

Briefing 7: Progress on sustainable development through trade and investment dispute settlement



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Executive Summary

Sustainable development issues have arisen multiple times in trade and investment disputes. In this regard, the outcome of these disputes has evinced the need for reforming the international trade and investment system.

This paper outlines key decisions in the World Trade Organization's Dispute Settlement system as well as Arbitral Investment Awards that illustrate the progress made within these dispute settlement systems regarding the consideration and promotion of the sustainable development goals. The purpose is to utilise these past examples as a benchmark in the present process of reforms. The analysis of the disputes will be divided between cases where sustainable development issues were directly examined eg. General Exceptions, or indirectly, when interpreting a term.

The case law of the WTO adjudicating bodies and International Investment Arbitral tribunals have dealt multiple times with the interrelation of international trade obligations found in the WTO Agreement and investment protection obligation in , such as those identified in the Sustainable Development Goals (SDGs). The examination of the progress made during the last 20-25 years of jurisprudence needs to be based upon the distinction between instances where regulatory considerations were directly examined as an exception or as part of substantive obligations of the treaties and instances where adjudicating bodies had to examine the indirect relevance of regulatory concerns in the operation of WTO and IIA provisions.¹ In this sense, the necessity of future reforms of the dispute settlement systems established by the WTO, IIAs and Regional Trade Agreements in order to cater for the SDGs shall be assessed.

Direct examination of sustainable development issues

The first category mainly includes case law related to the General Exceptions found in the GATT Article XX and GATS Article XIV as well as jurisprudence related to the operation of the TBT and SPS Agreements. In this category, we can include also Investment arbitral jurisprudence related to the police powers doctrine.²

WTO Dispute Settlement: Exceptions in the GATT/GATS and the TBT and SPS Agreements

The cases that need to be examined in order to clarify the exact development of WTO case are *US*

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¹ Pierre-Marie Dupuy and Jorge E. Viñuales, *International Environmental Law*, Second edition (Cambridge New York, NY Port Melbourne New Delhi Singapore: Cambridge University Press, 2018).

² Catharine Titi, 'Police Powers Doctrine and International Investment Law', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 10 October 2017), <https://papers.ssrn.com/abstract=3050417>; Prabhash Ranjan, 'Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of Philip Morris v. Uruguay', *Asian Journal of International Law* 9, no. 1 (January 2019): 98–124, <https://doi.org/10.1017/S2044251318000139>; Noam Zamir, 'The Police Powers Doctrine in International Investment Law', *Manchester Journal of International Economic Law* 14, no. 3 (2017): 318–37; Alain Pellet, 'Police Powers or the State's Right to Regulate: Chemtura v. Canada' in Kinnear et al. (eds), *Building International Investment Law: The First 50 Years of ICSID* (Wolters Kluwer 2015) 447.

– *Gasoline*,³ *EC – Asbestos*,⁴ *US – Shrimp*⁵ and *EC – Tariff Preferences*,⁶ the *EC – Seals*,⁷ the *Brazil-Tyres*,⁸ the *China – Raw Materials* and *China – Rare Earths*,⁹ the *India- Solar Cells*,¹⁰ the *EU – Energy Package*,¹¹ the *US-Tuna*,¹² the *Australia-Plain Packaging*¹³ and the *Korea-Radionuclides*.¹⁴

The response of WTO adjudicating bodies when examining disputes where the right of a State to regulate in favour of sustainable development has been at stake, can be exemplified by the Appellate Body Report in *EC-Seals*. In specific, the Appellate Body found that Article I and III GATT (that constitute the fundamental non-discrimination obligations, MFN and National Treatment) do not provide for policy space as the existence of a legitimate regulatory distinction cannot justify a measure that modifies the competitive opportunities to the detriment of foreign products in comparison to domestic or certain other foreign products.¹⁵ Yet, the Appellate Body affirmed that Member States maintain their right to regulate and can justify measures that seek to protect animal welfare in Article XX GATT.¹⁶ Hence, the Appellate Body has clarified that policy considerations can only be examined in the clauses where the treaty language so demands or proposes.¹⁷

An example of this approach is the TBT Agreement, where the Appellate Body has interpreted Articles 2.1 and 2.2 broadly so as to provide the national authorities with the regulatory space to pursue non-trade values. Recently, the Appellate Body confirmed in the *US-Tuna* cases in the context of Article 2.1 and 2.2 TBT that US schemes relating to the preservation of dolphins when harvesting Tuna can be justified under WTO Rules, as long as they are applied origin neutrally and even-handedly for all fishing techniques, while not imposing more trade-restrictive conditions than necessary.¹⁸

As such, the WTO dispute settlement has accepted, among others, as legitimate policy goals environmental goals related to waste management,¹⁹ conservation of natural resources such as rare earths and refractory-grade bauxite²⁰ and security of energy supply.²¹

However, the inclusion of such legitimate concerns primarily in exceptions imposes a heavy burden on the State to demonstrate the consistency of the measure, all while bearing the burden of proof.²² This becomes even more important when taking into account the heavy evidentiary burden that an examination

³ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*.

⁴ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing*.

⁵ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*.

⁶ Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*.

⁷ Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*.

⁸ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*.

⁹ Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*; Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, para. 5.124, 5.127.

¹⁰ Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*.

¹¹ Panel Report, *European Union and its member States – Certain Measures Relating to the Energy Sector*, para. 7.1155-7.1156.

¹² Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, para. 214; Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, para. 5.93; Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States/ United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico*, para. 6.10.

¹³ Appellate Body Report, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*; Panel Report, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*; Appellate Body Report, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*.

¹⁴ Appellate Body Report, *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*.

¹⁵ Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, para. 5.115- 5.117, 5.121- 5.130.

¹⁶ *Ibid.*, para. 5.167.

¹⁷ Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, para. 96; Peter Van den Bossche and Werner Zdouc, 'The Law and Policy of the World Trade Organization: Text, Cases and Materials', Cambridge Core, July 2017, 1743, <https://doi.org/10.1017/9781316662496>; Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, International Economic Law Series (Oxford ; New York: Oxford University Press, 2009), 287.

¹⁸ Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, para. 214; Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, para. 5.93; Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States/ United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico*, para. 6.10.

¹⁹ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*.

²⁰ Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*; Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*.

²¹ Panel Report, *European Union and its member States – Certain Measures Relating to the Energy Sector*, para. 7.1155-7.1156;

²² Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, para. 694; Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products Hormones*, para. 98, 109; Appellate Body Report, *US-Gasoline*, 22; Appellate Body Report, *US-Shrimp*.

of ‘necessity’ or ‘justifiability’ requires.²³

The Appellate Body has tried to ease this burden by stating for example that “*the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context.*”²⁴ Hence, a Panel should not exercise undue scrutiny over a measure and its contribution to a proclaimed cause. Rather, the compliance of a national policy with GATT and the contribution of a measure to the proclaimed cause should be examined with a benefit of time.²⁵ However, this cannot easily be seen to mitigate the rather systematic limited capability to cater for SDGs.²⁶

In conclusion, the capacity of WTO Members to pursue non-trade values has been reaffirmed by WTO case law. However, this right to regulate is only acceptable under the established strict conditions of Article XX GATT and XIV GATS such as the weighting and balancing exercise or the obligation for even-handedness between domestic and foreign products.²⁷ In addition, in many instances the Appellate Body has reiterated that any possible discriminatory treatment should have a reasonable and justifiable relationship to the regulatory concern at issue.

International Investment Law: Police Powers Doctrine

In the field of International Investment Law, Arbitral Tribunals have dealt with measures taken within the context of a State’s police powers doctrine. Arbitral Tribunals have disagreed on the exact operation of the doctrine. In this regard, there is a magnitude of case law that can be examined.²⁸ In a nutshell, Arbitral Tribunals have distinguished between measures that amount to indirect expropriation that require the payment of compensation to the investor and measures of general application that constitute the State’s reasonable right to regulate.²⁹ The distinction can be exemplified by the difference between the following quotes:

*“While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. **That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The***

²³ Appellate Body Report, *US – Gasoline*, p. 22; Appellate Body Report, *US – Shrimp*, para. 156; Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.96; Appellate Body Reports, *China – Raw Materials*, para. 356,360; Appellate Body Reports, *China – Rare Earths*, para. 5.93-5.94; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 229-230; Appellate Body Report, *US – Tuna II (Mexico) Art. 21.5*, para. 7.88, 7.316; Panel Report, *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products*, para. 7.229; Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, para. 6.114; Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, para. 7.260-1; Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, para. 7.428-9, 7.574; Panel Report, *Australia – Measures Affecting Importation of Salmon*, para. 8.133; Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, para. 215; Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, para. 159-66; Marios Tokas, ‘Hanging in the Balance: The Prohibition of Protectionism in Article III and XX of the GATT 1994 in Light of the Inherent Balance Theory’, *Indian Journal of International Economic Law* XI, no. 1 (2019): 209–15; Bossche and Zdouc, ‘The Law and Policy of the World Trade Organization’.

²⁴ Appellate Body Report, *Brazil – Tyres*, para. 229-230.

²⁵ *Ibid.* para. 151.

²⁶ Examples of criticisms: Dupuy and Viñuales, *International Environmental Law*, 478.

²⁷ Illustratively: Appellate Body Report, *Brazil – Tyres*, Appellate Body Report, *China – Rare Earths* and Appellate Body Report, *US – Tuna*.

²⁸ *Compañía del Desarrollo de Santa Elena, s.a. v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000; *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000; *Compañía de Aguas del Aconquija s.a. and Vivendi Universal s.a. v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011; *Pope & Talbot Inc v. Canada*, Interim Award, 26 June 2000; *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006; *Técnicas Medioambientales Tecmed s.a. v. Mexico*, ICSID Case No. arb (AF)/00/2, Award, 29 May 2003; *Philip Morris Brands Sàrl, Philip Morris Products s.a. and Abal Hermanos s.a. v. Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016; *Compañía del Desarrollo de Santa Elena, s.a. v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000; *Compañía de Aguas del Aconquija s.a. and Vivendi Universal s.a. v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007; *Pope & Talbot Inc v. Canada*, Interim Award, 26 June 2000; *Philip Morris Brands Sàrl, Philip Morris Products s.a. and Abal Hermanos s.a. v. Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016; *Fireman’s Fund Insurance Company v. Mexico*, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006; *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award, 13 November 2000; *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002; *Chemtura Corporation v. Canada*, UNCITRAL, Award, 2 August 2010; *Suez, Sociedad General de Aguas de Barcelona s.a., and Vivendi Universal s.a. v. Argentina*, ICSID Case No. ARB/03/19, and *Anglian Water Group (awg) v. Argentina*, UNCITRAL, Decision on Liability of 30 July 2010; *Quiborax s.a. and Non Metallic Minerals s.a. v. Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015; *Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001; *Les Laboratoires Servier, s.a.s. Biofarma, s.a.s., Arts et Techniques du Progrès s.a.s. v. Poland*, PCA (UNCITRAL), Final Award, 14 February 2012; *Renée Rose Levy de Levi v. Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014.

²⁹ *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 148; J.E. Viñuales, ‘Sovereignty in Foreign Investment Law’, in *The Foundations of International Investment Law*, ed. Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (Oxford University Press, 2014), 326–43, <https://doi.org/10.1093/acprof:oso/9780199685387.003.0012>.

*international source of the obligation to protect the environment makes no difference.*³⁰

and

*“a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable”.*³¹

Both decisions accept that the State can take measures for the protection of a legitimate regulatory concern; yet, the second decision provides that States do not owe compensation when applying non-discriminatory measures of general application in accordance with due process. This provides for a wider policy space for States as the fear of claims of compensation for indirect expropriation can become a strong disincentive to regulate in favour of an SDG.

Indirect examination of sustainable development goals

In this category, we analyse how the Adjudicating Bodies have integrated the regulatory concerns within the operation of substantive provisions of the treaties such as the Fair and Equitable Treatment, the interpretation of the term ‘like products’ or ‘like circumstances’ or in instances related to countermeasures.

Hence, we need to examine the following cases: *US-Clove Cigarettes*,³² *Canada-Renewable Energy*,³³ *Thailand-Cigarettes (21.5)*,³⁴ *Brazil-Taxation*,³⁵ *Cortec v Kenya*,³⁶ *Plama v Bulgaria*,³⁷ *Parkerings v Lithuania*,³⁸ *Unghlaube v. Costa Rica*,³⁹ *Bilcon v. Canada*,⁴⁰ *Gold Reserve v. Venezuela*,⁴¹ *Perenco v. Ecuador*,⁴² *Burlington v Ecuador*⁴³ and *Urbaser v Argentina*.⁴⁴

A striking example is the interpretation of the term ‘likeness’ in which the Appellate Body has reiterated a competition-related examination that excludes consideration of the reasons underpinning regulatory distinctions for distinct treatment of products, or non-trade concerns in general.⁴⁵ That said, the Appellate Body has opened the door to consideration of non-trade values – like health concerns – where these values bear upon the classic likeness tools such as physical characteristics or consumer preferences.⁴⁶

Similarly, in the *Canada – Renewable Energy* case when examining the definition of ‘market’ in Article 1 and 14 of the *SCM Agreement*, the Appellate Body found that where a WTO Member ‘creates’ a new market for renewable energy like solar panels and wind turbines as part of a feed in tariff scheme, this process is not

³⁰ *Compania del Desarrollo de Santa Elena S.A., v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award on the Merits, February 27, 2000, para. 71.

³¹ *Methanex Corporation v. United States of America*, NAFTA Arbitral Tribunal, Final Award, pt. IV, ch. D, 7, Aug. 3, 2005, para. 262.

³² Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*.

³³ Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*.

³⁴ Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Recourse to Article 21.5 of the DSU by the Philippines*; Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Second Recourse to Article 21.5 of the DSU by the Philippines*.

³⁵ Appellate Body Reports, *Brazil – Certain Measures Concerning Taxation and Charges*.

³⁶ *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award 22 October 2018.

³⁷ *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award 27 August 2008.

³⁸ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007)

³⁹ *Marion Unghlaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1 and *Reinhard Unghlaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award 16 May 2012.

⁴⁰ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v. Government of Canada*, NAFTA (UNCITRAL), Award 17 March 2015.

⁴¹ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award 22 September 2014.

⁴² *Perenco Ecuador Ltd v. The Republic of Ecuador and Empresa Estatal Petróleo del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim 11 August 2015.

⁴³ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleo del Ecuador (PetroEcuador)*), Decision on Counterclaims, 7 February 2017.

⁴⁴ *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.

⁴⁵ Indicatively: Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, para.113-115.

⁴⁶ Appellate Body Report, *US-Clove Cigarettes*, para. 117; Appellate Body Report, *EC-Asbestos*, para. 120-122; Appellate Body Report, *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*, para. 5.50-5.67; Appellate Body Report, *Argentina-Financial Services*, para. 6.38, 6.56, 6.61

necessarily considered a “subsidy” within the meaning of the *SCM Agreement*.⁴⁷ This interpretation gives considerable policy space for states to provide support for environmentally friendly products and schemes.

Another very interesting example is the examination of the ‘market value’ of a property, the Tribunal in *Unglaube v. Costa Rica* used environmental considerations and standards as the basis for the evaluation of the ‘highest and best use’ of the property.⁴⁸

Lastly, a very particular example is the examination of proportionality in the term ‘fair and equitable treatment’. More specifically, Tribunals have accepted that “*Under this FET standard, there is a balancing exercise permitted to the host State, weighing the legitimate interests of the foreign investor with the legitimate interests of the host State and others, including (especially) its own citizens and local residents*”.⁴⁹ As such Tribunals seemingly introduce regulatory space in light of which measures legitimate policy considerations may be examined.

New approaches to Dispute Settlement Reform to enhance Sustainable Development

The key for reforming Dispute Settlement procedures and strengthening alignment with goals of Sustainable Development lies first and foremost in providing greater clarity to the underlying treaty text. This is especially relevant for International Investment Law where the ambiguity of the treaty text has always been considered one of the primary reasons for ambiguity or inconsistency or even reluctance of Tribunals to accept the relevance of SDGs in Investment Arbitration.⁵⁰

For example, the EU-Canada Comprehensive Agreement reads as follows:

*“For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objective, such as health, safety and the environment, do not constitute indirect expropriations.”*⁵¹

or

Article 17 of the Investment Agreement for the COMESA Common Investment Area (2007) reads:

“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;*

⁴⁷ Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, para. 5.178.

⁴⁸ *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1 and *Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award 16 May 2012, para. 309.

⁴⁹ *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award, para. 6.81 (Mar. 15, 2016); *Teemed v Mexico* (ICSID ARB (AF)/00/2), Award (29/5/2003), para. 122; *LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentine Republic* (ICSID Case No ARB/02/1), Award (25 July 2007), para. 195; *El Paso v Argentina* (ICSID ARB/03/15), Award (31/10/2011), para. 241; *EDF International v Argentina* (ICSID ARB/03/23), Award (11/6/2012), para. 293; Gebhard Bücheler, *Proportionality in Investor-State Arbitration*, First edition (Oxford, United Kingdom: Oxford University Press, 2015), 193.

⁵⁰ Boone Barrera, Enrique, *The Case for Removing the Fair and Equitable Treatment Standard from NAFTA* (April 27, 2017). CIGI Paper No. 128. Available at SSRN: <https://ssrn.com/abstract=3012347>; *Sempre Energy International v Argentine Republic* (ICSID Case No ARB/02/16), Award (28 September 2007).

⁵¹ *Investment Chapter of the Canada-EU Comprehensive Economic and Trade Agreement*, Oct. 30, 2016. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5380>

*and the examination shall not be limited to or be biased towards any one factor?*⁵²

Other examples are the inclusion of general exception clauses (like in the WTO) or clauses that address a specific consideration such as environmental clauses, labor protection clauses, social corporate responsibility clauses etc.⁵²

Regarding the latter option, BITs should provide for CSR obligations and specific post-establishment obligations of investors in relation to environmental protection that may constitute the basis either of a counterclaim or contributory fault. These obligations may entail the conduct of environmental/social impact assessment, prior public consultations (especially with indigenous communities), international certification (ISO 14001 on environmental management) and respect ILO principles on Tribal and Indigenous Peoples.⁵³ Additionally, the CSR obligations should include direct reference to international standards and best-practices related to CSR such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

Regarding the WTO Dispute Settlement, the current situation with the Appellate Body crisis have sharply frozen the possible reforms or approaches that could be adopted for boosting the presence of sustainable development in WTO jurisprudence.⁵⁴ However, negotiations at the market access level, especially for environmental goods and services are still continuing, while one significant development was the acceptance of *amicus curiae* brief by the Appellate Body in environmentally important disputes.⁵⁵ Recently, negotiations on further market access for environmental services had begun to take shape, but were unfortunately halted by the rise of the pandemic.⁵⁶

Lastly, WTO Dispute Settlement Procedures (primarily) and Investment Arbitral Tribunals have begun to open up the hearings and the allowed submissions (by whom?), which increased the level of transparency of the procedures. This was done either through ad-hoc agreements (recent US Tariffs Disputes in the WTO)⁵⁷ or by specific treaty provisions such as Article 10.21 of the United States-Dominican Republic - Central America Free Trade Agreement (CAFTA).

Conclusions

In sum, SDGs have started to receive wider consideration under International Trade and Investment Dispute Settlement, either through explicit treaty reforms or by recognition from adjudicating bodies that sustainable development cannot be simply excluded for the interpretation and application of International Economic Law. The recognition that sustainable development considerations are inherent in the interpretation and application of economic law norms such as the term 'likeness', 'market value' or 'fair and equitable treatment' constitutes a major turn in International Economic Law adjudication. The provision of general exception clauses or specific commitments clauses (which are usually excluded from dispute settlement),⁵⁸ provide a certain standing to sustainable development which however cannot be equated to the status of being part of the ordinary '*modus operandi*' of a substantial treaty provision.

⁵² UNCTAD, World Investment Report 2014. Investing in the SDGs (2014) (UNCTAD 2014); Jarrod Hepburn and Vuyelwa Kuuya, 'Chapter 24: Corporate Social Responsibility and Investment Treaties', in Marie-Claire Cordonier Segger, Markus W. Gehring, et al., Sustainable Development in World Investment Law, Global Trade Law Series, Vol 30. p 589- 609; Marie-Claire Cordonier Segger and Duncan French, 'Chapter 26: Governing Investment in Sustainable Development: Investment Mechanisms in Sustainable Development Treaties and Voluntary Instruments', in Marie-Claire Cordonier Segger, Markus W. Gehring, et al., Sustainable Development in World Investment Law, Global Trade Law Series, Volume 30 pp. 645-680

⁵³ Eg. Article 18 Morocco – Nigeria BIT (2016). Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3711/morocco%E2%80%93nigeria-bit-2016->

⁵⁴ Hillman, 'Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, The Bad and the Ugly?'; Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?'; Lo, Nakagawa, and Chen, The Appellate Body of the WTO and Its Reform, pg. 248.

⁵⁵ Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*. Available at: <https://www.tradelab.org/single-post/2018/03/02/Canada---Certain-Measures-Affecting-the-Renewable-Energy-Generation-Section-DS412>

⁵⁶ https://www.wto.org/english/news_e/news19_e/serv_30sep19_e.htm

⁵⁷ US — Steel and Aluminium Products (European Union) (DS548); US — Steel and Aluminium Products (Norway) (DS552); US — Steel and Aluminium Products (Switzerland) (DS556).

⁵⁸ See Energy Charter Treaty