The Strategic Use of Sustainable Development to Adequately Address Social and Environmental Issues in Disputes Involving Transnational Companies

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A mi madre y a mi padre,

quienes con un esfuerzo insuperable me abrieron todos los caminos.

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Contents

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Abstract

This work examines the place that sustainable development has in the field of international policy and law. The thesis argues that a narrative of balance between different economic, social and environmental aspects, and a narrative of prevention and mitigation of the adverse effects of economic activities upon social development and the environment are rooted at the core of the concept of sustainable development. The study proposes that such narratives can be strategically used in litigation to adequately weigh the social and environmental issues surrounding disputes arising between a private entity and a *public* authority. By this token, this thesis also aims to determine the extent to which the use of these narratives can bear any effect on claims concerning the determination of the responsibility and liability of the parties to the dispute. This evaluation is carried out using as backdrop to the analysis, the frameworks regulating the activities of deep seabed mining beyond national jurisdiction and foreign investment.

Resumen

Este trabajo examina el lugar que el desarrollo sostenible ocupa en el área de la política y el Derecho internacional. La tesis que se defiende sostiene que en el núcleo del concepto de desarrollo sostenible se encuentran arraigadas una narrativa de integración entre distintas cuestiones de orden económico, social y ambiental, y otra narrativa de prevención y mitigación de los efectos adversos que las actividades económicas pueden presentar sobre el desarrollo social y el medio ambiente. El estudio propone que estas narrativas pueden ser estratégicamente utilizadas en litigio con el objetivo de integrar adecuadamente las cuestiones sociales y ambientales que se comprenden en las controversias surgidas entre un sujeto privado y una autoridad pública. Así, la tesis busca determinar con qué alcance, el uso de las referidas narrativas puede tener un efecto sobre la determinación de la responsabilidad de las partes de la controversia. El contexto en el cual esta evaluación se lleva a cabo es, por una parte, el marco jurídico internacional que regula las actividades de minería realizadas en el fondo marino más allá de la jurisdicción nacional y, por otro, en aquel que regula la inversión extranjera.

Abbreviations

AB	Appellate Body of the World Trade Organisation
BIT	Bilateral Investment Agreement
CHM	Common Heritage of Mankind
CSD	Commission on Sustainable Development
DRE	Draft Regulations on Exploitation of Mineral Resources in the Area
DSM	Deep Seabed Mining
ECT	Energy Charter Treaty
EIA	Environmental Impact Assessment
EIS	Environmental Impact Study
EO	Emergency Orders
EU	European Union
FCTC	Framework Convention on Tobacco Control
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
HLPF	High-Level Political Forum
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IFC	International Finance Corporation
IIA	International Investment Agreement
ILC	International Law Commission
ILO	International Labour Organisation
ISA	International Seabed Authority
ISA SG	Secretary-General of the International Seabed Authority
ISDS	Investor-State Dispute Settlement

ITLOS	International Tribunal for the Law of the Sea
LOSC	United Nations Convention on the Law of the Sea
LTC	Legal and Technical Commission
MDG	Millennium Development Goals
MEA	Multilateral Environmental Agreement
MEP	Marine Environmental Protection
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
RPN	Regulations on Prospecting and Exploration for Polymetallic Nodules
RPS	Regulations on Prospecting and Exploration for Polymetallic Sulphides
RCF	Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese
SDC	Seabed Disputes Chamber
SDG	Sustainable Development Goals
TNC	Transnational Company
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

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"The 'national' is a 'question' which today is either underestimated or treated only from an external and superficial-economic standpoint; for this reason, its negative side comes strongly to the fore and covers up the other side completely. It is this very other side, that is, the inner, which is essential. From this last standpoint, the sum of the nations would form not a dissonance but rather, harmony".

(W. Kandinsky, 1923)

"There is no deterministic road down the slope of history toward entropy, decay, disorder, and annihilation. But there is also no determined process toward improvement and nirvana".

(E. Adler, 2005)

Introduction

On a daily basis, international activities are carried out by states and international organisations according to the rules and regulations set forth by international law. To this end, different sub-branches of international law regulating transnational, field-specific activities have been developed. As such, depending on the activity that will be carried out, these actors will have to observe the governing norms of international law and abide by the obligations set therein.

However, it will not be accurate to express that states and international organisations are the only ones acting transnationally, as there are also private entities engaged in this kind of business. The difference is that private entities engaged in transnational activities are not bound to the rule of international law. This assertion is, nonetheless, nuanced by the exceptional instances in which these participants are provided with the opportunity to access the realm of international law. Indeed, complex legal frameworks have been created to make this possible in the fields of international human rights law, international criminal law, international humanitarian law, international environmental law, the law of the sea, and international investment law.

A highly relevant participant in transnational activities are transnational companies, which benefit from the international legal system in different ways which range from taking advantage of the regulations aiming at the protection of their interests to accessing

international adjudicative bodies to claim for the enforcement of states and international organisations' obligations owed to them under international law. Although the recognition of transnational companies in international law has increased considerably from the mid-20th century onwards, the legal frameworks according to which these participants engage with international law, are far from being comprehensive of the scope of influence they have in the achievement of the global interests of the international community, and complete, as far as none of these efforts envisages the submission of transnational companies directly to the rule of international law.

Out of these premises, transnational companies have resulted in unsustainable actors to the international system because they are not subject to the rule of international law - but only right holders – which, in turn, makes them, at least in appearance, not relevant for the achievement of the goals established by the international community.

Arguably, the position these actors enjoy within the international legal system is of great convenience as their economic interests are well protected, but there is nothing this system can oblige them to do in exchange. Indeed, the formula established by the international community is that states must adopt the adequate national legislation individually and take the necessary measures to regulate transnational companies' activities within the state borders, which has led to observe great inequalities between states regarding the protection of their indigenous and local communities, their environment and natural resources. This holds true to the extent that states are competing to offer the *best* conditions in order to encourage transnational companies to invest in their economies. However, it is widely acknowledged that companies operating transnationally are not keen to develop their activities where high, social and environmental standards are set by a given state, but on the contrary, these companies look for those states setting weaker standards to carry out their investment projects. This is nothing new as most of the business sector is motivated by the extractivist maxim pleading to obtain the most revenues at the least costs.

The study that will be performed is not an attempt to challenge the rules of the game nor to advocate for changes in the current understandings that the legal system has with regard to transnational companies, but to work with what is on the table, looking for other avenues to curve the behaviour of these unsustainable actors and to adequately integrate both social and environmental concerns within their activities.

For the accomplishment of the aforementioned objective, this research will argue that, within the international legal system, the term *sustainable development* has grown over the years from a political goal to a global interest that should permeate through and be considered in all the activities carried out transnationally no matter who is performing them. In this sense, paraphrasing an already famous declaration of the International Court of Justice,[1] sustainable development has emerged in international policy and law as a term that aptly express the need to integrate economic, social and environmental interests, while also, imposes a duty of prevention or mitigation of any potential harm to social development and the environment when imputable to economic development.[2] Thus, it will be argued that sustainable development encompasses a narrative of balance and a narrative of prevention that are unique to it and may constitute useful argumentative resources in the litigation of disputes against transnational companies.

To this end, the following research will be focused on exploring the extent to which the sustainable development narratives of balance and prevention can be articulated in the litigation of cases confronting a transnational company against a public authority – either a state or an international organisation – whose responsibility is sought to be determined for having taken a measure which is allegedly causing the impairment of the former's rights under international law.

Therefore, the thesis that will be supported is that the narratives of balance and prevention subjacent to sustainable development can be strategically used in litigation in order to integrate social and environmental concerns into disputes brought by transnational companies before international adjudicative bodies, impacting on the determination of the responsibility and liability of the parties. If this thesis is right, litigation outcomes would have to start growing against transnational companies, which in turn, would induce a shift in their consideration regarding the social and environmental impacts of their activities.

This thesis will be tested in the fields of deep-sea mining and foreign investment. In both realms, international law regulating these activities foresees the possibility for

[1] *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at paragraph 140.

[2] See: *Social and Economic Rights Action Center, Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Communication 155/96 (2001) at paragraph 52 ; *Award in the Arbitration regarding the Iron Rhine ('Ijzenen Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, 27 RIAA (2005) 35 at paragraphs 59, 222-223. Further analysis on these cases will be developed later on.

transnational companies to pursue the international responsibility of public authorities for measures affecting the rights they hold pursuant to international law. These disputes will, in all cases, be settled by international adjudicative bodies according also to the relevant norms of international law governing the field.

A relevant difference between these two activities, is that the legal framework designed to carry out deep seabed mining activities envisages an integrated set of obligations that aims to protect the economic interests of the parties as well as the social and environmental concerns raised by mining activities in areas beyond national jurisdiction. This circumstance makes the articulation of narratives of balance and prevention more suitable to be integrated in disputes arising in the field of deep seabed mining. On the contrary, international investment treaties do not establish obligations to foreign investors, not even indirectly, nor minimum standards of protection regarding indigenous and local communities or the environment, leaving, therefore, to the appreciation of states the extent to which local, social and environmental interests will be protected according to their domestic law. Consequently, articulating sustainable development narratives will turn to be more intricate as it would be necessary to create a space for advancing social and environmental concerns within legal reasoning in a forum that largely excludes non-investment concerns from any consideration.

In each of the settings chosen to carry out the evaluation of the thesis, it will be argued that the sustainable development narratives of balance and prevention may contribute to strengthen the position of the respondent public authority by pushing forward the social and environmental interests in the adjudicative process, as far as they constitute the underpinnings on which the measure purportedly affecting the economic interests and expectations of the claimant is based. The advancement of these narratives is expected to have an impact on the determination of the responsibility and liability of the parties, which in turn, is expected to induce shifts in the behaviour of transnational companies regarding the social and environmental impact of their activities. Moreover, in the long run, this study wishes to be a contribution to achieve outcomes that better address social and environmental concerns in the litigation of disputes arising from deep seabed mining and foreign investment activities.

The aim of this research is, therefore, to examine whether the sustainable development narratives of balance and prevention would be able to nourish international law in areas where private entities engage in transnational activities. To this end, the study will explore

the alternatives available for public authorities to bring social and environmental concerns to the forefront of disputes concerning the determination of their international responsibility through the articulation of the sustainable development narratives of balance and/or prevention. In other words, the study will discuss on the possibility to engage in arguments based on the sustainable development narratives of balance or prevention to exclude the responsibility or to adjust the amount of compensation in cases against the International Seabed Authority – in the case of disputes arising from deep-sea mining activities - or host states – in disputes arising out of the activities performed by a foreign investor according to an investment treaty. The argument will be focused on the role that the sustainable development narratives may have in adjusting the perspective from where international disputes involving transnational companies are assessed to one that gives proper account of the related social and environmental concerns that justify the action taken by the public authorities which are deemed to cause the affectation of the other party's economic interests.

The research will show that the strategic use of the sustainable development narratives of balance and prevention in litigation may prove to be a resource to consider social and environmental issues adequately within the adjudicative process, while also a way to come closer to the achievement of sustainable development. In so doing, this research will bring to the front the role that, at their turn, international courts and tribunals have in reaching sustainable development. As such, the study will evidence that international adjudicative bodies hold a central position in advancing the sustainable development narratives in order to properly weigh the different interests converging in international disputes.

The following epigraphs will present the relevance (A), scope (B), methodology (C) and structure of the research study (D).

A. Relevance of the Research

Many efforts have been made in international law in order to attribute to sustainable development a normative character capable of constraining the behaviour of the participants to the legal system, however, none of these efforts have been regarded in international adjudication as key elements for the settlement of a dispute. Therefore, seeking to overcome the state of the current understanding of sustainable development,

this study, in a humbler effort than its predecessors, is an attempt to develop a fresh start for the concept and its role in international law.

From an academic perspective this study is relevant as it further elaborates on the role of sustainable development advanced by Vaughan Lowe in his celeb piece *Sustainable Development and Unsustainable Arguments*.[3] The central argument of this contribution was that, although sustainable development was not a norm of international law, it could play the role of an interstitial norm, i.e. an element of the judicial reasoning process aimed at aiding judges to perform their adjudicatory task. However, the piece written by Lowe was inconclusive as it did not address the way in which this intended function could be performed nor the extent of its effects on judicial adjudication, either to the appreciation of the parties' position with regard to the matter of the dispute or upon the outcome of the dispute itself. To this end, this research will examine these unresolved issues by elaborating on international policy and law related to sustainable development and through the evaluation of the hypothesis in disputes arising within the realm of deep seabed mining and foreign investment activities.

In this sense, it will be proposed that this role of sustainable development be reinforced by the acknowledgement of it as the global interest that it represents to the international system, since this is the way chosen by the international community to achieve development. Hence, it will be argued that sustainable development is able to permeate through the different layers of transnational activities and the governing legal frameworks created for them. As Birnie, Boyle and Redgewell argue, sustainable development may not always entail "a preservationist approach but a value judgment that may be development-oriented".[4] Indeed, through the analysis of the developments in international policy and further elaborations made upon the concept in international adjudication, this study will argue the existence of two main narratives grounded in the core of sustainable development. The existence of a narrative of balance or integration between the three elements of sustainable development will be argued on the one hand, and a narrative of prevention or mitigation of the adverse impacts of economic development upon social development and the environment, on the other. According to this line of thoughts, the role of sustainable development narratives of balance and

[3] Lowe, 'Sustainable Development and Unsustainable Arguments', in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 19.
[4] P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment* (3rd ed., 2009) at 385.

prevention within international law will be that of informing the application of international norms and obligations in order to align them with the global interest that sustainable development represents.

The research is also relevant from a practitioner's standpoint as it deals with practical issues arising in international, field-specific litigation. Indeed, the study is novel in presenting the effects that sustainable development narratives of balance and prevention may have within disputes arising in the fields of deep seabed mining and foreign investment, analysing the extent to which these narratives may influence the determination of the responsibility and liability of public authorities brought before international adjudicative bodies by private entities claiming them to have violated their rights conferred by the international legal system.

The research also advocates for these narratives to have a role in the determination of the amount of compensation owed to private entities in case the liability of the public authority is ascertained. Indeed, it is argued they may nourish the legal reasoning related to the application of the contributory fault standard in both deep-seabed-mining- and foreign-investment-related disputes. In this sense, this research is expected to be a contribution to all international law operators, particularly those close to the litigation of international disputes where one of the parties is a transnational company and the other a public authority, either a state or an international organisation.

As far as the knowledge of the author reaches, the pursued field-specific analysis on the contribution that sustainable development narratives of balance and prevention may have to nourish international law in areas where private entities engage in transnational activities is novel to international law literature.

The study is also relevant to the extent that it provides some interesting elaborations regarding the specific field of deep seabed mining and foreign investment. Regarding deep seabed mining, to the analysis, it is interesting to consider the extent to which the private sector may be subject to observing international law when performing activities in the international seabed area beyond the limits of national jurisdiction (hereinafter referred to as the Area), and the role that sustainable development narratives may play in accommodating the perspective from which industrial activities could be assessed. In other words, bearing in mind that private actors – juridical or natural persons - are able to perform activities in the Area, it is argued that they should be expected to take into

account the Area and its resources as the common heritage of mankind. This principle, as well as the rules set out for the protection of the marine environment, should govern all activities of exploration and exploitation. Therefore, relevant to this point is the need to address the scope of private entities' rights and obligations whenever the industrial activity they are carrying out is found incompatible with such principles. It will be argued that the narrative subjacent to sustainable development may play a significant role at the time of conducting the assessment of the conformity of the behaviour of contractors regarding the paramount status of the Area. As stated above, the focus will be placed in finding out the effect that sustainable development narratives may have upon responsibility and liability issues arising in this category of disputes.

As far as foreign investment is concerned, the study departs from the premise that host states must seek to achieve a balance between the convergent economic interests and social and environmental concerns at the time they frame their domestic policy regarding foreign investment as well as in the conclusion of international investment treaties. However, in the event that the balance reached *ex ante* does not prevent or minimise, in practice, the adverse social and/or environmental effects of the investment developments, this should not entail for the state to stand in a dead-end. Conversely, the study will argue that host states are entitled *ex post* to curve any adverse effect stemming from on-going investment developments through the exercise of their sovereign powers. By doing so, the host state will certainly cause a change of the circumstances under which the investor expected to carry out its investment and the latter is most likely to rise a claim according to the mechanisms foreseen in the relevant international investment treaty. Facing this scenario, host states will have to provide arguments to justify the measures challenged in order to either exclude the unlawfulness of their action or, if held responsible and liable, to claim for a reduction of the compensation to which the investor otherwise would be entitled through the application of the contributory fault standard.

B. Scope of the research

The study acknowledges that the fact of considering sustainable development as a global interest instead of a norm of international law capable of constraining the behaviour of international actors, allows putting it forward in diverse fields of international law. In this vein, sustainable development will be proposed as a useful concept, in first place, to integrate norms within a regime. Therefore, the objective is to explore whether sustainable development narratives of balance and prevention could be useful

argumentative resources to articulate norms of self-contained regimes in order to later extrapolate this function into systemic interpretation, if possible, albeit this latter hypothesis exceeds the overall aim of the present study.

Consequently, this research is focused in finding out the capacity of sustainable development to curve the behaviour of transnational companies. The areas where the hypothesis is evaluated are also limited to those fields allowing private entities to engage in activities carried out transnationally and regulated by international law. The scope of the research is limited to international law and international adjudication in the fields of deep seabed mining and foreign investment. The research is further narrowed to the analysis of disputes brought before international adjudicative bodies by private entities looking for the determination of the responsibility and liability of public authorities, therefore, the study excludes any other type of dispute concerning different parties or different claims.

C. Research Methodology

In general terms, this research uses both primary and secondary sources of international law. To this extent, the overall framework within which the thesis is evaluated is that of international law, as established in international customary law rules, international treaties and the resolutions of international organisations, as well as in the interpretation and application of international law according to the decisions adopted by different international adjudicative bodies, among which are: the judgments and advisory opinions delivered by the International Court of Justice and the International Tribunal for the Law of the Sea; the decisions rendered by the Appellate Body of the World Trade Organisation; the decisions of the Court of Justice of the European Union and the African Commission on Human and People's Rights; and the awards issued by international arbitral tribunals constituted according to the Permanent Court of Arbitration, the International Centre for Settlement of Investment Disputes, and the Stockholm Chamber of Commerce. With regard to secondary sources, this study turns to the academic work published by relevant international law doctrine as well as issue-specific reports made by international organisations.

Particularly, concerning Part I, deductive reasoning is applied upon primary sources of international law to reach the findings therein. Primary sources consulted in this Part range from international treaties and resolutions of the United Nations General Assembly

related to sustainable development, to the analysis of international adjudicative bodies' jurisprudence on the same topic. The findings reached through this method of reasoning are supported with references to secondary sources of international law, mostly academic studies developed in the areas of general international law, international environmental law, and international law on sustainable development.

The main method of reasoning used in Part II is deductive reasoning as there is no jurisprudence to follow yet, on the interpretation or application of international law regulating the activities of deep seabed mining in areas beyond national jurisdiction. By this token, Part II applies deductive reasoning upon primary sources of international law such as the United Nations Convention on the Law of the Sea, and the rules, regulations and procedures adopted by the International Seabed Authority, and upon the decisions and advisory opinions rendered by the International Tribunal for the Law of the Sea. As such, deductive reasoning is also applied to further elaborate on the few doctrinal studies on the matter, which are also widely inconclusive.

Part III mainly uses inductive reasoning applied upon awards rendered by international arbitral tribunals in investment treaty arbitrations, substantiated by different rules of procedure and also submitted to different arbitral institutions such as the Permanent Court of Arbitration, the International Centre for Settlement of Investment Disputes, and the Stockholm Chamber of Commerce. The findings reached in this Part III are strengthened by the analysis of secondary sources of international law such as academic studies and the reports of international organisations on issues related to international investment law, investor-state dispute resolution, international environmental law and foreign investment, sustainable development and foreign investment.

D. Structure of the Research

The research is structured into three parts. Part I aims to describe the history and evolution of sustainable development in international policy (Chapter 1) and within the jurisprudence of international adjudicative bodies (Chapter 2). The analysis of sustainable development from these two perspectives will provide the theoretical framework from where Part II and III will depart. Part II and III aim to evaluate the thesis proposed above, this is, to examine whether sustainable development could be claimed to be strategically used in the litigation of disputes involving transnational companies, and their ability to adequately integrate social and environmental issues in disputes arising in the fields of

deep seabed mining activities in the Area (Part II: Chapter 3 and 4) and foreign investment (Part III: Chapter 5 and 6).

Chapter 1 is divided into two sections. The first section aims to provide a brief history of the evolution of sustainable development, from 1972 to 2019, from a United Nations approach. This section will highlight the main achievements that the United Nations have reached in their way to make sustainable development one of its core purposes, posing particular attention to both the substantive and institutional framework created to this end. The second section argues that the social process surrounding the construction and evolution of sustainable development has given rise to a global public interest. The acknowledgement of sustainable development as a global interest presumes that its narratives can nourish many fields of international policy and law, and that it can be considered as guidance not only to states and international organisations', but also to other participants operating transnationally.

Chapter 2 is divided in two sections. The first section aims to argue the existence of a narrative of balance and a narrative of prevention that are subjacent to the concept of sustainable development, which have been further elaborated in the jurisprudence of international courts and tribunals. Indeed, the study will show that the traditional understanding of sustainable development as the need to strike a balance between economic development, social development and the protection of the environment, has been complemented with a duty of prevention, where social and environmental concerns are considered to provide solid ground in order to halt states' activities or to curve such activities to minimize their social or environmental adverse impacts. The second section addresses three conceptual limitations considered to stand as an obstacle to reach the role proposed for sustainable development, this is, to be a useful tool to adequately address social and environmental concerns in the settlement of international disputes.

Chapter 3 is divided into four sections. The first section provides a brief account on the framework according to which deep seabed mining activities are carried out in the Area, and the interplay observed between its participants and the governing principles of the regime. The second section approaches the concept of common heritage of mankind and the stand that will be taken in this study with regard to the content of such concept. The third section puts the concept of marine environment forward and stresses its relationship with the protection of the common heritage of mankind, contending that all damages

caused to the common heritage of mankind constitute a damage to the marine environment. This section also highlights the progressive nature of the regime that has been established for the protection of the marine environment. The fourth section aims to address the obligations that the framework designed to carry out deep seabed mining activities establishes upon contractors. To this end, obligations concerning the protection of the common heritage of mankind will be examined, followed by those aimed to the protection of the marine environment.

Chapter 4 is divided into two sections. The first section addresses the mechanisms at hand for the International Seabed Authority to enforce the obligations that contractors must comply with in order to carry out activities in the Area without adversely affect the common heritage of mankind and/or the marine environment. Particularly, the study will examine the power of the Authority to refuse applications for the extension of contracts for the exploration of resources in the Area, its power to issue emergency orders and the penalties available to enforce the legal framework for deep seabed mining. The second section is aimed at the study of the jurisdiction of the Seabed Disputes Chamber over disputes involving non-state participants in deep seabed mining to the extent that it is relevant when addressing the responsibility, liability and contributory fault regime set forth in Article 22 of Annex III to the LOSC applicable to the parties to the dispute and the role that sustainable development may play therein.

Chapter 5 is divided into three sections. The first section of this Chapter will examine the role of host states *vis-à-vis* foreign investment. It will be argued that there is a strong paradigm in the foreign investment regime that gives strong protection to the investment, whereas host states are forced to deal with the dichotomy position to promote investment on the one hand, and to afford adequate protection to their indigenous and local communities, and the environment, on the other. The second section will provide an account of some international instruments and mechanisms that have been created to address the impairment that the system, according to which foreign investment is carried out, causes at different economic, social and environmental levels. The third section aims to contrast the above by providing an account of the way that social and environmental concerns are dealt with in Investor-State Dispute Settlement.

Chapter 6 is divided into four sections. The first section aims to show the utility of the sustainable development narrative of balance to assist the construction of successful

arguments when defending the measures taken by host states based on the investor's failure to attain social license. The second section will explore the strategic use of sustainable development to be integrated in disputes concerning claims of indirect expropriation as a useful tool to balance the degree of interference that the measure causes upon the right of ownership and the power of the host states to adopt policies pursuing the protection of social and environmental interests. The third and fourth sections will examine, respectively, the state police powers doctrine and the general principles of international public policy as means to justify host states' measures aimed to put a halt or mitigate the adverse social or environmental effects of an investment project.

PART I

The Status of Sustainable Development in International Policy and in the Jurisprudence of International Adjudicative Bodies: History, Implications and Narratives

Sustainable development is one of the core objectives of the international community as well as a global public interest which provides common narratives able to permeate down all endeavours carried out at the international level. Indeed, the following argues that the United Nations efforts towards the promotion of sustainable development have contributed greatly to the evolution of sustainable development and to spread the term far beyond the boundaries of international policy and law, reaching to participants other than states and international organisations. This history has cemented the underpinnings for sustainable development to become a global public interest.

Acknowledging that international policy elaborations on sustainable development are, in most cases, broad and general, an undeniable notion of balance between economic interests and social and environmental concerns is subjacent to the term. This underlying notion of balance has been largely recognised in international jurisprudence in cases brought before international judiciaries such as the International Court of Justice, arbitral tribunals constituted according to the rules of the Permanent Court of Arbitration, the Appellate Body of the Dispute Settlement Body of the World Trade Organisation, the African Commission on Human and Peoples' Rights, and the Court of Justice of the European Union.

Elaborating on the reach that sustainable development may have according to international law, the jurisprudence created by the decisions of the abovementioned adjudicative bodies, has also contributed to the emergence of a second notion which is also at the core of the concept of sustainable development. Indeed, together with the narrative of balance, there is found another one that is referred to the duty of prevention or mitigation of any potential harm to social development or the environment when imputable to economic development.

Taking the above into account, Part I aims to describe the history and evolution of sustainable development in international policy (Chapter 1) and within the jurisprudence of international adjudicative bodies (Chapter 2). The analysis of sustainable development from these two perspectives will provide the theoretical framework from where Part II and III will depart.

Chapter 1

The Emergence of Sustainable Development as a Global Interest

The history of sustainable development from the perspective of the United Nations provides both a political and an institutional view of a concept that has been progressively growing in importance since the second half of the 20th century onwards. Given the relevance that sustainable development has gained at the international political level, and the resources that it has put in motion, is difficult to contest that it is an international policy objective[5] which represents the path that the international community has chosen for achieving development for all peoples,[6] expressing "a global consensus as to the future direction of environmental, economic and social decision-making".[7]

The race run to place sustainable development at the core of the international agenda as an aim of the international community, took no shortcuts, being every step as meaningful as the previous. Indeed, the socio-political process, which will, afterwards, contribute to the emergence of the concept of sustainable development, began with the acknowledgement that expectations and planning related to economic development had to envisage the need to maintain a healthy environment where human life could be developed. Hence, while environmental concerns were growing big, and indisputable scientific evidence was showing the ever-increasing deterioration of the planet and the depletion of its natural resources, the global economic system started to be systematically requested to account on these findings – at least in theory. Later, as economic development alone was considered to be incapable to encompass and adequately attend all people's needs, social concerns and inequalities were also beginning to be advanced against the global economic system. The disaggregation of social development from

[5] In this sense, the Report of the WTO Appellate Body on the *Shrimp/Turtle* case that the WTO Marrakesh Agreement signatories were "fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the WTO Agreement – which informs not only the GATT 1994, but also the other covered agreements – explicitly acknowledges 'the objective of sustainable development'" (*United States – Import Prohibition of Certain Shrimp and Shrimp Products* (20 September 1999), WT/DS58/AB/R (AB Report), paragraph 129).

[6] Rodrigo, 'El Desarrollo Sostenible Como Uno de Los Propósitos de Las Naciones Unidas', in X. Pons (ed.), *Las Naciones Unidas Desde España. 70 Aniversario de Las Naciones Unidas. 60 Aniversario Del Ingreso de España a Las Naciones Unidas* (2015) 265 at 282.

[7] M.-C. Cordonier Segger and A. Khalfan, *Sustainable Development Law Principles, Practice, and Prospects* (2004), at 50

economic development and the recognition of the importance to protect the environment, gave rise to the three elements taking part of the concept of sustainable development, while their interdependency, the key element for its achievement.

This chapter will argue that the evolution of the concept of sustainable development under the auspices of the United Nations, had turned itself into a global public interest. According to this status, it will also be argued that sustainable development should be embraced and pursued by all participants to the international community – this is from states to international organisations to natural and juridical persons - and the interdependence of its three elements to be considered, therefore, in all the transnational activities conducted by the foregoing. Indeed, as the overall thesis is to examine whether sustainable development can be strategically use in the litigation against private entities, the argument supporting that it stands as a global interest of the international community is crucial to make its content extensible to areas of international law where other participants, different from states and international organisations, are engaging with.

Chapter 1 is divided into two sections. The first section aims to provide a brief history of the evolution of sustainable development, from 1972 to 2020, from a United Nations approach. This section will highlight the main achievements that the United Nations have reached in their way to make sustainable development one of its core purposes, posing particular attention to both the substantive and institutional framework created to this end. The second section argues that the social process surrounding the construction and evolution of sustainable development has given rise to a global public interest. The acknowledgement of sustainable development as a global interest presumes that its narratives can nourish many fields of international policy and law, and that it can be considered as guidance not only to states and international organisations', but also to other participants operating transnationally.

1.1 Reconstructing Sustainable Development History: From 1972 to 2020

The reconstruction of sustainable development according to its history in the United Nations (UN) is justified because it is under its auspices where sustainable development

has received and continue to receive the largest attention,[8] and also in the fact that the UN is the international organisation that gathers together under the same roof the greatest number of states.[9] Hence, if there is to be found authoritative arguments from where to analyse the relation between international law and sustainable development, they will have to come up through the analysis of the UN documents and conferences related to sustainable development.

1.1.1 Sustainable Development before the 1987 *Brundtland Report*

First mentioned as such in the 1987 Report of the World Commission on Environment and Development: Our Common Future or, as it is frequently referred to, the *Brundtland Report*,[10] sustainable development was defined as the development "[that ensures to meet] the needs of the present without compromising the ability of future generations to meet their own needs".[11] Nonetheless, UN documents inspired in the notions brought about by sustainable development can be traced back to 1962 when the United Nations General Assembly Resolution 1831 (XVII) on Economic Development and the Conservation of Nature[12] was adopted. Through the endorsement of a UNESCO General Conference resolution, the General Assembly (UNGA), recommended the adoption of measures aimed at reconciling national economic development goals with a proper consideration of natural resources, flora and fauna conservation and restoration *especially* in the developing countries. Indeed, the target of this resolution were the developing countries, which were arbitrarily thought to be the only ones able to jeopardise natural resources, flora and fauna, in the sake of development.[13]

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[8] *Ibid.*, at 16.

[9] To this day, January 30th, 2020, the UN counts of 193 members (plus two observers), being the largest international organisation. The UN is considered for the purposes of this work to provide an institutional framework from where to study sustainable development inception and evolution, and on the other hand, an authoritative voice for representing the international community regard towards sustainable development. Certainly, this does not mean that sustainable development hasn't been referenced elsewhere before, see, for instance, Article 1 (1) of the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources.

[10] Named after the report's Chairman Gro Harlem Brundtland.

[11] World Commission on Environment and Development, *Our Common Future* (1987), paragraph 27.

[12] United Nations General Assembly, Resolution 1831 (XVII), 18 December 1962.

[13] However, this idea would prove to be wrong as, later on, industrialised countries bear their own part regarding their contribution to the deterioration of the environment as it can be observed in the 1972 Stockholm Declaration and the 1992 Rio Declaration (principles 12 and 7, respectively). For deeper analysis on the responsibility of developed countries for global environmental degradation, see: Cullet, 'Principle 7 Common but Differentiated Responsibilities', in *The Rio Declaration on Environment and Development: A Commentary* (2015) 229.

This resolution was aimed to accommodate emerging environmentalism with developing countries' extractivist activities, urging them, for instance, to preserve, restore, enrich and make a rational use of natural resources[14] or to observe existing international conventions and treaties relating to environment preservation.[15] As such, the resolution failed to address the problem from a global perspective as it was only concerned on the national efforts that had to be made in order to avoid the unwanted fact that goals of economic development would harm natural resources, flora and fauna if no consideration in their conservation and restoration was effectively taken.

1.1.1.a. The 1972 UN Conference on the Human Environment

Another milestone in the history of sustainable development is found in the 1972 UN Conference on the Human Environment which took place in Stockholm.[16] The Stockholm Conference was sought to reach international co-operation in the field of environmental protection looking towards to the reconciliation of developmental efforts with environmental concerns. The outcomes of the Stockholm Conference were a set of 26 Principles that constituted the Declaration on the Human Environment[17] (Stockholm Declaration) and the foundation of the United Nations Environment Programme by UNGA Resolution No. 2997 (XXVII).[18] The principles of the Stockholm Declaration recognise the fact that humanity must live within the earth's carrying capacity, acknowledging as well that economic and social development are essential for a good human environment, emphasizing the need to solve environmental deficiencies through financial and technical aid.[19] In this line, while Principle 4, for instance, urges to consciously account on nature conservation in the planning for economic development; Principle 8, on the other hand, prescribes that economic and social development are essential to ensure a favourable living and working environment for all human beings and for creating the conditions that are regarded necessary for improving the quality of life; and Principle 18 reminds us that, in the same way that science and technology are playing a fundamental role regarding economic and social development, they must be applied to

[14] UNGA, Res. 1831 (XVII), *supra* note 12 at paragraph 1 (a).
[15] Cordonier Segger and Khalfan, *supra* note 7, at paragraph 1(c).
[16] UN Conference on the Human Environment, Stockholm, June 1972.
[17] Declaration of the United Nations Conference on the Human Environment, in Report of the United Nations Conference on the Human Environment, Stockholm, June 1972.
[18] United Nations General Assembly, Resolution 2997 (XXVII), A/RES/27/2997, 15 December 1972.
[19] Schrijver, 'The Evolution of Sustainable Development in International Law: Inception, Meaning, and Status', 329 *R. Des C.* (2007) 217, at 44-45.

the identification, avoidance and control of environmental risks and the solution of environmental problems as well as for the common good of mankind.

As it can be noted from these principles, an embryonic notion related to the interdependence of economic and social development and the protection of the environment, which will be intrinsic to the concept of sustainable development, were to be comprised in 1972 by the members that adopted the Stockholm Declaration. Most notably, thereafter, the integration of environmental and developmental concerns would be regarded as a global issue needing holistic solutions both at the national and international level. The Stockholm Declaration was the necessary prelude for further formulations on the concept of sustainable development.[20]

Another great achievement of the UN Conference on the Human Environment towards the institutionalisation of sustainable development was the foundation of the UN Environment Programme (UNEP),[21] which, in the long term, has been considered to have given "a pragmatic dimension to the progressive development of international environmental law by creating specific regimes that integrate environmental and developmental interests".[22] Indeed, the Preamble of the UNGA Resolution No. 2997 (XXVII), recognises the urgent need for a permanent institutional arrangement within the UN system for the protection and improvement of the environment.[23] Although still timidly and circumscribed only to developing countries, the need for the integration of developmental and environmental concerns was stated as responsibility of the UNEP Governing Council, in the following words: "To maintain under continuing review the impact of national and international environmental policies and measures on developing countries, as well as the problem of additional costs that may be incurred by developing countries in the implementation of environmental programmes and projects, and to ensure that such programmes and projects shall be compatible with the development plans and priorities of those countries".[24] Notwithstanding, to incorporate a decision linking development and environment in an institution which is in the first place aimed at

[20] In the same line see: Timoshenko, 'From Stockholm to Rio: The Institutionalization of Sustainable Development', in W. Lang (ed.), *Development, International Law and Sustainable* (1995) at 143-160; Gordon, 'Unsustainable Development', in S. Alam et al. (eds.), *International Environmental Law and the Global South* (2015) at 58.
[21] UNGA, Res. 2997 (XXVII), *supra* note 18.
[22] Timoshenko, *supra* note 20 at 148.
[23] UNGA, Res. 2997 (XXVII), *supra* note 18, Preamble.
[24] *Ibid*. at Title I, paragraph (2)(f).

safeguarding and enhancing the environment for the benefit of present and future generations, reflects the concern of the international community represented by the UNGA to identify global environmental problems as consequences of developmental goals, thus highlighting their interdependent nature.

1.1.1.b. The 1982 UN World Charter for Nature

Ten years after the Stockholm Conference, in 1982, the UNGA released the *World Charter for Nature,*[25] another non-binding document stressing on the importance of maintaining natural processes and diversity of life forms, facing past and current excessive human exploitation and destruction of natural habitats, inviting, therefore, all "Member States, in the exercise of their permanent sovereignty over their natural resources, to conduct their activities in recognition of the supreme importance of protecting natural systems, maintaining the balance and quality of nature and conserving natural resources, in the interests of present and future generations".[26] Furthermore, the *World Charter for Nature* set out some general principles rooted in the belief that "(a) Lasting benefits from nature depend upon the maintenance of essential ecological processes and life support systems, and upon the diversity of life forms [...] (b) The degradation of natural systems owing to excessive consumption and misuse of natural resources [...] leads to the breakdown of the economic, social and political framework of civilisation, (c) whereas the conservation of nature and natural resources contributes to justice and the maintenance of peace, [...] man must acquire the knowledge to maintain and enhance his ability to use natural resources in a manner which ensures the preservation of the species and ecosystems for the benefit of present and future generations".[27] Subjacent to these lines, there is a strong notion related to what is today understood to be at the core of sustainable development, which is the recognition of the undeniable interdependence between humans and the life of the planet, i.e between humans' need for development and the protection of the environment. Clearly, drafters of the *World Charter for Nature* were mindful of the balance needed to be struck between economic and social development, and the protection of the environment.

[25] United Nations General Assembly, *World Charter for Nature*, A/RES/37/7, 28 October 1982.
[26] UNGA, *World Charter for Nature*, *supra* note 25, at Preamble.
[27] *Ibid.* at Annex.

1.1.2 Sustainable Development after the 1987 *Brundtland Report*

The linkage among the *World Charter for Nature* and the *Brundtland Report* is undeniable. Indeed, the acknowledgement in the former document concerning to the need to integrate environmental concerns within states' activities at the national and international levels, was the very starting point of the latter. As a commentator argues, the rationale behind the theoretical framework of the *Brundtland Report* is anchored in the belief that "a healthful environment provides the economy with essential natural resources. A thriving economy, in turn, allows society to invest in environmental protection and avoid injustices such as extreme poverty. And maintaining justice ensures that natural resources are well managed and economic gains allocated fairly".[28] It is of high relevance to bear in mind that this statement, however, only holds true to that part of the world which is not dependent on its own natural resources to achieve development; indeed, the other part of the world is still waiting for that *justice* to come. As Gordon explains, once the industrialized countries realized about the environmental degradation and destruction that the achievement of development had caused, "the concept of sustainable development was conceived in large part to engage the global South in ecological discourse, not to fundamentally question global North understandings of development and economic growth and their bearing on the environment".[29]

1.1.2.a. The Brundtland Report

The *Brundtland Report* proved to be a decisive step towards the creation of sustainable development as a socio-political objective of the international community; indeed, it is recognised both for enabling sustainable development to have a broader political embrace[30] as much as for popularising the concept in international discourse.[31] The *Brundtland Report* is also broadly recognised for having positioned sustainable development, unquestionably, in the centre of environmental policy.[32] Unfortunately, the broad and general description that the *Brundtland Report* gave to sustainable development, will also prove to be of little help at the time of elucidating its specific

[28] Victor, 'Recovering Sustainable Development', 85 *Foreign Affairs* (2006) 91, at 91.
[29] Gordon, 'Unsustainable Development', in S. Alam et al. (eds.), *International Environmental Law and the Global South* (2015) at 62.
[30] Schrijver, *supra* note 19, at 47.
[31] Cordonier Segger and Khalfan, *supra* note 7, at 16.
[32] Cullet, *supra* note 13, at 230.

contours, not to mention to provide the term with a neat normative character. As Viñuales has argued, although sustainable development was raised as a unifying concept "it provides little or no guidance on how the two terms of the environment-development equation should be reconciled in case of conflict".[33]

1.1.2.b. The 1992 Rio Conference on Development and Environment

The UN Conference on Development and Environment[34] held in Rio de Janeiro in 1992 (commonly referred as *Earth Summit* or *Rio Conference*), twenty years after the first global conference on the environment, had as main themes of discussion the environment and sustainable development. This conference gathered 172 participating governments, some 2,400 representatives of non-governmental organisations, and more than fifty international intergovernmental organisations.[35] The outcomes of the Earth Summit were three non-binding documents: the Rio Declaration,[36] Agenda 21,[37] and the Statement of Forest Principles.[38] It also give birth to two multilateral, international treaties: the UN Framework Convention on Climate Change[39] (Climate Change Convention), and the UN Convention on Biological Diversity(Biodiversity Convention).[40] Some institutional, follow-up mechanisms were also created in the Rio Conference, among them there are: The Commission on Sustainable Development (CSD),[41] the Inter-agency Committee on Sustainable Development,[42] and the High-Level Advisory Board on Sustainable Development.[43]

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[33] Viñuales, 'Foreign Investment and the Environment in International Law: An Ambiguous Relationship', 80 *British Yearbook of International Law* (2010) at 251.
[34] United Nations Conference on Development and Environment, Rio de Janeiro, 1992.
[35] United Nations, *UN Conference on Environment and Development*, 1992, available at http://www.un.org/geninfo/bp/enviro.html (last visited 10 July 2017).
[36] Report of the United Nations Conference on Environment and Development, Annex I, A/CONF.151/26 (Vol. I), General Assembly, Rio de Janeiro, 3-14 June 1992.
[37] Report of the United Nations Conference on Environment and Development, Annex II, A/CONF.151/26 (Vol. II), General Assembly, Rio de Janeiro, 3-14 June 1992.
[38] Report of the United Nations Conference on Environment and Development, Annex III, A/CONF.151/26 (Vol. III), General Assembly, Rio de Janeiro, 3-14 June 1992.
[39] United Nations General Assembly, United Nations Framework Convention on Climate Change, A/RES/48/189, 20 January 1994.
[40] Convention on Biological Diversity, United Nations, Treaty Series, vol. 1760, p. 79. Entry into force29 December 1993.
[41] United Nations Commission on Sustainable Development, United Nations General Assembly, Resolution A/RES/47/191, 29 January 1993. The Commission on Sustainable Development was replaced in 2013 by the High-Level Political Forum on Sustainable Development, United Nations General Assembly, Resolution A/RES/67/290, 9 July 2013.
[42] Ceased to exist in 2001.
[43] Ceased to exist in 1997.

The Rio Declaration is a set of non-binding principles aimed at providing guidance to states for correctly addressing the intersection between trade and the environment during decision-making processes. The Rio Declaration is regarded as the *fundamental* text on sustainable development and the starting point to every analysis on the topic.[44] Albeit its non-binding character, as Boyle and Chinkin assert, the Rio Declaration "both codifies existing international law and tries to develop new law. It is not obvious that a treaty with the same provisions would carry greater weight or achieve its objectives any more successfully. On the contrary, it is quite possible that such a treaty would, several years later, still have far from universal participation, whereas the 1992 Declaration secured immediate consensus support, with such authority as that implies".[45]

All principles set out in the Rio Declaration rest on the acknowledgement of the different impacts that social and economic development have upon the environment. Indeed, although written in a more refined and sophisticated way, the underlying purpose of the Rio Declaration certainly resembles to that of the Stockholm Declaration.[46] Environmental concerns related to developmental needs are addressed throughout the principles stated in the Rio Declaration, explicitly expressing the urge for achieving balance among them. This is the reason why the Rio Declaration was regarded as an instrument where "the current consensus of values and priorities in environment and development"[47] could be found.

Undeniably, the need for striking a balance between economic interests and environmental concerns, can be easily inferred from the Principles expressed in the Rio Declaration. Indeed, Principle 3 prescribes that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations; Principle 4 expresses that, for attaining sustainable development, environmental protection shall constitute an integral part of the developmental process and cannot be considered in isolation from it. Although social development is not yet

[44] D. French, *International Law and Policy of Sustainable Development* (2005), at 46-47.
[45] A. Boyle and C. Chinkin, *The Making of International Law* (2007), at 215.
[46] In the words of Virginie Barral, principles stated in the Rio Declaration, although non-binding, "are formulated in strong legal terms" (Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm', 23 *European Journal of International Law* (2012) 377, at 379). The non-binding character together with the compromise reached by developed and developing states featuring the 27 principles as a package-deal, gave the Rio Declaration, in the opinion of Birnie, Boyle and Redgwell, "significant authority and influence in the articulation and development of contemporary international law relating to the environment (Birnie, Boyle and Redgwell, *supra* note 4, at 112-113).
[47] Porras, 'The Rio Declaration: A NewBasis for International Cooperation', 1 *RECIEL* (1992) 245 at 246.

disaggregated from economic development, the need to balance the three dimentions od sustainable development, stands at the core of the document, mirroring the intention of the international community[48] gathered in the Conference, to stress its relevance both for present and future generations. Following this line, Principle 8, addresses the role of states in "reducing and eliminate unsustainable patterns of production and consumption" and in promoting "appropriate demographic policies" for achieving sustainable development. Social goals of sustainable development are also stated in the Rio Declaration, spearheaded by poverty eradication, an aim that is expressed in Principle 5, which acknowledges that the eradication of poverty is "an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world".[49]

Complementary to the Rio Declaration, Agenda 21 represents a working program for global goals facing the 21st century. It entails a comprehensive plan of action to be undertaken globally, nationally and locally, which was approved by consensus among the leaders in Rio, representing over 98% of the world's population.[50]

1.1.2.c. The Earth Summit+5: The Disaggregation of Social Development from Economic Development

The Commission on Sustainable Development was created as part of the enforcing plan reached in 1992, to monitor and report on the implementation of the Biodiversity and Climate Change Convention, and so it did. After five years, a review of the progress reach so far was carried out in a special session of the UNGA, a meeting that is commonly known as the Earth Summit+5.[51] This special session of the UNGA was aimed at examining how countries, international organizations and different sectors of the civil society had responded to the challenges set out in the Earth Summit. After reviewing the

[48] For Birnie, Boyle and Redgewell, Principle 3 and 4 constitute "the core of the principle of sustainable development" (Birnie, Boyle and Redgwell, *supra* note 4, at 113-114).
[49] A call for attention is raised by Gordon as to embrace without questioning the relationship between sustainable development and the eradication of poverty. Indeed, according to this author no serious efforts for making the global North accountable for the implicit harms to the environment produced by the ways chosen for achieving development were made in the *Brundtland Report* or elsewhere, instead, as she recalls "the foremost adversary of the environment was not industrialization but rather poverty, as impoverishment reduced the ability to use resources in a sustainable manner" (Gordon, *supra* note 13 at 61).
[50] IISD, "The Earth Summit and Agenda 21". In: *Global Tomorrow Coalition Sustainable Development Tool Kit*, 1996, p. 6. Available at: http://www.unesco.org/education/pdf/RIO_E.PDF (Last visited: 19 August 2019)
[51] United Nations General Assembly, Resolution S-19/2, A/S-19/29, 28 June 1997.

compliance atmosphere with the guidelines provided in Agenda 21, the UNGA adopted a resolution establishing a programme for the further implementation of Agenda 21. The most important aspect of this resolution was that it finally disaggregated social development from economic development, recognising that both of them had to be considered as equally relevant together with the protection of the environment. Thus, the urge to achieve an equitable social development around the globe stood at the same level together with the need to promote economic growth and to protect the environment. As declared by the UNGA:

> "28. Economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development. Sustained economic growth is essential to the economic and social development of all countries, in particular developing countries. Through such growth, which should be broadly based so as to benefit all people, countries will be able to improve the standards of living of their people through the eradication of poverty, hunger, disease and illiteracy and the provision of adequate shelter and secure employment for all, and the preservation of the integrity of the environment. Growth can foster development only if its benefits are fully shared. It must therefore also be guided by equity, justice and social and environmental considerations. Development, in turn, must involve measures that improve the human condition and the quality of life itself. Democracy, respect for all human rights and fundamental freedoms, including the right to development, transparent and accountable governance in all sectors of society, as well as effective participation by civil society, are also an essential part of the necessary foundations for the realization of social and people-centred sustainable development."[52]

Throughout this resolution is possible to observe the determination of the international community in order to promote the achievement of balance between the three elements of sustainable development. Indeed, their interdependence and mutually reinforcing character is expected to be promoted in all sorts of activities, no matter who is performing them. For instance, as for poverty eradication is concerned it prescribed that "policies for providing basic social services and broader socio-economic development, are effective as well since enhancing the productive capacity of poor people increases both their well-being and that of their communities and societies, and facilitates their participation in resource conservation and environmental protection".[53] In the area of consumption and production patterns, a change is strongly sought as, in the words of the UNGA, "unsustainable patterns in the industrialized countries continue to aggravate the threats to the environment, there remain huge difficulties for developing countries in meeting basic

[52] *Ibid.* paragraph 23.
[53] *Ibid.* paragraph 27.

needs such as food, health care, shelter and education for people".[54] With regard to trade, the UNGA proclaims that "in order to accelerate economic growth, poverty eradication and environmental protection, particularly in developing countries, there is a need to establish macroeconomic conditions in both developed and developing countries that favour the development of instruments and structures enabling all countries, in particular developing countries, to benefit from globalization".[55] Sustainable development is also required in areas related to health as it enables "all people, particularly the world's poor, to achieve a higher level of health and well-being, and to improve their economic productivity and social potential. Protecting children from environmental health threats and infectious disease is particularly urgent".[56]

1.1.3 Sustainable Development in the 21st Century

During the first two decades of the 21st century, the UN has succeeded in positioning and strengthening sustainable development as the policy of the organisation in order to achieve global development,[57] while its efforts to continue developing an international framework for sustainable development have also been fruitful. This period is also relevant because of the recognition of the achievement of sustainable development as a participatory process, needing the commitment of everyone for its realisation.

1.1.3.a. The 2002 World Summit for Sustainable Development

Held in Johannesburg, South Africa, the World Summit for Sustainable Development was the last of a sequence of world conferences in a decade since 1992, when the Rio Conference took place. Gathering thousands of participants, including heads of State and Government, national delegates and leaders from non-governmental organizations, businesses and other major groups, the Summit focused on different topics including improving people's lives and conserving natural resources taking into account the continuing growing population, with ever-increasing demands for food, water, shelter, sanitation, energy, health services and economic security.[58] The issues addressed during the Summit represented the aim of sustainable development to encompass cross-cutting,

[54] *Ibid.* paragraph 28.
[55] *Ibid.* paragraph 29.
[56] *Ibid.* paragraph 31.
[57] Á. J. Rodrigo, *El Desafío Del Desarrollo Sostenible* (2015), at 36.
[58] See: https://sustainabledevelopment.un.org/milesstones/wssd (last visited: 24 May 2019).

social issues as integral parts of it.[59] Strengthening social development as the third pillar of sustainable development, the 2002 World Summit for Sustainable Development has been recognised for reconceptualising sustainable development, allowing for the protection of human rights and duties of good governance to be integrated within the framework of sustainable development.[60]

Out of this conference, two major documents were adopted: the Johannesburg Declaration on Sustainable Development[61] and the Johannesburg Plan of Implementation.[62]

The Johannesburg Declaration on Sustainable Development is a three-page document where head of states reaffirms in name of *the peoples of the world* their commitment to sustainable development, recognising the path initiated in Stockholm in 1972. Most notably, the Declaration highlights and declares that sustainable development shall be an inclusive process, especially regarding women's empowerment and gender equality, indigenous peoples, and the private-sector's corporate accountability. In this Declaration, states also assumed a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development.

The Johannesburg Plan of Implementation covers a range of issues disaggregated in eleven titles, including: Introduction; Poverty Eradication; Changing Unsustainable Patterns of Consumption and Production; Protecting and Managing the Natural Resource Base of Economic and Social Development; Sustainable Development in a Globalizing World; Health and Sustainable Development; Sustainable Development of Small Island Developing States; Sustainable Development for Africa; Other Regional Initiatives; Means of Implementation; and, Institutional Framework for Sustainable Development.

As asserted by some commentators, from the Johannesburg Summit onwards "it became evident that sustainable development is more than a vague concept and, as an area of law and policy, can help to address the need to balance and coordinate widely divergent priorities related to economic growth, social development and environmental protection".[63]

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[59] Cordonier Segger and Khalfan, *supra* note 7, at 29.
[60] Rodrigo, *supra* note 57, at 32; Cordonier Segger and Khalfan, *supra* note 7, at 26.
[61] United Nations, *Report of the World Summit on Sustainable Development* (2002), p. 1.
[62] *Ibid.* p. 7.
[63] Cordonier Segger and Khalfan, *supra* note 7, at 31.

1.1.3.b. Rio +20 UN Conference on Sustainable Development

Rio +20 resulted in a non-binding, but thoughtful handbook on sustainable development, with the title *The Future We Want*, which was approved by the UNGA Resolution 66/288.[64] The states gathered under the umbrella of the General Assembly expressed once again their commitment to sustainable development and to ensuring the promotion of an economically, socially and environmentally sustainable future for the planet and for present and future generations.[65] Along the document there are found clear references to the integration that sustainable development requires from all its three economic, social and environmental aspects, recognising the need to draw linkages and balance among them for achieving sustainable development in all dimensions.[66] The document addresses a great number of thematic areas and cross-sectoral issues regarded to be key elements for achieving sustainable development, thus paving the way for the settling of the Sustainable Development Goals, also known as the SDGs, which were going to be established later on by the UN 2030 Agenda for Sustainable Development.

In Rio+20 it was strengthening the institutional framework for sustainable development by the creation of a universal, intergovernmental, High-Level Political Forum (HLPF), [67] which came to replace the former Commission on Sustainable Development. The HLPF aims to provide political leadership, guidance and recommendations for the implementation of sustainable development; enhance integration of the three elements of sustainable development; constitute a platform for dialogue; follow-up and review the progress in the implementation of sustainable development commitments in current ongoing international cooperation plans; encourage and improve cooperation in the area of sustainable development; enhance the consultative role and participation of major groups and other relevant stakeholders in order to make a better use of their expertise; promote the sharing of best practices and experiences, system-wide coherence and coordination of sustainable development policies; gather dispersed information and assessments and enhance evidence-based decision-making.[68] The HLPF is also in charge

[64] United Nations General Assembly, Resolution A/RES/66/288, 11 September 2012.
[65] *Ibid.* at paragraph 1.
[66] See: *Ibid.* at paragraphs 3, 6, 10, 11, 19, 30, 56, 63, 75, 76(a), 78, 85(b), 87, 94, 100 and 101.
[67] *Ibid.* at paragraph 84.
[68] *Ibid.* at paragraph 85(a) to (l). For an in-depth study of the HLPF and its contribution to the global governance of sustainable development, see: Rodrigo, 'La Gobernanza Global Del Desarrollo Sostenible: El Foro Político de Alto Nivel Sobre El Desarrollo Sostenible', in J. Juste Ruiz, V. Bou Franch and F.

of following-up and review the plan of action set out in the 2030 Agenda for Sustainable Development which in the year 2015 came to replace the expired Millennium Development Goals (MDGs).[69]

1.1.3.c. The 2030 Agenda for Sustainable Development

The SDGs are considered to be integrated and indivisible goals and are expected to represent at all times the balance that is sought among economic and social development and the protection of the environment. As claimed by the Heads of State and Government and High Representatives for the Agenda, the SDGs are "to be guided by the purposes and principles of the Charter of the United Nations, including full respect for international law, and grounded in the Universal Declaration of Human Rights, international human rights treaties, the Millennium Declaration and the 2005 World Summit Outcome".[70] According to the text of the UNGA Resolution 70/1, achieving sustainable development entails "eradicating poverty in all its forms and dimensions, combating inequality within and among countries, preserving the planet, creating sustained, inclusive and sustainable economic growth and fostering social inclusion are linked to each other and are interdependent",[71] being all efforts in all fields aimed at the accomplishment of such broad goals which were synthesized into seventeen specific aims each one subdivided in an array of more specific targets.[72]

According to the 2030 Agenda for Sustainable Development, the SDGs shall be regarded as "integrated and indivisible, global in nature and universally applicable".[73] In line with this utterance, efforts made by states "in other forums to address key issues which pose potential challenges to the implementation of the Agenda"[74] are encouraged, yet not mandatory nor expected, whereas, regarding the adoption of domestic policies related to the SDGs, the UNGA Resolution acknowledges that "there are different approaches, visions, models and tools available to each country, in accordance with its national

Pereira Coutinho (eds.), *Desarrollo Sostenible y Derecho Internacional - VI Encuentro Luso-Español de Profesores de Derecho Internacional y Relaciones Internacionales* (2018) 139.

[69] United Nations General Assembly Resolution A/RES/55/2, 18 September 2000.

[70] United Nations General Assembly Resolution A/RES/70/1, 25 September 2015, paragraph 10.

[71] *Ibid.* at paragraph 13.

[72] For a detailed view of the SDGs and its individual targets and indicators, see: https://sustainabledevelopment.un.org/sdgs (Last visited: 19 August 2019).

[73] UNGA, Resolution A/RES/70/1, *supra* note 70, at paragraph 55.

[74] *Ibid.* at paragraph 58.

circumstances and priorities, to achieve sustainable development".[75] These three statements highlight the key elements to determine the status and reach of the SDGs as well as the nature of their implementation both at the national and international levels.

It is undoubtedly that the SDGs reflect the intention of the international community to uphold sustainable development as the kind of development that is desire for meeting the needs of present generations without compromising the ability of future generations to meet their own needs. Although the voluntary nature of their implementation both at the domestic and international levels have undoubtedly contributed to reaching a compromise amongst states, it undermines their effectiveness, especially when referred to cross-border activities carried out by other participants different from states or international organisations.

Indeed, there is a gap between municipal and international law where transnational companies are difficult to grasp, and their activities hard to control. In this sense, despite the fact that it is not contested that the SDGs appear clearly as the path for reaching sustainable development as a political aim in humanity's best interest, the effort remains short in creating a framework from where to include other international actors different than states which are equally important at the time of undertaking the tasks to achieve sustainable development.

1.1.3.d. The 2018 Nelson Mandela Peace Summit

For the centenary of the birth of Nelson Mandela, the UN called it members to a summit at the New York Headquarters' to reflect on global peace. The gathering concluded in a political declaration addressing today's humanity as the people who can find sustainable solutions to bring lasting peace, today and for future generations. The declaration recalled sustainable development in the following words:

> "We reaffirm the 2030 Agenda for Sustainable Development and recognize that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development. We remain committed to achieving sustainable development in its three dimensions – economic, social and environmental –in a balanced and integrated manner. Sustainable development cannot be realized without peace and security, and peace and security will

[75] *Ibid.* at paragraph 59.

be at risk without sustainable development. We reaffirm our pledge that no one will be left behind."[76]

The Declaration, as noted, reaffirms that sustainable development is an objective that the UN is committed to achieve through the balanced integration of its three dimensions, strengthening the long-standing premises of balance and integration of interests subjacent to the concept. Most notably, for the first-time sustainable development is expressly related to international peace and security as objectives that should be mutually reinforced, together with human rights and development. The Declaration went on stating that, among others, promoting sustainable development is a mean to sustaining peace.[77]

1.2 Sustainable Development as a Global Interest

Above section has briefly reproduced the history of sustainable development within the UN, stressing on the main achievements of the organisation regarding the evolution of a political goal which became gradually into an encompassing, robust objective of the international community aiming at the need to strike a balance between economic development, social development and the protection of the environment. From the Stockholm Conference in 1972 to present-day, international policy and law on sustainable development has walked through a process of matureness, where the concept has gained strong support among the members of the international community, and has been vested with a cross-cutting reaching which makes not at all odd to claim that sustainable development has earned a place in the socio-political heritage of many generations. Indeed, the history of the concept of sustainable development is the result of a process of cognitive evolution[78] which began with the request made to developing countries as to the need to take into account the environment in their endeavours towards the achievement of development, to move on to consider that this was not a burden to be supported only by developing states, but by all states. Furthermore, the international community also came to realise that adverse effects of development were not only affecting the environment but it was contributing too to broaden inequalities among peoples, gender, race, health and wealth, increasing poverty and hunger, covering and justifying human rights violations in the name of progress and threatening peace among

[76] United Nations General Assembly, Resolution A/RES/73/1, 3 October 2018, paragraph 8.
[77] United Nations General Assembly Resolution A/RES/73/1, 3 October 2018, paragraph 19.
[78] E. Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations* (2005), at 57.

peoples. This was the time when a line was drawn between economic development and social development, recognising that the former was incapable for realising the latter. Today, it has been compromised that sustainable development can only be achieved collaboratively, that everyone has to be committed to it, from civil society to the business sector to local governments to states and international organisations and transnational companies. Everyone counts.

The process that has been described in the previous section shows the great efforts that the international community has made to integrate economic and social development, and the protection of the environment as mutually reinforcing elements of sustainable development.

As has been stressed, what was primarily a concern of international policy against the increasing exhaustion of natural resources and the deliberate harms caused to the environment in pursuing progress-for-progress, turned to recognise the existence of such three dimensions integrating the concept of sustainable development, where the need to strike a balance among them was at its core.

In order to strengthen the achievements reached in international policy and law, this section aims to argue that sustainable development is a global interest of the international community. The status of global interest aims to stress on the collaborative character that the achievement of sustainable development presupposes and looks forward to overcoming the limitations that are known to international law with regard to non-state actors.

Indeed, for sustainable development to be achieved, its content and subjacent narratives must be extensible to and applied by all relevant actors both at the national and international level. As it will be argued, the emergence of sustainable development as a global public interest is useful for reminding the community the overall objectives, legal

narratives as well as the law relating to it[79] and to guide the behaviour of the different participants of a community toward such objectives.[80]

1.2.1 The Concept of Global Interest

Acknowledging that there are many business activities taking place transnationally and regulated to some extent by international law, where private entities are allowed to participate and carry out activities therein, wouldn't it be desirable to identify a core of common preferences or shared understandings aim to provide such activities with an overall framework according to which private entities' endeavours should be carried out? This question is the more relevant as private entities are not obliged to observe the regulations set by international law, therefore, even if such common preferences may find protection according to international law, private entities would not be bound by any such regulation. This core of common preferences should relate to collective interests that the international community has shown to be determined to promote and protect, as their realisation is sought to maximise the opportunities for present and future generations to develop. As such, this can be predicated about international peace and security, the protection of human rights, the protection of the environment, and the achievement of sustainable development, among others.

The global interest, as pointed out by Kulick "shall comprise all interests [*that inhere*] a pivotal importance for the international community and bearing relevance on both the domestic and international levels".[81] In this sense, global interests shall constitute the underpinnings of the international legal system as for they are aimed to preserve the

[79] Following Brunnée and Toope, law would be "rooted in social practice that generates shared understandings, and we can work to make these shared understandings deeper through more and more interaction" (J. Brunnée and S. J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010), at 33), thus social practice informs participants' conduct through a process of socialisation of the global interests the community is pursuing. Whereas law is the more or less binding outcome of such socialisation, here is argued that legal narratives are also an outcome of such socialisation, which in spite of their lack of normative character, are nonetheless useful to guide participants' behaviour towards the accomplishment of global interests.

[80] In Alder's words "Members of a community of practice, however, must share collective understandings that tell their members what they are doing and why" (Adler, *supra* note 78, at 21).

[81] A. Kulick, *Global Public Interest in International Investment Law* (2012), at 3.

system as a whole,[82] being essential to the withstand of the whole international community at the time they provide the system with functionality.[83]

As such, global interests would have to echo the prevailing global political goals compromised for the wellbeing and endurance of the international social body.[84] Hence, global public interests should not be addressed as a collection of particular interests,[85] but interests that represent the fundamental preferences that the international community has compromised to promote and protect, such as international peace and security, the protection of human rights, the protection of the environment, and the achievement of sustainable development.[86]

These thoughts, however, would prove to find, at least, two critiques. On the one hand, while for some, norms addressing matters of concern to the international society would be norms settled to promote and protect global interests,[87] this study recognises that for others the idea of relying in global interests may not be the best, to the extent that any definition of the concept would lack precision because the very same concept is especially incipient and scarcely institutionalised.[88] This study acknowledges the difficulty to give a concrete content and shape to what exactly should entail the term global interest. However, such lack of precision, rather than an undermining feature, it could turn into its main leverage. Indeed, this lack of precision may be what allows it to global interests

[82] Charney, 'Universal International Law', 89 *American Journal of International Law* (1993) 529, at 532.
[83] For Wolfrum, community interests "aims directly at the benefit of the international community of States as such. These community interests are often expressed by references to the common interest of mankind or comparable terminology" (Wolfrum, 'Enforcing Community Interests Through International Dispute Settlement: Reallity or Utopia?', in U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (2011) 1132, at 1134).
[84] Pérez González, 'Pluralidad de Regímenes, Unidad Del Ordenamiento', in C. García Segura and Á. J. Rodrigo Hernández (eds.), *Unidad y Pluralismo En El Derecho International Público y En La Comunidad Internacional* (2011) 151, at 156-158.
[85] Wolfrum, *supra* note 83, at 1132.
[86] UN Charter Article 1.1 and 1.3 (United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI). In a thoughtful contribution, Ángel J. Rodrigo argues that article 1.3 has been subject to a reinterpretation making it able to encompass sustainable development as another purpose of the UN becoming the global policy for development for the period post-2015 Rodrigo, *supra* note 6, at 269-282. In this same line, Wolfrum adds the protection and management of the environment, and of spaces beyond national territorial jurisdiction (Wolfrum, *supra* note 83, at 1133).
[87] J. D'Aspremont, *Contemporary International Rulemaking and the Public Character of International Law*, 12 (2006), available at www.iilj.org, at 5; Tams, 'Individual States as Guardians of Community Interests', in U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (2011) 379.
[88] Cornago, 'De La Filosofía Política a La Gobernanza Global: Un Acercamiento Crítico a La Noción de 'Interés Público Global'', in N. Bouza, C. García and Á. J. Rodrigo (eds.), *La Gobernanza Del Interés Público Global* (2015) 81, at 84-85.

exist in different times, to be adapted to different communities, and to be able to fulfil different needs.

On the other hand, it would be fairly possible that, for some, the assertion that global interests are established on behalf of the wellbeing of the international community and looking after its endurance, would entail the risk that any development thereon may be the result of the exercise of a hegemonic power. Indeed, as has been argued by Klabbers "any attempt to espouse universal values almost automatically carries the suspicion of domination".[89] However, as the same author further explains, as far as global interests are a construction of the community as a whole, and built after long, inclusive debates within formal and regulated forums, where consent is freely expressed, the awe of falling in hegemonic rhetoric to substantiate certain interests as collective to the international community should be dissipated. Moreover, as argued by Brunnée and Toope, "[i]t is not necessary to have a morally cohesive 'community' before law-making is possible, though some foundation of shared understandings is required",[90] i.e. indoctrination of the community under common moral values is not required for having a set of rules or preferences guiding the behaviour of the participants to that community. Indeed, the distinction between moral values and objectives is timely as it stresses the fact that in pursuing some objectives, the community is still able to shape and draw the path, while when referring to moral values, the path seems to be already fixed, being difficult to propose something different without compromising the entire building in which moral values are based.

From a pragmatic perspective, this work argues for global public interests to be tools aimed to provide a common ground or backdrop for the assessment of both the international legal system and the activities that are carried out transnationally. Hence, global interests should provide a basis for achieving a comprehensive, systemic perspective on the overall international system. To this end, global interests are expected to permeate down through all processes and outcomes of international and transnational activities. These common preferences facilitate the task to strike a balance between the many different objectives and interests at stake at the international level, subjugating them to the objectives that the community has previously recognized as common and

[89] Klabbers, 'Law-Making and Constitutionalism', in J. Klabbers, A. Peters and G. Ulfstein (eds.), *The Constitutionalization of International Law* (2009) 81, at 114.
[90] Brunnée and Toope, *supra* note 79, at 44.

fundamental.[91] Indeed, an interest addressed as global should then be taken into account as a common, starting ground to all international processes, irrespectively of the participants involved.

Bearing in mind all the above, for the aim of this study, global interests will relate to the fundamental interests addressing common preferences of the international community, which are intended to prevail over other particular interests, and are aimed at ensuring the conditions for both present and future generations' development.

1.2.2 The Characteristics of Global Interests

Five main characteristics are proposed here to be attached to global public interests: that the interest is, in essence, global (a) and public (b); that it is developed by and for a community (c); its content is determined to evolve (d); and that it should be mainstreamed across the whole international system (e).

1.2.2.a. Global

This characteristic is meant, firstly, to draw a difference between the global interest and other kinds of interests that could also be found at the international level, distinguishing it from the individual interests that each of the participants of the international community may have, and from those individual interests shared with other participants that constitute a set of collective interests or the interests of a collective.

As some part of the doctrine stresses, it will not be global the interest composed by the mere collection of individual interests of the participants to the international community.[92] In this sense, Joyner, theorising upon the interests that deserve protection under the expression 'common heritage of mankind', proposes the need to separate these interests from those belonging to states, as far as the common heritage of mankind is more

[91] Pérez González, *supra* note 84, at 162.

[92] Gutiérrez Espada, 'El Orden Público Internacional', in Á. J. Rodrigo Hernández and C. García Segura (eds.), *Unidad y Pluralismo En El Derecho International Público y En La Comunidad Internacional* (2011) 411. At 419-422; Rodrigo, 'Más Allá Del Derecho Internacional: El Derecho Internacional Público', (2016); Pérez González, *supra* note 84. At 153-155. A different approach is defended by Villalpando who asserts that the international community's interest is "not one collective interest, but many (as many as there are states) identical interests having a collective content" (Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law', 21 *The European Journal of International Law* (2010) 387, at 394).

suitable to encompass "some political units and peoples who are not incorporated into the political entities called States [...] Hence, the interests, needs and aspirations associated with 'all mankind' would appear greater than the sum of all States' national interests".[93]

On the other hand, to be global reflects an intention, an objective which is also globally shared by the community. This dimension is represented by the aim towards the withstanding of the international community and the survival of humankind pursued by the global interest. In this sense, it would be hard to challenge that international peace and security, as declared by the parties to the UN Charter both in the preamble and in Article 1.1, are global interests to the international community. The same apply to the promotion and protection of human rights and fundamental freedoms, as stated in Article 1.3 UN Charter and complemented by the many international and regional agreements on the protection of human rights that have been concluded from the second half of the 20th century onwards. As McCorquodale argues, "the Vienna Declaration on Human Rights, agreed by all states by consensus at the World Conference on Human Rights in 1993, makes it clear that the promotion and protection of all human rights is a legitimate concern of the international community".[94] In other words, the relevance of human rights for the endurance of the international community and the operativity of the international system make their protection a global interest, which fulfilment is desired by all participants of the international community. Related to our claim, sustainable development cannot be but a global interest as "no state would any longer claim not to be *pro* sustainability".[95] Another perspective based on the different layers an interest can spans on, is explained by Kulick, who considers that an interest will be global when it gain legal relevance both in the domestic and international stage, assuming that the global feature of an interest "is supposed to illustrate the 'interdigitation', i.e. the integration of the domestic and the international".[96] Assuming this last perspective, it would be possible to argue that sustainable development reaches this threshold as well.

[93] Joyner, 'Legal Implications of the Concept of the Common Heritage of Mankind', 35 *International and Comparative Law Quarterly* (1986) 190, at 195.
[94] McCorquodale, 'An Inclusive International Legal System', 17 *Leiden Journal of International Law* (2004) 477, at 487.
[95] C. Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (2009), at 3.
[96] Kulick, *supra* note 81, at 153.

1.2.2.b. Public

The public character of a global interest derivates both from the source that recognises it as a global interest, and from the objective such interest is aimed to achieve. According to this, all interests promoted and protected by the international legal system are public in nature as far as this character derivates from the public character of international law. In this sense, even individual interests protected in bilateral treaties are public from this point of view, although they will not be global.

The second approach argues that the public character of an interest can also derivate from the objective that it pursues. Accordingly, an interest will be public when it aims at the wellbeing and endurance of the international community. This entails, firstly, that, given the relevance of the public interest to the community and the international system, all should take part and contribute to its promotion and protection, having all participants the duty to take it into consideration when carrying out their activities. As such, it is expected for this global public interest to prevail over individual interests. Indeed, the protection of the global public interest should not be conditioned to any particular state demand of self-interest satisfaction nor to states reciprocity.[97] This is not to say that the interests of some states could not concur with the global public interest which promotion and protection is required, but that the rationale behind its protection should be the wellbeing of the international community, broadly considered. In itself, as argued by Casanovas and Rodrigo, taking sustainable development as a global interest, for instance, commands to promote a rational exploitation and a better allocation of resources, limiting, consequently, states freedom of action.[98]

1.2.2.c. Build-up by and for a Community

Community interests are a construction of social interaction that reflects the agreement on what a given community believes to be good and appropriate.[99] They emerge from common understandings achieved among all the participants of a given community, where the group agrees that these common interests should prevail over any other interest, either individual or collective. As corollary, once the shared understanding is reached, all

[97] Rodrigo, *supra* note 92.
[98] O. Casanovas and Á. J. Rodrigo, *Compendio de Derecho Internacional Público* (4th ed., 2015), at 65.
[99] M. Finnemore, *National Interests in International Society* (1996), at 2.

participants should be willing to align their actions in conformity to the accorded preferences.

The recognition of a global interest must certainly consider the needs of forthcoming generations. This intergenerational element requires to assess the impact that present decisions will have in the long-term, because beneficiaries are not only today's community, but also the generations to come.[100] Whereas sustainable development has been the outcome of broad consensus among the international community of states, the intergenerational element of sustainable development has been largely discussed by the doctrine of international law[101] and it is at the core of the definition provided by the *Brundtland Report* as it refers to the development "*[that ensures to meet]* the needs of the present without compromising the ability of future generations to meet their own needs".[102] As argued by Wolfrum "the principle of sustainable development is a reflection of community interests as it attempts also to preserve natural resources for future generations and thus is based on the consideration of inter-generational equity".[103]

1.2.2.d. Evolving Content

The content of global interests should not be thought to remain static and permanent over time, as they must be able to adapt to changing circumstances. Although their content might be conditioned by present circumstances, there must be considered long-term perspectives as well. Their evolutive character is inherent to them to the extent that it is also provided on the necessities that the international community is compelled to take care of. This is related to the relevancy an issue may have with respect to humanity's survival and wellbeing in a given period of time; problems that are characterised for their global scale relevancy. This is particularly notorious in the case of sustainable development as it has been evidence through its history under the UN auspices.

Indeed, from the Stockholm Conference in 1972 to our days, the concept of sustainable development proved not to remain static, encompassing other aims of the international community, such as social development, the eradication of poverty, the protection of human rights, the sustainable use of resources, international peace and security, women

[100] Rodrigo, *supra* note 92.
[101] See, for instance: Rodrigo, *supra* note 57, at 103-113.
[102] World Commission on Environment and Development, *supra* note 11, at paragraph 27.
[103] Wolfrum, *supra* note 83, at 1136.

empowerment and gender issues, as well as the embracement of indigenous people concerns. Shifts in the circumstances induce changes in the normative context as well, and as internationally held norms and preferences change, they are expected to create coordinated shifts in the behaviour of the many participants acting across the system. In this sense, it is expected for the preferences and behaviour of all participants to be shaped by these internationally shared understandings and preferences that provide the system with structure and give meaning to international political life.[104]

1.2.2.e. Cross-Cutting Element

This characteristic is related to the systemic function that global interests are expected to perform: a unifying, harmonic element aimed to highlight the permeability that global interests are expected to have in every nook of the international system.

Horizontally, the cross-cutting element of global public interests is both material and substantive. Concerning the substantive aspect, global interests are expected to be mainstreamed across all international processes, organisations, and forums. In its material aspect, the cross-cutting element refers to the need for it to be transversal to any decision-making process and in the application of norms. In this line, Birnie, Boyle and Redgwell argue that "although international law may not require development to be sustainable, it does require development decisions to be the outcome of a process which promotes sustainable development".[105] This perspective recognises the many agencies that can influence global arrangements, such as domestic policies of particular states and the international relations between states, the private sector, civil society, political organisations, and non-governmental organisations. Therefore, the cross-cutting element predicated from global interests is expected to motivate the behaviour of all these agencies, i.e. to put global public interests as the backdrop where their activities take place. Hence, the task is to encompass global interests in such several, but interrelated domains involving various groups that cut across national boundaries.[106]

The cross-cutting character is also vertical as it implies national issues to be carried out bearing global interests as a milestone. This is central to the well-functioning of the

[104] Finnemore, *supra* note 99, at 2-3.
[105] Birnie, Boyle and Redgwell, *supra* note 4, at 126-127.
[106] Sen, 'Global Justice Beyond International Equity', in I. Kaul, I. Grunberg and M. A. Stern (eds.), *Global Public Goods: International Cooperation in the 21st Century* (1999) 116, at 121-122.

international system. A structure-oriented approach is useful here to understand this top-to-the-bottom perspective. Structure-oriented approaches treat social structures as causal variables and derive actors and interests from them.[107] International norms and institutions, shared beliefs, discourse, and culture are all encompassed in this structure-based perspective. According to it, the international legal system can change the need of states, creating new interests and values for every participant, changing their action, not by constraining them through a given set of preferences but by changing their preferences.[108]

1.2.3 Global Interests, Sustainable Development and Transnational Companies

The need to find a set of global interests representing the shared understandings of the international community is of relevance to the extent that they can contribute – as international law does - to the achievement of the community's goals and future perspectives. Also, and with particular regard to transnational companies, as far as they are not bound to international law, such global interests will provide an authorised, argumentative framework from where to assess their transnational activities from a more comprehensive perspective, helping, therefore, to determine to what extent their activities are in conformity with the objectives set forth by the international community.

As it has been argued, the status of global interest claimed for sustainable development aims to strengthen the developments made in international policy and to stress on the idea that its achievement will only be possible through collaborative means.[109] Recalling the overall objective of this work, which is to look for alternative avenues to curve transnational companies' behaviour to adequately integrate both social and environmental concerns within their activities, as a global interest of the international community, sustainable development is argued to provide an adequate argumentative framework, able to accomplish such objective. Indeed, it is expected that the hermeneutical resources provided by sustainable development be able to nourish international adjudicative process

[107] Finnemore, *supra* note 99, at 14.
[108] *Ibid.*, at 5-6.
[109] Villalpando, *supra* note 92, at 391.

carried out in disputes involving transnational companies, thus, contributing to the achievement of decisions better addressing the parties' different, convergent interests.

The idea of using sustainable development in this way is not new, as it has been already discussed by Lowe, for whom sustainable development could, if anything, perform a pragmatic function within international adjudication by acting as an interstitial norm or meta-principle capable of having legal effects by "acting upon other legal rules and principles [...] pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other".[110] In this same line, Rodrigo has argued that: "*[e]l marco metodológico del desarrollo sostenible, además, proporciona a los órganos encargados de aplicar las normas jurídicas internacionales y, en especial, a los jueces y tribunales, un conjunto de recursos hermenéuticos que pueden contribuir a una interpretación y aplicación sostenible de las normas jurídicas. Por interpretación sostenible se puede entender una interpretación del derecho aplicable a un supuesto de hecho que tenga en cuenta, pondere e integre los aspectos económicos, sociales y ambientales del desarrollo sostenible […]"*.[111] Following these authors' findings, this study further elaborates on the role that sustainable development may play in international law, but exploring the role that it may actually play in the litigation of disputes involving transnational companies. To this end, the study that will be undertaken in the following Chapter will be aimed to address the main narratives laying at the core of sustainable development.

Concluding Remarks

This Chapter revisited the history of sustainable development as written through the main UN-conferences and documents related to the topic, from the year 1972 to this date. The study provided an account on the evolution that sustainable development went through in international policy and law, until it finally completed its subjacent narrative related to the need to strike a balance between its three dimensions, challenging progress-for-progress-ideas that reigned over the 20th century. As it was highlighted, the need to balance economic development, social development and the protection of the

[110] Lowe, *supra* note 3, at 31.
[111] Rodrigo, *supra* note 57, at 85.

environment stands at the very core of sustainable development as developed in international policy.

In order to strengthen the achievements reached in international policy and law, this Chapter argued that sustainable development is a global interest of the international community. To this end, it was proposed that global interests referred to those fundamental interests addressing common preferences of the international community, which were intended to prevail over other particular interests, and were aimed at ensuring the conditions for both present and future generations' development. Among such interests there would be international peace and security, the protection of human rights, the protection of the environment, and the achievement of sustainable development. Global interests were argued to be social constructions representing the needs of the international community for ensuring its wellbeing and endurance, and which characteristics made them different from the rest of interests converging at the international level and made them adaptable to different circumstances and periods of time, and which content must permeate down through every nook of the international system.

The status of global interest is meant to stress on the collaborative character that the achievement of sustainable development presupposes and looks forward to overcoming the limitations that are known to international law regarding its application to transnational companies. Indeed, taking into account that TNCs, in spite of carrying out activities regulated under international law, are not bound by the rules set therein, it was argued that acknowledging sustainable development as a global interest should provide an alternative to this obstacle, and to provide an authoritative, argumentative framework from where to assess the conformity of TNCs activities to the objectives pursued by the international community.

In order to find the argumentative resources that sustainable development is claimed to be able to deliver, the next Chapter will examine the treatment that its concept, content and scope of application have received in the jurisprudence of different international judiciaries. Such study will reveal that the core of the concept of sustainable development there is a narrative of balance and a narrative of prevention.

Chapter 2

Sustainable Development in International Jurisprudence: The Emergence of the Sustainable Development Narratives of Balance and Prevention

As evidenced in the previous Chapter, sustainable development has gone through a decades-long process where, its contours, have been thoroughly polished by the international community. Indeed, its evolution in international policy and law cannot be underestimated, and its credentials as global interest of the international community are manifest. All this proves true the statement made in the *Brundtland Report* as to considering sustainable development "a process of study and adaptation, rather than a final stadium of complete equilibrium".[112]

Following this line of argumentation, this Chapter will show that international judiciaries were not excluded from the process of evolution and change that sustainable development underwent in international policy and law from the second half of the 20th century onwards. Indeed, since the late 1990s and with a relative success, international judiciaries, learning about inter-state disputes, have had the opportunity to integrate sustainable development into their adjudicative process. Considering this, the aim of this Chapter is to argue for the existence of two main narratives laying at the core of sustainable development, which have been further developed by international adjudicative bodies. As

[112] United Nations General Assembly Resolution A/42/427, 4 August 1987, Anexo Informe de la Comisión Mundial sobre el Medio Ambiente y el Desarrollo, *Nuestro Futuro Común*, p. 89, paragraph 82. The translation from the Spanish version of the World Commission on Environment and Development, *Our Common Future* was made by the author. The complete paragraph in the Spanish version reads as follows: "82. Estos requisitos son estrictos y confiar en que todos puedan llegar a cumplirse plenamente sería poco realista. La supervivencia y el desarrollo de las sociedades humanas no exige tal grado de perfección. Las mencionadas exigencias pueden considerarse más bien metas que deberían suscribir las acciones de desarrollo, tanto nacionales como internacionales. Lo que cuenta es la sinceridad en la prosecución de dichos objetivos y la eficacia con que se corrigen sus desviaciones. En este sentido, el desarrollo duradero es un proceso de estudio y adaptación más que un estado definitivo de completo equilibrio". In the English version there are missing the two first sentences and the last one from the Spanish version, reading, instead, as follows: "82. These requirements are more in the nature of goals that should underlie national and international action on development. What matters is the sincerity with which these goals are pursued and the effectiveness with which departures from them are corrected" (World Commission on Environment and Development, *supra* note 11, at Chapter 2, paragraph 82). See, also: Barral, *supra* note 46, at 382-383.

the study will show, these narratives have been used by judiciaries, to different extent, to inform the adjudicative process in disputes arising between states.

In order to achieve such objective, the first section aims to argue the existence of a narrative of balance and a narrative of prevention that are subjacent to the concept of sustainable development, which have been further elaborated in the jurisprudence of international courts and tribunals. Indeed, the study will show that the traditional understanding of sustainable development as the need to strike a balance between economic development, social development and the protection of the environment, has been complemented with a duty of prevention, where social and environmental concerns are considered to provide solid ground in order to halt states' activities or to curve such activities to minimize their social or environmental adverse impacts.

The second section addresses three conceptual limitations considered stand as an obstacle to reach the role proposed for sustainable development, this is, to be a useful tool to adequately address social and environmental concerns in the settlement of international disputes. These limitations are: first, the existence of an environmental bias affecting sustainable development, clearly contributing to hinder social development concerns; second, there is an unsustainable use of economic development as proxy to social development, which in fact has the same effect of hindering social development issues; and, third, that there is a reluctance of tribunals to directly address the practical effects of the concept of sustainable development in the settlement of international disputes.

2.1 The Narratives Subjacent to Sustainable Development in International Jurisprudence

Comprehensive studies on the approach taken by international courts and tribunals regarding to sustainable development have been previously performed by several international legal scholars.[113] Furthermore, endeavours for creating legal theories upon

[113] See, for instance: Sands, 'International Law in the Field of Sustainable Development: Emerging Legal Principles', in W. Lang (ed.), *Sustainable Development and International Law* (1995) 53; Sands, 'Environmental Protection in the Twentieth Century: Sustainable Development and International Law', in N. J. Vig and R. S. Axelrold (eds.), *The Global Environment. Institutions, Law and Policy* (1999) 116;Sands, 'International Courts and the Application of the Concept of 'Sustainable Development'', 3 *Max Planck UNYEB* (1999) 389; Lowe, *supra* note 3; Cordonier Segger and Khalfan, *supra* note 7; Birnie, Boyle and Redgwell, *supra* note 4; K. Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (2008); E. Bonanomi Burgi, *Sustainable Development in International Law Making and*

sustainable development aimed to strengthen the place that some believe it should have within international law, range from considering sustainable development to be a brand new branch of international law,[114] indistinctly called *sustainable development law* or *international law on sustainable development*; or an objective that entails an obligation of means, materialized in the obligation of states to promote sustainable development;[115] or a principle of international environmental law,[116] where sustainability, as a quality bearing on social and economic development, is considered to address the environmental account that must be taken in the achievement of developmental goals. In this sense, sustainability turns to be, then, the normative quality of sustainable development and, as Bosselmann explains "equal to other fundamental principles of law such as freedom, equality and justice".[117]

This study does not challenge any of these approaches, and recognises, furthermore, the possibility for what was originally conceived as a mere political objective to become afterwards a legally binding norm of international law.[118] As such, the ambition of this section is, however, different. It is different to the extent that, rather than focusing the attention in finding a way sustainable development may attain a degree of normative character within international law, the following study is focused on exploring the argumentative role that sustainable development has played in the adjudication of disputes between states. Following this approach, the aim is to find those narratives that

Trade: International Food Governance and Trade in Agriculture (2015); V. Barral, *Le Développement Durable En Droit International: Essai Sur Les Incidences Juridiquez d'une Norme Évolutive* (2016).

[114] Indeed, for Cordonier Segger and Khalfan, sustainable development law "describes a group of congruent norms, a corpus of international legal principles and treatieswhich adress the areas of intersection between international economic law, international environmental law and international social law aiming toward development that can last" (Cordonier Segger and Khalfan, *supra* note 7, at 46-47 and 103).

[115] According to Barral, "[b]oth in treaty law and in general international law, sustainable development is understood as an objective that legal subjects must strive to achieve, and the object of an obligation of means is precisely to try to achieve an objective. […] States are thus under a relative rather than absolute obligation to achieve sustainable development; they are not bound to achieve it, but are bound to try to, they are bound to promote sustainable development" (Barral, *supra* note 46, at 390-391).

[116] Bosselmann, *supra* note 113.

[117] *Ibid.*, at 57.

[118] The precautionary approach is a good example of how a concept that was originally conceived as a merely political objective can turn afterwards into a concept with fully normative character. Indeed, as declared by the Seabed Disputes Chamber of the International Tribunal on the Law of the Sea, in its Advisory Opinion N°17 on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* of 1 February 2011, paragraph 127: "The provisions of the aforementioned [Nodules and Sulphides] Regulations transform this non-binding statement of the precautionary approach in the Rio Declaration into a binding obligation. The implementation of the precautionary approach as defined in these Regulations is one of the obligations of sponsoring States" (*Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10).

are subjacent to sustainable development, which application will be tested in disputes involving private entities, further on in this study. This will be done, in order to evaluate their potential ability to adequately address social and environmental concerns in the adjudication of disputes related to the activities of deep seabed mining and foreign investment.

As the path to achieve development for all peoples, it is argued here, that sustainable development has an instrumental dimension within the adjudication process which is, to some extent, coincident to the function afforded to it by Lowe.[119] In this sense, the following study will show how the role attributed to sustainable development works, i.e. how its core narratives can be implemented into legal reasoning.

Although Lowe was of the opinion that sustainable development did not have a normative character as such, he did advance the idea that it may have a role within judicial reasoning and thus, a certain pragmatic function based on the ground that it could be conceived as an interstitial norm or meta-principle capable of having legal effects by "acting upon other legal rules and principles [...] pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other".[120] His thesis was developed on the analysis he carried out regarding the approach taken by the International Court of Justice in the *Gabčíkovo-Nagymaros* case[121] and, particularly, on the separate opinion to the same case delivered by Judge Weeramantry,[122] where he explored the role sustainable development was expected to play with regard to the obligations bearing on the parties.

The ICJ, on the one hand, declared that sustainable development was to be a concept suitable for mirroring the way states should balance the intersection between economic development and the protection of the environment in order to solve their dispute, pointing out, in what nowadays has become a famous statement, that:

> "Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be

[119] See: Lowe, *supra* note 3, at 21.
[120] *Ibid.*, at 31.
[121] *Gabčíkovo-Nagymaros* case, *supra* note 1.
[122] *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7 (Separate Opinion of Vice-President Weeramantry).

> taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development"[123].

On the other hand, Judge Weeramantry went further in his separate opinion, claiming that sustainable development was to be regarded a principle of international law as it was recognised in several "multilateral treaties, international declarations, the foundation documents of international organizations, the practices of international financial institutions, regional declarations and planning documents, or State practice".[124] As argued by Judge Weeramantry:

> "The Court has referred to [sustainable development] as a concept in paragraph 140 of its Judgement. However, I consider it to be more than a mere concept, but as a principle with normative value[…][125]

> "The concept of sustainable development is thus a principle accepted not merely by the developing countries, but one which rests on a basis of worldwide acceptance [...] The principle of sustainable development is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community".[126]

Conversely, Lowe was inclined to think that sustainable development would rather embedded "another species of Normativity which is of great potential value in the handling of concepts of international environmental law",[127] this was to assist the adjudication process, particularly within judicial reasoning, playing a role not as a rule of conduct applicable *ex ante* to the states concerned, but as a rule for nourish judicial decisions. In this sense, Lowe has argued that "[n]orms may function primarily as rules for decision, of concern to judicial tribunals, rather than rules of conduct",[128] and that tribunals were entitled not only to perform their judicial reasoning according to norms that were established through traditional law formation process.[129] From this perspective, sustainable development could be considered to be able to provide ground from where evaluate states' obligation compliance or their failure to comply with previously agreed

[123] *Gabčíkovo-Nagymaros* case, *supra* note 1, at paragraph 140.
[124] *Gabčíkovo-Nagymaros* case (Separate Opinion of Vice-President Weeramantry), *supra* note 122, at 90.
[125] *Ibid.*, at 85.
[126] *Ibid.*, at 91-92.
[127] Lowe, *supra* note 3, at 21.
[128] *Ibid.*, at 31.
[129] *Ibid.*, at 31.

obligations. However, there are some opposing to this position, contending that this could lead to treaty revision.[130]

Bearing in mind that sustainable development is a global interest established to contribute to the wellbeing and endurance of the international community, broadly considered, if any long-term perspective is sought to be reached, i.e. to effectively meet the needs of the present without compromising the ability of future generations to meet their own needs, the narratives central to the concept of sustainable development would have to be heading towards this direction.

2.1.1 The Sustainable Development Narrative of Balance According to the Jurisprudence of International Courts and Tribunals

Rooted in the field of international policy and followed to a great extent by the jurisprudence of international courts and tribunals, the more influential narrative of sustainable development is that requiring a balance or integration of its three dimensions.

As many have argued, the idea of balance as embedded in sustainable development is not new in international environmental law doctrine. Indeed, many authors have stressed that implicit to the notion of sustainable development is the principle of integration which calls to "integrate environmental considerations into economic and other development, and to take into account the needs of economic and other social development in crafting, applying and interpreting environmental obligations".[131] In the words of French, "The principle of integration is central to the attainment of sustainable development […] and, if interpreted correctly, should not only influence the composition and implementation of specific measures but also the creation and realisation of policy".[132]

As it will be shown in the following epigraphs, the jurisprudence has been consistent in reinforcing the argument that, intrinsic to the concept of sustainable development, there is a notion of balance that aims to the mutually reinforcing application of norms and

[130] Barral, *supra* note 46, at 397.
[131] P. Sands et al., *Principles of International Environmental Law* (4th ed., 2018), at 227. Also in this line: Cordonier Segger and Khalfan, *supra* note 7, at 103-109; Rodrigo, 'El Principio de Integración de Los Aspectos Económicos, Sociales y Ambientales Del Desarrollo Sostenible', LXIV *Revista Española de Derecho Internacional* (2012) 133.
[132] French, *supra* note 44, at 54-55.

obligations from international environmental law, international social law, and international economic law.

2.1.1.a. The Gabčíkovo-Nagymaros case

The ICJ's *Gabčíkovo-Nagymaros* case was the first time an international tribunal had the opportunity to deal with a claim involving sustainable development considerations. The case was submitted before the International Court of Justice by Hungary and Slovakia, for it to decide upon the way the parties had to overcome their obligations related to the construction of a dam in the Danube river as agreed in an early treaty concluded by the parties in 1977.

The parties to the treaty were facing troubles in honouring the terms they had agreed, because of the allegedly serious environmental impacts foreseen by Hungary if the project was to be carried out according to the conditions primitively agreed. When dealing with the claim, the ICJ bestowed fair attention to outline its thoughts upon the role sustainable development should bear in the settlement of the case.

Although cautious in its wording, the ICJ delivered what could be a promising starting point for exploring the role that sustainable development should have in international law. As such, required to determine the legal consequences of the breach, including the rights and obligations of the Parties, the ICJ determined that the overarching obligations should be negotiated by the parties looking forward to find a way where "the multiple objectives of the Treaty can be best served, keeping in mind that all of them should be fulfilled".[133] In doing so, the ICJ went on, the parties "should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant".[134] This two quotes already brought to the forefront the idea of the need to reach a balance amongst the different interests that the project is intended to satisfy, regarding all of them as equally relevant. This leads to think that, as pointed out by Boyle, "[t]he willingness of the ICJ to take sustainable development into account as an 'interstitial norm', derived from the Rio

[133] *Gabčíkovo-Nagymaros* case, *supra* note 1, at paragraph 139.
[134] *Ibid.*, at paragraph 140.

Declaration, illustrates the potential impact of such soft law general principles on the interpretation and application of treaties".[135]

Also, the ICJ reminded the parties that the treaty bounding them together was not only one of a joint investment for the production of energy, "but it was design to serve other objectives as well: the improvement of the navigability of the Danube, flood control and regulation of ice-discharge, and the protection of the natural environment… [including the] maintenance of water quality".[136] As it can be seen, some of these objectives such as the improvement of the conditions for transporting goods and people over the river or the prevention of the negative impacts of torrent's overflow upon the population and infrastructures, are settled for improving peoples' life quality and having a direct effect on social development. On the other hand, the ICJ clearly stated that the environmental objectives were as crucial as the economic and social objectives foreseen by the parties, asserting *a contrario sensu* that "[n]one of these objectives has been given absolute priority over the other, in spite of the emphasis which is given in the Treaty to the construction of a System of Locks for the production of energy. None of them has lost its importance. In order to achieve these objectives, the parties accepted obligations of conduct, obligations of performance, and obligations of result".[137]

To this end, the ICJ argued that sustainable development was an expression recently developed in the field of environmental law, according to which the parties were required "to discuss in good faith actual and potential environmental risks"[138] that may stem from the compliance of the obligations they originally agreed in 1977. In other words, the parties were prompted to take into account the environmental adverse effects that the construction of a dam may cause or threat to cause, and to update the content of their obligations to adequately address all environmental concerns arising from the construction of the dam.

[135] Boyle, 'Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change', in D. Freestone, R. Barnes and D. Ong (eds.), *The Law of the Sea: Progress and Prospects* (2006) 40, at 51.
[136] *Gabčíkovo-Nagymaros* case, *supra* note 1, at paragraph 135 and 137.
[137] *Ibid.*, at paragraph 135.
[138] *Ibid.*, at paragraph 112.

2.1.1.b. The Shrimp/Turtle Case

The nourishing role that sustainable development plays with regard to states' treaty obligations was also addressed in the 1999 Report of the WTO Appellate Body (hereinafter, AB) on the *Shrimp/Turtle* case,[139] where the Dispute Settlement Body was required to establish a panel to perform an assessment of a prohibition imposed by the United States of America on the importation of certain shrimp and shrimp products.[140]

The AB argued that sustainable development was to perform a role within the WTO, insofar, the contracting parties had recognised in the preamble to the WTO Agreement that, in the field of trade and economic endeavour, the relations between members should be conducted "allowing for the optimal use of the world's resources in accordance with the objective of sustainable development".[141] Although expressed in a footnote, the AB of the WTO Dispute Settlement Body stated, that sustainable development was a concept "generally accepted as integrating economic and social development and environmental protection".[142] This statement recognises once again the core narrative of balance that sustainable development purports between economic and social development and the protection of the environment was, consequently, declared part and parcel of the foundations of the WTO.

The AB considered, thereinafter, that WTO law "must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment",[143] and, as such, sustainable development was crucial to the interpretation of WTO law.[144] The argument advanced by the AB as for sustainable development to be a contemporary concern of the community of nations, reinforces its

[139] *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (20 September 1999), WT/DS58/AB/R (AB Report), WT/DS58/R (Panel Report).
[140] In 1987, the United States adopted some regulations pursuant the Endangered Species Act of 1973, requiring all United States' shrimp trawl vessels to use approved Turtle Excluder Devices in all areas where there it was likely that shrimp trawling will interact with sea turtles. These regulations also imposed a ban on the import of shrimp harvested with commercial fishing technology which may adversely affect sea turtles; this ban was to affect every harvesting nation that did not have a specific certification required by the US.
[141] Preamble to the WTO Agreement (WTO Agreement, Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994)).
[142] *Shrimp/Turtle* case (AB Report), *supra* note 5, at paragraph 130, footnote 107.
[143] *Shrimp/Turtle* case (AB Report), *supra* note 5, at paragraph 129.
[144] Also in this line, see: Judge Weeramantry in *Gabcíkovo-Nagymaros case* (Separate Opinion of Vice-President Weeramantry), *supra* note 122, at 91-92.

status of global interest of the international community as was argued in the previous Chapter.

Furthermore, the AB claimed, that as far as the preamble "reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994",[145] claiming that these instruments cannot be seen as static.

2.1.1.c. The Pulp Mills Case

The content shaping role of sustainable development with regard to international obligations is also observed in the 2010 Decision of the International Court of Justice on the *Pulp Mills* case,[146] where Argentina claimed that Uruguay had breached its obligation to contribute to the optimum and rational utilization of the river as established in Article 1 of the 1975 Statute, by failing to co-ordinate with Argentina the measures necessary to avoid ecological change, and by failing to take the measures necessary to prevent pollution[147] before authorizing the construction and operation of the Orion (Botnia) mill. Argentina contended that according to Article 31, paragraph 3(c) of the Vienna Convention on the Law of Treaties, the 1975 Statute should be interpreted according to the principles governing the law of international watercourses and other principles of international law aimed to ensure the protection of the environment, among which is found the principle of sustainable development.

Referring to such claim, the Court noted that:

> "[…] the object and purpose of the 1975 Statute, set forth in Article 1, is for the Parties to achieve 'the optimum and rational utilization of the River Uruguay' by means of the 'joint machinery' for co-operation, which consists of both CARU and the procedural provisions contained in Articles 7 to 12 of the Statute. The Court has observed in this respect, in its Order of 13 July 2006, that such use should allow for sustainable development which takes account of 'the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States'".[148]

[145] *Shrimp/Turtle* case (AB Report), *supra* note 5, at paragraph 153.
[146] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14.
[147] *Ibid.*, at paragraph 170.
[148] *Ibid.*, at paragraph 75.

Insofar the obligation of the parties to contribute to the optimum and rational use of the river established in Article 1 of the 1975 Statute was deemed by the Court as the 'cornerstone of the system of co-operation' established therein, the Court considered that:

> "[…] the attainment of optimum and rational utilization requires a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other. The need for this balance is reflected in various provisions of the 1975 Statute establishing rights and obligations for the Parties, such as Articles 27, 36, and 41. The Court will therefore assess the conduct of Uruguay in authorizing the construction and operation of the Orion (Botnia) mill in the light of those provisions of the 1975 Statute, and the rights and obligations prescribed therein". [149]

The Court went on concluding that:

> "Regarding Article 27, it is the view of the Court that its formulation reflects not only the need to reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource, but also the need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development. The Court has already dealt with the obligations arising from Articles 7 to 12 of the 1975 Statute which have to be observed, according to Article 27, by any party wishing to exercise its right to use the waters of the river for any of the purposes mentioned therein insofar as such use may be liable to affect the régime of the river or the quality of its waters. The Court wishes to add that such utilization could not be considered to be equitable and reasonable if the interests of the other riparian State in the shared resource and the environmental protection of the latter were not taken into account. Consequently, it is the opinion of the Court that Article 27 embodies this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development."[150]

Although the Court finally declared that Uruguay had not breached its substantive obligation to contribute to the optimum and rational utilization of the river, in reaching such conclusion, it did not assess whether an appropriate balance was made between the economic interests held by each party and the obligation of protecting the river from any environmental harm resulting from their economic and commercial activities. The decision rendered upon the *Pulp Mills* case has been criticised for eluding any engagement in further elaborations on the concept and content of sustainable development.[151]

[149] *Ibid.*, at paragraph 174-175.
[150] *Ibid.*, at paragraph 177.
[151] In this line, see: Stephens, 'International Courts and Sustainable Development: Using Old Tools', in B. Jessup and K. Rubenstein (eds.), *Environmental Discourses in Public and International Law* (2012) 195, in particular, 231-215.

2.1.1.d. The China - Raw Materials Case

More than a decade after the *Shrimp/Turtle* case, in the 2012 Report of the WTO Dispute Settlement Body on the *China - Raw Materials* case,[152] the Panel established to assess the conformity to WTO law of certain restrictions on the exportation taken by China relative to various forms of bauxite, coke, fluorspar, manganese, silicon metal, yellow phosphorus, and zinc, had again the chance to elaborate on sustainable development.

According to China's point of view, sustainable development required that economic development and conservation must be aligned through the effective management of scarce resources, insofar the term *conservation* as prescribed in Article XX(g) 1994 GATT[153] was applicable to the case as it encompasses the management of a limited supply of exhaustible natural resources over time. China considered that the "export restraints 'relate to conservation' because they are part and parcel of China's measures for managing the limited supply of refractory-grade bauxite and fluorspar, which are exhaustible natural resources".[154] China claimed that this view was in conformity with the principle of sovereignty over natural resources, which is applicable to the case according to Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

This view was upheld by the Panel who further contended that:

> "[…] the principle of sovereignty over natural resources affords Members the opportunity to use their natural resources to promote their own development while regulating the use of these resources to ensure sustainable development. Conservation and economic development are not necessarily mutually exclusive policy goals; they can operate in harmony".[155]

The utterance prescribing that economic development and conservation may be articulated *to operate in harmony* leads to conclude that for the Panel, the objective of sustainable development, as it is referred by the Preamble to the WTO Agreement, requires the integration of both the economic interests of a state with its aim of protecting the environment. This is confirmed by the Panel by recalling that:

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[152] *China – Measures Related to the Exportation of Various Raw Materials* (22 February 2012), WT/DS394,395,398/R (Panel Reports), WT/DS394,395,398/AB/R (AB Reports).
[153] Article XX(g) 1994 GATT provides an exception for measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.
[154] *China - Raw Materials* case (Panel Reports), *supra* note 152, at paragraph 7.364.
[155] *Ibid.*, at paragraph 7.381.

> "Pursuing multi-faceted objectives, usually involves making policy choices and prioritization; the chosen policy depends on, *inter alia*, the choice of particular economic policy objectives (*e.g.*, employment; income; tax etc.); social policy objectives (*e.g.*, education; health; etc.); and, environmental policy objectives (e.g., conservation; pollution reduction; waste management; recycling; biodiversity preservation). These different policy objectives cannot be viewed in isolation; they are related facets of an integrated whole."[156]

It is worthy of attention the different aspects relating to economic, social and environmental issues that, in the Panel's view, can be addressed in the underlying need of balance sought by sustainable development. As such, sustainable development may entail the balance between public policies related to economic and social development and the protection of natural resources. These policies may find themselves protected under the law through the creation of norms and obligations or not, but in either case, the approach must be one of integration rather than one that considers each of them isolated from the others.

2.1.1.e. The Preliminary Ruling of the European Court of Justice in the C-371/98 Case

In the case C-371/98[157] brought before the European Court of Justice by the Queen's Bench Division of the High Court of Justice of England and Wales, it was requested a preliminary ruling in the proceedings pending before the latter, between the Queen and Secretary of State for the Environment, Transport and the Regions, *ex parte* First Corporate Shipping Ltd., to elucidate on the interpretation of Articles 2(3) and 4(1) of the European Council Directive 92/43/ECC (1992) on the Conservation of Natural Habitats and of Wild Fauna and Flora (hereinafter, the Habitats Directive).

The conflict arose when the Secretary of State for the Environment, Transport and the Regions showed to be predisposed to suggest the Severn Estuary as a site eligible for its designation of special area of conservation under Article 4(1) of the Habitats Directive. The First Corporate Shipping Ltd (FCS) - the statutory port authority for the port of Bristol – thought, however, that such designation would have the effect of undermining its investment on the area. The FCS was of the opinion that Article 2(3) of the Directive obliged the Secretary of State to consider the economic, social and cultural requirements and regional and local characteristics when deciding which sites shall be proposed to the

[156] *Ibid.*, at paragraph 7.376
[157] Case *C-371/98*, R. v. Secretary of State for the Environment, Transport, and the Regions, ex parte First Corporate Shipping Ltd. (2000) ECR I-9235.

Commission pursuant to Article 4(1), hoping, therefore, that the balance required by Article 2(3) will prove suffice to change the Secretary of State's mind. The Secretary of State, however, opposed to such interpretation of Article 2(3) in terms that there was no such prior obligation.

The question asked for a preliminary ruling of the Court of Justice of the European Union was whether a member state was entitled or obliged to take account of the considerations laid down in Article 2(3) of the Habitats Directive when deciding which sites to propose pursuant Article 4(1). Although the court replied that member states were neither entitled nor obliged to take account of the balance pointed out in Article 2(3) of the Habitats Directive, it was of its interest to stress that the balance proposed by Article 2(3) could be identified with sustainable development without resorting to intricate arguments, insofar as it required a balance between the objective of the Habitats Directive - the protection of biodiversity and the environment of certain sites within the national territory of the member states - and the national converging, social, cultural and economic interests affected.

This view was also highlighted by the General Advocate,[158] Mr. Léger, who asserted that, the aim of the Habitats Directive reflected the intention of the Community "to comply with the objective of 'sustainable development' in Article 2 of the EC Treaty (now, after amendment, Article 2 EC) and the principle of 'integration' in Article 130r(2) *in fine* of the EC Treaty. The principle of integration now appears in Article 6 EC (formerly Article 3c of the EC Treaty). That Article expressly states that the principle of integration must be capable of 'promoting sustainable development'".[159]

However, the General Advocate further elaborated upon the concept of sustainable development, arguing that it "does not mean that the interests of the environment must necessarily and systematically prevail over the interests defended in the context of the other policies pursued by the community in accordance with Article 3 of the EC Treaty (now, after amendment, Article 3 EC). On the contrary, it emphasizes the necessary balance between various interests which sometimes clash, but which must be

[158] Opinion of Advocate General Léger to Case *C-371/98*, R. v. Secretary of State for the Environment, Transport, and the Regions, ex parte First Corporate Shipping Ltd. (2000) ECR I-9235, delivered on 7 March 2000.
[159] *Ibid.*, at paragraph 5.

reconciled".[160] Sustainable development, in his opinion, is a concept that must be applied accordingly to the principle of integration which "requires the Community legislature to conform with the environmental protection requirements in the definition and implementation of other policies and actions. Integration of the environmental dimension is thus the basis of the strategy of sustainable development enshrined in both the Treaty on European Union and the Fifth Environment Programme".[161]

According to this perspective, implementing the balance provided by sustainable development is, hence, a matter dependent on the principle of integration as established in EU primary law. In particular, Article 6 of the Treaty establishing the European Community provides that environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, with a view to promote sustainable development. The General Advocate argued that the aim of the EU Directive reflected the intention of the member states "to comply with the objective of 'sustainable development'".[162]

From the jurisprudence reviewed above, it is possible to observe that most of the judiciaries considered sustainable development a concept able to express the need of balance between economic, social and environmental aspects. The jurisprudence appears to uniformly consider that the three dimensions of sustainable development are to be mutually reinforced, this is, that all of them must be considered equally. In this sense, the jurisprudence of the adjudicative bodies reviewed is in conformity with the developments that the concept has gone through in the realm of international policy and law under the auspices of the UN.

Out of the analysis of the legal reasoning made by the diverse adjudicative bodies, there is evidence to consider that the need to reach a balance among the different elements integrating sustainable development is not fixed to any category, but can be indistinctly referred to: (i) legal aspects, such as regulations, norms or rights addressing issues of economic, social or environmental nature, as illustrated in the *Pulp Mills* case, the *China*

[160] *Ibid.*, at paragraph 54.
[161] *Ibid.*, at paragraph 57.
[162] *Ibid.*, at paragraph 5.

Raw Materials case or the *Ogoni People* case; (ii) factual circumstances, as the balance pursued on the potential risks that achieving development may pose on social development or the environment, as showed in the *Gabčíkovo-Nagymaros* case or the *Shrimp/Turtle* case; or (iii) a mix of the above, through the balance between the objectives pursued by the law and the economic, social and environmental interests pursued by a state, as illustrated in the Preliminary Ruling of the European Court of Justice to the *C-371/98* case.

2.1.2 The Sustainable Development Narrative of Prevention According to the Jurisprudence of International Courts and Tribunals

The following section argues that, together with the narrative of balance, a narrative of prevention started to blossom in the jurisprudence, however, its utilisation has not been as widespread or consistent as in the case of the former. The narrative of prevention is aimed to articulate the duty of prevention or mitigation of the adverse impacts of economic development onto social development and the environment. The practical side of this narrative is manifest in the sense that, were the balance that sustainable development entails between its three elements fail or is not possible to be achieved, prevention or minimisation of the harm or of the risk of harm that the impairment may have cause, or it is likely to cause, to either its social or environmental elements should be an available recourse. Also, this narrative is thought to give operativity to sustainable development in cases where there are no environmental, social or economic laws are called to be integrated, justifying the action taken by public authorities in order to safeguard social development or the environment.

This section will review two cases where this narrative hasbeen called into the reasoning performed, on the one hand, by the African Commission on Human and Peoples' Rights and, on the other, by an arbitral tribunal constituted according to the rules of the Permanent Court of Arbitration.

2.1.2.a. The Ogoni People Case

The *Ogoni People* case[163] was brought, among other venues,[164] before the African Commission on Human and Peoples' Rights, for it to determine whether the Nigerian military government was causing "*de graves dommages à l'environnement et des problèmes de santé au sein la population Ogoni du fait de la contamination de l'environnement*"[165] because of the exploitation activity that it was carrying out in association with Shell Petroleum Development Corporation, violating, in consequence, the provisions established in the African Charter on Human and Peoples' Rights.[166]

In its 2001 decision on the *Ogoni People* case, the African Commission on Human and Peoples' Rights observed that, in fulfilling the right of their citizens to enjoy the highest attainable standard of physical and mental health and to a general satisfactory environment favorable to their development, as established in the African Charter on Human and Peoples' Rights,[167] states were obliged to halt all their activities that can constitute a threat to their citizens' health and environment.

In the words of the African Commission:

> "*Le droit de jouir du meilleur état de santé physique et mental possible, conformément aux dispositions énoncées dans l'article 16 [al.] 1 de la Charte africaine, ainsi que le droit à un environnement global acceptable et favorable au développement (article 16 [al.] 3)[sic]9, droits dont il vient d'être fait mention, obligent les gouvernements à cesser de menacer directement la santé et l'environnement de leurs citoyens. L'Etat a l'obligation de respecter les droits mentionnés, et cela exige un comportement largement non-interventionniste de la part de l'Etat, par exemple, ne pas exercer, sponsoriser ou tolérer toute pratique, politique ou mesure légale violant l'intégrité de l'individu*". [168]

[163] *Ogoni People* case, *supra* note 2.
[164] For a detailed study on the different litigation avenues this case went through, see: Pigrau and Cardesa-Salzmann, 'Intertwined Actions Against Serious Environmental Damage: The Impact of Shell in Nigeria', 70 *Revista de La Facultad de Derecho PUCP* (2013) 217. In spite of the serious damages caused to the Ogoni people and the Nigerian environment by the oil companies, the authors concluded that "mediante esas acciones entrelazadas, con todo el sacrificio y el desgaste humano y económico que comportan litigios que se alargan durante años en lugares lejanos, y con todas las limitaciones de las distintas vías empleadas, han podido hacer visibles algunas pequeñas grietas en un sistema jurídico internacional diseñado para facilitar las operaciones de las grandes empresas multinacionales y en el que pueden casi siempre hacer valer su poder y su dinero para blindarse frente a cualquier responsabilidad por los daños que causan" (*Ibid.*, at 240).
[165] *Ogoni People* case, *supra* note 2, at paragraph 1.
[166] African Charter on Human and Peoples' Rights, adopted in the 18th *Conferénce d'état et de Gouvernement*, June 1981 in Nairobi, Kenya.
[167] *Ibid.*, Article 16 and 24, respectively.
[168] *Ogoni People* case, *supra* note 2, at paragraph 52.

The African Commission on Human and Peoples' Rights did not challenge that the Nigerian government was entitled to take part on joint associations aimed at the exploitation of natural resources located within its territory. Furthermore, it acknowledged that the product of the extraction of petroleum could contribute to the realisation of the Nigerian people's economic and social rights.[169] Notwithstanding, the African Commission strongly contended that such endeavour would have to be undertaken with due care of the rights of the people, and that states were, to this end, obliged to halt all activities directly affecting its citizens health or the environment.

The stand taken by the African Commission is the outcome of an integrated evaluation of the different economic, social and environmental aspects of the dispute before it. Such evaluation is representative of a sustainable development approach. However, instead of calling for a balance between the diverse aspects converging in the dispute, the African Commission claimed that, when economic endeavours have such substantial adverse social and environmental impacts, the only possible solution is to put a halt on them.

2.1.2.b. The Iron Rhine Case

In the *Iron Rhine* case,[170] the arbitral tribunal, established under the statute of the Permanent Court of Arbitration, managed to integrate sustainable development in the settlement of the dispute brought by Belgium and the Netherlands.

The main issue submitted to the arbitral tribunal referred to the articulation of a balance between the economic interests of Belgium and the social and environmental concerns of the Netherlands over the measures that had to be taken for constructing a train line on the territory of the latter, and who was to bear the costs of it. According to the Netherlands the only way to reactivate the Iron Rhine railway, without failing to comply with its environmental legislation was, together with noise abatement measures, to dig tunnels beneath certain areas. The tribunal argued that the sovereign powers of the Netherlands to establish environmental standards in the area where the works were to be done, were limited by the treaty rights granted to Belgium or the rights that Belgium could be entitled to exercise according to general international law, or other constrains imposed by the law of the European Union applicable to the case. Belgium, recognising the Netherlands

[169] *Ibid.*, at paragraph 54.
[170] *Iron Rhine* case, *supra* note 2.

sovereign powers, contended, however, that its intention to allocate the costs of construction on Belgium turned unreasonable the exercise of the rights of the Netherlands. Hence, it asked the tribunal to allocate the costs of construction, taking into account the rights and obligations established in Article XII of the 1839 Treaty of Separation.

According to its reasoning, sustainable development was to be implemented through the principle of integration, which, entails, together with the integration of environmental protection into the developmental process, the duty to prevent, or at least mitigate, the significant harm to the environment that development may cause. This duty, according to the arbitral tribunal, had become a principle of general international law.[171]

In the words of the arbitral tribunal:

> "59. Since the Stockholm Conference on the Environment in 1972 there has been a marked development of international law relating to the protection of the environment. Today, both international and EC law require the integration of appropriate environmental measures in the design and implementation of economic development activities. Principle 4 of the Rio Declaration on Environment and Development, adopted in 1992 (31 I.L.M. p. 874, at p. 877), which reflects this trend, provides that 'environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm (see paragraph 222). This duty, in the opinion of the Tribunal, has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties. The Tribunal would recall the observation of the International Court of Justice in the *Gabčíkovo-Nagymaros* case that "[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development" (*Gabčíkovo-Nagymaros (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7 at p. 78, para. 140). And in that context the Court further clarified that "new norms have to be taken into consideration, and... new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past" (Ibid.). In the view of the Tribunal this dictum applies equally to the Iron Rhine railway."[172]

According to this paragraph, since the duty to prevent or mitigate damages to the environment is considered a principle of general international law, its compliance could

[171] Some authors have argued that *extra*-legal norms - as it is the case of sustainable development and the principle of precaution - insofar *acknowledged by the court* as a principle "is by definition legal", turning into *bona fide* legal norm which combined with the moral understanding of the justices will become the law in action (P. Orebech et al., *The Role of Customary Law in Sustainable Development* (2005), at 396).
[172] *Iron Rhine* case, *supra* note 2, at paragraph 59.

be required from all states which developmental activities are likely to cause damage to the environment. At its turn, the threshold established does not need for the damage to be materialised, which encompasses, therefore, also to prevent or mitigate potential risks of damage. But, in either case, the damage or the foreseen damage needs to be significant, which according to the ILC Commentary to Principle 2 of the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, significant refers "to something more than 'detectable' but need not be at the level of 'serious' or 'substantial'";[173] i.e. important or large enough to be noticed.

Interestingly, beyond the stand that one may take regarding the proposition to consider the duty to prevent or mitigate damages to the environment to be part of general international law, the tribunal seems to propose that, under the principle of integration, which at its turn is the way to implement sustainable development, a narrative of balance and a narrative of prevention coexist. In this sense, the duty to prevent or mitigate the environmental damage caused by economic activities can be of great assistance to justify public authorities' intervention through the exercise of their regulatory powers there, where the balance between economic, social and environmental issues is broken or cannot be achieved.

Despite of the elaborations made by the tribunal on the two dimensions that the principle of integration can add to the achievement of sustainable development, in the aftermath the tribunal seemed to follow the classical understanding of balance as, at the end, it recognised that "Belgian obligations other than those associated with functionality flow from the fact that the requested reactivation represents an economic development on the territory of the Netherlands, with which the prevention and minimalization of environmental harm is to be integrated"[174] made different and sector-specific allocations of the costs between the parties according with their actual and projected benefits.

There are three concluding remarks to this section:

[173] Report of the International Law Commission, 58th Session, 2006, A/61/10, p. 65, paragraph 2.
[174] *Iron Rhine* case, *supra* note 2, at paragraph 243.

The first is that the *Ogoni People* case and the *Iron Rhine* case represent an improvement in the way that most of international adjudicative bodies approached to sustainable development. The contribution of these cases was to provide sustainable development with a more practical side compared to that represented by the narrative of balance, which in practical terms can be difficult to address.[175] Indeed, the duty to prevent or mitigate environmental damage give rise to a narrative that could be useful to justify measures taken by states aiming to that end, articulating on an integrated manner issues of economic, social and environmental nature.

Secondly, although the approach taken by the *Iron Rhine* case is a step forward in many regards, here is contended that the reach given to the duty to prevent or mitigate falls short as it does not include the risks of damage to social development together with those that can be posed to the environment. Indeed, such duty, which according to the tribunal was to be considered a principle of general international law, was only aimed to prevent or mitigate the potential damages that developmental activities may cause onto the environment, whereas damages to social development or indigenous and local communities were utterly disregarded. Of course, someone may argue that there was no need to include these cases in the principle described by the arbitral tribunal as there are no indigenous communities to protect in the territory of the Netherland, and no local communities were to be affected by the developmental project. However, as it will be argued in the following section there are two limitations that better explain the tribunal's overlook the threats that economic endeavours may also pose to social development. Indeed, at the time the decision of the tribunal was issued, the trend was, on the one hand, to consider sustainable development a by-product of international environmental law, which implied, above all, that protection to the environment had to be integrated in economic development, while, on the other, that social development was included in economic development.

Taking this into account, this work contends that the narrative of prevention has to overcome such limitations and to be able to articulate the need to prevent or, at least mitigate, the potential harms that economic endeavours may cause upon the environment, social development, and indigenous and local communities.

[175] Morrow, 'Rio+20, the Green Economy and Re-Orienting Sustainable Development', 14 *Environmental Law Review* (2012) 279, at 281.

Finally, out of the reviewed cases, it can be argued that, as well as in the case of the narrative of balance, there is no fix category upon which to implement the narrative of prevention. This means that the narrative of prevention or mitigation of the potential damages that economic endeavour can cause to the environment can be articulated between aspects of legal nature, such as the *Ogoni People* case showed, or considering only factual circumstances, as the risks that the reactivation of the railway supposed to the environment as showed by the *Iron Rhine* case, or a mix of these two.

2.2 Limitations in Current Understandings on Sustainable Development

The following examines three limitations that follows from the survey of jurisprudence made in the previous sections. These limitations are intended to highlight the weak spots of sustainable development as handled by international adjudicative bodies in disputes between states. However, if the strategic use of sustainable development that is proposed in this thesis is successfully received in legal practice, it is expected that these limitations will have to be taken into account and overcome both by legal operator, judges, and arbitrators.

The limitations that will be examined in the following pages are: first, the existence of an environmental bias affecting sustainable development, clearly contributing to hinder social development concerns; second, there is an unsustainable use of economic development as proxy to social development, which in fact has the same effect of hindering social development issues; and, third, that there is a reluctance of tribunals to directly address the practical effects of the concept of sustainable development in the settlement of international disputes.

2.2.1 The Environmental Bias Affecting Sustainable Development

This limitation acknowledges that sustainable development has been largely discussed and debated by prominent scholars in the field of international environmental law, where it has found ample support as this field certainly facilitates the understanding of sustainable development, at the time that it provides a safe nest for it to keep developing. Indeed, recent works on the field of international environmental law and sustainable

development had asserted that "the concept of sustainable development has entered the corpus of international customary law, requiring different streams of international law to be treated in an integrated manner";[176] others, not going this far, have attached to sustainable development the legal status of *concept* within a three-category classification of international environmental norms, where the other two are principles and rules.[177] However, as stressed by French, "sustainable development is concerned not only with environmental protection, but also with wider issues of social development and cultural advancement".[178] This is the view that is supported in this study as well.

Having pointed this out, an issue related to the developmental stage in which sustainable development is observed to be, is related to the environmental bias that covers every discussion related to it. By this token, it is observed that the argumentative angle most commonly adopted in the reviewed cases is related to the environmental aspect of sustainable development and, as such, the reasoning of the adjudicative bodies is observed to oscillate between two ends: one that could be identified with a full environmental perspective of sustainable development, and another that is better aware of the three elements or dimensions that are intended to be integrated by the concept of sustainable development: economic development, social development, and the environment protection.

A full environmental perspective of sustainable development will be that of the arbitral tribunal set to decide on the *Iron Rhine* case; while a fully integrated approach to sustainable development is that deployed in the opinion delivered by the General Advocate in the *Habitats Directive* case brought before the Court of Justice of the European Union.

The scarce account on the social dimension of sustainable development, however, can be explain, firstly, because in the late 1990s sustainable development was pervaded by a sort of environmental bias – and it's likely that today some may contend that this perspective has not changed – being largely conceived to be a by-product of international environmental law.[179] Consequently, back on those days, referring to sustainable

[176] Sands et al., *supra* note 131, at 219.
[177] P.-M. Dupuy and J. E. Viñuales, *International Environmental Law* (2nd ed., 2018), at 59-60.
[178] French, *supra* note 44, at 56.
[179] The understanding of sustainable development as an outcome of environmental law and, therefore, the inclusion of social development as an element of sustainable development, would only appear with the

development was to be referring to the synergy between economic development and environmental protection.

Addressing sustainable development as derivative from international environmental law, may have, however, a practical side to the extent that such approach could benefit from the maturity of this regime, having better odds to be related to norms of general international law. Such is the case, for instance, when relating sustainable development to the precautionary principle/approach, in which behalf, all possible means to achieve an objective should be considered in an environmental impact assessment.[180] Recently, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea argued in its Advisory Opinion No. 17 that "the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law".[181]

Secondly, recalling the state-of-the-art relating to sustainable development in the early 2000s, it could be argued that social development was mostly implicitly included within economic development. As it is explained by the Vice-President to the *Gabčíkovo-Nagymaros* case, Judge Weeramantry, at the very beginning of his separate opinion, if it weren't for the account of developmental aspects affecting upon the project, Hungary claims based on possible environmental harm would prove conclusive,[182] in other words, even though social concerns were not expressly mentioned, they were actually considered but not differentiated from the economic interests sought by the parties in the treaty.

The recognition of three equally important elements intersecting on the concept of sustainable development, proves to be crucial as it allows curving the adverse consequences of economic development to achieve better social and environmental

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adoption of UN General Assembly Resolution S-19/2, A/S-19/29, 19th Special Session Agenda Item 8, 11th Plenary Meeting, 28 June 1997. Indeed, as explained elsewhere in this study, the interrelation between economic growth and environmental protection was firstly evidenced in the 1972 Stockholm Conference and replicated later in the 1992 Rio Declaration, not being until the 2002 World Summit for Sustainable Development, that the social dimension of sustainable development was recognised and strengthen as a separate element from economic development. In this line, the Advocate General Léger argued that sustainable development was "a fundamental concept of environmental law" (Case *C-371/98* (Advocate General), *supra* note 158, at paragraph 56).

[180] International Law Association New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2 April 2002, paragraph 4.2(c).

[181] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Reports 2011, *supra* note 118, at paragraph 145.

[182] *Gabčíkovo-Nagymaros* case (Separate Opinion of Vice-President Weeramantry), *supra* note 122, at 88.

outcomes. This idea was strengthened in the separate opinion of Judge Weeramantry. Throughout the narrative he developed, it is observed a less economic-based perspective with regard to sustainable development. Differing from the words of the ICJ, he was of the idea that sustainable development was a principle enabling the ICJ to balance "the environmental considerations and the developmental considerations raised by the respective Parties",[183] suppressing the economic connotation from the developmental concerns of the parties, and therefore, from his understanding of sustainable development.

The same can be observed in the *Shrimp/Turtle* case, where a bias towards considering sustainable development as a by-product of environmental law is perceived in the AB statement regarding the awareness claimed by the signatories to the WTO Agreement as to "the importance and legitimacy of environmental protection as a goal of national and international policy… [As much as the Preamble to the WTO Agreement] explicitly acknowledges the objective of sustainable development".[184] The Preamble to the WTO Agreement reaffirms such reading as for it recognizes that the objective of sustainable development entails for the contracting parties "seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development".[185] In spite of the recognition for sustainable development to encompass a threefold dimension, there is no mention regarding to the needs of social development which, together with environmental protection, can also be use as legitimate arguments for curving the way trade relations and economic endeavour are carried out.

2.2.2 The False Friends: Social Development and Economic Development

Addressing the problem of the false friends as a limitation wants to stress the lack of individuality that bears upon the social dimension of sustainable development when it is thought as a by-product of economic development or economic growth. It is claimed here, that a perspective where social concerns are included as part of economic development is unsustainable. Indeed, whereas economic development is related to measurable, quantitative profits, social development cannot be a proxy to it, because whenever social

[183] *Ibid.*, at 88.
[184] *Shrimp/Turtle* case (AB Report), *supra* note 5, at paragraph 129.
[185] Preamble to the WTO Agreement.

development is thought in economic terms, its realisation turns to be dependent on the effects economic growth has upon it.

This problem is evidenced and well-illustrated in the *Gabčíkovo-Nagymaros* case, where the court, in spite of arguing that social and environmental objectives sought by the parties were of equal relevance and that the fulfilment of both of them shall guide their new obligations,[186] did not include the reference to social development as a third element of sustainable development, when arguing that "[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development".[187] The feeling of something missing arises almost immediately, and questions about the actual relevance and the place bearing by social development arise.

The same narrow approach is found in the *Iron Rhine* case, where the ICJ acknowledged that the integration of environmental concerns into policies and activities seeking economic development were crucial for the process of development. A look into the references the ICJ use to build its argument would be sufficient to conclude that it was not taking social development and separate from economic development. Indeed, it only referred to the achievements made in the 1972 Stockholm Conference and the 1992 Rio Declaration, time where no explicit reference as to sustainable development was also about integrating social development was made yet. Moreover, the arbitral tribunal did its own the words used by the ICJ to refer to sustainable development in the *Gabčíkovo-Nagymaros* case.

2.2.3 The Tepidity in addressing Sustainable Development within International Adjudication

This last section wants to build upon the opinion of the General Advocate to the Case C-371/98, as to the acknowledgement that the objective of sustainable development, in his words, does not mean "that the interests of the environment must necessarily and systematically prevail over the interests defended in the context of the other policies pursued by the community [...] On the contrary, it emphasizes the necessary balance

[186] *Gabčíkovo-Nagymaros* case, *supra* note 1, at paragraph 135.
[187] *Ibid.*, at paragraph 140.

between various interests which sometimes clash, but which must be reconciled".[188] Indeed, this remark aims to stress that due attention must be paid to the three pillars of sustainable development as elements that need to be interrelated and integrated. This is, to acknowledge that these three elements are not to be seen as alternative, but as mutually reinforcing.

In both the *Gabčíkovo-Nagymaros* case and the *Pulp Mills* case, the ICJ showed to be willing to elaborate upon the ability of sustainable development to shape the obligations agreed by the parties, this was handled with too much cautious, and left on the parties the final assessment of the extent to which sustainable development was to perform the updating role onto their mutual obligations. Take for instance the *Gabčíkovo-Nagymaros* case, where despite the relevance sustainable development was argued to have according to the Court, inasmuch as it was regarded as the benchmark that the parties must apply to *look afresh* their obligations, no further elaboration as to the exact requirements of sustainable development beyond the recognition of its aptitude to reconcile economic and environmental concerns was made.[189] In the words of the court, the obligations the treaty have imposed to the parties "must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses"[190], and the only and rather conspicuous guideline given by the court to the parties in order for them to negotiate their obligations was to follow the *pacta sunt servanda* rule.

Similarly, in the *Pulp Mills* case, the court argued once again that the need to reconcile reconciling economic development with the protection of the environment was aptly expressed in sustainable development.[191] And, as it did in the *Gabčíkovo-Nagymaros* case, it declared that bearing upon the parties was the duty "to find an agreed solution that takes account of the objectives of the Treaty".[192] The Court went on explaining that "it is by co-operating that the States concerned can jointly manage the risks of damage to the

[188] Case *C-371/98* (Advocate General), *supra* note 158, at paragraph 54.
[189] Sands et al., *supra* note 131, at 220.
[190] *Gabčíkovo-Nagymaros* case, *supra* note 1, at paragraph 141.
[191] *Pulp Mills* case, *supra* note146, at paragraph 76.
[192] *Ibid.*, at paragraph 76. The complete utterance drafted by the Court in the *Gabčíkovo-Nagymaros* case was as following: "It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses (*Gabčíkovo-Nagymaros* case, *supra* note 1, at paragraph 141).

environment that might be created by the plans initiated by one or other of them",[193] and remained silent as to determine how sustainable development may affect their reciprocal obligations.

Different is the reasoning developed in the *Iron Rhine* case. Here, the arbitral tribunal was more active in evaluating the different interests of the parties, allocating their costs and burdens accordingly. Indeed, the arbitral tribunal recognised that "Belgian obligations other than those associated with functionality flow from the fact that the requested reactivation represents an economic development on the territory of the Netherlands, with which the prevention and minimalization of environmental harm is to be integrated",[194] and made sector-specific allocations of the costs between the parties according with their actual and foreseen benefits.

Concluding Remarks

Even though sustainable development was primarily a concept forged in the realm of international policy, it has been gradually brought to the attention of international adjudicative bodies. This has contributed for sustainable development to grow as a legal concept,[195] integrating international law, and which content and effects have been shaped in international jurisprudence.

This Chapter argued for the existence of two narratives that are considered to be at the core of sustainable development. The study performed, reviewed the jurisprudence of different international adjudicative bodies to determine the extent these narratives could be found in interstate dispute settlement as well as to provide them with content, looking forward to their application in the litigation of disputes involving private entities.

The study showed that, in the great majority of cases, international adjudicative bodies such as the International Court of Justice, the Appellative Body of the World Trade Organisation, or the Court of Justice of the European Union, considered that sustainable development was a concept calling for the achievement of a balance between economic, social and environmental aspects. As it was argued, this narrative of balance did not refer

[193] *Pulp Mills* case, *supra* note146, at paragraph 77.
[194] *Iron Rhine* case, *supra* note 2, at paragraph 243.
[195] Dupuy and Viñuales, *supra* note 177, at 218.

to any particular category, being able to encompass the balance of norms, rights or regulations related to economic, social or environmental issues; factual circumstances, interests and objectives; or between economic, social and environmental aspects of both legal and fact-based nature.

The study also found that a narrative of prevention could be evidenced, particularly, in the decisions issued upon the *Ogoni People* case and the *Iron Rhine* case. This narrative aims to articulate the need to prevent or, at least mitigate, the potential harms that economic endeavours may cause upon the environment, social development, and indigenous and local communities. As well as in the narrative of balance, there is no fix category upon which to implement the narrative of prevention, meaning that it could be articulated between aspects of legal nature, such as the *Ogoni People* case showed, or considering only factual circumstances, as the risks that the reactivation of the railway supposed to the environment as showed by the *Iron Rhine* case, or a mix of these two.

The practical side of the narrative of prevention is manifest in the sense that, were the narrative of balance cannot be articulated being, either, because the balance that sustainable development entails between its three elements fails, or is not possible to be achieved, prevention or mitigation of the harm or risk of harm to the environment, social development or indigenous or local communities should be a recourse available to public authorities.

Despite of the findings reached as to the use of the concept of sustainable development in international adjudication, there are some limitations to overcome for it to be use at large in litigation. These limitations were addressed and elaborated separately and refers to three flaws observed in the approach taken on sustainable development by the different adjudicative bodies that were put to settlement the cases reviewed in this Chapter. The first limitation is referred to the environmental-centred focus adopted to approach to sustainable development. The second limitation is referred to the perspective that assumes social development as included in economic development. Both of these limitations have the effect to make social development invisible to the equation that sustainable development is expected to represent, i.e. the balance between economic, social and environmental aspects. Were these two limitations to persist, the advantages envisaged in sustainable development for it to be strategically use in litigation will never reach their maximum. The third limitation wanted to highlight that, even though tribunals are willing

to give space to sustainable development to contribute to the adjudication process, they have been too cautious, providing little light on the practical side of the concept.

PART II

The Strategic Use of Sustainable Development in Disputes Involving Transnational Companies in the Field of Deep Seabed Mining

The narratives of balance and prevention are the backbone of sustainable development. Both international policy and jurisprudence have contributed to the emergence and evolution of these narratives as well as to their strengthening in international law. Tackling directly the overall objective of this study, the following chapters will explore the extent to which the sustainable development narratives of balance and prevention can be articulated in the litigation of disputes confronting a transnational company against a public authority – being a state or an international organisation – whose responsibility is sought to be determined for having taken a measure which is allegedly causing the impairment of the former's rights under international law. As it has been pointed out earlier in this work, this objective will be tested in disputes brought by private entities before the international adjudicative bodies established for the settlement of disputes related to deep seabed mining in areas beyond national jurisdiction (Chapter 3 and 4) and foreign investment (Chapter 5 and 6 of Part III).

The different of Part II and Part III lays in the main method of reasoning according to which the analysis in each of them is performed. While the main method of reasoning used in Part II is deductive reasoning as there is no jurisprudence to follow yet, on the interpretation or application of international law regulating the activities of deep seabed mining in areas beyond national jurisdiction, Part III relays more in inductive reasoning applied upon awards rendered by international arbitral tribunals in investment treaty arbitrations.

Although not a norm of international law, following Lowe's findings, sustainable development may purport the role of interstitial norm; this is, an element of the adjudicative process aimed to aid judges to perform their adjudicatory task.[196] Such role is strengthen if considered the global interest character that sustainable development has

[196] See, in detail: Lowe, *supra* note 3.

within the international system. Considered a global interest of the international community, sustainable development is expected to permeate through all activities performed transnationally, and to influence the application of the regulations contained in the international legal frameworks governing such activities.

According to this line of thoughts, it is argued that the role of the narratives of balance and prevention of sustainable development within international law is to inform the application of international norms and obligations. As such, recalling the words of Birnie, Boyle and Redgewell, sustainable development may not always entail "a preservationist approach but a value judgment that may be development-oriented".[197] Indeed, sustainable development has added elements to assess the behaviour of all different kinds of participants when engaging in transnational activities, joining, therefore, the efforts made internationally through other mechanisms, towards the same end.

Part II aims to evaluate the aforementioned role claimed for sustainable development narratives and their ability to adequately integrate social and environmental issues in disputes arising in the field of deep seabed mining activities in the Area.

To this end, it will be argue that the sustainable development narratives of balance and prevention provide useful argumentative resources for public authorities to build coherent legal reasonings, capable to motivate measures adopted to balance converging economic, social and environmental aspects in the realms of deep-sea mining and foreign investment, or to justify the measures adopted to prevent or mitigate the adverse social or environmental impacts of the activities carried out by transnational companies in these realms. As it will be argued, these narratives are expected to constitute a handful tool for adjudicative bodies to assess the behaviour of non-state participants, taking into account all economic, social and environmental aspects converging in the disputes before them.

Recalling the ultimate goal of this research, which is to articulate sustainable development as a coherent narrative from where to scrutinise the activities carried out in a transnational basis by transnational companies, as much as they have *jus standi* to personate before international adjudicative bodies for the protection of their rights and interests, it should also the opportunity to assess their behaviour according to international law standards,

[197] Birnie, Boyle and Redgwell, *supra* note 4, at 385.

and to accommodate their activities in conformity with the global public interests of the international community. As pointed out by Stephens, "[i]nternational courts and tribunals have a privileged role and responsibility in advancing the discourse of sustainable development".[198]

The following chapters are sought to show the existence of a gap where the strategic use of sustainable development could be argued to find a place in litigation of DSM- and foreign investment-related disputes. Using the narratives of balance and prevention in litigation would prove to assist the adjudication process in the application of international law norms concerning to the operators that are developing their activities in the Area or within the borders of a host state according to international investment treaties.

In both deep-sea mining and foreign investment regimes, the private sector can carry out activities that may, eventually, rise social and environmental concerns about the risks they may pose, on the one hand, to the common heritage of mankind and the marine environment and, on the other, to social development, indigenous and local communities and the environment. In each regime, public authorities are called to look for a balance between the converging economic, social and environmental interests, and to adopt the necessary measures to prevent or mitigate the adverse effects of deep-sea mining or foreign investment activities when such balance is impaired or not possible to be reached. The choice of deep-sea mining and foreign investment as adequate settings where to test the thesis of this work, responds precisely to the interactions that these regimes allow to the parties taking part in them.

Coming to this point and before beginning the analysis that has been proposed above, it is necessary to explicit what, in the author's opinion, brings the deep seabed mining and the foreign investment regimes together or, in other words, what are the characteristics that are shared to both regimes that make them adequate settings to evaluate the thesis that is supported in this study. To this regard, four characteristics will be briefly pointed out. These characteristics relate to (i) the participants that are capable to engage in activities under one regime or the other, (ii) the similarity between the organisational

[198] Stephens, 'Sustainability Discourses in International Courts: What Place for Global Justice?', in D. French (ed.), *Global Justice and Sustainable Development* (2010) 39, at 46.

structures in which these participants develop their activities, (iii) the possible social and/or environmental impact that these activities may cause and the consequent exercise of regulatory or police powers by the relevant public authority, and (iv) the international character of the mechanisms established for the settlement of disputes arising out of such exercise of authority.

(i) Participants

Commonly, under the rules of BITs or IIAs it is permitted to all nationals of a signatory state to carry out investments in the territory of any other signatory state, and vice versa. The category is broad, ranging from natural persons to transnational companies to state-owned enterprises and public-private partnerships.[199]

At its turn, the legal framework for DSM provides that the activities in the Area – the seabed and subsoil beyond national jurisdiction - will be carried out by the Enterprise and in association with the International Seabed Authority by states parties to the LOSC, or state enterprises or natural or juridical persons which possess the nationality of states parties or are effectively controlled by them or their nationals, when sponsored by such states, or any group of the foregoing,[200] which includes, certainly, international organisations and public-private partnerships as well. As such, the participation in DSM activities is slightly broader than that envisaged in foreign investment regimes as the former also includes states individually considered, international organisations, and under joint venture agreements by the Enterprise and developing states.

Interestingly to this study, common to both regimes is the participation of natural and juridical persons, state-owned corporations, and public-private partnerships. In both cases, a national from a state crosses the territorial borders to engage in economic or industrial activities elsewhere. The difference is that in the case of foreign investment 'elsewhere' will be the territory of another sovereign state, whereas in the case of DSM it will be an area where there is no such thing as sovereignty or property rights to exercise over any resources[201] found deep down in the Area.[202] 'Elsewhere' or the issue of

[199] See: M. Sornarajah, *The International Law on Foreign Investment* (3rd ed., 2010), at 60-65.
[200] Article 153(2)(a) and (b) LOSC.
[201] Article 133(a) LOSC defines resources as "all solid, liquid or gaseous mineral resources *in situ* in the Area or beneath the seabed, including polymetallic nodules".
[202] The legal status of the Area and its resources is found in Article 137 LOSC.

sovereignty, is not relevant yet, as what matters to this point is that in both cases there is an alien whose property must be respected and protected, while, in turn, this alien must undertake and accept to observe the rules and regulations of the place where s/he is carrying out her/his activities.

The legal framework regulating in each case the endeavour of this alien, will stem both from national and international law. Indeed, in the case of foreign investment, the foreign investor will have to comply with the municipal law of the host state; whereas, generally, at the international level, BITs and IIAs will entitle the investor with rights aimed to protect its investment, rights which in case of being violated by the host state can be enforceable before international adjudicative bodies. Moreover, developments in general international law will affect the rights granted to the investor under the relevant BIT or IIA, changing from time to time the expectations foreign investors may have regarding the enforceability of their rights.

On the other hand, albeit there is no clear cut for the case of DSM as to whether international law applies directly to private entities operating in the Area, taking into account that in many respects rules, regulations and procedures adopted by the ISA are directly applicable to the legal relation with the contractor, the stand takes side with the argument holding that international law is applicable to private entities, at least in an indirect fashion. This caveat is warranted to distinguish it from the position arguing that the LOSC itself applies directly to private entities, which is less tenable since the Seabed Disputes Chamber has already ruled out this possibility.[203] As to the application of municipal law, according to the DSM regime all private entities are expected to observe national legislation and regulations on DSM. The obligation to observe national legislation on DSM stems from the sponsorship-based regime created for allowing private entities to enter into the realm of international law on DSM and DSM activities according to the rules referred to above. Corollary to the obligation of the contractor, is the obligation bearing upon sponsoring states to enact the law or adopt the measures necessary and appropriate to ensure that activities in the Area are carried out in

[203] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Reports 2011, *supra* note 118, at paragraph 108.

conformity with the LOSC and to ensure that the sponsored entity engaging in DSM activities will comply with these legislation and administrative regulations.[204]

(ii) The Organisational Structure

In both regimes the activities of the participants take place within a structure which is organised in political, legal and economic terms. The structure in which foreign investment is carried out is that of sovereign states, whereas for DSM activities, Part XI of the LOSC establishes the International Seabed Authority, an international organisation composed by all state parties, which is mandated to organise and control activities in the Area.[205] To this end, the LOSC has endorsed the ISA with powers and functions, which exercise has been politically organised among the different organs of the ISA. As states do through legislation, the ISA is also entitled to adopt rules, regulations and procedures in order to administering activities in the Area.

(iii) The Possible Social and/or Environmental Impact of the Activities and the Exercise of Regulatory or Police Powers

The potential social and environmental impacts that DSM and foreign investment activities may cause will be addressed and discussed at large in the following chapters. Although these impacts are different in concept and scale, and the evaluation of the risks of damage or of actual damage, will differ provided on the activity concerned, without doubts, what is common to both regimes is the need to balance the economic interests these activities entail with their potential or actual social and environmental costs, and to prevent, minimise or contain any of such impacts. This can be done *ex ante* through the adoption of adequate regulations, or *ex post* through the exercise of the powers that the relevant public authorities to each regime have at hand. Therefore, the potential affectations on investments attributed to regulatory action or the exercise of police powers as exercised by the relevant public authority of each regime, is a fact to be considered by both foreign investors and contractors carrying out activities in the Area – which, to some extent, can also be considered some category of foreign investors.

[204] See: Article 139(1) and (2); *Ibid.*, at paragraph 107-116.
[205] Article 157(1) LOSC.

Both regimes envisage the exercise of regulatory and police powers by public authorities in order to curve the negative impacts of the activities performed by foreign investors and DSM contractors. Hence, on the one hand, the host state is expected to act on behalf of its population, protecting its environment and natural resources as well as ensuring that activities within its jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.[206] As pointed out by Sornarajah "[t]he state, in theory, must act in the public good as it perceives it to be at any given time".[207] On the other hand, concerning to DSM activities, the ISA is expressly mandated to act on behalf of mankind[208] and to protect the marine environment through the adoption of rules, regulations and procedures for, *inter alia*: "(a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities; (b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment".[209] Different provisions of the LOSC address other contingencies that may affect coastal states during DSM activities.[210]

As noted earlier, the ISA is also in charge of the control of the activities carried out in the Area, hence it "shall exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of this Part and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved in accordance with paragraph 3 […] The Authority shall have

[206] See: Principle 2 of the Rio Declaration.
[207] Sornarajah, *supra* note 199, at 282.
[208] Article 137(2) LOSC.
[209] Article 145 LOSC.
[210] See: Article 142 LOSC on the rights and legitimate interests of coastal states; Regulation 34 of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters (RPN), ISBA/19/C/17, 22 July 2013); Regulation 36 of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (Decision of the Assembly of the International Seabed Authority relating to the regulations on prospecting and exploration for polymetallic sulphides in the Area (RPS), ISBA/16/A/12/Rev.1, of 15 November 2010); Regulation 36 of the Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts (Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (RCF), ISBA/18/A/11, of 22 October 2012); and Regulation 4 of the Draft Regulations on Exploitation (Draft Regulations on Exploitation of Mineral Resources in the Area (DRE), prepared by the Legal and Technical Commission of the International Seabed Authority, ISBA/25/C/WP.1, of 25 March 2019).

the right to take at any time any measures provided for under this Part to ensure compliance with its provisions and the exercise of the functions of control and regulation assigned to it thereunder or under any contract. The Authority shall have the right to inspect all installations in the Area used in connection with activities in the Area".[211]

(iv) Dispute Settlement Mechanisms

Disputes concerning a varied range of matters can emerge from the activities of DSM and foreign investment. Relevant to the study that will be developed in the following chapters, is the fact that both foreign investors and contractors aggrieved as the result of the exercise of regulatory or police powers, can bring a claim and seek remedy for the violations of their rights before an international adjudicative body.

Indeed, on the one hand, host states' behaviour having as consequence the violation of foreign investors' rights warranted by the relevant IIA, will fall under the jurisdiction of the dispute settlement mechanism expressly indicated in the same treaty, which in most cases will be investment arbitration. Therefore, foreign investors, instead of invoking remedies for the violations to the rights established in the investment treaty in local courts and tribunals, will do so through international adjudicative bodies,[212] unless of course otherwise agreed. Concerning to the DSM regime, together with the creation of the International Tribunal for the Law of the Sea, Article 14 Annex VI LOSC provides for the creation of a Seabed Disputes Chamber composed of eleven members selected from among the members of the Tribunal.[213] The Seabed Disputes Chamber will have exclusive jurisdiction to know about disputes between the ISA and a contractor concerning, among others matters, the responsibility and liability of the former for the adoption of measures affecting the rights granted to contractors according to the legal framework for DSM.

[211] Article 153(4) and (5) LOSC.
[212] Sornarajah, *supra* note 199, at 276.
[213] Article 35 Annex VI LOSC.

Chapter 3

The Framework for Deep-Sea Mining in Areas Beyond National Jurisdiction

The aim of this Chapter is to introduce, to the extent necessary for the purposes of the overall study, the interplays that are observed to occur between the different participants to the regime of deep seabed mining, as well as to provide an account on the key principles governing the legal framework designed for carrying out activities in the Area, which are the common heritage of mankind and the protection of the marine environment. The study will also provide a classification of the obligations bearing upon contractors related to the protection of the common heritage of mankind and the marine environment.

In this sense, the following pages will set the scenario where the sustainable development narratives of balance and prevention will be implemented. Therefore, this descriptive framework is relevant for, afterwards, turn to the evaluation of the thesis, this is, to examine whether the narratives subjacent to sustainable development are able to be strategically used in litigation; particularly, in this case, in the litigation of disputes arising from deep-sea mining activities between a private entity and the International Seabed Authority, and the effects that they may purport, if any, to the determination of the responsibility and liability of it.

This Chapter is divided into four sections. The first section provides a brief account on the framework according to which deep seabed mining activities are carried out in the Area, and the interplay observed between its participants and the governing principles of the regime. The second section approaches the concept of common heritage of mankind and the stand that will be taken in this study with regard to the content of such concept. The third section puts the concept of marine environment forward and stresses its relationship with the protection of the common heritage of mankind, contending that all damages caused to the common heritage of mankind constitute a damage to the marine environment. This section also highlights the progressive nature of the regime that has been established for the protection of the marine environment. The fourth section aims to address the obligations that the framework designed to carry out deep seabed mining activities establishes upon contractors. To this end, obligations concerning the protection

of the common heritage of mankind will be examined, followed by those aimed to the protection of the marine environment.

3.1 The Framework for Deep Seabed Mining

The machinery designed to administer and manage the common heritage of mankind is embodied under the International Seabed Authority[214] (hereinafter, indistinctly the Authority or the ISA), an international organisation entrusted to act "on behalf of mankind as a whole".[215] The organs of the Authority are: the Assembly; the Council, which has two organs that work as commissions, one occupied with the economic planning and the other with providing legal and technical advice; the Secretariat; and the Enterprise.[216] Although in-depth analysis of these organs will not be offered in the following pages, reference to them will be made as needed a long the study.

The functions and powers of the Authority are found in Part XI and its related Agreements, Regulations and other relevant instruments. Overall, the Authority will have all "incidental powers as are implicit in and necessary for the exercise of those powers and functions with respect to activities in the Area".[217]

The system created by the LOSC for carrying out activities in the Area allows for public and private entities - including natural and juridical persons – to engage with deep seabed mining (hereinafter, DSM). Indeed as prescribed in Article 153.2 LOSC activities in the Area can be carried out by the Enterprise, which is the operating arm of the Authority; or, in association with the Authority, by states parties, or state enterprises or natural or juridical persons which possess the nationality of states parties or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing.

Allowing non-state entities to engage in DSM implies for them to be bound, at least indirectly, by rules of international law, particularly, those related to the law of the sea and other rules of international law not incompatible with the LOSC, providing, therefore,

[214] Article 157.1 LOSC.
[215] Article 153.1 LOSC.
[216] Article 158. 1 LOSC.
[217] Article 157.2 LOSC.

an almost unique setting of study.[218] As such, the power given to the Authority for administering and controlling the activities in the Area, may also be exerted upon these private entities that are – to some extent - extraneous to international law.

The functions that the Authority will exercise in relation to the activities carried out in the Area have great relevance in terms of the balance the Authority would have to strike between the interests it is entitled to protect relating to the common heritage of mankind and the marine environment, and those belonging to the contractors, for whom the aforementioned interests may entail scarce significance *vis-á-vis* the interests related to their investment.

The protection of the interests of investors in DSM was an issue from the beginnings, as Nandam argues, at the time of negotiating the LOSC some issues arose relating to what he called 'real concerns of States' that were different from those issues merely political or ideological. One of these latter concerns was, of course, the fear of developing countries for seeing their mineral extracting industry undermined by the new source of minerals that purports the Area, while one of the so-called real concerns of states was related to "the decision-making procedures in the organs of the Authority which may not be adequate to protect the interest of investors in seabed mining".[219] This distinction is relevant to the extent that it shows the input of the private sector in the negotiations of the regime as well as the factual division between developing and industrialised states.

Before the entrance into force of Part XI, the principle of freedom of the high seas governed deep seabed mining,[220] which of course did not provide that much certainties

[218] The setting put forward by the LOSC in relation to non-state entities is only comparable to that developed by international investment law. As Brown argues, the legal regime to the deep seabed mining "is better regarded as a legal regime *sui generis*, founded on a convention governed by international law but extending also to cover the rights and remedies of natural or juridical persons which, though lacking international personality, have entered into contractual or other arrangements with the Authority" (E. D. Brown, *Sea-Bed Energy and Minerals: The International Legal Regime Vol. 2* (2001), at 357).

[219] Nandam, 'Administering the Mineral Resources of the Deep Seabed', in D. Freestone, R. Barnes and D. M. Ong (eds.), *The Law of the Sea: Progress and Prospects* (2006) 75, at 77.

[220] Thereafter, as Scovazzi has argued, the common heritage of mankind would be a 'third kind of regime' among the freedom of the high seas and states' sovereign-related principles applicable to the territorial seas (Scovazzi, 'The Seabed Beyond the Limits of National Jurisdiction: General and Institutional Aspects', in A. G. Oude Elferink and E. J. Molenaar (eds.), *The International Legal Regime of Areas Beyond National Jurisdiction: Current and Future Developments* (2010) 43, at 43). In a similar sense, Tanaka describes the common heritage of mankind as the antithesis against the principle of sovereignty and the principle of freedom of the high seas, endorsing to humankind a 'transspatial' and 'transtemporal' features. Indeed, as the author expresses, "[i]t is transspatial because 'mankind' includes all people on the planet. It is transtemporal because 'mankind' includes both present and future generations. It would seem to follow that the common interest of mankind means the interest of all people in present and future generations" (Y.

or advantages to investors either, therefore, for many the creation of the Authority came "to provide an essential safeguard for investors who intend to undertake long-term development of the resources of the deep seabed areas by giving them exclusive rights to the resources of those areas for the duration of their contracts or licenses with the Authority".[221] Illustrative of the better situation contractors were found after the creation of the ISA, is their possibility to renew their contracts for the exploration held with the Authority for unlimited times. The duration of contracts for exploration of resources in the Area is of 15 years, however, the contractor may apply for extensions for periods of no more than five years each, provided upon the approval of the Council – the executive power of the Authority.[222] To this end, the contractor must prove, either, that it has made efforts in good faith to comply with the requirements of the plan of work, but for reasons beyond its control, it has been unable to complete the necessary preparatory work for proceeding to the exploitation stage or, that the prevailing economic circumstances do not justify proceeding to the exploitation stage.[223] On the one hand, contracts provide contractors with exclusive rights to explore the area covered by the plan of work for exploration in respect to a specific resource. The Authority, on the other hand, must ensure that no other entities will operate in the same area for other resources in a manner that might interfere with the operations of the contractor.[224] Both the exclusive right of the contractor over the exploration of a particular resource and the correlative obligation of the Authority, are aimed to preclude other interested prospectors to apply for the exploration of the same resource in the area designated in the contract. The consequence of this scheme is that areas covered by a plan of work will be *de facto* locked up for other interested prospectors as far as the right holders count with the approval of the Council for renewing their contracts or decide to renounce their exclusive rights, which is very unlikely to happen. Further on, it will be argued that this setting may adversely affect the common heritage of mankind and the refusal of extensions may be rightly based in sustainable development narratives.

The framework for DSM also counts with an independent tribunal in charge of the settlement of disputes arising out of the activities in the Area. Indeed, given the

Tanaka, *The International Law of the Sea* (2012), at 19). See in this same line the work of A. A. Cancado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (2nd ed., 2013).

[221] Nandam, *supra* note 219, at 79.

[222] Article 162.1 LOSC.

[223] Regulation 26 RPN and Regulation 28 RPS and RCF.

[224] Regulation 24 RPN and Regulation 26 RPS and RCF.

complexity and specificity of the DSM legal regime,[225] contracting states have established that a special chamber of the International Tribunal for the Law of the Sea (hereinafter, ITLOS), namely the Seabed Disputes Chamber (hereinafter, SDC), will be in charge of the settlement of disputes that may arise regarding the interpretation and implementation of the rules set forth in Part XI and its related instruments. The composition of the SDC is set forth in Article 35 Annex VI LOSC. According to paragraph 1 of this provision the SDC will be integrated by eleven members of the ITLOS, and most notably, paragraph 2 states that in the selection of the members, the representation of the principal legal systems of the world and equitable geographical distribution shall be assured.

As it will be examined in the next Chapter, all participants undertaking activities in the Area will have access to the SDC to safeguard their rights and seek the enforcement of their counterparties' correlative obligations. Widening the capacity to appear before the SDC to other participants different than states and international organisations, is quite a unique case within international law, and constitutes an exception within the ITLOS itself, the International Court of Justice and other international dispute settlement bodies[226] created through multilateral, universal, international treaties. In this sense, the SDC bears the burden to accommodate the different interests the parties involved in the dispute may claim to be at stake.

As such, according to the rules on jurisdiction of the SDC, it will have to deal with disputes over the rights and obligations of the parties engaging with activities in the Area regarding the infringement of both substantive international norms and contractual-based rules set forth in contracts for the exploration and exploitation of the Area, signed by the Authority together with the contractor, whatever form of personality this latter may have.

Part XI LOSC and the Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea establish the governing principles and rules to be considered when carrying out activities in the Area – which, according to Article 1 LOSC,

[225] To the purposes of this study, the deep seabed mining regime or legal framework encompasses: Part XI LOSC and its related Annexes, the Resolutions of the III United Nations Conference for the Law of the Sea (UNCLOS III), the 1994 Agreement Relating to the Implementation of Part XI of the LOSC; the Rules, Regulations and Procedures issued by the International Seabed Authority, other norms of international law not incompatible with the LOSC; and the rules set forth in contracts for exploration and exploitation of resources in the Area. This same range of norms will constitute the applicable law to disputes under the jurisdiction of the SDC, to the extent they are pertinent (Brown, *supra* note 218, at 357-358).
[226] N.-J. Seeberg-Elverfeldt, *The Settlement of Disputes in Deep Seabed Mining* (1998), at 69.

relates to the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. According to Article 136 LOSC, the Area and its resources[227] are the common heritage of mankind. Both the common heritage of mankind and the preservation and protection of the marine environment[228] constitute the central parts of the governing system established for the Area.[229]

The common heritage of mankind and the marine environment are, thus, the main things that the DSM regime is aimed to protect, being at the same time, the main obstacles contractors will find to perform their activities. In other words, the protection granted to the common heritage of mankind and the marine environment will affect the economic benefits that contractors are expected to receive from their endeavours in the Area. This is not to say that contractors will not be keen to respect the status of the Area and the marine environment to the extent possible, but it is not unrealistic to think that such respect is affected by the same principle governing almost every economic activity, which is to make the most possible profit at the less possible cost.

However, bearing in mind that private actors – juridical or natural persons - are able to perform activities in the Area according to the DSM legal framework, it is contended here that they should be expected to take into account the Area and its resources as they are the common heritage of mankind which is deemed "to govern all activities of exploration and exploitation"[230], as well as the rules set out for the protection of the marine environment. Relevant to this point is to address the scope of their rights and obligations

[227] Article 133 LOSC provides that by resources it should be understood all solid, liquid or gaseous mineral resources *in situ* in the Area or beneath the seabed, including polymetallic nodules. The DRE, refers in Appendix IV Schedule 1, as 'resources' to "all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including, but not limited to (a) polymetallic nodules, defined as any deposit or accretion of nodules, on or below the surface of the deep seabed, which contain metals such as manganese, nickel, cobalt and copper; (b) polymetallic sulphides, defined as hydrothermally formed deposits of sulphides and accompanying mineral resources in the Area which contain concentrations of metals such as copper, lead, zinc, gold and silver; and (c) cobalt crusts, defined as cobalt-rich ferromanganese hydroxide/oxide deposits formed from direct precipitation of Minerals from seawater onto hard substrates containing concentrations of metals such as cobalt, titanium, nickel, platinum, molybdenum, tellurium, cerium and other metallic and rare earth elements".

[228] Article 192 LOSC prescribes for all states the obligation to protect and preserve the marine environment.

[229] Brown, *supra* note 218, at 49; Bourrel, Thiele and Currie, 'The Common Heritage of Mankind as a Means to Assess and Advance Equity in Deep Sea Mining', *Marine Policy* (2018) 311, at 312. Similarly, the Virginia Commentary refers to the common heritage of mankind as set out in Article 136, as the underlying principle upon which the regime for seabed mining rests (S. N. Nadan and M. W. Lodge, *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. VI* (2002), at 95).

[230] Nelson, 'Reflections on the 1982 Convention on the Law of the Sea', in D. Freestone, R. Barnes and D. M. Ong (eds.), *The Law of the Sea: Progress and Prospects* (2006) 28, at 33.

whenever the industrial activity they are carrying out is found to be incompatible with such principles.

3.2 The Common Heritage of Mankind

The following is not aim to provide an in-depth study on the meaning of the expression common heritage of mankind[231] nor to address the extent of its legal status,[232] but to briefly introduce its history in the law of the sea, the interests that were colliding at the moment of its inception, the compromise reached by the international community in order to keep it within the LOSC and, finally, to explicit the stand that, for the purposes of this study, will be taken with regard to the content of the common heritage of mankind.

The expression common heritage of mankind was first placed into the UN General Assembly in 1967 by the Permanent Representative of Malta, Dr Arvid Pardo, who called all delegates to consider the resources of the oceans beyond national jurisdiction as the common heritage of mankind.[233] Thereinafter, this expression has been useful for adequately address sovereignty issues related to international regions where the international community has precluded "all kind of appropriation either public or private, national or corporate".[234] As Baslar argues, the concept of common heritage of mankind "disassociates with this [*with the desire to achieve progress at all cost*] since the concept symbolizes a deviation from the mercantilist international law to egalitarian law of mankind. The common heritage of mankind is not a materialistic concept in that it does not mean an unimpeded progress; rather it aims to achieve sharing, caring and sustainable management of natural resources and to protect them for future generations".[235]

In this sense, the intention to exclude some terrestrial and extra-terrestrial spaces from the scope of exercise of states' sovereignty or people's right of property, seems to come

[231] For an in-depth analysis of the concept of common heritage of mankind, see: K. Baslar, *The Concept of Common Heritage of Mankind in International Law* (1998).
[232] On discerning the legal status of the expression common heritage of mankind, see: Van Hoof, 'Legal Status of the Concept of the Common Heritage of Mankind', 7 *Grotiana New Series* (1986) 49; Joyner, *supra* note 93.
[233] However, as explained by Lodge, the call made by Ambassador Pardo "was in many ways merely reflecting the spirit of the times in an era where there was intense interest in the materialisation of common interests in common resources through global regimes" (Lodge, 'The Common Heritage of Mankind', in D. Freestone (ed.), *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas* (2013) 59, at 60).
[234] Joyner, *supra* note 93, at 191.
[235] Baslar, *supra* note 231, at 25-26; Scovazzi, *supra* note 220, at 45-46.

before the concept of common heritage of mankind. However, as observed in the literature, undertaking the task of giving the CHM a precise legal content and scope have proven to be difficult and each attempt to be arguable and subject to debate.[236] As far as this study is concerned, the following will examine the concept within the framework of the LOSC and will address some of the obligations related to the CHM that contractors must comply with when carrying out activities in the Area.

3.2.1 Struggling Interests in the Inception of the CHM

Declaring the Area and its resources as common heritage of mankind was the result of a factual circumstance, related to the relationship that developing and industrialised states had with the minerals found in the deep seabed, and their commercial expectations, as the formers were the major producers of such minerals and the latter the greatest consumers.[237] Forces, then, were divided onto two bargaining groups: on the one side, developing countries were gathered under the Group of 77 +China advocating, among other claims, to establish a New International Economic Order; while, on the other, industrialised countries, aware of the strength of the numerical Group of 77, "had their own economic needs to obtain vital minerals used in industry without being dependent on developing countries for their supply. This concern deepened following the oil crisis of the early 1970s. Moreover, industrialized countries faced domestic pressure from wealthy mining consortia and interested constituents in developing a stable legal regime that would promote investment in deep sea mining ventures".[238] As Klein explains "the successful establishment of a deep seabed regime, premised on the notion of the common heritage of mankind, had to accommodate competing economic philosophies".[239]

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[236] Lodge, *supra* note 233, at 60. Arguably, as stated by Matz-Luck, "the common heritage approach as incorporated in the law of the sea is the result of compromise and different interpretations and has no generally accepted and reliable legal content that could serve as a model" (Matz-Luck, 'The Concept of the Common Heritage of Mankind: Its Viability as a Management Tool for Deep-Sea Genetic Resources', in A. G. Oude Elferink and E. J. Molenaar (eds.), *The International Legal Regime of Areas Beyond National Jurisdiction: Current and Future Developments* (2010) 61, at 66). Also in this line: T. Davenport, *Responsibility and Liability for Damages Arising Out of Activities in the Area: Potential Claimants and Possible Fora*, 5 (2019), at 4.

[237] N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005), at 317-318.

[238] *Ibid.*, at 319.

[239] *Ibid.*, at 320. However, as the same author points out, "industrialized countries faced domestic pressure from wealthy mining consortia and interested constituents in developing a stable legal regime that would promote investment in deep sea mining ventures"(*Ibid.*, at 319).

Part XI LOSC as drafted in the Third Conference on the Law of the Sea, reflected the interests of the developing countries in much of the principles that shaped the contours of the status of common heritage of mankind of the Area.[240] Notwithstanding, at the same time, such design was also the reason for industrialised countries to vote against or to refuse to ratify the Convention on the Law of the Sea, mainly due to "the restrictive provisions of Part XI on the entry into the market, the ceiling on annual production and the mandatory transfer of technology [which] were all viewed as inconsistent with free market principles".[241] Particularly, the European Union was of the opinion "that Part XI was defective since the mechanism was too heavy and weighted against the individual firms and consortia that wish to engage in seabed mining".[242]

3.2.2 The 1994 Agreement: A Compromise with Regard to Deep Seabed Mining

Facing the unwillingness of industrialized countries to enter into the Convention and its imminent entry into force without such states, the Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea (hereinafter, the 1994 Agreement) was adopted on July 28, 1994, addressing and amending the most controversial issues from the perspective of the industrialized countries.

The 1994 Agreement was envisioned to change the LOSC for all the parties, not simply inter se,[243] modifying several aspects of Part XI,[244] while Article 2.1 1994 Agreement stated that provisions contained in it and Part XI shall be interpreted and applied together

[240] Such principles are traditionally enumerated as follows:
a) The Area and its resources are the common heritage of mankind (Article 136 LOSC);
b) No state may claim or exercise sovereignty or sovereign rights over any part of the Area or its resources (Article 137 LOSC);
c) Activities in the Area shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into account the interests and needs of developing states (Article 140 LOSC);
d) The Area shall be open to use exclusively for peaceful purposes (Article 141 LOSC).
e) States have the responsibility to protect the marine environment from harmful effects derived from activities in the Area (Article 145 LOSC).
See, generally: Nadan and Lodge, *supra* note 229, at 99; Brown, *supra* note 218; Lodge, *supra* note 233; Scovazzi, *supra* note 220, at 45; Tanaka, *supra* note 220, at 172-173.
[241] Klein, *supra* note 237, at 321. See also: Scovazzi, *supra* note 220, at 46-48.
[242] Hardy, 'The Law of the Sea and the Prospects for Deep Seabed Mining: The Position of the European Community', 17 *Ocean Development and International Law Journal* (1986) 309, at 313.
[243] Boyle, *supra* note 135, at 48.
[244] For example: principles on redistribution against tax to contractors (Brown, *supra* note 218, at 53-54), advantages of the Enterprise to perform activities in the area (Seeberg-Elverfeldt, *supra* note 226, at 112).

as a single instrument, also establishing that in the event of any inconsistency between this Agreement and Part XI, the provisions of the Agreement shall prevail.

3.2.3 The Area and its Resources are the Common Heritage of Mankind

From a *ratione loci* perspective, according to Article 136 the Area and its resources are the common heritage of mankind.[245] In the regime established by the LOSC, Article 137 prescribes the limits the concept of common heritage of mankind entails in legal terms, dealing both with the legal status of the Area and the legal status of its resources.[246] As such, it precludes the possibility for states to claim or exercise sovereignty or sovereign rights over any part of the Area and prevents any kind of appropriation of any part of it by states and natural or juridical persons.[247] Corollary to this, all rights upon the resources found in the Area are vested in mankind as a whole,[248] being also precluded for states or natural or juridical persons to claim, acquire or exercise rights with respect to the minerals recovered from the Area, except in accordance with Part XI.[249]

On the other hand, all activities in the Area, as prescribed in Article 140 LOSC, are to be carried out in the benefit of mankind as a whole.[250] To this end, the ISA shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis.[251] The relationship between the status of common heritage of mankind and the goal of equitable sharing of benefits seems to be indissociable.

Indeed, as has been noted by Baslar, the common heritage status "purports to expunge national interests from the administration process. Instead, universal popular interests

[245] This classification is taken from Brown, who analyses the common heritage of mankind as set out in the LOSC, from four different approaches: *ratione loci*, *ratione materiae*, *ratione temporis* and *ratione personae*. See for details: Brown, *supra* note 218, at 52-71.
[246] Nadan and Lodge, *supra* note 229, at 103.
[247] Article 137.1 LOSC.
[248] Article 137.2 LOSC.
[249] Article 137.3 LOSC.
[250] According to Brown this provision "make it clear that the intention is to benefit 'mankind as a whole' and not simply those parts of mankind which are neatly distributed among the sovereign states parties to this Convention" (Brown, *supra* note 218, at 65). An interesting debate is the one rising the question about what are those interests that the Authority represents when acting in behalf of humankind according to Article 137(2) LOSC, are those of all states parties, or are actually the interests that are not represented by states parties? Although with no further reach but that of a mere proposition, this debate found its germen in: Bourrel, Thiele and Currie, *supra* note 229, at 313.
[251] Voneky and Hofelmeir, 'Article 140 Benefit of Mankind', in A. Proelss et al. (eds.), *United Nations Convention on the Law of the Sea: A Commentary* (2017) 976, at 977.

would assume priority, and thereby supply the foundation for any administrative decisions made affecting the region".[252] As all contracting states are *ipso facto* members of the Authority,[253] which is in turn endorsed with the representation of mankind as a whole,[254] it would be expected that individual interests of contracting parties should waive before the *universal popular interest*, as referred by Balsar. In this same perspective, Bourrel, Thiele and Currie considered that, in order to understand the concept of common heritage of mankind, one must account in its *universalist intention* which is "to support the ultimate objective to achieve a more egalitarian society".[255] These ideas are all expressed in the Preamble of the LOSC as far as it declares among its objectives "to contribute to the realisation of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked".[256]

Notwithstanding, it will be naïve to think that states will waive their particular interests for advocating, instead, in favour of the referred universal popular interest or, what is the same, the global interest implicit in the status given to the Area and its resources. Moreover, bearing in mind that the private sector is also capable to engage in mining ventures in the Area according to the LOSC,[257] they will look forward to influence states' action towards the achievement of more suitable conditions for their own. Indeed, as commented by Lodge, "one of the main obstacles to its timely entry into force was objection on the part of most of the industrialized states to the deep seabed mining provisions contained in Part XI. In large measure these objections stemmed from radically different interpretations of the common heritage of mankind principle".[258]This view is strengthened, as Klein has expressed, with regard to the stage of negotiation of the LOSC, in the fact that "industrialized countries faced domestic pressure from wealthy mining consortia and interested constituents in developing a stable legal regime that would promote investment in deep sea mining ventures"[259]. The competing, particular interests

[252] Baslar, *supra* note 231, at 191-192.
[253] Article 156.2 LOSC.
[254] Article 137.2 LOSC.
[255] Bourrel, Thiele and Currie, *supra* note 229, at 311.
[256] Preamble to the LOSC, paragraph 5.
[257] Article 153.2(b) LOSC.
[258] Lodge, *supra* note 233, at 62.
[259] Klein, *supra* note 237, at 319.

of states and the yield of private actors are clearly reflected in the refusal of developed countries to join the LOSC until the 1994 Agreement was adopted.

3.2.4 The Equitable Sharing Criteria behind the Common Heritage of Mankind Regime

The purpose of declaring the Area and its resources as the common heritage of mankind looks for the equitable distribution of the benefits of DSM. This was first thought through the operation of an international system headed by the Authority, financed by the contracting parties, and empowered exclusively to explore and exploit the resources in the Area. However, such regime was pulled down due to the different economic stands of the negotiating parties, being finally replaced by the so-called parallel system proposed by the United States. This regime envisaged that mining activities in the Area were to be carried out by the Authority and the contracting parties on an equal footing.

The 1994 Agreement further amended the parallel system seeking to achieve consensus between the parties. Before the adoption of the 1994 Agreement, the LOSC contemplate two obligations relating to the CHM, which were established to materialise such regime. One was the obligation for contractors to transfer technology to the Enterprise,[260] and the other was the obligation of contractors to contribute one million-USD annually to finance the operations of the Enterprise[261] when the time came.

However, with the adoption of the 1994 Agreement such obligations were to be revoked, and the scheme foresaw for the Enterprise to engage in activities in the Area, weakened. Indeed, the obligation related to technology transfer as primitively stated in the LOSC, was no longer applicable; conversely, according to Section 5(b) of the 1994 Agreement, contractors and states parties shall only have the duty to cooperate with the ISA in facilitating the acquisition of DSM technology by the Enterprise or its joint venture, or by developing states, on fair and reasonable commercial terms and conditions. As for the obligation of paying the annual million-dollar cannon, Section 8(2) of the 1994 Agreement revoked the provisions contained in Article 13(3)-(10) Annex III LOSC. The revocation of these obligations clearly undermined the realization of the CHM as far as the changes introduced by the 1994 Agreement went against the autonomy envisaged for

[260] Article 144 and Article 5(3)(a)-(e) Annex III LOSC.
[261] Article 13(3) Annex III LOSC.

the ISA to exploit, through the Enterprise, the resources found in the Area. All of which, certainly affected the total amount of benefits that could be distributed, while also limited the opportunities for developing states to effectively engage in activities in the Area.[262]

The 1994 Agreement came to undermine the CHM regime, as originally foreseen by the drafters of the LOSC, in order to attract the few industrialized states that were not keen to accept the original terms settled for performing activities in the Area. Remarkably, despite the limitation bearing on states parties according to Article 311(6) LOSC, this is, not to amend the basic principle relating to the CHM, the 1994 Agreement evidenced the vacuum that exists behind this concept. Indeed, in the words of Cançado Trindade "[t]he Agreement of 1994 much emptied the concept of common heritage of mankind of its original content, largely depriving it of great part of its purpose of distributive justice".[263] In spite of the changes introduced by the 1994 Agreement – induced, as it has been seen, by practical considerations - the CHM regime finds protection from further, significant changes in Articles 155(2) and 311(3) LOSC; where, the former, limits the powers of the Review Conference relating to amendments of the principle of the common heritage of mankind, and, the latter, excludes the possibility for two or more states to conclude agreements affecting or derogating the basic principles embodied in the LOSC.

The leading piece dealing with the equitable sharing criteria as understood in the field of DSM is the 2017 paper written by Lodge, Segerson, and Squires, where the authors clarify that there are two ways for implementing the CHM regime under the rules settled in Part XI LOSC: the first is based on the concept of shared ownership, implying that benefits should be shared according to each ones' ownership share; while the second relates to the willing for distributing income or wealth from wealthier states to poorer states, which will be based on an indicator not yet created.[264]

Whether the CHM purports a regime for addressing the way benefits from activities in the Area should be equitably distributed among states is something to continue

[262] For a detailed study of the relevant changes introduced by the 1994 Agreement affecting the CHM regime, see: Preller Bórquez, 'El Rol de La Sala de Controversias Sobre Los Fondos Marinos Del Tribunal Internacional Sobre El Derecho Del Mar En La Protección Del Interés General En La Zona', 6 *Anuario de Derecho Comercial y Marítimo* (2017) 165.
[263] Cancado Trindade, *supra* note 220, at 333.
[264] Lodge, Segerson and Squires, 'Sharing and Preserving the Resources in the Deep Sea: Challenges for the International Seabed Uthority', 32 *The International Journal of Marine and Coastal Law* (2017) 427.

elaborating upon.[265] However, as stated earlier, this study is not pursuing this goal, but to work with the text provided in the LOSC. In this sense, the following will regard the CHM in its dual understanding: As a regime aimed at the equitable sharing of resources of the Area, and according to its material scope established in Article 136 LOSC.

3.3 The Marine Environment

Contrary to the uncertainties that the concept of CHM entails, the concept of marine environment is, apparently, less controversial. For the purposes of DSM, the marine environment "includes the physical, chemical, geological and biological components, conditions and factors which interact and determine the productivity, state, condition and quality of the marine ecosystem, the waters of the seas and oceans and the airspace above those waters, as well as the seabed and ocean floor and subsoil thereof".[266] Clarifying the concept to which marine environment is referred to, makes easier to identify the set of obligations related to its protection for all participants in DSM.

However, a caveat must be made as to the fact that it is fairly possible to confuse an affectation to the marine environment with one to the CHM. Indeed, if harm is caused to the column of water above the Area, it is likely for this harm to affect the minerals found in the Area as well. Thus, it will be correct to address such event as a damage to the marine environment as far as the resources in the Area are also included in the definition above. Although the marine environment and the CHM are intertwined, a distinction must be done as to the twofold affectation that minerals can receive, as far as they are, simultaneously, part of the marine environment and part of the CHM. As Brown argues "[t]he most fundamental principle governing the Area is, of course, the principle laid down in Article 136 that 'The Area and its resources are the common heritage of mankind'. The specifically environmental rules which follow are designed to safeguard mankind's heritage from the pollution which its exploitation may threaten".[267] A similar

[265] The ISA is the organism primarily commanded to design the scheme through which equitable sharing of the financial and other economic benefits from DSM activities will be allocated among humankind. For a critical assessment on how the ISA has undertaken this duty, see: Lodge, *supra* note 233, at 64-66. According to his opinion, this term of art includes: equal participation, rational use of resources, environmental stewardship and equitable sharing of financial and economic benefits.
[266] Regulation 1(3)(c) RPN, Regulation 1(c) RPS, Regulation 1(d) RCF, and Schedule 1 DRE.
[267] Brown, *supra* note 218, at 389.

stand is hold by Davenport, who proposes that damages to the CHM and damages to the marine environment are two separate heads of damage.[268]

Interesting to this section is the reasoning of the SDC as to the factors that should be considered to assess the compliance of sponsoring states with due diligence obligations, as far as it acknowledges that the different stages of DSM as well as the extraction of the different resources poses *inter alia* different degrees of risks: "The content of 'due diligence' obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that 'due diligence' is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity. As regards activities in the Area, it seems reasonable to state that prospecting is, generally speaking, less risky than exploration activities which, in turn, entail less risk than exploitation. Moreover, activities in the Area concerning different kinds of minerals, for example, polymetallic nodules on the one hand and polymetallic sulphides or cobalt rich ferromanganese crusts on the other, may require different standards of diligence. The standard of due diligence has to be more severe for the riskier activities".[269] By virtue of analogy, the same reasoning must be applied, unless a strict liability regime is established, to contractors being either the Enterprise, states parties, state-owned enterprises, and natural or juridical persons. Hence, in light of the reasoning of the SDC, the obligations of the contractor have been considered to be "progressive in nature".[270] Indeed, according to Lodge, the system set out for carrying out DSM activities is "based on the application of the precautionary approach and evolutionary in nature".[271]

The general obligation towards the protection and preservation of the marine environment is set forth in Article 192 LOSC,[272] while Article 145 LOSC mandates the ISA to adopt

[268] Davenport, *supra* note 236, at 4.
[269] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Reports 2011, *supra* note 118, at paragraph 117.
[270] Nandam, *supra* note 219, at 88.
[271] Lodge, 'Protecting the Marine Environment of the Deep Seabed', in R. Rayfuse (ed.), *Research Handbook on International Marine Environmental Law* (2015) 151, at 152.
[272] Article 192 LOSC: "States have the obligation to protect and preserve the marine environment". The ITLOS has recalled this duty in several occasions (see: *M/V "Louisa"* (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010, p. 70, paragraph 76; *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015, p. 160, paragraph 69) stating that, read together with Article 193 LOSC, purports a

the necessary measures to ensure the effective protection of the marine environment from harmful effects which may arise from the activities in the Area. The mandate includes the adoption of rules, regulations and procedures for, *inter alia*: (a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities; (b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.

As noted by Lodge, Article 145 LOSC includes the obligation for the ISA to take measures "to protect the flora and fauna of the marine environment regardless of whether or not they form part of the Area and whether or not such flora and fauna were known to exist at the time of negotiating the LOSC".[273] This statement seems to be in conformity with the overarching mandate entrusted to the ISA to represent the interests of mankind in promoting, but also counterbalancing, DSM activities carried out in the Area.[274]

3.4 Contractors' Obligations relating to the Common Heritage of Mankind and the Protection of the Marine Environment

All parties involved in the DSM regime have been carefully assigned with obligations towards the protection of both the common heritage of mankind and the marine environment. This reflects the perception of parties to the LOSC to be joining a community that shares certain common interests and common values[275] relevant to the welfare of the group and fundamental to the system. Such conviction is in part, based on the assumption that the risk of destruction, exhaustion, depletion, or disappearance of the

limit to the exercise of states' right to exploit their natural resources pursuant to their environmental policies (see: *Maritime Boundary (Ghana/Côte d'Ivoire)*, paragraph 70). Interestingly, as noted by Lodge, the 1972 Stockholm Conference on the Human Environment influenced the drafting of Part XII LOSC which opening provision is Article 192 LOSC (*Ibid.*, at 154).

[273] *Ibid.*, at 155.

[274] In this same line of thoughts, see: Scovazzi, 'Mining, Protection of the Environment, Scientific Research and Bioprospecting: Some Considerations on the Roleof the International Sea-Bed Authority', 19 *The International Journal of Marine and Coastal Law* (2004) 383, at 393-396.

[275] H. Bull, *The Anarchical Society* (4th ed., 1977), at 13.

public goods to be protected through the LOSC will have consequences affecting all the members equally.[276]

Therefore, as Lodge points out "the ISA Regulations attempt to strike a balance between a precautionary approach to activities in the Area and an incremental approach to regulation, with an emphasis on gathering sufficient data during early phase of exploration in order to determine the range of potential environmental impacts".[277] To the enforcement of these obligations, the ISA is endorsed by the legal framework for DSM, to exercise functions and powers over those entities carrying out activities of exploration of and exploitation for resources in the Area. On its turn, contractors to the ISA must comply with contractual obligations, which are established in the relevant contract either for exploration or exploitation of resources. Such obligations are also aimed at the protection of the Area and its resources, on the one hand, and the preservation and protection of the marine environment, on the other.

Addressing the obligations that contractors must comply with aimed to the protection of the marine environment, do not pose great difficulties since, in most cases, these obligations are written in a straightforward way, and directly relate to the marine environment in their wording. However, the same cannot be said regarding those obligations that are set to protect the common heritage of mankind. The reason behind this, is that the expression common heritage of mankind has not been related to a concrete meaning in the LOSC, while its content and scope, as has been mentioned earlier, remain contested in the doctrine of international law.

Notwithstanding, this section aims to address the obligations of contractors towards the protection of the common heritage of mankind and the marine environment when performing activities for the exploration for and exploitation of resources in the Area.

3.4.1 Obligations related to the Protection of the Common Heritage of Mankind

According to the findings reached above, the obligations toward the protection of the common heritage of mankind will be those aimed either or both to the promotion of the

[276] Villalpando, *supra* note 92, at 392.
[277] Lodge, *supra* note 233, at 158.

equitable sharing regime and those aimed to protect the Area – the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction – and the different resources found there as defined by Article 133(a) LOSC.[278]

These obligations are mostly contained in the regulations on the exploration for and exploitation of resources in the Area issued by the ISA in compliance with its functions and discretionary powers set forth in the LOSC.

The different obligations the contractor must comply with are grounded in the scheme settled in the LOSC for carrying out activities in the Area, as implemented by the different regulations issued by the ISA for dealing with the exploration and exploitation of resources, and the relevant contracts signed for these purposes. Due regard to the CHM would make inappropriate to assert that some obligations aimed at its protection are only binding in one stage of DSM and not in the others, i.e. obligations that are binding only in the stage of prospection but not in the subsequent stages of exploration or exploitation, or vice versa. This is not to say that in the three stages the standard for assessing compliance with the relevant obligation should be the same, as the risk to the CHM in all three stages may differ. Indeed, prospecting is considered to have less impacts than exploration, while this latter is considered to have less impacts than exploitation.[279]

The following subparagraphs will review the main obligations related to the protection of the CHM bearing upon private entities engaging in activities in the Area.

[278] Interesting debates on the scope of Article 133(a) in relation with Article 136 are taking place today regarding the ability of these norms to encompass marine genetic resources that are found both in the seabed or floating at short distance above it, questioning whether the CHM regime is able to effectively protect these peculiar forms of life *vis-à-vis* DSM activities. In Freestone's opinion "despite the strong and unequivocal obligations to protect the marine environment in the Convention discussed above, insufficient attention is directed at conservation of marine ecosystems outside areas of national jurisdiction" (Freestone, 'Governance of Areas Beyond National Jurisdiction: An Unfinished Agenda?', in J. Barret and R. Barnes (eds.), *Law of the Sea: UNCLOS as a Living Treaty* (2016) 231, at 236). See also: Lodge, *supra* note 233, at 67; Tladi, 'Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction: Towards an Implementing Agreement', in R. Rayfuse (ed.), *Research Handbook on International Marine Environmental Law* (2015) 259; Scovazzi, *supra* note 220; Matz-Luck, *supra* note 236; Siswandi, 'Marine Genetic Resources beyond National Jurisdiction and Sustainable Development Goals: The Perspective of Developing Countries', in M. H. Nordquist, J. N. Moore and R. Long (eds.), *The Marine Environment and United Nations Sustainable Development Goal 14: Life below Water* (2019) 194; Dalaker Kraabel, 'The BBNJ PrepCom and Institutional Arrangements: The Hype about the Hybrid Approach', in M. H. Nordquist, J. N. Moore and R. Long (eds.), *The Marine Environment and United Nations Sustainable Development Goal 14: Life below Water* (2019) 137.

[279] See the reasoning of the SDC in: *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Reports 2011, *supra* note 118, at paragraph 117.

3.4.1.a. Obligation to have the Required Sponsorship Throughout the Period of the Contract

The LOSC foresees that private entities, being natural or juridical persons, may carry out activities in the Area by their own under the condition of having the sponsorship of the state of their nationality.[280] This sponsorship scheme allows private entities to enter in the realm of international law, creating rights and obligations for the parties,[281] Once the sponsorship is granted, the beneficiary may commence the proceedings before the ISA to submit a plan of work[282] to perform activities in the Area which, provided on the approval of the Council, will be sign in the form of a contract.

As it is provided for in the regulations issued by the ISA, each contractor shall have the required sponsorship throughout the period of the contract.[283] In the event a sponsoring state decides not to continue sponsoring a contractor, and if the contractor is unable to find the sponsorship of another state party, the contract with the ISA will terminate accordingly.[284] It is worthy to note that, the termination of the contract in the regulations for exploration operates differently from that provided for in the DRE, this latter expresses that the contract will automatically terminate if the contractor fails to obtain a new sponsorship, while the formers do not consider this *ipso jure* effect, suggesting, therefore, that an action of the ISA is required to this end.

Compliance with the obligation of having the sponsorship of a state party is set, among other things, to protect the Area and its resources from uncontrolled activities of private entities. Indeed, through the sponsorship scheme, the LOSC makes all sponsoring states in charge of the surveillance of their sponsored entities, and responsible for their wrongdoings. Indeed, sponsoring states may be held responsible for the unlawful acts of their sponsored entities, and liable for the damages caused to the common heritage of mankind during the performance of their activities. However, sponsoring states liability will be residual in terms that it will be ascertain "only for damages that arise from its

[280] Article 153(2)(b) LOSC, and Article 4 Annex III LOSC.
[281] For a detail analysis of the obligations bearing on sponsoring states, see: *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Reports 2011, *supra* note 118.
[282] Article 4 Annex III LOSC.
[283] Regulation 29(1) RPN; Regulation 31(1) RPS and RCF; Regulation 21(1) DRE.
[284] Regulation 29(3) RPN; Regulation 31(3) RPS and RCF; Regulation 21(3) DRE.

failure to exercise due diligence".[285] Accordingly, Article 4(4) Annex III LOSC provides that no liability will result for the sponsoring state when it has adopted laws and regulations and taken administrative measures reasonably appropriate for securing compliance by persons under its jurisdiction.

3.4.1.b. Obligation not to Interfere with Other Activities in the Marine Environment

This obligation finds its legal basis in Article 147 LOSC, which deals with the accommodation of activities in the Area and in the marine environment. Paragraph (1) of this provision states that, activities in the Area shall be carried out with reasonable regard for other activities in the marine environment. Its corollary is found in the standard clauses of contracts for the exploration of resources,[286] within the undertakings the contractor must accept for commencing activities in the Area. Even though the DRE do not consider this obligation within the regulations nor in their annexes,[287] observance of Part XI and the 1994 Agreement in the performance of activities in the Area should made the obligation in Article 147 LOSC extensible to contractors for the exploitation of resources. The Preamble to the DRE clearly indicates that the exploitation for resources of the Area shall be carried out for the benefit of mankind as a whole in accordance with Part XI and the 1994 Agreement. Article 139(1) LOSC provides for sponsoring states to undertake

[285] C. Neil, *Determining the Standard for Liability for Environmental Harm from Deep Seabed Mining Activities*, 2 (2018), Liability Issues for Deep Seabed Mining Series, at 4. See also: Article 139(2) LOSC. For the standard of due diligence of sponsoring states, see: *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Reports 2011, *supra* note 118.

[286] Section 13.3(c) RPN, RPS and RCF.

[287] According to Regulation 18(3) DRE, the ISA shall ensure that no other entity operates in the Contract Area for a different category of Resources in a manner which might interfere with the rights granted to the contractor. At first sight, this provision seems to change the bearer of the obligation examined in this number, from the contractor to the ISA, however, two arguments may refute such understanding. The first one is related to the limited scope of Regulation 18(3) DRE as it only covers DSM activities, leaving aside other activities included in Article 147 LOSC. Secondly, this provision should not be interpreted as an obligation that the ISA has to perform during the whole time of the contract, but only at the time of approving a plan of work, otherwise, the ISA would be responsible and liable every time a contractor interferes with the activities of another causing damage to the latter. Since nothing in the DSM regime prevents for different contractors to carry out activities of exploration or exploitation in the same area provided these refer to different resources (see, Regulation 15(2)(a) DRE), interferences are likely to occur, and it would be unreasonable to find the ISA responsible for breaching the obligation set out in Regulation 18(3) DRE for the whole time of the contracts. Moreover, the LTC has the task not to recommend the approval of a proposed Plan of Work, if part or all of the area covered by the proposed Plan of Work, is included in a Plan of Work approved by the Council for Exploration or Exploitation of other Resources, if the proposed Plan of Work would be likely to cause undue interference with activities under such approved Plan of Work for other Resources (Regulation 15(2)(b) DRE). This mandate reinforces the limited time the obligation of the ISA can be claimed for by a contractor who has seen its activities interfered by another contractor after the contract has entry into force.

measures to secure effective compliance by contractors of the standards set forth in Part XI and the 1994 Agreement, therefore, it would be expected that sponsoring states integrate this obligation in their relevant regulations on the obligations for sponsoring entities to carry out DSM activities in the Area. However, the best alternative would be for this obligation to be included in the Regulations and in the relevant exploitation contract.

Interestingly, activities carried out in the marine environment may range from activities developed by other contractors in the Area or contractors to the same area but for different resources, to marine scientific research, and many other maritime activities as shipping, installations of submarine cables, or fishing. Notwithstanding, the activities relevant to present purposes are those that may affect the activities of other contractors to the Area, as these may impact directly upon the Area and its resources and/or the realization of the CHM regime. This obligation, as noted by Brown, may also have implications for the preservation of the marine environment.[288] To illustrate the above, imagine a situation where contractor A is carrying out activities of exploitation of polymetallic nodules, while in the same area, contractor B is exploring for a different mineral. Both A and B must comply with the obligation not to interfere with the activities of the other. One fine day, due to the operations carried out by B, the minerals A was exploiting were affected. The affectation of these minerals would certainly affect the economic interests of A but will also affect the CHM as for it encompasses the resources of the Area.

3.4.1.c. Obligation to Notify the ISA of the Finding of Other Resources in the Area

The Area as well as its resources are the CHM, and according to Article 137(2) LOSC all rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. Paragraph (3) goes on preventing anyone to acquire or exercise rights with respect to the minerals recovered from the Area, except in accordance with the legal framework designed for DSM. The obligation to notify the ISA of findings of resources different from those specified in the relevant contract, aims to provide the ISA with information to carry out its administering function concerning the resources found in the Area. Noncompliance with this obligation would entail to hinder the functions of the ISA

[288] Brown, *supra* note 218, at 390.

in prejudice of the greater interests endorsed by state parties to the LOSC regarding the CHM.

Regulations for the exploration for resources in the Area[289] and the DRE[290] expressly provide for this obligation regarding to prospectors and contractors, notably, the latter establishes that notification to the ISA must be done within 30 days from the finding.

3.4.1.d. Obligation to carry out the Program of Activities set out in the Plan of Work of Exploration for Resources and Maintaining Commercial Production in the Exploitation Stage

According to Article 17(2) Annex III LOSC, rules, regulations and procedures issued by the ISA shall fully reflect several criteria set out therein. Paragraph (c) of this provision, refers to the performance requirements the ISA shall regulate accordingly, mandating it to address the timetable and aspects to be considered in that regard, to assess the activity of contractors in the stage of exploration, and once in the exploitation stage, to determine a maximum time interval to achieve commercial production. This mandate is consistent to the CHM regime as far as it implies movement towards the exploitation of resources in the Area and is intended to prevent contractors to maintain a passive mining activity. Indeed, contractors' passivity in each stage may affect the development of the CHM, undermining the achievement of the objectives defined by the LOSC. Consequently, previous stages to the exploitation of resources should be provisional, and under this logic the exploration stage should turn into exploitation without unnecessary delays, as the final objective is to bring the contracted area into commercial production.

To this end, obligations have been drafted in the regulations for exploration and the DRE to prevent contractors from passive mining activity. Accordingly, Annex IV to the regulations for exploration, set the obligation for the contractor to carry out the

[289] Regulation 41 RPN, Regulation 43 RPS and RCF. In all three, *mutatis mutandi*, the provision reads as follows: "If a prospector or contractor finds resources in the Area other than polymetallic nodules, the prospecting and exploration for and exploitation of such resources shall be subject to the rules, regulations and procedures of the Authority relating to such resources in accordance with the Convention and the Agreement. The prospector or contractor shall notify the Authority of its find."

[290] Regulation 41.1 DRE, reads:
"1. The Contractor shall notify the Secretary-General if it finds Resources in the
Area other than the Resource category to which the exploitation contract relates within 30 Days of its find.
2. The Exploration for and Exploitation of such finds must be the subject of a separate application to the Authority, in accordance with the relevant Rules of the Authority."

programme of activities set out in the plan of work.[291] The standard clause goes on specifying that, in doing so, the contractor shall spend in each contract year not less than the amount specified in such programme, or any agreed review thereof, in actual and direct exploration.[292] This is in conformity with the information that the contractor must provide to receive the approval of the plan of work, as for it has to deliver a general description and a schedule of the proposed exploration programme, including the programme of activities for the immediate five-year period, and a schedule of anticipated yearly expenditures in respect of the programme of activities for the same period.[293]

In order to verify the expenditures, the contractor shall keep books and records including information on the actual and direct expenditures for exploration.[294] Such information must be included also in the annual report as well as any proposal of adjustment of the plan of work for the following year.[295]

Referring to the exploitation stage, according to Regulation 28 DRE, the contractor shall maintain commercial production in accordance with the contract and the plan of work, and the regulations issued by the ISA. The DRE, similarly to the wording used in Article 17(2)(g) Annex III LOSC, provides that commercial production "shall be deemed to have begun where a Contractor engages in sustained large-scale recovery operations which yield a quantity of materials sufficient to indicate clearly that the principal purpose is large-scale production rather than production intended for information-gathering, analysis or the testing of equipment or plant".[296] Notwithstanding, account must be taken with regard to the caveat made by the Legal and Technical Commission's (hereinafter, LTC) in the footnote to this definition, as to the need of a clearer definition.[297] Indeed, according to such definition, the concept behind commercial production, constitutes at the same time the milestone to recognise that a contractor's mining activity steps into actual exploitation of resources, but is also an expression addressing a phase within the stage of exploitation that relates to significant mining activity. In any case, this is the activity that is expected to be reached for the realization of the CHM regime, i.e. one

[291] Section 4.2 Annex IV RPN, RPS and RCF.
[292] Therefore, if the contractor becomes insolvent, or in face of any other of the circumstances referred to in Section 21.1(c) Annex IV RPN, RPS and RCF, the ISA Council may suspend or terminate the contract.
[293] Regulation 18(a) and (f) RPN, Regulation 20(1)(a) and (f) RPS and RCF.
[294] Section 9 Annex IV RPN, RPS and RCF.
[295] Section 10.2 (c) and (d) Annex IV RPN, RPS and RCF.
[296] Schedule 1 DRE.
[297] Footnote 1, Schedule 1 DRE, p. 117.

capable of producing benefits to be shared by all mankind. A related obligation to notify the Secretary-General of the ISA bears on the contractor if it fails to comply with the plan of work or determines that it will not be able to adhere to the plan of work in the future.[298] However, a temporarily reduce or suspension of the commercial production can be justified upon reasons relating to the protection of the marine environment, human health and safety, or due to market conditions.[299]

3.4.2 Obligations related to the Protection of the Marine Environment

The following epigraphs are aimed to address and describe the main obligations bearing upon contractors set for the protection of the marine environment.

3.4.2.a. Obligation to take Necessary Measures for the Protection of the Marine Environment

According to the regulations for exploration, contractors have the obligation to take appropriate measures to prevent, reduce and control pollution and other hazards to the marine environment arising from their activities in the Area.[300] Similarly, Regulation 44 DRE establishes that contractors must plan, implement and modify measures necessary for ensuring the effective protection of the marine environment from harmful effects of their activities.[301] In both the exploration and exploitation stages, measures pursuant such objective must be taken applying a precautionary approach and best environmental practices. Notably, the DRE also include some further obligations together with the need to apply a precautionary approach[302] and best environmental practices[303] - which are common to the regulations on exploration – adding the application of best available

[298] Regulation 28.2(a) and (b) DRE.
[299] Regulation 28.3 and 29 DRE.
[300] Regulation 31(5) RPN, Regulation 33(5) RPS and RCF.
[301] Regulation 44 DRE.
[302] The precautionary approach is to be applied as reflected in Principle 15 of the Rio Declaration on Environment and Development, which reads: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".
[303] Best Environmental Practices: "means the application of the most appropriate combination of environmental control measures and strategies, that will change with time in the light of improved knowledge, understanding or technology, taking into account the guidance set out in the applicable Guidelines" (Schedule 1 DRE).

techniques,[304] the integration of best available scientific evidence[305] in environmental decision-making, and the promotion of accountability and transparency in the assessment, evaluation and management of environmental effects.[306]

The inclusion of a precautionary approach has been long debated in the core of the ISA meetings,[307] and the aftermath shows, as regarded by Lodge, that the ISA "has made good progress, on the basis of the evolutionary approach set out in the 1994 Agreement, in elaborating a regulatory regime for access to the resources of the Area that emphasizes the precautionary approach and the need for ecosystem-based management of the resources of the Area."[308] In this same line, Rayfuse acknowledges that "the principle's significance for marine environmental protection in general and marine resource conservation in particular has been well recognised, and the language of precaution has entered the lexicon of the law of the sea".[309]

The SDC also had the opportunity to refer to the importance of the obligation to apply a precautionary approach and best environmental practices in its Advisory Opinion relating to the *Responsibilities and Obligations of States with respect to Activities in the Area*. With regard to the former, most relevantly, the SDC argued that insofar "the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration […] this has initiated a trend towards making this approach part of customary international law. This trend is clearly reinforced by the inclusion of the precautionary approach in the Regulations and in the 'standard clause' contained in

[304] Best Available Techniques: "means the latest stage of development, and state-of-the-art processes, of facilities or of methods of operation that indicate the practical suitability of a particular measure for the prevention, reduction and control of pollution and the protection of the Marine Environment from the harmful effects of Exploitation activities, taking into account the guidance set out in the applicable Guidelines" (Schedule 1 DRE).
[305] Best Available Scientific Evidence: "means the best scientific information and data accessible and attainable that, in the particular circumstances, is of good quality and is objective, within reasonable technical and economic constraints, and is based on internationally recognized scientific practices, standards, technologies and methodologies" (Schedule 1 DRE).
[306] This more comprehensive approach to the protection of the marine environment clearly reflects the vast experience of the ISA, the further development in international environmental law and the law related to DSM as well as due account on the increased risks that purport the exploitation stage.
[307] See in detail: Brown, *supra* note 218, at 416-419.
[308] Lodge, *supra* note 233, at 68.
[309] Rayfuse, 'Precaution and the Protection of Marine Biodiversity in Areas Beyond National Jurisdiction', in D. Freestone (ed.), *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas* (2013) 99, at 100.

Annex 4, section 5.1, of the Sulphides Regulations".[310] As to the latter, the SDC highlighted that, complementing the obligation to apply the precautionary approach with an obligation to apply best environmental practices, showed account on the advancement in scientific knowledge, and even though the RPN do not mention this obligation but solely refers to the best technology available to the contractor, "in the absence of a specific reason to the contrary, it may be held that the Nodules Regulations should be interpreted in light of the development of the law, as evidenced by the subsequent adoption of the Sulphides Regulations".[311]

The obligation to apply a precautionary approach and best environmental practices are also included as contractual obligations of contractors in the exploration regulations,[312] however, DRE Annex X, relating to standard clauses to exploitation contracts, do not refer expressly to any of the obligations in Regulation 44. Instead, compliance with such obligations should be inferred from the general undertakings set in Section 3.3(d) Annex X DRE regarding to the obligation of the contractor to carry out its contractual obligations with due diligence, including compliance with the rules, regulations and procedures adopted by the Authority to ensure the effective protection of the marine environment.[313]

3.4.2.b. Obligation to Report Incidents

The scheme for performing activities in the Area rely heavily in the active behaviour of contractors towards monitoring and informing about possible harms to the marine environment. Accordingly, based on the relevant regulations on exploration,[314] contractors have the obligation to promptly report to the Secretary-General of the ISA any incident arising from their activities that has caused, is causing or poses a threat of serious harm to the marine environment.[315] Regulations on exploration define serious harm to the marine environment as "any effect from activities in the Area on the marine environment which represents a significant adverse change in the marine environment

[310] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Reports 2011, *supra* note 118, at paragraph 135.
[311] *Ibid.*, paragraph 136-137.
[312] Section 5.1 Annex IV RPN, RPS and RCF.
[313] An in-depth analysis of the precautionary approach and the possible thresholds to meet towards its implementation can be found in: A. L. Jaeckel, *The International Seabed Authority and the Precautionary Principle: Balancing Deep Seabed Mineral Mining and Marine Environmental Protection* (2017). At 176-187.
[314] Regulation 33.1 RPN, Regulation 35.1 RPS and RCF.
[315] Section 6.2 Annex IV RPN, RPS and RCF.

determined according to the rules, regulations and procedures adopted by the Authority on the basis of internationally recognized standards and practices".[316]

The DRE Regulation 34(1) set the obligation of the contractor to immediately notify its sponsoring state or states and the Secretary-General of the ISA of the occurrence of any events listed in Appendix I. Those events most evidently relating to the marine environment are: significant leak of hazardous substance; unauthorized mining discharge;[317] adverse environmental conditions with likely significant environmental consequences; and, the impairment/damage to environmentally critical equipment. To this end, paragraph (2) of the same provision states that the contractor shall, as soon as reasonably practicable, but no later than 24 hours after the contractor becomes aware of any such event, provide written notification to the Secretary-General of the event, including a description of the event, the immediate response action taken and any planned action to be taken.

3.4.2.c. Obligation regarding Environmental Baseline Data and Monitoring Programme

As established in the exploration regulations contractors have the obligation to gather environmental baseline data and to establish environmental baselines against which to assess the likely effects of the programme of activities under the plan of work, and a programme to monitor and report on such effects.[318] To this end, the contractor has also the obligation to cooperate with the ISA and its sponsoring state in the establishment and implementation of such monitoring programme.[319] Accordingly, the standard clauses to exploration contracts impose and elaborate on these obligations.[320]

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[316] Regulation 1(3)(f) RPN, RPS and RCF.
[317] See: Regulation 50 DRE on restrictions on mining discharges reads:
"1. A Contractor shall not dispose, dump or discharge into the Marine Environment any Mining Discharge, except where such disposal, dumping or discharge is permitted in accordance with:
(a) The assessment framework for Mining Discharges as set out in the Guidelines; and
(b) The Environmental Management and Monitoring Plan.
2. Paragraph 1 above shall not apply if such disposal, dumping or discharge into the Marine Environment is carried out for the safety of the vessel or Installation or the safety of human life, provided that all reasonable measures are taken to minimise the likelihood of Serious Harm to the Marine Environment, and shall be reported forthwith to the Authority."
[318] The monitoring programme has been called to be a complement to the obligation to conduct environmental impact assessments before the commencement of the activities for the exploration for resources. For a detailed study on the matter, see: Jaeckel, *supra* note 313, at 157-166.
[319] Regulation 32.1 RPN, Regulation 34.1 RPS and RCF.
[320] Section 5.3 and 5.4 Annex IV RPN, RPS and RCF.

3.4.2.d. Obligation to Implement and Maintain an Environmental Management System

Contractors for the exploitation of resources in the Area shall implement and maintain an environmental management system capable of delivering site-specific environmental objectives and Standards in the Environmental Management and Monitoring Plan; capable of cost-effective, independent auditing; and permit effective reporting to the Authority in connection with environmental performance.[321]

3.4.2.e. Obligation to Comply with the Environmental Management and Monitoring Plan

The purpose of an environmental monitoring and management plan is to manage and control that environmental effects[322] meet the environmental quality objectives and standards for the mining operation. The plan will set out commitments and procedures on how the mitigation measures will be implemented, how the effectiveness of such measures will be monitored, what the management responses will be to the monitoring results and what reporting systems will be adopted and followed.[323]

Pursuant Regulation 51 DRE, a Contractor shall, in accordance with the terms and conditions of its Environmental Management and Monitoring Plan and the relevant Regulations:

(a) Monitor and report annually on the environmental effects of its activities on the marine environment, and manage all such effects as an integral part of its exploitation activities;

(b) Implement all applicable mitigation and management measures to protect the marine environment; and

(c) Maintain the currency and adequacy of the environmental management and monitoring plan during the term of its exploitation contract in accordance with Best Available Techniques and Best Environmental Practices and taking account of the relevant Guidelines issued by the ISA.

[321] Regulation 46 DRE.
[322] Environmental effects "means any consequences in the marine environment arising from the conduct of exploitation activities, whether positive, negative, direct, indirect, temporary or permanent, or cumulative effect arising over time or in combination with other mining impacts" (Schedule 1 DRE).
[323] Regulation 48(1) DRE.

3.4.2.f. Obligation to Conduct Performance Assessments of the Environmental Management and Monitoring Plan

According to Regulation 52(1) DRE a contractor shall conduct performance assessments of the Environmental Management and Monitoring Plan to assess the compliance of the mining operation with the plan and the continued appropriateness and adequacy of the plan.

Where, as the result of the review by the LTC of the assessment performed, it concludes that a contractor has failed to comply with the terms and conditions of its environmental management and monitoring plan, or that the plan is determined to be inadequate in any material respect, the Secretary-General shall issue a compliance notice or require the contractor to deliver a revised environmental management and monitoring plan, taking into account the findings and recommendations of the LTC.[324]

Concluding Remarks

This Chapter introduced the scenario in which deep seabed mining activities take place. To the extent that it is useful for the purposes of the overall study, it was examined the interplay that DSM regime promotes between its participants. To this end, a brief account was provided regarding who may carry out activities in the Area; the role of both the International Seabed Authority and states parties to the LOSC with regard to the supervision and control of the activities carried out by private entities; and the role of the Seabed Disputes Chamber, as the dispute settlement mechanism established in the LOSC.

The study then turned to examine the two main principles governing the legal framework for developing activities in the Area: the common heritage of mankind and the protection of the marine environment. As to the first one, acknowledging that no compromise has been reached as to what is specifically referred by it, for the purposes of this study, the concept of common heritage of mankind will be understood as the Area and its resources, on the one hand, and as representing the regime created for the equitable sharing of the benefits obtained from the exploitation of the resources of the Area, on the other. Regarding the marine environment, it was highlighted its relationship with the common

[324] Regulation 52(8) DRE.

heritage of mankind as to all damages caused to the common heritage of mankind constitute damage to the marine environment, but not backwards.

Both caveats are relevant to the extent that they urge to distinguish those obligations that are established strictly to protect the common heritage of mankind, understood as protecting the equitable sharing of benefits, and those that are sought to protect the marine environment, which will as well have the effect to protect the common heritage of mankind understood in its material dimension as the Area and its resources. According to this, the study finally offered a classification of the obligations that contractors must abide by when developing activities in the Area, which separate their obligations into two categories, those related to the protection of the common heritage of mankind and those related to the protection of the marine environment.

All the above contributed to set the scenario where the sustainable development narratives of balance and prevention will be implemented in the following Chapter. Therefore, the framework depicted above is relevant in order to turn into the evaluation of the thesis, this is, to examine whether the narratives subjacent to sustainable development are able to be strategically used in litigation; particularly, in this case, in the litigation of disputes arising from deep-sea mining activities between a private entity and the International Seabed Authority, and the effects that they may purport, if any, to the determination of the responsibility and liability of it.

Chapter 4

Integrating the Sustainable Development Narratives of Balance and Prevention in the Regime for Deep-Sea Mining

Bearing in mind the obligations that contractors are obliged to abide by when performing DSM activities is reasonable to analyse the role that sustainable development may perform in shaping the content of the rules, procedures and obligations governing the relationship between the different participants involved in the DSM regime.

As the following study will show, the legal framework for DSM forged powers to be exercised by the Authority and the sponsoring states to act upon contractors when their activities pose risks onto the marine environment and/or the common heritage of mankind.[325] Indeed, the setting where DSM activities take place, makes sustainable development an adequate argumentative resource to motivate and justify the measures taken by the pertinent authorities, when these are aimed to put a halt in the activities contractors are carrying out in the Area in light of the risk of or actual harm they pose to the marine environment and/or the common heritage of mankind. In other words, the following pages will show the strategic use of the sustainable development narratives of balance and prevention, as an effective resource for the protection of both the common heritage of mankind and the marine environment. Indeed, it will be argued that they are useful to adequately address both the social issues embodied in the common heritage of mankind as well as the environmental concerns arising out of DSM.

Applying the sustainable development narratives of balance and prevention into the legal framework of DSM in areas beyond national jurisdiction[326] is not at all alien to the law of the sea; indeed, although the very concept of sustainable development did not exist at the time the LOSC was negotiated, when the UN General Assembly decided to vest the

[325] An analysis of the potential environmental impacts derived from DSM can be found in Lodge, *supra* note 271, at 152-154.

[326] For the purposes of this study, the legal framework of deep seabed mining will refer to: the United Nations Convention on the Law of the Sea, particularly Part XI and its related Annexes; the 1994 Agreement on the Implementation of Part XI of the United Nations Convention on the Law of the Sea; Resolutions issued in the third United Nations Conference on the Law of the Sea; the rules, regulations and procedures of the International Seabed Authority; and the contracts related to the exploration and exploitation of resources in the Area.

Area and its resources as the common heritage of mankind,[327] states were actually struggling to achieve a balance between the economic benefits exploitation of strategic minerals may report for the wealthier, the social costs this will imply for the weaker, and the significant, potential harms to the marine environment that uncontrolled exploitation may cause as well as the impact such damage will have upon the international community as a whole.[328]

The analysis that will be carried out in the following pages does not intend to perform a critique on the political way the machinery established by the LOSC to control, administer, organise or monitor the activities in the Area have been arranged, but to work upon this framework with what is on the table.

This Chapter is divided into two sections, where the first section addresses the mechanisms at hand for the International Seabed Authority to enforce the obligations that contractors must comply with in order to carry out activities in the Area without adversely affect the common heritage of mankind and/or the marine environment. Particularly, the study will examine the power of the Authority to refuse applications for the extension of contracts for the exploration of resources in the Area, its power to issue emergency orders and the penalties available to enforce the legal framework for deep seabed mining. The second section is aimed at the study of the jurisdiction of the Seabed Disputes Chamber over disputes involving non-state participants in deep seabed mining to the extent that it is relevant when addressing the responsibility, liability and contributory fault regime set forth in Article 22 of Annex III to the LOSC applicable to the parties to the dispute and the role that sustainable development may play therein.

4.1 The Role of the ISA in the Protection of the Common Heritage of Mankind and the Marine Environment

To the extent that all rights in the resources of the Area are vested in mankind as a whole, on whose behalf the ISA shall act,[329] and based on the imperative obligations of the ISA

[327] United Nations General Assembly Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, A/RES/2749(XXV), 17 November, 1970.
[328] Scovazzi, *supra* note 220, at 44. See also: Tanaka, *supra* note 220, at 171-172.
[329] Article 137(2) LOSC.

established in Articles 153(4)[330] and 145 LOSC,[331] the ISA is obliged to take action whenever the CHM or the marine environment are put in risk by DSM. The enforcement mechanisms and the measures the ISA is able to take against threats or actual damages to the CHM and the marine environment, are crucial to the system.[332]

To prevent harms to the common heritage of mankind and/or to the marine environment from activities in the Area, Article 153(5) LOSC entitles the ISA to take any measures to ensure compliance with Part XI and the exercise of the functions of control and regulation assigned to it thereunder or under any contract. To this end, the ISA is vested with three main powers. Firstly, related to the contracts for the exploration of resources in the Area, the ISA has the power to grant extensions – provided on the compliance of certain conditions by the contractor - or terminate such contracts.[333] Secondly, whatever the stage of the activity is, the ISA has the power to issue emergency orders, which aim to prevent serious harm to the marine environment arising out of activities in the Area, including orders for the suspension or adjustment of operations,[334]and, thirdly, the ISA can apply any of the penalties set out in Article 18 Annex III LOSC.

All of these measures are set out to ensure the effective protection of the CHM and the marine environment, acting as counterbalance to the threats that DSM activities naturally pose to them.[335] As stressed by Rayfuse, "[t]he challenges for the ISA are thus to balance the interests of the commercial development of the resources with those of environmental protection and to work out how stringent any preventive rules should be in the face of

[330] Article 153(4) LOSC reads as follows: "The Authority shall exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of this Part and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved in accordance with paragraph 3. States Parties shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139".

[331] On its hand, Article 145 impose to the ISA the obligation to adopt appropriate rules, regulations and procedures for *inter alia*, the prevention, reduction and control of pollution and other hazards to the marine environment related to activities in the Area, and the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.

[332] Lodge, *supra* note 233, at 160. As to the extent and scope of the competencies of the ISA concerning the protection of the marine environment, Jaeckel has stressed that the ISA is, overall, well-equipped and that its role in the protection on the marine environment is paramount (Jaeckel, *supra* note 313, at 74). Notwithstanding, Churchill and Lowe consider that the ISA's duty of enforcement of the LOSC with respect to sponsored entities engaging with activities in the Area is only 'residual' of the enforcement powers that should be exercised by sponsoring states (R. Churchill and V. Lowe, *The Law of the Sea* (3rd ed., 1999). at 378).

[333] Regulation 26(2) and Section 3.2 RPN; Regulation 28(2) and Section 3.2 RPS and RCF.

[334] Article 162(2)(w) LOSC. See, also: Article 165(2)(k) and Article 18(3) Annex III LOSC.

[335] Rayfuse, *supra* note 309, at 104-105.

scientific uncertainty".[336] In this same line, Lodge argues that "[o]nce commercial-scale recovery of minerals begins, however, there is the potential for significant and lasting damage to the marine environment, not only from activities at the seafloor, but also as a result of pollution from discharges at the surface and disposal of tailings. For this reason, it is clear that the ISA has a central role to play in ensuring protection of the marine environment from adverse effects of activities in the Area".[337]

As will be argued, there is an important role that the sustainable development narratives of balance and prevention may play concerning to the duty of the ISA to balance the converging interests on DSM. Indeed, they can provide a coherent argumentative framework to justify the measures adopted in order to safeguard the CHM and the marine environment. Recently, Ascencio-Herrera, Legal Counsel and Deputy to the Secretary-General of the ISA, elaborated in the relation existing between the functions of the ISA and sustainable development, highlighting that "The mission of the International Seabed Authority is a unique one, yet limited in scope. Its mandate is circumscribed to administer the use of the mineral resources of the Area, while at the same time, adopting appropriate regulations to ensure the effective protection of the marine environment from harmful effects that may arise from exploration and exploitation activities in the Area. The Authority also has the role to promote and encourage the conduct of marine scientific research in the Area, and coordinate and disseminate the results of such research, when available. Even in the context of that confined mandate, the combination of those aspects, together with the aspiration of the Convention on the Law of the Sea to promote the economic and social advancement of all peoples of the world, reflects the basic three-pillared architecture of the notion of Sustainable Development."[338]

4.1.1 Rejection of the Application for Extensions of Contracts for the Exploration for Resources in the Area

The contract for the exploration for resources has an ordinary length of 15 years and can be extended for periods of 5 years, provided the contractor meets the conditions set forth

[336] *Ibid.*, at 105.
[337] Lodge, *supra* note 271, at 153.
[338] Ascencio-Herrera, 'Status of Deep Seabed Minerals: Introductory Remarks', in M. H. Nordquist, J. N. Moore and R. Long (eds.), *The Marine Environment and United Nations Sustainable Development Goal 14: Life below Water* (2019) 229, at 230.

by the legal framework of DSM.[339] So far, of the 29 contracts in force, 7 of them have been extended, meaning that all of these contractors have successfully proved either that, although efforts in good faith have been made to comply with the requirements set in the relevant plan of work, for reasons beyond their control, it has not been possible to complete the necessary preparatory work for proceeding to the exploitation stage, or that prevailing economic circumstances do not advice to proceed to the exploitation stage. Either way, as regulations relating to exploitation had not been approved at the time applications for extension were submitted, luckily no contractor applied for a plan of work for exploitation, which would have trigger the provisions contained in Section 1 paragraph 15 to the Annex of the 1994 Agreement. This latter situation would have put the ISA in a hurry to elaborate regulations for the exploitation of resources in a 2-year period, after which the ISA would have to consider and provisionally approve the application subject to the rules, regulations and procedures the ISA Council may have adopted provisionally. The implicit peril to the CHM and the marine environment stemming from the approval of a plan of work for the exploitation of resources under such circumstances are self-evident.

Regulations relating to the exploitation of resources are in their way to be adopted as the document containing the DRE, elaborated by the LTC, will be reviewed by the Council at its 25th Session in July 2019.[340] Time is pressing as exploration contracts are due to expire as soon as March 2021, and regulations on the exploitation of resources need to be in force at that time. Notwithstanding, each contractor has the final decision whether to step into the exploitation stage, waive to its rights in the area covered by the exploration contract – opting out from the system - or apply for an extension of the plan of work.

Interesting to the purposes of this study, is to address the extent of the power to refuse an application for the extension of the plan of work in relation to the protection of the CHM, and the argument that can be formulated from the perspective of sustainable development.

Indeed, the legal framework for DSM has been designed, ultimately, to promote the recovery of minerals from the seabed beyond national jurisdiction for the benefit of mankind. To that end, as it was stated in the above section, the contractor has the

[339] Regulation 26 RPN, and Regulation 28 RPS and RCF.

[340] See: https://www.isa.org.jm/news/proposal-draft-exploitation-regulations-released-isa-legal-and-technical-commission (last visited: 22 April 2019)

obligation to carry out the programme of activities set out in the plan of work[341] and to spend in each contract year not less than the amount specified in such programme in actual and direct exploration. Compliance with this obligation will inform the assessment that the ISA Council has to perform according to the regulations on exploration to grant or deny the extension of the plan of work, as it will reveal whether the contractor made the necessary efforts to comply with the plan of work. If the obligation is met, it is likely that the extension might be granted.

However, if the contractor fails to meet the obligation, the ISA Council would have to assess the causes that prevented compliance, specifically regarding those parts of the plan of work considered 'necessary preparatory work' for proceeding to the exploitation stage. The standard clause concerning the duration of contracts indicates, that only circumstances beyond the contractor's control will be taken into account as justifications for not complying with the requirements of the plan of work. Hence, extensions should be granted when the contractor successfully demonstrates that because of reasons beyond its control it was unable to complete the necessary preparatory work to turn into an exploitation contract.

The question then would be, how to determine what would amount to reasons beyond the contractor's control? Reasonably, force majeure would be suitable to address those situations that exceeds the control of the contractor, but this argument must be dismissed, as the contractor may request a time extension equal to the period by which performance was delayed by force majeure, and the term of the contract shall be extended accordingly.[342]

Contrary to the DRE, which foreseen circumstances allowing for temporarily reduction or suspension of production,[343] the regulations on exploration do not have a similar provision. Therefore, venturing an answer, looking to the undertakings set in Section 13.3 Annex IV RPN, RPS and RCF, the contractor is obliged to actively carry out the programme of activities with due diligence, efficiency and economy; with due regard to the impact of its activities on the marine environment; and with reasonable regard for other activities in the marine environment. In this sense, it would be reasonable to think

[341] Section 4.2 Annex IV RPN, RPS and RCF.
[342] Section 17.2 Annex IV RPN, RPS and RCF.
[343] Regulation 28(3) DRE.

that the ISA Council would assess the circumstances presented by the contractors according to these parameters.

It would be reasonable too, according to the ISA mandate, to act on behalf of mankind when evaluating the extension of contracts. This is, for the ISA Council to determine whether the CHM is being affected by granting an extension to a contract. Indeed, the power vested in the ISA Council might prove to be a tool at hand for protecting the common heritage of mankind from opportunistic use of the Area.

Even though some contractors might be genuinely interested in stepping into the exploitation stage, it is not less likely that some others may just want to hold exploration contracts with the aim to test and enhance their DSM technology, for becoming afterwards in the main retailers of such technology. Carrying out activities towards the exploration for resources while at the same time testing technology, could be a great business if the same contractor decides, afterwards, to transfer its contract to another qualified applicant. As stated by the ISA SG: "Although this situation may be reasonable, given the technological and economic conditions relating to seabed mining that prevailed until recently it must also be recalled that the resources of the deep seabed are the common heritage of mankind and that the fundamental objective of the regime established by the Convention and the Agreement is to encourage the development of those resources for the benefit of mankind as a whole. This is why the Agreement provides for a time-limit of 15 years, during which time contractors have exclusive rights to explore the areas allocated to them. The expectation is that, after 15 years, in the absence of special circumstances, contractors will either move to the exploitation phase or surrender the areas allocated to them. The current leisurely pace of activities, however, would suggest that contractors will basically continue to sit on the sites and seek multiple extensions of their contract if they are to retain the allocated areas. Prolonged blocking of access to the resources is neither an efficient nor an equitable way of administering the resources, which belong to mankind as a whole".[344]

As it has been stated earlier, the CHM regime implies movement towards exploitation of the resources found in the Area. This is also implied in the scheme of relinquishment set

[344] Secretary-General of the International Seabed Authority, *Report of the Secreatary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea* (2008), at paragraph 59.

forth in the regulations relating to exploration,[345] which require the contractor to actively explore as it has to relinquish parts of its contracted area progressively during the life of the contract.[346] After going through the relinquishment scheme, the result will be the definition of the area that the contractor is effectively going to apply for exploitation.[347] The problem is that, salve for the RPN, the other regulations foreseen that the nomination of the area to be retained for exploitation can be either at the end of the 15th year from the date of the contract, or when the contractor applies for exploitation rights.[348] Optimistically, this may imply that the application of a plan of work for the exploitation of resources may happen before the ordinary termination period for a contract for exploration; but, it could also be possible to interpret this provision in the sense that contractors are able to nominate such portion of the area, after the ordinary period, when deciding to turn to exploitation, and in the meanwhile, apply for as many extensions as necessary as no restriction on the number of applications is established in the regulations.

As it is possible to observe, there is no pressure at all upon contractors to turn to the exploitation stage, while, by establishing no limit to the number of extensions that can be requested, the affectation to the CHM is not hard to see. Indeed, because of the exclusive rights warranted to contractors over the contracted area, such area will be locked for other contractors willing to engage in DSM to the same resource but willing to earn less revenues than those expected by the actual contractor for the whole length of the contract. This situation clearly has the effect of obstructing the realization of the CHM as it impedes to equitably distribute any benefit from DSM. The situation for the contractor is convenient as it had already secured the best area to nominate for exploitation – which is also entitled to transfer - and in the meantime, it will continue testing and enhancing the technology for DSM which, in the aftermath, will give it revenues that are not considered among those benefits that have to be equitably shared according to the CHM regime.

[345] Regulation 25 RPN, and Regulation 27 RPS and RCF.
[346] According to DSM practice, the completion of the relinquishment scheme represents a milestone between two stages encompassed within the exploration contract. Accordingly, Stage I goes from the sign of the contract to the end of the relinquishment scheme, while Stage II is identified with the period after all relinquishment had been made until pre-feasibility (J. Jincai, The Area and Its Resources: Scientific and Legal Aspects, 2019).
[347] The size of the area that will be nominated for exploitation will vary provided on the resource aimed to exploit. See: Regulation 25(1) RPN; Regulation 27(3) RPS; and, Regulation 27(2) RCF. However, as argued by Jin Jincai, the actual mining site would be smaller than the contracted area for the exploitation of resources. Indeed, the determination of the mining area will be determined taking into account economic and efficiency parameters and should not exceed of thousand square kilometres (*Ibid.*).
[348] Regulation 27(4) RPS and Regulation 27(1) RCF.

The stand taken by the ISA Council towards the applications it receives for the extension of the plan of work is crucial in order to avoid circumstances like the one referred, and to this end, it might be helpful to integrate the narrative of balance to adequately integrate in the decision of the ISA Council, the different interests at stake. The impact that the CHM may have upon social development of all peoples represents one of the links between DSM and sustainable development. Both the CHM regime and sustainable development imply movement towards an objective, which in the case of the latter is to balance social developmental and environmental concerns with purely economic interests, adjusting their relation thereto.

Arguably, the concession of the first seven extensions might be justified through sustainable development narratives as well. Indeed, such extensions could have been justified on the potential environmental risks otherwise implicit in allowing the commencement of exploitation activities without an adequate legal framework to that purpose. Neither the CHM regime nor the obstacles to its achievement that the extension of contracts may pose, would amount to configure good reasons to put such a threat to the marine environment. The situation would have been different – and it should be - provided the existence of a legal framework for exploitation of resources.

Indeed, once regulations on exploitation come to be adopted, and the marine environment appropriately protected from the adverse impacts of exploitation activities, the balance will need to be struck differently. Provided on the adoption of the regulations for the exploitation of resources, the stand of the ISA Council, as representative of mankind would be expected to change *vis-à-vis* the applications for extensions of contract. This will suppose, among other things, to address clearly whether activities and objectives of contractors, as those depicted in the precedent paragraphs, are in conformity with the CHM regime,[349] or else, appropriately balance the concurrent interests to justify either the extension of the plan of work or its refusal.

[349] As highlighted in the Virginia Commentary, the principle of common heritage of mankind must be a guide for the interpretation and application of the legal framework for DSM, consequently, all decisions taken by the ISA, including the refusal of extensions to exploration contracts, must dully consider the CHM, and, most prominently, the essential element that "the resources in the Area must be developed for the benefit of mankind as a whole" (Nadan and Lodge, *supra* note 229, at 99).

4.1.2 The Adoption of Emergency Orders

An emergency order (hereinafter, EO) is a measure adopted by the ISA Council, acting upon the recommendation of the LTC,[350] aimed to prevent, contain and minimise serious harm or the threat of serious harm to the marine environment. According to what was explained in the previous chapter as to the relationship between damages to the marine environment and damages to the common heritage of mankind, it is assumed here that an emergency order can be also adopted to protect the Area and its resources.

The initiation of the procedure established to adopt an emergency order is directly linked to the obligation of contractors to promptly report to the ISA SG all incidents befallen during the performance of their activities.[351] The report must account on the threat or damage caused to the marine environment, and the measures taken by the contractor, if any, and inform subsequent actions to be taken by the ISA SG[352] and the ISA Council. As a general rule, emergency orders are adopted by consensus, however, if all efforts to reach a decision by consensus have been exhausted, the decision will be taken by a two-thirds majority of members present and voting.[353] According to Article 162(2)(w) LOSC, an emergency order may include orders for the suspension or adjustment of operations to prevent serious harm to the marine environment arising out of activities in the Area.[354] Subjects responsible for complying with emergency orders are all sort of contractors operating in the Area, and the sponsoring states with regard to their sponsored entities.

The contractor's obligation to comply with the EOs is set in the regulations for exploration[355] and the DRE.[356] Contrary to the judicial opportunity available to contractors to challenge penalties pursuant Article 18 Annex III LOSC before their

[350] Article 165(2)(k) LOSC.
[351] Lodge, *supra* note 271, at 161
[352] See Regulation 33(1) RPN, and Regulation 35(1) RPS and RCF, relating to the power of the ISA SG to take immediate measures of temporary nature to prevent, contain and minimise serious harm or threat of serious harm to the marine environment.
[353] See in detail: Rule 56 of Rules of Procedure of the Council of the ISA, available at: https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/documents/EN/Regs/ROP-Council.pdf (last visited: 24 April 2019), and Rule 84 of the Rules of Procedure of the Assembly of the ISA, available at: https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/documents/EN/Regs/ROP-Assembly.pdf (last visited: 24 April 2019). Interestingly to further research is the issue of quorum and 'chambers weight' for taking decisions concerning substantive matters at the ISA Council when consensus cannot be achieved.
[354] Interestingly, EOs may not impose the termination of the contractor's rights in the Area, only their suspension or the adjustment of operations (Nadan and Lodge, *supra* note 229, at 746).
[355] Section 6.3 Annex IV RPN, RPS and RCF.
[356] Regulation 53 DRE.

implementation, EOs are automatically executed once adopted,[357] however, as it will be examined in the following section, this is in spite of the possibility contractors have, to look for redress before the Seabed Disputes Chamber. Responsibility of sponsoring states with regard to the compliance of an EO has been described as a direct obligation, which compliance is subject to due diligence standard[358] entailing, twofold, to adopt, on the one hand, the necessary measures to ensure that sponsored contractors will provide guarantee of their financial and technical capability to comply with EOs, or to assure that such EOs can be taken, and on the other, to ensure that assistance will be provided to the ISA in those cases where contractors do not promptly comply with an EO, being necessary the adoption of practical measures on its behalf to prevent, contain and minimise serious harm or the threat of serious harm to the marine environment.[359]

As underscored above, EOs are adopted *vis-à-vis* the existence of serious harm or a threat of serious harm to the marine environment. According to the exploration regulations and the DRE, serious harm to the marine environment "means any effect from activities in the Area on the marine environment which represents a significant adverse change in the marine environment determined according to the rules, regulations and procedures adopted by the Authority on the basis of internationally recognized standards and practices".[360] The DRE also provides for practices to be informed by best available scientific evidence, which relates to "the best scientific information and data accessible and attainable that, in the particular circumstances, is of good quality and is objective, within reasonable technical and economic constraints, and is based on internationally recognized scientific practices, standards, technologies and methodologies".[361] Even though harm or the threat of harm to the CHM is not explicitly referred in any provision as constituting a plausible justification for the ISA Council to adopt an EO, as argued earlier, it is reasonable to include harms to the CHM within those caused to the marine environment. Arguably, any harm caused to the CHM will always constitute a harm to the marine environment, but not the other way around.

[357] See: Regulation 103(7) DRE.
[358] See: *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Reports 2011, *supra* note 118, at paragraph 138.
[359] Regulation 33(7) and (8) RPN; Regulation 35(7) and (8) RPS and RCF.
[360] Regulation 1(3)(f) RPN, RPS and RCF; Schedule 1 DRE.
[361] Schedule 1 DRE.

Considering the set of obligations contractors must comply with to ensure the protection of the marine environment, it would not be too precipitous to assert that the breach of one or more of these obligations may entail a serious threat of harm or an actual harm to the marine environment. If this were the situation, provided suffice evidence of a significant adverse change in the marine environment caused or foreseen to be caused by the breach of one or multiple obligations, the ISA Council would have enough legal basis to issue an EO to curve the activities of the wrongdoer by suspending or adjusting its operations in order to prevent, contain or minimise the harm or the threat of harm to the marine environment. If this is true, the legal perspective of sustainable development held in the 2005 Award of the arbitral tribunal to the *Iron Rhine* Case[362] would find in EOs its most accurate expression in international law. Indeed, the tribunal to that case argued that sustainable development supposed a duty of prevention or mitigation of any potential harm to the environment when imputable to development,[363] which is exactly the objective of EOs. In this sense, it would be accurate to say that EOs represent the materialisation of the sustainable development narrative of prevention in international law. Indeed, the traditional, political understanding on sustainable development implying a balance and integration between economic development, social development and the protection of the environment is not at the core of an EO, and to such end, the ISA Council is not ordered to balance the interests and concerns converging in DSM in a sustainable development fashion, but to apply the sustainable development narrative of prevention, i.e. to prevent, minimise or contain harms to the marine environment by ordering the halt or suspension of DSM activities carried out by a contractor.

This is not to say, however, that an adequate justification is not needed to back up the adoption of these measures, as the suspension or adjustment of the contractor's operations in the Area may entail monetary losses which contractors, most likely, will want to recover.

Indeed, the adoption of EOs is not a discretionary power of the ISA Council, and their review falls under the jurisdiction of the SDC, being possible for contractors to challenge a particular EO before the SDC, seeking remedy for the losses the measure may have caused to its investment, therefore, the importance for EOs to be appropriately motivated.

[362] *Iron Rhine* case, *supra* note 2.
[363] *Ibid.*, at paragraph 59.

In the next section it will be analysed the relevance of the motivation of an EO in the case it is challenged by the contractor before the SDC, and the role that sustainable development narratives play at the time of assessing the appropriateness of the measure. Suffice to say here, that according to the legal framework for DSM, in the adoption of an EO, the ISA Council should take into account the recommendations of the LTC, the report of the ISA SG, any information provided by the contractor and any other relevant information.[364]

4.1.3 Mechanisms Available for the Enforcement of the Legal Framework for Deep Seabed Mining

Article 18 Annex III LOSC sets out the mechanisms by which the ISA may pursue the enforcement from the contractors of the LOSC, the ISA's rules, regulations and procedures, the terms of contracts for the exploration for and exploitation of resources in the Area, and binding decisions issued by the relevant dispute settlement body.[365] Penalties ranging from monetary penalties to suspension and termination of the contract can be imposed to contractors whenever they carry out their activities in violation of the legal framework of DSM.[366] The penalty will be determined according to the character of the violation; carrying suspension or termination if the violation is serious, persistent and wilful,[367] otherwise, or alternatively to suspension or termination, a monetary penalty proportionate to the seriousness of the breaching might be impose.[368] Also, Article 18 Annex III LOSC provides for the suspension or termination of the contractor's rights

[364] Regulation 33(6) RPN; Regulation 35(6) RPS and RCF.
[365] See, generally: Nadan and Lodge, *supra* note 229, at 745; Le Gurun, 'Annex III Article 18 LOSC', in A. Proelss et al. (eds.), *United Nations Convention on the Law of the Sea: A Commentary* (2017) 2250, at 2251.
[366] Article 18(1)(a) and (2) Annex III LOSC.
[367] As noted by Le Gurun, these adjectives that are aimed to qualify the degree of the violation, are not defined in the text of the Convention nor in the regulations, "but their addition reinforces the idea that a high level of grave and repeated violations of the fundamental terms of a contract is required for penalties other than monetary penalties" (Le Gurun, *supra* note 365, at 2253). This author goes on explaining that "what is at stake is several breaches of essential terms which represent the core of a contract. Violation of non-fundamental clauses of a contract would exclude suspension and termination" (*Ibid.*). However, key to the analysis is, also, to address what does the sentence 'fundamental terms of the contract, Part XI and the rules, regulations and procedures of the Authority' in Article 18(1)(a) refers to? This work has shown that both the CHM and the marine environment are considered the governing principles of the Area, thus key elements to take into account in assessing DSM activities. In this sense, the set of obligations that has been pointed out earlier as aimed to the protection of the CHM and the marine environment, could be, among others, integrating the *fundamental* conditions according to which DSM has to be developed.
[368] Article 18(2) Annex III LOSC.

whenever it does not comply with a final binding decision of the dispute settlement body applicable to it.[369]

Interesting to the study are those cases relating to penalties imposed for violations of the DSM regime - either qualified or not - because in these cases, before the application of the measure or measures taken by the ISA, an administrative, contradictory phase will precede. This phase is more elaborated in the case of the DRE than in the regulations for exploration, which instead do not establish clear rules for this procedure. The process begins with the communication to the contractor of one or more warnings issued by the ISA, letting it know about the potential violations to the DSM regime from the performance of its activities. According to the DRE, if there is reasonable ground to consider a contractor in breach of the terms and conditions of its contract, the ISA SG shall issue a compliance notice to it, requiring the adoption of specific actions to curve its activities in conformity with the DSM regime.[370] This compliance notice will constitute a warning for the purposes of Article 18 Annex III LOSC.[371] In the regulations for the exploration of resources, on the other hand, the provision is found in Annex IV, in identical terms in all three regulations.[372] According to it, before deciding to impose a penalty, is necessary a written warning by the ISA. These warnings should describe the alleged breach and the factual basis for it and require the contractor to take remedial action or other such steps considered appropriate to ensure compliance within a specified period of time.[373] Indeed, the aim of these warnings is to encourage the contractor to bring back its behaviour in conformity with the legal framework to DSM. Notably, the role played by the ISA SG in triggering the application of the penalties established in Article 18(1)(a) and (2) Annex III LOSC is paramount b, as in him/her rests the duty to perform the assessment of the circumstances that will enable him/her to issue the warnings to the contractors relating the conduction of their activities. The accomplishment of this duty will require the ISA SG to be highly pro-active and clear-sighted. Contrarily to the DRE, the contractual provision in the exploration regulations, does not specify whether the ISA SG should oversee the assessment of the circumstances for issuing such warning. Nonetheless, it follows from the obligation to report incidents bearing on contractors that

[369] Article 18(1)(b) Annex III LOSC.
[370] Regulation 103(1) DRE.
[371] Regulation 103(3) DRE.
[372] Section 21 RPN, RPS and RCF.
[373] Regulation 103(2)(a) and (b) DRE.

the ISA SG should issue the warning as notifications are primarily addressed to him/her.[374] After the warning is delivered, the contractor will be accorded with a reasonable opportunity to make representations in writing to the ISA SG.[375]

Interestingly, in performing the assessment commissioned, the ISA SG will need to evaluate the whole setting and interconnect the obligations that are in breach and those that may potentially be breached by the contractor, and simultaneously evaluate the actual and/or potential harms to the CHM and/or the marine environment. It would certainly be useful at this point to integrate in the assessment the sustainable development narratives of balance and prevention, as these may aptly contribute to evaluate all concurrent interests.

As it was advanced, different from EOs, penalties of Article 18 Annex III LOSC, are not automatically executed, and will be only enforceable 60 days after being notified to the contractor, or after the contractor has exhausted the judicial remedies available to it for challenging the measure before the SDC.[376] In this latter case, penalties will be effective once declared so by the court or tribunal.[377]

Giving contractors the right to challenge the measures adopted by the ISA before an international adjudicative body, ensures that their investments will not be arbitrarily

[374] See: Regulation 5(3) RPN, RPS and RCF.
[375] Regulation 103(4) DRE.
[376] Article 18 Annex III LOSC read together with Section 21.3 RPN. Identical provision is contained in RPS and RCF, and in Section 12.3 Annex X DRE.
[377] Most likely, according to the rules on jurisdiction in Article 187(c)(ii) LOSC, the SDC is the judiciary capable to issue such a decision as these rules gives jurisdiction to the SDC to learn about disputes concerning acts or omissions of the ISA relating to activities in the Area, and directed to the contractor or directly affecting its legitimate interests. However, some may argue that a commercial arbitral tribunal may be capable as well, when a dispute concerning the interpretation or application of a relevant contract or plan of work according to Article 187(c)(i) is brought pursuant Article 188(2) LOSC. In my opinion, mindful on the fact that this might be an arguable position, I would be inclined to think that a commercial arbitral tribunal would not have jurisdiction to decide upon the enforceability of a measure adopted by the ISA pursuant to Article 18 Annex III LOSC. Indeed, as it will be analysed in the following section, the jurisdiction *ratione personae* and *ratione materiae* of the SDC is carefully drafted in Articles 187-189 LOSC. The jurisdiction subject-matter of the SDC seems to follow the pattern established in Article 36(2) of the Statute of the International Court of Justice, as far categories mentioned therein relate to the interpretation of a treaty (a); any question of international law (b); the determination of a breach of an international obligation (c); and the determination of the nature or extent of the reparation to be made for the breach of an international obligation (d). Acknowledging that this is not a fixed path that all disputes should follow, and that there is no hierarchy between these categories nor among the categories referred to in Article 187 LOSC, a narrow interpretation of Article 188(2) LOSC would suggest that no disputes other than those concerning the interpretation or application of a relevant contract or plan of work could be decided by commercial arbitral tribunals, being everything else, including issues related to measures taken by the ISA, and others that may fall within Article 187(c)(ii), or issues of liability according to Article 187(e), beyond the jurisdiction of such commercial arbitral tribunals.

frustrated by any such measures. This is similar to the situation observed in the case of foreign investment and the protection that these are warranted by IIAs or BITs.

Bearing this in mind, it turns necessary to find a coherent line of argumentation, that provides solid justification to the assessment of the ISA upon the behaviour of the contractor and the specific penalty ultimately decided. The proposal of this study is to use the sustainable development narratives of balance and prevention to build a strong and coherent legal argumentation supporting the measures taken by the ISA. Indeed, as noted by Voneky and Hofelmeir, "global, long-term concerns and aspects of sustainable development have to be taken into account when conducting activities in the Area for the 'benefit of all mankind'",[378] which also gives ground to assert that in assessing the overall scenario of the compliance of the obligations aimed to the protection of the governing principles of the Area, a sustainable development approach must be considered.

4.2 The Strategic Use of Sustainable Development in Deep Seabed Mining Dispute Settlement

As it has been shown in the previous section, the sustainable development narratives of balance and prevention can be useful argumentative resources to justify the measures taken by the ISA in enforcing the DSM regime. Indeed, such narratives can contribute to justify the exercise of the powers that the ISA has, to curve the behaviour of contractors whenever deemed to be affecting the common heritage of mankind and/or the marine environment. The following section aims to examine the next step, this is, the extent to which the sustainable development narratives of balance and prevention can be articulated in the litigation of cases confronting a contractor - transnational company - against the ISA, concerning the determination of the responsibility of the latter for having taken a measure which is allegedly causing the impairment of the former's rights.

Therefore, the thesis that will be supported is that the narratives of balance and prevention subjacent to sustainable development can be strategically used in litigation in order to integrate social and environmental concerns into these disputes, effecting on the determination of the responsibility and liability of the parties. If this is correct, litigation outcomes would have to start growing against transnational companies, which in turn,

[378] Voneky and Hofelmeir, *supra* note 251, at 980.

would induce a shift in their consideration regarding the social and environmental impacts of their activities.

In other words, the study will discuss on the possibility to engage in arguments based on the sustainable development narratives of balance or prevention, to exclude the responsibility or to adjust the amount of compensation in cases against the International Seabed Authority. The argument will be focused on the performance that the sustainable development narratives may have to adjust the perspective from where international disputes involving transnational companies are assessed, to one that gives proper account to the related social and environmental concerns that justify the action taken by public authorities which are deemed to cause the affectation of the other party's economic interests.

4.2.1 Scope of the analysis: Disputes brought by a Contractor Against the ISA Before the Seabed Disputes Chamber

Certainly, for contractors will not be indifferent if any of the measures analysed in the previous section is adopted by the ISA, as these may be the source of potentially, great economical damage to their investments. Seeking to ensure the rights of the contractor and its investment, as it will be shown, the legal framework designed for DSM entitles contractors to bring their claims against the ISA before the Seabed Disputes Chamber.[379] Indeed, as argued by the former Judge Tuerk, "the fact that the Seabed Disputes Chamber has now become operational will also reassure States and private entities intending to engage in deep seabed mining that, in carrying out such activities, their rights and obligations under UNCLOS may ultimately be determined by an independent tribunal".[380]

As relevant as addressing the mechanisms available and the standards applicable to determine the responsibility and liability of states parties and contractors engaging in DSM, is to address those relating to the determination of the responsibility and liability of the ISA. The relevant provisions incumbent on the mechanisms available to challenge

[379] As stated by Seeberg-Elverfeldt "Otherwise neither a judicial enforcement of the provisions underlying the regime nor the corresponding legal protection from measures taken by the institution would be thinkable" (Seeberg-Elverfeldt, *supra* note 226, at 66 and 126-127).
[380] Tuerk, 'The International Seabed Area', in D. Attard, M. Fitzmaurice and N. A. Martínez Gutiérrez (eds.), *The IMLI Manual on International Maritime Law, Vol. I* (2014) 276, at 301.

the decisions taken by the ISA are set out in Articles 187 to 189 LOSC; whereas principles governing issues relating to the responsibility and liability of the ISA are set out in Article 22 Annex III LOSC, which is broken down and further elaborated in the regulations on exploration and the DRE.

The following study will be limited to the analysis of those disputes concerning to the interpretation or application of a contract or plan of work,[381] the determination of the responsibility of the ISA,[382]and the determination of its liability[383]. The criteria for focusing only in these categories of disputes, setting aside all the other categories in Article 187 LOSC,[384] is grounded on the interest that represents for the author the consequences that may arise for the ISA facing judicial procedures filed by a private entity looking for the responsibility of the former to be declared in order to claim compensation for the damages caused.[385] The relevance of these disputes bears on the tight link between the active role expected from the ISA in safeguarding the CHM and the marine environment, and the legitimate expectations of the contractor not to see its investment frustrated. Certainly, remedies are on the table for contractors each time the ISA's behaviour is deemed wrongful either because it has infringed its obligations, act in excess of jurisdiction or misuse of power.

Consequently, this section is aimed at the study of the jurisdiction of the SDC[386] to learn about disputes where a private entity carrying out activities in the Area claims the responsibility of the ISA in light of the consequences a measure taken by the latter is alleged to have upon its investment. Interestingly to the analysis is to elaborate on the question of compensation for eventual damages caused to the contractor if the ISA is held responsible for the wrongdoing of its actions or omissions and liable thereon. Indeed, provisions on responsibility, as set out in the DSM regime, will prove to grant broad space for the SDC to apply its discretionary power to determine the amount of compensation payable to the contractor. This discretion is materialised in the SDC's opportunity to

[381] Article 187(c)(i) LOSC.
[382] Article 187(c)(ii) LOSC.
[383] Article 187(e) LOSC.
[384] Article 187 (a), (b), (d), and (e) LOSC.
[385] For a study on the responsibility of states parties to the LOSC, see: Hinrichs Oyarce, 'Sponsoring States in the Area: Obligations, Liability and the Role of Developing States', *Marine Policy* (2018) 317. For a study on the liability of states parties and contractors for environmental damage caused by their activities in the Area, see: Neil, *supra* note 285.
[386] Account being taken to Article 288(4) LOSC: "In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal".

assess the contributory fault standard to adjust the amount of compensation payable otherwise to the contractor by the ISA.

Not many authors have engaged yet with the practical application of Article 187 LOSC on the jurisdiction of the SDC over disputes that may arise among the many participants of DSM, and even less are those which have engaged with the analysis of the mechanisms portrayed to the settlement of disputes involving private entities sponsored by states parties according to Article 153(2)(b) LOSC, which are already developing activities in the Area.[387] However, writing on this topic gains great relevancy as the Legal and Technical Commission of the ISA is currently working on the Draft Regulations on Exploitation of Mineral Resources in the Area (DRE), hurried by the fact that the first extensions granted to the very first contracts on exploration are due to expire in 2021.[388]

As this section will show, disputes concerning the interpretation or application of DSM contracts, and those concerning the responsibility and liability of the ISA may prove to be fertile ground to make a strategic use of the sustainable development narratives of balance and prevention. Indeed, it is most likely that in many of the disputes brought, a balance will need to be achieved between, on the one hand, the protection of the CHM and marine environment and, on the other, the economic interests of contractors and those of the international community.

Considering sustainable development narratives of balance and prevention at the time of applying the legal framework designed for DSM should not be incompatible with the LOSC, nor unjustifiable for the SDC to consider them within the adjudicative process. Indeed, integration of narratives stemming from other fields of international law is not new to the International Tribunal for the Law of the Sea. Throughout the jurisprudence of the ITLOS it is found a consistent and systematic reference to the expression *considerations of humanity*[389] as a way to include, within the assessment of facts that have

[387] According to the Authority's information available in its web site there are 29 contracts in force. Seventeen of these contracts are for exploration for polymetallic nodules in the Clarion-Clipperton Fracture Zone (16) and in the Central Indian Ocean Basin (1). There are seven contracts for exploration for polymetallic sulphides in the South West Indian Ridge, Central Indian Ridge and the Mid-Atlantic Ridge and five contracts for exploration for cobalt-rich crusts in the Western Pacific Ocean (Available at: https://www.isa.org.jm/deep-seabed-minerals-contractors (last time visited: 14 October 2018)).

[388] It is most likely contractors will apply for another 5-years extension for their exploration contracts.

[389] *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, paragraph 155; *"Juno Trader" (Saint Vincent and the Grenadines v. Guinea-Bissau)*, Prompt Release, Judgement, ITLOS Reports 2004, p. 17, paragraph 77; *M/V "Virginia G" (Panama v. Guinea-Bissau)*,

been put forward by the parties, a certain degree of human rights consideration. This, however, does not mean that the ITLOS has jurisdiction to determine breaches of human rights obligations,[390] but to use the shared understandings of the international community that are based on human rights, to provide an integral assessment of the facts of the case in light of the applicable law.[391]

4.2.2 Disputes Concerning the Interpretation or Application of Contracts or a Plan of Work

Article 187(c)(i) LOSC gives the SDC jurisdiction over disputes between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons, concerning the interpretation or application of a relevant contract or a plan of work.

4.2.2.a. Jurisdiction Ratione Materiae

The first sentence of this provision - 'Disputes between parties to a contract' – refers to any contract signed between the subjects mentioned in the second part of the provision as far as these instruments are related to Article 187 *chapeau*.[392] Indeed, the jurisdiction of the SDC shall concern disputes with regard to activities in the Area, and it is manifest that exploration and exploitation contracts are related to activities in the Area. Consequently, the jurisdiction of the SDC according to Article 187(c)(i), will cover the interpretation or application of the relevant contracts for the exploration and exploitation of resources in the Area. At first sight, the separate mention in paragraph (i) to 'a relevant contract or a plan of work' would suggest that the relevant contract and the plan of work might not

Judgment, ITLOS Reports 2014, p. 4, paragraph155; *"Enrica Lexie" (Italy v. India)*, Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015, p. 182, paragraph 133.

[390] In the *M/V "Norstar" (Panama v. Italy)*, Judgment, ITLOS Reports 2019, Panama made several references to alleged breaches of human rights obligations by Italy in the course of the written proceedings, while Italy contended that the ITLOS had no jurisdiction to ascertain such breaches as these will fall outside the applicable law according to the LOSC. The ITLOS, unfortunately, did not pronounce itself upon this discussion in its judgement as Panama did not include claims regarding human rights violations by Italy in its final submissions, being therefore not required to address those claims (*Ibid.*, paragraph 139-146).

[391] This seems to be the idea expressed by Judge Lucky when inferring from Article 300 LOSC that the prevention against abuse of rights may be also covering situations of abuse of *human* rights. Accordingly, he goes on explaining, what the judge is doing "is not making new law but rising to the challenge of contributing to the development of international law and providing an enhancement to the existing law set out in the Convention" (*M/V "Norstar" (Panama v. Italy)*, Separate Opinion to the Judgment of Judge Lucky, paragraph 150).

[392] Seeberg-Elverfeldt, *supra* note 226, at 125-126.

always be related instruments. However, according to Regulations on exploration for resources in the Area and the DRE, the plan of work should be in any case regarded an annex to the contract either of exploration or exploitation.[393]

4.2.2.b. Jurisdiction Ratione Personae

From the perspective of the subjects involved in the category of disputes prescribed in Article 187(c)(i), and as it is relevant to the analysis, some caveats must be warranted. As a preliminary note, it must be stressed that the ISA will always be a party to any exploration or exploitation contract,[394] except when the Enterprise,[395] the operative arm of the ISA, engages with DSM in the Area.[396] However, as the Enterprise is an organ of the ISA, disputes between these two subjects are precluded, and so it seems from the reading of the second part of the provision under analysis. By using the conjunction *'or'* when referring to the ISA and the Enterprise, most authors[397] have understood that disputes between them are not under the jurisdiction of the SDC, but should be settled within the international organisation through other mechanisms.[398] However, reference to the Enterprise is not void of meaning, as it is expected to enter into joint ventures or production sharing arrangements in the form of contracts, with any of the eligible entities to carry out activities in the Area for the exploitation of resources in the reserved areas.[399] Although controversies between the Enterprise and its correlative joint venture partner are prone to arise,[400] this category of disputes are out off of the scope of this study as the source of the dispute will never be related to the exercise of a prerogative of the Enterprise

[393] See: Section 4.4 Annex IV and Schedule 2 Annex III to the RCF, RPS and RPN; and, Draft Regulation 55 and Annex X Section 20 and Schedule 2 DRE.
[394] According to Article 153(2)(b) LOSC, activities in the Area shall be carried out in association with the Authority by States Parties, or state enterprises or natural or juridical persons.
[395] Article 3(5) Annex III LOSC excludes the plan of work presented by the Enterprise to be drafted and signed in the form of a contract with the ISA.
[396] According to Article 153(2)(a) LOSC, activities in the Area shall be carried out by the Enterprise.
[397] Adede, 'The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention', 11 *Ocean Development and International Law Journal* (1982) 125, at 142; Seeberg-Elverfeldt, *supra* note 226, at 111.
[398] As this scenario falls out of the scope of the present study, no further reference will be made to the mechanisms and ways of solving disputes that may arise between the ISA and the Enterprise.
[399] Article 9 and 11 Annex III LOSC.
[400] For a detailed study on the legal framework of the Enterprise, see: Brown, *supra* note 218, at Chapter 8, Section II.2; Seeberg-Elverfeldt, *supra* note 226, at 125.

upon its counterparty,[401] as the contractual relation among them is purely *private*,[402] in the sense that none of them is entitled to exercise any authority power upon the other.

The jurisdiction of the SDC to learn about controversies between a contractor and the ISA pose no difficulties,[403] as it is out of question that the ISA may enter into contracts with private entities and that any dispute arising from this contractual relation falls under the jurisdiction of the SDC - unless the parties otherwise agree. Nonetheless, particular regard has to be taken on Article 188 LOSC, which provides for disputes on the interpretation or application of a contract to be submitted, at the request of any party to the dispute, to binding commercial arbitration.[404] But as Seeberg-Elverfeldt argues, "it becomes apparent that all disputes on the interpretation or application of whatever kind of agreement relative to deep seabed mining activities shall be considered as disputes within the meaning of Art. 187(c)(i) UNCLOS and should be settled according to the provisions on the settlement of disputes under UNCLOS".[405] Following this line of thoughts, embrace the jurisdiction of the SDC for settling disputes concerning the interpretation and application of contracts will provide coherent and comprehensive understandings upon the DSM regime. Moreover, the SDC seems to be the most adequate judiciary to provide a decision able to integrate the governing principles of the Area to the interpretation and application of contracts.

4.2.2.c. The Contribution of Sustainable Development in Disputes Concerning the Interpretation and Application of Contracts

Acknowledging that the DSM regime is the point of convergence of an array of different interests belonging, at their time, to an array of different participants, ranging from the international community to states and international organisations, individually considered, to natural and juridical persons, to the humankind as a whole, the strategic use of the sustainable development narratives as an argumentative resource in disputes

[401] For a study on the liability of the Enterprise, see: Brown, *supra* note 218. At 333-336; Seeberg-Elverfeldt, *supra* note 226, at 130.
[402] Account being taken on the Enterprise's immunities and privileges set forth in Article 13 Annex IV LOSC.
[403] Seeberg-Elverfeldt, *supra* note 226, at 123.
[404] This prerogative is limited, however, to disputes not concerning a question of the interpretation of Part XI and Annexes relating thereto, in which case the SDC has exclusive jurisdiction (Article 188(2)(a) LOSC), or when the decision of the arbitral tribunal depends upon a ruling of the SDC, in which case the arbitral tribunal shall refer such question to the SDC for such ruling (Article 188(2)(b) LOSC).
[405] Seeberg-Elverfeldt, *supra* note 226, at 126.

concerning the interpretation or application of a contract is paramount to create coherent, all-embracement legal arguments.

Indeed, the SDC will have to consider the common heritage of mankind and the protection of the marine environment as principles aimed to give colour and shape to the interpretation and application of contracts for the exploration or exploitation of resources in the Area. However, these principles would have to be integrated in such a manner not to constitute a disincentive to engage in DSM activities. The narrative of balance subjacent to sustainable development is considered to provide the argumentative framework to achieve outcomes adequately addressing all these economic, social and environmental aspects.

The role of the ISA is considered crucial in order to promote the strategic use of the narrative of balance in the adjudicative process performed by the SDC, as the former can promote and encourage the latter to adopt a different approach towards sustainable development. The dialogue between both institutions will take place within compulsory procedures, where the SDC will be assessing the conformity of a measure adopted by the ISA to the DSM regime, gaining relevance therefore the motivation and arguments developed *ex ante* by the ISA in support of the reasonability of the challenged measure.

4.2.3 Disputes Concerning the Responsibility of the ISA

Article 187(c)(ii) LOSC gives jurisdiction to the SDC over disputes between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons, concerning the acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests.

Out of its own interpretation or application of provisions contained in the relevant contract, the ISA may adopt measures,[406] which, afterwards, may be considered unlawful according to the right interpretation or application of such provisions provided by the SDC, or a commercial arbitral tribunal.[407] In this sense, a claim pursued to Article

[406] Measures such as those analyzed in the previous section, i.e. the refusal to grant extensions to exploration contracts, adoption of emergency orders, or imposition of penalties pursuant to Article 18 Annex III LOSC.
[407] See: Article 188(2)(a) LOSC.

187(c)(i) LOSC may turn into a dispute falling into the category under its paragraph (ii), under review here.

To the same extent, a measure taken in the exercise of the prerogatives granted to the ISA to curve the activities carried out by contractors in the Area, may be perceived as a wrongdoing by the party the measure was directly ordered to, which will allow it to bring the dispute before the SDC. The same will apply in the case of measures adopted by the ISA directly affecting the interests of a party to the contract different to the direct bearer of the measure. Hence, this provision deals with the possible impairing that the acts or omissions of a party to a contract may cause to another party's interests and establishes the exclusive jurisdiction of the SDC to learn about these disputes.[408]

4.2.3.a. Jurisdiction Ratione Materiae

The analysis of Article 187(c)(ii) LOSC necessarily calls for it to be sectioned into three parts.

a) The first part is related to the sentence 'acts or omissions of a party to the contract'. Mindful that this sentence may involve more situations than those considered here,[409] as it was stated above, crucially to the present study is the behaviour of the ISA whenever it is contractually bound to a contractor. The need to provide access to the SDC to private entities to challenge the measures taken by the ISA, in case these measures affect their interests, derivates from the need of counterbalancing the position of public authority held by the ISA *vis-à-vis* the contractor.[410]

The behaviour[411] of the ISA will be wrongful when it is proved to be in violation of Part XI or the Annexes relating thereto, or of rules, regulations and procedures adopted by the ISA itself, as well as the acts or omissions alleged to be in excess of jurisdiction or

[408] Brown, *supra* note 218, at 372.
[409] For other examples of disputes included in this paragraph, see: *Ibid.*, at 144-145.
[410] Seeberg-Elverfeldt, *supra* note 226, at 126-127. The structure is also comparable to that established to ensure the protection of foreign investors' rights under international investment treaties, which, in practically all cases, grant foreign investors with access to international arbitral tribunals for the settlement of disputes between them and their host states.
[411] While action will require a positive, wrongful conduct, an omission only will be relevant when there is an obligation to act. For instance, a wrongdoing stemming from the ISA's inaction will be not to take the adequate measures to prevent interferences to the right of a contractor by another one carrying out activities in the same portion of the Area. See: *Ibid.* at 127.

constitutive of a misuse of power.[412] Making extensible the conducts described in Article 187(b)(i) and (ii) LOSC seems reasonable when reading Article 187 in relation to Article 189. This last provision excludes the jurisdiction of the SDC from deciding upon any discretionary powers of the ISA,[413] prescribing only that the jurisdiction of the SDC pursuant to Article 187 will be confined, as far as it is pertinent, to decide claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute, or their obligations under the LOSC and claims concerning the *excess of jurisdiction* or *misuse of power*.

b) The second part of the provision is referred to the material scope of the dispute, i.e. 'relating to activities in the Area'. It then follows that acts or omissions of a party must be related to the activities the other party is performing in the Area.

The SDC has had the opportunity to elucidate the content of the expression 'activities in the Area' in the context of exploration and exploitation in its Advisory Opinion on the Responsibilities and Obligations of States with respect to Activities in the Area. Among the activities addressed were the following: drilling, dredging, coring, excavation, disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents, the construction and operation or maintenance of installations, pipelines and other devices related to such activities[414]; shipboard processing immediately above a mine site of minerals derived from that mine site[415]; the recovery of minerals from the seabed and their lifting to the water surface[416]; all activities directly connected with the recovery of minerals, such as the evacuation of water from the minerals and the preliminary separation of materials of no commercial interest, including their disposal at

[412] See: *Ibid.*, at 102-107, 113 and 127.
[413] Notably, Article 189 LOSC represents the "balance between those who wished to limit the jurisdiction of the Seabed Disputes Chamber and protect the authority of the principal organs of the Authority and those who wished to ensure that the rights and the legitimate interests of those engaged in seabed mining activities would be sufficiently protected" (Nadan and Lodge, *supra* note 229, at 631). According to Adede, this would be the "definite attempt to exclude from judicial second-guessing of the acts of the Sea-Bed Authority in the exercise of its legislative or discretionary powers" (Adede, *supra* note 397, at 756-757). As Klein argues, "[i]n this regard, it is notable that the discretion of the Authority has been preserved, as is evident from the provisions on the scope of judicial review" (Klein, *supra* note 237, at 329).
[414] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Reports 2011, *supra* note 118, at paragraph 87.
[415] *Ibid.*, paragraph 88.
[416] *Ibid.*, paragraph 94.

sea[417]; transportation within the high seas suprajacent to the part of the Area in which the activities are taken place, when directly connected with extraction and lifting[418].

c) Finally, the third part of Article 187(c)(ii) relates to the specific subjects who can be affected by the acts or omissions of the ISA, therefore, narrowing down a bit more the material scope of the jurisdiction of the SDC. As advanced at the beginning, in the case of measures adopted by the ISA, two or more subjects could be affected provided they are all parties to the same contract with the ISA.[419] Indeed, a measure of the ISA may well affect directly the interests of the bearer of the measure, as may also affect another party to the same contract, different from the one the measure was directed to, inasmuch as the measure directly affects its legitimate interests.[420]

From all categories of disputes set forth by Article 187 to fall under the jurisdiction of the SDC, clearly, the jurisdiction over disputes according to paragraphs (b)(i) and (ii)[421] and that of paragraph (c)(ii) – under review here - is aimed to establish or dismiss the existence of a wrongful act or omission of one of the subjects mentioned in these provisions against another one, which in turn will result in the determination or exclusion of the responsibility of the respondent party to the dispute. In the category of dispute under analysis, the assessment will be directed to determine whether the ISA can be held responsible for its behaviour toward the contractor or not. If responsibility is established, the next step, naturally, would be to ascertain the liability of the ISA and to determine the compensation payable to the contractor for the actual amount of damages suffered.

In the case of disputes against the ISA, due regard must be taken on Article 189 LOSC on the limitation on jurisdiction with regard to decisions of the ISA. According to the literature, a balance was needed to be set between the discretionary powers of the ISA and those that could be exerted by the SDC; Article 189 represents such a balance.[422]

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[417] *Ibid.*, paragraph 95.
[418] *Ibid.*, paragraph 96.
[419] Seeberg-Elverfeldt, *supra* note 226, at 127.
[420] For examples of this situation, see: *Ibid.*, at 129-130.
[421] Referring to disputes between a state party and the ISA concerning:
"(i) acts or omissions of the ISA or of the state party alleged to be in violation of Part XI or the Annexes relating thereto or of rules, regulations and procedures of the ISA adopted in accordance therewith; or, (ii) acts of the ISA alleged to be in excess of jurisdiction or a misuse of power".
[422] Indeed, as argued by Burke, "[t]he article strikes a balance between those parties who wished to limit the Chamber's jurisdiction and protect the prerogatives of the Authority, and those who wished to ensure that the rights and interests of those parties who engaged in mining of the deep seabed received adequate protection" (Burke, 'Article 189 Limitation on Jurisdiction with Regard to Decisions of the Authority', in

According to this provision, the SDC will have no jurisdiction regarding the exercise of the ISA's discretionary powers in accordance to Part XI; in no case, the provision goes on, the SDC shall substitute its discretion for that of the ISA. The SDC has no jurisdiction to determine whether any rules, regulations or procedures of the ISA are contrary to the LOSC, nor to declare them invalid. Hence, the SDC's jurisdiction pursuant to Article 187 will be confined to decide upon three categories of claims:[423] first, those related to the application of any rules, regulations and procedures of the ISA in individual cases alleged to be in conflict with the contractual obligations of the parties to the dispute, or their obligations under the LOSC; second, claims concerning excess of jurisdiction or misuse of power; and, third, claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under the LOSC.

4.2.3.b. Jurisdiction Ratione Personae

In order to avoide repetition, consider here what was said previously regarding the jurisdiction *ratione personae* in disputes concerning the interpretation or application of a relevant contract or a plan of work.

4.2.3.c. The Contribution of Sustainable Development in Disputes Concerning the Responsibility of the ISA

It seems reasonable to assert that sustainable development narratives may help judges through the adjudication process in disputes concerning the application of rules, regulations and procedures alleged to be in conflict with the contractual obligations of the parties. Measures such as those described in the previous section, i.e. the refusal of the extension of a contract for exploration, EOs, and the imposition of penalties, are related to the application of regulations and procedures.

a) In the case of the imposition of penalties pursuant to Article 18 Annex III LOSC, as it was advanced, the contractor is entitled to exhaust the judicial remedies available to it before the penalty becomes effective. If this right is not exercised, the penalty will be effective after 60 days from the notification to the contractor. The proceedings before the

A. Proelss et al. (eds.), *United Nations Convention on the Law of the Sea: A Commentary* (2017) 1266, at 1267).

[423] Which are, at their turn, exceptions to the limitation settled in the first part of the provision.

SDC in these cases will be conducted not to determine the ISA's responsibility, but to declare that the penalty imposed by the ISA is reasonable and proportionate to the seriousness of the violation, or to declare that the behaviour of the contractor amounts to that prescript in subparagraph (a) or (b).

b) In the case of the adoption of EOs the case is different as according to Article 18(3) Annex III LOSC, such measures are automatically effective from the time they are adopted. As argued earlier, EOs may entail economic losses to the contractor, either if they prescribe the suspension or adjustment of its operations. If this is the case, the contractor will most likely challenge the measure taken by the ISA Council before the SDC, looking for the responsibility of the ISA to be established in order to recover its economic loss. As observed in the previous section the relation of EOs and sustainable development is manifest, and the role of the ISA to put forward this relationship before the eyes of the SDC when assessing the appropriateness of the measure is crucial. Indeed, as it was argued, the sustainable development narrative of prevention would provide the necessary argumentative framework to support the measure of the ISA, being either to suspend or adjust the activities of the contractor, in light of the affectation to the common heritage of mankind or the marine environment. If, following the findings of the arbitral tribunal to the *Iron Rhine* case, the ISA is also obliged to comply with the duty to prevent or mitigate any significant damage caused by economic endeavours to the marine environment, its responsibility should have to be excluded, therefore, its behaviour should have to be considered lawful.

c) Lastly, a contractor may also challenge the decision of the ISA denying the extension of a particular exploration contract. Challenging such decision will be motivated, again, by the economic losses caused to the contractor's investment attributable to the decision of the ISA. However, as explained earlier, from a sustainable development perspective, the possibility available for contractors to apply to unlimited number of extensions can be considered to constitute a damage to the CHM. This argument was fully unfolded in the previous section and is replicated here to its full extent.

The dialogue between the ISA and the SDC is once again of great relevance, as the former is in the position to put sustainable development on the table for discussion, giving the SDC the opportunity to elaborate upon it, either to consider or refuse the ISA's line of

argumentation. If positively regarded, the ISA might see its responsibility to be excluded and the refusal of the application for the extension of the relevant contract, ascertained.

4.2.4 Disputes Concerning the Liability of the ISA

Article 187(e) LOSC deals with the jurisdiction of the SDC to learn about disputes involving the liability of the ISA. The provision establishes the following: "The Seabed Disputes Chamber shall have jurisdiction under this Part and the Annexes relating thereto in disputes with respect to activities in the Area falling within the following categories: e) disputes between the Authority and a State Party, a state enterprise or a natural or juridical person sponsored by a State Party as provided for in article 153, paragraph 2(b), where it is alleged that the Authority has incurred liability as provided in Annex III, article 22".[424]

Once the responsibility of the ISA has been established, as mentioned earlier, the following step would be to determine whether it could be held liable for its wrongful acts or omissions.[425] Necessarily, this stage must be differentiated from the previous, as there might be cases where, despite having been asserted the responsibility of a party, no liability may be borne by the party held responsible. However, when the responsibility and liability of a party are established, the calculation of the amount of damages will take place.

Different rules providing on the disputing parties or on the applicable law to the dispute, are set in international law for determining the amount of compensation for damages cause;[426] and, responsibility and liability will be assessed, therefore, before different jurisdictional bodies. In the category of dispute that this study has been focused on so far, the liability of the ISA will be ascertained by the SDC. Notably, after determining the liability and the amount of compensation payable thereof, the SDC enjoys of a

[424] Article 187(e) LOSC.
[425] For a general balance on this matter, see: Davenport, *supra* note 236, at 17-19. See also Klein's category of contractual disputes under the SDC jurisdiction: Klein, *supra* note 237, at 329.
[426] As a resemblance of the customary law standard ascertain by the Permanent Court of Justice in the *Factory at Chorzów* case where compensation should "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that had not been committed" (*Factory at Chorzów*, PCIJ, Series A. No. 17, Merits, 1928, paragraph 47), Article 36(2) of the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts provides that the compensation shall cover any financially assessable damage including loss of profits insofar as it is established. Less eloquent, the standard settled in the LOSC by Article 22 Annex III states that liability of the ISA or the contractor in every case shall be for the actual amount of damage.

discretionary power to adjust the amount of compensation otherwise payable to the claimant by taking into account the contribution of this latter to its own injury.[427]

4.2.4.a. Jurisdiction Ratione Materiae

Concerning the jurisdiction *ratione materiae*, Article 187(e) is concerned to issues of liability, particularly to determine whether the liability of the ISA is compromised as provided in Article 22 Annex III LOSC. According to this last provision, the ISA shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions, including violations under Article 168(2), account being taken of contributory acts or omissions by the contractor.[428]

As the legal basis for any dispute arising between a contractor and the ISA will be the contract[429] concluded between them both, this conventional standard is addressed in each of the regulations issued by the ISA, as one of the standard clauses for either exploration or exploitation contracts. Interestingly, the contractual clause governing on the contributory fault is further elaborated and completed than the one of the LOSC.

4.2.4.b. Jurisdiction Ratione Personae

The exclusive jurisdiction of the SDC to entertain disputes concerning the liability of the ISA is set out in Article 187(e) LOSC. Although the jurisdiction *ratione personae* for the SDC to learn upon claims of liability raised by a contractor against the ISA pose no problems,[430] it is noteworthy the fact that this provision deals with disputes where the

[427] Article 39 of the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts provides: In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured state or any person or entity in relation to whom reparation is sought. At its turn, Article 22 Annex III LOSC provides: The contractor shall have responsibility or liability for any damage arising out of wrongful acts in the conduct of its operations, account being taken of contributory acts or omissions by the Authority. Similarly, the Authority shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions, including violations under article 168, paragraph 2, account being taken of contributory acts or omissions by the contractor.

[428] As the study that has been portrayed so far is only aimed to cover situations where the ISA has exercised its powers to prevent damages to the CHM or the marine environment, analysis of the liability of the ISA for violations of Article 168(2) exceeds the scope of this section. Thus, it is convenient to recall in this point that the matter of the dispute interesting to this study is concerning the liability of the ISA sought out of a wrongful act in the exercise of its powers and functions, and to analyse the application of the contributory fault standard to the end of adjusting the amount of compensation payable by the ISA.

[429] In this sense, see: Brown, *supra* note 218, at 145.

[430] Without being resolute, and not offering further insights, Brown argues that it could be possible that under Article 187(c) the SDC could have jurisdiction for determining the liability of the ISA for any damage arising out of wrongful acts in the exercise of its powers and functions (*Ibid.*, at 145).

liability of the ISA is claimed by any of the subsequently mentioned subjects, but it does not work backwords, nor if any of them wants to claim the liability of another. There is no clear provision within the DSM regime giving jurisdiction to the SDC over disputes between states parties, the ISA or the Enterprise, state enterprises and natural or juridical persons referred to in article 153(2)(b) concerning claims of liability directed among them.

Venturing an alternative to this deadlock, and to the extent it appears reasonable, reading Article 189 in connexion with Article 187(f) could provide a solution. Indeed, the final sentence of Article 189 states that the jurisdiction exercised by the SDC pursuant to Article 187 over disputes involving the ISA will be confined, among others, to claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under the LOSC.

Although puzzling in its wording, the provision sheds some light on the disputes it is referring to. It assumes that there is a party affected by the failure of another party to comply with its contractual or conventional obligations, suggesting therefore that responsibility has been already established. It can also be assumed that this norm deals, exclusively, with the issue of liability or compensation. The undetermined reference of the place the ISA bears in these claims suggest that it could be either the party concerned for the failure or the party that has failed to comply with its obligations. The overall framework of this provision is, on the one hand, Article 187 and the categories of disputes established thereon, and on the other, that it provides for the limits of the SDC with regard to the discretionary powers of the ISA.

Disputes under the jurisdiction of the SDC involving the ISA are referred to in Article 187(b), (c), (d) and (e), however, only paragraphs (b) and (c) will be relevant in so far the disputes described therein might pursue the responsibility of the subjects mentioned in each one of them for their failure to comply with their obligations under the LOSC, or a contract, respectively. Thus, four situations may be encompassed: a) The ISA seeking compensation from a contractor;[431] b) A contractor seeking compensation from the

[431] A different perspective is expressed by Neil, *supra* note 285, at 4, for whom, the SDC would not have jurisdiction for assert the liability of the contractor, being this to be sought before the domestic tribunals of the sponsoring state.

ISA;[432] c) A state party seeking compensation from the ISA; and, d) The ISA seeking compensation from a state party.[433] The role of Article 187(f), given its residual nature, is to subsume all these disputes to the jurisdiction of the SDC. Reasonably, however, disputes between states parties to the LOSC concerning issues of liability would fall outside the reasoning developed here, inasmuch as the ISA will not be a party to such disputes. Instead, for the settlement of such disputes rules of general international law would apply, whereas the judicial forum with jurisdiction to entertain such claims would be provided upon states' consent.[434] This argument finds support, at least with regard to state parties' breaches of their obligations towards the protection and preservation of the marine environment. Indeed, Article 235 LOSC provides that states parties shall be liable in accordance with international law. On the other hand, in a weaker position are found those disputes on liability pursued among contractors – not contractually related among them - since there is no provision in the LOSC addressing any sort of dispute that may arise among them. This suggest that any conflict emerging among them would have to be submitted to the national courts of the respondent.

Finally, the jurisdiction of the SDC concerning disputes on liability has been carefully drafted in Article 187(e), which is only applicable when the liability and calculation of damages are sought against the ISA by any of the subjects mentioned therein. As shown above, the jurisdiction of the SDC for disputes on liability can also be asserted in four other cases when reading together Article 189 and Article 187(f). The limited jurisdiction of the SDC concerning liability disputes, suggests that, had the parties to the LOSC wanted to, jurisdiction to determine the liability in other sorts of disputes would have been provided for if wanted.[435]

[432] This category could be thought to be redundant in light of Article 187(e), but it has the value to clearing all doubts in order to assert that the jurisdiction of the SDC also cover disputes concerning the liability of the ISA when the legal basis of the dispute is the contract for the exploration for or exploitation of resources in the Area.

[433] A different perspective is held by Burke, *supra* note 422, at 1270. For this author, jurisdiction of the SDC for learning about this sort of dispute could be asserted according to the first exception to the limitation set forth in Article 189.

[434] Indeed, in the words of Crawford, "[a]t the international level, there is no 'inherent' jurisdiction over states, and this is true however serious the breach may be" (Crawford, 'Sovereignty as a Legal Value', in J. Crawford and M. Koskenniemi (eds.), *International Law* (2012) 117, at 124).

[435] This rationale is also exemplified by the exclusion from the jurisdiction of the SDC of disputes concerning the responsibility and liability of the ISA arising out of those disputes referred to in Article 187(d). In this sense, see: Seeberg-Elverfeldt, *supra* note 226, at 120.

4.2.4.c. The Contribution of Sustainable Development in Disputes Concerning the Liability of the Parties: A Study of the Contributory Fault Standard

There have not been many opportunities where international adjudicative bodies have applied the contributory fault standard,[436] and most relevant cases where this standard has been applied have been settled before international investment tribunals.[437] The similarities between the *sui generis* legal framework established for the settlement of disputes between a contractor and the ISA, and that of Investor-State disputes settlement (ISDS), made recourse to ISDS jurisprudence most pertinent to clarify the scope of application and effects of the contributory fault, as established in the DSM regime.[438]

a) The contributory fault standard in the jurisprudence of ISDS.

As generally accepted in ISDS jurisprudence, pertinent for beginning the analysis of the contributory fault standard is to resort to the International Law Commission Commentary to Article 39 of the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts, as for it gives authoritative opinion regarding the elements and scope of application of this standard. As stated in paragraph (1) of the commentary "Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but where the injured State, or the individual victim of the breach, has materially contributed to the damage by some wilful or negligent act or omission";[439] on its turn, paragraph (5) explains that "[n]ot every action or omission which contributes to the damage suffered is relevant for this purpose. Rather, article 39 allows to be taken into

[436] As provided for in Article 39 of the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts.

[437] See: *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May, 2004; *YUKOS Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA227, Final Award, 18 July, 2014, paragraphs 1594-1637 and 1827; *Copper Mesa Mining Corporation v. The Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March, 2016.

[438] The Special Chamber of the International Tribunal for the Law of the Sea constituted for the setlment of Case No. 23 had the opportunity to address the authoritativeness of international arbitration awards to inform the reasoning of the ITLOS. In this sense, the Special Chamber was reluctant to follow the approach taken in an arbitration award presented by one of the parties because "that Award was not followed by subsequent international jurisprudence" (*Maritime Boundary (Ghana/Cote D'Ivoire*), *supra* note 271, paragraph 287). Such observation shows the willing of the ITLOS to incorporate within its own reasoning approaches and insights of other courts and tribunals, particularly from international arbitral tribunals, when, *a contrario sensu*, the relevant approach of the award appears to be followed by subsequent international jurisprudence.

[439] Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, adopted by the International Law Commission, 53rd Session, 2001, A/56/10.

account only those actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights. While the notion of a negligent action or omission is not qualified, e.g. by a requirement that the negligence should have reached the level of being 'serious' or 'gross', the relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case. The phrase 'account shall be taken' indicates that the article deals with factors that are capable of affecting the form or reducing the amount of reparation in an appropriate case".[440] Out of these paragraphs, two main findings with regard to the conduct of the injured party are to be stressed: firstly, the injured party must have materially contributed to the damage; and, secondly, actions or omissions of the injured party must be wilful or negligent. With regard to the scope of application of the provision, Article 39 acknowledges that, provided the concurrence of the injured party to the damages suffered, the form or amount of reparation has to be reconsidered or reduced accordingly.

In ISDS jurisprudence there is wide acceptance as for the contribution to the injury must be material and significant,[441] thus "Article 39 requires a factual assessment as regards the claimant's conduct".[442] The assessment of the injured party behaviour contributing to its own injury are to be found in the evidence produced during the proceedings, and may range from simple decisions considered to have increased the risks for the claimant[443] to conducts considered abusive[444] or unlawful.[445]

On the other hand, following the ILC's Commentary to Article 31,[446] ISDS jurisprudence has asserted that a link in the causative chain must be found for the allocation of the contributory fault. In other words, tribunals must decide whether a causal link exists between the acts or omissions of the injured party and the unlawful measures adopted by

[440] *Ibid.*
[441] *MTD v. Chile*, *supra* note 437, paragraph 101; *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. the Republic of Ecuador*, ICSID Case No.ARB/06/11, Award, 5 October 2012, paragraph 670; *YUKOS v. Russia*, *supra* note 437, paragraph 1600.
[442] *Copper v. Ecuador*, *supra* note 437, paragraph 6.98.
[443] See: *MTD v. Chile*, *supra* note 437, paragraph 242; *Ibid.*, paragraph 6.99; *Occidental v. Ecuador*, *supra* note 441, paragraph 672.
[444] See: *YUKOS v. Russia*, *supra* note 437, paragraph 1615.
[445] See: *Occidental v. Ecuador*, *supra* note 441, paragraph 681.
[446] Paragraph (13) of the Commentary to Article 31 reads: "It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct".

the respondent with the damage resulting from such measure.[447] At this point tribunals must address whether there are actions or omissions of the claimant, without which, the unlawful measure adopted by the respondent will have not been taken.[448] However, ISDS jurisprudence is not uniform in this regard as there exist exceptions where, although the contributory fault of the injured party has been found unrelated to the wrongdoing of the respondent, still the amount of compensation has been adjusted in terms of making the injured party proportionally responsible.[449]

Facing the issue of allocating the contributory fault, judiciaries will have to "determine to what extent and in what proportion the Claimant's unlawful act contributed to lessen the responsibility of the Respondent."[450] As it has been well established in ISDS, in going through the assessment of the evidence before them and allocating the claimant's contributory fault, international adjudicative bodies enjoy a wide margin of appreciation.[451] Moreover, from the cases reviewed, there is no conclusive finding as to the method that tribunals have relied on to determine the proportional amount that the claimant has to bear in light of its contribution to its own damages, which according to the consulted data, it ranges from 25% to 50% of the total amount of compensation – however, it is not limited to these numbers. As argued by some arbitral tribunals, the discretionary figure is reached on grounds of fairness and reasonability in light of the circumstances of each case, being, hence, a purely legal question without anything to do with an underlying valuation or scientific basis.[452]This finding makes sustainable development narratives of balance and prevention suitable to nourish the legal reasoning of the adjudicative body in relation to the proportion of damages the claimant would have to bear. Indeed, the strategic use of sustainable development narrative of balance, may contribute to the construction of a coherent legal reasoning, capable to reduce questionings about how did the adjudicative body reach its convincement concerning the application of the contributory fault standard.

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[447] *Occidental v. Ecuador*, *supra* note 441, paragraph 669; *YUKOS v. Russia*, *supra* note 437, paragraph 1599.
[448] *Occidental v. Ecuador*, *supra* note 441, paragraph 683.
[449] See: *MTD v. Chile*, *supra* note 437.
[450] *Occidental v. Ecuador*, *supra* note 441, paragraph 681.
[451] *Ibid.*, paragraph 670 and 680; *YUKOS v. Russia*, *supra* note 437, paragraph 1637.
[452] *YUKOS v. Russia*, *supra* note 437, paragraph 1637; *Occidental v. Ecuador*, *supra* note 441, paragraph 687. In the Copper v. Ecuador case, the Tribunal after stating the claimant's contributory fault at 30%, declared that: "On the facts of this case, it could not be less" (*Copper v. Ecuador*, *supra* note 437, paragraph 6.102).

b) Scope of application and effects of the contributory fault standard in DSM-related disputes.

Fitting-in the findings reached in ISDS jurisprudence on the application of the contributory fault standard into DSM adjudication should not pose problems. However, differences in the wording of the specific, contractual provision dealing with contributory fault for the purposes of DSM, invites to highlight some remarks related to the relevant acts or omissions that should be considered at the time to the application of the standard, the type of contribution needed, the causation link, the margin of appreciation of the SDC, and third parties to DSM contracts.

Firstly, there is no reason to conclude that actions or omissions of the injured party should not reach the threshold of being material and significant in order to achieve relevance in the application of the standard.

Secondly, contributory acts or omissions are to be found in the evidence produced by the parties to the proceeding, thus it will purport a factual and legal analysis of the behaviour of the injured party. However, neither Article 22 Annex III LOSC nor the standard clauses to DSM contracts state that acts or omissions should be wilful or negligent as Article 39 ILS Articles on Responsibility does. In both LOSC-related provisions, the behaviour of the injured party is not qualified, but referred plainly as acts or omissions. It seems to be no problem to assert that the negligent behaviour of the injured party should be taken into account to adjust the compensation allocated to the ISA in light of the contractor's decisions, or its abusive conducts towards the DSM regime. On the other hand, differently from ISDS proceedings, where the general rule is that the respondent cannot raise counter claims against the investor,[453] wrongful doings of DSM contractors are covered within the jurisdiction of the SDC. This implies that the responsibility and liability of the contractor for violations to the DSM regime can be settled before the SDC according to Article 187(c)(ii) and Article 189 in connexion to Article 187(f) – as explained above. Hence, a dispute can be brought by the ISA in the form of claim or counterclaim. In a proceeding raised by the contractor, where the ISA raised a counterclaim, the application of the contributory fault standard will be provided on the causation link between the wrongdoing of the contractor and the measure adopted by the ISA – also regarded

[453] As these claims are to be settled within domestic courts and according to municipal law.

unlawful. However, if no causation link is observed, the setting will be different as each claim will reach their specific type of reparation, if both of them are in the form of compensation, logically the amounts should be also compensated.

Thirdly, the damage to the contractor must be caused both by the ISA's wrongdoing and also by the former's own contributory acts or omissions. In this sense, a causation link must be determined by the SDC at the time of assessing whether there is legal ground for applying the standard.[454]

Fourthly, there is no reason to consider the margin of appreciation of the SDC other than wide, as it has been stressed by the jurisprudence in ISDS proceedings, especially if considered its role regarding the safeguard of the principles governing the activities in the Area. Indeed, thorough consideration of the common heritage of mankind and the protection of the marine environment is expected to be carried out by the SDC as these are the two guiding principles of the DSM regime;[455] reasonably, no fear of future high-compensations must influence the decision of the ISA at the time to consider the appropriateness for exercising its powers.

Sustainable development narrative of balance may contribute to the assessment of the appropriateness of the measure adopted by the ISA *vis-à-vis* the actions or omissions of the contractor, without which, the measure would have not been adopted. It could also prove to be a useful tool to integrate concerns regarding the common heritage of mankind and the protection of the marine environment when no related obligations have been breached by the contractor, but potential risks are instead foreseen. In this sense, sustainable development narrative of balance can provide the framework to assess the contributory fault of the contractor when its behaviour has put a risk to the CHM and/or the marine environment, which, consequently, pushed the ISA to act accordingly, even

[454] This is in spite of the power of SDC to determine whether the contractor adopted adequate measures to mitigate its losses, which may also reduce the amount otherwise payable by the ISA (See: *YUKOS v. Russia*, *supra* note 437, paragraph 1603).

[455] The same argument could be drafted with regard to the limitation on the jurisdiction of commercial arbitral tribunals when learning about a dispute of those referred to in Article 187(c)(i) LOSC. Indeed, as provided by Article 188(2)(a) "A commercial arbitral tribunal to which the dispute is submitted shall have no jurisdiction to decide any question of interpretation of this Convention. When the dispute also involves a question of the interpretation of Part XI and the Annexes relating thereto, with respect to activities in the Area, that question shall be referred to the Seabed Disputes Chamber for a ruling". As it seems, the SDC holds a "rather essential jurisdiction" (Seeberg-Elverfeldt, *supra* note 226, at 80), which should stand and prevail over that of the commercial arbitral tribunal in light of the paramount principles it is entrusted to protect and apply. See, generally: Klein, *supra* note 237, at 328-329.

though its behaviour may finally be regarded unlawful. In this same line, Judge Tanaka, points out that "it is debatable whether the concept of sustainable development itself can be an independent rule for adjudication. Overall there may be room for the view that this concept should be regarded as a factor orienting the behaviour of States and guiding proper interpretation of relevant rules in the judicial process".[456]

Finally, one element that requires further elaboration is the extension of the ISA's liability to third parties or, as mentioned in the clauses to the exploration and exploitation contracts, to all persons engaged in working or acting for the contractor in the conduct of its operations under its exploration or exploitation contract.[457] Many unresolved issues can be identified regarding such third parties. Relevant to the study is whether their acts or omissions are to be regarded acts or omissions of the contractor for the purposes of applying the contributory fault standard.

Concluding Remarks

This Chapter evaluated the strategic use of the sustainable development narratives of balance and prevention as an adequate argumentative framework to support the measures taken by the International Seabed Authority in the exercise of the powers it is vested with according to the legal framework designed for DSM. In each of these mechanisms the narratives related to sustainable development prove to be useful for articulating the governing principles of the regime, nourishing the content of rules, regulations and procedures followed by the ISA in each case. Sustainable development narratives prove to be a comprehensive argumentation tool able to integrate the different interests converging in DSM and solidly justified the measures that the ISA may take against contractors.

Then, the study turned to the evaluation that the strategic se of sustainable development narratives of balance and prevention may have within the adjudication process in disputes brought by contractors against the ISA concerning the interpretation or application of a relevant contract, and the responsibility and liability of the parties. The study reviewed the jurisdiction of the SDC, and findings as to the contribution of sustainable development were made in each category of dispute. The study shown that sustainable development

[456] Tanaka, *supra* note 220, at 237.
[457] See: Section 16.3 Annex IV of the RPN, RPS, RCF; and Section 7 Annex X of the DRE.

narratives of balance and prevention are central to the legal reasoning that can be developed by the Seabed Disputes Chamber to different extents. Most relevantly, it was argued that the strategic use of sustainable development narratives could be useful to exclude the responsibility of the ISA in certain scenarios, and to be part and parcel of the legal reasoning that the SDC needs to build when applying the contributory fault standard as set out in the DSM regime.

The overall study performed in this chapter demonstrates that the strategic use in litigation of the sustainable development narratives of balance and prevention are an effective resource to adequately consider social and environmental issues within the adjudicative process of DSM disputes, while also a way to come closer to the achievement of sustainable development.

PART III

The Strategic Use of Sustainable Development in Disputes Involving Transnational Companies in the Field of Foreign Investment

As mentioned in the introduction to the previous Part II, the analysis that is developed in the following Chapter 5 and 6 serves themselves fundamentally from the application of inductive reasoning upon awards rendered by international arbitral tribunals in investment treaty arbitrations, substantiated according to different rules of procedure and submitted also to different arbitral institutions such as the Permanent Court of Arbitration, the International Centre for Settlement of Investment Disputes, and the Stockholm Chamber of Commerce. The findings reached in this Part III are strengthen by the analysis of secondary sources of international law such as academic studies and the reports of international organisations on issues related to international investment law, investor-state dispute resolution, international environmental law and foreign investment, sustainable development and foreign investment.

Part III aims to evaluate the thesis supported in this work, this is that the narratives of balance and prevention subjacent to sustainable development can be strategically used in litigation in order to integrate social and environmental concerns into disputes brought by transnational companies before international adjudicative bodies, impacting on the determination of the responsibility and liability of the parties in the field of foreign investment. If this thesis is right, litigation outcomes would have to start growing against transnational companies, which in turn, would induce a shift in their consideration regarding the social and environmental impacts of their activities.

Chapter 5

Foreign Investment: The Everlasting Conflict Between Economic, Social and Environmental Interests

In the field of international investment law, the literature has been prone to suggest that investment protection and sustainable development may seem as contradictory goals, having to waive one in the benefit of the other.[458] In this sense, the well-known race-to-the-bottom argument warns ourselves on the implicit peril when regulatory endeavours for protecting the environment or observing social rights are carried out by the same entity that has to attract foreign investment in order to achieve its own goals regarding economic growth.[459] Regarding to this point, a study commissioned by the UNCTAD published in 2004, argued that "[o]ften sites and countries compete internationally for mobile investment capital and for industrial settlement, on the assumption that investment flows exert a positive influence on employment, income and technological development. The adjustment of site-based factors with a view to attracting capital therefore represents an essential aspect of a country's growth-oriented strategy. Apart from considerations of legal certainty, market volume, infrastructure, availability of resources and factor costs, site-based factors include costs for environmental protection. Site-based competition resulting in a reduction of environmental factors can set off a process of repeated mutual undercutting of standards (commonly known as a 'race to the bottom') and so lead to a deterioration of the environment".[460]

[458] Mbengue and Raju, 'Energy, Environment and Foreign Investment', in E. De Brabandere and T. Gazzini (eds.), *Foreign Investment in the Energy Sector: Balancing Private and Public Interests* (2014) 171. At 176.

[459] As described by Affolder, "governments are key environmental overseers [...] but they are also tasked with attracting mining investment and participating in mining projects as tax collectors, equity participants, and dividend receivers. These multiple (and conflicting) roles can undermine government's ability to operate as an effective regulator" (Affolder, 'Rethinking Environmental Contracting', 21 *Journal of Environmental Law and Practice* (2010) 155, at 160). Such understanding is quite well depicted by the race-to-the-bottom argument, which in simple words, as explained by Viñuales, is no more than "States wishing to attract foreign investment to further their development will have an incentive to lower their environmental protection standards. In such situation, other States may be led to do the same in order to avoid a competitive disadvantage, with a resulting overall decline of environmental protection" (Viñuales, *supra* note 33, at 249).

[460] UNCTAD and S. B. I. at the E. B. School, *Making FDI Work for Sustainable Development* (2004), at 55.

Illustrative is the history behind the *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia* case,[461] as it shows, in a two-step play, the restless relationship existent between host states and foreign investment. The first step of the play relates to the enactment of the 1998 Bolivian Law No. 1854/1998, which was aimed to reduce the size of the *Gran Salar de Uyuni*, which since 1965 was to be a reserve area located in the Bolivian region of Potosí. The reduction of the extension of the reserve was aimed to promote foreign investments in the excluded portions of land, and, effectively, several mining concessions were granted by the Bolivian government. The reduction of the reserve deliberately sought to enlarge the mineral exploitation area for mining companies, without considering the social and environmental costs such decision entailed.

The decision made by the Bolivian government may have well been based on the need of the state to reach its own economic developmental goals, but also in show itself more attractive to foreign investors than its neighbouring countries. This effect of foreign investment in states' public policies relates to the race to the bottom argument, as it leads "domestic regulators to seek a false comparative advantage where the lack of environmental regulation (and therefore reduced cost to production) can be leveraged to obtain FDI inflows".[462] From the perspective of the protection granted to foreign investment in international investment agreements (IIAs), the argument assumes that "developing countries, competing with each other to attract investment, make investment treaties in order to ensure that they recognise the same standards of protection as other developing states similarly placed",[463] which is clearly leading towards uniformity; however, in reality, domestic policy and regulations clearly differ from one country to another, and is here where the real difference for foreign investors is at the time to choose where to put their investments.

The second step of the play starts with the revocation of the Bolivian Law No. 1854/1998, which triggered, in turn, the annulment of the concessionaires' mining rights, and the

[461] *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September, 2015.
[462] Alam, 'Natural Resource Protection in Regional and Bilateral Investment Agreements: In Search of an Equitable Balance for Promoting Sustainable Development', in S. Alam, J. H. Bhuiyan and J. Razzaque (eds.), *International Natural Resources Law, Investment and Sustainability* (2018) 108, At 111.
[463] Sornarajah, *supra* note 199, at 173.

nationalisation of the minerals therein.[464] The revocation of the law and the effects that this measure had upon the investors' rights under the IIA, finally, brought the case before an ICSID arbitral tribunal.

Reaching this stage, the claimant argued that the law enacted by the Bolivian government was in response to the social unrest that the concessions created due to the nationality of the concessionaires; while, the respondent – Bolivia - responded that the concessionaires were operating without the environmental permits and causing economic damage to the state because the amount of resources declared by the claimant, did not match with the cargo volumes transported by the National Railways Company.[465]

Indeed, measures adopted by a host state affecting foreign investments may be grounded in different arguments, where, among others, considerations regarding to their economic development, social development and/or the protection of the environment can be included. Yet, in the protection of such interests, states may find strong resistance from foreign investors, as measures thereafter may amount to a breach of their rights, leading yet to another undesirable consequence for the host state, which is to face ISDS proceedings for the alleged breach of investment protection standards. As argued by Alam, this would become increasingly more frequent as "states are undertaking a stronger role in guiding and steering economic development, whilst recognising that unregulated economic growth has resulted in significant social and environmental costs".[466]

Following this line of argumentation, the first section of this Chapter will examine the role of host states *vis-à-vis* foreign investment. It will be argued that there is a strong paradigm in the foreign investment regime that gives strong protection to the investment, whereas host states are forced to deal with the dichotomy position to promote investment on the one hand, and to afford adequate protection to their indigenous and local communities, and the environment, on the other. The second section will provide an account of some international instruments and mechanisms that have been created to

[464] Nationalisation of natural resources has been contended to have its source in the so-called 'resource nationalism' which may encompass public policies that range from preventing tax avoidance from multinational companies to expropriations and other measures alike (Brohmer, 'Expropiation, Nationalisation and Resource Protection - 'resource Nationalism' and International Law', in S. Alam, J. H. Bhuiyan and J. Razzque (eds.), *International Natural Resources Law, Investment and Sustainability* (2018) 162, at 162. See also: Wilson, 'Understanding Resource Nationalism: Economic Dynamics and Political Institutions', 21 *Contemporary Politics* (2015) 399).
[465] *Quiborax v. Bolivia*, *supra* note 461, at paragraphs 7-17.
[466] Alam, *supra* note 462, at 112.

address the impairment that the system, according to which foreign investment is carried out, causes at different economic, social and environmental levels. The third section aims to contrast the above by providing an account of the way that social and environmental concerns are dealt with in Investor-State Dispute Settlement.

5.1 The Role of the Host State and the Paradigm of the Protection of the Investment

As explained Sornarajah, there are three conflicting legal paradigms affecting ISDS.[467] The first paradigm is that of free market, which is of course supported by multinational companies and their respective home-states (usually, but not exclusively, industrialised states). The second paradigm is the struggle that emerges for states trying to resist the embracement of the paradigm of the free market without restrictions. This second paradigm is related to developing states that have both the need to attract foreign investment to achieve their developmental goals as well as the need to save enough regulatory space to control foreign investment. The third paradigm, as the author explains "represents the interests of the international community in foreign investment disputes. This paradigm is not concerned with disputes which are purely of a commercial nature. It is concerned with disputes that implicate rule of international law on areas of international concern such as environmental protection and human rights. [It] reflects the emergence of a people centred approach to international law. It transcends the idea of the international community as being based on states – an idea on which positivist international law is based – and ushers in the idea that people must reach out to each other and shape rules that are protective of their values".[468]

Following these thoughts, here is proposed that, the different reactions to ISDS are due to the fundamental paradigm in which the system to carry out foreign investment activities is anchored, this is, the strong protection of the investment found in the relevant international treaties regulating states' relationship to this end, and the lack of any regulation towards the protection of aspects related to social development and the protection of the environment in such instruments. In turn, as also acknowledged by

[467] M. Sornarajah, *The Settlement of Foreign Investment Disputes* (2000), at 74-84.
[468] *Ibid.*, at 83.

Sornarajah, the excessive protection of foreign investors' rights has led to constrain states' regulatory power, "scarifying social, environmental and human rights interests".[469]

5.1.1 Making the Globe Suitable for Transnational Companies

The way in which the parties strike a balance between multiple interests is the Achilles heel of the international foreign investment system;[470] whereas its strength lies on the ever-increasing need of investments for contributing state's economic growth. However, on the other side of the coin, diverse environmental and social concerns are left aside if all concurrent interests are balanced exclusively under the light of economic growth. It is easy to see this if one thinks on the fact that most – if not all – international regulation relating to the protection of the environment, and indigenous and local communities, are contained in international instruments that, *a priori*, do not have any binding effect on the private sector. Although, as recalled by Sands, in his Partial Dissenting Opinion to the *Bear Creek Mining Corporation v. Republic of Peru* case, the law included in international treaties may purports obligations for states, but this does not mean that it had no "significance or legal effects" to evaluate the conduct of the private sector.[471]

Hereof, the scope of the analysis is seen enlarged and furthered by the variety of legal issues that may arise from the activities performed transnationally by the private sector. Indeed, there is a growing need to reconcile all conflicting interests stemming from the activities of both private and state-owned companies operating transnationally and those interests that host states must preserve.[472] On the one hand, foreign investment regimes

[469] M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (2015), at 205.
[470] As Dimsey argues "[f]oreign investors are usually involved because of the promise of certain financial return, while host states, themselves lacking the necessary technology and other resources, need the investment but cannot ignore the concerns, and in particular the purchasing power, of their population. This divergence of interests can lead to tension in which the potential for disputes is rife" (Dimsey, 'Arbitration and Natural Resource Protection', in S. Alam, J. H. Bhuiyan and J. Razzaque (eds.), *International Natural Resources Law, Investment and Sustainability* (2018) 132, at 132).
[471] Bear Creek Mining Corportation v. Republic of Peru, ICSID Case No. ARB/14/21, Philippe Sands's Partial Dissenting Opinion, Award, November 30, 2017, paragraph 10.
[472] On the one hand, the structural deficiencies of the current foreign investment regime are not related exclusively to the private sector's role, but also to state-owned companies. On the other hand, these structural differences go beyond traditional understandings related to the Global North and the Global South. As Morrow argues "It is also increasingly apparent that, while development does indeed breed environmental degradation and the oppression of marginalised groups, notably indigenous peoples, this too is not limited to the activities (colonial, neo-colonial or otherwise) of the developed world - developing countries are just as capable of such behaviour in their own pursuit of development" (Morrow, *supra* note 175, at 282. See also: Merino Blanco, 'State Owned Oil Companies, North-South and South-South Perspectives on Investment', in S. Alam, J. H. Bhuiyan and J. Razzaque (eds.), *International Natural Resources Law, Investment and Sustainability* (2018) 203).

are clearly aimed to make the globe a space suitable for the business sector to develop economic activities not just within their national borders, but also abroad allowing investments in foreign economies and carrying out high-capital projects. On the other hand, states face the need to adopt competitive legislation efficiently, promoting social development and the protection of the environment, whilst providing foreign investors with a steady and attractive environment for developing their investments.[473]

The advancement of foreign investment is, all the most, aimed to make the globe a space suitable for the business sector to develop economic activities not just within their national borders, but to go abroad and invest in foreign economies carrying out high-capital projects. This is clear in the field of energy and natural resources, a sustainable development sensitive area, where the International Energy Agency has foreseen in its 2016 World Energy Outlook that during the period 2016-2040 cumulative investment in the power sector will be of 19.2 trillion US dollars, where 60% of the total will be accounting in renewable energy technologies, while in 2040 half of the power plant investment is projected to be made in wind and solar technologies, and 18% in hydro and bioenergy.[474] However, together with this estimations, local resistance has also grown strong against foreign investment, turning difficult to find peaceful ways to introduce foreign investment into national plans and legislation upon energy production: "local resistance to new FDI in the energy sector 'not in my backyard' phenomenon has made it very difficult for policymakers to implement energy investment projects, including the necessary infrastructure development. Examples are the building of refineries, high-tension lines, terminals or nuclear power plants".[475]

5.1.2 The Role of Host States

Certainly, host states are in a troublesome position both regarding foreign investors, on the one side, and the community they must look after and the environment they are entrusted to protect, on the other. As such, the role of host states could be addressed at least from a twofold perspective. Firstly, it could relate to the active role that states must

[473] Alam, *supra* note 462. At 108. According to this author, "IIAs have primarily been concerned with creating a stable regulatory environment to enable or encourage FDI in a host state. IIAs have achieved this through two primary mechanisms supported by 'umbrella' clauses: the development of 'standard' protection standards and the incorporation of stabilisation clauses" (*Ibid.*, at 115).
[474] OECD/IEA, *World Energy Outlook* (2016), at 262-263.
[475] Karl, 'FDI in the Energy Sector: Recent Trends and Policy Issues', in E. De Brabandere and T. Gazzini (eds.), *Foreign Investment in the Energy Sector: Balancing Private and Public Interests* (2014) 9, at 14.

perform in their path for development by attracting foreign investment, granting investors with a secure legal framework and competitive market conditions to put inflows of foreign investments serving economic and social development. Secondly, host states are also expected to perform an active role of surveillance *vis*-à-*vis* the investment/investor, observing both national and international legal frameworks, the needs of their community and the protection of the environment.

In this latter role, states are expected to exercise their right to intervene, taking action on behalf of their economic interests and the protection of both the community and the environment.[476] The right to intervene is materialised through the right of the host state to regulate investment activities *ex ante* as well as *ex post* through the adoption of measures whenever risks of an adverse impact to the community or the environment are envisaged. The exercise of this sovereign power may be the consequence of the investor's failure to comply with the law in force or a behaviour that cannot be tolerated by the host state under international law.[477]

In exercising its surveillance role, a state is expected to prevent any disruption caused by an investment project upon the surrounding community or the environment by taking the adequate measures to put a halt on or lessen the negative impacts of the investment; but such reaction will not always be cost-free. The reaction of host states to a perceived social or environmental threat will certainly induce a change in the existing relationship between the host state and the investor. The counteracting measure will, as such, be based on the host state's sovereign power and justified according to domestic law and regulations and/or international law.[478] In this sense, once a risk to the environment or a given community is perceived, the host state should interfere by modifying its legal relationship with the investor, by means of the renegotiation of the investment contract or through the amendment of the legal framework in order to neutralise the perceived adverse effects.

The constraints to exercise these sovereign powers are well known, particularly under old generation BITs, being difficult to contest that the protection of the investment has been

[476] Notably, host states "are keen to preserve sufficient policy space for the regulation and possible control of [the] industry, including the right to intervene whenever they consider this necessary" (*Ibid.*, at 21)
[477] Although the investor is not expected to comply with the latter.
[478] Referring to the energy sector, Karl considered that "countries need to safeguard the public interest by appropriate regulation of investments in the energy sector to minimize potential negative effects. Labour, social, safety and environmental laws in particular are essential to ensure that such FDI contributes to sustainable development and inclusive growth" (Karl, *supra* note 475, at 23).

the paradigm underpinning the whole structure of foreign investment regimes since its beginnings. As pointed out by Sornarajah "historically, the paradigms [on which arguments in ISDS are built] were developed in the context of the disputes between the United States and Latin American states",[479] therefore, the aim and purpose of investment agreements has been to grant foreign investments with a broader scope of protection, working as counterbalance to host states' sovereign powers. Such paradigm finds corollary in many provisions of international investment agreements. As Alam argues "the challenge for developing countries wishing to improve their equitable natural resources management is in implementing an adequate process which allows foreign investors to exercise their right to due process, and where necessary, adequate compensation in instances of expropriation, but which also preserves the capacity of states to legislate domestically for the protection of natural resources where these are impacted by investment".[480]

As advanced, in their role of surveillance, host states always have, at least theoretically, the right to counteract against perceived disturbances caused upon the environment or a community by a given foreign investment project, through the measures they deemed adequate.[481] Arguably, states enjoy sufficient scope of manoeuvre to regulate - *ex ante* and *ex post* - the way the investment should be carried out. However, what also holds true is that in exercising this power, host states may still have to bear the consequences of the measures adopted if these are found to infringe the rights set forth for protecting the investment. In other words, if the state wants to halt or mitigate the environmental or social impacts caused by an investment project, it will have to pay the price for doing so - unless host states' measures reach the high threshold set to rule out the infringement in each of the standards the claimant presumably considered breached. As Sornarajah has found, the emergence of the state's obligation to compensate for the negative effects on the investment that the exercise of its regulatory powers may cause finds support in ISDS since, from the perspective of the business sector and home states, "dispute settlement mechanisms committed to giving protection to the foreign investment is beneficial to

[479] Sornarajah, *supra* note 467, at 77.
[480] Alam, *supra* note 462, at 117.
[481] As the tribunal to the *S.D. Myers v. Canada* case acknowledged, tribunals "do not have an open-ended mandate to second-guess government decision-making" which will suggest that there could be a margin, although limited, for the tribunal to assess state's motivation and the suitability of the measures taken to tackle the issue they were intended to address (*S.D. Myers Inc. V. Government of Canada*, NAFTA Arbitration Case, Partial Award, 13 November, 2000, paragraph 261).

economic development […] dispute settlement must be guided by principles which will promote the free flow of foreign investment by assuring it of protection against capricious behaviour by states".[482]

5.1.3 Stepping on Investor-State Dispute Settlement

Host states undoubtedly face many difficulties in balancing the several convergent and conflicting interests both of their own and of the investor. On top of this, host states face the unavoidable reality of seeing themselves taking part in ISDS procedures, where disputes regarding such competing interests are sought to be settled. Moreover, taking into account that predictability is not one of the attributes of international investment arbitration[483] and that both ISDS procedures and IIAs law are based on the strong paradigm of protecting the rights of the investors *vis-à-vis* host states' interferences,[484] a paramount concern for host states should be to avoid ISDS procedures, particularly because of the potential costs these may entail.[485]

However, host states still must comply with their duty to safeguard the community and the environment from the adverse effects the economic activity carried out by foreign investors may cause or is actually producing. Indeed, investment regimes place the host state in a position of guardian of the public interest vested with powers to exercise public authority upon the investor's rights.

Facing ISDS procedures pose several problems to host states, especially for developing states and so-called transition economies countries.[486] The best scenario for the host state is to successfully challenge the tribunal's jurisdiction as figures show that the awards on the merits are prone to favour the investor. As the 2018 UNCTAD Report shows: "Of the cases that were resolved in favour of the State, about half were dismissed for lack of

[482] Sornarajah, *supra* note 467, at 79.
[483] Sornarajah, *supra* note 199.
[484] It has been argued that the high standards of protection of the investment set in IIAs are in great part due to the power that transnational companies have in the realm of international relations as their ability "to subscribe a set of principles which are protective of its interests and promote this set of principles as constituting the law that should be applied in the event of a dispute" is widely recognised, but also because of the role played by lawyers defending TNCs interests inasmuch as they "contribute to the growth of a set of international principles which are aimed at the protection of foreign investors and their home states" (Sornarajah, *supra* note 467, at 78-79).
[485] As commented by Kulick, "international investment law [...] exerts such control [upon the exercise of public authority] by handing trump cards to non-State actors that can pursue their rights, originating in an international law source, before an international Tribunal" (Kulick, *supra* note 81, at 148).
[486] UNCTAD, *World Investment Report: Investment and New Industrial Policies* (2018), at 92.

jurisdiction. Looking at the totality of decisions on the merits (i.e. where a tribunal determined whether the challenged measure breached any of the IIA's substantive obligations), about 60 per cent were decided in favour of the investor and 40 per cent in favour of the State".[487]

According to the figures shown in the same Report, most frequently home states of claimants from 1987 to 2017 were developed countries, led by the United States of America and followed mostly by European Union members and Canada, while the only developing country in the list was Turkey.[488]

Following the same trend, arbitrators appointed to investment arbitrations were in their majority nationals from developed countries.[489] Notably, among those who have been appointed to more than 30 cases each, all are citizens of European or North American countries, except for Mr Francisco Orrego Vicuña (1942-2018) who was national from Chile, and only two out of thirteen are women (Ms Brigitte Stern and Ms Gabrielle Kaufmann-Kohler).[490]

5.2 International Efforts to Curve the Behaviour of Transnational Companies towards Environmentally and Socially Sound Practices in Foreign Investment

The current state of international relations has been contended, not to exclusively involve interstate relations, but also transboundary relations between states and non-state actors, especially in the trade and investment sector. These two sectors have been on the sight of international organisations for long time now, who have contributed from each own perspective to keep awareness on the transnational activities performed by transnational companies. This have been made, among other efforts, through the elaboration of reports

[487] *Ibid.*, at 94-95. See in this line: M. Waibel and Y. Wu, *Are Arbitrators Political? Evidence from International Investment Arbitration* (2017).
[488] UNCTAD, *supra* note 486, at 93.
[489] An interesting debate on the lack of geographical representation within the composition of arbitral tribunals in ISDS arbitration is found in: M. Langford, D. Behn and M. Usynin, Does Nationality Matter? Arbitral Backgorund and the Universality of the International Investment Regime, 2018.
[490] UNCTAD, *supra* note 486, at 95.

and codes of conduct related to the expected behaviour of TNCs regarding human rights, the environment, cultural heritage, indigenous people, gender, and so on.[491]

There have been several efforts conducted by international organisations to ensure that developments carried out through foreign investment schemes afford due respect to internationally agreed social and environmental standards. This preventive function is aimed to avoid the possible negative impacts that foreign investment may cause to indigenous and local communities or to the environment of the host state. As argued by Morgera, "[a] growing international practice spearheaded by international organisations is based upon the interpretation and implementation of a combination of international soft and hard law instruments, with a view to 'translating' inter-state obligations into normative benchmarks adapted to the reality of private operators, mainly foreign investors".[492] As it has been largely discussed, social and environmental concerns are underrepresented in most foreign investment regimes, while attempts conducted by international organisations are proof of the invisibility in which such concerns are embedded.

Illustrative to this end is the statement included in the 1999 Human Development Report of the UNEP, which evidenced that "[m]ultinational corporations are already a dominant part of the global economy - yet many of their actions go unrecorded and unaccounted".[493] From head to tail, this utterance still holds true twenty years after. Although, in the opinion of Sornarajah, "[n]otions of corporate responsibility for ensuring the welfare of the community within which investment functions are coming to be recognized both in domestic and international law".[494]

There are several examples of international instruments targeting the behaviour of TNCs in the realm of foreign investment, among which are found: the Global Compact,[495] the

[491] See: UN Global Compact and UN Guide to the Global Compact: A Practical Understanding of the Vision and the Nine Principles (Both available at: www.globalcompact.org); The OECD Guidelines for Multinational Enterprises, *OECD*, 2011; IFC, Performance Standard on Social and Environmental sustainability, adopted by the IFC Board, 21 February, 2006, and 2012 IFC Performance Standard, revised version adopted in 2011.
[492] Morgera, 'Human Rights Dimensions of Corporate Environmental Accountability', in P.-M. Dupuy, F. Francioni and E.-U. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (2009) 511, at 511.
[493] United Nations Development Programme, *Human Development Report 1999* (1999), at 100.
[494] Sornarajah, *supra* note 469, at 241.
[495] Global Compact core principles are available at: https://www.unglobalcompact.org/what-is-gc/mission/principles (last visited: 26 July 2019).

OECD Guidelines for Multinational Enterprises,[496] the World Bank Group International Finance Corporation Performance Standards on Environmental and Social Sustainability,[497] the UNCTAD Investment Policy Framework for Sustainable Development,[498] the Draft Code of Conduct for Transnational Corporations,[499] and the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.[500]

Notably, all these international instruments are located in a realm which is highly adaptative and versatile as these instruments to set the focus of their recommendations accordingly must run along economic, trade and investment trends, while also respect international law regulations in the field. Thus, for instance, talking about the banking system, Klabbers has recognised that "[t]he current system is an intricate mixture of formal and informal standards set by formal and informal bodies",[501] or as argued by Morgera with regard to the IFC standards, "[e]ven when these standards are not formally included in loan agreements or other contractual instruments, they can still be used as benchmarks to assess the conduct of foreign investors who benefit from international financing, and discrepancies can motivate effective international action to influence private investors' behaviour towards a more environment- and human-rights-respecting conduct".[502]

Notwithstanding, versatility of these instruments allows them to exist in a sphere which is not legally binding but highly authoritative.[503] A brief account of the main instruments referred to above will be provided in the following pages. This will show their relationship

[496] OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing, http://dx.doi.org/10.1787/9789264115415-en (Last visited: 26 July 2019).
[497] International Finance Corporation Performance Standards on Environmental and Social Sustainability, IFC, 1 January 2012, available at: https://www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC_Performance_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk (Last visited: 26 July 2019).
[498] UNCTAD, Investment Policy Framework for Sustainable Development, 2005, available at: https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf (Last visited: 26 July 2019).
[499] Proposed Text of the Draft Code of Conduct on Transnational Corporations, UN Commission on Transnational Corporations, UN Doc E/1990/94, 12 June 1990.
[500] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, UN Commission on Human Rights, UN Doc E/CN.4/Sub.2/2013/12/Rev.2, 26 August 2003.
[501] Klabbers, *supra* note 89, at 91
[502] Morgera, *supra* note 492, at 515.
[503] As pointed out by Klabbers, the emergence of these type of instruments, which are closely related to law, have come to blur the line between law and non-law, posing challenges regarding how to distinguishing them, what would be the form they can take, and the basis of the obligation underlying the norm (Klabbers, *supra* note 89, at 83-85).

with the achievement of sustainable development as a global interest of the international community, and with the overall objective that is pursued in this study, which is to curve the behaviour of transnational companies to adequately integrate both social and environmental concerns within their activities.

5.2.1 The Global Compact

a) Aim of the Initiative

Elaborating upon strongly supported international instruments such as the Universal Declaration of Human Rights,[504] the International Labour Organisation Declaration on Fundamental Principles and Rights at Work,[505] the Rio Declaration on the Environment and Development,[506] and the United Nations Convention Against Corruption,[507] the Global Compact tackles corporate responsibility providing a set of principles aimed at corporate sustainability and responsible business. In the website of the Global Compact is claimed that these goals will only be achieved if business operates in a way that meets "fundamental responsibilities in the areas of human rights, labour, environment, and anti-corruption".[508]

b) Overview of the Document

Particularly, a set of ten principles were drafted for the achievement of corporate sustainability and responsible business: Principle 1[509] and 2[510] relate to human rights;

[504] The Universal Declaration of Human Rights, General Assembly Resolution No. 217A, 10 December 1948.
[505] Declaration on Fundamental Principles and Rights at Work, International Labour Organisation, 86th Session, Geneva, 18 June 1998.
[506] Report of the United Nations Conference on Environment and Development, Annex I, A/CONF.151/26 (Vol. I), General Assembly, Rio de Janeiro, 3-14 June 1992.
[507] United Nations Convention Against Corruption, General Assembly Resolution No. 58/4, 14 December 2003.
[508] See: https://www.unglobalcompact.org/what-is-gc/mission/principles (Last visited: 26 July 019).
[509] Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights.
[510] Principle 2: Businesses should make sure that they are not complicit in human rights abuses.

Principle 3,[511] 4,[512] 5[513] and 6[514] relate to labour; Principle 7,[515] 8[516] and 9[517] to the environment; and Principle 10[518] to anti-corruption. The website provides for each principle a brief explanation about its content and scope, the reason or reasons why should companies care about conducting their activities in conformity to this or that principle and suggests in each case a set of particular actions available for the company towards the accomplishment of the mandates established by the concerned principle.

5.2.2 The OECD Guidelines for Multinational Enterprises

a) Aim of the Initiative

In the Preface to the 2011 Guidelines, governments parties to the OECD declared that this instrument pursued the aim "to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises".[519] These goals are intended to be reached through the implementation of the voluntary principles and standards for responsible business conduct set forth in the document by the countries adhering to the Guidelines, for whom their implementation is mandatory. To this end, trade and investment need to be conducted in "a context of open, competitive and appropriately regulated markets".[520] However, the same document recognizes that legal, social and regulatory settings lead some enterprises to look for neglecting "appropriate principles and standards of conduct in an attempt to gain undue competitive advantage".[521] The implementation of the

[511] Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining.
[512] Principle 4: Businesses should uphold the elimination of all forms of forced and compulsory labour.
[513] Principle 5: Businesses should uphold the effective abolition of child labour.
[514] Principle 6: Businesses should uphold the elimination of discrimination in respect of employment and occupation.
[515] Principle 7: Businesses should support a precautionary approach to environmental challenges.
[516] Principle 8: Businesses should undertake initiatives to promote greater environmental responsibility.
[517] Principle 9: Businesses should encourage the development and diffusion of environmentally friendly technologies.
[518] Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.
[519] OECD, *supra* note 496, at 13.
[520] *Ibid.*, at 14.
[521] *Ibid.*

Guidelines is further enhanced by the establishment of National Contact Points and of the Investment Committee.

b) Overview of the Document

In its first part, the Guidelines provide a set of fifteen General Policies[522] and several titles regarding specific policies about: Disclosure,[523] Human Rights,[524] Employment and

[522] "Enterprises should:
1. Contribute to economic, environmental and social progress with a view to achieving sustainable development.
2. Respect the internationally recognised human rights of those affected by their activities.
3. Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise's activities in domestic and foreign markets, consistent with the need for sound commercial practice.
4. Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.
5. Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues.
6. Support and uphold good corporate governance principles and develop and apply good corporate governance practices, including throughout enterprise groups.
7. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.
8. Promote awareness of and compliance by workers employed by multinational enterprises with respect to company policies through appropriate dissemination of these policies, including through training programmes.
9. Refrain from discriminatory or disciplinary action against workers who make *bona fide* reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the *Guidelines* or the enterprise's policies.
10. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.
11. Avoid causing or contributing to adverse impacts on matters covered by the *Guidelines*, through their own activities, and address such impacts when they occur.
12. Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.
13. In addition to addressing adverse impacts in relation to matters covered by the *Guidelines*, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the *Guidelines*.
14. Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.
15. Abstain from any improper involvement in local political activities" (*Ibid.*, at 19-20).

[523] "Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance" (*Ibid.*, at 27).

[524] Enterprises should "Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved" (*Ibid.*, at at 31).

Industrial Relations,[525] Environment,[526] Combating Bribery,[527] Bribe Solicitation and Extortion,[528] Consumer Interests,[529] Science and Technology,[530] Competition,[531] and Taxation.[532] The second part of the Guidelines deals with the Implementation Procedures of the Guidelines that are materialized through the establishment of National Contact Points[533] and the Investment Committee.[534] As to the operational part of National Contact Points and the Investment Committee, the Guidelines provide for a Procedural Guidance for both of these and further detailing the way for their implementation and operation.[535]

5.2.3 The IFC Performance Standards on Environmental and Social Sustainability

a) Aim of the Initiative

This document takes part of the IFC's Sustainability Framework which also encompasses IFC's Access to Information Policy. The document applies to all clients of IFC, i.e. the party responsible for implementing and operating the project that is being financed, or the

[525] Enterprises should "Respect the right of workers employed by the multinational enterprise to establish or join trade unions and representative organisations of their own choosing" (*Ibid.*, at 35).
[526] "Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development" (*Ibid.*, at 42).
[527] "Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Enterprises should also resist the solicitation of bribes and extortion" (*Ibid.*, at 47).
[528] *Ibid.*
[529] "When dealing with consumers, enterprises should act in accordance with fair business, marketing and advertising practices and should take all reasonable steps to ensure the quality and reliability of the goods and
services that they provide" (*Ibid.*, at 51).
[530] Enterprises should "Endeavour to ensure that their activities are compatible with the science and technology (S&T) policies and plans of the countries in which they operate and as appropriate contribute to the development of local and national innovative capacity" (*Ibid.*, at 55).
[531] Enterprises should "Carry out their activities in a manner consistent with all applicable competition laws and regulations, taking into account the competition laws of all jurisdictions in which the activities may have anticompetitive effects" (*Ibid.*, at 57).
[532] "In particular, enterprises should comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate. Complying with the spirit of the law means discerning and following the intention of the legislature. *[…]* Enterprises should treat tax governance and tax compliance as important elements of their oversight and broader risk management systems. In particular, corporate boards should adopt tax risk management strategies to ensure that the financial, regulatory and reputational risks associated with taxation are fully identified and evaluated" (*Ibid.*, at 60).
[533] *Ibid.*, at 68.
[534] *Ibid.*, at 68-69.
[535] *Ibid.*, at 71-75.

recipient of the financing, depending on the project structure and type of financing,[536] and to all projects that entail social and environmental risks and impacts.[537] The aim of the initiative with regard to direct investments is "to manage environmental and social risks and impacts so that development opportunities are enhanced… [Therefore, where] environmental or social risks and impacts are identified, the client is required to manage them through its Environmental and Social Management System (ESMS) consistent with Performance Standard 1",[538] which provides the obligation for clients to establish and maintain a "ESMS appropriate to the nature and scale of the project and commensurate with the level of its environmental and social risks and impacts".[539] From Performance Standards 2 through 8 there are found issue-specific objectives and requirements to avoid, minimize, and where residual impacts remain, to compensate for risks and impacts to workers, affected communities, and the environment.[540] Of course, the specific issues these standards are concerned about do not have the purpose of being an exhaustive list, rather the standards attempt is to attract major efforts on those issues that are believed to deserve major attention. Climate change, gender, human rights, and water constitute cross-cutting topics addressed in the majority of the different Performance Standards.

b) Overview of the Document

The document is composed by a set of eight Performance Standards: Assessment and Management of Environmental and Social Risks and Impacts;[541] Labour and Working Conditions;[542] Resource Efficiency and Pollution Prevention;[543] Community Health,

[536] IFC, *supra* note 497 at 2 (footnote 1).
[537] *Ibid.*, at 3.
[538] *Ibid.*, at 2.
[539] *Ibid.*, at 7.
[540] *Ibid.*, at 3.
[541] "Performance Standard 1 underscores the importance of managing environmental and social performance throughout the life of a project" (*Ibid.*, at 5).
[542] "Performance Standard 2 recognizes that the pursuit of economic growth through employment creation and income generation should be accompanied by protection of the fundamental1 rights of workers" (*Ibid.*, at 16).
[543] "Performance Standard 3 recognizes that increased economic activity and urbanization often generate increased levels of pollution to air, water, and land, and consume finite resources in a manner that may threaten people and the environment at the local, regional, and global levels" (*Ibid.*, at 22).

Safety, and Security;[544] Land Acquisition and Involuntary Resettlement;[545] Biodiversity Conservation and Sustainable Management of Living Natural Resources;[546] Indigenous Peoples;[547] and Cultural Heritage.[548]

5.2.4 The UNCTAD Investment Policy Framework for Sustainable Development

a) Aim of the Initiative

Targeting the overall policy setting for international investment, the UNCTAD Investment Policy Framework for Sustainable Development serves as the basis for technical assistance and for international investment policy discussions. The aim of the initiative is "to operationalize sustainable development in concrete measures and mechanisms at the national and international levels, and at the level of policymaking and implementation".[549] The document elaborates on the several effects that emerged after a period of crises relating to the areas of finance, food security and the environment. Such is the backdrop of a so-called 'new generation' of investment policies which "is reflected

[544] "Performance Standard 4 recognizes that project activities, equipment, and infrastructure can increase community exposure to risks and impacts. In addition, communities that are already subjected to impacts from climate change may also experience an acceleration and/or intensification of impacts due to project activities. While acknowledging the public authorities' role in promoting the health, safety, and security of the public, this Performance Standard addresses the client's responsibility to avoid or minimize the risks and impacts to community health, safety, and security that may arise from project related-activities, with particular attention to vulnerable groups" (*Ibid.*, at 27).
[545] "Performance Standard 5 recognizes that project-related land acquisition and restrictions on land use can have adverse impacts on communities and persons that use this land" (*Ibid.*, at 31).
[546] "Performance Standard 6 recognizes that protecting and conserving biodiversity, maintaining ecosystem services, and sustainably managing living natural resources are fundamental to sustainable development" (*Ibid.*, at 40).
[547] "Performance Standard 7 recognizes that Indigenous Peoples, as social groups with identities that are distinct from mainstream groups in national societies, are often among the most marginalized and vulnerable segments of the population. In many cases, their economic, social, and legal status limits their capacity to defend their rights to, and interests in, lands and natural and cultural resources, and may restrict their ability to participate in and benefit from development. Indigenous Peoples are particularly vulnerable if their lands and resources are transformed, encroached upon, or significantly degraded. Their languages, cultures, religions, spiritual beliefs, and institutions may also come under threat. As a consequence, Indigenous Peoples may be more vulnerable to the adverse impacts associated with project development than nonindigenous communities. This vulnerability may include loss of identity, culture, and natural resource-based livelihoods, as well as exposure to impoverishment and diseases" (*Ibid.*, at 47).
[548] "Performance Standard 8 recognizes the importance of cultural heritage for current and future generations. Consistent with the Convention Concerning the Protection of the World Cultural and Natural Heritage, this Performance Standard aims to ensure that clients protect cultural heritage in the course of their project activities. In addition, the requirements of this Performance Standard on a project's use of cultural heritage are based in part on standards set by the Convention on Biological Diversity" (*Ibid.*, at 53).
[549] UNCTAD, *supra* note 498 at 10.

in the dichotomy in policy directions over the last few years – with simultaneous moves to further liberalize investment regimes and promote foreign investment, on the one hand, and to regulate investment in pursuit of public policy objectives on the other".[550] In other words, the idea of foreign investment as the means for boosting economic growth for economic growth – or *progress for progress* - is being challenged by those who suffered the consequences of the crises pointed out above, whom are calling to find a balanced solution for promoting foreign investment without waiving to the exercise of regulatory powers nor to conclude investment treaties silent on the social and environmental aspects of the investment. The UNCTAD Investment Policy Framework for Sustainable Development provides for a set of principles "for investment policymaking, guidelines for national investment policies, and guidance for policymakers on how to engage in the international investment policy regime, in the form of options for the design and use of international investment agreements".[551]

b) Overview of the Document

The document is divided into six chapters which inform on: A New Generation of Investment Policies; Principles for Investment Policymaking; National Investment Policy Guidance; Framework for International Investment Agreement; Promoting Investment in SDGs: Action Menu; and the Way Forward.

Concretely, the document establishes ten principles under the umbrella of the overarching principle to promote investment for inclusive growth and sustainable development.[552] The ten principles are relating to: policy coherence;[553] public governance and institutions;[554]

[550] *Ibid.*, at 16.
[551] *Ibid.*, at 10.
[552] "It recognises the need to promote investment not only for economic growth as such, but for growth that benefits all, including the poorest. It also calls for the mainstreaming of sustainable development issues in investment policymaking, both at the national and international levels" (*Ibid.*, at 31).
[553] "Investment policy should be integrated in an overarching development strategy […] there is consequently a need for a coherent overall approach to make them conducive to sustainable development and to achieve synergies" (*Ibid.*, at 31-32).
[554] "Participatory approach to policy development as a basic ingredient of investment policies aimed at inclusive growth and fairness for all" (*Ibid.*, at 32).

dynamic policymaking;[555] balanced rights and obligations;[556] right to regulate;[557] openness to investment;[558] investment protection and treatment;[559] investment promotion and facilitation;[560] corporate governance and responsibility;[561] and, international cooperation.[562]

5.3 Environmental and Social Concerns in Investor-State Dispute Settlement

As it has been argued, the role of the host state with regard to foreign investment is twofold, and this leaves them in a troublesome position regarding foreign investors, on the one side, and their constituency, on the other.

The following will discuss upon the surveillance role of host states with regard to foreign investment and the difficulties they face to rise environmental and social concerns as defences in ISDS.

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[555] "This principle recognises that national and international investment policies need flexibility to adapt to changing circumstances, while recognising that a favourable investment climate requires stability and predictability" (*Ibid.*, at 32).

[556] "Investment policies need to serve two potentially conflicting purposes. On the one hand, they have to create attractive conditions for foreign investors. […] On the other hand, the overall regulatory framework of the host country has to ensure that any negative social or environmental effects are minimised. […] this core principle suggests that the investment climate and policies of a country should be balanced as regards the overall treatment of foreign investors" (*Ibid.*, at 33).

[557] "This principle advocates that countries maintain sufficient policy space to regulate for the public good" (*Ibid.*, at 33).

[558] "The principle considers a welcoming investment climate, with transparent and predictable entry conditions and procedures, a precondition for attracting foreign investment conducive for sustainable development" (*Ibid.*, at 34).

[559] "Core elements of protection at the national level include, inter alia, the rule of the law, the principle of freedom of contract and access to courts. Key components of investment protection frequently found in IIAs comprise the principle of non-discrimination (national treatment and most-favoured nation treatment), fair and equitable treatment, protection in case of expropriation, provisions on movement of capital, and effective dispute settlement" (*Ibid.*, at 34).

[560] "The principle contains two key components. First, it stipulates that in their efforts to improve the investment climate, countries should not compromise sustainable development goals, for instance by lowering regulatory standards on social or environmental issues, or by offering incentives that annul a large part of the economic benefit of the investment for the host country. Second, the principle acknowledges that, as more and more countries seek to boost investment and target specific types of investment, the risk of harmful competition for investment increases. Investment policies should be designed to minimise this risk (*Ibid.*, at 34-35).

[561] "The principle calls on governments to actively promote Corporate Social Responsibility Standards and to monitor compliance with them" (*Ibid.*, at 35).

[562] "This principle considers that investment policies touch upon a number of issues that would benefit from more international cooperation. The principle also advocates that particular efforts should be made to encourage foreign investment in LDCs" (*Ibid.*, at 35).

5.3.1 Environmental Concerns in ISDS

Striving a balance between the economic interests of foreign investors and host-states' environmental concerns is a matter of great interest to academics, governments and international organisations. Often, economic interests and the protection of the environment are seen as competing, legitimate interests. In the field of foreign investment, at least in theory, is found, on the one hand, the interest of the investor, related to the protection of its rights of property and over its estimated benefits, while, on the other, is the legitimate interest of the host state to protect its environmental resources, and to prevent any significant damage to the environment.[563]

5.3.1.a. ISDS and the Protection of the Environment

The protection of the environment has been addressed largely in a vast range of environment-related multilateral agreements, which provisions, however, have been referred to be vague, as pointed out by Sands,[564] or as held by Viñuales, "broad, often merely exhortative or even vague".[565] On top of this, in the field of foreign investment, the environment has never been a priority fully addressed at the time of negotiating IIAs, as they rarely contain clauses imposing the duty not to affect the environment during the course of the investment, or the mandate to follow any given international environmental standard,[566] although, according to Viñuales, "investment tribunals may apply international environmental law to all the extent relevant for the resolution of an investment dispute".[567]

However, as noted by Alam, some recent IIAs have included provisions aimed to promote the protection of the environment, for instance, by precluding the possibility of host states to relax their environmental standards in order to attract, enlarge or retain foreign investment.[568] Also in this sense, the 2018 UNCTAD World Investment Report has found

[563] Sands, 'Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law', in T. M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (2007) 313, at 314.
[564] *Ibid.*, at 315.
[565] Viñuales, 'Environmental Regulation of FDI Schemes', in P.-M. Dupuy and J. E. Viñuales (eds.), *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (2013) 273, at 309.
[566] Dimsey, *supra* note 470, at 142.
[567] Viñuales, *supra* note 565, at 317.
[568] Alam, *supra* note 462, at 109.

that "in contrast to the IIAs signed in 2000, the 2017 IIAs include a larger number of provisions explicitly referring to sustainable development issues (including by preserving the right to regulate for sustainable development-oriented policy objectives). Of the 13 agreements concluded in 2017, 12 have general exceptions – for example, for the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources. All but one also explicitly recognize that the parties should not relax health, safety or environmental standards to attract investment; and 11 refer to the protection of health and safety, labour rights, the environment or sustainable development in their preambles".[569] The Report goes on stressing that "Strengthening cooperation between national and international investment policymakers, improving interaction and ensuring cross-fertilization between the two regimes (including by identifying lessons learned that can be transferred from one policy regime to the other) are crucial tasks for countries striving to create a mutually supporting, sustainable development-oriented investment policy regime".[570]

Illustrative of the above is the reasoning of the arbitral tribunal to the *Adel A Hamadi Al Tamimi v. Sultanate of Oman* case,[571] where due to the infringement of several domestic regulations related to the protection of the environment, the host state took some measures that led to the termination of the investor´s lease. The claimant supported the case against the host state in the latter alleged breach of the minimum standard of treatment and national treatment provisions set forth in the Oman-US Free Trade Agreement, while also claiming that the measure taken amounted to the expropriation of the investment. For the present purposes, the reasoning of the tribunal not to consider the existence of a breach of the minimum standard of treatment is relevant to the extent that it is based on the analysis of the Oman-US Free Trade Agreement provisions on environmental protection in order to address whether the measure taken fall within the state's lawful scope of action. To such end, the tribunal cautiously analysed the manner and extent to which the parties to the Oman-US Free Trade Agreement had regulated the relationship between the investment and the duty bearing on the host state to protect the environment. Clearly, the environment could find protection through both domestic law and international law, and the investment treaty was useful to determine the proportionality of the measure taken

[569] UNCTAD, *supra* note 486, at 96.
[570] *Ibid.*, at 105.
[571] *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/13, Award, 3 November, 2015.

according to the host-state's domestic regulation.[572] Following this line of thoughts, the tribunal noted that the Oman-US Free Trade Agreement "places a high premium on environmental protection [providing] forceful protection of the right of either State Party to adopt, maintain or enforce any measure to ensure that investment is 'undertaken in a manner sensitive to environmental concerns', provided it is not otherwise inconsistent with the express provisions of Chapter 10".[573]

Addressing environmental concerns is also difficult as not all investment areas have consequences upon the environment to the same extent. For instance, energy and mining, had been considered prone to potentially "affect national sovereignty over natural resources and create significant risks in terms of sustainable development and inclusive growth, *[being]* more prone to State interference than FDI in other sectors".[574] Taking into account the risks to the environment that the energy production industry may cause, attempts to multilateralise rules on investments in this area have been carried out at the international level. Although without having reached the impact expected from it,[575] the 1994 Energy Charter Treaty - a multilateral treaty covering common principles for international cooperation and common areas of cooperation in the field of energy – successfully established standards aimed to minimise, in an economic efficient manner, possible harmful environmental impacts stemming from energy-related activities, taking into account the pursuit of sustainable development and each party's MEA-based obligations.[576]

Although foreign investment schemes are drafted in treaties that rarely address the behaviour that the foreign investor must adopt towards the environment, this does not mean that environmental-related complaints have been completely blurred from foreign

[572] *Ibid.*, at paragraph 389.
[573] *Ibid.*, at paragraph 387.
[574] Coop, 'Introduction', in E. De Brabandere and T. Gazzini (eds.), *Foreign Investment in the Energy Sector: Balancing Private and Public Interests* (2014) 1, at 1.
[575] As pointed out by Karl, "Since IIAs focus on the promotion and protection of FDI, thereby potentially shifting the balance of interests in favour of the investor, the domestic regulatory framework of host countries, within which foreign investors operate, needs to provide the necessary counterweight. To effectively play this role, it is crucial that IIAs do not unduly undermine national regulatory space through which governments can pursue sustainable development strategies and minimize negative impacts of investment in the energy sector. To avoid the risk of an undue reduction of regulatory space for investments in the energy sector, countries may want to abstain from entering into specific international commitments at all. This is particularly an issue for the ECT, which lacks the membership of many major oil and gas producing countries" (Karl, *supra* note 475, at 25).
[576] ECT, Article 19.

investment disputes, brought either by investors[577] against host states or by means of counter-claims.[578] However, what holds true is that environment-related claims brought before international arbitral tribunals by means of counterclaim are far from constitute the general rule. Indeed, environmental claims for acts or omissions attributable to the investor are commonly entertained by the domestic tribunals of the host state or before those from where the investor is national.[579]

To file a counter-claim would be necessary for such an alternative to be conceived in the international investment treaty or contract, and will depend on the nature of the claim, whether it is based on the treaty or in a contract, on the clause governing the applicable law, and on the arbitration institution statute. For instance, the World Bank Convention on the Settlement of Investment Disputes Between States and Nationals of Other States provides in its Article 46 that: "Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre". According to the NAFTA, counterclaims will only be accepted if "the disputing investor has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages" (which

[577] In a case brought before a tribunal under the auspices of the Permanent Court of Arbitration, an investor claimed the destruction of the investment's value due to the host-state's failure to take environmental protection measures. However, the claims were finally rejected by the tribunal (*Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award, 26 June, 2016).

[578] See: *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, 23 September 2019. In the award, for the breaches of its obligations, Ecuador shall pay Perenco USD$448,820,400, while Perenco will have to pay to Ecuador the costs of restoring the environment and remedying the infrastructure in the amount of USD$54,439,517. Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February, 2017. In this ICSID case, Ecuador was awarded USD41 million for soil and water contamination and creation of mud pits.

[579] Particularly notorious has been the case between the Amazonian people of Lago Agrio in Ecuador against the oil company Chevron (former Texaco Petroleum) for the environmental damage caused by the industrial activities carried out by the North American firm. The Ecuadorian courts found the firm liable for the environmental damages ordering to pay 9.500 million dollars in compensation. For an exhaustive analysis of the different avenues this case went through, see: Pigrau, 'The Texaco-Chevron Case in Ecuador: Law and Justice in the Ge of Globalization', V *Revista Catalana de Dret Ambiental* (2014) 1. Similarly, but claiming the investor has caused negative impacts upon the local community, see: *Copper v. Ecuador*, *supra* note 437, and the related judgment issued by the Ontario Court of Appeal in Piedra v. Copper Mesa Mining Corporation, 2011 ONCA 191 (Available at: http://www.ontariocourts.ca/decisions/2011ONCA0191.pdf). As pointed out by Sornarajah, relevant issues raised when communities affected by activities of foreign investors decide to put forward their social and environmental claims before justice are, on the one hand, the multiple judicial forums that might be opening, the broadening of the relevant participants to the dispute in all these instances, and notably for international law that "domestic courts become instruments through which new areas of international law, like international environmental law, come to be enforced" (Sornarajah, *supra* note 467, at 72-74).

excludes any counterclaim related to a different matter).[580] Within the proceeding of an arbitration substantiated according to UNCITRAL rules, the respondent may brought a counterclaim in its statement of defence, or at a later stage in the arbitral proceedings, if the arbitral tribunal decides that the delay was justified under the specific circumstances, provided that the arbitral tribunal has jurisdiction over it.[581]

5.3.1.b. ISDS and Sovereign Rights of States Upon their Natural Resources

As argued by Dimsey, to acknowledge the sovereignty of the state over its natural resources should include "the obligation to protect its natural resources, and arguably part of the obligation to protect is an obligation to ensure that resources are properly managed and available to the population in adequate measure […] A need to access and utilise natural resources, but no experience in implementation, has in turn triggered the entry of multinational companies equipped with the know-how to make resources available and accessible".[582]

The protection of natural resources has been long understood as a matter of national concern, thus being the state the one entitled to develop the national policies regarding the safeguard and exploitation of its natural resources. As it was recognised by the tribunal to the *Crystallex International Corporation v. Venezuela* case:

> "… it is a state's sovereign prerogative to grant or deny a permit, particularly one that affects natural resources over which the state has sovereign rights. The Tribunal thus does not share the Claimant's presentation of the issues in terms of it being 'entitled' or having a 'right' to a Permit. From the point of view of international law, a state could not be said to be under an obligation to grant a permit to affect natural resources, and would always maintain the freedom to deny a permit if it so considers. It would, however, incur liability under the BIT if the treatment of the investor in the process leading to the denial was unfair and inequitable, because it was arbitrary, lacking transparency or consistency."[583]

The rationale behind this statement lies in the relation between the status of natural resources with regard to the sovereignty of states according to the UNGA Resolution 1803(XVII) on Permanent Sovereignty over Natural Resources issued in 1962.[584] The

[580] Article 1137(3) of the North American Free Trade Agreement.
[581] Article 21 of the United Nations Commission on International Trade Law Arbitration Rules, UN Doc A/31/98, 31st Session Supp No 17.
[582] Dimsey, *supra* note 21 at 143-144.
[583] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April, 2016, paragraph 581.
[584] United Nations General Assembly, Resolution 1803(XVII) on Permanent Sovereignty over Natural Resources, 14 December, 1962. Similarly, Article 193 LOSC provides that "States have the sovereign right

above quoted paragraph is refreshing on the effects afforded to the principle of permanent sovereignty over natural resources in investment arbitration, as it accounts on the vulnerability faced by host-states' decisions regarding their natural resources. Indeed, as argued by Viñuales, referring to the obstacles to a progressive approach to the relationship between the environment protection and the investment protection, "even when this link exists and is invoked in an investment dispute it remains vulnerable to challenges on grounds of proportionality and/or due process".[585]

Indeed, as the award to the *Crystallex v. Venezuela* case evidenced, the tribunal found the host state liable for having breached the FET standard as it denied the environmental permit to the investor on grounds deemed arbitrary and unfair. The tribunal went on arguing that it was evident that the host state was bringing new arguments as they were convenient to justify its decision. Particularly, the arbitral tribunal was appreciative on the fact that arguments related to global warming were raised for the first time by the host state to justify the denial of the permit in a 4-years working relation with the investor, which considered "a clear example of arbitrary and unfair conduct".[586] On top, the tribunal considered that the lack of scientific evidence and thorough evaluation of the environmental impact study, -ignored by the host state, cannot put "such a dramatic halt to the project".[587]

5.3.1.c. ISDS and Host States Environmental Regulatory Power

The above shows the possibility that arbitral tribunals have to impose constrains upon host states whenever wanting to regulate or change their direction to more environmental sound practices.[588] In the *Compañia del Desarrollo de Santa Elena S.A. v. Republica de Costa Rica* case,[589] the arbitral tribunal expressly rejected that compliance with an

to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment". Thus, the limit for the activities on the seabed covered by the continental shelf under the sovereignty of a given coastal state will be that expressed in Article 193 LOSC; beyond that area, exploration and exploitation activities shall be carried out in accordance to the General Obligation prescribed in Article 192 "States have the obligation to protect and preserve the marine environment" and the rules established in Part XI LOSC, which further limits will be addressed and discussed in the following section.

[585] Viñuales, *supra* note 565, at 309.

[586] *Crystallex v. Venezuela*, *supra* note 583, paragraph 592.

[587] *Ibid.*, paragraph 597.

[588] Alam, *supra* note 462, at 108.

[589] *Compañia del Desarrollo de Santa Elena S.A. v. Republica de Costa Rica*, ICSID case No. ARB/96/1, Award, 17 February, 2000.

international obligation to protect the environment - whatever the international source of the obligation be – should not affect the international obligation of the host state of prompt payment and adequate and effective compensation after having expropriated the property of an investor. The arbitral tribunal stated in this sense that "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".[590]

Commenting upon this paragraph, Sands has argued that "If the tribunal is right then the practical consequence may be to prevent States, in particular developing country States, from taking effective measures to give effect to their international obligations to protect their environmental patrimony, since they will often not be in a position to finance an interference. On the other hand, there is a need to be vigilant against the possibility of abusing the right to protect the environment at the cost of foreign (or indeed domestic) property rights".[591]

To some extent, arbitral tribunals can create limits to the regulatory power of host states, narrowing the margin of appreciation of host states regarding the measures they are able to adopt pursuant to the protection of the environment. And, for measures aimed to the protection of the environment to be adopted provided on the costs they may entail I something fragile to openly assert.

5.3.2 Social Concerns in ISDS

Similar to the situation observed with regard to the environment, in spite of the endeavours made by the international community to grant a safe space for people's rights to be respected and fulfilled, investment agreements often lack specific provisions tackling issues relating to the impact of projects upon social development, or indigenous and local communities.

5.3.2.a. Advantages of Foreign Investment on Social Development

According to the 2018 UNCTAD World Investment Report "[i]nvestment promotion is integral to industrial policy because FDI is more than a flow of capital that can stimulate

[590] *Ibid.*, at paragraph 71.
[591] Sands, *supra* note 563, at 323.

economic growth. It comprises a package of assets that includes long-term capital, technology, market access, skills and know-how, all of which are crucial for industrial development. It can contribute to sustainable development by providing financial resources where such resources are often scarce; generating employment; strengthening export capacities; transferring skills and disseminating technology; adding to GDP through investment and value added, both directly and indirectly; and generating fiscal revenues. FDI can support industrial diversification and upgrading, and the build-up of productive capacity, including infrastructure. Importantly, it can contribute to local enterprise development through linkages with suppliers".[592] In this same line of thoughts, Alam argues that "[t]he increased availability of capital in certain industries unlocks the opportunity for increased investment in potentially less pollution-intensive goods and services, and thus drives down the cost of these to the consumer through the facilitation of economies of scale"[593].

5.3.2.b. The "Resource Curse"

Most of the regulation aimed to tackle the adverse social impacts of investments development, naturally, will be found in domestic law. However, not all host states are equally efficient at the time to regulate in this field, as Al Faruque argues, "[m]any developing countries might be more interested in gaining large economic benefits from the mineral project and may ignore the social and environmental aspect of the operation".[594] This phenomenon has been addressed as the 'resource curse',[595] which refers to the impairment of people's life when its government becomes aware on the economic input that a certain natural resource of its own may purports, all of which "can lead to public outcry and unrest, and result in disputes".[596]

The abandonment that communities bear is mostly absolute if it is considered the weak – if not complete lack of - domestic regulation addressing social impacts of investment

[592] UNCTAD, *supra* note 486, at 131-132.
[593] Alam, *supra* note 462, at 111.
[594] Al Faruque, 'Sustainable Mining, Human Rights and Foreign Investment: Nexus and Challenges', in S. Alam, J. H. Bhuiyan and J. Razzaque (eds.), *International Natural Resources Law, Investment and Sustainability* (2018) 287, at 303-304.
[595] See: World Trade Organisation Secretariat, *World Trade Report: Trade in Natural Resources* (2010), at 91.
[596] Dimsey, *supra* note 470, at 133. See also: T. H. Moran, *Is FDI in Natural Resources a 'Curse'?* (2010), available at https://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_moran_e.htm.; Merino Blanco, *supra* note 472.

developments, allowing, for instance, that displacement of people or the emergence of sacrifice zones[597] to happen unnoticed. On top of this, recourse to international law is also prevented, as recalled by the ICSID tribunal to the *Bear Creek* case,[598] on the effects that the ILO Convention 169[599] may have upon the private sector:

> "ILO Convention 169 imposes direct obligations on states only. Contrary to Respondent's arguments, a private company cannot '*fail to comply*' with ILO Convention 169 because it imposes no direct obligations on them. The Convention adopts principles on how community consultations should be undertaken, but does not impose an obligation of result. It does not grant communities veto power over a project. The only relevant inquiry is whether the consultations were conducted in good faith, adjusted to the circumstances of the Project and the affected community, and conducted with the objective of reaching agreement."[600]

Adding to the above, the favourable treatment that foreign investors rights are afforded to by international investment law, turns the situation all the most difficult for host states to find legal arguments to justify its measures affecting the investor's rights.

5.3.2.c. Addressing Social Concerns at the National Level

Social impacts of investment projects could be approached from a twofold perspective. They could be addressed *ex ante* by means of preventive strategies adopted by the host state. At the national level, some domestic regulations had progressively included within the requirements of the environmental impact studies, the need to address the social impact that the project will have upon the surrounding community. Indeed, there is a need to enhance the regulatory frameworks, especially in the realm of extractivist activities, as these operations tend to have "substantial and profound impact on local communities and can generate significant social tensions among community and stake holders".[601] Most often, licenses granted to investors to carry out projects affecting natural resources rise both environmental and public health concerns, particularly when these projects are carried out in developing countries,[602] where they are deemed to "significantly impair

[597] Bolados García and Sánchez Cuevas, 'Una Ecología Política Feminista En Construcción: El Caso de Las 'Mujeres de Zonas de Sacrificio En Resistencia', Región de Valparaíso, Chile', 16 *Psicoperspectivas Individuo y Sociedad* (2017) 33, at 35-36; Scott and Smith, '"Sacrifice Zones" in the Green Energy Economy: Toward an Environmental Justice Framework', 62 *McGill Law Journal* (2017) 862.
[598] *Bear Creek Mining Corportation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017.
[599] International Labor Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 1989.
[600] *Bear Creek v. Peru*, *supra* note 598, at paragraph 241.
[601] Al Faruque, *supra* note 594, at 288.
[602] Dimsey, *supra* note 470, at 147.

enjoyment of the social, economic and cultural rights of the local community".[603] Preventive measures represent the strategies adopted by a host state to avoid both foreseen and unforeseen potential, social impacts and consequent risks of development projects[604].

The second approach is through *ex post* measures of prevention or mitigation, which relate to "retroactive solutions for social impacts and require their implementation by way of the provision of compensation and rehabilitation programs to the affected local and indigenous communities".[605]

5.3.2.d. ISDS and Social Concerns

The first group of measures, those dealing *ex ante* with the possible adverse social impacts of an investment project, appear more suitable to prevent or mitigate the unwanted effects of a project in a given community. Indeed, measures adopted *ex post* in order to prevent or reduce the adverse social effects of an investment project, similarly to the situation addressed in the case concerning the protection of the environment, can find themselves challenged on grounds of arbitrariness or unfairness, lack of proportionality or due process, and therefore regarded as unlawful. This would make the state liable to the investor, emerging the obligation to compensate for the damages caused.

This statement is by no means intended to imply that the assessment of the behaviour of the host state by international adjudicative bodies should be relaxed, as it is acknowledged the role of arbitral tribunals to be vigilant on possible abuse of rights from host states. Rather, the idea is to draw the attention to the difficulties that integrating social concerns into ISDS suppose both from the point of view of the host state as from the perspective of the adjudicative bodies.

Illustrative of the above is the *William Ralph Clayton and others v. Government of Canada* case substantiated according to NAFTA investment rules. In this case, the host state, having doubts as to the adequacy of the environmental impact study submitted by the investor to attain the approval of its project, established an independent Joint Review

[603] Al Faruque, *supra* note 594, at 290. The author mention that most vulnerable human rights are the right to self-determination, the right to an adequate standard of living, the right to life, the right to employment and the right to social security.
[604] *Ibid.*, at 298.
[605] *Ibid.*, at 295-298.

Panel to conduct an environmental impact assessment.[606] Considering the findings reached by the Joint Review Panel, the host state rejected the project because the investor's environmental impact assessment did not consider the 'community core values', which the host state considered to equivalent to the human environmental effects of the project.

In the opinion of the majority of the tribunal, the Panel's determination of the community core values was more like to a referendum amid the community than a scientific-based study. In the words of the tribunal "*[the]* function of a review panel is to gather and evaluate scientific information and input from the community and to assess a project in accordance with the standards prescribed by law, not to conduct a plebiscite".[607]

Notwithstanding, McRae in his dissenting opinion, argued, on the one hand, that a complete reading of the Joint Review Panel Report would show that it did assess the effects the investment project may have upon the human environment as part of an overall assessment of what the commissioned group called 'core values'.[608] On the other hand, he deemed the convincement reached by the majority to entail a high cost, that may bear negative consequences for future panels commissioned to make environmental assessments on investment proposals.[609] Indeed, McRae went on explaining that, as a result of the inability of the tribunal to see the Panel's report on the human environment effects far beyond a mere referendum, "a chill will be imposed on environmental review panels which will be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment in case the result is a claim for damages",[610] which he considered to be an "intrusion into the environmental public policy of the state".[611]

According to McRae, the mission of the Joint Review Panel was of great complexity as it had to review the nature of the potential effects in light of the investors' mitigation proposals for each of the terrestrial, marine, human and cumulative effects.[612] With regard

[606] *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March, 2015, paragraph 35.
[607] *Ibid.*, at paragraph 508.
[608] William Ralph Clayton and others v. Government of Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March, 2015, Dissenting Opinion Prof. Donald McRae, paragraph 19.
[609] *Ibid.*, at paragraph 48.
[610] *Ibid.*, at paragraph 51.
[611] *Ibid.*, at paragraph 49.
[612] *Ibid.*, at paragraph 15.

to the analysis over the human environment effects of the project, the Panel rightly expressed that the investor was unable to provide an adequate assessment of the effects. This was largely considered to the failure of the investor to engage in consultations with aboriginal and local people in the community to effectively know the community core values. Indeed, contrary to the assessment of the investor, who saw the community as one in decline, "the Panel saw several instances where the communities had discussed and set out in documents their vision of the community that encourages economic development, but provides a balanced approach combining economic, social and cultural issues. […] This failure of the Proponent to consider the way in which the relevant communities have given consideration to community planning activities and policy outcomes, such as commonly identified priorities, core values, vision statements or future goals was regarded as a serious deficiency in the EIS".[613]

As well as in the case of pulling forward environmental concerns at the time to justify the reasonability or proportionality of a measure affecting the rights of investors, bringing social concerns to the assessment of the tribunal is also fragile. As it has been shown, tribunals are not keen to embrace these sorts of arguments nor mindful of the consequences that their dismissal may cause within domestic public policy. Indeed, facing a threat to the environment or to its community, a host state may be reluctant or dubitative to interfere with the investment because of the high costs that such interference may entail in the long run.[614]

However, exceptions are also possible as it was the case brought before an ICSID tribunal against Venezuela after the claimants suffered the expropriation of its investment, which Venezuela justified according to its public policy on 'endogenous development'.[615] According to the tribunal the expropriation was made according to domestic public interest.[616] The respondent state considered that the industrial sector of the production of glass packages "*es prioritario dentro de la política económica de desarrollo endógeno que adelanta el Gobierno Nacional, a los fines de generar empleo y garantizar a la*

[613] *Ibid.*, at paragraph 21-22.
[614] As presented by Klabbers, "any attempt to change domestic law as it relates to topics such as the environment, labour regulation, or taxation, may come with a heavy price tag" (J. Klabbers, *International Law* (2013), at 277).
[615] As stated in the Award, the policy on endogenous development is aimed at the promotion of national and autonomous production in strategic economic sectors (*OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March, 2015, paragraph 301).
[616] *Ibid.*, at paragraph 372.

población un nivel adecuado de bienestar",[617] to this statement, the tribunal argued as follows:

"[…] *la República expropió las Plantas para promover el desarrollo endógeno, una política pública legítima que puede implementar de la forma que considere más beneficiosa para el bien común, incluso mediante expropiaciones y nacionalizaciones.*"[618]

The host state motivation for declaring the expropriation of the investment was also regarded not to be discriminatory but a strategic decision towards the achievement of Venezuela's policy on 'endogenous development'.[619] The tribunal noticed that the investor was holding more than 60% of the market of glass packages production, thus the expropriation granted the control over the industry to the Venezuelan government.[620]

Concluding Remarks

The study developed in this Chapter showed that, from a host state perspective, the way in which the balance of the concurrent interests converging in foreign investment regimes, is the weakness of the system, whereas its strength lies on the ever-increasing need of investments for states to achieve their plans of economic growth. This perspective implies, however, that diverse environmental and social concerns are left aside if all concurrent interests are balanced exclusively under the light of economic growth.

This picture leaves host states, specially less developed states, in the troublesome position to encourage inflows of foreign investment, while, at the same time, ensuring an effective protection to indigenous and local communities, and the environment from the adverse effects of developmental projects. As it was argued, this turns the more difficult if acknowledging the strong paradigm of the protection of the investment that reigns in foreign investment regimes. Indeed, as argued by Alam, "IIAs have primarily been concerned with creating a stable regulatory environment to enable or encourage FDI in a host state".[621]

[617] *Ibid.*, at paragraph 112, Decreto de Expropiación, Considerando 7, Anexo C-24.
[618] *Ibid.*, at paragraph 410.
[619] *Ibid.*, at paragraph 411.
[620] *Ibid.*, at paragraph 411.
[621] Alam, *supra* note 462, at 115.

Despite the efforts made at the international level through different instruments and mechanisms aimed to curve the behaviour of transnational companies concerning social and environmental concerns, among others relevant claims, the paradigm remains the same. Indeed, the situation is not any better when host states are brought to ISDS and try to integrate social and environmental concerns in their defences.

Chapter 6

Integrating the Sustainable Development Narratives of Balance and Prevention into Investor-State Dispute Settlement

Probably, sustainable development narratives of balance and prevention are not going to solve the many difficulties and flaws observed in the literature on international investment law concerning investor-state dispute settlement (hereinafter, ISDS). One relevant critique put forward to the ISDS system, is related to the lack of coherence observed in the jurisprudence of international investment arbitral tribunals.[622] Kulick, for instance, discussing on the so-called *Argentine crisis awards*, has deemed the decisions of tribunals on the topic as inconsistent, when not contradictory.[623] The cause of this lack of coherence has been "often attributed to the inconsistencies in the language in the treaties each tribunal had to interpret"[624] and the plurality of tribunals engaging with different arbitration rules. Another strong reproach on ISDS, is the incapability of this system to properly manage or weigh non-investment-related claims, such as those concerning to social development, indigenous and local communities, human rights, and the protection of the environment whenever affected by the investment project.

Bearing this in mind, the following chapter will examine the strategic use of sustainable development narratives of balance and prevention in ISDS, aiming to the softening of these rough edges, with the view to present these narratives as effective argumentative resources to adequately address social and environmental issues.

Before beginning with the analysis portrayed to in this part, is convenient to recall that, in their role of surveillance, host states will always have the right to counteract through the measures they deemed adequate against perceived disturbances caused upon the environment or a community by a given foreign investment project. As it has been argued, states enjoy a certain scope of manoeuvre to regulate - *ex ante* and *ex post* - the way the

[622] Reinisch, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration', in I. Buffard et al. (eds.), *International Law between Universalism and Fragmentation* (2008) 107, at 114-118.
[623] Kulick, *supra* note 81, at 130.
[624] Sornarajah, *supra* note 199, at 1.

investment should be carried out to avoid its adverse social and environmental effects. However, what also holds true is that in exercising this power, host states may still have to bear the consequences of the measures adopted if these are found to infringe the rights set forth for protecting the investment. In other words, if the state wants to halt or mitigate the environmental or social impacts caused by an investment project, it will have to pay the price for doing so - unless host states' measures reach the high threshold set to rule out the infringement in each of the standards the claimant presumably considered breached.

The analysis conveyed in this Chapter cannot focus on the strategic use of sustainable development in the interplay between international legal norms as the analysis carried out concerning DSM-related disputes did; where both contractors and the ISA were bound by norms and obligations stemming out of the same international law regime, and where, in the event that a measure adopted by the ISA resulted in an economic loss to the contractor, this could be brought to the settlement of the SDC, who cannot just focus on the economic dimension of the dispute as it is obliged to consider the principles of the common heritage of mankind and the protection of the environment in its adjudicative process. Instead, the evaluation of the thesis in the field of ISDS needs to be proposed differently as according to foreign investment international regimes, foreign investors are only afforded with rights aimed to the protection of their investments, but no obligations are set for them to consider, either the protection of the environment or indigenous or local communities in the performance of their activities. This of course, makes the evaluation of the thesis in this field to be more fragile, as some may plainly argue that ISDS is just not the forum where to address social or environmental concerns of host states.

Taking the above into account, the strategic use of sustainable development in ISDS will be put forward as an argumentative resource, useful to the construction of four legal arguments supporting the position of host states when they adopt measures in the exercise of their surveillance role.

This Chapter is divided into four sections: The first section aims to show the utility of the sustainable development narrative of balance to assist the construction of successful arguments when defending the measures taken by host states based on the investor's failure to attain social license. The second section will explore the strategic use of

sustainable development to be integrated in disputes concerning claims of indirect expropriation as a useful tool to balance the degree of interference that the measure causes upon the right of ownership and the power of the host states to adopt policies pursuing the protection of social and environmental interests. The third and fourth sections will examine, respectively, the state police powers doctrine and the general principles of international public policy as means to justify host states' measures aimed to put a halt or mitigate the adverse social or environmental effects of an investment project.

This exercise will show that host states may find in sustainable development narratives of balance and prevention a way to resist the rules of international investment law mostly established to the protection of the rights of foreign investors. Indeed, as will be shown below, a measure considered to be in breach of a given standard of protection or to amount to the expropriation of the investment will oblige the host state to remedy the investor's economic loss. This holds true unless the respondent state succeeds in persuading the tribunal that the measure meets the threshold set for considering it lawful, excluding, therefore, the state's responsibility. Were the conduct of the state deemed to be unlawful, the following would be to argue for the application of the contributory fault standard and ascertain the extent to which the acts or omissions of the investor contributed to its own injury, having to bear the weight of its own negligence. Consequently, the amount of compensation would be adjusted accordingly, reducing the amount otherwise payable by the host state.

6.1 Investor's Need to Obtain Social License

Investment projects do not occur in a vacuum and it is undeniable that many of them produce considerable impacts upon host states' local communities. These impacts may be of different degrees and connotation, and there could even be some investments that will not have any impact whatsoever. Preventing potential, social and environmental risks posed by investment developments falls within the competence of states, who must deal with this through the adoption, in their national legislation, of different mechanisms intended to curve the adverse effects of foreign investment upon local communities or the environment.

For those investments that may entail potential adverse effects upon local communities, and in order to create a space for cooperation between the investor and these communities,

in their relevant domestic regulations, host states can establish the obligation for the investor to conduct different actions to attain social license in order to avoid the potential, adverse social impacts of development projects. Social license refers to the strategies adopted by a host state to avoid both foreseen and unforeseen potential social impacts and the consequent risks of development projects.[625] Mechanisms to attain social license may range from social planning and social impact assessments to stakeholder consultations, or agreements with the host community. All these mechanisms are closely oriented to sustainable development as they aim to balance the converging economic interests of the investor with the social and environmental concerns born by local communities, by securing agreements that satisfy both parties.

This section aims to show the performance of sustainable development narrative of balance in order to assist the construction of successful arguments when defending the measures taken by host states based on the investor's failure to attain social license. The analysis will show that the sustainable development narrative of balance may provide a tool for host states to accommodate social and environmental concerns in a regime that appears to be mostly designed to protect investors engaging in transnational businesses.

The following will address the legal basis found in international law for the creation of obligations relating to the attainment of social license and their relationship with sustainable development. Then there will be analysed the *Pac Rim Cayman LLC v. The Republic of El Salvador*[626] and the *Bear Creek Mining Corporation v. Republic of Peru*[627] ICSID awards, where the measures taken by the host state based on the alleged failure of the investor to comply with its obligation to attain social license were reviewed in order to determine the responsibility of the former. The analysis will also explore the place where the reasoning of both ICSID tribunals intersects with the function contended to the sustainable development narrative of balance. Finally, elaborating on the award to the *Bear Creek* case, the last title of this section will discuss on the application of the contributory fault standard and the potential use that the sustainable development

[625] Al Faruque, *supra* note 594, at 298.
[626] *Pac Rim Cayman LLC v. The Republic of El Salvador* (*Pac Rim* case), ICSID Case No. ARB/09/12, Award, 14 November, 2016.
[627] *Bear Creek v. Peru*, *supra* note 598.

narrative of balance may have to this end by providing a comprehensive assessment of the investor's obligation to attain social license.

6.1.1 Social License in International Law and Sustainable Development

From declarations wrote in strong legal wording to its creation as a proper due diligence obligation, several international law instruments have referred to the relevance of attaining social license to evaluate and address the potential social impact that different activities may have upon indigenous and local communities.

Although timidly, Principle 22 of the 1992 Rio Declaration on Environment and Development[628] is clear in linking the relevant role of indigenous and local communities to the achievement of sustainable development recognising that:

> "Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development".

Related to the above Principle 22 is Principle 1 of the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development, which declares that the duty of states to ensure a sustainable use of natural resources would entail the duty to manage natural resources "in a rational, sustainable and safe way so as to contribute to the development of their peoples, with particular regard for the rights of indigenous peoples, and to the conservation and sustainable use of natural resources and the protection of the environment, including ecosystems"[629].

In the same vein, Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples[630] reads as follow:

> "1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other

[628] UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).
[629] UN Doc. A/CONF.199/8, 9 August 2002.
[630] Annex to the General Assembly Resolution 61/295 on the Rights of Indigenous Peoples, 13 September 2007.

> resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
>
> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact".

Additionally, Article 15 of the International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries provides:

> "1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
>
> 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities."[631]

Furthermore, within the realm of the Convention on Biological Diversity, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization is conclusive in determining the great relevance of the proceedings aiming at achieving consent or approval from indigenous and local communities when accessing their traditional knowledge associated with genetic resources. In its Article 7, the Protocol establishes that:

> "In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established."[632]

Following these developments in international law, host states have adopted legislation imposing the requirement for investors to obtain social license as a condition to be met before the commencement of their investment development. Although there have not been many cases dealing with this topic, two controversies have emerged between investors and host-states where the attainment of social license has been the centre of the

[631] International Labor Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 1989.
[632] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, UNEP/CBD/COP/DEC/X/1, Annex I, 29 October 2010, p.5.

debate. This, in turn, has given arbitral tribunals the opportunity to engage with the analysis of the concept, its scope and extent within the realm of international investment law.

6.1.2 Evaluation of the Host State's Responsibility for Measures Adopted after the Investor's Breach of the Obligation to Attain Social License

The following examines two awards rendered by ICSID arbitral tribunals in cases where the measures challenged by the investor were taken by the host state based on the alleged failure of the former to comply with the obligation to attain social license. This study will explore the extent to which the adjudication process accommodated the sustainable development narrative of balance to assess in each case the state's responsibility for the eventual breach of the investment standards of protection.

The first of these cases is *Pac Rim Cayman LLC v. The Republic of El Salvador*.[633] In this case, according to the host-state's domestic law, the investor was required to obtain the consent from landlords of a property located on the area of a subsoil mining project. The conflict emerged after the refusal of the host state to grant the exploitation concession to the investor based on its failure to comply with the submission of the "property title for the real estate or authorised permissions, in legal form, from the landowner"[634] as required by domestic mining law. The ICSID tribunal was called among other issues to interpret a domestic law provision in order to determine the extent of the investor's obligation to find such social license as part of the conditions established to turn an exploration concession into an exploitation one. The parties to the case had different understandings on the actual extent of the required consent, being the investor's belief that the condition was met by attaining the consent only of those landowners likely to be directly affected, whereas, for the host state, such understanding fell short by not considering the entire surface area of the requested concession.[635]

The tribunal rejected the investor's understanding based on three criteria: a) the behaviour and decisions taken by the investor; b) the recognition of a fair degree of deference to that interpretation of domestic law issued by the host state's authorities before the emergence

[633] *Pac Rim v. El Salvador*, *supra* note 626.
[634] El Salvador's Mining Law Article 37(2)(b).
[635] *Pac Rim v. El Salvador*, *supra* note 626, at paragraph 8.12.

of the dispute; and, c) a teleological argument was deployed by the tribunal.[636] This third argument – as reproduced below - embraces sustainable development in its core inasmuch as it stresses the relevance of achieving an exhaustive consent of those landowners that are considered to be directly affected by the concession, as well as of those that could be indirectly affected. Although not expressly mentioning sustainable development, the tribunal declared, referring to the wording and scope of the domestic provision subject to interpretation, that:

> "Read literally, it can be stretched to describe the full surface area of the requested concession. However, applied to underground mining conducted under modern mining practices [...], that literal interpretation does not seem to make much practical sense, whether viewed from the perspective of the proposed concessionaire, the Respondent (as the owner of the sub-soil) or the individual owners and occupiers of the full surface area. Equally, also a matter of practical sense, it would unduly truncate the wording to limit its application to only that part of the surface area directly impacted by the proposed mining infrastructure at the surface. What matters, in practice, are the potential risks posed to surface owners or occupiers; and, inevitably, those risks may not be the same over the full surface area of the requested concession, particularly over the full 30-year period of the requested concession".[637]

In the reasoning of the tribunal, it is observed that, in order to adequately interpret the domestic provision, there is a need to strike a balance between the economic aim of developing the mining project *vis-á-vis* the need to protect the land owners and occupiers from the risks that such projects may cause, i.e. between an economic interest and a legitimate social concern. On the one hand, based on the merits, the tribunal determined that consent must reach owners and occupiers in the whole surface area of the concession. On the other hand, a time-perspective is also taken into account, which is aimed at integrating a future perspective approach within the wording of the regulation subject to interpretation. This long-term approach led the tribunal to include the need to consider even those owners or occupiers that could be indirectly affected by the project within the investor's obligation. In other words, the tribunal articulated the obligation of the investor to attain social license from a sustainable development perspective. This is so, inasmuch as it determined which was or could be the local community actually affected and then call for the achievement of a balance between the interests of the investor to move on with its project and the concern for lowering the potential social risks that may be generated by it. The investor, not having satisfied such balance or, what is the same, not

[636] *Ibid.*, at paragraphs 8.29-32.
[637] *Ibid.*, at paragraphs 8.32.

having completely and adequately fulfilled its obligation to attain social license from a sustainable development perspective, the arbitral tribunal dismissed its claim regarding the determination of the responsibility of the host state.

The second case also substantiated before an ICSID arbitral tribunal, concerns *Bear Creek Mining Corporation v. Republic of Peru*[638]. In this case, the host state – Peru – argued that the measure challenged by the investor, i.e. the revoking of a permit previously granted to the investor to carry out its investment project, was an exercise of its police powers aiming at the prevention of border blockades and social unrest in the area. Such measure was taken according to the Respondent, in light of the investor's fault to achieve an adequate degree of social license – which was claimed to be the cause of the social unrest of the communities living nearby the project implementation area. As stressed by the ICSID arbitral tribunal to the *Bear Creek* case, although social license is not a concept "clearly defined in international law, all relevant international instruments are clear that consultations with indigenous communities are to be made with the purpose of obtaining consent from all the relevant communities".[639] Out of these lines, it is possible to infer that social license refers to the process of consultation that has to be conducted by the interested investor in order to obtain consent from all relevant, indigenous and local communities. If one thinks on sustainable development as related to the need to halt or lessen all significant adverse social or environmental impacts caused by economic development through the achievement of a balance among the different, convergent interests, attaining social license is clearly heading, in this case, to such an end in a preventive way.

Differently from the *Pac Rim* case, here the tribunal did not find that the investor was in breach of its obligation to attain social license; rather it reached the conviction that the host-state's appreciation of the investor's compliance was wrong. Therefore, the measure taken on the assumption that the investor failed to attain social license was regarded as a violation of the investment protection standards. Thus, the responsibility of Peru was established.

The ensuing title will discuss on the application of the contributory fault standard and the potential use that the sustainable development narrative of balance may have to this end

[638] *Bear Creek v. Peru*, *supra* note 598.
[639] *Ibid.*, at paragraph 406.

by providing a comprehensive assessment of the investor's obligation to attain social license. The evaluation of this thesis will be performed by elaborating further on the reasoning conveyed by the tribunal to the *Bear Creek* case.

6.1.3 Evaluation of the Outreach Made to Attain Social License for the Purposes of the Application of the Contributory Fault Standard

The framing principle for reparation of damages to the victim of a wrongful act or omission is that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[640] Article 39 on the contribution to the injury of the Articles on Responsibility of States for Internationally Wrongful Acts[641], however, establishes that "[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought". Interestingly, there is not much literature on the application of the contributory fault standard.[642] The following paragraphs will deal with the assessment of the investor's contributory fault when measures taken by host states are grounded on preventing or minimising the adverse effects of the investment development on the community and/or the environment.

The idea of looking for the investor's contributory fault to the injuries on grounds of both social and environmental concerns[643] was raised firstly in the *Copper Mesa Mining Corporation v. The Republic of Ecuador* case[644] brought before an arbitral tribunal constituted according to the rules of the Permanent Court of Arbitration (PCA). Ecuador,

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[640] *Chorzow*, *supra* note 426, at paragraph 47.
[641] Annex to the General Assembly Resolution 56/83, A/56/49(Vol.I)/Corr.4, 12 December, 2001.
[642] Some authors, as Hober, have argued that contributory fault of the investor could be taken into account at the stage of damages of the arbitration and that it is the tribunal who has the discretionary faculty to determine the compensation amount (Hober, 'Compensation: A Closer Look at Cases Awarding Compensation for Violation of the Fair and Equitable Treatment Standard', in K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2010) 573. At 576). Mostly all handbooks on international investment law devote just a few lines to refer a few cases where tribunals have applied the contributory fault standard to reduce the damages otherwise payable to the investor: C. F. Dugan et al., *Investor-State Arbitration* (2008), at 602-603; R. Dolzer and C. H. Schreuer, *Principles of International Investment Law* (2008), at 273; Kinnear, 'Damages in Investment Treaty Arbitration', in K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2010) 551.
[643] Contributory fault to the injury assessed on different grounds see: *MTD v. Chile*, *supra* note 437, paragraphs 242-246.
[644] *Copper v. Ecuador*, *supra* note 437.

the host state, was sued by the investor for unlawfully expropriating the investment, as well as for breaching the FET and FPS clauses, which, according to the investment agreement, governed the relationship between the parties. Particularly, the claimant raised a domestic law passed by Ecuador as the source of the infringements. However, Ecuador argued that such domestic law "was adopted for the legitimate public policy purposes of protecting public health and the environment where the requirement to consult the local population on the basis of an EIS was specifically intended to protect the residents and local communities and to reduce the environmental impacts of mining activities".[645] Therefore, the measure adopted was within the margin allowed for exercising its police powers legitimately. Interestingly, the tribunal was of the belief that its function was not to pass judgment upon the motivation that led the host state to declare the termination of the mining concessions, but to check whether the procedural aspects of its implementation were consistent with due process and whether they were not discriminatory nor arbitrary. However, after finding the host state responsible, when the liability and the amount of compensation owed by the respondent were determined, the tribunal examined each of the parties' contribution to the prior facts that led to the termination of the concessions and asserted that the investor had to bear part of the outcome on its own, thus reducing the amount to be paid by the respondent by 30%.[646]

Similarly, in the *Bear Creek* case, the application of the contributory fault standard was put forward by the respondent state for the Tribunal's assessment. However, recalling the findings achieved in a previous ICSID case,[647] the arbitral tribunal asserted that in order for a host state's international responsibility to be excluded based on the investor's omission or fault, two conditions had to be met: firstly, the host state had to prove that there was an omission or fault attributable to the investor; and, secondly, it had to prove the existence of a causal link between such omission or fault and the alleged harm suffered,[648] placing the burden of proof, therefore, upon the host state. In the tribunal words, "[w]hile Claimant could have gone further in its outreach activities, the relevant question for the Tribunal is whether Respondent can claim that such further outreach was legally required and its absence caused or contributed to the social unrest, so as to justify

[645] *Ibid.*, at paragraph 1.16.
[646] *Ibid.*, at paragraph 6.64.
[647] *Abengoa S.A. y Cofides S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, April 18, 2013.
[648] *Bear Creek v. Peru*, *supra* note 598, at paragraph 410.

Supreme Decree 032".[649] Although the parameter for assessing the Claimant's outreach was found in a national document regulating citizen participation in the mining subsector, reference to some articles of the International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries were also brought to the analysis. Special regard was put on Article 15 about the inclusion of peoples in the use, management and conservation of natural resources and the procedures to consult them in order to accurately measure the degree up to which their interests would be prejudiced. Clearly, the tribunal in this case did not make a difference between responsibility and liability.

Although the examination of the claimant's contributory fault to the injuries suffered "appears to be relatively rare in investment arbitration",[650] in his partially dissenting opinion,[651] Philippe Sands, respondent's appointee to the arbitral tribunal, argued for reducing the amount of damages awarded to the investor in light of its own contribution to the social unrest and protests that led the host state to take the decision to revoke the investor's rights to operate the mine.[652] The state of rebellious dissatisfaction of the communities inhabiting the area where the mine was settled was supposed to be a reaction to the contamination of the local land and the nearby Lake Titicaca. For Sands, massive and growing social unrest was caused in part by the investment project, leaving the host state "with no option but to act in some way to protect the well-being of its citizens".[653] According to Sands, "the evidence before the Tribunal is that the Respondent has clearly established the Claimant's contributory responsibility, by reason of its acts and omissions, to the social unrest that left the Peruvian government in the predicament it faced, and the need to do something reasonable and lawful to protect public well-being". In his arguments on the claimant's contributory responsibility to the local community unrest, Sands went on explaining that:

> "In particular, the Project collapsed because of the investor's inability to obtain a "social license", the necessary understanding between the Project's proponents and those living in the communities most likely to be affected by it, whether directly or indirectly. It is blindingly obvious that the viability and success of a project such as this, located in the community of the Aymara peoples, a group of interconnected communities, was necessarily dependent on local support. In this regard, the Project can hardly be said to

[649] *Ibid.*, at paragraph 408.
[650] Dugan et al., *supra* note 642, at 603.
[651] *Bear Creek v. Peru (Sands)*, *supra* note 471.
[652] *Ibid.*, at paragraph 4.
[653] *Ibid.*, at paragraph 2 and 4.

> have got off to a good start, with the Claimant making use of a degree of subterfuge, by obtaining permits in the name of one of its own lowly employees – Ms Villavicencio, a Peruvian national – which it, as a foreign corporation, was not at the time authorised or lawfully entitled to obtain. If nothing else, the absence of transparency at that early stage of the Project can only have contributed to an undermining of the conditions necessary to build trust over the longer term. The discontent that followed, expressed by many members of the affected local communities, was foreseeable."[654]

Accordingly, for Sands, obtaining social license would be in some cases 'blindingly obvious' if one takes into account the external factors surrounding the investment. Whereas for the majority of the tribunal the critical issue was if the outreach shall constitute a legal requirement to authorise the investment, the gravitating question was to address whether the scope of the implemented outreach plan was adequate one or not. For Sands, instead, the gravitating question is that "[a]s issues become more inter-related it will be incumbent upon those involved in arbitrating disputes with an environmental element to strive for balance, balance between potentially competing objectives of environmental protection on one hand, and the protection of rights of foreign investors on the other hand. Neither of these important societal interests should trump the other, they should be treated in an integrated manner".[655] Sadly, the piece from where this quote is taken dates back to the year 2007 and in its conclusion reads: "It may be that the cases reflect a 'generational issue': that environmental issues remain novel with the consequence that it will take time to fully integrate environmental concerns into the better established norms of foreign investment protection".[656] Ten years later, when the award to the *Bear Creek* case was released, the same generational issue appears to be still on top, oppressing both social and environmental concerns.

The perspective conveyed by Sands is aptly expressed in the narrative of balance that is subjacent to sustainable development, where the three dimensions are not perceived as alternatives but as mutually reinforcing.[657] The articulation of this narrative would have provided a comprehensive understanding of the elements that had to be weighed in order to determine the contributory fault of the investor, even though the obligation to attain social license had been considered fulfilled.

[654] *Ibid.*, at paragraph 6.
[655] Sands, *supra* note 563, at 313.
[656] *Ibid.*, at 325
[657] In this line, see: *Iron Rhine* case, *supra* note 2.

6.2 The Threshold for Host States in Claims concerning the Indirect Expropriation of the Investment

The choice of advancing the strategic use of sustainable development in claims concerning the indirect expropriation of the investment derivates from the fact that in both ISDS literature and jurisprudence it is highly contested where to draw the line between what should be considered a valid exercise of states' regulatory power and what measures are, on the other hand, amounting to indirect expropriation. The study acknowledges that claims of indirect expropriation and their development have resulted in constraints to states' regulatory power in fields of paramount importance such as the protection of aspects related to welfare, social development and the environment.[658] Far from provide an answer to this dilemma, the following study is humble in presenting sustainable development narratives of balance and prevention as argumentative tools at hand for host states to justify the lawfulness of the measure or measures challenged by the foreign investor.

Indeed, this section aims to address the role of the sustainable development narratives of balance and prevention in meeting the threshold established to dismiss a claim of indirect expropriation, excluding, therefore the responsibility of the host state. The focus of the discussion will be centred on the argumentative role that these narratives exercise in favour of the respondent state, while espousing some thoughts to articulate them within legal discourse in ISDS.

The first part of this section aims to convey an account on the concept of indirect expropriation and the features that distinguish it from regular expropriation. The second part examines the debate that the establishment of a threshold for considering a claim of indirect expropriation has generated in international investment law doctrine and ISDS jurisprudence. Finally, it will be examined the contribution that the sustainable development narratives of balance and prevention may have for states facing these types of claims.

[658] Sornarajah, *supra* note 469, at 203-204.

6.2.1 The concept of Indirect Expropriation

Expropriation is the taking by the state of something that before the seizure was owned by a natural or juridical person. Expropriation is an institution of law that has been largely developed within the area of administrative law and, roughly speaking, to fall under the legitimate exercise of the state's power is needed for the state to compensate the market value of the property that has been taken and to prove that the expropriation has been conducted to fulfil a purpose of public interest. Therefore, expropriation is not out of its own a wrongful act of the state; this holds true both for expropriations incumbent to national and international law.[659] Indeed, as pointed out by Yannaca-Small "[c]ustomary international law does not preclude host States from expropriating foreign investments provided certain conditions are met".[660]

The expropriation of the right of property belonging to a natural or juridical person will be relevant for international law when the legal relation between the state conducting the seizure and the affected foreigner is regulated by international law norms either of conventional or customary source.[661] Indeed, under foreign investment schemes the power exercised by a state upon the property of a foreign investor must be conducted in accordance to the norms agreed in the relevant international treaty, but also in compliance of applicable rules of customary international law.

Traditionally, the physical seizure of property or the outright transfer of title conducted by a state without compensation is an unlawful act[662] which relates to what has been called in doctrine and ISDS jurisprudence as direct or formal expropriation.[663] In turn, indirect expropriation does not involve the physical takeover of property or the outright transfer of title, but a governmental measure or action that interferes with an investor's right of

[659] Dugan et al., *supra* note 642, at 429.
[660] Yannaca-Small, 'Indirect Expropriation and the Right to Regulate: How to Draw the Line?', in K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2010), at 447.
[661] The distinction is made to highlight that expropriation of foreigners' right of property could be regulated in an international treaty concluded by the state that carries out the expropriation and the state of the foreigner's nationality, or according to customary law in case no such a treaty is found. As to the first case, the dispute settlement mechanism will be that accorded by the states party to the treaty; whereas in the second case, rules on diplomatic protection might be applicable. The present study will only cover the first case.
[662] As argued by Dolzer and Schreuer, "[a]ll expectations of the investor are destroyed in case the investment is taken without adequate compensation" (Dolzer and Schreuer, *supra* note 642, at 89).
[663] Dugan et al., *supra* note 642, at 450.

property or diminishes its value.[664] Differently from direct expropriation, in cases of indirect expropriation the investor retains its right of property over the investment,[665] however, the government's action or the measure adopted are deemed to have effectively deprived the foreign investor from the use and enjoyment of such right.[666]

Moreover, indirect expropriation relates to an act of or measure adopted by the host state that, in principle, does not involve the obligation for the state to compensate, but would entail such reparation once indirect expropriation is declared by an adjudicative body as the concurrent legal effects of the state's behaviour amounted to those emerging from direct expropriation, i.e. the deprivation of the use and enjoyment of the right of property.[667]

6.2.2 The Threshold for considering a Claim of Indirect Expropriation

There are no clear rules for determining whether a measure adopted by a host state is constitutive of indirect expropriation or a valid exercise of its sovereign powers, and doctrine and ISDS jurisprudence are lean to consider that fact-based assessment on a case-by-case basis is imperative.[668] As noted by Dugan et al. "The signal problem is defining with precision when an exercise of regulatory or police power crosses the line and becomes compensable".[669] In the same line, Dolzer and Schreuer argue that "[w]hat was and remains contentious is the drawing of the line between non-compensable regulatory and other governmental activity and measures amounting to indirect, compensable expropriation";[670] also, as Sornarajah highlights "what would be explored most in expropriation law would not be the old rules relating to standards of compensation, but new issues as to what would amount to a taking and how regulatory taking, which does not involve compensation, is to be identified and differentiated from compensable expropriation".[671] As mentioned, also in ISDS jurisprudence there is no consensus as to

[664] *Ibid.*, at 451. In this same line, some authors have proposed that the difference between direct and indirect expropriation is "whether the legal title of the owner is affected by the measure in question"(Dolzer and Schreuer, *supra* note 642, at 92).
[665] Dolzer and Schreuer, *supra* note 642, at 93.
[666] Yannaca-Small, *supra* note 660, at 447.
[667] See: *Ronald S. Lauder v. Czech Republic*, Arbitration under UNCITRAL Rules, Final Award, 3 September 2001, paragraph 200.
[668] Yannaca-Small, *supra* note 660, at 446.
[669] Dugan et al., *supra* note 642, at 452.
[670] Dolzer and Schreuer, *supra* note 642, at 93.
[671] Sornarajah, *supra* note 469, at 198. It is also enlightening the reconstruction this author makes on the reasons arbitral tribunals came to disregard the intent of the state's measure to focus only in the effects the

the factors that had to be weighed on the determination of indirect expropriation, in this sense, an arbitral tribunal declared that: "[w]hether to consider only the effect of measures tantamount to expropriation or consider both the effect and purpose of the measures is a point on which not only the parties disagree but also arbitral tribunals".[672]

The threshold host states' must meet for considering the challenged measure to be within the scope of the valid exercise of their sovereign powers, and therefore, non-compensable, depends on the consideration of different criteria or elements. As mentioned above, nor the jurisprudence neither the doctrine has found a peaceful solution to this matter. However, three main approaches can be identified

a) Part of the doctrine has put forward some of the recurrent elements usually weighed in ISDS in order to determine if a measure is constitutive of indirect expropriation;[673] among the most relevant ones are found:

a. The challenged measure must be adopted in good faith (*bona fide*) and in a non-discriminatory fashion[674].
b. It must be adopted pursuing the protection of legitimate public welfare objectives[675].
c. It must be adopted according to due process conditions[676].
d. Attention must be paid to the duration of the effects of the measure[677].

b) A different proposal is that advanced by Yannaca-Small, who considers: "(i) the degree of interference with the property right, including the duration of the regulation; (ii) the character of governmental measures, i.e., the purpose and the context of the governmental measure; (iii) the proportionality element between the public policy objective pursued by

measure had on the investment at the time to determine whether an indirect expropriation had occurred, as "[t]his facilitated a measure to be considered as expropriation on the ground that it affected the exercise of a right or caused a depreciation in value despite the fact that it was not the intention of the state to produce such a result, but was a by-product of the measures it had taken to achieve an objective in the public interest. The strategy was to argue that the impact of the measure on the investment was what mattered" (*Ibid.*, at 209).

[672] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, paragraph 309.

[673] See in detail: Dugan et al., *supra* note 642, at 455.

[674] See: *Bernhard Friedrich Arnd Rüdiger Von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July, 2015, paragraphs 648, 652 and 657.

[675] See: *S.D. Myers v. Canada*, *supra* note 481, paragraph 285.

[676] See: *Copper v. Ecuador*, *supra* note 437, paragraph 6.64.

[677] See: *Ivan Peter Busta and James Peter Busta v. Czech Republic*, SCC Case No. V2015/14, Final Award, 10 March 2017, paragraph 389, where the tribunal stressed that "for an expropriation to occur, in the form of direct or creeping expropriation, there must be a permanent and irreversible deprivation".

a measure and the impact of such measure in the property of the investor; and (iv) the interference of the measure with reasonable and investment-backed expectations".[678] Similar to this approach, an ICSID tribunal in the *Siemens A.G. v. The Argentine Republic case*,[679] based its decision on the existence of an expropriation, firstly, on the effects caused by the challenged measure on the investment. Secondly, the tribunal believed that the act considered to be expropriatory was permanent in nature, having the effect to terminate the relevant contract. Thirdly, contending that the treaty required the expropriation to be for a public purpose and compensated, the tribunal was of the opinion that, although a public purpose could be arguably observed, not having compensated the claimant rendered the expropriation of the investment unlawful.[680]

c) Yet, there are some for whom the effects upon the investment, are the only relevant elements to be addressed by arbitral tribunals in order to determine the compensable nature of the state's measure. As pointed out by Dolzer and Schreuer, "[t]he effect of the measure upon the economic benefit and value as well as upon the control over the investment will be the key question when it comes to deciding whether an indirect expropriation has taken place".[681] According to this approach it would be always the same to talk about compensable, indirect expropriation and compensable exercise of regulatory powers.

For these authors, the backdrop of indirect expropriation reflects states' double-standard *vis-á-vis* the international community, suggesting that what is actually behind states' purposes is to avoid the adverse effects direct expropriation may cause regarding to their international image and reputation,[682] where indirect expropriation would be a mechanism more suitable towards the end states pursue.

Interestingly, the line drew by these two latter approaches between the conditions for considering that an expropriation had happened and those for considering it unlawful seems to leave states without many much room of manoeuvre. Indeed, according to this view, it is of no relevance whether the alleged expropriatory acts respond to states' exercise of their regulatory power, but only whether this exercise of authority carries the

[678] Yannaca-Small, *supra* note 660, at 460.
[679] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007.
[680] *Ibid.*, at paragraphs 270-273.
[681] Dolzer and Schreuer, *supra* note 642, at 101.
[682] *Ibid.*, at 92.

deprivation of the investor's property right on the investment or its enjoyment, in which case the obligation to compensate will arise. Then, to assess whether the expropriation was carried out based on a public purpose or compensated is a matter concerning its lawfulness; indeed, the failure to comply with any of the foregoing would render the expropriation unlawful.

The more notorious difference between the second approach with the two on the poles, is that it considers necessary to carry out a proportionality test with regard to the effects that the challenged measure have had upon the right of property of the claimant, this is, whether the claimant has lost control over its investment or was deprived from the use or enjoyment of its rights, and also upon the extent that it has affected the investor's expected benefits.

6.2.3 The Strategic Use of the Sustainable Development Narratives in Claims of Indirect Expropriation

As has been shown, the determination of indirect expropriation is mostly provided on a case-by-case assessment and there is no agreement as to the elements that have to be taken into account in order to its determination. Arbitral tribunals and scholars are polarised as to the real weight of contextual factors surrounding the measure adopted by the state and, on the other side, the criteria that solely focus on the effects of the measure upon the investor's right of property,[683] being a proposal in the middle which calls for the performance of a test of proportionality bringing the poles together.

Either way, here is proposed that sustainable development narratives of balance and prevention may help host states to resist to broader conceptions or understandings about when a measure should have to be considered as constitutive of compensable, indirect expropriation, while dissipating second thoughts regarding their intentions.

As the ICSID tribunal to the *S.D. Myer* case pointed out: "A tribunal should not be deterred by technical or factual considerations from reaching a conclusion that an expropriation or conduct tantamount to an expropriation has occurred. It must look at the real interests involved and the purpose and effect of the government measure".[684]

[683] Dugan et al., *supra* note 642, at 461.
[684] *S.D. Myers v. Canada*, *supra* note 481, paragraph 285.

Notably, Dugan et al. had asserted that "[t]he degree to which a tribunal should consider the intent, purpose, nature, or character of the governmental act arguably now provokes more controversy that the question of the degree of deprivation itself".[685] More recently, ISDS jurisprudence has shown that a balance must be reached between the "two competing interests: the degree of the measure's interference with the right of ownership and the power of the State to adopt its policies".[686] Notably, this consideration calls for striking a balance between the interests of the host state to protect its community and/or the environment, and those interests belonging to the foreign investor.[687]

The strategic use of sustainable development narrative of balance in the litigation of claims of indirect expropriation, may prove to provide an argumentative framework to encompass and adequately assess all concurrent factual circumstances, and the intention of host states behind the measure adopted, which had, ultimately, caused a disruption on the foreign investor's economic interests.[688] As highlighted by Yannaca-Small, "the debate has shifted to the application of indirect expropriation to regulatory measures aimed at protecting the environment, health, and other welfare interests of society. The question that arises is to what extent a government may affect the value of property by regulation, either general in nature or by specific actions in the context of general regulations, for a legitimate public purpose without effecting a 'taking' and having to compensate a foreign owner or investor for this act".[689] This, in other words, is to separate compensable, indirect expropriation from non-compensable, regulatory power.

It has been claimed that customary international law recognises that, non-discriminatory regulation for a public purpose,[690] enacted in accordance with due process, should not entail for the state an exercise of its regulatory powers requiring compensation.[691] This

[685] Dugan et al., *supra* note 642, at 461
[686] *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paragraph 189.
[687] Sornarajah, *supra* note 469, at 222.
[688] As noted by Kingsbury and Schill, "[p]ublic law concepts arguably can help to address the concerns arising in this respect and accommodate the impact of non-investment related matters within the system of international investment law and arbitration" (Kingsbury and Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - The Concept of Proportionality', in S. W. Schill (ed.), *International Investment Law and Comparative Public Law* (2010) 75, at 77).
[689] Yannaca-Small, *supra* note 660, at 446.
[690] See, for instance: *Von Pezold v. Zimbabwe*, *supra* note 675, at paragraphs 648, 652 and 657.
[691] See: *Methanex Corporation v. United States of America*, NAFTA Arbitration under Chapter 11, Award, 44 ILM 2005, 3 August 2005, Part IV – Chapter D, paragraph 7; *Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA under UNCITRAL Rules, Partial Award, 17 March 2006, paragraph 262. See in this sense: Yannaca-Small, *supra* note 660, at 449; Sornarajah, *supra* note 469, at 191.

implies that, even though measures pursuing environmental or social purposes may fit under the description of public interest, if these are enacted in a discriminatory fashion or without compliance of due process, such measures would be qualified as indirect expropriation.[692] This is notwithstanding, as noted by Dugan et al., that there are certain areas where tribunals appear to be more willing "to give a state more latitude to enact certain measures; for example, if it can be shown that they relate to a government's right to tax, to control its currency or to regulate health, welfare, and the environment".[693]

This approach calls for the performance of a balance between the economic interests underlying the investment both for the investor and the host state, and the social and environmental interests which protection is entrusted to the state. The sustainable development narrative of balance can contribute as an argumentative resource to adequately encompass all these converging interests. The narrative of balance may be helpful to satisfy the test of proportionality called for to determine whether the exercise of the state's sovereign powers would have to be compensated or not. As an ICSID tribunal recalls, "[w]ith respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed".[694] Indeed, provided these interests are successfully weigh, the measure should be regarded to be lawful, excluding, therefore, the obligation of reparation otherwise owed to the investor.

However, taking into account that arbitrary use of sustainable development in litigation may also occur, the balance between the interests that sustainable development aims to address must be present through the whole activities of the host state previous to the adoption of the challenged measure. This is, throughout the decision-making processes out of which the measure affecting foreign investors' interests emerged as well as within the legal argumentation provided in the contentious stage before the adjudicatory body in charge of the settlement of the dispute.

[692] See: *Compañía v. Costa Rica*, *supra* note 598. See also the piece of Viñuales, *supra* note 565.
[693] Dugan et al., *supra* note 642, at 462-463.
[694] *LG&E v. Argentina*, *supra* note 686, paragraph 195.

6.3 The Exercise of Police Powers by the Host State

The exercise of police powers finds its immediate justification in the internal dimension of sovereignty, which "involves a monopoly of governing authority"[695] exercised by the state without the interference of other states.[696] Thus, the exercise of police powers is based on the state's sovereignty over its territory and people. This authority within the state is exercised by the government and materialised through the performance of its legislative, executive and judicial powers. Within the municipal realm, as pointed by Kolb, "private individuals enjoy their freedom (*Privatautonomie*) only within the four corners of State legislation and the mandatory jurisdiction of tribunals".[697] Therefore, the exercise of police powers may result from the adoption of norms, rules, regulations, administrative measures, procedures, judicial decisions, and so on. Sovereignty in the sense attributed above, does not intend to justify any breach of international obligations, the enforcement of such obligations before international courts or tribunal, or the non-compliance with international courts and tribunals decisions.

To the extent pertinent to this study, the exercise of police powers will be examined as an expression of host states' surveillance role, this is, to afford their indigenous and local communities and the environment with effective protection against the adverse effects of investment projects. In this sense, it will be argued that the sustainable development narrative of prevention may contribute to strengthen the position of the host state by pushing forward into the adjudicative process, the social and environmental interests underpinning the measure purportedly affecting the economic interests and expectations of the investor. Particularly, it will be argued that the sustainable development narrative of prevention can contribute to argue in favour of a valid exercise of the state's police powers. Indeed, as it will be shown, the space for host states to intervene upon foreign investments by the adoption of measures aimed to prevent or mitigate significant risks to the environment or indigenous and local communities.

Police powers pursue a twofold aim when they are exercised based on sustainable development: firstly, to put a halt on the adverse social or environmental effects that the

[695] Crawford, *supra* note 434, at 120.
[696] *Island of Palmas*, Award, 4 April, 1928, 11 RIAA 831, p. 838.
[697] R. Kolb, *Theory of International Law* (2016), at 220.

investment project may cause, and secondly, to exclude or reduce the state's responsibility and liability.

6.3.1 The Valid Exercise of Police Powers

As advanced above, the exercise of police powers may result in the exclusion of the host state's responsibility under international law, but it must be validly exercised for this outcome to be achieved. The jurisprudence of ISDS has drawn upon the conditions that states must met to consider that a measure has been taken according to a valid exercise of its police powers.

In the words of the ICSID tribunal to the *Philip Morris v. Uruguay*[698] case:

> "The principle that the State's reasonable *bona fide* exercise of police powers in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic damage to an investor and that the measures taken for that purpose should not be considered as expropriatory did not find immediate recognition in investment treaty decisions. But a consistent trend in favour of differentiating the exercise of police powers from indirect expropriation emerged after 2000. During this latter period, a range of investment decisions have contributed to develop the scope, content and conditions of the State's police powers doctrine, anchoring it in international law. According to a principle recognized by these decisions, whether a measure may be characterized as expropriatory depends on the nature and purpose of the State's action."[699]

Indeed, the arguments underpinning the measure gained value to justify the profitable loss of the investor stemming from policy changes would not amount to takings that should be compensated by the host state insofar police powers had been exercised in good faith[700] and in a non-discriminatory manner[701].

For the tribunal to the *Windstream* case, the conditions that had to be met by the host state for validly issuing a measure exercising its police powers would be: i) firstly, the measure has not to be made in an arbitrary manner, meaning that has to be taken within the

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[698] *Philip Morris Brands SÀRL, Philip Morris Products S.A. and Abal Hermanos S.A. v. The Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July, 2016.
[699] *Ibid.*, at paragraph 295.
[700] As far as the *bona fide* condition is concerned, in the ICSID case *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, the tribunal found the measure taken by the host state against the Claimants' investment did not fall within the legit exercise of its police powers as it clearly sought "to improve Bolivia's defence in this arbitration". Following this reasoning, the tribunal also addressed the measure to be disproportionate as far as "the alleged irregularities were either fabricated or trivial breaches that would not normally justify the annulment of a concession" (*Quiborax v. Bolivia*, *supra* note 461, at paragraph 139).
[701] See: Sornarajah, *supra* note 467, at 70-71.

authority mandate; ii) secondly, it cannot be discriminatory; iii) thirdly, it cannot be excessive; iv) and, finally, it has to be taken in good faith. In this token, the arbitral tribunal was of the opinion the respondent did little to address the scientific uncertainty surrounding offshore wind and did nothing toward the amendment of the relevant regulatory framework[702]. Moreover, the tribunal noted that the claimant was left in a 'contractual limbo' after the imposition of the moratorium[703]. All of these led the tribunal to deem the conduct of the respondent unfair and inequitable according to Article 1105(1) of NAFTA[704].

6.3.2 The Narrative of Prevention Behind the Exercise of Police Powers

States' police powers encompass the exercise of administrative interference in the interests of the state against foreign investment, and recently, as Sornarajah asserts, "[l]egislation on foreign investment has increased the scope for the exercise of administrative discretion over the process of foreign investment. This has happened despite the trend towards free market notions and openness to foreign investment".[705] These powers will constrain the behaviour of and regulate the activities carried out by natural or juridical persons within the state's territory.

Norms and legal processes set out to the development of an industrial activity, and their possibility to be changed, are the tools at hand for states to protect their people and the environment from being negatively affected by such endeavours. Indeed, as Crawford argues, the underlying premise is that sovereignty "does not mean freedom from law but freedom within the law (including freedom to seek to change the law)".[706]

The *Philip Morris v. Uruguay* case[707] is illustrative of the acceptance that that the narrative of prevention subjacent to sustainable development has in the field of ISDS.

In this case, the investor claimed that the host state had breached the bilateral investment treaty, as the measures issued by the host state in accordance to its international

[702] *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September, 2016, paragraph 378.
[703] *Ibid.*, at paragraph 379.
[704] *Ibid.*, at paragraph 379.
[705] Sornarajah, *supra* note 467, at 69.
[706] Crawford, *supra* note 434, at 122.
[707] *Philip Morris v. Uruguay*, *supra* note 698.

obligations amounted to the expropriation of the investment and the violation of the FET standard. Uruguay, in turn, argued that the measures taken fall within the exercise of its police powers inasmuch as they were seeking "to protect the inhabitants of the country from the devastating health, social, environmental, and economic consequences of tobacco consumption and exposure to second-hand smoke".[708]

The tribunal, recalling its decision on jurisdiction, considered that "the BIT does not prevent Uruguay, in the exercise of its sovereign powers, from regulating harmful products in order to protect public health after investments in the field have been admitted",[709]and went on explaining that "[p]rotecting public health has since long been recognized as an essential manifestation of the State's police powers".[710] Also, considering the outcomes achieved by the host state pursuant the implementation of the FCTC, the tribunal was convinced that they were "a valid exercise by Uruguay of its police powers for the protection of public health. As such, they cannot constitute an expropriation of the Claimant's investment".[711] Indeed, as Sornarajah argues, "[w]here state measures are a reaction to a situation brought about by the foreign investor (as where the foreign investor causes massive pollution), the idea that there should be compensation paid by the state for intervening to remedy the harm involved in the situation would be to reward the harm-doer".[712] This is why the success of this case is even greater if compared with the results of the arbitration substantiated under UNCITRAL rules on identical matter against Australia,[713] where the award favoured the tobacco company.

In a case established according to the rules of the PCA and substantiated under NAFTA Chapter 11[714] relating to an alleged breach of the minimum standard of treatment in its fair and equitable treatment dimension,[715] the respondent was arguing in favour of a moratorium established upon an offshore wind project due to the lack of standards and the lack of scientific certainty about the risks to the environment that the project may

[708] Ley 18.256 on Tobacco Control, 6 March, 2008, Article 2.
[709] *Philip Morris v. Uruguay*, *supra* note 698, at paragraph 288.
[710] *Ibid.*, at paragraph 291.
[711] *Ibid.*, at paragraph 307.
[712] Sornarajah, *supra* note 469, at 222.
[713] *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award, 17 December, 2015.
[714] *Windstream v. Canada*, *supra* note 702.
[715] In NAFTA Chapter 11 Article 1105(1) refers to the minimum standard of treatment standard which has been considered according to international law as encompassing both the fair and equitable treatment standard and the full protection and security standard. However, the assessment of a breach of one or both standards will depend upon the claimant's submission.

cause, particularly concerning water quality, noise emissions, disturbance on benthic life forms and the potential structural failure,[716] all of which was considered of relevance for the creation of a regulatory framework backed by solid scientific research before any activity begun. The respondent argued that the decision "was grounded in the precautionary principle, which suggests waiting until sufficient research has been conducted, so that an adequately informed policy framework could be developed".[717] This argumentative line was endorsed by the PCA tribunal by stating that both the decision to impose a moratorium or the process that led to it were not wrongful *per se*, and that the respondent's "evolving position was at least in part driven by a genuine policy concern that there was not sufficient scientific support for establishing an appropriate setback, or exclusion zone, for offshore wind projects".[718] However, the arbitral tribunal did find a breach of the minimum standard of treatment caused by the uncertainty in which the investor was left in after the moratorium.

In this same vein, as explained in a NAFTA arbitration case, substantiated according to UNCITRAL rules, a measure taken to prevent the adverse effects of an investment project upon the environment or human health, would always be a valid exercise of the states' police powers, inasmuch as it is not discriminatory. In the words of the tribunal:

> "Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. […] the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation".[719]

6.4 Compliance with International Public Policy

According to the tribunal to the *Inceysa Vallisoletana, SL v. El Salvador* case, international public policy "consists of a series of fundamental principles that constitute the very essence of the State, and its essential function is to preserve the values of the

[716] *Windstream v. Canada*, *supra* note 702, at paragraph 207.
[717] *Ibid.*, at paragraph 207.
[718] *Ibid.*, at paragraph 376.
[719] *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, 2 August, 2010, at paragraph 266.

international legal system against actions contrary to it".[720] Accordingly, Lalive identifies international public policy with "a series of rules or principles concerning a variety of domains, having a varying strength of intensity, which form or express a kind of 'hard core' of legal or moral values".[721]

However, it turns difficult to make a list of such fundamental principles, notably, when there are other actors different from states taking part on transnational relationships, and general principles aimed to preserve the values of the international legal system may not be applicable to them because of their exclusionary inter-state nature.

This is illustrated in a thoughtful piece by Rodrigo, who arguing for the existence of an *invisible* Constitution to the international community, addressed certain principles considered to be aimed at the organisation and governance of both the international system and the international community. Such principles were to be basic general norms regulating aspects related to both the relational structure and, in some circumstances, to cooperation. Aiming to provide a systematic approach to such principles, the author made the following list: "*el principio de igualdad soberana, el principio de arreglo pacífico de las controversias internacionales; el principio de no intervención en los asuntos internos de otros Estados; el principio de cooperación internacional; el principio de inmunidad jurisdiccional y de ejecución del Estado; el principio de inmunidad y de inviolabilidad de los agentes diplomáticos y de los locales diplomáticos; el principio de inmunidad de jurisdicción penal de los funcionarios del Estado; y las reglas que regulan la subjetividad internacional*".[722] As it might be noticed, these principles would only be relevant in the realm of inter-state relationships, paradoxically, most cases where non-state actors engage with activities falling within the scope of international law would fall outside the scope of application of them.

[720] *Inceysa Vallisoletana, SL v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006, at paragraph 245.
[721] Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', in P. Sanders (ed.), *Comparative Arbitration Practice and International Arbitration* (1987) 257, at 263. In this token, Gutiérrez Espada has commented that the protection of human rights, the promotion of international peace and security, and the protection of the environment, to the extent they are essential political goals of present times they reflect the essential moral values of the international community (Gutiérrez Espada, *supra* note 92, at 415).
[722] Rodrigo, 'La Constitución Invisible de La Comunidad Internacional', 34 *Anuario Español de Derecho Internacional* (2018) 1, at 20.

Instead, the principles of international public policy, aimed to preserve the international legal system against actions contrary to it, relevant for the purposes of this study would be those capable to be extensible to private entities, or able to affect them in an indirect manner, which would be evidenced when the behaviour of the state, acting in compliance with international public policy, effects on private entities. Therefore, looking for these public international policy principles appear of great value to nourish host-states' defences raised against claims brought by investors.

Compliance with international public policy can prove the lawfulness of the behaviour of the host state that has resulted in a breach of the investment protection standards or in the expropriation of the investment. If successfully addressed, compliance with international public policy principles will have the effect of excluding the host-state's responsibility or liability, or only this latter.

The following epigraphs examines three principles of international public policy that can be useful to the purposes stated above.

6.4.1 Compliance with International Obligations as a Principle of International Public Policy

Compliance with international obligations, whatever their source is, can certainly be taken as a principle of international public policy as it aims to preserve the values of the international legal system.

At their turn, states seeking to comply with their international obligations may be the basis of a change on the circumstances of the investment. This may not necessarily entail a breach of the rights warranted to investors. Indeed, public international law has gained relevance in ISDS both at the time of giving content to investment protection standards as well as in the assessment of the measures that have allegedly affected foreign investments.[723] In the case brought before an ICSID tribunal by *Philip Morris against Uruguay*,[724] the issue of complying with international obligations made the case favourable to the host state, insofar as the tribunal considered that the adopted measures

[723] Dugan et al., *supra* note 642, at 213.
[724] *Philip Morris v. Uruguay*, *supra* note 698, at paragraph 291.

did not amount to the expropriation of the investment[725] nor to a failure of compliance with the FET standard inasmuch the measures were adopted in fulfilment of the host-state's national and international legal obligations for the protection of public health.[726]

Particularly, the tribunal's reasoning upon the alleged breach of the FET standard, relied heavily on the scientific evidence provided by the World Health Organisation Framework Convention on Tobacco Control provisions and guidelines[727] to disregard any arbitrariness behind the measures taken by the host state in compliance with its international obligations under the FCTC. In the tribunal's words, "the FCTC is a point of reference on the basis of which to determine the reasonableness of the two measures".[728]

A similar line of argumentation was held in a case substantiated under the NAFTA investments rules,[729] where the tribunal decided on the scope and extent of a measure taken against the investor's products, declaring that they were taken by the authority "in pursuance of its mandate and as a result of Canada's international obligations".[730]

The assessment of the host states defences in these two awards shows that defences based on principles of international public policy, prove to be useful at the time to justify the adoption of a given measure that results in the exclusion of the host state's international responsibility and liability.

Interestingly, *erga omnes* prohibition of discriminatory treatment has been argued to be included as a principle of international public policy as far as it represents the values in which the international community is founded. However, a discriminatory measure adopted by a host state may not always constitute a breach of such prohibition, and thorough regard must be given to the arguments outlined by respondent state. Inversely, if the respondent state delivers no sufficient arguments as to support the implementation of a discriminatory measure affecting the investor, it will trigger the breach of the

[725] In this sense, Sornarajah: "A state that takes property in order to ensure that it conforms to an obligation under international environmental law or treaty need not pay compensation for the taking" (Sornarajah, *supra* note 469 at 240).
[726] *Philip Morris v. Uruguay*, *supra* note 698, at paragraph 302.
[727] *Ibid.*, at paragraph 396.
[728] *Ibid.*, at paragraph 401.
[729] *Chemtura v.Canada*, *supra* note 719.
[730] *Ibid.*, at paragraph 138.

corollary right of the investor aimed to the protection of the investment against discriminatory measures.[731]

Illustrative of the above is the case brought before an ICSID arbitral tribunal, where several foreign landowners claimed that the Zimbabwean government failed to give their investments FET after seen their properties seized by the host state without any payment.[732] The case concerns to the expropriation measures taken during a turmoil affecting Zimbabwe's domestic affairs. The government seized the farmland of a number of foreign owners claiming afterwards that the lands would be redistributed among native Zimbabweans. Both the seizure of the lands and its redistribution were claimed to be made under a necessity plea, due to social instability and mass movements.[733] But, while the seizure of the Claimants' land was carried out without paying any compensation, that of the farms belonging to native Zimbabwean owners went through with compensation.

The discussion was set on the issue whether the defence of necessity as stated in Article 25 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, could be supported according to the host state behaviour. To this end, the tribunal begun its assessment breaking down all elements in Article 25, being relevant to this analysis, the reasoning of the tribunal addressing the behaviour of Zimbabwe as causing the impairment of other states and the international community as a whole.

The tribunal, taking side with the claimants, decided that the host state failed to provide FET based on the essential interest the prohibition against discrimination on the basis of race represented to the international community, dismissing consequently the host-state's defence of necessity.

As noted, the decision of the arbitral tribunal considered that the behaviour of the host state constituted an infringement of the *erga omnes* obligation establishing the prohibition of discrimination, however, it did not engage with the determination of the host-state's

[731] Protection of the investment against discriminatory treatment most of the times it is breached on grounds of nationality, and when ascertained it may also trigger a breach of the nation-treatment, most favoured nation, and fair and equitable treatment standards (Dolzer and Schreuer, *supra* note 642, at 176).
[732] *Von Pezold v. Zimbabwe*, *supra* note 674.
[733] As to the safeguarding of the environment as an argument of necessity, see: Viñuales, *supra* note 565, at 307-308.

international responsibility for such a breach as it had no jurisdiction for doing so – as this was a matter of international human rights law.

The strategic use of sustainable development narrative of balance is proposed here to be useful to build legal arguments capable to integrate the social and environmental obligations that states have acquired at the international, that may have consequences upon foreign investors.

6.4.2 Sustainable Development as a General Principle of International Public Policy

The argument to consider sustainable development a principle of international public policy as well as a global interest of the international community was already made in Chapter 1, hence, in order to avoid duplication, this part remits to what has been said there.

The relevant question is to determine whether to justify a measure affecting an investment on the commitment of host states to the achievement of sustainable development, as many times underscored in UNGA Resolutions, would prove to exclude their responsibility and liability? Following the statement of the ICSID tribunal to the *OI European Group B.V. v. Bolivarian Republic of Venezuela* case, the answer would be in the positive, as far as the host state includes the achievement of sustainable development within their national policies. The declaration of the tribunal reads as follows:

> "[…] *la República expropió las Plantas para promover el desarrollo endógeno, una política pública legítima que puede implementar de la forma que considere más beneficiosa para el bien común, incluso mediante expropiaciones y nacionalizaciones.*"[734]

Concluding Remarks

Following the findings achieved in the previous chapter, where it was discussed the strong tension existing between the need of states to introduce themselves to foreign investors as keepers of highly attractive environments in which to develop investments, whilst at the same time comply with their duty to adopt efficient legislation and other mechanisms

[734] *OI European v. Venezuela*, *supra* note 614, at paragraph 410.

to protect their local communities and the environment from the adverse effects of developmental projects. Furthermore, the study acknowledged the existence of constraints for states wanting to curve these adverse effects in an international legal framework that considers the protection of the investment as its core paradigm. Indeed, the exercise of sovereign powers, altering either foreign investors' expectations on the benefits of the investment or affecting their right of property over the investment, always risks a claim before international arbitral tribunals where non-investment-related interests are often demoted.

The study showed the role that the narratives of balance and prevention subjacent to sustainable development may have to aid host states in advancing their social and environmental concerns to ISDS, and to make this forum more comprehensive of the different dimensions integrating foreign investment disputes.

To this end, the study focused on the performance that the narrative of balance had in disputes concerning the breach of the investment standards of protection by measures taken by host states based in the presumed failure of the investor to attain social license. The analysis went on exploring the role that sustainable development narrative of balance had to exclude the host state responsibility and the application of the contributory fault standard. In both stages of ISDS proceedings, the field seemed to be open to articulate the law applicable to the dispute according to sustainable development grounds.

The Chapter also examined the strategic use of the sustainable development narrative of balance in claims concerning the indirect expropriation of the investment. To this end, three main approaches found in the jurisprudence and doctrine of ISDS concerning the elements that had to be assessed to determine whether an indirect expropriation had occurred were advanced. The narrative of balance was argued to provide an argumentative framework to adequately encompass all the converging interests as well as to be helpful at the time to satisfy the test of proportionality to determine whether the exercise of the state's sovereign powers would have to be compensated or not.

The sustainable development narrative of prevention was argued to be at the core of states' exercise of police powers. An examination of different ISDS jurisprudence showed that measures taken by host states in order to prevent or mitigate the adverse effects of

investment projects upon, at least, to human health and the environment were a valid exercise of this sovereign power, if only it was exercise in a non-discriminatory manner.

Finally, the study proposed that, to the extent that sustainable development could be considered a principle of international public policy, it could have the effect to exclude the responsibility of host states for measures affecting investors' right, provided the host state includes the achievement of sustainable development within their national policies.

Conclusions

The thesis that was supported through the whole work was that the narratives of balance and prevention subjacent to sustainable development can be strategically used in litigation in order to integrate social and environmental concerns into disputes brought by transnational companies before international adjudicative bodies, impacting, consequently, on the determination of the responsibility and liability of the parties.

To such end, the first part of this work examined the place that sustainable development has in the field of international policy and law, and within the jurisprudence of international adjudicative bodies in inter-state disputes. Out of this study, it was evidenced that a narrative of balance and a narrative of prevention were at the core of the concept of sustainable development.

As to the narrative of balance, in most of the decisions of the international adjudicative bodies reviewed sustainable development was considered a concept able to express the need of balance between economic, social and environmental aspects. The jurisprudence was uniform as to consider the three dimensions of sustainable development to be mutually reinforcing elements, this is, that all of them was to be considered equally. In this sense, the jurisprudence of the adjudicative bodies reviewed is in conformity with the developments that the concept has gone through in the realm of international policy and law under the auspices of the UN. Concerning the narrative of prevention, the *Ogoni People* case and the *Iron Rhine* case represented an improvement in the way that most of the international adjudicative bodies approached to sustainable development. The contribution of these cases was to provide sustainable development with a more practical side compared to that represented by the narrative of balance, which in practical terms can be difficult to address. Indeed, the duty to prevent or mitigate environmental damage give rise to a narrative that can be useful to justify measures taken by states and international organisations aiming to that end, articulating on an integrated manner issues of economic, social and environmental nature.

The analysis showed that there is sufficient evidence to consider that the narratives of balance and prevention are not fixed to be implemented upon any given category, but can be indistinctly referred to: (i) legal aspects, such as regulations, norms or rights addressing issues of economic, social or environmental nature, as illustrated in the *Pulp Mills* case,

the *China Raw Materials* case or the *Ogoni People* case; (ii) factual circumstances, as the balance pursued on the potential risks that achieving development may pose on social development or the environment, as showed in the *Gabčíkovo-Nagymaros* case or the *Shrimp/Turtle* case, or to prevent the risks that the reactivation of the railway supposed to the environment as showed in the *Iron Rhine* case; or (iii) a mix of the above, through the balance between the objectives pursued by the law and the economic, social and environmental interests pursued by a state, as illustrated in the Preliminary Ruling of the European Court of Justice to the *C-371/98* case.

Subsequently, according to the overall thesis, in the second and third parts, the study turned to evaluate whether these narratives could contribute to adequately weigh the social and environmental issues converging in disputes arising between a private entity and a *public* authority, and to determine the extent to which the use of these narratives could bear any effect on claims concerning the determination of the responsibility and liability of the latter. This evaluation was carried out using as backdrop to the analysis, the frameworks regulating the activities of deep seabed mining and foreign investment.

The study showed, on the one hand, that concerning the disputes arising out of deep seabed mining activities, the legal framework is well-equipped to comprehensively encompass the concurrent economic, social and environmental dimensions during the time when the mining activities are carried out as well as once claims concerning the responsibility and liability of the ISA are entertained by the SDC. These findings were supported, firstly, on the fact that the legal framework for DSM itself envisages an integrated set of norms and obligations aimed to the protection of the common heritage of mankind and the marine environment that all participants taking part in DSM activities must abide by. Clearly, a balance between the economic interests that all parties have upon DSM and the concerns this activity raises regarding the protection of the common heritage of mankind and the marine environment, was compromised by the contracting parties to the LOSC. Secondly, it is also relevant the power vested in the International Seabed Authority to compel contractors - being either states, natural or juridical persons or any group of the foregoing - to comply with their obligations concerning to the protection of the common heritage of mankind and the marine environment, either through refusing extensions to the exploration contracts or through the adoption of emergency orders and other penalties. As it was shown, the narratives subjacent to

sustainable development prove to be useful argumentative resources to interconnect contractors' obligations as well as to better motivate the measures adopted by the ISA in order to effectively protect the common heritage of mankind and the marine environment. In the third place, although the extent to which the ISA can exercise the abovementioned powers is well-defined in the law, in case the bearer of a measure disagrees with it, such controversy would have to be submitted to the judgment of the Seabed Disputes Chamber. As it was also demonstrated, sustainable development narratives of balance and prevention constitute useful argumentative resources to the adjudicative process that the SDC will have to perform, especially regarding disputes concerning the determination of the responsibility and liability of the ISA and the application of the contributory fault standard. It was claimed that these narratives will aid the SDC to adequately weigh the principles governing the activities in the Area *vis-à-vis* the behaviour of the parties to the dispute, playing a crucial role both in the assessment of facts and in the application of the relevant law.

On the other hand, the evaluation of the strategic use of sustainable development in disputes arising from activities carried out under the umbrella of foreign investment regimes showed not to be as straight forward as it was in the case of disputes relating to DSM. This is mostly attributed to the restraints posed to host states by the paradigm of the protection of the investment. Indeed, this paradigm is strengthened, firstly, in the lack of protection granted in international investment treaties to indigenous and local communities, and the environment, against the solid protection granted to investors' rights. Secondly, the system created to carry out foreign investment activities, deliberately, leaves on each state the adoption of the domestic legislation aimed to effectively protect their indigenous and local communities and the environment, while they are also urged to create a safe and competitive market environment for foreign investors, all of which, in not few cases, leads states to seek false comparative advantages by lowering their national, social or environmental protection standards. Thirdly, the rules regulating Investor-State dispute settlement mechanisms, provide not much help as far as they are established to grant investors with a secure forum where to claim host states' responsibility and liability for the breach of investment protection standards, but where social and environmental aspects of the disputes are often blurred away. Taking this into account, the strategic use of the sustainable development narratives of balance and prevention in ISDS, were to be sought, indirectly, through their application in some

commonly held arguments crafted by host states against claims raised by investors before international arbitral tribunals. Throughout an exhaustive analysis of cases, four legal arguments were found to be more or less suitable to integrate the narratives subjacent to sustainable development as useful argumentative resources to support the position of host states when they adopt measures in the exercise of their surveillance role. To different extents, all four arguments were found to provide fertile ground to accommodate social and environmental concerns in ISDS, while effectively resisting, on the one hand, the strong protection granted to foreign investment in international investment treaties and, on the other, the reluctance observed in ISDS to integrate non-investment-related issues as elements of the adjudication process.

After the above brief sum up of the main arguments developed in this work, the following paragraphs will address the general findings and main conclusions to the overall research (**I to VII**), some field-specific contributions reached in the areas of international law on deep seabed mining and foreign investment (**VIII and IX**) and some thoughts will also be shared regarding fields where further research can be carry out on the synergies between the international regimes for DSM and foreign investment (**X**).

I.

This study presented a fresh look to the development that the concept of sustainable development has been subject to in more than five decades. The analysis reviewed the evolution of sustainable development according to the United Nations conferences, documents and international instruments related to the topic, as well as to the decisions issued by the main international adjudicative bodies, such as the International Court of Justice, the World Trade Organisation Dispute Settlement Body, the African Commission on Human and Peoples' Rights, Arbitral Tribunals established under the Permanent Court of Arbitration, and the Court of Justice of the European Union.

The strong background that sustainable development was observed to have in international policy and law supports the proposal made for it to be a global interest of the international community, i.e. part and parcel of those interests addressing the common preferences of the international community, which are intended to prevail over other particular interests, and aimed to ensure the conditions for both present and future generations to develop. As such, it was argued that the narratives of balance and prevention subjacent to sustainable development must be able to permeate down through

all international system processes and outcomes, tempering and accommodating the relations between norms, rules and regulations pertaining to a self-standing body of law and the economic, social and environmental interests of the parties.

The analysis showed, however, that there are some limitations in the current understanding of sustainable development that must be taken into account and overcome for the narratives of balance and prevention to reach their highest performance. These limitations relate to the environmental bias affecting the concept of sustainable development, the difficulty for disaggregating and clearly distinguishing social development from economic development, and the tepidity with which international adjudicative bodies handle sustainable development.

II.

Many efforts have been made in international law to vest sustainable development with a normative character capable to constrain the behaviour of the participants to the legal system, however, none of these efforts have been regarded in international adjudication as a key element for the settlement of a dispute. Seeking to overcome the state of current understandings on sustainable development, this study, perhaps in a humbler effort than its predecessors, aimed to reconstruct a fresh start for the concept and its role within international law.

According to the analysis performed upon the developments made in international policy and further elaborations made in international adjudication concerning the scope and effects of sustainable development, this study argued for the existence of two main narratives rooted at the core of the concept. On the one hand, it was argued for the existence of a narrative of balance or integration between the three dimensions of sustainable development, and on the other, it was argued that central to the term was also a narrative of prevention or mitigation of the adverse effects of economic development upon social development and the environment. Bearing these narratives in mind, the study went on looking for gaps and opportunities in the legal frameworks regulating DSM and foreign investment activities that allow the strategic use of these narratives in the litigation of disputes brought by private entities against public authorities, being states or international organisations.

As it was demonstrated, such narratives of balance and prevention are useful argumentative resources at the hand of judges and adjudicators to adequately weigh the

relevant economic, social and environmental issues at the time of the assessment of claims concerning the responsibility and liability of the parties to a dispute.

III.

The evaluation performed upon the strategic use of the sustainable development narratives of balance and prevention to adequately address social and environmental issues in the litigation of DSM- and foreign-investment-related disputes was encouraging. Indeed, as it was showed, these narratives can nourish the legal reasoning of public authorities both at the time of drafting the motivation of reason of the measures taken affecting the activities of transnational companies as well as at the time to respond to claims raised by these latter before international adjudicative bodies. By this token, it could be asserted that the use of sustainable development narratives in international litigation has proven to have an impact on the determination of the responsibility and liability of the respondent public authority as well as a great performance on the application of the contributory fault standard.

IV.

The role expected from the participants to the different dispute settlement mechanisms available at the international level is central to the achievement of an integrated approach to the sustainable development narratives in international adjudication. In this sense, judges and arbitrators should contribute in the advancement and promotion of the sustainable development narratives of balance and prevention within the construction of their legal reasoning. At the same time, it is expected that states and international organisations also push forward sustainable development arguments when constructing their legal reasoning in order to adequately integrate social and environmental matters within litigation.

V.

Certainly, the strategic use of sustainable development narratives will contribute to the creation of progressive jurisprudence by setting legal precedents. They will also strengthen and clarify international and regional standards, all of which will impact on the legal assessment of the behavior of TNCs. Indeed, as it was shown, the aim of this research shared the same objective pursued by many soft law instruments designed by international organisations such as the UN, the OECD and the IFC, to curve the activities

of private entities engaging in transnational activities to better account on their social and environmental impacts. Although this objective cannot be empirically tested yet in the fields of DSM or foreign investment, the study showed that, provided the strategic use of sustainable development narratives is widespread amongst international legal operators and accepted by the relevant adjudicative bodies, a shift in transnational companies' behaviour towards social and environmental matters may be evidenced as the decisions on the disputes will start to grow against them.

VI.

The findings reached on the strategic use of the sustainable development narratives of balance and prevention are not limited only to the disputes arising in the fields that provided the context to evaluate the thesis of this work. Indeed, most of the analysis and argumentation that has been developed is keen to be extended to disputes in other fields of international law. In this sense, an important finding to emerge in this study is that the cross-cutting character of the sustainable development narratives of balance and prevention contributes to resist to the fragmentation of international law.

In this sense, the strategic use of sustainable development in litigation contributes to bridging different international law sub-fields, allowing for the systemic integration of the international legal order. However, it must be recognised that this finding will be subject to the limitations self-imposed by the concept of sustainable development itself, which are provided by its core elements. Indeed, for instance, this study does not argue that sustainable development or the narratives subjacent to it could bear any effect in the ascertainment of human rights violations or in the assessment of breaches to general international principles such as, for instance, the prohibition of the use of force or people's self-determination.

VII.

Although the study was focused on the use of sustainable development to achieve judicial decisions that better address social and environmental issues, to the extent that the regimes selected to evaluate this hypothesis allowed private entities to enter into the realm of international law, does not but provide evidence that continuing contending that international law is a body of norms aimed to regulate the behaviour of states and international organisations is nothing but fiction. Therefore, instead of keeping upholding this fiction, the sight should be placed farther beyond to unleash international law

authority to comprehensively encompass private entities cross-border activities within its scope of ruling.

VIII.

As to the field of deep seabed mining is concerned, the study has contributed to the elaboration of two categories of obligations bearing upon private entities engaging in activities in the Area. Notably, the study proposes that some of the obligations contained in the regime can be classified as to the object of protection they are aimed at. Hence, the classification is made between those obligations that are aimed to protect the common heritage of mankind, on the one hand, and those aimed to the protection of the marine environment, on the other. There is no other piece in the specialised literature advancing this classification.

There is also scarce development in specialised literature on the mechanisms at hand for the International Seabed Authority to enforce the obligations of the contractors, either related to the protection of the common heritage of mankind or the marine environment. This study provides detailed insights on three main mechanisms available to enforce contractors' obligations: the power of the ISA Council to refuse an application for the extension of the plan of work, the power of the ISA Council to issue emergency orders, and the imposition of penalties according to Article 18 Annex III LOSC.

Finally, the study is a seminal piece on the specific topic related to the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea as it offers a thoughtful study on the different disputes arising between a contractor and the ISA that can be submitted before the SDC, being most relevantly to international law operators.

IX.

With regard to international law on foreign investment, the study departed from the premise that ISDS purports an unequal adjudicative system, among other reasons, because it only foresees foreign investors as claimants while the host state will be, almost exclusively, the respondent party, and because scarce regard is paid to non-investment-related interests, which makes utterly difficult for social or environmental issues to play a significant role within legal reasoning in this disputes. In advancing social and environmental concerns into ISDS, four main arguments at hand for host states to respond claims where examined. In each case, the strategic use of the sustainable development

narratives of balance and prevention was addressed and evaluated, showing to have different results.

X.

Further research should be done to explore the synergies between the regimes created to carry out deep seabed mining and foreign investment activities. In this sense, considering the factual and legal framework in which private entities get involved with, when engaging in DSM activities, most certainly they will find themselves facing situations similar to that expected in traditional foreign investment regimes. As largely discussed, an act or omission of the International Seabed Authority may be challenged by a contractor, who has seen its rights violated, and will seek the determination of the wrongdoing, creating the obligation for the ISA to repair the damages caused and compensate the economic losses of the contractor/investor. To this extent, the study developed on the contributory fault standard set out for the legal framework for DSM, recovering ISDS jurisprudence on the topic as means for its future implementation, is a contribution in this line.

Some areas where further research on these synergies might be interesting to develop are: the interplay that investment protection standards and the rules on expropriation may have within the DSM regime; the content and scope of the due diligence standard to be met by contractors according to the terms ‘best available techniques’ or ‘good industry practice’; the implications of the assumption that a contractor is one well-informed and reasonable, regarding the burden of proof to determine whether its expectations were affected by an ISA’s measure.

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