on environmental impact assessment, environmental management and corporate social responsibility (CSR) (UN Environment and IISD, 2016). This can also include voluntary principles and international standards such as, UN Global Compact[44] (Beharry and Kuritzky, 2015), UN Guiding Principles on Business and Human Rights[45] (UNCTAD, 2015), and OECD Guidelines on Multinational Enterprises [46] (Tietje and Baetens, 2014; Firger and Gerrard, 2012). These obligations have been, to a limited degree, incorporated in investment related articles or alternatively in the preamble to acknowledge environmentally responsible investment (see also Section 4).

RTAs increasingly include reference to promote CSR activities. In particular, Canada has been at the forefront of including such provisions (Alschner and Tuerk, 2013). References encouraging the adoption of CSR standards by companies can be seen in the investment chapters of the Canada-Korea FTA and Canada-Panama FTA.[47] Other examples include

[43] *IBID*, Article 24 (4): "The arbitral tribunal may request the parties jointly or separately to provide a nontechnical document summarizing and explaining the background to any scientific, technical or other specialized information which the arbitral tribunal considers to be necessary to understand fully the matters in dispute."

[44] See: https://www.unglobalcompact.org/.

[45] See: United Nations (2011).

[46] See: OECD (2011c).

[47] **Canada - Korea FTA** (2015), Article 8.16 and **Canada - Panama FTA** (2013), Article 9.17: "Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognised standards of corporate social responsibility in their practices and their internal policies, including statements of principle that are endorsed or supported by the Parties. These principles address issues such as labour, environment, human rights, community relations, and anticorruption."

RTAs which include the European Union as a party that takes a co-operative approach. These include for example, the EU-Colombia and Peru and Ecuador FTA[48] and the EU-Korea FTA.[49]

In addition, some model BITs include environmentally specific investor obligations in their agreements. For example, the Southern African Development Community (SADC) model BIT includes investor obligations in reference to environmental and social impact assessment,[50] environmental management and improvement,[51] and "minimum standards for human rights, environment and labour".[52] Beyond environmentally specific provisions, the India's model BIT includes investor obligations in relations to sustainable development objectives.[53] Some other BITs include investor obligations in a more general sense,[54,55] and

[48] **EU - Colombia and Peru and Ecuador FTA** (2013) Article 271 (3): "The Parties agree to promote best business practices related to corporate social responsibility."

[49] **EU - Korea FTA** (2011), Article 13.6 (2): "[…] The Parties shall strive to facilitate and promote trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability." **;** Annex 13 (1): "In order to promote the achievement of the objectives of Chapter Thirteen and to assist in the fulfilment of their obligations pursuant to it, the Parties have established the following indicative list of areas of cooperation: […] information exchange and joint work on corporate social responsibility and accountability, including on the effective implementation and follow-up of internationally agreed guidelines, fair and ethical trade, private and public certification and labelling schemes, including eco-labelling, and green public procurement."

[50] **South Africa Model BIT** (2012), Article 13(1): "Investors or their Investments shall comply with environmental and social assessment screening criteria and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the Host State for such an investment [[or the laws of the Home State for such an investment][or the International Finance Corporation's performance standards on Environmental and Social Impact Assessment], whichever is more rigorous in relation to the Investment in question]."

[51] **South Africa Model BIT** (2012), Article 14(1): "Investments shall, in keeping with good practice requirements relating to the size and nature of the Investment, maintain an environmental management system consistent with recognized international environmental management standards and good business practice standards."

[52] **South Africa Model BIT** (2012), Article 15(3): "Investors and their investments shall not [establish,] manage or operate Investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher."

[53] **India Model BIT** (2016), Article 8: "The objective of this Chapter is to ensure that the conduct, management and operations of Investors and their Investments are consistent with the Law of the Host State, and enhance the contribution of Investments to inclusive growth and sustainable development of the Host State."

[54] **COMESA Investment Agreement** (2007), Article 13: "COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made."

[55] **Morocco-Nigeria BIT** (signed in 2016), Article 19 Corporate Governance and Practices: "Investments shall meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices."

set conditions for counterclaim provisions (Beharry and Kuritzky, 2015; Bernasconi-Osterwalder, 2015; UNCTAD, 2015).[56, 57]

Screening processes can inform the host governments about the compliance records, corporate governance and environmental performance of potential incoming foreign investors, and are increasingly included in BITs and RTAs, for example the Azerbaijan-Croatia BIT[58] and India-Japan EPA[59] (Alschner and Tuerk, 2013).

In terms of challenges to this approach, some parties may find it difficult to negotiate such provisions on investor obligations and counterclaims as investment treaties are often used as a tool to promote investor protection and attract foreign investment (Beharry and Kuritzky, 2015). Furthermore, the application of "denial of benefits" have so far been less likely subject to modification for the purpose to safeguard specific sectors including for the environment (OECD, 2018a). Nevertheless, in order to secure environmentally responsible investment, some treaties already incorporate investor obligations, counterclaim provisions, or the right to seek information about the investor's business information to screen incoming investment.

3.3. Reaffirming policy space through general investment provisions

The focus of this section is to investigate ways to reaffirm policy space, including for environmental regulation and its linkages with general investment provisions. The examples given in this section are also drawn from existing practices.

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56 **COMESA Investment Agreement** (2007), Article 28 (9): "A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages."

57 **SADC Model BIT** (2012), Article 10: Common Obligation against Corruption; Article 11: Compliance with Domestic Law; Article 12: Provision of Information; Article 13: Environmental and Social Impact Assessment; Article 14: Environmental Management and Improvement; Article 15: Minimum Standards for Human Rights, Environment and Labour; Article 16: Corporate Governance Standards; Article 17: Investor Liability; Article 18: Transparency of Contracts and Payments.

58 **Azerbaijan-Croatia BIT** (2008), Article 3 (1): "Host Contracting Party has the right to seek information from a potential investor or its home state about its corporate governance history and its practices as an investor, including in its home state. Host Contracting Party shall protect confidential business information they receive in this regard. Host Contracting Party may make the information provided available to the public in the community where the investment may be located, subject to the protection of confidential business information and to other applicable national legislation."

59 **India-Japan EPA** (2011) Article 91 (2): "[A] Party may require an investor of the other Party or its investments in the Area of the former Party, to provide business information concerning those investments, to be used solely for informational or statistical purposes. The former Party shall protect such business information that is confidential from disclosure that would prejudice the competitive position of the investor or the investments. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its laws and regulations."

Given the broad intersection between environmental regulation and investor protection, it is important to specify the scope of the agreement and their substantive provisions to the extent possible rather than leaving the task of interpreting provisions to dispute settlement procedures (Frey, 2015a). Such approaches would involve further specification of the scope and definitions, main liability provisions (e.g. fair and equitable treatment, most favoured nation treatment), and other procedural safeguards that are beyond those specific to the environment, such as filtering frivolous claims.

Although these generic issues may have implications to the environment, they form part of the broader obligations that are not environmentally specific. Indeed, commitments to refine such obligations are taking place in other fora, such as the OECD Investment Committee. Moreover, possible reforms for ISDS have been under discussions for example at UNCITRAL since 2017[60] and ICSID since 2018.[61] For this reason, this report does not intend to make any recommendations on these generic issues. Instead, this section aims to highlight general investment provisions that have potential implications for the right to regulate on environmental issues under IIAs and to inform some of the issues at stake. While the available literature points to environmental objectives and their linkages with elements for possible reforms under ISDS,[62] it is beyond the scope of this report to discuss these issues.

3.3.1. Scope and Definitions

The scope and definitions specified in IIAs can have significant influence over arbitral cases that may be related to the environment. In some ISDS cases, the definition of investors and investments can be a decisive factor for the arbitral tribunal to determine its jurisdiction over the case and to place a final decision. In this regard, some IIAs include additional requirements to specify investments as those in accordance with domestic laws of the host state. A number of arbitral tribunals have considered this requirement to decide on its jurisdiction over the case (OECD, 2008a). In this vein, a detailed definition of protected investors under such agreements may help facilitate legitimate claims made by foreign investors against host governments (UN Environment and IISD, 2016).

3.3.2. Fair and Equitable Treatment and Minimum Standard of Treatment

The legal concept of fair and equitable treatment (FET) has been interpreted by ad hoc arbitral panels, based on the specific drafting for that provision of a particular treaty and the unique fact pattern of each case, leading to different tribunal outcomes regarding the extent of investor protection. According to Gaukrodger (2017b) and Section 3.1.2 of this report, FET is the most often cited substantive provision in debates over the right to

[60] See: www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html.

[61] See: https://icsid.worldbank.org/en/amendments.

[62] Some approaches raised in the literature are for example: (i) to qualify the scope and procedural access to arbitral systems (UN Environment and IISD, 2016; Firger and Gerrard, 2012); (ii) to filter frivolous and obviously unmeritorious claims; (iii) to consider third party involvement in proceedings (Beharry and Kuritzky, 2015; OECD, 2005); (iv) to install mandatory transparency requirements (UNCTAD, 2015; 2010; Tietje and Baetens, 2014); (v) to consider the qualification of roster of arbitrators (OECD, 2017; Tietje and Baetens, 2014); (vi) to consider appellate mechanisms (OECD, 2017; Tietje and Baetens, 2014); and (vii) to consider Investment Court Systems and Multilateral Investment Courts (European Commission; 2017).

regulate. The FET clause is intended to establish host government obligations to secure investor protection in a number of ways. This is also relevant to the ISDS cases concerning environmental disputes brought under IIAs, in which FET was the primary reason for foreign investors to raise claims against host governments, and also where states were found liable for treaty breaches from our review (see Figure 6).

While loosely-drafted FET clauses create a range of uncertainty and can be subject to different interpretations, current efforts to safeguard the right to regulate have been translated by some into provisions limiting the application of FET obligations to the minimum standard of treatment under customary international law (Gaukrodger, 2017b). Examples can be seen in NAFTA[63] and a range of other recent RTAs including the CAFTA-DR agreement[64] and the ASEAN-Australia-New Zealand FTA.[65]

Another approach can be seen where the FET obligations are specified as the Minimum Standard of Treatment according to the customary international law and supplemented by additional caveats. For instance, such approaches can indicate that an action inconsistent with an investor's expectations does not constitute a breach of FET obligations, as seen in the CPTPP agreement. Furthermore, IIAs could make explicit that measures not to issue, maintain or grant subsidies would not breach FET commitments, as specified in the CPTPP agreement (Bernasconi-Osterwalder, 2015).[66]

Other efforts have gone further in specifying the norms of FET directly in the agreements. This can be seen for instance in the approaches taken by ASEAN-China agreement,[67] the

[63] **NAFTA** (1994), Article 1105: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

NAFTA Parties subsequently issued a joint interpretation in 2001 - Notes of Interpretation of Certain Chapter 11 Provisions: "The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."

[64] **CAFTA-DR** (2006), Article 10.5: "Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."

[65] **ASEAN-Australia-New Zealand FTA** (2010), Chapter 11 Article 6: "[T]he concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights."

[66] **CPTPP Agreement** (2018), Article 9.6: "Each Party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security. […] For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.[…] For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."

[67] **ASEAN – China Agreement** (2005), Article 7 (2): "[F]air and equitable treatment refers to the obligation of each Party not to deny justice in any legal or administrative proceedings."

CETA between Canada and the EU,[68] and the EU-Singapore Investment Protection Agreement.[69]

While specifying the scope of FET seems to be the main trend, at least one party has opted to drop the whole FET clause from the agreements. This can be seen for instance in the Indian model BIT (Gaukrodger, 2017b; Firger and Gerrard, 2012).

3.3.3. Full protection and security

Full protection and security provisions aim to guarantee a certain level of protection and security to foreign investors covered in a given agreement. In some cases, "full protection and security" is specified without further explanation and interpreted by arbitral tribunals in different ways. For example, some tribunals have limited the interpretation of full protection and security provisions to physical protection and security.[70] Several other tribunals have indicated that the full protection and security provision is not absolute and does not impose strict liability upon the state.[71] In contrast, other tribunals have interpreted

[68] **CETA** (2017), Article 8.10 (2): "A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article."

[69] **EU-Singapore Investment Protection Agreement** (n.d.), Article 2.4 (1): "Each Party shall accord in its territory to covered investments of the other Party fair and equitable treatment1 and full protection and security in accordance with paragraphs 2 to 6."

[70] See *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, §632: "The Parties have proposed two different interpretations of the "full protection and security" provision in Article II(2) of the Treaty. The Claimant submits that "full protection and security" extends to protection of legal security and the stability of the legal environment, whereas the Respondent contends that such standard should be limited to physical protection and security. The Tribunal is of the view that "full protection and security" is a distinct treaty standard whose content is not to be equated to the minimum standard of treatment. However, the Tribunal considers that such treaty standard only extends to the duty of the host state to grant physical protection and security. Such interpretation best accords with the ordinary meaning of the terms "protection" and "security"."; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, §§622-623 "The Tribunal finds that Claimant's claim under Article II(2) of the BIT, to the extent that it provides for the duty to accord full protection and security to Claimant's investments, is to be dismissed. While some investment treaty tribunals have extended the concept of full protection and security to an obligation to provide regulatory and legal protections, the more traditional, and commonly accepted view, as confirmed in the numerous cases cited by Respondent is that this standard of treatment refers to protection against physical harm to persons and property. […] Accordingly, the Tribunal finds that the obligation to accord full protection and security under the BIT refers to the protection from physical harm.[…]."

[71] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, §177 "[…] full protection and security is not absolute and does not impose strict liability upon the State that grants it."; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, §181: "Finally, this Tribunal observes that the standard is not absolute and does not imply strict liability of the host State. As

this provision by extending its meaning beyond physical security to cover economic, legal and other protection to offer a stable and secure investment environment (Malik, 2011; OECD, 2004). For example, among the environment related cases covered in this report, some tribunals have interpreted the provision to provide for due diligence[72] or cover beyond physical protection and security,[73] and found states liable for breaching these obligations.

For this reason, it may be important to consider the scope of full protection and security, in order to safeguard regulatory policy space, including for the environment. Some parties have taken action to link this standard to customary international law or to explicitly specify that the standard is limited to police protection and physical security (Malik, 2011; OECD, 2004). While these approaches may have positive implications to public policy measures, the standard is frequently analysed in connection with claims involving fair and equitable treatment provisions and should be considered in parallel.

3.3.4. Most Favoured Nation Treatment and National Treatment

Most favoured nation (MFN) and national treatment (NT) obligations generally commit host governments to grant treatment to foreign nationals covered by an agreement no less favourably than it treats nationals in like circumstances from any other country or domestically. MFN treatment and national treatment obligations generally serves to secure non-discrimination between their trading partners.

From an environment policy perspective, it would be important for governments to retain rights to distinguish between investments made in an environmentally sound manner and those associated with environmental risks. Since trade laws under GATT on non-discrimination apply to investments under "like circumstances", it may be worthwhile to further clarify what might qualify as "like circumstances" in the framework of trade and

noted by the tribunal in Teemed and later quoted by the tribunal in Saluka "*...the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it.*""; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, §357: "The Arbitral Tribunal finds that the record does not show in which way the process of investigation amounted to a violation of the Treaty. In Tecmed, the Tribunal underlined that "the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it."

[72] *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award, 15 March 2016, §6.81: "[…] Under the FPS [full protection and security] standard, the obligation of the host State does not attract strict liability but imposes a lesser duty more akin to the exercise of due diligence. Both standards can require active, and not merely passive, conduct by the host State that may go beyond the mere abstention from prejudicial conduct."

[73] See *Azurix v. Argentina (I)*, ICSID Case No. ARB/01/12, Award, 14 July 2006, §408: "[…] when the terms "protection and security" are qualified by "full" and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security."; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, §729: "The Arbitral Tribunal adheres to the *Azurix* holding that when the terms "protection" and "security" are qualified by "full", the content of the standard may extend to matters other than physical security."

investment agreements. Some examples are found in the COMESA Investment Agreement and the CPTPP agreement (UN Environment and IISD, 2016).[74, 75]

Treaty shopping[76] under the MFN clause could potentially undermine a government's policy space to regulate for, but not limited to, environmental protection. In some cases, the MFN clause has led to unanticipated interpretation by arbitral tribunals. An issue that has been identified within the MFN clause is that it can, in some instances, filter stringent investor protection obligations from other agreements into certain agreements which in contrast may grant less favourable treatment to foreign investors.[77] This means that government's efforts to preserve the right to regulate against investor protection in certain recent agreements can be nullified by the investors' application of MFN commitments to "looser" investor obligations specified in parallel agreements by the host country (UN Environment and IISD, 2016).

For instance, despite that the Australia-United States FTA (2004) does not provide for ISDS mechanisms under the agreement, an investor related to the energy sector recently filed a notice of dispute against Australia in 2016 by seeking the importation of investor protection obligations under parallel BITs (e.g. Australia-Mexico BIT and Australia-Hong Kong, China BIT) through the MFN clause.[78]

The scope of the MFN clause could be expressly circumscribed to exclude ISDS mechanisms or to exclude any favourable conditions granted to third-country investors

[74] COMESA Investment Agreement, Article 17.2: "For greater certainty, references to 'like circumstances' in paragraph 1 of this Article requires an overall examination on a case by case basis of all the circumstances of an investment including, inter alia: a) its effects on third persons and the local community; b) its effects on the local regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment; c) the sector the investor is in; d) the aim of the measure concerned; e) the regulatory process generally applied in relation to the measure concerned; and f) other factors directly relating to the investment or investor in relation to the measure concerned; and the examination shall not be limited to or be biased towards any one factor."

[75] CPTPP (2018), Chapter 9, subscript 14: "For greater certainty, whether treatment is accorded in "like circumstances" under Article [X] (National Treatment) or Article [X] (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives."

[76] For an explanation of treaty shopping, see for example, Gaukrodger and Gordon (2012, p55), "Treaty shopping under international investment law occurs when an investor structures an investment (through incorporation and possibly by restructuring certain business operations) in order to seek to qualify for protections conferred by particular investment treaties."

[77] For example, see: *White industries v. India*, UNCITRAL, Final Award, 30 November 2011, Section 4.4.2: "Article 4 (2) of the BIT - a "most favoured nation" clause - provides that: "a Contracting Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments of investors of any third country"."

[78] See: *APR Energy and others v. Australia*, UNCITRAL, Notice of Dispute, 30 November 2016: "In the event the parties cannot settle this dispute, APR will be compelled to initiate arbitration against Australia in accordance with the dispute resolution provisions of Article 10 of the Hong Kong BIT (see also Article 20 of the Mexico BIT), is applicable to APR's investment by operation of Article 11.4 [Most-Favoured Nation Treatment] of the AUSFTA."

under other IIAs concluded before (and/or after) the agreement (UN Environment and IISD, 2016). While delimiting the scope of MFN treatment can be seen as a possible way to adjust the balance between investor protection and the right to regulate, the legacy of commitments across different existing agreements poses significant challenges and needs to be addressed (Gaukrodger, 2017a).

3.3.5. Umbrella clauses

The so called "umbrella clauses" are provisions which encompass an agreement to cover any contractual commitments and other obligations of the host state to the foreign investor. It can safeguard investors' rights not only by securing commitments under IIAs against certain administrative or legislative acts, but also by broadening the scope to investors' contractual rights that can be subject to international arbitration mechanisms under such agreements (OECD, 2008b).

In claims concerning the environment, arbitral tribunals have rarely found states liable for commitments covered by umbrella clauses, with the exception of one case under the ECT (see also Annex E).[79] While limited in practice, two potential issues are identified in the application of umbrella clauses. First, such clauses can elevate investors' rights to a level where their contractual rights are considered in addition to investor protection commitments granted under an agreement. Second, umbrella clauses may provide an opportunity for foreign investors to bring claims to different fora or to forum shop (OECD, 2008b; UN Environment and IISD, 2016).

As indicated by a number of studies, some parties have decided in response to limit the scope to explicitly written contractual obligations such as the EU-Singapore Investment Protection Agreement,[80] while other RTAs such as the CETA agreement between Canada and the EU do not include such an umbrella clause as a whole (Tietje and Baetens, 2014; UN Environment and IISD, 2016).

[79] See: *Khan Resources v. Mongolia*, UNCITRAL, Award on the Merits, 2 March 2015, § 451: "The breach of Article 8.2 of the Foreign Investment Law constitutes a breach by Mongolia of Article 10(1) (the umbrella clause) of the Energy Charter Treaty 1994 in relation to Khan Netherlands' investment in the Exploration License."

[80] **EU-Singapore Investment Protection Agreement** (n.d.), Article 2.4 (6): "Where a Party, itself or through any entity […] had given a specific and clearly spelt out commitment in a contractual written obligation towards a covered investor of the other Party with respect to the covered investor's investment or towards such covered investment, that Party shall not frustrate or undermine the said commitment through the exercise of its governmental authority either: (a) deliberately; or (b) in a way which substantially alters the balance of rights and obligation in the contractual written obligation unless the Party provides reasonable compensation to restore the covered investor or investment to a position which it would have been in had the frustration or undermining not occurred."

4. Promoting green investment

This section turns to the *second angle* of this report and focuses on how to incorporate environmental objectives in trade and investment agreements to promote green investment. Green investment in this context can include both environmentally supportive investment (e.g. investment in the green economy and renewable-energy deployment) as well as environmentally responsible investment (e.g. investment in compliance with environment impact assessment requirements).

The following sections first briefly explore the recent trends, developments and future needs in green investment and then investigate possible approaches used in trade and investment agreements to facilitate green investment.

4.1. Trends, developments and future needs in green investment

Fostering green investment is important to contribute to the achievement of the SDGs and the Paris Agreement. Furthermore, a shift towards green growth and sustainable development may require important changes to investment patterns including those related to renewable energy and low emission technologies. Green investment – namely environmentally supportive investment - can encompass investment directed towards various sectors, including energy efficiency, renewable energy, low emission technologies, low emission transport, resource efficiency and waste management, pollution control and many more areas. Due to the limited availability of data, this section primarily draws on available information concerning investment made in renewable energy and low emission energy infrastructure. Even for this subset of sectors, the available data is patchy and a full overview of recent trends and future projections of green investment is beyond reach.

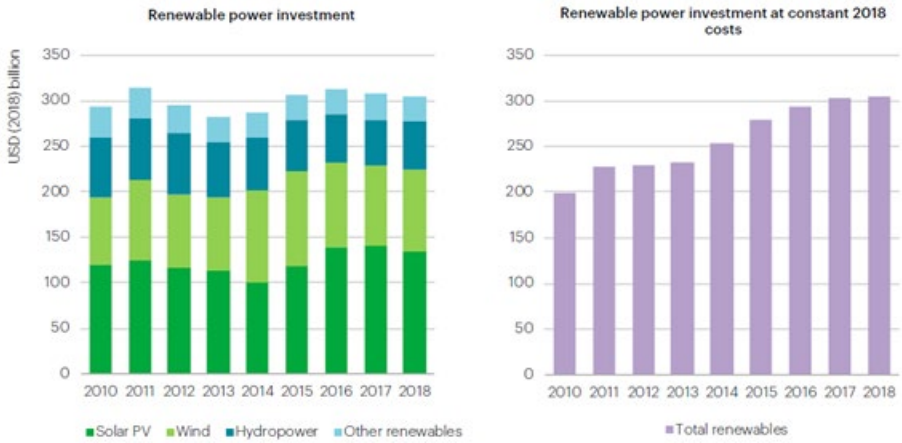
Trends from the past two decades suggest that green investment and innovation, in particular for renewable energy technologies, have grown more rapidly than economy-wide investment. Drawing on Ang et al. (2017), Figure 8 illustrates investment patterns (covering both cross-border and domestic investment flows) and patent counts for renewable energy in OECD and G20 countries between 2000 and 2014. In contrast to the economy-wide investment that grew relatively steadily during this period (grey line in Figure 8), investment flows in renewable energy strongly increased in mid-2000 and onwards (dark blue line in Figure 8).

Figure 8. Trends in investment and patents in renewable energy in the OECD and the G20

Note: Investment flows (2000-14) in billion USD; trillion constant USD; patents (2000-12). Data covers investment made in grid-connected renewable energy projects, excluding large hydro power and nuclear energy, in 49 OECD and G20 countries.
Source: Ang, et al. (2017).

More recent data on renewable energy investment encompassing both domestic and international flows is available from the IEA (2019). It shows that worldwide investment in renewable energy is relatively stable at around USD 300 billion per year between 2010 and 2018, compared to pre-2010 levels (see Figure 9, left hand panel). When considering significant cost reductions for renewable energy technology during this period, investment in expanding renewable power generation capacity are estimated to have grown by 55% (see Figure 9, right hand panel).

Figure 9. Trends in investment and cost reduction in renewable energy

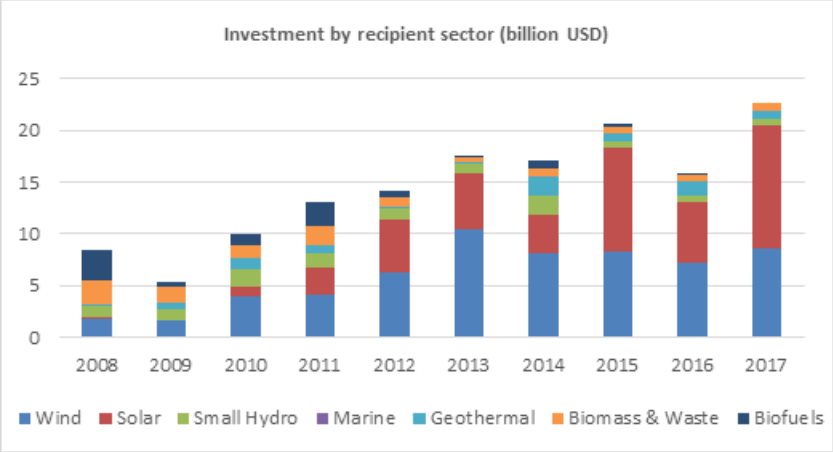


Note: Investment flows (2010-18) in billion USD. Data covers global investment made in renewable energy (wind, solar PV, hydro, biomass, geothermal, solar thermal, marine) excluding nuclear plants.
Source: IEA (2019).

When focussing more specifically on cross-border investment directed towards emerging economies, the growth rate in renewable energy investment is prominent. According to Bloomberg New Energy Finance (2018), cross-border investment in clean energy that was

channelled to emerging economies grew by more than two-and-a-half times from USD 8.47 billion in 2008 to 22.6 billion in 2017 (Figure 10).[81] Absolute levels of cross-border investment towards renewable energy in emerging economies remain relatively low and represent only around 7% of overall investment in renewable energy in 2017. Nevertheless, international investment in renewable energy is on the rise, mainly driven by investment in solar and wind energy plants (red and blue bars in Figure 10).

Figure 10. Cross-border investment in clean energy towards emerging economies



Note: Investment by recipient sector and deal signing year (2008-2017) in billion USD.
Source: BNEF (2018).

Despite these growing trends in green investment in terms of renewable energy infrastructure, recent projections suggest that current efforts to scale up green investment are lower than the investments levels required to meet the well below 2 degrees goal of the Paris climate agreement (OECD/The World Bank/UN Environment, 2018). More specifically, the OECD (2017b) projects that an annual investment of USD 6.9 trillion is needed between 2016 and 2030 to meet climate and development objectives. This requires a 29% increase in total investment levels on low emission energy infrastructure during the 15 years considered in the analysis (Röttgers, 2017; OECD, 2017b; OECD/The World Bank/UN Environment, 2018).[82] This projection implies that current investment levels are still limited, directed towards the wrong sectors and insufficient to address the growing concerns of climate change.

To better accommodate the increasing trends and future needs for green investment, in particular for renewable energy infrastructure and low emission technologies, there may be an important role for investment agreements to play in facilitating these flows. The OECD report by Ang et al. (2018) investigates the drivers for renewable energy investment and explains that investment flows largely depend on environmental policies as well as the broader investment environment such as investment policy and facilitation (e.g. ease of

[81] In its analysis, BNEF (2018) covers cross-border investments to the clean energy sector in OECD member countries of Chile, Mexico and Turkey that have significant markets, and non-OECD member countries with over 2 million inhabitants. Cuba, Iran, North Korea and Yemen are excluded due to typical conditions such as local conflicts or international sanctions.

[82] This increase is smaller than one might think, as investments for fossil fuels are reduced substantially. What remains is largely a redirection of investment.

property registration, obtaining permits and licences, regulatory quality and anti-corruption), competition and trade policy, and financial access. In this regard, trade and investment agreements may be able to establish commitments and mechanisms to facilitate some of these drivers to further enable green investment.

In addition, there is growing awareness that business activities could make important contributions to economic, environmental and social progress, especially by managing the potential negative impacts arising from their own operations and through their supply chains. Cross-border investments, regardless of being subject to an array of different regulations and standards across different jurisdictions, need to be made in an environmentally responsible manner. This growing perception, for example, has led the OECD (2018b) to develop the Due Diligence Guidance for Responsible Business Conduct (2018b). Ensuring responsible business conduct is essential for international investment, which can be directed to countries with less stringent regulatory, legal, and institutional frameworks *inter-alia* to protect the environment.

Considering these recent trends and developments in green investment, the following section looks into the necessary coherence between, trade and investment agreements and their possible role to facilitate environmentally responsible investment.

4.2. Facilitating green investment in trade and investment agreements

In addition to reaffirming the regulatory policy space for environmental protection, strengthening environmentally supportive investment and environmentally responsible investment is another way to incorporate environmental objectives in IIAs. Seeking synergies between trade, investment and environmental objectives within these agreements is attracting interest among countries that are committed to pursue an integrated approach for the environment, and sustainable development more broadly.

So far, this approach is underexplored compared to the issues of reaffirming policy space for environmental protection. One reason for this may be that the most prominent and widespread function of investment agreements have historically been the obligation to grant investor protection to the foreign investor (Pohl, 2018). Another reason for this may be that RTAs, and IIAs more broadly, are less inclined to give preferential conditions to a particular sector, and therefore less suitable as a tool to address sector specific environmentally supportive investment. Nevertheless, there are some existing practices and proposals in the literature that show possible ways of promoting green investment through IIAs, BITs and RTAs, both for environmentally supportive investment and environmentally responsible investment. Given the expected rapid expansion of green investments in the coming decades, this is of increasing importance.

This section provides an overview of possible approaches already practiced or proposed in the literature to facilitate green investment in trade and investment agreements. Specifically, four possibilities are outlined as potential ways forward: (i) including commitments for green investment in the *preamble*, (ii) establishing *investor obligations* for environmentally responsible investment, (iii) establishing *home country obligations* to facilitate environmentally supportive investment, and (iv) supporting *co-operation on investment promotion and facilitation*.

4.2.1. Preamble

The preamble of the agreement sets forth the overall context of the agreement and informs the intentions of the parties to the agreement. While some refer to the preamble as non-

binding "hortatory" statements, others argue that a specified preamble to the agreement on environmental matters recognises the overall environmental objective of the agreement, which could for instance inform arbitral tribunals to weigh decisions (Firger and Girrard, 2012).

Some agreements, such as the Japan-Switzerland Economic Partnership Agreement (EPA), include a general reference to environmental protection (and climate change actions).[83] Other agreements, such as the Energy Charter Treaty,[84] can have more specific statements; including for example commitments to the United Nations Framework Convention on Climate Change (UNFCCC) or decommissioning of energy and waste disposal installations. Although the intent of promoting green investment is only one aspect of the preamble, preambles that supporting the diffusion of environmental goods and services or environmentally responsible investment could be a starting point to inform the overall objectives of the agreement (UN Environment and IISD, 2016). Moreover, incorporating direct text from the UNFCCC might ensure the mutual supportiveness of trade and climate policies (Firger and Gerrard, 2012).

4.2.2. Investor obligations

Although yet to be a widespread approach, investor obligations that ensure environmentally responsible investment may be considered in IIAs. As discussed in Section 3.2.6, some studies point to the possibility of incorporating investor obligations by referring to domestic legislations related to investment and the environment (UN Environment and IISD, 2016). Other studies raise the possibility of addressing Corporate Social Responsibility (CSR) standards or referring to available international standards such as the UN Global Compact,[85] UN guiding principles on business and human rights,[86] and OECD guidelines on Multinational Enterprises[87] (Beharry and Kuritzky, 2015; UNCTAD, 2015; Tietje and Baetens, 2014; Firger and Gerrard, 2012; UN Environment and IISD, 2016). There can also be further possibilities for these agreements to refer to the OECD Due Diligence Guidance for Responsible Business Conduct (OECD, 2018b). These guidelines provide guiding principles for responsible business conduct which include environmentally responsible investment (See also counterclaim provisions in Section 3.2.6.).

Alternatively, environmentally specific investor obligations could be incorporated in RTAs (and more broadly in IIAs). These obligations include environmental impact assessments

[83] **Japan-Switzerland EPA** (2009), Preamble: "Determined, in implementing this Agreement, to seek to preserve and protect the environment, to promote the optimal use of natural resources in accordance with the objective of sustainable development and to adequately address the challenges of climate change."

[84] **Energy Charter Treaty** (1998), Preamble: "Recalling the United Nations Framework Convention on Climate Change [UNFCCC], the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects; and recognising the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes."

[85] See: https://www.unglobalcompact.org/.

[86] See: United Nations (2011).

[87] See: OECD (2011c).

as a part of pre-establishment impact assessment or implementation of environmental management systems as a part of post-establishment obligations. For instance, companies with a large number of employees can be required to maintain ISO 14001 certificates. Such measures could also be in compliance with domestic laws and legislations. In addition, the records of these obligations should be accessible by the public domain (UN Environment and IISD, 2016; Mann et al., 2005).

As discussed in Section 3.2.6, even though this is not a generalised trend, there are some BITs and model-BITs that already include investor obligations in their agreements. Examples of agreements that consider investor obligations with explicit reference to domestic measures or environment and sustainable development objectives include COMESA Investment Agreement;[88] Morocco-Nigeria BIT;[89] South Africa's model BIT;[90] and India's model BIT.[91]

However, some parties may find it difficult to consider and incorporate provisions on investor obligations, as investment treaties are often used as a tool to promote investor protection and attract foreign investment (Beharry and Kuritzky, 2015). While these obligations could promote environmentally responsible investment, some parties may opt to regulate at the national level (Mann et al., 2005).

4.2.3. Home country obligations

Another approach that can be useful but that has so far been limited in practice is to promote environmentally supportive investment as a part of home-country obligations and co-operation activities on investment facilitation (Firger and Gerrard, 2012; UN Environment and IISD, 2016). This is applicable if a home country of the investor has the capacity to assist environmentally supportive investment on the grounds of the host (developing)

[88] **COMESA Investment Agreement** (2007), Article 13: "COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made."

[89] **Morocco-Nigeria BIT** (signed in 2016), Article14(1) Impact Assessment: "Investors or the investment shall comply with environmental assessment screening and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host state for such an investment or the laws of the home state for such an investment, whichever is more rigorous in relation to the investment in question."; Article 18(1) Post Establishment Obligations: "1) Investments shall, in keeping with good practice requirements relating to the size and nature of the investment, maintain an environmental management system. Companies in areas of resource exploitation and high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard."; Article 19 Corporate Governance and Practices: "Investments shall meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices."

[90] **South Africa Model BIT** (2012), Article 11: Compliance with Domestic Law; Article 13: Environmental and Social Impact Assessment; Article 14: Environmental Management and Improvement; Article 15: Minimum Standards for Human Rights, Environment and Labour; Article 16: Corporate Governance Standards; Article 17: Investor Liability.

[91] **India Model BIT** (2016), Article 8: "The objective of this Chapter is to ensure that the conduct, management and operations of Investors and their Investments are consistent with the Law of the Host State, and enhance the contribution of Investments to inclusive growth and sustainable development of the Host State."

countries through the facilitation of foreign direct investment and private-sector development. Such measures should be closely aligned with development priorities and sustainable development objectives of partner countries (Mann et al., 2005).

Some agreements (e.g. the Japan-Switzerland EPA,[92] EU-Korea FTA,[93] New Zealand-Chinese Taipei FTA,[94] Canada-Korea FTA[95] and EU-Singapore FTA[96]) already include commitments to facilitate the diffusion of environmental goods and services (Frey, 2015a). These commitments could be further promoted by linking them to home country obligations or co-operation activities. Such examples can be found in the Cotonou Agreement[97] between the European Union and the African, Caribbean and Pacific Group of States (ACP) (Firger and Gerrard, 2012).

4.2.4. Co-operation on investment promotion and facilitation

Co-operation on investment promotion and facilitation through IIAs could be another way to support environmentally supportive investment. While IIAs traditionally have had a strong focus on investment protection, there are emerging signs of incorporating commitments on investment promotion and facilitation policies in IIAs. For example, since 2015, Brazil has moved towards a new approach in signing investment co-operation and facilitation agreements (Novik and de Crombrugghe, 2018).

The OECD distinguishes between investment promotion and investment facilitation (Novik and de Crombrugghe, 2018). Investment promotion refers to activities that attract foreign

[92] **Japan-Switzerland EPA** (2009), Article 9: "The Parties shall encourage trade and dissemination of environmental products and environment-related services in order to facilitate access to technologies and products that support the environmental protection and development goals, such as improved sanitation, pollution prevention, sustainable promotion of renewable energy and climate-change-related goals."

[93] **EU - Korea FTA** (2011) Article 13.6(2): "The Parties shall strive to facilitate and promote trade and foreign direct investment in environmental goods and services, including environmental technologies, sustainable renewable energy, energy efficient products and services and eco-labelled goods, including through addressing related non-tariff barriers."

[94] **New Zealand - Chinese Taipei FTA** (2014) Chapter 17, Article 3 (1) and (2): "The Parties recognise that facilitating trade in environmental goods and services through elimination of tariff and non-tariff barriers can enhance economic performance and address global environmental challenges including climate change; natural resources protection; water, soil and air pollution; management of waste and waste water; and depletion of the ozone layer. Accordingly, the Parties shall:[…] encourage the application of good regulatory principles to the design of any future standards and regulations relating to environmental goods and services, including transparency, proportionality, a preference for least trade-distorting measures, and the use of internationally agreed standards.*"*

[95] **Canada - Korea FTA** (2015), Article 17.4: "The Parties shall strive to facilitate and promote trade and investment in environmental goods and services, including through addressing related nontariff barriers."

[96] **EU – Singapore FTA** (2019), Article 12.11 (1): "The Parties resolve to make continuing special efforts to facilitate and promote trade and investment in environmental goods and services, including through addressing related non-tariff barriers. The Parties also recognise the usefulness of efforts to promote trade in goods that are the subject of voluntary or private sustainable development assurance schemes, such as eco-labelling, or fair and ethical trade."

[97] **The Cotonou Agreement** (2014), Chapter 7, Investment and private sector development support.

investment to a particular destination, while investment facilitation starts from the pre-establishment phase and aims to assist investors to establish, operate and expand their existing investments. Policies for investment promotion can include targeted investment incentive schemes, and those for investment facilitation can include streamlining of administrative processes. Investment promotion agencies are established in many countries and have mandates to both promote and facilitate investment (Novik and de Crombrugghe, 2018).

Concerning environmentally supportive investment, investment promotion agencies can have an important role to play in attracting foreign investment towards green growth and sustainable development. In particular, a number of studies highlight that identifying projects that are bankable, packaged in suitable sizes for specific target groups, and politically supported, can be effective in supporting green investment (OECD, 2017b; UNCTAD, 2015). As an example, the Danish investment promotion agency has taken this direction in promoting and facilitating investment on clean technologies for wind energy and bioenergy development. This approach will nevertheless require specialised expertise to identify potential projects that are indeed sizeable, bankable, and impactful in terms of environmentally supportive investment for green infrastructure such as energy efficiency and renewable energy, water and waste management, green mobility and sustainable transport, as well as the environmental goods and services sector (OECD, 2017b; UNCTAD, 2015).

Providing technical assistance to investment promotion agencies, and encouraging information exchange and co-operation between investment promotion agencies in host and home countries could be a useful approach to support environmentally supportive investment. IIAs could promote and facilitate investment towards green growth and a low-emission transition, in particular by securing technical assistance and capacity building for investment promotion agencies, and encouraging information exchange and co-operation between these agencies in host and home countries (OECD, 2017b; UNCTAD, 2015).

4.2.5. Summary of promoting green investment in IIAs

Promoting green investment in terms of environmentally supportive investment and environmentally responsible investment within the framework of trade and investment agreements has so far been underexplored. Aiming to explore synergies between investment and environmental objectives within the framework of IIAs, this section of the paper identifies four ways in which commitments for green investment can be incorporated. The first option is to establish overarching commitments for green investment as a part of the preamble. The second option is to install investor obligations for environmentally responsible investment in reference to domestic regulations, international standards (such as the UN Global Compact and the OECD Guidelines on Multinational Enterprises) and other rules such as environmental impact assessments. The third option is to establish home country obligations to facilitate co-operation and institutional arrangements for environmentally supportive investment. The fourth option is to promote and facilitate environmentally supportive investment by securing technical assistance and capacity building for investment promotion agencies, and encouraging information exchange and co-operation between these agencies in host and home countries.

This section provided an overview of possible approaches already practiced or proposed in the literature. A more detailed forward-looking analysis would be necessary to highlight further opportunities in facilitating green investment under IIAs. The analysis should involve not only investment and environment experts but also other stakeholders in the process.

5. Summary of findings for greening provisions related to investment

The investigation of investment related provisions in RTAs, and IIAs more broadly, in this report has identified ample scope for potential improvement of trade and investment agreements to secure policy coherence with environmental objectives. Two specific *angles* were explored: the ways in which domestic environmental policy space could be asserted within trade and investment agreements; and how green investment could be promoted in these agreements. These two approaches were analysed based on existing practices as well as recommendations made available in the literature. These possible ways of incorporating environmental objectives in chapters and articles related to investment enable an integrated approach in aligning different commitments embedded in IIAs with environmental goals.

An important finding of this report is that investment-related chapters and articles can reflect environmental objectives not only by incorporating environmentally specific provisions, but also through cross-cutting provisions that can play a key role. For example ensuring that non-discriminatory environmental regulations do not constitute indirect expropriation is clearly environmental. Other proposals may be a part of cross-cutting disciplines that cover broader policy areas such as labour and social issues. Nevertheless, such disciplines may have environmental implications and their modification could have an impact on overall environmental objectives. For instance, carefully-drafted fair and equitable treatment obligations is clearly beyond environmental issues but may have important implications for investor-state disputes that emerge around environmental regulation. This means that generic investment provisions that have environmental implications but that are not specific to the environment require a broader analysis. This also implies that international discussions on the right to regulate (including for environmental issues) largely take place in other fora beyond the environment (such as the Investment Committee of the OECD). To this end, it is important to distinguish between proposals that are environmentally specific and those that are of cross-cutting nature. While it is beyond the scope of this report to set forth detailed recommendations on general issues related to investment, policy makers should be aware of the broader discussions on the right to regulate and possible linkages between environmental regulation and general investment protection obligations in trade and investment agreements.

Regarding the *first angle* of this report in reaffirming the domestic environmental policy space within these agreements, investor protection and environmental objectives within these agreements need to be aligned in a coherent way to ensure that trade, investment and environmental policies are mutually supportive. Investor protection provisions and ISDS mechanisms, while having a prominent role in facilitating trans-border capital flows, have in some cases been perceived to have potential implications for environmental measures. While it is beyond the scope of this report to examine possible elements for ISDS reforms, this report primarily focuses on the regulatory measure at issue and the quality of drafting of the investment related provisions in question.

A noticeable number of ISDS cases brought on the basis of IIAs are related to the environment. This report estimates that between 1987 and 2017, 75 out of all known 855 cases that were brought under RTAs, BITs and the ECT are environment related disputes. This accounts for 9% of ISDS cases that were reported during this period. This estimate can be considered as conservative, based on official documentation such as notice of arbitration and final awards. When the analysis is broadened to include unofficial sources, such as news articles and policy briefs, the numbers of cases that have potential

implications to the environment are estimated to nearly double. While ISDS cases can involve claims against measures adopted for important public policy objectives including environmental protection, increased transparency of these cases would benefit all stakeholders involved. Transparency principles, as reflected in the Mauritius Convention on Transparency,[98] may serve as a good reference in this regard.

Regulatory measures, including those stated to be made on environmental grounds, have been subject to investor claims under ISDS for allegedly breaching treaty obligations. For example, these measures include the modification of environmental laws and regulations, the revocation of environmental permits and licences, or the termination of concession contracts based on alleged inadequate environmental performance of the foreign investor. Arbitration claims are made on environmental issues across different sectors such as mining and quarrying, renewable energy, waste management, manufacturing and real estate, in both OECD and non-OECD countries. Arbitral tribunals, when having jurisdiction to hear the claim, have found some environmental measures to be consistent with treaty obligations while others were deemed inconsistent, unlawful or discriminatory. Treaty breaches by the host state were found in around one-third of these environment related cases, which typically involved large amounts of pecuniary (monetary) compensation averaging at USD 158 million and up to USD 1.2 billion per award between 1987 to 2017.

Tribunal decisions, either rendered in favour of the state or the investor, refer to the interpretation of main investment liability provisions. The application of investor protection provisions to national legislation can raise different sensitivities and issues. The varying investor protection commitments across different treaties, their alleged inconsistent interpretation, and high amount of potential monetary damages, which can be perceived to pose challenges to the government's regulatory ability to achieve certain public policy objectives in key areas including the environment. Even if the right to regulate is not directly affected, investor protection provisions and ISDS mechanisms can be interpreted by some to have potential dissuasive effects on government action.

Good practices to secure investor protection while ensuring environmental protection at the same time include careful drafting of substantive investor protection provisions such as fair and equitable treatment (and minimum standard of treatment) and indirect expropriation, as well as refining the scope and definitions of the agreement. Parties can also consider detailed provisions to explicitly specify the right to regulate including for the environment, and to promote the relevant technical expertise of the arbitral tribunal for disputes related to environmental measures in ISDS proceedings. IIA joint-party submissions may also help assist future tribunals in interpreting autonomous treaty provisions.

Regarding the *second angle* of this report, trade and investment agreements can provide important opportunities to encourage green investment in terms of both environmentally supportive investment (e.g. for renewable energy deployment) and environmentally responsible investment (e.g. in compliance with environmental requirements). In particular, investment towards renewable energy has outpaced economy-wide investment in the past two decades. To achieve the targets of the Paris Agreement, investment towards renewable energy and low-emission energy infrastructure is projected to scale up by 29%, and reach

[98] See: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention on Transparency") - https://uncitral.un.org/en/texts/arbitration/conventions/transparency.

USD 6.9 trillion per year, between 2015 and 2030, in order (OECD/The World Bank/UN Environment, 2018; OECD, 2017b; Röttgers, 2017).

Approaches to facilitate green investment in trade and investment agreements have been scarcely explored by governments and require further investigation. The main reasons for this limited experience is that trade and investment agreements have historically focused on establishing state obligations to grant investor protection to the foreign investor (Pohl, 2018), and have a non-discriminatory nature that runs counter to granting preferential conditions to a particular sector.

Nevertheless, this report identifies a number of possible approaches through existing practice and research. First, parties can emplace overarching commitments for green investment in the preamble. Second, parties could consider installing investor obligations for environmentally responsible investment in reference to domestic regulations, internationally available standards (e.g. UN Global Compact; OECD Guidelines on Multinational Enterprises; OECD Due Diligence Guidance for Responsible Business Conduct), or environmental impact assessments. Third, agreements can also establish home-state obligations for environmentally supportive investment through investment facilitation frameworks. Fourth, provisions to promote and facilitate environmentally supportive investment through co-operation and capacity building of investment promotion agencies could be considered.

These possible ways of greening IIAs are compiled in Table 1 below. The report refrains from making detailed recommendations on general investment issues. Nevertheless, issues related to generic investor protection provisions are listed in Table 1 to indicate their potential linkages with environmental regulation. The nature of the proposals that are either related to environmental provisions or generic investment provisions is indicated in the fourth column of this table.

The main contribution of this report is that it identifies available practices to advance environmental objectives in trade and investment agreements based on available information in the public domain. It is, however, beyond the scope of this report to provide a detailed analysis of possible effects of such provisions or proposals, or offering a forward-looking exercise for possible reforms. At the same time, further discussion between trade, investment and environment experts could be helpful to facilitate improved understanding of various policy choices when drafting IIAs.

Table 1. Summary of possible approaches in greening investment related provisions

Potential areas	Key issues	Possible approaches	Type of Provision
Right to regulate for environmental protection	Scope and definitions	Define environmental law	Environmental provisions or environment related investment provisions
	Indirect expropriation	Specify that non-discriminatory measures for environmental regulation does not constitute indirect expropriation	
		Specify that certain measures (e.g. changes in regulatory regime concerning subsidies) do not qualify as expropriation	
	Performance requirements	Reserve policy space for the use of performance requirements for environmental purposes	
	General exceptions	Include robust exception clauses for the environment	
	Right to regulate	Specify the right to regulate including for the environment	
	Procedural safeguards for ISDS proceedings	Qualify the scope of ISDS (e.g. exclude environmental measures from the scope of ISDS mechanisms)	
		Refer to arbitration rules designed for environmental disputes and technical issues	
		Include counterclaim provisions and investor obligations	
	Scope and definitions	Define investors	Generic investment provisions
	Fair and equitable treatment (Minimum standard of treatment)	Delimit the scope of Fair and Equitable Treatment (Minimum Standard of Treatment)	
	Full protection and security	Delimit the scope of full protection and security standards	
	Most favoured nation treatment	Delimit the scope of most favoured nation treatment	
	Umbrella clauses	Delimit the scope of umbrella clauses	
Promoting green investment	Preamble	Include intention promoting green investment	Environmental provisions or environment related investment provisions
	Investor obligations	Refer to domestic legislations related to environmentally responsible investment	
		Refer to available international standards on investor obligations for environmentally responsible investment (e.g. UN Global Compact; OECD guidelines on Multinational Enterprises; OECD Due Diligence Guidance for Responsible Business Conduct)	
		Include obligations on environmentally responsible investment (e.g. environmental impact assessments)	
	Home country obligations	Include home-state obligations towards investment facilitation and to promote environmentally supportive investment.	
	Co-operation on investment promotion and facilitation	Include commitments to promote and facilitate environmentally supportive investment through co-operation and capacity building of investment promotion agencies	

Source: Author's elaboration based on the agreements and studies referenced in this report.

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Annex A. Summary table of environmental provisions in RTAs related to investment

Table A.1. List of environmental provisions in RTAs related to investment articles

Regional Trade Agreement	Year of signature	Preamble Language	General coherence - trade, investment and environmental policies	Inappropriate to relax environmental measures to attract investment	Reserving policy space for environmental regulation	Precluding environmental measures from Indirect expropriation	Environmental reports in ISDS	Environmental safeguards for performance requirements	Excluding environmental measures from ISDS
Finland-Poland	1976	•							
Lomé IV	1989		•						
EC-Hungary	1991		•						
EC-Poland	1991		•						
MERCOSUR	1991	•	•						
EC-Maastricht	1992	•							
European Economic Area (EEA)	1992	•							
North American Free Trade Agreement (NAFTA)	1992	•	•	•	•		•	•	
Bulgaria-EC	1993		•						
Common Market for Eastern and Southern Africa (COMESA)	1993	•	•						
Czech Republic-EC	1993		•						
EC-Romania	1993		•						
EC-Slovakia	1993		•						
Central American Common Market (CACM) - Guatemala	1993	•	•						
Bolivia-Mexico	1994	•		•	•				
Costa Rica-Mexico	1994	•		•	•				
Group of Three	1994	•		•					
Armenia-Ukraine	1994				•				
Association of Caribbean States	1994	•							
WTO Agreements	1994	•	•		•				
EC-Estonia Europe Agreement	1995		•						
EC-Latvia Europe Agreement	1995		•						
EC-Lithuania Europe Agreement	1995		•						
EFTA-Estonia	1995	•	•						
EFTA-Latvia	1995	•	•						
EFTA-Lithuania	1995	•	•						
EFTA-Slovenia	1995	•	•						
Canada-Chile	1996	•		•	•		•	•	
EC-Slovenia Europe Agreement	1996		•						
Estonia-Slovenia	1996	•	•						
Baltic Free Trade Area (BAFTA)	1996	•	•						
EC-Amsterdam	1997	•							
EFTA-Morocco	1997	•	•						
Mexico-Nicaragua	1997	•		•	•				
Central America-Dominican Republic	1998	•			•				
Chile-Mexico	1998	•		•	•		•	•	
Estonia-Hungary	1998	•	•						

Hungary-Lithuania	1998	•	•						
Hungary-Latvia	1999	•	•						
East African Community (EAC)	1999		•						
EC-Switzerland Bilaterals I	1999	•							
Cotonou Agreement	2000	•	•						
EFTA-Macedonia	2000	•	•						
EFTA-Mexico	2000	•							
Jordan-US	2000	•							
Mexico Northern Triangle	2000	•		•	•			•	•
Bulgaria-Estonia	2001	•	•						
Bulgaria-Lithuania	2001	•	•						
Caribbean Community (CARICOM)	2001	•							
Croatia-EFTA	2001	•	•						
EFTA-Jordan	2001	•	•						
EFTA services	2001	•	•		•				
Algeria-EC Euro-Med Association Agreement	2002	•							
Central America-Panama	2002	•		•	•			•	
Chile-EC	2002	•							
Croatia-Lithuania	2002	•	•						
EFTA-Singapore	2002	•	•		•				
Japan-Singapore	2002				•				
Chile-EFTA	2003	•							
Chile-Korea	2003	•	•	•	•		•	•	
Chile-US	2003	•	•	•	•	•	•		
Mexico-Uruguay	2003						•	•	
Panama-Taiwan	2003	•		•	•			•	
Romania-Serbia	2003	•	•						
Singapore-US	2003	•	•	•	•	•	•		
Australia-Singapore	2003				•				
Caribbean Community (CARICOM)-Costa Rica	2004	•							
CAFTA	2004	•	•	•	•	•	•		
CAFTA-DR	2004	•	•	•	•	•	•		
EFTA-Lebanon	2004	•	•						
Agadir Agreement	2004		•						
EFTA-Tunisia	2004	•	•						
Japan-Mexico	2004		•	•			•	•	
Morocco-US	2004	•	•	•	•	•	•		
Australia-Thailand	2004				•				
Australia-US	2004	•	•	•	•	•			
Bahrain-US	2004	•	•	•					
Chile-China	2005	•	•						
EFTA-Korea	2005	•	•	•	•				
Guatemala-Taiwan	2005	•		•	•			•	
India-Singapore	2005	•	•		•	•			
Japan-Malaysia	2005			•	•				
Korea-Singapore	2005				•				
New Zealand-Thailand	2005	•		•	•				
Trans Pacific Strategic EPA	2005	•	•	•					
Belize-Guatemala	2006				•				
Chile-Colombia	2006	•	•	•	•	•	•		
Chile-Panama	2006	•	•						
China-Pakistan	2006	•	•						
Colombia-US	2006	•	•	•	•	•	•		
EFTA-Southern African Customs Union (SACU)	2006	•		•					
Japan-Philippines	2006			•	•				
Nicaragua-Taiwan	2006	•	•	•	•	•	•		
Oman-US	2006	•	•	•	•	•	•		
Panama-Singapore	2006				•	•			
Peru-US	2006	•	•	•	•	•	•		
Chile-Peru	2006	•			•	•	•		
Brunei-Japan	2007	•		•	•				
Chile-Japan	2007	•		•			•		

Colombia Northern Triangle	2007	•			•	•	•		
EC-Montenegro SAA	2007	•							
EFTA-Egypt	2007	•		•					
El Salvador-Honduras-Taiwan	2007	•		•	•	•		•	
Indonesia-Japan	2007			•	•				
Japan-Thailand	2007		•	•					
Korea-US	2007	•	•	•	•	•	•	•	
Malaysia-Pakistan	2007				•				
Panama-US	2007	•	•	•	•	•	•		
Bosnia and Herzegovina-EC SAA	2008	•							
Canada-Colombia	2008	•	•	•	•	•	•	•	
Canada-EFTA	2008	•	•						
Canada-Peru	2008	•	•	•	•	•	•	•	
CARIFORUM-EC EPA	2008	•	•	•					
Algeria-Tunisia	2008		•						
Chile-Ecuador	2008	•							
China-New Zealand	2008	•	•			•			
China-Singapore	2008				•				
Colombia-EFTA	2008	•	•		•				
Cote d'Ivoire-EC EPA	2008	•							
EC-Serbia SAA	2008	•							
Japan-Vietnam	2008				•				
Peru-Singapore	2008				•	•			
Australia-Chile	2008	•	•			•	•		
Canada-Jordan	2009	•	•	•					
Chile-Turkey	2009	•	•	•					
China-Peru	2009	•	•			•			
EFTA-GCC	2009	•							
EFTA-Serbia	2009	•	•	•					
India-Korea	2009	•	•	•	•	•		•	
Japan-Switzerland	2009	•		•	•				
Malaysia-New Zealand	2009	•	•	•	•	•			
ASEAN-Australia-New Zealand FTA (AANZFTA)	2009			•	•	•			
Albania-EFTA	2009	•	•	•					
Canada-Panama	2010	•	•	•	•	•	•	•	
Chile-Malaysia	2010	•		•					
China-Costa Rica	2010	•	•						
Costa Rica-Singapore	2010	•	•		•	•			
EC-Korea	2010	•	•	•					
EFTA-Peru	2010	•	•						
EFTA-Ukraine	2010	•	•		•				
Hong Kong-New Zealand	2010	•		•	•				
Chile-Vietnam	2011	•							
Costa Rica-Peru	2011			•	•	•	•	•	
EFTA-Hong Kong	2011	•	•	•	•				
EFTA-Montenegro	2011	•	•	•					
Guatemala-Peru	2011			•	•	•	•	•	
India-Japan	2011	•		•		•		•	
India-Malaysia	2011		•		•	•			
Japan-Peru	2011	•	•						
Korea-Peru	2011	•	•	•	•	•		•	
Panama-Peru	2011			•	•	•	•	•	
Central America-Mexico	2011	•		•	•	•		•	
Australia-Malaysia	2012				•	•			
Central America-EC	2012	•	•	•					
Colombia-Peru-EC	2012	•	•	•					
Korea-Turkey	2012	•	•	•					
Chile-Hong Kong	2012	•	•	•					
Panama-US (Environment)	2012		•						
Korea-US (Environment)	2012		•						
Canada-Honduras	2013	•	•	•	•	•	•	•	
Chile-Thailand	2013			•					

Colombia-Costa Rica	2013	•		•	•	•	•	•	
Colombia-Israel	2013	•	•	•	•	•			
Colombia-Korea	2013	•	•	•	•	•	•	•	
Colombia-Panama	2013		•	•		•	•	•	•
New Zealand-Taiwan	2013	•	•	•	•	•			
Bosnia and Herzogovina-EFTA	2013	•	•	•					
China-Switzerland	2013	•	•	•					
Central America-EFTA	2013	•	•	•	•				
Colombia-US (Environment)	2013		•						
Australia-Japan	2014				•	•			
Canada-EC (CETA)	2014	•	•	•	•	•			
Canada-Korea	2014	•	•	•	•	•	•	•	
EC-Georgia	2014	•	•	•					
EC-Moldova	2014	•	•	•					
EC-Ukraine	2014	•	•	•					
Mexico-Panama	2014		•	•	•	•	•	•	
Australia-Korea	2014	•	•	•	•	•	•		
Malaysia-Turkey	2014	•	•						
Australia-China	2015				•		•		•
EC-Singapore	2015	•	•	•	•	•			
China-Korea	2015	•	•	•					
Korea-New Zealand	2015	•	•	•	•	•			
Korea-Vietnam	2015				•	•			
Belarus-Kazakhstan-Russia-Vietnam	2015		•	•					
Honduras-Peru	2015			•	•	•	•	•	
Japan-Mongolia	2015			•	•				
EC-Kosovo SAA	2015	•							
Canada-Ukraine	2016	•	•	•					
EC-Vietnam	2016	•	•	•	•		•	•	
Transpacific Partnership	2016	•	•	•	•	•			
EFTA-Philippines	2016	•	•	•					

Source: Authors' compilation based on Gordon and Pohl (2011) and Morin et al. (2018).

Annex B. Summary table of investor-state dispute settlement (ISDS) cases

Table B.1. List of ISDS cases under RTAs related to the environment

No	Year of initiation	Case name	Applicable RTA	Sector
1	2016	Cosigo Resources and others v. Colombia	Colombia-US FTA (2012)	Mining and quarrying
2	2016	Eco Oro v. Colombia	Canada-Colombia FTA (2006)	Mining and quarrying
3	2016	TransCanada v. USA	NAFTA (1994)	Construction, Transport
4	2014	Aven and others v. Costa Rica	CAFTA-DR (2006)	Real estate activities
5	2014	Ballantine v. Dominican Republic	CAFTA-DR (2006)	Real estate activities
6	2014	Bear Creek Mining v. Peru	Canada-Peru FTA	Mining and quarrying
7	2014	Corona Materials v. Dominican Republic	CAFTA-DR (2006)	Mining and quarrying
8	2014	Longyear v. Canada	NAFTA (1994)	Agriculture and forestry
9	2013	Berkowitz and others v. Costa Rica	CAFTA-DR (2006)	Real estate activities
10	2013	Lone Pine v. Canada	NAFTA (1994)	Mining and quarrying
11	2013	Windstream Energy v. Canada	NAFTA (1994)	Electricity
12	2012	Mercer v. Canada	NAFTA (1994)	Electricity
13	2011	St. Marys v. Canada	NAFTA (1994)	Mining and quarrying
14	2011	Mesa Power v. Canada	NAFTA (1994)	Electricity
15	2010	AbitibiBowater v. Canada	NAFTA (1994)	Electricity
16	2009	Commerce Group v. El Salvador	CAFTA-DR (2006)	Mining and quarrying
17	2009	Dow AgroSciences v. Canada	NAFTA (1994)	Manufacturing (chemicals)
18	2009	Pac Rim v. El Salvador	CAFTA-DR (2006)	Mining and quarrying

19	2008	Clayton/Bilcon v. Canada	NAFTA (1994)	Mining and quarrying
20	2007	Gallo v. Canada	NAFTA (1994)	Waste management
21	2005	Bayview v. Mexico	NAFTA (1994)	Agriculture and forestry
22	2003	Glamis Gold v. USA	NAFTA (1994)	Mining and quarrying
23	2002	Chemtura v. Canada	NAFTA (1994)	Manufacturing (chemicals)
24	2002	Kenex v. USA	NAFTA (1994)	Manufacturing (pharmaceuticals)
25	2000	Waste Management v. Mexico (II)	NAFTA (1994)	Waste management
26	1999	Methanex v. USA	NAFTA (1994)	Waste management
27	1999	Pope & Talbot v. Canada	NAFTA (1994)	Agriculture and forestry
28	1998	Myers v. Canada	NAFTA (1994)	Manufacturing (chemicals)
29	1998	Waste Management v. Mexico (I)	NAFTA (1994)	Waste management
30	1997	Azinian v. Mexico	NAFTA (1994)	Waste management
31	1997	Ethyl v. Canada	NAFTA (1994)	Waste management
32	1997	Metalclad v. Mexico	NAFTA (1994)	Manufacturing (chemicals)

Note: "ISDS case related to the environment" represent the views of the author and do not represent the official views of the OECD or of its member countries.
Source: Author's compilation based on italaw website (www.italaw.com).

Table B.2. List of ISDS cases under BITs related to the environment

No	Year of initiation	Case name	Applicable BIT	Sector
1	2016	Dominion Minerals v. Panama	Panama - United States of America BIT (1982)	Mining and quarrying
2	2015	Gabriel Resources v. Romania	Canada - Romania BIT (2009), Romania - United Kingdom BIT (1995)	Mining and quarrying
3	2014	Infinito Gold v. Costa Rica	Canada - Costa Rica BIT (1998)	Mining and quarrying
4	2013	Caratube v. Kazakhstan (II)	Kazakhstan - United States of America BIT (1992)	Mining and quarrying
5	2013	JSW Solar v. Czech Republic	Czech Republic - Germany BIT (1990)	Electricity and gas
6	2013	South American Silver v. Bolivia	Bolivia, Plurinational State of - United Kingdom BIT (1988)	Mining and quarrying
7	2012	Bogdanov v. Moldova (IV)	Moldova, Republic of - Russian Federation BIT (1998)	Manufacturing
8	2012	Enkev Beheer v. Poland	Netherlands - Poland BIT (1992)	Manufacturing
9	2012	Fabrica de Vidrios v. Venezuela	Netherlands - Venezuela, Bolivarian Republic of BIT (1991)	Manufacturing
10	2012	Rusoro Mining v. Venezuela	Canada - Venezuela, Bolivarian Republic of BIT (1996)	Mining and quarrying
11	2011	Copper Mesa v. Ecuador	Canada - Ecuador BIT (1996)	Mining and quarrying
12	2011	Crystallex v. Venezuela	Canada - Venezuela, Bolivarian Republic of BIT (1996)	Mining and quarrying
13	2011	Mamidoil v. Albania	Albania - Greece BIT (1991), The Energy Charter Treaty (1994)	Mining and quarrying
14	2010	Allard v. Barbados	Barbados - Canada BIT (1996)	Real estate activities
15	2009	Abengoa v. Mexico	Mexico - Spain BIT (2006)	Water supply; sewerage, waste management and remediation activities
16	2009	Chevron and TexPet v. Ecuador (II)	Ecuador - United States of America BIT (1993)	Mining and quarrying
17	2009	Gold Reserve v. Venezuela	Canada - Venezuela, Bolivarian Republic of BIT (1996)	Mining and quarrying
18	2009	Reinhard Unglaube v. Costa Rica	Costa Rica - Germany BIT (1994)	Real estate activities
19	2008	Burlington v. Ecuador	Ecuador - United States of America BIT (1993)	Mining and quarrying

20	2008	Marion Unglaube v. Costa Rica	Costa Rica - Germany BIT (1994)	Real estate activities
21	2007	Foresti v. South Africa	BLEU (Belgium-Luxembourg Economic Union) - South Africa BIT (1998), Italy - South Africa BIT (1997)	Mining and quarrying
22	2007	Impregilo v. Argentina (I)	Argentina - Italy BIT (1990)	Water supply; sewerage, waste management and remediation activities
23	2007	Paushok v. Mongolia	Mongolia - Russian Federation BIT (1995)	Mining and quarrying
24	2007	Urbaser and CABB v. Argentina	Argentina - Spain BIT (1991)	Water supply; sewerage, waste management and remediation activities
25	2006	Quiborax v. Bolivia	Bolivia, Plurinational State of - Chile BIT (1994)	Mining and quarrying. Manufacturing
26	2005	Biwater v. Tanzania	United Republic of Tanzania - United Kingdom BIT (1994)	Water supply; sewerage, waste management and remediation activities
27	2005	Parkerings v. Lithuania	Lithuania - Norway BIT (1992)	Construction. Transportation and storage
28	2003	Industria Nacional de Alimentos v. Peru	Chile - Peru BIT (2000)	Manufacturing
29	2003	Plama v. Bulgaria	The Energy Charter Treaty (1994), Bulgaria - Cyprus BIT (1987)	Manufacturing
30	2001	AIG v. Kazakhstan	Kazakhstan - United States of America BIT (1992)	Real estate activities
31	2001	Azurix v. Argentina (I)	Argentina - United States of America BIT (1991)	Water supply; sewerage, waste management and remediation activities
32	2001	MTD v. Chile	Chile - Malaysia BIT (1992)	Real estate activities
33	2000	Tecmed v. Mexico	Mexico - Spain BIT (1995)	Water supply; sewerage, waste management and remediation activities
34	1994	Saar Papier v. Poland (I)	Germany - Poland BIT (1989)	Water supply; sewerage, waste management and remediation activities

Note: "ISDS case related to the environment" represent the views of the author and do not represent the official views of the OECD or of its member countries.
Source: Authors' compilation based on italaw website (www.italaw.com).

Table B.3. List of ISDS cases under the ECT related to the environment

No	Year of initiation	Case name	Applicable IIA	Sector
1	2015	Eskosol v. Italy	The Energy Charter Treaty (1994)	Electricity (Renewable Energy)
2	2014	Blusun v. Italy	The Energy Charter Treaty (1994)	Electricity (Renewable Energy)
3	2013	Eiser and Energía Solar v. Spain	The Energy Charter Treaty (1994)	Electricity (Renewable Energy)
4	2013	Isolux v. Spain	The Energy Charter Treaty (1994)	Electricity (Renewable Energy)
5	2013	RREEF v. Spain	The Energy Charter Treaty (1994)	Electricity (Renewable Energy)
6	2012	Charanne and Construction Investments v. Spain	The Energy Charter Treaty (1994)	Electricity (Renewable Energy)
7	2012	Vattenfall v. Germany (II)	The Energy Charter Treaty (1994)	Electricity (Other)
8	2011	Khan Resources v. Mongolia	The Energy Charter Treaty (1994)	Mining and quarrying
9	2011	Mamidoil v. Albania	Albania - Greece BIT (1991)	Mining and quarrying
10	2009	Vattenfall v. Germany (I)	The Energy Charter Treaty (1994)	Electricity (Other)
11	2003	Plama v. Bulgaria	The Energy Charter Treaty (1994), Bulgaria - Cyprus BIT (1987)	Manufacturing (refined petroleum products)

Note: "ISDS case related to the environment" represent the views of the author and do not represent the official views of the OECD or of its member countries.
Source: Authors'compilation based on italaw website (www.italaw.com).

Annex C. Investor-state disputes related to the environment brought on the basis of RTAs

ISDS mechanisms in RTAs have been used to make claims against environmental measures with important public policy objectives. For instance, in 2016, the establishment of the Yaigojé Apaporis National Park in Colombia entailed the termination of mining activities and was challenged by a gold mining company based in the United States through the United States - Colombia Free Trade Agreement.[99] Among a total of 86 known ISDS cases brought under RTAs between 1997 and 2017, at least 32 cases (37%) somehow relate to measures whose stated purpose includes environmental protection based on official documentation.

Figure C.1. shows that ISDS cases concerning the environment emerge on a regular basis. On average, more than one case is initiated per year reaching a total of 32 cases as of 2017. These cases are most significantly brought under the North American Free Trade Agreement (NAFTA),[100] in force since 1994, accumulating 23 cases, which makes 72% of the overall claims. The second agreement attributing to these cases is the Dominican Republic - Central America - United States Free Trade Agreement (CAFTA-DR) in force since 2006, which consists of six cases (19% of the total claims). The rest was brought under more recently agreed RTAs: the Canada – Peru Free Trade Agreement (in force since 2009), the Canada – Colombia Free Trade Agreement (in force since 2011), and the United States – Colombia Free Trade Agreement (in force since 2012).

Notably, all cases under RTAs have been brought under the agreements within the Americas. [101] Across the total of 32 cases, the tribunal dismissed investor claims in 13 cases (41%), the tribunal found states liable for treaty breaches in 4 cases (12%), other cases were settled (6 cases, 19%) or discontinued (2 cases, 6%) before reaching final arbitration decisions, and 7 cases (22%) are still pending final decisions. These tribunals undertake lengthy procedures before reaching final decisions and these processes usually take several years to complete. Therefore, the number of unsettled cases to date is not unusual when taking account of the number of cases brought forward each year.

ISDS cases related to environment brought under RTAs included claims on fair and equitable treatment (97%), followed by indirect expropriation (78%), national treatment (63%) and most favoured nation treatment (38%). Other cases involved, full protection and security (22%), performance requirements (13%), direct expropriation (9%) and arbitrary, unreasonable or discriminatory measures (3%). Among the five cases that were rendered in favour of the investor, breaches were found against fair and equitable treatment (4 cases), indirect expropriation (2 cases), national treatment (1 case), and full protection and security (1 case).

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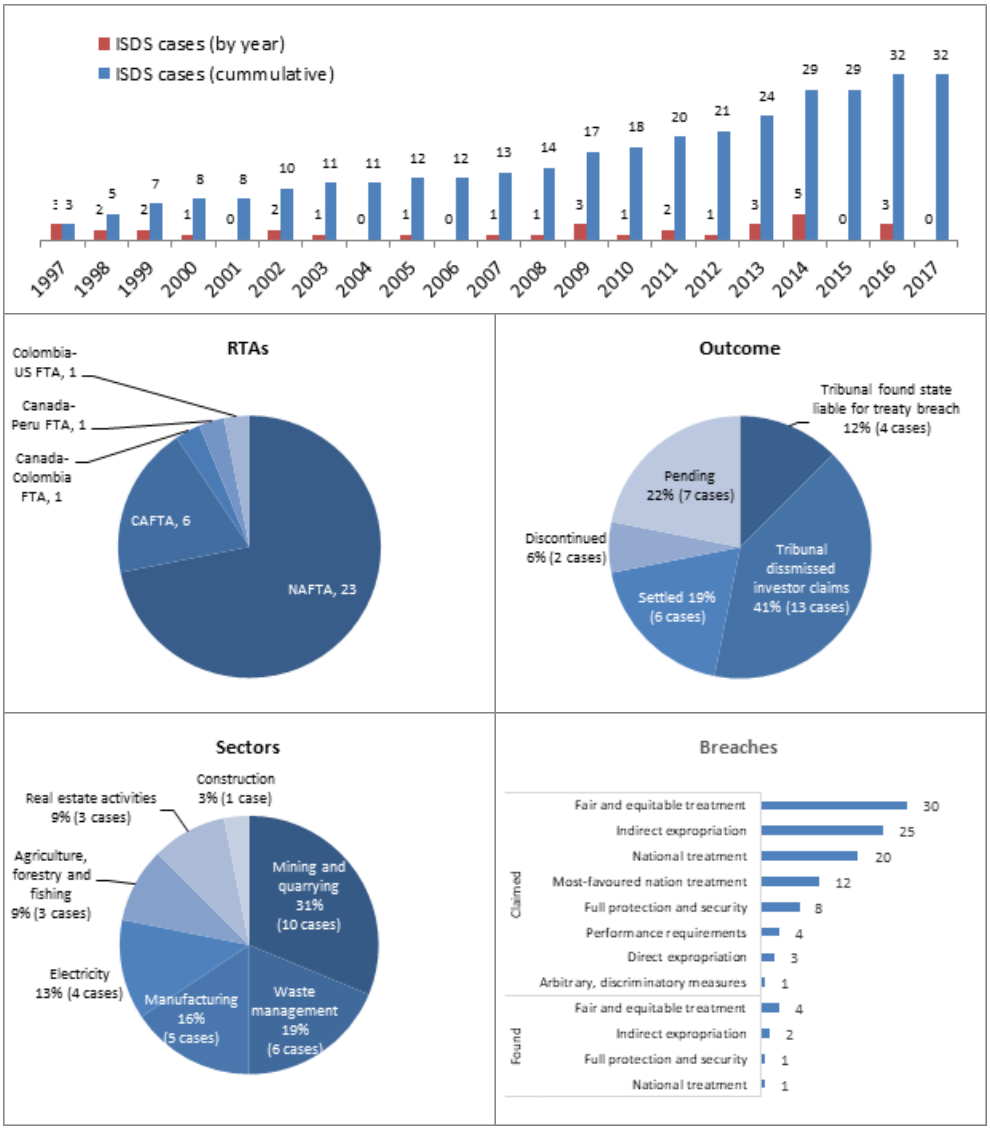
99 See: *Cosigo Resources and others v. Colombia*, UNCITRAL, Notice of Demand for Arbitration and Statement of Claim, 19 February 2016.

100 On 30 September 2018, the United States, Mexico and Canada announced their agreement toward a new United States-Mexico-Canada Agreement (USMCA) in the renegotiations of NAFTA. The USMCA came into effect on 1 July 2020. (See: https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement; and https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/usmca-aeumc/index.aspx?lang=eng).

101 This statement is only viable for claims related to environment under RTAs. Broader geographical coverage is observed under IIAs including BITs and the ECT.

Figure C.1. ISDS cases related to the environment under RTAs



Note: The year represents the year of initiation.
Source: Authors' calculations based on italaw website (www.italaw.com).

These ISDS cases brought under RTAs comprise seven sectors related to the environment. The most reported cases were on mining and quarrying (10 cases, 31%) followed by waste management (6 cases, 19%), manufacturing of chemicals and pharmaceuticals (5 cases, 16%), electricity generated from renewable energy (4 cases, 13%), real estate activities (3 cases, 9%), agriculture, forestry and fishing (3 cases, 9%) and construction (1 case, 3%). At a glance, the number of cases reported for renewable energy seems relatively low compared to other major cases such as mining. This is partly because the majority of cases related to renewable energy for instance solar and wind energy are brought forward separately under the ECT and not under RTAs.

Claims related to mining and quarrying (and construction)[102] can be categorised into three different types of claims. The first type of claim concerns the termination of mining concessions due to the introduction of national parks or environmental conservation zones (2 cases pending final decision).[103] The second type relates to the denial or revocation of mining licences, environmental permits and other authorisations as a result of potential environmental concerns (9 cases total: 4 cases in which the tribunal dismissed investor claims,[104] 2 in which the tribunal found states liable for treaty breaches,[105] 2 pending final decision[106] and 1 withdrawn[107]). The third type of claim is related to changes in the regulatory regime (additional backfilling and restoration requirements) in relation to environmental protection (1 case where the tribunal dismissed investor claims[108]).

Waste management is another sector that has typically been challenged through ISDS mechanisms in the framework of NAFTA. Several types of claims can be observed. The first type is related to the refusal to operate landfills (2 cases total: one where the tribunal dismissed investor claims[109] and the other where the tribunal found the state liable for treaty breach[110]). The second type relates to alleged violation of waste management concessions (3 cases all where the tribunal dismissed investor claims[111]). The third type of claim concerns export restrictions on contaminated waste (1 case where the tribunal found states liable for treaty breach[112]).

Investments related to the manufacturing of chemicals, pesticides and pharmaceuticals have also been subject to ISDS claims under NAFTA. Two cases addressed state measures

[102] To be precise, this includes the mining and quarrying sector plus the construction sector which involves the case related to the keystone oil pipeline (*TransCanada v. USA*, ICSID Case No. ARB/16/21).

[103] See *Cosigo Resources and others v. Colombia*, UNCITRAL, Notice of Demand for Arbitration and Statement of Claim, 19 February 2016; *Eco Oro v. Colombia,* ICSID Case No. ARB/16/41, Request for Arbitration, 8 December 2016.

[104] See *Corona Materials v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016; *St. Marys v. Canada*, UNCITRAL, Consent Award, 29 March 2013; *Pac Rim v. El Salvador*, ICSID Case No. ARB/09/12, Award, 14 October 2016; *Commerce Group v. El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011.

[105] See *Bear Creek Mining v. Peru*, ICSID Case No. ARB/14/2, Award, 30 November 2017; *Clayton/Bilcon v. Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015.

[106] See *Lone Pine v. Canada,* ICSID Case No. UNCT/15/2, Notice of Arbitration, 6 September, 2013; *Kingsgate Consolidated Ltd v. The Kingdom of Thailand*, UNCITRAL.

[107] See *TransCanada v. USA*, ICSID Case No. ARB/16/21, Order of the Secretary-General Taking Note of the Discontinuance of the Proceeding, 24 March 2017.

[108] See *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009.

[109] See *Gallo v. Canada*, UNCITRAL, PCA Case No. 55798, Award, 15 September 2011.

[110] See *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.

[111] See *Azinian v. Mexico*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999; *Waste Management v. Mexico (I)*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000; *Waste Management v. Mexico (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004.

[112] See *Myers v. Canada*, UNCITRAL, Final Award, 30 December 2002.

to ban certain chemicals and pesticides with alleged environmental concerns in which investor claims were dismissed by the tribunal.[113] Two other cases concerned the ban of specific chemicals and gasoline additives and have been settled among the parties either with or without compensation.[114] One other case was related to the interpretation of chemical regulations and was discontinued and resolved through the domestic court.[115]

Four ISDS cases relate to renewable energy and have all been filed under NAFTA. Two cases concern wind energy development projects and feed-in tariff (FIT) programmes in which the tribunal outcomes are mixed. One case was decided by the tribunal finding the state liable for a treaty breach with awards amounting to USD 19.1 million,[116] and another case was decided by the tribunal dismissing investor claims.[117] Two other cases each relate to biomass power generation in which the tribunal dismissed investor claims,[118] and hydro power (amicably settled).[119]

Claims arising from real estate rights in relation to environmental protection are relatively new and have all been brought under the CAFTA-DR with pending final decisions. One claim relates to investor rights in conflict with the existence of a national park.[120] Two other cases involve the revocation of environmental permits necessary for real estate development.[121]

Three cases on agriculture and forestry were brought before NAFTA. One case was related to the use and allocation of irrigation water where investor claims were dismissed by the tribunal.[122] Another case involved alleged discriminatory export fees imposed on timber exports and the tribunal found states liable for treaty breach.[123] One other case related to sustainable forestry management and access to tax incentive programmes and was settled between the parties with monetary compensation.[124]

[113] See *Chemtura v. Canada*, UNCITRAL, Award, 2 August 2010; *Methanex v. USA*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005.

[114] See *Dow AgroSciences v. Canada*, UNCITRAL, Settlement Agreement, 25 May 2011; *Ethyl v. Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998.

[115] See *Kenex v. USA*, UNCITRAL, Notice of Arbitration, 2 August 2002.

[116] See *Windstream Energy v. Canada*, PCA Case No. 2013-22, Award, 27 September 2016.

[117] See *Mesa Power v. Canada*, PCA Case No. 2012-17, Award, 24 March 2016.

[118] See *Mercer v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018.

[119] See *AbitibiBowater v. Canada*, UNCITRAL, Issues Statement on AbitibiBowater Settlement, 24 August 2010.

[120] See *Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Notice of Arbitration, 11 September 2014.

[121] See *Aven and others v. Costa Rica*, ICSID Case No. UNCT/15/3, Notice of Arbitration, 24 January 2014; *Berkowitz and others v. Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award of the Tribunal (Corrected), 30 May 2017.

[122] See *Bayview v. Mexico*, ICSID Case No. UNCT/15/3, Notice of Arbitration, 24 January 2014; *Berkowitz and others v. Costa Rica*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007.

[123] See *Pope & Talbot v. Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002.

[124] See *Longyear v. Canada*, UNCITRAL, Notice of Withdrawal of Claim, 26 June 2015.

Annex D. Investor-state disputes related to the environment brought on the basis of BITs

With more than 2,500 Bilateral Investment Treaties (BITs) currently in place, involving most countries in the world, 672 cases were brought under ISDS between 1987 and 2017. Just over 5% of them (34 cases) are related to measures whose stated purpose includes environmental protection, with the number of disputes growing fairly steadily since early 2000s (See Figure D.1.). These figures are based on official documentation and can be considered as a relatively conservative estimation. When considering unofficial sources such as from media and IGOs, this number can potentially grow up to 9% (62 cases). The following analysis is solely based on official sources.

Nearly half of these disputes involved the sector of mining and quarrying (44%, 15 cases), followed by water and waste management (20%, 7 cases), manufacturing (15%, 5 cases),[125] and real estate activities (15%, 5 cases). Other sectors included electricity (3%, 1 case) and construction (3%, 1 case).

Cases on mining and quarrying can be further grouped into five broad set of issues. First, four cases address the rejection of mining licences and concession contracts due to stated environmental concerns arising from environmental impact assessments, environmental authorisation processes or newly introduced environmental laws. These cases are either pending final decision or discontinued.[126] Second, the majority with eight cases emerge from the revocation of mining licences, concession contracts or mining rights due to alleged inadequate environmental performance of the claimant. Respective tribunals found treaty breaches in six cases.[127] The remaining two are pending final decision.[128] Third, in one related case, the respondent was challenged by imposing a number of measures including

[125] This includes a range of subsectors including the manufacturing of refined petroleum products, chemicals, glass and food products.

[126] See: *Dominion Minerals Corp. v. Republic of Panama*, ICSID Case No. ARB/16/13, Request for Arbitration, 29 March 2016; *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31, Notice of Arbitration, 21 July 2015; *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Request for Arbitration, 6 February 2014; *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Award, 4 August 2010.

[127] See: *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016; *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award, 15 March 2016; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015.

[128] See: *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award of the Tribunal, 27 September 2017; *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Respondent's Post-Hearing Brief, 31 October 2016.

windfall taxes on mining activities, and made a counterclaim against the claimant based on their alleged environmental performance. This case is pending final decision.[129] Fourth, one case was brought forward concerning the liability for environmental remediation of oil fields and is pending final decision.[130] Fifth, another case arose from the relocation of port facilities for petroleum vessels by the government according to a land use plan, which allegedly responded to safety, environmental and public policy concerns. The tribunal did not find any treaty breaches in this particular case.[131]

On water and waste management, four cases relate to the alleged breach of water supply and wastewater treatment concessions with potentially negative impacts on the environment and public health.[132] Two cases address the operation of landfills and the cancellation or non-renewal of necessary permits and licences due to alleged environmental concerns.[133] One other case was raised against an environmental regulation that imposed an import ban on paper waste and secondary raw materials.[134] The respective arbitral tribunals found treaty breaches all seven cases.

In the manufacturing sector, two cases emerge from introducing (new or modified) environmental legislations based on spatial planning or import charges, which allegedly affected the claimant's industrial facilities or production processes.[135] Two other cases are related to measures in response to stated environmental concerns arising from investor's activities with alleged poor performance[136] or alleged environmental threat to a natural protected area.[137] Another case was related to alleged responsibility of the state for

[129] See: *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Impregilo v. Argentina (I)Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011.

[130] See: *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, PCA Case No. 2009-23, Notice of Arbitration, 23 September 2009.

[131] See: *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015.

[132] See: *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14, July 2006.

[133] See: *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award (Spanish), 18 April 2013; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003.

[134] See: *Saar Papier Vertriebs GmbH v. Poland*, UNCITRAL, Final Award, 16 October 1995.

[135] See: *Yuri Bogdanov and Yulia Bogdanova v. Republic of Moldova*, SCC Case No. V091/2012, Final Award, 16 April 2013; *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 29 April 2014.

[136] See: *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Award, 13 November 2017.

[137] See: *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005.

environmental remediation of an oil refinery.[138] The respective tribunals dismissed all investor claims in these cases in which two denied jurisdiction over the claim.

On real estate activities, three cases are related to the establishment of a national park or public park which led to alleged indirect expropriation by the government. The respective tribunals found treaty breaches in two out of three cases.[139] One case involved the rejection of a property development project due to environmental and urban planning regulations. The tribunal found a treaty breach in this particular case.[140] Another case emerged from claims by the investor over the development of an eco-tourism site and alleged environmental damage caused by the government. No treaty breaches were found in this case.[141]

One case related to electricity, and in particular renewable energy, involved claims against government measures in withdrawing tax exemptions and introducing levies on solar energy projects.[142] Another case on construction concerns a rejection of a public parking development plan with alleged environmental concerns in a historic town. The respective arbitral tribunals did not find any treaty breaches in these particular cases.[143]

With four submitted cases (12% of all), Venezuela has been the country most frequently challenged for its regulatory changes that were alleged necessary for environmental protection. This is followed by Argentina, Ecuador and Costa Rica, which account for three cases each.

While one in four environment related disputes was directed against OECD member countries, the remaining three quarters were submitted against non-OECD countries. Simultaneously, over 85% of foreign Investors submitting claims came from OECD member states. In particular, 7 Canadian investors (33%), 6 American (29%), and 4 German (19%) as well as 3 Spanish (14%), sued other governments in relation with environmental policies under BITs. Nevertheless, it should be noted again that the national origin of these claims may have little economic meaning as disputes can be raised by intermediate shareholding companies depending on the quality of provisions in specific treaties (Gaukrodger, 2017a).

[138] See: *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008.

[139] See: *Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012; *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012; *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October, 2003.

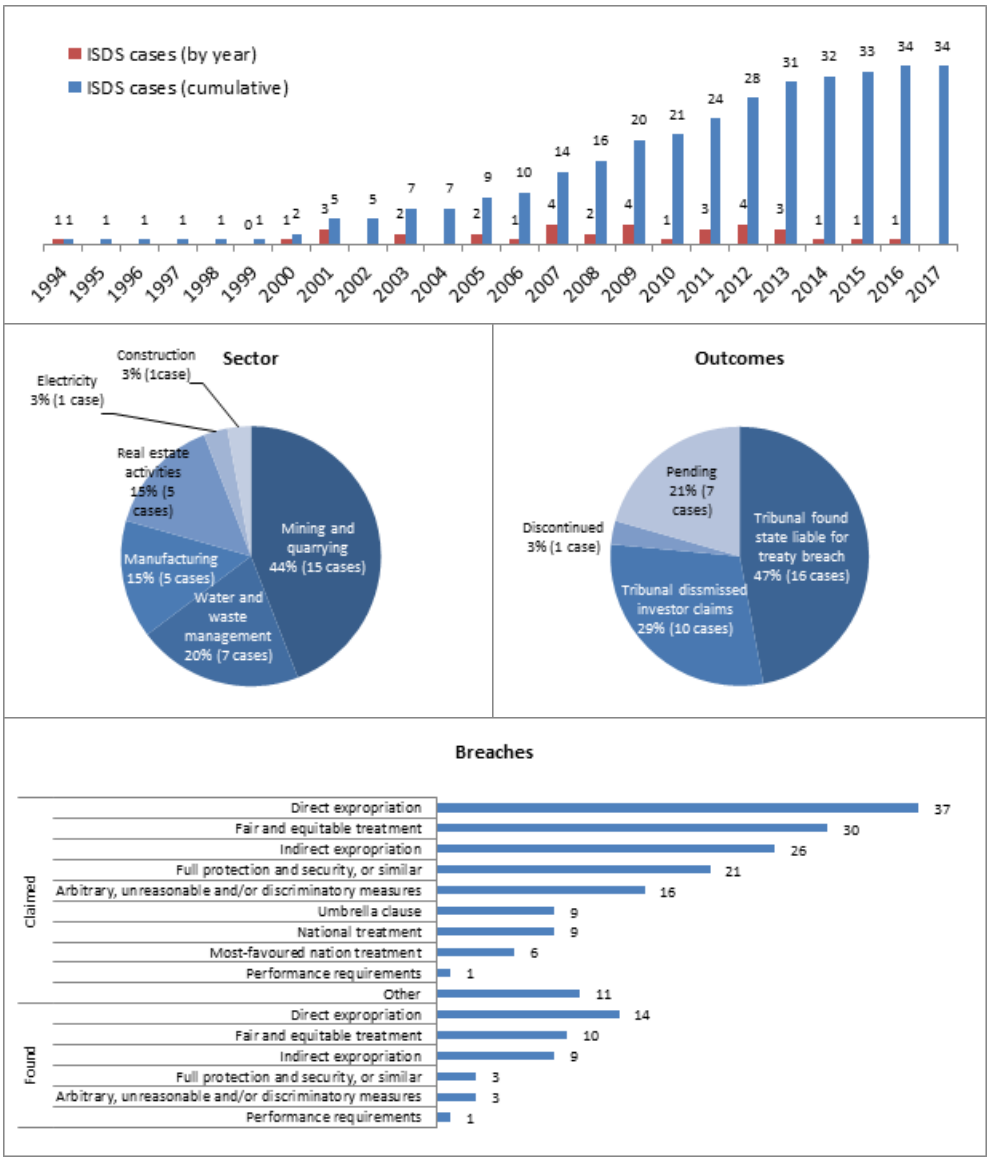
[140] See: *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25May 2004.

[141] See: *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award, 27 June 2016.

[142] See: *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Final Award, 11 October 2017.

[143] See: *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007.

Figure D.1. ISDS cases related to the environment under BITs



Note: The year represents the year of initiation.
Source: Authors' calculations based on italaw website (www.italaw.com).

The tribunal found states liable for treaty breaches in nearly half of cases (16 cases) under BITs, which is apparently more than those under RTAs. In contrast, the tribunal dismissed investor claims in approximately one-third of cases (10 cases). Approximately 21% (7 cases) of environmental disputes under BITs are still pending decision of the tribunal. The remaining 3% have been discontinued (1 case).

Claims most frequently included direct expropriation (37 cases), fair and equitable treatment (30 cases), indirect expropriation (26 cases), and full protection and security (21 cases). Other cases also included accusations of arbitrary measures (16 cases), umbrella clause and national treatment (9 cases each), most-favoured nation treatment (6 cases), as

well as performance requirements (1 case). Among these cases, the arbitral tribunal found states liable for treaty breaches of direct expropriation (14 cases), fair and equitable treatment (10 cases), indirect expropriation (9 cases), full protection and security (3 cases), arbitrary measures (3 cases) and performance requirements (1 case).

The average claim in environmental disputes under BITs amounts to USD 458 million, while the average award of USD 122 million, has been nearly four times lower. The largest compensation of USD 4.4 billion was claimed by a Canadian investor Gabriel Resources against Romania, in a case concerning issuance of an environmental permit required to start exploitation of the claimant's mining project.[144] Tribunal's decision for that case is still pending. The highest award granted so far in an environment related dispute under BITs, amounted to USD 1.2 billion, and was given to another Canadian investor – Crystallex, in a case against Venezuela. [145]

[144] See Gabriel Resources v. Romania, ICSID Case No. ARB/15/31, Notice of Arbitration, 21 July 2015.

[145] See *Crystallex v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, §917.

Annex E. Investor-state disputes related to the environment brought on the basis of the ECT

Between 2001 and 2017, a total of 113 cases were submitted by foreign investors to ISDS arbitration under the Energy Charter Treaty (ECT). Roughly one-tenth of them (11 cases) were somewhat related to environmental issues based on official documentation (See Figure E.1.). When referring to unofficial documentation, the count potentially grows up to 61 cases implying a particularly high relevance of environmental policies in the context of ECT.

Nearly three-quarters of environment related disputes brought under the ECT involved the electricity sector (73%, 8 cases). Remaining cases concerned mining and quarrying (18%, 2 cases) and manufacturing of refined petroleum products (9%, 1 case).

Noticeably, six cases of all the reported environmental cases concerned electricity generated from renewable energy. Four cases are due to a series of changes in the Feed-in-Tariff (FIT) programme for photovoltaics and solar thermal energy projects in Spain. The tribunal found a treaty breach in one case,[146] however, did not find a breach in two others,[147] and the remaining is pending final decision.[148] Two other cases emerge from the reductions in FITs in solar power projects in Italy and are pending final decision.[149]

Regarding the two other cases on electricity, one case emerged from water use restrictions for a coal thermal power plant which allegedly responded to environmental concerns and limited investor's operations. This case was settled between the parties.[150] One final case was raised against the acceleration of the phase out of nuclear energy in Germany following the Fukushima accident which allegedly elevated safety and environmental concerns. This case is pending final decision.[151]

Two cases were related to mining and quarrying. One case concerned the cancelation of a mining licence for a uranium deposit due to stated environmental concerns. The tribunal

[146] See: *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017.

[147] See: *Isolux Netherlands, BV v. Kingdom of Spain,* SCC Case V2013/153, Final Award (Spanish), 17 July 2016; *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Award, 21 January 2016.

[148] See: *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016.

[149] See: *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent's Application Under Rule 41(5), 20 March 2017; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Final Award, 27 December 2016.

[150] See: *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany,* ICSID Case No. ARB/09/6, Award, 11 March 2011.

[151] See: *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Judgment of the Federal Constitutional Court of Germany (German), 6 December 2016; Public Hearing, 10 October, 2016.

found a treaty breach in this case.152 The other case brought under the ECT, and equally under the Albania - Greece BIT, is related to the relocation of port facilities for petroleum vessels due to environmental concerns raised in a land use plan. The tribunal dismissed investor claims in this particular case.[153]

One other case brought under the ECT, in parallel to the Bulgaria - Cyprus BIT (1987), associates with an alleged responsibility of the investor for environmental remediation of an oil refinery. The tribunal dismissed investor claims in this case.[154]

OECD countries were subject to 8 out of 11 arbitrations (72%) conducted in environment related disputes. From the investor side, 10 out of 11 cases related to environmental regulation (90%), was submitted by companies registered in OECD member states. The highest number of cases was put forward by investors from Luxembourg (26%, 3 cases), followed by Swedish investors (18%, 2 cases). It should be noted again however that the origin of claims may have little economic meaning as these cases can be submitted by intermediate shareholding companies with limited economic activities in the home states (Gaukrodger, 2017a).

As a majority of environmental disputes have been submitted in the last ten years, nearly 36% of them (4 cases) are still pending the decision of the tribunal. Out of remaining 7 cases, the arbitral tribunal dismissed investor claims in 3 cases, found states liable for treaty breaches in 2 cases, while others were either discontinued or settled (1 case each).

While documentation on most of the pending cases is not publicly available, for those where claims are known, they mostly include fair and equitable treatment (7 cases), indirect or direct expropriation (7 cases each), arbitrary measures (5 cases), full protection and security (4 cases), and umbrella clauses (3 cases). In two cases, the tribunal found states liable for a treaty breach, in which one was on fair and equitable treatment obligations, and the other involving the umbrella clause.

In cases where the arbitral tribunals found states liable for damages, two investors were awarded USD 139.8 million and USD 80 million of compensation respectively. This compares to an average claim across all the environmental disputes under the ECT amounting to USD 946 million. The highest compensation of USD 5.2 billion was claimed by a Swedish investor Vattenfall against Germany, in response to country's decision to phase out nuclear power plants by 2022.[155] Tribunal's arbitration for that case is still pending.

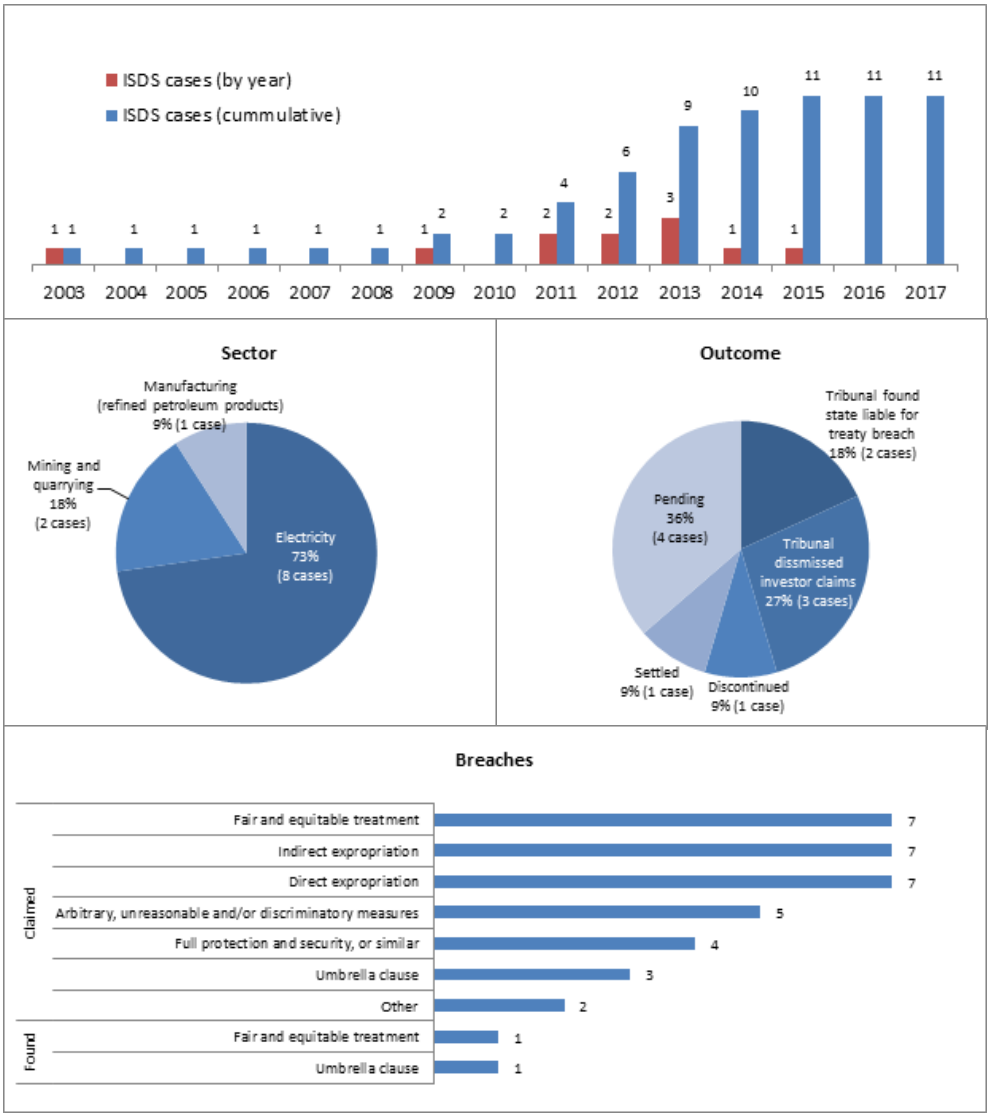
[152] See: *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, Award on the Merits, 2 March 2015.

[153] See: *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015.

[154] See: *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008.

[155] See: Vattenfall v. Germany (II), ICSID Case No. ARB/12/12; https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/12/12.

Figure E.1. ISDS cases related to the environment under the ECT



Note: The year represents the year of initiation.
Source: Authors' calculations based on italaw website (www.italaw.com).