11

Bilateral Investment Treaties, Investor Obligations and Customary International Environmental Law

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1 Introduction

In 2016, Nigeria and Morocco signed a Bilateral Investment Treaty (BIT), which mandated that the foreign investor conduct an Environmental Impact Assessment (EIA) in accordance with domestic law and that both the foreign investor and the host State apply the precautionary principle to the investment.[1] The BIT also required that foreign investors comply with the international environmental obligations of the host State while operating the investment.[2] This treaty follows upon the heels of several other regional model international investment frameworks which require similar obligations.[3] BITs rarely impose obligations of conduct on foreign investors, given that they are not considered a means of economic regulation,[4] and their primary objective is the promotion and protection of

[1] Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and The Government of the Federal Republic of Nigeria (Morocco & Nigeria) (adopted 3 December 2016, not yet in force) Art 14 (Hereinafter Nigeria–Morocco BIT).

[2] Nigeria–Morocco BIT (n 1) Art 18(3).

[3] The language of the precautionary principle clause in the Nigeria–Morocco BIT is identical to the language in the South African Development Committee (SADC) Model BIT and the ECOWAS Common Investment Code. The SADC Model BIT also states that the application of the precautionary principle by investor and investments shall be described in the environmental impact assessment. The ECOWAS Common Investment Code further highlights various aspects of EIA and mandates that environmental and social impact assessment be made available to the general public and local affected communities. In addition, the investor is required to perform restoration, using appropriate technologies for any damage caused to the natural environment and provide necessary environmental information to the competent national environmental authorities, together with measures and costs necessary to avoid and mitigate against potentially harmful effects.

[4] See P Muchlinski, 'Negotiating International Investment Agreements: New Sustainable Development Oriented Initiatives' in S Hindelang, M Krajewski & ors (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated and Increasingly Diversified* (OUP 2016) 41.

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investments. However, these treaties represent a new paradigm in investment treaty drafting. They try to hold foreign investors accountable for potential violations of domestic and international environmental norms. Further, both the precautionary principle and EIA are rules of customary international law.[5] Their inclusion in BITs gives rise to two pertinent issues.

First, though the precautionary principle and EIA are recognised as rules of Customary International Law (CIL), their status as CIL has been highly debated because they are, in essence, rules of procedure, and their form and content vary from jurisdiction to jurisdiction.[6] Therefore, for these rules to create binding obligations upon foreign investors, the host State must have first recognised these rules as CIL. This recognition may happen through domestic law or the ratification of an international treaty or even any other action of the host State which demonstrates acceptance of the rule.

Second, are foreign investors, most of whom are private multinational corporations, directly bound by these rules because of their inclusion in a BIT? Multinational Corporations as non-state actors are not considered to be subjects of international law[7] and, while Investor-State Dispute Settlement (ISDS) tribunals have recognised that they need to operate the investment and act in accordance with the domestic and international environmental obligations of the host State, they have been reluctant to recognise that foreign investors may have any direct environmental obligations with the host State.[8]

To discuss these issues, this chapter will be divided into three parts. The first part will briefly document how the international investment law regime has evolved from an isolated regime, focusing only on investment promotion and protection, to a regime which is trying to take investor responsibility into account. The second part of this chapter will discuss the incorporation of the precautionary principle and EIA as investor

[5] P Marie-Dupuy & JE Viñuales, *International Environmental Law* (CUP 2015) 61, 68.

[6] OW Pederson, 'From Abundance to Indeterminacy: The Precautionary Principle and its Two Camps of Custom' (2014) 3(2) TEL 323, 327.

[7] The Tribunals in *Urbaser v Argentina* and *David Aven v Costa Rica* were confronted with the question of whether multinational corporations had the same international human rights and environmental obligations as state actors. Both Tribunals concluded that there was a certain degree of responsibility on multinational corporations to ensure that they operated within the host state's legal obligations. However, those obligations were not identical to those of nation states and in both cases, the relevant investment frameworks did not impose any direct obligation. See *Urbaser v Argentina* (Award of 8 December 2016) ICSID Case No ARB/07/26 [1207–10]; and *David Aven v Costa Rica* (Final Award of 18 September 2018) ICSID Case No UNCT/15/3 [743].

[8] *Urbaser v Argentina* [1210]; *David Aven v Costa Rica* [743].

obligations into BITs, with reference to their status as CIL. It will correspondingly examine how these rules may bind the foreign investor if the host State has recognised them as CIL.

While the BITs analysed in this chapter seek to impose obligations on foreign investors, they also require the host State to apply some of these rules in conjunction with the foreign investors. Therefore, the third part of this chapter will be divided into two sections. It will first discuss how the inclusion of these rules of customary international environmental law in investment treaties will affect host States and whether host States can be held accountable by foreign investors for not implementing the precautionary principle or following EIA procedures.

The second part will discuss the decisions of investor-State arbitral tribunals towards the international environmental obligations of foreign investors as non-State actors. It will argue that while the inclusion of environmental rules in investment treaties is a welcome step towards ensuring investor responsibility, tribunals are not yet ready to acknowledge that foreign investors have responsibility towards the host State unless such obligations are a part of general international law or incorporated in domestic law.[9] It will also situate these decisions within the systemic reluctance of public international law frameworks to impose international environmental obligations on non-State actors such as multinational corporations. Most international efforts to regulate the environmental obligations of multinational corporations place the onus on State parties to create obligations of compliance, rather than create any direct obligation.[10]

2 A Brief History of Environmental Regulation in Investment Treaties

The first BITs focused solely on investment promotion and protection, following a capital exporting model, which sought to protect investments in new nations and former colonies from nationalisation.[11] Initially, only a

[9] ibid [1210].

[10] See J Wouters & AL Chane, 'Multinational Corporations in International Law' in M Noorman, A Reinisch & C Ryngaert (eds), *Non-State Actors in International Law* (Bloomsbury 2017) 239.

[11] K Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013) 19–20. Miles argues that the content and form of foreign investment protection cannot be separated from its socio-political context and the rules on foreign investment protection evolved throughout the 'colonial encounter' as a tool to protect the interests of capital exporting States and their nationals. She further

handful of BITs were signed between developed and developing nations, in part because of resistance from the New International Economic Order (NIEO) movement and the Permanent Sovereignty over Natural Resources (PSNR) resolution.[12] It was only in the early 1990s that certain States began signing investment treaties, following the collapse of the Soviet Union and the realisation that foreign capital was needed for economic development.[13]

By the early 2000s, States had begun challenging the legitimacy of BITs, arguing that they were a restraint on the sovereign regulatory power of the host State, especially since the threat of investment arbitration could prove costly to developing host States – the concept of 'regulatory chill'.[14] The signing of the North American Free Trade Agreement (NAFTA) in 1994, led to developed economies like the US and Canada finding themselves as respondents in investment treaty arbitration, because domestic environmental regulation was often challenged by foreign investors.[15] Many erstwhile capital importing States became exporters of capital and several BITs were signed between developing countries.[16] These reasons contributed to States' rethinking of the regulatory scope of BITs, beginning with the model US and Canada BITs of 2004 and 2006 respectively.[17]

argues that colonial capital exporting States portrayed the European form and content of international law, along with its particular conceptions of property, private wealth, economy and regulation as being the basis for the evolution of international investment law as a mechanism which protected only the investor.

[12] KJ Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 UCDavis JInt'l L& Pol'y 57.

[13] ibid 174. Terming it the *Global Era*, Vandevelde observes that the victory of market ideology following the collapse of the Soviet Union and loss of alternatives to foreign investment as a source of capital acted as a catalyst for the growth of international investment agreements.

[14] K Tienhaara, 'Regulatory Chill and the Threat of Arbitration' in C Brown & K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011).

[15] Two early cases where the United States found itself as a respondent were *Methanex v USA* (Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005) UNCITRAL and *Glamis Gold, Ltd v USA* (Award of 8 June 2009) UNCITRAL. In the former, the Canadian investor producing Methanol challenged the California ban of the additive MTBE of which Methanol was a component. In the latter, the Canadian investor sough compensation from California for a regulation that required the restoration and backfilling of Native American sites. In both cases, the Tribunal held that expropriation had not occurred.

[16] An analysis of the Database of BITs on the International Centre for Settlement of Investment Disputes website shows that more BITs were signed between 1978 and 1995 and onwards, rather than before 1978. Moreover, several BITs signed in the 1980s and 1990s were between developing nations. See ICSID, 'Database of Bilateral Investment Treaties' (*ICSID*, 2022) <https://icsid.worldbank.org/resources/databases/bilateral-investment-treaties> accessed 1 June 2022.

[17] The 2012 US Model BIT, Art 12(5) specifically states that nothing shall prevent the State parties from taking measures or undertaking regulations to protect the environment. Likewise, Annex B of the Treaty excludes non-discriminatory regulatory objectives to protect the environment from the scope of expropriation. Of course, these provisions are also present in the

These BITs contained Exception Clauses and Non-Precluded Measures to regulate the investment, a common component of most BITs today.[18]

> Since then, BITs have continued the trend of allowing the host State to regulate the investment. However, it is rare to see BITs impose obligations of environmental conduct on investors and host States. Countries use IIAs to attract foreign investment and as observed recently, it does not appear likely that express investor obligations of conduct will be included in investment treaties in the immediate future, since they may serve as deterrent to the signing of investment treaties and investors may shy away from making investments.[19]

Admittedly, the BIT models being discussed in this chapter are a unique exception to BIT drafting practices, envisaging that both investors and host States will play a role in the environmental management of the investment. While the treaty drafting language does not have precedent, the objective of this chapter is to give an overview of the investor obligations enshrined in these treaties so that their implications from both the perspective of investors and host States can be understood.

2004 US model BIT. The increased scope of regulation in the US Model BIT is a reflection of the North American Free Trade Agreement (NAFTA) (adopted 17 December 1992, entered into force 1 January 1994) 32 ILM 289; Canada, '2004 Model Agreement for the Promotion and Protection of Investments' (*Canadian Government*, 2004) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download> accessed 1 June 2022; USTR, '2012 U.S. Model Bilateral Investment Treaty' (USTR, 2012) <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed 1 June 2022; USTR, '2004 Model Bilateral Investment Treaty' (USTR, 2004) <https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf> accessed 1 June 2022.

[18] A way in which states attempt to promote sustainable development and green economy objectives is the use of exceptions and reservations in IIAs. By exceptions, States ensure that their ability to regulate certain fields will not be restricted by investment treaties. Exceptions can be in several forms, ie, sector-specific treaty reservations, general exceptions such as measures relating to the protection of 'human, animal or plant life or health' or Non-Precluded Measures which are intended to exempt certain subject areas such public health, public security and morality from the scope of the treaty or specific treaty obligations.' These are standardised clauses found in almost all treaties. See MW Gehring & A Kent 'International Investment Agreements and the Emerging Green Economy: Rising to the Challenge' in F Baetens (ed), *Investment Law Within International Law* (CUP 2013) 187, 204. A clause which allows cause for exceptions to a country's liability in an international investment agreement regarding matters such as public health, public order, environmental matters, essential security interests, etc. Non precluded measures preclude the wrongfulness of a nation's regulatory liability in such areas. They are a form of exception clauses.

[19] See M Krajewski, 'A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application' (2020) 5(1) BHRJ 105, 128. Krajewski observes that recent treaty-making practice in international law does not seem to move towards including clear and precise binding human rights obligations for investors. Consequently, it seems unlikely that investor obligations to respect human rights will emerge in the foreseeable future in international treaty making or treaty-application. The Nigeria–Morocco BIT appears to be an exception to the rule.

3 Integrating Customary International Environmental Law in Investment Treaties

3.1 *Treaty Drafting Practices*

Over the past decade or so, several regional model investment treaties have tried to integrate the EIA and the precautionary principles as investor obligations. The clauses in the Nigeria–Morocco BIT are based on similar clauses from other model treaties as well the International Institute for Sustainable Development Model BIT.[20] In addition, the African Union in 2016 produced the Draft Pan African Investment Code, a comprehensive document which seeks to protect the environment through investor obligations and promote investment protection in the African continent.[21] However, are these obligations couched in terms which make them directly binding on foreign investors or is their enforceability dependent on domestic law or the host State's international environmental obligations?

Article 14(1) of the Nigeria–Morocco BIT mandates 'that investors or the investment shall comply with environmental assessment screening and assessment processes applicable to their proposed investments prior to their establishment as required by the laws of the host state or home state, whichever is more rigorous'.[22] Article 14(3) states that

> investors, their investments, and host state authorities shall apply the precautionary principle to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigation [sic] or alternative approaches of the precautionary principle by investors and investments shall be described in the environmental impact assessment they undertake.[23]

Article 18(3) states that '[i]nvestors and investments shall not manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are parties'.[24]

[20] See H Mann, K Van Moltke, LE Peterson & ors, 'International Institute for Sustainable Development Model International Agreement on Investment for Sustainable Development, Negotiators Handbook' (*IISD*, Aril 2006) <www.iisd.org/system/files/publications/investment_model_int_handbook.pdf> accessed 1 June 2022 (hereinafter IISD Model BIT).

[21] See African Union Commission, 'Draft Pan African Investment Code' (December 2016) <https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf> accessed 1 June 2022 (hereinafter Draft PAIC).

[22] Nigeria–Morocco BIT (n 1) Art 14(1).

[23] ibid, Art 14(3).

[24] ibid, Art 18(3).

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These clauses are almost identical to the corresponding clauses of the International Institute of Sustainable Development (IISD) Model Investment Agreement. Article 12(a) of the IISD Model Agreement provides for investors to comply with the EIA processes of the home State or the host State, whichever is more rigorous.[25] The only addition is that Article 12(a) calls for the parties to adopt a minimum standard of EIA at their first meeting and comply with these standards on all occasions. Likewise, Article 12(d) requires investors to apply the precautionary principle to their investments.[26] Article 14(d) is identical to Article 18(3) of the Nigeria–Morocco BIT.[27]

While the South African Development Community (SADC) Model BIT also adopts identical language to the Nigeria–Morocco BIT and SADC Model BIT, it goes a step ahead and prescribes the International Finance Corporation's (IFC) performance standards on environmental and social impact assessments as an alternative to home State and host State laws.[28] Likewise, the Economic Committee of West African States (ECOWAS) Common Investment Code also adopts the precautionary principle and EIA as investor obligations but only mandates the investor to undertake an EIA and social impact assessment of proposed business activities and investments with respect to natural environment and the local population in the relevant jurisdiction. It also only mandates the investor to apply the precautionary principle to the EIA or social impact assessment, including any mitigating approaches.[29]

Finally, the Pan African Investment Code (PAIC) does not mention the precautionary principle but simply mandates the investor to conduct an EIA.[30] However, the Nigeria–Morocco BIT, IISD Model Investment Agreement, ECOWAS Common Investment Code and the PAIC incorporate these obligations to try and hold the investor accountable for the violation of environmental norms; they do not, however, prescribe any standard to be followed for the implementation of the precautionary principle and EIA. In the absence of a domestic law incorporating EIA or

[25] IISD Model BIT (n 20) Art 12(a).
[26] ibid, Art 12(d).
[27] Nigeria–Morocco BIT (n 1) Art 18(3); ibid 14(d).
[28] SADC, 'SADC Model Bilateral Investment Treaty Template: With Commentary' (*SADC*, July 2012) Art 13.1 <www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> accessed 1 June 2022.
[29] ECOWAS, 'ECOWAS Common Investment Code (ECOWIC)' (July 2018) arts 27(1)(b-d) <https://wacomp.projects.ecowas.int/wp-content/uploads/2020/03/ECOWAS-COMMON-INVESTMENT-CODEENGLISH.pdf> accessed 1 March 2022.
[30] Draft PAIC (n 20) Art 37(4).

the precautionary principle, these investor obligations may be rendered nugatory. Moreover, even if the investor must act in accordance with the host State's international obligations, which may include the host State's recognised rules of CIL, it will be difficult for the investor to implement these rules in the absence of domestic law. It is only the SADC Model BIT which expressly prescribes the IFC standards in absence of rigorous domestic standards.[31] However, the adoption of these standards is subject to an agreement between the investor and host State. Therefore, does the inclusion of these CIL obligations in BITs have any real significance for investor obligations, or are they just window dressing without any real effect? The next subsection, which discusses the customary nature of the precautionary principle and EIA, will try to answer this question.

3.2 Customary International Law Status of the Precautionary Principle and Environmental Impact Assessment and Their Relevance as Investor Obligations

3.2.1 The Precautionary Principle

The Precautionary Principle was first incorporated into international environmental agreements in the 1980s, though precautionary thinking had been present in domestic environmental policy.[32] The basic underlying idea behind this concept is that the lack of scientific certainty about the actual or potential effects of an activity must not prevent States from taking appropriate measures.[33] The most accepted formulation of the precautionary principle is in the Rio Declaration. Principle 15 states that:

> 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.[34]

[31] Supra SADC (n 28).

[32] P Sands, J Peel, A Fabra & ors, *Principles of International Environmental Law* (CUP 2012) 34–5.

[33] Marie-Dupuy & Viñuales (n 5) 61. The main thesis of the precautionary principle is that in the face of serious risk to or grounds (as appropriately qualified) for concern about the environment, scientific uncertainty or the absence of complete proof should not stand in the way of positive action to minimise risks or take actions of a conservatory, preventative or curative nature; see also *Southern Bluefin Tuna Cases (NZ v Japan; Australia v Japan)* (Provisional Measures, Order of 27 August 1999) 1999 ITLOS Rep 280, Separate Opinion of Judge Laing [14].

[34] UNGA, 'Report of the United Nations Conference on Environment and Development' (16 March 1992) UN Doc A/RES/47/190 (Rio Declaration) principle 15.

The precautionary principle is not so much a *principle,* as it is a *rule* or a *standard*.[35] This dichotomy marks a controversy regarding its actual status as a rule of customary international law. Though it has been included in several transboundary environmental treaties, all of which reflect the approach echoed in the Rio Declaration, its status as a CIL rule has been debated.[36] The debate surrounding its normative content also has a spillover effect in its application, as is it a rule that obligates a State to act irrespective of scientific uncertainty. Does such a spillover, therefore, shift the burden of proof to the proponent of a project (ie, the investor), or is it simply a standard which States may include in its domestic laws and policies, with varying environmental standards and thresholds?[37]

There is one school of thought which argues that it is CIL, simply, based on the frequency of its inclusion in multilateral treaties and declarations, while another school of thought argues that it is not customary international law since actual State practice is difficult to prove empirically.[38]

[35] Pederson (n 6) 329.

[36] For a detailed list of treaties containing the precautionary principle or incorporating a precautionary approach, See J Peel, *The Precautionary Principle in Practice* (Federation Press 2005). For example, some treaties define the precautionary principle and then apply it. The Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (adopted 16 September 1995, entered into force 21 October 2001) 2161 UNTS 91, Art 1: '"Precautionary principle" means the principle that in order to protect the environment, the precautionary approach shall be widely applied by Parties 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', Art 13(3) of the same convention; likewise, the preamble of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (adopted 29 January 2000, entered into force 11 September 2003) 39 ILM 1027, reaffirms the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development. Article 1 states that 'In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements'.

[37] Sands & ors (n 32) 61: 'Even if the existence of a customary precautionary principle could be admitted, its content would still have to be defined. Is it an obligation to take action despite the lack of sufficient evidence about the danger that an activity poses to the environment? Or is it, rather, a simple authorisation to take such measures?'.

[38] According to the non-custom camp, since the principle is ill defined, it is difficult to prove empirically, see Pederson (n 6) 329.

This is the classic *rule vs standard* dialectic.[39] CIL is often difficult to prove and depends upon whether widespread State practice (and corresponding *opinio juris*) can be established.[40] This grey area has not been resolved by the decisions of several international courts and tribunals, which have adopted what may be called a *precautionary approach*, where they have been reluctant to recognise the principle as CIL. This reluctance stems from the fact that while international treaties may enshrine the rule, its application, form and content differs across jurisdictions, which poses a challenge in establishing definitive State practice.

In the *Southern Bluefin Tuna* case, New Zealand and Australia filed for provisional measures restraining Japan from unilaterally designing and undertaking an experimental fishing programme.[41] Both New Zealand and Australia requested that the parties act consistently in accordance with the precautionary principle.[42] In their decision, the Tribunal did not expressly mention the precautionary principle, but stated that even though they could not conclusively assess the scientific evidence presented by the parties, further measures must be taken to preserve the rights of the parties and to avert further deterioration of Bluefin Tuna and that the parties must act with prudence and caution to ensure that effective conservation measures are taken.[43]

Though the Tribunal did not expressly mention the precautionary principle, several separate opinions clarified the approach of the Tribunal, lending clarity to the application of the precautionary principle. Judge

[39] ibid 334. According to Pederson, this dialectic plays out where controversy arises concerning the enactment of a legal directive or norm. Preference may be given to rules over principles, depending on which virtues and vices or vice versa. The non-custom camp prefers the conception of rules over broader principles.

[40] The custom camp primarily relies on widespread State practice to bolster its stand that the precautionary principle is CIL. Since *opinio juris* is a state of mind, there is difficulty in attributing it to a State, and therefore, it has to be deduced from a State's actions and pronouncements. A rule is often considered to be CIL by being codified in multilateral conventions – in fact, so much so, that a judge no longer has to ascertain from the practice what the alleged rule requires, see H Thirlway, *The Sources of International Law* (OUP 2005) 80. The ICJ, in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 16, 98 [186], explained that for a rule to be considered customary it dd not consider that the corresponding practice must be in absolute conformity with the rule. Rather, it is sufficient that the conduct of States should, in general, be consistent with such rules.

[41] *Southern Bluefin Tuna Cases (NZ v Japan; Australia v Japan)* (Provisional Measures, Order of 27 August 1999) 1999 ITLOS Rep 280 [28–9].

[42] ibid [34].

[43] ibid [77].

Laing stated that adopting an *approach* (sic), rather than a principle, appropriately imports a certain degree of flexibility and tends, though not dispositively, to underscore reticence about making pronouncements about desirable normative structures.[44] Judge Treves, while regretting that the precautionary principle was not expressly stated in the order of the Tribunal, underscored the importance of the Tribunal adopting a precautionary approach even though it was reluctant in taking a position whether it was a binding position of international law. Observing that the measures prescribed by the Tribunal aimed at stopping the deterioration of the Southern Bluefin tuna stock, it was essential that the Tribunal adopt a precautionary approach since there was scientific uncertainty whether the situation of the stock had improved.[45] In fact, he equated the notion of precaution with 'caution', an aspect inherent in the very notion of precautionary measures.[46]

Reinforcing this approach, in the *EC Asbestos* dispute, the WTO Appellate body adopted a precautionary approach, stating that member States have the undisputed right to determine the level of health protection they deem appropriate and that Canada, the proponent of the exports, would have to prove that their 'controlled use' alternative would achieve the same level of protection.[47] In the *Nuclear Tests* case, the separate dissenting opinions of Judges Weeramantry and Palmer supported the idea of the Precautionary Principle being a rule of customary international law relating to the environment.[48] In the *EC-Hormones* dispute, the

[44] ibid, Separate Opinion of Judge Laing [19].
[45] ibid, Separate Opinion of Judge Treves [8].
[46] ibid.
[47] WTO, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products – Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R [53].
[48] In the *Nuclear Tests* case, Judge Palmer (dissenting) observed that the norm involved in the precautionary principle has developed rapidly and may now be a principle of customary international law. Judge Weeramantry (dissenting) observed that reversing the burden of proof was an essential element to guarantee an effective protection of the environment and give full force to the legal obligations tending to ensure this protection. New Zealand argued that France should prove the absolute innocuity of nuclear tests in the South Pacific. See *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20th December 1974 in the Nuclear Tests (New Zealand v France)* [1995] ICJ Rep 288, Dissenting opinion by Judge ad hoc Sir Geoffrey Palmer [91] & Dissenting opinion by Judge Weeramantry 343.The reluctance to directly refer to the precautionary principle as custom is reflective of the lack of uniform conception of the principle. In the *Pulp Mills* decision, the ICJ observed that the precautionary principle may be relevant in the interpretation and application of the provisions of the disputed treaty. Within the context of the Nigeria–Morocco BIT, the inclusion of the precautionary principle may provide clear guidance as to the environmental management procedures to be followed by the

WTO Appellate Body, while noting that the Precautionary Principle did not override the treaty obligation of Article 5.7 of the WTO Agreement on Sanitary and Phytosanitary Standards to base measures on a risk assessment, noted that it would be unnecessary to take a position on whether the precautionary principle had been authoritatively formulated as a general principle of customary international law, since 'responsible, representative governments commonly act from perspectives of prudence and caution where risks are irreversible…'.[49]

3.2.2 Environmental Impact Assessment

Like the Precautionary Principle, the status of EIA as customary international law is not established. While it may be argued that it is custom in a transboundary context, given the number of treaties and tribunal decisions which stress its importance,[50] it is not referred to in a transnational context to the treaties discussed in this chapter. Rather, the reference to EIA will be within the domestic context. Still, it has been observed that human rights law has greatly expanded through the adoption of wide-ranging international conventions, even with the typical difficulty in establishing a practice based customary law.[51] Since many of these conventions have been ratified by almost all States, it is argued that the norms embodied in those conventions are binding on non-parties, leading to a customary law of human rights.[52] It might be argued that even though an EIA has been recognised as customary in a transboundary context, it has developed as a customary norm of international environmental law, where the rule of conducting an *impact assessment* is customary rather than the context in which it is undertaken.

investors; see *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14 [164].

[49] WTO, *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Report of the Appellate Body* (13 February 1998) WT/DS26/AB/R, WT/DS48/AB/R [124].

[50] Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991, entered into force 10 September 1997) 1989 UNTS 309. In the *Case Concerning Pulp Mills* [204] the ICJ observed, 'that a practice has developed which in recent years has gained so much acceptance among states that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource'.

[51] Thirlway (n 40) 72.

[52] ibid 73.

It is evident that while the customary status of the precautionary principle as rule *per se* is debated, courts and tribunals appear to treat the precautionary approach as customary. What is the significance of this approach for BITs? It could be argued that by placing the onus of applying the precautionary principle in the context of an EIA on the investor and the host State, a BIT is trying to adopt a precautionary approach, giving credence to what may be termed a *customary approach* instead of customary rule. The significance of this inclusion cannot be underestimated. BITs, which have traditionally only obligated host States to protect the investment, could now require environmental cooperation between the investor and host State. The inclusion of these CIL rules in BITs also promotes the host State's right to regulate the investment, though of course, domestic frameworks or standards would have to be adopted to give effect to these rules creating investor obligations.[53]

While these treaties try to ensure that the host State regulates the investment in accordance with its international legal obligations and places affirmative obligations of conduct on the investor, it remains to be seen whether and how investor-State dispute settlement tribunals may interpret these clauses and agree with the objectives of such inclusion. This question is discussed in the following section.

4 The Interpretation of Environmental Obligations by Investor-State Arbitration Tribunals

While the precautionary principle and EIA clauses in the treaties discussed above have not yet been interpreted by any investor-State arbitration tribunal, they have implications for investors and host States alike. This section examines the jurisprudence of investor-State arbitration tribunals, which discuss the host State's environmental obligations towards foreign investors – both substantive and procedural. Subsequently, it will discuss the approach of tribunals towards the environmental obligations of foreign investors.

[53] India has recently diluted its environmental screening procedures to attract greater investment. It allows certain projects of strategic importance to be cleared without screening and has reduced the timeline for public participation. Therefore, even if a BIT were to include the application of a precautionary approach, it would depend on whether domestic law provides for that approach. See Indian Government, 'Ministry Of Environment, Forest And Climate Change: Notification' (*Gazette of India*, 23 March 2020) Extraordinary, pt II, sect 3, subsect (ii) <http://environmentclearance.nic.in/writereaddata/Draft_EIA_2020.pdf> accessed 1 June 2022.

4.1 *Procedural Implications for Host States*

Foreign investors have often challenged the procedures used by the host State to apply the precautionary principle to the investment or to challenge the EIA methodology employed by the host State to assess the investment.[54] Consequently, tribunals have adjudicated on the legitimacy of application of these procedural rules. Investors have also argued that host State's neglect of the environment has led to a diminishment of value of the investment. These decisions are discussed below.

The *Bilcon*[55] decision concerned the denial of a permit to conduct mining activities in Nova Scotia following the recommendation of an environmental joint review panel (JRP). On the grounds of procedural fairness, the majority of the tribunal concluded that the review panel had acted in breach of Canadian environmental law, which amounted to a breach of the international minimum standard of treatment. The Tribunal held that it was a serious breach of the law on procedural fairness that Bilcon was denied reasonable notice of the 'community core values' standard of the environmental JRP as well as a chance to seek clarification and respond to it.[56] The Tribunal emphasised that while legislatures could adopt rigorous and comprehensive environmental regulations, including assessments, those regulations had to be actually implemented and carried out.[57]

The *Bilcon* award highlights the importance of an effective and transparent impact assessment procedure prior to the establishment of the investment and could work as a call to host States to incorporate such clauses into BITs, in order to ensure stability and transparency of investment projects.[58] Such impact assessment mechanisms, along with adopting a precautionary approach, could include public participation in the form of information sharing and consultation which would increase the likelihood of potential impacts, the disclosure of all alternatives and the reasons for rejection of certain alternatives based on a measure of accountability.[59]

[54] H Davies, 'Investor-State Dispute Settlement and the Future of the Precautionary Principle' (2016) 5(2) Br J A Leg Studies 449, 454.
[55] *Bilcon v Canada* (Award of 17 March 2015) PCA Case No 2009–04.
[56] ibid [534].
[57] ibid [597–8].
[58] MW Gehring, 'Impact Assessments of Investment Treaties' in MC Cordonier Segger, MW Gehring & AP Newcombe (eds) *Sustainable Development in World Investment Law* (Kluwer Law 2011) 149–50.
[59] ibid.

In *Allard v Barbados*, the claimant claimed that the host State failed to take the necessary environmental protection measures and contributed to the contamination of the claimant's eco-tourism site.[60] These actions violated the FET and expropriation standards of the investment.[61] While the Tribunal noted that the host State was not responsible for the contamination of the eco-tourism site, and therefore, the terms of the BIT were not violated,[62] it did note that the claimant bought the land for economic development even before submitting an environmental management plan or conducting an EIA, against the warnings of State officials.[63]

The decisions in these awards may be relevant to scenarios where both the investor and the host State have the responsibility of ensuring the environmental viability of a project. The Nigeria–Morocco BIT and the African model treaties, which create such a scenario, do not explain what they mean by these clauses. Nonetheless, some educated guesses can be made as to potential interpretative implications that may arise with respect to these clauses.

First, procedurally speaking, the host State will be bound to be transparent with the investor about environmental screening procedures. Moreover, if a host State alleges that an investor is responsible for environmental degradation, the host State cannot evade responsibility if proper procedures have not been followed or if a project has been approved even without environmental sanction. Therefore, the host State may share liability with a foreign investor for environmental degradation.

Second, an investor cannot argue that environmental procedures were not informed or that the host State did not follow due procedures and that action of the host State led to a diminishment in the economic value of the investment. A joint reading of the obligations in the Nigeria–Morocco BIT, the ECOWAS treaty, and the SADC Model and to some extent, the PAIC, emphasise that the obligation to conduct an EIA employing the precautionary approach is on the investor, in conjunction with the host State and that there is a certain duty of responsibility.[64]

[60] *PA Allard v Barbados* (Award of 27 June 2016) PCA Case No 2012–06 [3].
[61] ibid.
[62] ibid [226].
[63] ibid [224].
[64] There may also be a certain benefit in the investor co-operating with the host State in conducting an environmental screening of the investment. *Bear Creek Mining Corporation v Peru* (Award of 30 November 2017) ICSID Case No ARB/14/21 [39]. In *Bear Creek Mining Corporation v Peru* (Partial Dissenting Opinion of Professor Philippe Sands of 30 November 2017) ICSID Case No ARB/14/21, Sands argued in his dissenting opinion

4.2 Investor-State Arbitration and Investor Obligations

BITs do not expressly impose environmental obligations of conduct on foreign investors, whether in accordance with domestic law or international law. Consequently, tribunals have rarely had a chance to expound upon investor obligations from a general international law perspective. The limited jurisprudence on investor obligations usually involves counterclaims. However, even these instances have been marked by a reluctance on the part of tribunals to expressly recognise investor obligations unless they are treaty obligations or a general principle of international law.[65] In general, tribunals have also been reluctant to recognise human rights defences raised by host states.[66]

Both the Nigeria–Morocco BIT and the SADC Model Treaty recognise the domestic and international environmental obligations of foreign investors. However, international environmental treaties do not impose any obligations on non-State actors and, while domestic law may place a precautionary burden of proof on a private actor, the onus to apply the principle and decide is on a State party.[67] Therefore, to what extent would clauses that mandate that foreign investor conduct an EIA and apply the precautionary principle, in accordance with the international legal obligations of the host State, have credence before an investor-State arbitration tribunal? Further, would such tribunals be willing to hold foreign investors liable in accordance with international law? The following analysis discusses the jurisprudence on investor obligations to answer this question.

In *Aven v Costa Rica*, the respondent claimed that the suspension of the claimant's real estate project was in pursuit of legitimate environmental interests protected under the Central America-Dominican Republic Free Trade Agreement (DR-CAFTA)[68] and in accordance with Costa Rica's domestic and international environmental obligations.[69] The respondent

that investors are obliged to adhere to human rights in particular, to minimise any potential damages which investors could suffer. See also, T Ishikawa, *The Role of International Environmental Principles in Investment Treaty Arbitration: Precautionary and Polluter Pays Principles and Partial Compensation* (Brill 2016) 245.

[65] *Urbaser v Argentina* [1207].

[66] JH Fahner & M Happold, 'The Human Rights Defence in International Investment Arbitration: Exploring the Limits of Systemic Integration' (2019) 68(3) ICLQ 741, 758.

[67] See, Peel (n 36), where most environmental treaties place the onus of applying the precautionary principle on State parties.

[68] For the full text of the DR-CAFTA, see Free Trade Agreement between Central America, the Dominican Republic and the United States of America (DR-CAFTA) (adopted 5 August 2004, entered into force 1 January 2009).

[69] *David Aven v Costa Rica* [385].

also argued that sound and efficient measures to protect the environment is key to the implementation of the treaty.[70] Chapter 17 of the DR-CAFTA expressly reserved space for environmental issues.[71] While making these arguments, the respondent maintained that neither the treaty nor the customary international law exonerates the claimants from complying with Costa Rica's framework for the protection of the environment.[72] However, the respondent did not emphasise which rule of customary international law applied to the claimants.[73]

One of the respondent's key contentions was that the burden of proof was reversed on the party allegedly causing the risk of harm, that is, the claimant had the burden of disclosing to the host State, the existence of protected wetlands and forests on the construction site.[74] The respondent tied this obligation to the precautionary principle, recognised in its domestic biodiversity law which provided that 'the burden of proof … shall correspond to whom requests the approval, the permit, or the access to biodiversity, or who is accused of having caused environmental harm'.[75] The respondent linked these obligations in its domestic law to its international obligations under the Ramsar and Biodiversity Conventions.[76]

The Tribunal sided with the respondent and found that the claimant had a duty to advise the environmental authorities in matters that affect any impact to the environment, and to evidence that no adverse impact was to occur as a result of the development, and that this duty arose under domestic law.[77] Therefore, the burden of proof was with the claimant when applying for a permit to demonstrate the absence of non-permitted pollution, degradation or affectation.[78] A pertinent question arises from this ruling, relevant to our central analysis.

First, the Tribunal did not hold the claimant responsible in accordance with international law or the precautionary principle, *per se*, but rather

[70] ibid.
[71] ibid. Article 17.2 of the DR-CAFTA recognises a Party's right to enforce its environmental laws. Article 17.12 further recognises that the implementation of multilateral environmental agreements is critical to achieving the objectives of those agreements. Article 10.11 allows a State Party to adopt, maintain or enforce any measure, consistent with its investment obligations, to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
[72] ibid.
[73] ibid [394].
[74] ibid [444].
[75] ibid.
[76] ibid [417–18].
[77] ibid [552].
[78] ibid [553].

in accordance with domestic law which incorporated the precautionary approach. The claimant had a duty under the domestic biodiversity law to advise the competent authority in matters that affect any impact to the environment and to evidence that no adverse impact was to occur as a result of the development.[79]

Therefore, even if a BIT does say that a foreign investor must apply the precautionary principle and conduct an EIA, the tribunal will be bound to decide in accordance with the domestic law of that State, rather than an absolute rule, even if that rule is embodied in the treaty. This approach again gives rise to the *rule vs standard* dialectic. Even if the BIT states that the investor must operate the investment in accordance with the host State's international obligations and apply the precautionary principle, the application of such rule will happen in accordance with domestic law, even if the host state has ratified environmental treaties which imbibe the precautionary approach.[80] It is, therefore, difficult to gauge the efficacy of the investor obligations in the Nigeria–Morocco BIT and draft PAIC from a purely international law perspective, even more so since these BITs are not in force.

Tribunals have also been reluctant to import investor obligations into investment treaties unless the treaty expressly mentions obligations.[81] In the *Aven* dispute, the host State also filed a counterclaim alleging that the claimant was responsible for environmental damage. Though the Tribunal recognised that the claimant was bound by the environmental measures taken by the host State under the DR-CAFTA, it observed that the treaty did not place any direct affirmative obligation on foreign investors.[82] Of course, an arbitral tribunal's ruling may differ regarding a treaty which expressly places obligations on the investor. In such cases, as the model treaties discussed in this chapter suggest, in the absence of a domestic legal framework the question of being held liable in accordance with international law would arise.[83]

The *Urbaser v Argentina* dispute is more relevant in the context of discussing the relationship between human rights treaties and the international investment law regime. However, the reasoning employed by the Tribunal

[79] ibid [552–3].
[80] *Urbaser v Argentina* [1210]. The Tribunal observed that the investor was only bound by the BIT and domestic law – ensuring the human right to water was the responsibility of the host State.
[81] ibid [1207].
[82] *David Aven v Costa Rica* [743].
[83] Please see Section 2.1 of this chapter.

is of some significance to understanding how the rules of international environmental law within investment treaties may apply to foreign investors.

In their counterclaim, Argentina argued that they suffered damage since the claimant failed to make the necessary level of investment, which would have guaranteed the human right to water and sanitation.[84] Their position was that under the concession contract and applicable regulatory framework, the claimants assumed investment obligations, which gave rise to bonafide expectations that the investment would be made and guarantee the human rights to water and sanitation. By failing to make these investments, the claimants violated the principles of good faith and *pacta sunt servanda* recognised by both Argentina and international law.[85] The claimant, on the other hand, argued that it was Argentina's regulatory actions which prevented them from making the investment and that the Argentine Republic should be the true guarantor of human rights, and not a private party.[86] The investor also argued that the treaty did not place any express obligations on the investor and, therefore, the counterclaim of the host State faced the insurmountable challenge of being presented in the context of a BIT which did not create obligations for the investor or subject the investor to the rules of Argentine or international law.[87] While Argentina agreed that the responsibility of the investor originated under international law *per se,* through the concession framework, it argued that the Universal Declaration on Human Rights placed obligations on private parties and had achieved the status of customary international law.[88]

In making its decision whether the investor had any positive obligation to guarantee human rights, the Tribunal referred to the dispute resolution clause of the Spain–Argentina BIT, which stated that disputes had to be decided in accordance with the general principles of international law. Using this clause as a steppingstone to further its arguments, the Tribunal ruled that a BIT cannot be an isolated, asymmetric set of rules, which only focuses on investment protection.[89] However, this is where the Tribunal showed a reluctance to read and express human rights obligation upon the investor within the treaty. The guarantee of human rights should be borne solely by the State, and the investor had a duty to ensure that its operations did not obstruct the host State from fulfilling its human rights

[84] *Urbaser v Argentina* [1156].
[85] ibid.
[86] ibid.
[87] ibid [1167].
[88] ibid [1158].
[89] ibid [1201].

obligations.[90] For such an obligation to exist, it should be part of another treaty or represent a principle of general international law.[91]

The precautionary principle and EIA are not substantive rights. Rather within the international and transnational context, they are procedurally binding on State parties in terms of application and implementation. If the reasoning of the *Urbaser* Tribunal were to be followed, there is no international treaty obligation, or any general principal of international law independent of the investment treaty, which obligates private investors to implement these obligations. Therefore, it seems unlikely that tribunals would budge from their narrow stance on the international law-based obligations of investors. This reluctance stems not only from the ambiguity surrounding the international environmental obligations of non-State actors but also whether arbitrators will accept the validity of a treaty which directly imposes international obligations on investors. Irrespective of their status in general international law, most treaties only mandate that investors act in accordance with domestic law and even these obligations rarely extent to obligations of conduct.[92]

The question of whether international obligations can be imposed on non-State actors or not remains unanswered. The next section explores this question from the wider perspective of those frameworks which try to impose environmental and human rights obligations on multinational corporations. It situates this discussion within the unique conception of international investment law, a regime which gives international rights to foreign investors but does not impose liabilities upon them.

5 The Environmental Liability of Foreign Investors as Non-State Actors – An International Law Perspective

The tribunals in the *Urbaser* and *Aven* counterclaims made similar observations that 'it can no longer be admitted that companies operating internationally are immune from becoming subjects of international

[90] ibid [1210].
[91] ibid [1207].
[92] See R Yotova, 'Compliance with Domestic Law: An Implied Condition in Treaties Conferring Rights and Protections on Foreign Nationals and Their Property?' in J Klingler, Y Parkhomenko & C Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer 2018) 307. She observes that compliance with domestic law rarely extends to obligations of conduct – most requirements of compliance are in regard to admission of investments, the definition of investment or limit the application of the treaty to investments made in accordance with the laws of the host State. However, this does not mean that investors are necessarily bound by the environmental obligations of the host State.

law'.[93] This observation was because several international instruments encouraged non-State actors to observe human rights and environmental obligations and investment treaties themselves expected investors to abide by host State measures to protect the environment. However, this is where the buck stopped, and the tribunals were unable to express themselves any further on the issue of the environmental liability of foreign investors. This limitation arose because general principles of international law do not recognise the international environmental liabilities of non-State actors. Indeed, while there are several soft law efforts to draft human rights codes for transnational multinational corporations like the 'UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', the 'Guiding Principles on Business and Human Rights' and the 'Third Draft of the Open Ended Intergovernmental Working Group (OEIGWG)', these instruments place the onus of regulation and enforcement on State parties and do not consider, in-depth, environmental obligations.[94]

There are historic and economic factors which have given investors, as private non-State actors, certain rights in international law to have their investments protected and file claims against States for a decrease in the value of the investment,[95] but they have not been imposed with reciprocal obligations. While a discussion on this dichotomy remains beyond the scope of this chapter, it is important to try and understand what the nature of environmental obligations imposed on foreign investors by the Nigeria–Morocco BIT and the PAIC are.

To that extent, do these BITs try to equate foreign investors and State parties with the same obligations? Or is there a greater burden on State parties to ensure the compliance of these norms along with cooperation and participation of the investor? The answer is, perhaps, the latter. The

[93] *Urbaser v Argentina* [1195].

[94] See Wouters & Chane (n 9) 239. See UN Sub-Commission on the Promotion and Protection of Human Rights, 'Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (26 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev2 (Draft Norms); UNHRC, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (21 March 2011) UN Doc A/HRC/17/31 [13]; and UNHRC, Text of the third revised draft legally binding instrument with the concrete textual proposals submitted by States during the seventh session, UNHRC, 'Text of the Third Revised Draft Legally Binding Instrument with the Textual Proposals Submitted by States During the Seventh Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights' (28 February 2022) UN Doc A/HRC/49/65/Add.1.

[95] Miles (n 10).

obligation to conduct an EIA applying the precautionary principle, and to follow the international environmental obligations of the host State, would be in conjunction with the independent obligation of the host State to ensure that its investment is in accordance with its domestic and international legal obligations. It is difficult to imagine a scenario where these obligations could be construed as being imposed solely on investors.

It will be useful to take inspiration from Alvarez' idea that international lawyers should spend their time addressing which rules may apply to corporations, rather than thinking about whether corporations are subjects of international law or not.[96] While acknowledging that corporations do have international responsibilities, he cautions that these responsibilities cannot be the same as those of State parties simply because corporations are not the equivalent of States or natural persons.[97] Therefore, a tribunal will not agree that an investor has the responsibility of ensuring the human right to water, but can agree that the investor has the responsibility of ensuring that the precautionary approach is followed while conducting an EIA, provided there are binding legal frameworks which provide for such obligations. International law does not directly hold multinational corporations responsible for human rights violations and, therefore, the drafters of investment treaties must align the obligations of conduct they place on foreign investors with their domestic legal frameworks, ensuring that their international legal obligations have been assimilated into those domestic legislations applicable to foreign investors.

6 Conclusion

Many of the treaties discussed in this chapter have not yet come into force and, in fact, the PAIC has been relegated to the status of a policy document.[98] However, the unique aspect of these treaties is that they adopt

[96] JE Alvarez, 'Are Corporations "Subjects" of International Law' (2011) 9(1) Santa Clara Journal of International Law 1, 31. Alvarez suggests that multinational corporations cannot have the same obligations as State parties – rather, they have obligations to protect and respect the human rights obligations of the host State through the conception of due diligence. To arrive at this reasoning, he borrows from the *UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,* which requires multinational corporations to respect human rights and to avoid causing adverse human rights impacts. See, UNHRC 'Report of the Special Representative of the Secretary General on the Issue off Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (7 April 2008) UN Doc A/HRC/8/5 [3].

[97] ibid 34.

[98] Krajewski (n 19).

a precautionary approach and mandate both investor and host State to assess the environmental impact of an investment with caution. In fact, the customary status of the precautionary approach is further legitimised with its integration in investment treaties. Though these environment CIL rules may bind only State parties, their inclusion in non-environmental treaties could be a step towards ensuring that State parties clearly delineate procedures for their implementation.

The reader may possibly think that this chapter started on an optimistic note, with its highlighting of the integration of customary international environmental law in investment treaties and its exploration of the possibilities of crafting investor obligations. However, it ends on a slightly pessimistic note, concluding that the efficacy of these obligations would primarily depend on domestic law mechanisms and by simply including these obligations in a treaty, even if they are CIL, is not enough. However, it is hoped that these treaties, and this chapter, mark the beginning of trying to find a solution to a problem that has plagued the study of international investment law for the past few years.