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International Investment Law and Community Interests

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UNIVERSITY OF AMSTERDAM

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International Investment Law and Community Interests

*Stephan W Schill and Vladislav Djanic**

Abstract

In contemporary discourse, international investment law (IIL) and investor-state dispute settlement (ISDS) are often perceived as threats to community interests in one-sidedly protecting foreign investors and undermining public policies that are to the benefit of the local population and the international community. This is nowhere more manifest than in the fierce debates about the inclusion of an investment chapter in the Transatlantic Trade and Investment Partnership currently being negotiated between the European Union and the United States. The present chapter forwards a different perspective. First, it argues that investment law properly construed can be conceptualized as protecting community interests, because it is part of the legal infrastructure that is necessary for the functioning of the global economy under a rule of law framework. Aimed at supporting economic growth, this helps further economic and non-economic community interests, including sustainable development. Second, the chapter argues that IIL and ISDS do not turn a blind eye to the conflicts that can arise between economic and non-economic community interests, such as environmental protection, labour standards, public health or human rights. Instead, investment law and dispute settlement have numerous mechanisms at their disposal for alleviating tensions with non-economic community interests.

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I. Introduction

Bruno Simma famously defined community interests as those interests covered by ‘a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se* but is recognized and sanctioned by international law as a matter of concern to all States’.¹ This definition captures a core set of public interests that should be protected by international law against any interference by States, whether acting unilaterally or jointly. It encompasses not only foundational societal interests protected as *ius cogens*, but all interests ‘that correspond to the needs, hopes and fears of all human beings, and attempt to cope with problems the solution of which may be decisive for the survival of entire humankind’.² This definition, while perhaps overly focused on the idea that an actual obligation of States exists to further the interests involved, provides a useful starting point to assess the position international investment law (IIL) takes in relation to the concept of community interests.

In contemporary discourse, IIL and investor-State dispute settlement (ISDS) are often perceived as being an obstacle to, or in conflict with, community interests, such as the protection of the environment³ or human rights, including the right to health,⁴ cultural heritage,⁵ or the

¹ Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 *Recueil des Cours* 217, 233.

² *Ibid* 244.

³ Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (CUP 2009). See further Jorge E Viñuales, ‘The Environmental Regulation of Foreign Investment Schemes Under International Law’ in Pierre-Marie Dupuy and Jorge E Viñuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (CUP 2013) 273.

⁴ See the contributions in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009).

⁵ See Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (CUP 2014).

rights of indigenous people.⁶ A concrete, and much discussed, example of the tensions IIL creates for a government's ability to regulate for the protection of such community interests are the cases Philip Morris initiated against Australia and Uruguay for measures taken by these countries for the protection of public health against smoking-related health hazards. In the case of Australia, ISDS was used to target the Tobacco Plain Packaging Act, which introduced a mandatory plain packaging requirement that only allowed for the company or brand name (in strictly specified form) to appear on cigarette packs, as a breach of the Australia-Hong Kong BIT.⁷ In the case of Uruguay, legislation was introduced that prohibited the sale and marketing of more than one variant of a single brand of cigarettes and mandated the use of graphic images illustrating the adverse health effects of smoking on 80% of the surface area of the packaging. The company considered this as a deprivation of its intellectual property rights and initiated arbitration proceedings under the Uruguay-Switzerland BIT.⁸ Another emblematic example is Vattenfall's claim that Germany breached the Energy Charter Treaty when deciding to phase out nuclear power after the Fukushima incident.⁹

Given that investment tribunals have in the past not always responded to delicate issues of public interest with the required sensitivity,¹⁰ cases such as these have led to considerable criticism (occasionally even outrage) in academia,¹¹ civil society¹² and the general public.¹³ Critics view IIL as a field of law that is primarily concerned with protecting the interests of a relatively small sub-group of actors – namely foreign investors – at the expense of the right of governments to regulate in order to protect community interests. In addition, the use of arbitration, a mode of dispute settlement that is predominantly used in international commercial

⁶ See eg Valentina Vadi, 'When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law' (2011) 42 Columbia Human Rights Law Review 797.

⁷ *Philip Morris Asia Limited v Australia*, UNCITRAL, Notice of Arbitration (21 November 2011). In a recent, so far unpublished, decision, the Tribunal is reported to have declined jurisdiction over the case. See Jarrod Hepburn and Luke E Peterson, 'Australia Prevails in Arbitration with Philip Morris over Tobacco Plain Packaging Dispute' (*IA Reporter*, 17 December 2015) <<https://www.iareporter.com/articles/breaking-australia-prevails-in-arbitration-with-philip-morris-over-tobacco-plain-packaging-dispute/>> accessed 4 May 2016.

⁸ *FTR Holding SA, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Notice of Arbitration (19 February 2010).

⁹ *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12 (registered 31 May 2012).

¹⁰ See Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (OUP 2013).

¹¹ See eg Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007); David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (CUP 2008); M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015)..

¹² Pia Eberhardt and others, 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom' (Corporate Europe Observatory and the Transnational Institute, 2012); Thomas Mc Donagh 'Unfair, Unsustainable, and Under the Radar: How Corporations Use Global Investment Rules to Undermine a Sustainable Future' (The Democracy Center, 2013).

¹³ See eg George Monbiot, 'This Transatlantic Trade Deal Is a Full-Frontal Assault on Democracy' (*The Guardian*, 4 November 2013) <<http://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy>> accessed 4 May 2016. An organized protest against TTIP in Berlin saw the participation of hundreds of thousands of people, see 'Hundreds of Thousands Protest in Berlin Against EU-US Trade Deal' (*Reuters*, 10 October 2015) <<http://www.reuters.com/article/us-trade-germany-ttip-protests-idUSKCN0S40L720151010>> accessed 4 May 2016.

relations, to settle disputes under international investment agreements (IIAs), is criticized as a source of pro-investor bias that alters the balance in the relationship between private rights and public interests to the detriment of the public.¹⁴ Accordingly, the tensions between IIL and non-economic community interests have brought about calls for reform, including replacing arbitration of investor-State disputes with a standing international investment court or completely dismantling the system, and returning to domestic courts and diplomatic protection.¹⁵

Reform is indeed needed in order to bring IIL better in line with fundamental principles of democracy, the rule of law and human rights.¹⁶ In fact, the on-going process of recalibrating IIAs through the inclusion of more precise standards of protection, exception clauses and carve-outs in order to protect host States' right to regulate,¹⁷ as well as making ISDS more transparent and open to third-party participation, may be seen as a way to better integrate non-economic community interests. However, analysing IIL reform debates is not the objective of the present chapter, nor do we want to rehash the criticism of IIL which has been described in detail elsewhere.¹⁸ We acknowledge that frictions exist between the interests protected by IIL and competing community concerns and support an incremental adaptation of IIL to 21st century demands. At the same time, we consider that much of the most vocal criticism is too undifferentiated in describing IIL solely as an obstacle to the unfolding of community interests and at times equally one-sided as some uncritical defences of the existing system.

Accordingly, without being apologetic of the current system, our aim in this chapter is to show to which extent IIL can be conceived as an instrument that itself aims at furthering certain, primarily economic community interests and possesses the tools to address, alleviate and resolve some of the frictions the system creates with competing community interests. As a consequence, the concepts of IIL and community interests are not inherently and necessarily antagonistic, as suggested by much of the current critical debate, but can be seen in a constructive and mutually supportive fashion. Against this background, Part II addresses the contributions IIL can make in advancing community interests by establishing quasi-multilateral disciplines that subject

¹⁴ One core argument, in this context, is that arbitrators have an economic incentive to decide cases in favour of investors as only this will increase the number of cases and their own future reappointment. See Van Harten (n 11) 172-73; Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 *Osgoode Hall Law Journal* 211; Eberhardt and others (n 12) 8.

¹⁵ See the contributions in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 2015) and Shaheez Lalani and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (Brill 2015). For the proposal by the European Commission to establish an investment court system, see European Commission, 'EU Finalises Proposal for Investment Protection and Court System for TTIP' (12 November 2015) <http://europa.eu/rapid/press-release_IP-15-6059_en.htm> accessed 4 May 2016.

¹⁶ See Stephan W Schill, 'Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward' (International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, July 2015) <<http://e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Schill-FINAL.pdf>> accessed 4 May 2016.

¹⁷ See Aikaterina Titi, *The Right to Regulate in International Investment Law* (Nomos 2014) 123 ff, 169-89.

¹⁸ In addition to the literature cited in nn 10-14 for a summary of the criticism see UNCTAD, *World Investment Report 2015 – Reforming International Investment Governance* (United Nations 2015).

investor-State relations to the rule of law in global economic governance, thereby contributing to economic growth and sustainable development. In this perspective, IIL itself furthers community interests. Part III turns to the conflicts IIL creates with competing, non-economic community interests and shows that (undoubtedly imperfect) tools, in substance and procedure, are available to mitigate resulting tensions. Part IV closes by looking at areas where community interests suggest further changes to, and conceptual reorientation in, IIL.

II. Advancing Community Interests through IIL

On the face of it, IIL has a relatively narrow objective – protecting foreign investment against certain government interferences and providing foreign investors with access to an international dispute settlement mechanism in order to enforce the standards of treatment granted under IIAs. The protection offered by IIAs, in turn, is aimed at promoting foreign investments and reacts to the wide-spread perception that political risk, in particular in developing and transitioning countries, is an important factor in making investment less efficient or even inhibiting it altogether.¹⁹ However, both the protection and promotion of foreign investment are primarily afforded, not for the private benefit of those foreign investors that profit from the protections in question, but are put into place in response to the public interest of States in increasing foreign investment flows and in taking advantage of the benefits foreign investment can bring, such as the transfer of technology, the creation of employment and tax income, and the increase in economic competitiveness. For the collectivity of all host States, this interest constitutes a community interest that is shared by all states participating in the IIL system.

In aiming to realize its economic objective, the operation of IIL can be seen as contributing to the advancement of a number of different community interests. First, IIL contributes to the establishment of a framework for governing international investment relations in an increasing global economy (1.). Second, IIL's compliance mechanism and States' efforts to adhere to the obligations contained in IIAs work towards the objective of strengthening the rule of law, both at the international and the domestic level (2.). Third, the disciplines on government conduct imposed by IIL serve as the medium for creating the institutional requirements necessary for economic growth (3.). Finally, the economic gains facilitated by IIL, in turn, act as a catalyst for creating the financial basis for States to implement other community interests, including those connected with sustainable development (4.).

1. IIL's Contribution to Governing the Global Economy

There is a widely shared interest of all States in having a stable and well-functioning global economic system that is conducive to economic growth and development.²⁰ International

¹⁹ See Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 3-6 (with further references to the relevant economic literature).

²⁰ Joseph E Stiglitz, 'Global Public Goods and Global Finance: Does Global Governance Ensure That the Global Public Interest Is Served?' in Jean-Philippe Touffut (ed), *Advancing Public Goods* (Edward Elgar Publishing 2006)

investment activities are an integral part of this global economy and bring benefits to other key components of the global economic system, such as international trade.²¹ IIL helps stabilize the investment flows by providing a legal framework and governance structures for international investment relations in the global economy²² and thereby helps to advance the community interest in having governance structures for the increasingly global economy, provided it can be seen as serving, in principle, the interest of all States. The question in this context therefore becomes whether one can understand IIL as an expression of the interest of all States, or whether it is merely the product of overwhelming bargaining power of capital-exporting States.

In fact, from a purely formal perspective, IIL appears as entrenched in bilateralism and driven by the self-interest of a small group of capital-exporting States rather than giving rise to a system that expresses the preferences of all States. What is more, capital-exporting States initially made use of bilateral negotiations with developing countries in order to have them agree to rules that the latter have for a long time collectively refused to agree to in multilateral settings.²³ As a consequence, with more than 3,000 individually negotiated bilateral investment treaties (BITs) as the cornerstone of the system and a party-driven mechanism for dispute resolution, it is intuitive to envision IIL as a system of hegemonic domination in which powerful States benefit to the detriment of weaker States.²⁴ Yet, there are good reasons to see IIL as constituting a system that functions according to multilateral (rather than bilateral) rationales and that implements disciplines on government conduct that are rather independent of the concrete bilateral relations in question. This uniformity suggests an interest of all States in the creation of converging rules governing investor-State relations in the global economy, rather than structuring international investment relations based on bilateral *quid pro quo* bargains.²⁵

Despite the repeated failure of attempts aimed at concluding comprehensive multilateral treaties, such as within the International Trade Organization in the late 1940s, in the Organisation for Economic Co-operation and Development (OECD) in the late 1960s and again in the 1990s,

149, 152; Markus Benzing, 'Community Interests in the Procedure of International Courts and Tribunals' (2006) 5 *The Law and Practice of International Courts and Tribunals* 369, 387.

²¹ Foreign direct investment often precedes increases in exports and is considered to be an important stimulant of trade flows, see UNCTAD, *World Investment Report 2013 – Global Value Chains: Investment and Trade for Development* (United Nations 2013) 134.

²² See Stephan W Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (2010) 23 *Leiden Journal of International Law* 401, 410; Barnali Choudhury, 'International Investment Law as a Global Public Good' (2013) 17 *Lewis and Clark Law Review* 481, 484.

²³ For this view see Andrew T Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1997) 38 *Virginia Journal of International Law* 639 and Eyal Benvenisti and George W Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stanford Law Review* 595, 616-17.

²⁴ In this sense see Sornarajah (n 11) and Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013).

²⁵ For a comprehensive overview on how the system of IIL can be seen as a multilateral, rather than a bilateral framework, see Schill (n 19).

as well as within the World Trade Organization (WTO) in the 1990s,²⁶ most IIAs are, owing to the existence of model treaties of a handful of capital-exporting countries, constructed in similar fashion at the level of legal principle, and offer remarkably similar types of protection to foreign investors, both in substance and procedure. These include the prohibition of expropriations without compensation, national and most-favoured-nation (MFN) treatment, fair and equitable treatment (FET) and full protection and security, provisions for the free transfer of capital and recourse to ISDS. Unlike one should expect in bilateral settings, IIAs do not differ considerably at the level of legal principle, but instead implement relatively uniform disciplines on government conduct affecting foreign investors, similarly to how an international regime negotiated and concluded in multilateral settings would.

Convergence in the disciplines IIAs impose on government conduct is also furthered by the operation of MFN clauses that multilateralize benefits granted by host States in bilateral relations²⁷ and the possibility for foreign investors to make use of nationality planning in order to bring their investments under the protection of an IIA other than that between the host State and their home State.²⁸ All of this levels differences in the treatment of foreign investors based on nationality and makes it difficult to understand IIAs as bilateral *quid pro quo* bargains between individual countries. Finally, the ISDS system, through its core group of arbitrators, interprets and applies IIAs as part of a treaty-overarching framework that transcends the bilateral structure of IIAs, *inter alia* by making use of cross-treaty interpretation and relying heavily on precedent.²⁹ Consequently, even though the foundational instruments of IIL are bilateral in form, taken together they display features of a multilateral regime that protects foreign investors under roughly identical terms rather independently of where they originate from or where they invest. With increasing investment flows into developed countries and with developing countries becoming important capital-exporters, this multilateral framework also becomes felt as a limitation on government conduct at a global scale, not only in selected capital-importing States.

Considering these multilateral structures underlying, or rather overarching, individual IIAs, it becomes clear that IIL plays a key role in contributing to the governing of an important aspect of economic activities in the global economy.³⁰ IIL sets out the rules for the promotion and protection of investment, establishing a legal regime that regulates how governments are to govern the flow of foreign investments from one country to another and how they are to treat foreign investors subject to their jurisdiction. It regulates the exercise of public authority in relation to foreign investors, by restricting arbitrary or otherwise illegitimate government conduct affecting them, and aims at ensuring equal treatment for foreign investors as a precondition for competition, both within a political economy and beyond. In doing so, IIL does not only take part in the construction of an overarching legal framework that governs foreign

²⁶ See for the failures of multilateral initiatives Schill (n 19) 31-40 and 49-60.

²⁷ Ibid 121-96.

²⁸ Ibid 197-240.

²⁹ Ibid 278-361. See also Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 EJIL 387.

³⁰ Schill (n 22) 413-18.

investment, but also forms part of a broader legal regime that contributes to the regulation and stability of the global economy and provides it with the fundamental norms required for a market economy to operate at the global level. The convergence in the structure of IIAs, then, is not fortuitous, but is the result of the shared interest of States in having a quasi-multilateral, rather than a fragmented, system that protects foreign investments in an increasingly globalized economy and forms part of the legal infrastructure that is conducive to efficient economic exchange in international investment relations.

2. IIL's Contribution to the Rule of Law

In addition to establishing a legal framework for governing international investment relations as part of the global economy, IIL makes a contribution to the furtherance of community interests by strengthening the idea of the rule of law more generally. Through ISDS as an enforcement mechanism, IIL creates a framework that ensures that host States comply with the obligations they have undertaken vis-à-vis foreign investors. This includes not only compliance with the obligations contained in IIAs themselves, but can encompass obligations arising under other international legal regimes (such as international environmental law, international human rights law and international trade law) or under domestic law. This is possible because the observance of certain standards of treatment in IIAs, such the umbrella clause or the obligation to treat foreign investors fairly and equitably, may require a State to respect obligations arising out of other international regimes³¹ or from domestic law.³² And in fact, investors are increasingly having recourse to ISDS in order to enforce these types of obligations undertaken by the host State.³³ In this sense, IIL serves as a powerful compliance mechanism that makes a variety of host State obligations more effective and hence contributes to enhancing the rule of law even beyond the limited realm of investment treaty disciplines.

As a corollary effect to its role as a compliance mechanism, IIL can also have a positive impact on domestic law reforms, most importantly in countries with weaker domestic institutions.

³¹ See eg Roger P Alford, 'The Convergence of International Trade and Investment Arbitration' (2014) 12 Santa Clara Journal of International Law 35, 55-60 (on the possibility of enforcing trade obligations through investment arbitration).

³² See eg Maria Cristina Gritón Salias, 'Do Umbrella Clauses Apply to Unilateral Undertakings?' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 490, on enforcing obligations from domestic law through umbrella clauses.

³³ See eg the case of *Peter A Allard v The Government of Barbados*, PCA Case No 2012-06, Notice of Dispute (8 September 2009) available at <http://graemehall.com/legal/papers/BIT-Complaint.pdf>, where the claimant is arguing that Barbados has violated its obligations under the Canada-Barbados BIT by refusing to enforce its environmental obligations under both its domestic laws and international law; *Philip Morris v Australia* (n 7), where the investor relied on the umbrella clause to argue that Australia had failed to observe various obligations from WTO agreements; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc v The Government of Canada*, PCA Case No 2009-04, Award on Jurisdiction and Liability (17 March 2015) paras 591-604, where the Respondent's non-compliance with domestic law resulted in a breach of NAFTA; *Hesham TM Al Warraq v Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014) s VI.5.(ii), where the tribunal relies extensively on the Respondent's obligations under the ICCPR and domestic law to afford the Claimant a fair trial in order to determine a breach of FET.

For many developing countries, abiding by the substantive standards of treatment set out in IIAs often requires long-term, structural reforms in the domestic legal system in order to integrate investment treaty disciplines; such reforms are likely to have a lasting positive effect on strengthening the rule of law within host States. But a positive impact of IIL for domestic law reform can also be beneficial for countries with well-developed legal systems that may need to overcome domestic obstacles and adapt their governance structures to the need of increasingly global markets and the concomitant international legal disciplines that accompany them.³⁴ This aspect is reflected more openly in newer generations of IIAs, which go beyond regulating matters that strictly concern foreign investment, and have instead evolved into agreements that have a broader good governance agenda. For example, several newer IIAs contain provisions aimed specifically at implementing international standards for the fight against corruption or for the encouragement of corporate responsibility.³⁵ Similarly, justifications of IIAs relating to the enhancement of the rule of law at the domestic level are increasingly voiced by policy-makers.³⁶

Finally, the promotion of foreign investment can also contribute to the strengthening of the local legal and social framework in other, more palpable ways, for example by positively impacting local working conditions and labour law compliance. Contrary to popular opinion, foreign investors who produce goods for their respective home markets will often provide better working conditions than local companies and pay attention to complying with local labour laws even if compliance among local competitors is low, because it is a necessary condition to be economically successful with socially aware consumers in the respective home market.³⁷ In addition, they may impose similar requirements on their local subcontractors through corporate social responsibility policies,³⁸ leading to positive spill-over effects. Having a regime such as IIL and an increased inflow of foreign investment can therefore contribute in multiple ways to the improvement of the local legal environment.

³⁴ The need for developed countries to adapt to international norms in the wake of globalization can be seen in the context of any other area of international economic integration, whether in the WTO, the EU or under NAFTA, for example. It can equally be seen when developed economies need to adapt to international human rights norm, such as under the European Convention on Human Rights or any other body of international law.

³⁵ Kathryn Gordon, Joachim Pohl and Marie Bouchard, 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey' *OECD Working Papers on International Investment 2014/01* (2014) 16-17; Marie-Claire Cordonier Segger and Andrew Newcombe, 'An Integrated Agenda for Sustainable Development in International Investment Law' in Marie-Claire Cordonier Segger, Markus W Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer 2011) 101, 138-41.

³⁶ See, eg, the qualification of the investment chapter, including ISDS, in the Trans-Pacific Partnership (TPP) Agreement by the Office of the US Trade Representative as 'a mechanism to promote good governance and the rule of law'; see Office of the United States Trade Representative, 'The Trans-Pacific Partnership' <<https://ustr.gov/tpp/>> accessed 4 May 2016.

³⁷ Aaron Halegua, 'The Debate Over Raising Chinese Labor Standards Goes International' (2007) 1 *Harvard Law Policy Review* (online edition, 5 April 2007) <<http://harvardlpr.com/online-articles/the-debate-over-raising-chinese-labor-standards-goes-international/>> accessed 4 May 2016.

³⁸ Stephen J Frenkel and Seongsu Kim, 'Corporate codes of labour practice and employment relations in sports shoe contractor factories in South Korea' (2004) 42 *Asia Pacific Journal of Human Resources* 6, 8-10; Elena Arnal and Alexander Hijzen, 'The Impact of Foreign Direct Investment on Wages and Working Conditions' *OECD Social, Employment and Migration Working Papers No 68* (2008) 21-22 <<http://dx.doi.org/10.1787/23018424022>> accessed 4 May 2016.

3. IIL and Domestic Economic Benefits

One of the foremost expectations in establishing the IIL system was that its creation would bring economic benefits to participating countries through increased foreign investment. The justification for the restrictions IIL imposes on host States, however, lies not so much in IIAs direct correlation with attracting increased foreign investment inflows; in fact, there is starkly contradicting empirical evidence on whether IIAs have such a direct impact.³⁹ Rather, the connection between IIL disciplines and positive economic impact on host State economies is more indirect. It is grounded in IIL's role, as set out in the two previous sections, in establishing a system of governance disciplines that embody the idea of the rule of law and reduce political risk. In fact, a key prerequisite for attracting investment and contributing to economic growth lies in the reduction of political risk associated with investment activities in foreign countries.⁴⁰ While there is inherent risk in making investments in any foreign country, this risk is magnified in cases of countries that lack qualities associated with good governance, such as well-working domestic institutions, including independent courts and efficient administrative agencies, and the ability to provide a sufficiently stable legal framework that accords minimum respect to property rights and contract enforcement and is free from arbitrariness and discrimination.⁴¹

By creating a legal framework for the governance of international investment relations, IIL is trying to overcome these institutional shortcomings and reduce political risk associated with investing in countries with weak governance frameworks. It does so by providing substitutes to domestic courts in the form of ISDS and laying down substantive standards that require States to implement good governance structures, for example, by prohibiting expropriations without compensation and requiring host countries to abide by the rule of law

³⁹ Contrast only Jennifer Tobin and Susan Rose-Ackerman, 'When BITs Have Some Bite' in Catherine A Rogers and Roger P Alford (eds), *The Future of Investment Arbitration* (OUP 2009) 131 (finding a positive correlation between investment agreements and investment flows) with Emma Aisbett, 'Bilateral Investment Treaties and Foreign Direct Investment: Correlation and Causation' in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009) 395 (negating a correlation between investment agreements and investment flows). In more recent refined studies, however, evidence is becoming more robust that there is a positive correlation between investment agreements and the inflow of foreign direct investment. See, eg, Axel Berger and others, 'Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box' (2012) 10 *Int'l Economics and Economic Policy* 247; Tim Büthe and Helen V Milner, 'Foreign Direct Investment and Institutional Diversity in Trade Agreements: Credibility, Commitment, and Economic Flows in the Developing World, 1971–2007' (2014) 66 *World Politics* 88 (with further references).

⁴⁰ Kyeonghi Baek and Xingwan Qian, 'An Analysis on Political Risks and the Flow of Foreign Direct Investment in Developing and Industrialized Economies' (2011) 6(4) *Economics, Management, and Financial Markets* 60, 85; Friedrich Schneider and Bruno S Frey, 'Economic and Political Determinants of Foreign Direct Investment' (1985) 13(2) *World Development* 161, 173.

⁴¹ For the importance of these factors in attracting foreign investment and achieving economic growth see World Bank, *World Development Report 1997* (OUP 1997) 29–38; Dani Rodrik, Arvind Subramanian and Francesco Trebbi, 'Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development' (2004) 9 *Journal of Economic Growth* 131; Richard A Posner, 'Creating a Legal Framework for Economic Development' (1998) 13 *The World Bank Research Observer* 1, 3; Agnès Bénassy-Quéré, Maylis Coupet and Thierry Mayer, 'Institutional Determinants of Foreign Direct Investment' (2007) 30 *The World Economy* 764.

standards under the FET standard.⁴² Thus, the manner in which IIL aims to address the problem of political risk is to incentivise, by means of international obligations, the improvement of good governance structures domestically. This improvement in good governance, and the concomitant reduction in political risk, in turn, is thought to contribute to increasing foreign investment activities and thereby contributing to economic growth.

At the same time, IIL adds a dimension to economic growth that is not restricted just to the inflow of foreign investment, but also benefits the host State's economy in a broader sense. As set out previously, IIL has a positive effect on strengthening the legal institutions and the rule of law within the host State.⁴³ While these features are important in attracting foreign investment,⁴⁴ they have implications that transcend this goal and contribute more broadly to economic growth. In fact, it is well documented that countries that are successful in generating long-term economic growth dispose of stable and well-working institutions that endorse the visions of good governance and the rule of law.⁴⁵ By helping develop these aspects IIL contributes to the improvement of the host States' local institutions and, in doing so, creates preconditions that are conducive, although not in and of themselves sufficient, for long-term economic growth. Therefore, not only does IIL seek to build a system that increases the flow of foreign investment, but by doing so it also sets the stage for more wide-ranging institutional reforms at the domestic level that are thought to generate long-term economic benefits.

4. IIL and (Sustainable) Development

The economic gains made through the implementation of IIL standards, in turn, can contribute to the furtherance of other community interests that require financial resources to pursue and ultimately achieve them. One example of such a community interest that IIL can positively contribute to is sustainable development.⁴⁶ Notwithstanding the potential frictions IIL may create with sustainable development, there is a wide consensus that increased investment, including foreign investment, plays a crucial role in fostering (sustainable) development.⁴⁷ In fact, a number of key international instruments on sustainable development, such as the Agenda 21,⁴⁸

⁴² See Stephan W Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in Stephan W Schill, *International Investment Law and Comparative Public Law* (OUP 2010) 151.

⁴³ See *supra* Section II.2.

⁴⁴ Bénassy-Quéré, Coupet and Mayer (n 41) 776.

⁴⁵ Gerald W Scully, 'The Institutional Framework and Economic Development' (1988) 96 *Journal of Political Economy* 652, 658; Stephen Knack and Philip Keefer, 'Institutions and Economic Performance: Institutional Measures Cross-Country Tests Using Alternative Institutional Measure' (1995) 7 *Economics and Politics* 207, 223.

⁴⁶ In depth on the relationship between IIL and sustainable development see the contributions in Stephan W Schill, Christian J Tams and Rainer Hofmann, *International Investment Law and Development: Bridging the Gap* (Elgar 2015) and Cordonier Segger, Gehring and Newcombe (n 35).

⁴⁷ Stephan W Schill, 'International Investment Law as Development Law' in Andrea K Bjorklund (ed), *Yearbook on International Investment Law & Policy 2012-2013* (OUP 2014) 327, 329-31.

⁴⁸ 'Agenda 21: Programme of Action for Sustainable Development' (United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992) UN Doc A/Conf.151/6/Rev.1, para 2.23.

the Monterrey Consensus⁴⁹, the Johannesburg Plan of Implementation⁵⁰ and the 2030 Agenda for Sustainable Development⁵¹ all stress the critical importance of investment in achieving sustainable development. While the increase of (foreign) investment, of course, cannot in and of itself lead to development, it is nonetheless an integral part of the equation because development efforts are dependent on sufficient financial resources.⁵²

Bearing in mind that, as illustrated previously, the rationale behind concluding IIAs is not merely protecting investor rights, but ultimately lies in the belief that such protection will increase the institutional quality of domestic governance and thereby contribute to increasing investment inflows and strengthening the domestic economy, it becomes apparent that IIAs are also envisioned to have a positive developmental impact. Thus, as astutely observed by van Aaken and Lehmann, while the object of IIAs may be investor protection, ‘the underlying purpose is (sustainable) development’.⁵³ This purpose has been increasingly recognized in preambles of IIAs, with several treaties explicitly expressing the desire to promote sustainable development as the end result of investment protection.⁵⁴ A similar understanding of the interplay between investment protection and development was put forward by several arbitral tribunals.⁵⁵ Sustainable development, then, is not merely a potential by-product of investment protection, but one of the desired aims of the IIL system itself.

Besides IIL establishing a general framework that generates the financial foundation necessary for sustainable development, it can also operate to actively promote sustainable development on a more tangible level. Thus, as suggested by a 2008 OECD study, foreign investment activities themselves may be an important driver of improving living standards for workers and tend to promote higher wages. These effects were especially pronounced in

⁴⁹ ‘Monterrey Consensus of the International Conference on Financing for Development’ (22 March 2002) para 20 <<http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf>> accessed 4 May 2016.

⁵⁰ ‘Plan of Implementation of the World Summit on Sustainable Development’ (2002) UN Doc A/Conf.199/20, para 4 <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf> accessed 4 May 2016.

⁵¹ UNGA, ‘Transforming Our World: The 2030 Agenda for Sustainable Development’ UNGA Res 70/1 (25 September 2015) UN Doc A/RES/70/1, para 67.

⁵² Marie-Claire Cordonier Segger and Avidan Kent, ‘Promoting Sustainable Investment Through International Law’ in Cordonier Segger, Gehring and Newcombe (n 35) 771, 792.

⁵³ Anne van Aaken and Tobias Lehmann, ‘Sustainable Development and International Investment Law: An Harmonious View from Economics’ in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy* (CUP 2013) 317, 329.

⁵⁴ See eg North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 289 and 605 (NAFTA) Preamble; Agreement Between the Government of Japan and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investment (signed 26 April 2011, entered into force 17 January 2014) Preamble <http://www.mofa.go.jp/mofaj/press/release/23/4/PDF/110426_01_03.pdf> accessed 4 May 2016. Currently around 7% of IIAs contain language promoting at least some aspect of sustainable development, see Gordon, Pohl and Bouchard (n 35) 15.

⁵⁵ See eg *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on Jurisdiction (25 September 1983) para 23; *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) paras 272–73.

developing countries.⁵⁶ IIL can also facilitate the co-alignment of investors'⁵⁷ or States'⁵⁸ interests with those of sustainable development. In so doing, it can incentivize both investors and States, respectively, to act in a manner beneficial to sustainable development in individual cases. Furthermore, the structure of the Kyoto Protocol can serve as an example of how economic interests can be aligned with the transformation of the global economy into a green(er) global economy. Viewed from this perspective, it becomes clear that a stable legal and economic framework is important for private-sector investments into the green economy. IIL then forms an active ingredient in supporting an economic system that calls sustainable development goals its own and that is not contrary to the interest of protecting the environment but that is indeed supportive of sustainable development goals.

In sum, IIL has considerable potential to contribute to the economic basis needed for the furtherance of a number of important community interests, such as sustainable development. While it already makes tangible contributions towards this goal, its ability to further this and other community interests is likely to increase in the future with the realization that increasing investment, including foreign investment, is important in providing the financial support necessary for achieving States' many development goals. Consequently, IIL should not be conceptualized as an antagonist to development, but rather as part of international development law.⁵⁹ At the same time, it is necessary that States continue to be able to regulate foreign investment effectively and dispose of sufficient regulatory space in order to implement community interests that may clash with the interests of foreign investors, such as the protection of the environment or human rights. The tension that IIL can create with such community interests, and ways to reconcile them, are addressed in the next section.

III. Reconciling Investment Protection with Competing Community Interests

The positive contributions IIL can make towards the furtherance of community interests notwithstanding, IIL and community interests are not only mutually supportive. As indicated before, IIL has the potential to curtail the realization of a wide range of community interests that compete with the protection of foreign investment. These interests include environmental protection and the protection of various human rights, such as the right to health, cultural or the

⁵⁶ Arnal and Hijzen (n 38) 25 (for previous literature on the topic see *ibid*, 17-22).

⁵⁷ See Edna Sussman, 'The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development' in Cordonier Segger, Gehring and Newcombe (n 35) 513, 523-30. See also the case of *Allard v Barbados* (n 33), where the claimant is arguing that Barbados has violated its obligations under the Canada-Barbados BIT by refusing to enforce its environmental obligations, as well as recent cases brought against Spain and Italy by investors in the renewable energy sector due to the States reneging on promises made to support green energy: Tom Jones, 'Italy and Spain Feel the Heat' (*Global Arbitration Review*, 17 August 2015) <<http://globalarbitrationreview.com/news/article/34071/italy-spain-feel-heat/>> accessed 4 May 2016.

⁵⁸ In a recent interim decision, an ICSID tribunal indicated that it was likely to rule favourably over Ecuador's counterclaim against an investor for damage caused to the environment. See *Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015) para 582.

⁵⁹ See Schill (n 47) 348-53.

rights of indigenous peoples.⁶⁰ This list is non-exhaustive – any non-economic community interest could conceivably be impacted by IIL. Because liability under an IIA can be triggered by measures of general application, including those aimed at the protection of non-economic community interests, the possibility of incurring considerable financial costs could cause delays in or altogether discourage governments from adopting regulation that would be beneficial for the protection of community interests.⁶¹ In these instances, then, IIL may stand in the way of taking steps aimed at the furtherance of non-economic community interests. The way to resolve the ensuing frictions does, however, not necessarily need to result in the fundamental institutional changes demanded in many quarters in the current political debate, nor should the system be dismantled completely, as this would risk sacrificing the community interests promoted by IIL.

Instead, as discussed in this section, there are many ways in which frictions between IIL and non-economic community interests can be alleviated already in the existing structures, including in investor-State arbitration. One way in which this can be done is by adapting the substantive rules in IIAs in order to better reflect community interests, either through changes to treaty texts, but also through reconceptualization and reinterpretation of existing texts in light of a public law, rather than a private law paradigm (1.).⁶² Similarly, investor-State dispute settlement can be reconceptualised under a public law paradigm in order to better represent competing community interests (2.). Both of these approaches can have transformative effects on how community interests are approached within IIL without the need for a fundamental redesign of the system.

1. Accommodating Community Interests through the Recalibration, Interpretation and Application of Substantive IIL

Room for the consideration of non-economic community interests within IIL can be created through both the recalibration of treaty text in new generations of IIAs, as well as by adapting the manner in which existing treaties are applied and interpreted. This section focuses mainly on the latter, which through relatively minor, system-internal tweaks has the potential to offer significant immediate gains for a better accommodation of non-economic community interests

⁶⁰ See nn 3-9 and accompanying text.

⁶¹ For example, New Zealand postponed the introduction of plain packaging of cigarettes pending the outcome of the cases brought against Australia in investment arbitration and the WTO. See release by New Zealand minister Tariana Turia, ‘Government Moves Forward with Plain Packaging of Tobacco Products’ (19 February 2013) <<https://www.beehive.govt.nz/release/government-moves-forward-plain-packaging-tobacco-products>> accessed 4 May 2016.

⁶² For more on a public law reconceptualization of IIL see Stephan W Schill, *International Investment Law and Comparative Public Law: An Introduction* in Schill (n 42) 3.

within IIL. However, the more intrusive method for reconciling conflicts between IIL and competing community interests – treaty redrafting – is briefly addressed first.⁶³

Indeed, States can negotiate future IIAs and renegotiate existing ones so as to make them more sensitive to issues of public interest and preserve space for policy makers to legislate for the common good. This process is already under way, with States resorting to several different techniques for infusing community interests into their present-day IIAs, such as referring to community interests in preambles,⁶⁴ including clauses on community interests within the substantive part of IIAs,⁶⁵ adding interpretative annexes,⁶⁶ or including exceptions,⁶⁷ carve-outs,⁶⁸ non-precluded-measures (NPM) clauses⁶⁹ or creating special regimes for certain areas of government activity, such as taxation or the regulation of financial services.⁷⁰ Newer generations of IIAs, including the ones that are expected to have the most significant impact, such as CETA⁷¹ and the TPP,⁷² are by and large employing most, or even all, of these techniques.⁷³

Taken together, these different drafting options can provide for considerable room for the protection of community interests in modern IIAs. It may also have the additional effect of increasing tribunals' awareness for community interests in deciding investment disputes under

⁶³ For similar suggestions see Vadi (n 6) 868-73; Christina L Beharry and Melinda E Kuritzky, 'Going Green: Managing the Environment Through International Investment Arbitration' (2015) 30 *American University International Law Review* 383, 405-11.

⁶⁴ See eg Preamble of the Japan-Papua New Guinea BIT (n 54), which recognizes the interdependency of economic and social development and environmental protection as pillars of sustainable development, and that promoting investment can enhance sustainable development.

⁶⁵ See eg Arts 12 and 13 of the US Model BIT (2012) <<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>> which deal with labor and environmental issues.

⁶⁶ See eg Annex B.13(1)(c) of the Canadian Model FIPA (2004) <<http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>> accessed 4 May 2016.

⁶⁷ See eg Article 33 of the Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (signed 9 September 2012, entered into force 1 October 2014) which contains a detailed GATT Article XX type exception.

⁶⁸ See eg Article 1 of the Agreement Between the Government of the Republic of Croatia and the Government of the Republic of Azerbaijan on the Promotion and Reciprocal Protection of Investments (signed 2 November 2007, entered into force 30 May 2008) which explicitly excludes sovereign debt from the coverage of the BIT and Canada-EU Comprehensive Economic and Trade Agreement (CETA) Article X.2(2), excluding the application of certain parts of the agreement to audiovisual services with regards to the EU and measure with regard to cultural industries with regard to Canada, negotiated text available at <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed 4 May 2016.

⁶⁹ See eg Agreement between the Government of Hong Kong and the Government of New Zealand for the Promotion and Protection of Investments (signed 6 July 1995, entered into force 5 August 1995) Art 8(3) which provides that it 'shall not in any way limit the right of either Contracting Party to take measures directed to the protection of its essential interests, or to the protection of public health'.

⁷⁰ See eg CETA (n 68) ch 15 (Financial Services) and ch 32 (Exceptions) art X.06 (relating to taxation).

⁷¹ *Ibid.*

⁷² Trans-Pacific Partnership Agreement (signed 4 February 2016, not yet in force) <<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>> accessed 4 May 2016.

⁷³ For an overview of the various methods adopted in newer IIAs in order to preserve regulatory autonomy see Caroline Henckels, 'Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA and TTIP' (2016) 19(1) *Journal of International Economic Law* 27.

older IIAs. However, while the frequency of introducing reference to community concerns into IIA texts is increasing,⁷⁴ it is unrealistic to expect that treaty drafting can solve the conflict between IIL and other community interests on its own. After all, there are more than 3,000 IIAs in existence, most of which not only do not contain explicit references to competing community interests, but even contain so-called ‘survival clauses’ that guarantee protection under the treaty even for a substantial period after the treaty has lapsed.⁷⁵ It is therefore necessary to consider mechanisms to minimize tensions with competing community interests under existing treaties as well through the appropriate use of interpretation methods that ensure that non-economic concerns are given the weight they deserve. An important step in the right direction in this regard is the realization that, as set out in Section II.4. above, the object and purpose of IIAs implicate a broader agenda than merely the protection of investors’ rights. This opens up the door, in line with Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT),⁷⁶ for tribunals to take other, non-economic interest into consideration when interpreting IIAs. Other interpretative tools tribunals should rely on in order to achieve this task include, most importantly, the principle of systemic integration (a), proportionality balancing (b) and making use of a deferential standard of review (c).

a. Systemic Integration

While IIL is a highly specialized system, it is not a self-contained one, but forms part of the general system of international law.⁷⁷ This means that, as international treaties, IIAs should be interpreted by tribunals in consonance with the system they form part of. This is what the principle of ‘systemic integration’, which is enshrined in Art 31(3)(c) of the VCLT, demands⁷⁸ Such an integrative approach to interpretation opens up the door for considerations from other areas of international law, including community interests, to seep into IIL.⁷⁹ In fact, this

⁷⁴ See Gordon, Pohl and Bouchard (n 35) 10.

⁷⁵ See eg Agreement Between the Government of the Republic of Korea and the Government of the Republic of Latvia for the Promotion and Reciprocal Protection of Investments (signed 23 October 1996, entered into force 26 January 1997) art 12(3) (‘In respect of investments made prior to the termination of this Agreement, the provisions of Article 1 to 11 of this Agreement shall remain in force for a further period of twenty (20) years from the date of the termination’).

⁷⁶ Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

⁷⁷ *Asian Agric Prods Ltd v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award (27 June 1990) para 21; Campbell McLachlan, ‘Investment Treaties and General International Law’ (2008) 57 ICLQ 361, 369. See also Rainer Hofmann and Christian J Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011); Rainer Hofmann and Christian J Tams (eds), *International Investment Law and Its Other* (Nomos 2012).

⁷⁸ VCLT (n 76) art 31(3)(c); ILC, ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission’ (Martti Koskenniemi) UN Doc A/CN.4/L682 (13 April 2006) para 413.

⁷⁹ Of course, in order for systemic integration to apply, requirements set out in Art 31(3)(c) of the VCLT must be fulfilled, see ILC (n 78) paras 410-80.

approach has already made its way into IIL with plenty examples of investment tribunals resorting (although not always explicitly) to systemic integration in investment arbitration.⁸⁰

When interpreting the FET clause in the NAFTA, for example, the *Pope and Talbot* tribunal, already early on, looked to other BITs for guidance;⁸¹ the tribunal in *Continental v Argentina* relied heavily on WTO law in interpreting the NPM clause in the Argentina-US BIT.⁸² Just as the tribunals in these cases drew on other treaties or areas of international law for interpretative purposes, the same can be done in order to make IIL more receptive towards community concerns. This was done, for example, by the tribunal in *Al-Warraq v Indonesia*, which relied considerably on human rights instruments in interpreting and applying the FET provision of the applicable IIA.⁸³

As a consequence, there is ample basis for employing the principle of systemic integration as a gateway for community concerns to guide the interpretation of otherwise vague treaty standards, such as the concept of indirect expropriation or the requirement to treat foreign investors fairly and equitably. Certainly, as the tribunal is only required to ‘take into account’ these concerns when interpreting a treaty, their precise impact can only be assessed on a case-to-case basis. In some instances (such as *Al-Warraq v Indonesia*), their effect may be to help clarify IIA standards to the benefit of investors, while in others they will elucidate the limits of investor protection and hence minimize frictions with competing community interests.

b. Proportionality Analysis

Another instrument that makes IIL more receptive for competing community interests is the increasing use by investment tribunals of proportionality balancing. Proportionality analysis constitutes an interpretative technique for resolving conflicts between two competing interests – in this particular case that of a foreign investor and the competing community interest.⁸⁴ It allows for striking a balance between opposing interests by weighing their relative importance even in cases where there is no express exception to the stipulated rights foreign investors enjoy under an IIA.⁸⁵ The principle, which originated in German public law, and subsequently spread to a large

⁸⁰ See Trinh Hai Yen, *The Interpretation of Investment Treaties* (Brill 2014) 55-61; J Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) paras 3.134, 3.141-3.149.

⁸¹ *Pope & Talbot Inc v The Government of Canada*, UNCITRAL, Award on the Merits (10 April 2001) paras 110-18.

⁸² *Continental Casualty Company v Argentina*, ICSID Case No ARB/03/9, Award (5 September 2008) paras 192-95. For other examples of the influence of WTO law on the interpretation of IIL see Jürgen Kurtz, ‘The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and Its Discontents’ (2009) 20 EJIL 749; Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (CUP 2016) 218-24; Nicholas DiMascio and Joost Pauwelyn, ‘Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’ (2008) 102 AJIL 48.

⁸³ *Al Warraq v Indonesia* (n 33) paras 540 ff. For another example of how community interests can be integrated in IIL see Bruno Simma, ‘Foreign Investment Arbitration: A Place For Human Rights?’ (2011) 60 ICLQ 573, 584-92.

⁸⁴ Benedict Kingsbury and Stephan W Schill, ‘Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality’ in Schill (n 42) 79.

⁸⁵ *Ibid.*

number of public-law systems across the globe,⁸⁶ can be considered to represent a true principle of comparative public law. On the international plane, it has found acceptance in the practice of the most prominent courts and tribunals, including the International Court of Justice, the European Court of Human Rights, and the Court of Justice of the European Union and increasingly also in the context of investment arbitration.⁸⁷

Investment tribunals have, for example, in cases that involve measures taken by the host State to protect community interests, used proportionality when applying the concept of indirect expropriation and interpreting FET and NPM clauses.⁸⁸ While early tribunals who made use of proportionality, often applied it in an unclear and sometimes only implicit manner,⁸⁹ in more recent cases proportionality plays an increasing role in the outcome of cases and is applied in a generally more elaborate and more sophisticated manner.⁹⁰ These tendencies notwithstanding, there is room for improvement to arrive more generally at a fuller three-step proportionality analysis that involves the assessment of a State measure as to its suitability, necessity and proportionality *stricto sensu*.⁹¹ It is by resorting to this structured analysis that investment tribunals can find an instructive tool to balance community interests and those of foreign investors.

While investment tribunals are yet to fully incorporate all the facets of this analytical tool in their reasoning, they have shown increasing sensitivity to the principle of proportionality. It is therefore not unlikely that future tribunals will turn to proportionality analysis to balance investor interests and competing community interests. At the same time, it is understandable that vesting arbitrators, who are appointed on a case to case basis, with the broad powers connected to proportionality balancing, especially when this is not explicitly mentioned in the governing treaty, and when ‘legislative’ counterweights in the hands of the contracting parties to an IIA are

⁸⁶ For a detailed account of proportionality’s origin and diffusion see Alec Stone Sweet and Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 73 and Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012) 175-210.

⁸⁷ See Alec Stone Sweet and Giacinto della Cananea, ‘Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez’ (2014) 46 *NYU Journal of International Law and Politics* 911, 918-22; Kingsbury and Schill (n 84) 83; Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (OUP 2015) 68-79.

⁸⁸ See Kingsbury and Schill (n 84) 89-102; Bücheler (n 87) 122-250; for a comprehensive overview of the application of proportionality analysis in investment arbitration see Caroline Henckels, *Proportionality and Deference in Investor State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (CUP 2015) 83-115.

⁸⁹ See eg *Tecnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No ARB(AF)/00/02, Award (29 May 2003) para 122; *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) para 195.

⁹⁰ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012) and *Continental Casualty* (n 82).

⁹¹ For a more detailed account on the application of the different steps in proportionality analysis see Kingsbury and Schill (n 84) 86-88; Anne van Aaken, ‘Defragmentation of Public International Law Through Interpretation: A Methodological Proposal’ (2009) 16 *Indiana Journal of Global Legal Studies* 483, 504; Stone Sweet and della Cananea (n 87) 917-18; Henckels (n 88) 25-26.

missing, may be cause for concern.⁹² If, however, the alternative to proportionality balancing is that competing interests remain unaddressed, proportionality appears to be the preferable route to take in order to accommodate community interests. Moreover, States are in a position to monitor how tribunals make use of proportionality analysis and could, in case they perceive the way arbitrator make use of it as illegitimate, step in through binding interpretations or treaty modification, at least in order to align future uses of proportionality to their interests.⁹³

c. Standard of Review and Deference

Finally, doctrines of deference vis-à-vis State measures protecting community interests are an instrument to alleviate conflicts. In reviewing host State measures affecting foreign investors, investment tribunals can adopt different standards of review, ranging from complete deference to the government's decision, its basis for decision-making and the underlying motivation, to re-examining the issue at hand *de novo*. Most IIAs do not explicitly address how much deference tribunals should exercise,⁹⁴ leaving them with considerable discretion. While tribunals are yet to develop a coherent methodological approach to the standard of review,⁹⁵ there seems to be increasing willingness to accord host States considerable deference,⁹⁶ in particular when competing community interests are concerned.

Adopting regulation that balances community interests against other rights, such as those of foreign investors, involves delicate policy choices and difficult decisions. Domestic institutions of the host State, often having better knowledge of the local circumstances and, at least in democratic societies, being infused with more democratic legitimacy, are in such instances usually in a better position to make inferences about relevant facts and the appropriate ways to address them than international tribunals that are farther removed from the ground.⁹⁷ In

⁹² See José E Alvarez, “Beware: Boundary Crossings” – A Critical Appraisal of Public Law Approaches to International Investment Law’ (2016) 17 JWIT 171; Sornarajah (n 11) 365-82; Valentina Vadi, ‘The Migration of Constitutional Ideas to Regional and International Economic Law: The Case of Proportionality’ (2015) 35 Northwestern Journal of International Law & Business 557, 571. For potential drawbacks of proportionality balancing in general see Bücheler (n 87) 62-66. Much of the anxiety about the intrusiveness of proportionality balancing can, nonetheless, be alleviated by combining it with the adoption of a deferential standard of review (see section III.1.c.). Depending on the specific circumstances of each case, various stages of proportionality analysis will require that different levels of deference are accorded to the primary decision maker, making proportionality balancing a less invasive instrument. For a detailed account of the interplay between proportionality balancing and deference see Henckels (n 88) 45-68.

⁹³ See Anthea Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ (2010) 104 AJIL 179.

⁹⁴ Caroline Henckels, ‘Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration’ (2013) 4 Journal of International Dispute Settlement 197.

⁹⁵ Caroline Henckels, ‘Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration’ (2012) 15 Journal of International Economic Law 223, 241.

⁹⁶ Henckels (n 94) 214.

⁹⁷ Stephan W Schill, ‘Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review’ (2012) 3 Journal of International Dispute Settlement 577, 600-2; Henckels (n 94) 205-7; Erlend M Leonhardsen, ‘Treaty Change, Arbitral Practice and the Search for a Balance’ in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (OUP 2014) 135,

addition, implementing measures that aim to protect competing community interests often requires skill and expertise that tribunals may not possess.⁹⁸ For example, investment claims concerning e.g. the protection of the environment or public health may involve scientifically based decisions made by specialised domestic bodies. In such cases, tribunals will usually have to accord a significant degree of deference to national regulators.

By according policy-makers sufficient deference when reviewing their decisions, investment tribunals can accord governments the space necessary for effectively safeguarding non-economic community interests. At the same time, exercising deference should not result in tribunals surrendering their adjudicatory function by yielding uncritically to decisions made at the domestic level. Arbitrators must remain the ones tasked with adjudging the legality of the host State's actions under international law. In doing so, they should, however, accord governments sufficient manoeuvring space for effectively managing competing community interests. They could, for example, apply a stricter standard of review in controlling the quality of government procedure and to curtail discrimination, while according deference in terms of how host governments balance competing interests in substance.⁹⁹ This would ensure host States the manoeuvring freedom to regulate for the protection of community interests, without compromising foreign investors' need for a certain level of protection, in particular against arbitrary or other acts that are not in accordance with the rule of law.

2. Accommodating Community Interests in Investor-State Dispute Settlement

Making IIL more sensitive towards community interests can also be achieved through the adaptation of investor-State dispute settlement procedure in order to accommodate community interests better. To do so, one does not necessarily have to look outside of the existing structures of IIL – tools capable of achieving this task already exist within the current system, even though they are presently perhaps not sufficiently used. Transparency and *amicus curiae* participation (a), various procedural means to minimize pro-investment bias (b), and counterclaims (c) are some of the most important examples.

a. Transparency and *Amicus Curiae* Participation

The shortcomings of the ISDS system in achieving the same level of transparency that usually accompanies public law adjudication has been one of the focal points of criticism of IIL.¹⁰⁰ There

149-51. See *Electrabel SA v Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para 8.35 and *Glamis Gold v United States*, UNCITRAL (NAFTA), Award (8 June 2009) paras 804-5.

⁹⁸ Schill (n 97) 602-3; Henckels (n 94) 201-12; Leonhardsen (n 97) 146-47.

⁹⁹ Schill (n 97) 603-4.

¹⁰⁰ European Parliamentary Research Service Briefing, 'Investor-State Dispute Settlement: State of Play and Prospects for Reform' (21 January 2014) <[http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130710/LDM_BRI\(2014\)130710_REV2_EN](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130710/LDM_BRI(2014)130710_REV2_EN).

is little doubt that a system that deals with important public issues, needs to provide sufficient openness so that all that could potentially be affected have access to relevant information and are able to have a voice in the decision-making process. Such improvements would also work to ensure the better protection of community interests within IIL. Not only will increased transparency incentivize investment arbitrators to show greater caution when dealing with sensitive issues of public importance; it will also facilitate the involvement of a greater number of actors, including academia and civil society, allowing them to point out deficiencies and suggests possible improvements to the system.

At the same time, one should also acknowledge that great strides have already been made with regard to improving transparency within IIL since the initial criticism was raised. It is hardly justified anymore to characterize tribunals as ‘secretive’ and ‘obscure’.¹⁰¹ Considerable efforts have been made within ICSID,¹⁰² NAFTA¹⁰³ and new generations of IIAs¹⁰⁴ to increase transparency. As a result, today most awards are made public; there is increasing access to submissions made in arbitrations; and the practice to allow public or publicly broadcasted hearings is increasing. Similarly, UNCITRAL has adopted ‘Rules on Transparency in Treaty-based Investor-State Arbitration’¹⁰⁵ that will apply by default to cases initiated under IIAs concluded after their coming into effect on 1 April 2014, while the Mauritius Convention on Transparency opens up the possibility for extending the application of the Rules to IIAs concluded before that date.¹⁰⁶ Taken together, all of these developments demonstrate a clear shift towards increased transparency within investment arbitration, which can, in turn, have a beneficial impact on the protection of community interests within IIL.

pdf>; Sven Giegold, ‘The Promised “Transparency” Around TTIP Has Been a Sham’ (*The Guardian*, 31 August 2015) <<http://www.theguardian.com/commentisfree/2015/aug/31/transparency-ttip-documents-big-business>>; ‘Open Letter from Lawyers to the Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement’ (8 May 2012) <<http://tpplegal.wordpress.com/open-letter/>> all [accessed 4 May 2016](#). For a balanced view see Julie A Maupin, ‘Transparency in International Investment Law: The Good, the Bad and the Murky’ in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 142-71.

¹⁰¹ Anthony De Palma, ‘Nafta’s Powerful Little Secret: Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say’ (*New York Times*, 11 March 2001) <<http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html>> [accessed 4 May 2016](#).

¹⁰² In 2006 the ICSID Arbitration Rules were amended in order to, *inter alia*, provide greater transparency in proceedings administered by ICSID, see Rules 32, 37 and 48, available at <<https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF.htm>> [accessed 4 May 2016](#).

¹⁰³ NAFTA Free Trade Commission, ‘Notes of Interpretation of Certain Chapter 11 Provisions’ (31 July 31 2001) <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng>>; Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations (7 October 2003) <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/open-hearing.aspx?lang=en>>; US Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations (7 October 2003) <https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf> all [accessed 4 May 2016](#).

¹⁰⁴ See eg TPP (n 72) art 9.23 and CETA (n 68) art X.33.

¹⁰⁵ UNCITRAL, ‘Rules on Transparency in Treaty-based Investor-State Arbitration’ (effective as of 1 April 2014) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html> [accessed 4 May 2016](#).

¹⁰⁶ United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 December 2014, not yet in force) <<http://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf>> [accessed 4 May 2016](#).

Furthermore, increased transparency also acts as an agent for enabling another important tool for the protection of community interests in IIL: *amicus curiae* participation. *Amici curiae* are ‘friends of the court’ that offer their specific knowledge, perspective or information to the tribunal on matters that arise in the case and are of interest to non-disputing parties or the wider community.¹⁰⁷ While tribunals were initially reluctant to accept *amicus curiae* involvement,¹⁰⁸ they have increasingly become more open to such initiatives.¹⁰⁹ Meanwhile, an amendment of the ICSID Rules, changes by some countries to their model BITs and the inclusion of rules on *amicus* participation in the UNCITRAL Transparency Rules have institutionally backed up such initiatives.¹¹⁰ Although the rights of non-disputing parties within the proceedings have mostly remained limited to submitting written briefs,¹¹¹ *amicus* participation provides an additional opportunity for community interests to be brought to the attention of arbitral tribunals, by private non-profit organizations as well as by international organizations whose mandate is the protection of community interests.

In *Philip Morris v Uruguay*, for example, both the World Health Organization and the Pan American Health Organization sought to be heard as *amici* in the proceedings in order to ensure that the community interests they represent are adequately taken into consideration.¹¹² Another encouraging development is the pro-active approach adopted by the tribunal in *Ely Lilly v Canada* to issue a public invitation to any person interested in applying for permission to submit a written submission in light of the community interest involved.¹¹³

¹⁰⁷ In the majority of cases where amici were involved the reason for involvement was, in fact, the existence of some type of community interests, including public health and environmental concerns, sustainable development, and protection of cultural heritage. See *Methanex Corporation v United States of America*, UNICTRAL (NAFTA), Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘*amici curiae*’ (15 January 2001); *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Submission of Member Organizations of La Mesa as Amicus Curiae (25 July 2014); *Biwater Gauff v Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008) para 366 and *Glamis Gold v United States* (n 97); *Grand River v United States*, ICSID Case No ARB/10/5, Award (12 January 2011) para 60.

¹⁰⁸ *Aguas del Tunari, SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent’s Objections to Jurisdiction (21 October 2005) paras 15-18; *Suez/InterAguas v Argentina*, ICSID Case No ARB/03/17, Order in Response to a Petition for Participation as *Amicus Curiae* (17 March 2006).

¹⁰⁹ See eg *Biwater Gauff v Tanzania* (n 107) Procedural Order No 5 (2 February 2007) and *Piero Foresti v South Africa*, ICSID Case No ARB(AF)/07/01, Letter from ICSID Regarding Non-disputing Parties (5 October 2009). For an overview of *amicus curiae* in investment arbitrations see Lucas Bastin, ‘The Amicus Curiae in Investor-State Arbitration’ (2012) 1 Cambridge Journal of International and Comparative Law 208.

¹¹⁰ See ICSID Rules (n 102) art 37(2); UNCITRAL Transparency Rules (n 105) art 4; US Model BIT (n 65) art 28(3) and Canadian Model FIPA (n 66) art 39.

¹¹¹ Other procedural rights requested by *amici*, such as attending the hearings and making oral presentations, were mainly refused. See Bastin (n 109) 215-21.

¹¹² *Philip Morris v Uruguay* (n 8) Procedural Order No 3 (17 February 2015) and Procedural Order No 4 (24 March 2015).

¹¹³ ICSID News Release, ‘Eli Lilly and Company v Government of Canada (ICSID Case No UNCT/14/2) – Amici Curiae’ (5 November 2015) <https://icsid.worldbank.org/apps/ICSIDWEB/Pages/News.aspx?CID=169&ListID=74f1e8b5-96d0-4f0a-8f0c-2f3a92d84773&variation=en_us> accessed 4 May 2016.

Despite these encouraging inroads with regard to transparency and *amici* participation, there is still considerable room for improvement. Firstly, the extent to which tribunals consider the arguments made in *amicus* submissions, and how much, if at all, the submissions influence the actual decision-making, is still largely a mystery. This calls for the development of a mechanism that ensures that tribunals take *amicus* submissions clearly into account, above all in their reasoning, but also avoid abuse of *amicus* submissions that could paralyse effective proceedings.¹¹⁴ Secondly, improvements are needed with regard to investment disputes, not administered by ICSID, that are not resolved under IIAs. Knowledge of such disputes in many cases remains direly lacking. Steps are therefore needed to ensure that all areas of international investment relations provide for sufficient transparency in order to avoid conflicts with competing community interests.

b. Minimizing Pro-Investor Bias in Arbitral Tribunals

The changes that are being made to the system of IIL to ensure that community interests are taken into account will, however, only be effective if the risk of pro-investor bias in arbitral tribunals is minimized as much as possible¹¹⁵. Perhaps unexpectedly, it is precisely the flexibility of the ISDS regime that is the object of criticism that allows for such adjustments to be made without the need for tectonic shifts in how the system operates. Even if arbitrators have an interest in obtaining future appointments and seeing investor-State arbitrations continue, it is rather short-sighted to suggest that this can be best achieved through simple favouritism of investors. Instead, what needs to be realized is that, in the long run, it is States who control the fate of ISDS. They have the power to adjust, renegotiate and even dismantle the system. As a consequence, arbitrators should have an interest in rendering decisions that appropriately balance investment protection and non-economic community interests in line with the preference of the international community and its community interests, unless they want to risk fundamental backlash against the existing system, which would equally phase out their opportunities for future appointment. This should require them to take non-economic community interests into account in their decision-making and minimize conflicts with investment protection.¹¹⁶

Furthermore, arbitrator appointments themselves are a means for States to influence that composition of the tribunal and bring in arbitrators with a background and specific skill set that will ensure that specific community interests involved will be properly taken into consideration

¹¹⁴ On potential drawbacks of *amicus curiae* see Katia Fach-Gomez, 'Rethinking the Role of the Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest' (2012) 35 Fordham International Law Journal 510, 548-54.

¹¹⁵ On the problem of pro-investor bias see n 14.

¹¹⁶ Systematic empirical studies are still missing as to how the interest of arbitrators in being reappointed affects their decision-making. There are, however, empirical studies that indicate that States are more successful in defending investment claims than investors in winning them. See Susan D Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50(2) Harvard International Law Journal 435, 447; Susan D Franck, 'Empirically Evaluating Claims About Investment Treaty Arbitration' (2007) 86 North Carolina Law Review 1, 49.

during the arbitration.¹¹⁷ Positive effects in terms of informing the tribunals' understanding of affected community interests could also be achieved by bringing in experts in the competing community interests concerned.¹¹⁸ Finally, increasing arbitrator independence and impartiality and minimizing pro-investor bias arising out of the embeddedness of arbitrators in the world of big business law firms can be helped by more stringent ethical rules for arbitrators¹¹⁹ and by restricting that individuals adopt dual roles as arbitrator and counsel in different cases.¹²⁰ All in all, a variety of tools exist in the current structure of investment arbitration or could be introduced through small organic changes, to help minimize pro-investment or pro-investor bias and to allow for a fair balance between investment protection and competing community concerns.

c. Counterclaims

A final example of a procedural avenue for alleviating tensions between IIL and competing community interests is the possibility for States to bring counterclaims in investment arbitration. This could provide an important additional mechanism to ensure that obligations that are of interest to the wider community are complied with by foreign investors. Attempts at bringing counterclaims successfully, however, are still rare, as tribunals have been hesitant to find jurisdiction over counterclaims.¹²¹ Nonetheless, virtually all tribunals have in principle accepted the notion that counterclaims can be brought,¹²² and recent decisions promise a more liberal

¹¹⁷ Interestingly enough, in a rare case when this approach was employed, it was the claimant and not the respondent that made use of it. See *Grand River v US* (n 107) paras 128-45, 186-87, 205-21 and 247, where the investors, who were members of an indigenous people, appointed Professor James Anaya, a former UN Special Rapporteur on the Rights of Indigenous Peoples, as arbitrator, which added a different perspective to the tribunal and provided for better accommodation of the interests of the indigenous group involved.

¹¹⁸ See eg *Perenco v Ecuador* (n 58) where the tribunal appointed an independent environmental expert to assist it in determining the extent of environmental damage.

¹¹⁹ See eg EU TTIP proposal (n 15) art 11; CETA (n 68) art X.25, paras 5-11.

¹²⁰ See eg EU TTIP proposal (n 15) art 11. For problems arising from such dual roles see Eberhardt and others (n 12) 23; Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law' (2006) 22(4) *Arbitration International* 495, 497-98; Nathalie Bernasconi-Osterwalder, Lise Johnson and Fiona Marshall, 'Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel' (IV Annual Forum for Developing Country Investment Negotiators Background Papers, New Delhi, 27-29 October 2010) <www.iisd.org/pdf/2011/dci_2010_arbitrator_independence.pdf> accessed 4 May 2016.

¹²¹ This is especially the case in treaty-based disputes. See *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Award (7 December 2011) paras 859-77; *Saluka Invs BV v Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim (7 May 2004) para 80. For an extensive overview of investment cases dealing with counterclaims see Ana Vohryzek-Griest, 'State Counterclaims in Investor-State Disputes: A History of 30 Years of Failure' (2009) 15 *International Law: Revista Colombiana de Derecho Internacional* 83. See also Hege Elisabeth Kjos, 'Counterclaims by Host States in Investment Treaty Arbitration' (2007) 4(4) *TDM* 1; Andrea Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17(2) *Lewis & Clark Law Review* 461 and Alessandra Asteriti, 'Environmental Law in Investment Arbitration: Procedural Means of Incorporation' (2015) 16 *JWIT* 248.

¹²² *Roussalis v Romania* (n 121) paras 864-66; *Saluka v Czech Republic* (n 121) paras 38-39; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2011) para 689.

practice, as several counterclaimants have been successful in passing the jurisdiction hurdle.¹²³ Of particular interests is the case of *Perenco v Ecuador*, where the respondent put forward two counterclaims, arguing that the investor had caused environmental damage in excess of USD 2.7 billion. In its interim decision, the tribunal stressed its mindfulness ‘of the fundamental imperatives of the protection of the environment’ and indicated that it is likely to find Perenco liable, subject to a factual determination by an environmental expert regarding the occurrence of damage.¹²⁴

Not only did the tribunal’s hearing of counterclaims in this case help contextualize the whole dispute in light of the broader interests involved, instead of focusing solely on the investor’s side of the story, but it has also increased the likelihood that the investor will be held accountable for damage caused by disregarding domestic norms that not only protect local interests of the host State but also broader community interests. This, in turn, will make it more likely that compliance by investors with such norms can be ensured in the future. Again, bringing and admitting counterclaims is a mechanism that can already be resorted to under many existing, but by far not all, IIAs, depending on the precise wording of the treaty.¹²⁵ The inclusion of clauses in future IIAs explicitly permitting counterclaims would therefore be advisable.

In sum, all three areas of procedural law can facilitate the reconciliation of investment protection and competing community interests. If used accordingly, these aspects demonstrate that existing procedural features of IIL possess considerable capacity for minimizing conflicts with competing community interests. It is only a matter of learning by all those involved, parties as well as arbitrators and counsel, to harvest that potential as best as possible. Changes to the structures of IIL and investment dispute settlement, as currently discussed, while possibly conducive to better integrating community interests into IIL, may not be strictly necessary to achieve that purpose. Instead, there is a great and largely uncharted territory to explore on how conflicts between IIL and competing community interests can be minimized, both in the procedure of investment arbitration and in substantive IIL.

IV. IIL and Community Interests: Unfinished Business

Although IIL’s potential to interfere in the realization of non-economic community interests is very real and should not be understated, instruments and mechanisms that investment tribunals can use to minimize conflicts are also available and, to a large extent, are already being used. This includes interpretative techniques that aim at better integrating non-economic community

¹²³ See eg *Antoine Goetz and others v Republic of Burundi*, ICSID Case No ARB/01/2, Sentence (21 June 2012) paras 267-85; and *Al Warraq v Indonesia* (n 33) paras 655-72.

¹²⁴ *Perenco v Ecuador* (n 58) paras 582-87.

¹²⁵ Contrast eg the dispute resolution clause interpreted by the tribunal in *Roussalis v Romania* (n 121) paras 868-69, which decided that the clause of the governing BIT was not broad enough to permit counterclaims against investors to the one in *Goetz v Burundi* (n 123) paras 276-85, where the tribunal found the dispute resolution clause of the applicable BIT broad enough to encompass such claims.

interests within the IIL framework, both as regards substantive law as well as dispute settlement procedure. Moreover, on-going efforts at renegotiating existing treaties or recalibrating investment arbitration procedure in light of public law approaches to the field, including through reformed arbitration rules and the Mauritius Convention, are also geared towards minimizing the negative effect of IIL on non-economic community interests. It is, nonetheless, hard to resist the impression that the conciliatory potential we have pointed to in this chapter is far from being fully explored and put into practice. On the contrary, there are still sizeable inroads to be made in developing a better balance between economic and non-economic concerns in IIL. Consequently, increased and harmonized efforts by all actors involved – treaty negotiators, government officials, arbitrators, academics and civil society – are required in achieving this goal. Yet, only to the extent that the frictions with non-economic community concerns are alleviated can IIL live up to its full potential in contributing to the community interests of economic growth, furtherance of the rule of law, and sustainable development.

Yet, even under its own justification – the reaction to institutional deficits in host countries – there are areas where the contribution of IIL to the economic community interests it sets out to protect and promote itself faces a number of shortcomings. One such lingering gap is the lack of regulation of investor conduct and obligations at the international level.¹²⁶ While in many instances countries are capable and willing to regulate foreign investors and impose obligations on them under domestic law in order to respect non-economic community interests, dysfunctional domestic institutions may also result in a lack of regulation or enforcement. The fact that no obligations are imposed on foreign investors under international law can then lead to an imbalance between the protection afforded to foreign investment and the protection of non-economic community interests. Even though some IIAs, such as the OIC Agreement,¹²⁷ already impose certain obligations on investors, and a large number of soft law approaches to the topic have been developed,¹²⁸ great strides in requiring governments to effectively regulate foreign investors still need to be made. Conceptual frameworks, in particular the one developed by UN Special Rapporteur John Ruggie,¹²⁹ and model treaties aiming at including investor obligations in IIAs,¹³⁰ already exist. The next step would now be for all States to include such obligations in their actual treaty-making practice and consider whether international law enforcement mechanisms for non-economic community interests should be created.

¹²⁶ See August Reinisch' chapter in this volume.

¹²⁷ Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (signed 5 June 1981, entered into force 23 September 1986) art 9 <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2399>> accessed 4 May 2016.

¹²⁸ For an overview over these soft law instruments see Marc Jacob and Stephan W Schill, 'Going Soft: Towards a New Age of Soft law in International Investment Law?' (2014) 8 World Arbitration & Mediation Review 1, 15-33.

¹²⁹ Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc HR/PUB/11/04 <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed 4 May 2016.

¹³⁰ IISD Model International Agreement on Investment for Sustainable Development (2005) pt 3 <https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf> accessed 4 May 2016.

Another shortcoming relating to institutional problems at the domestic level concerns the asymmetric access to international dispute settlement. While foreign investors have access to investor-State dispute settlement outside the host State's domestic courts, communities negatively affected by foreign investment projects only have remedies, whether against the foreign investor or their own State, in domestic courts. The same holds true for domestic investors who are limited to remedies at the national level. This inequality in access can not only be troubling from a democratic perspective, and is capable of distorting competition between foreign and domestic investors, but also exempts large parts of dispute settlement in domestic courts from control by international institutions. This has the potential of shielding domestic institutions against the need to improve and live up to internationally acceptable standards in the administration of justice under the concept of the rule of law even if no foreign investor is concretely affected. This notwithstanding, from the perspective of IIL's objective to improve the level of good governance in order to instil economic growth and contribute to creating the financial basis for sustainable development, domestic institutions need to be improved across the board, not only to the extent foreign investors are affected. This would, of course, require IIL to go beyond its roots in diplomatic protection and the international law on the protection of aliens, but it would be the logical step if the positive contribution of IIL to economic community interests is taken to heart.

In any event, on a conceptual level, it seems important to stress that IIL's function to advance economic and indirectly certain non-economic community interests thus far has remained underexplored. Instead, IIL's capacity to adversely affect non-economic community interests has attracted the bulk of attention. Such a state of affairs is unhelpful in appreciating IIL and its contribution to the advancement of community interests on the whole. In this respect, having IIL as a well-functioning system for the governance of international investment relations, whether administered through arbitral tribunals or a standing investment court, is of great importance to the entire international community and seems indispensable in the pursuit of sustainable development and good governance under the rule of law. It is only by acknowledging these positive offerings of IIL to the protection of community interests that a comprehensive and balanced understanding of this sub-system of international law can be achieved and the focus be put on how that system can operate smoothly and without negative interference with competing community interests.