

NO RETREAT: AN EMERGING PRINCIPLE OF NON-REGRESSION FROM ENVIRONMENTAL PROTECTIONS IN INTERNATIONAL INVESTMENT LAW

ANDREW D MITCHELL AND JAMES MUNRO*

ABSTRACT

A principle that host states not regress from existing environmental protections in their domestic legal systems to promote foreign investment has quietly begun to establish itself in international investment law in the last decade. With origins in the North American Free Trade Agreement, more than 130 countries now subscribe to this idea in at least one of their international investment agreements. The simplicity of the concept of non-regression and the evident legitimacy of environmental objectives mask deep complexities in measuring levels of environmental protection and identifying reductions in those levels. These complexities are exacerbated by the wide variety of drafting of non-regression clauses, with significant implications for their operation and potential enforcement through investment treaty disputes. Despite the increasing popularity of non-regression clauses as evidenced by an extensive survey of existing treaties, states' current approaches to these clauses leave major questions unresolved, creating the potential for unintentionally increasing host state liability without necessarily enhancing environmental or economic goals.

I. INTRODUCTION	627
II. IMPLICATIONS OF THE EMERGENCE OF NON-REGRESSION CLAUSES FOR INVESTMENT TREATY DISPUTES.	631
A. <i>Potential for Investor-State Claims to Enforce Non-Regression Clauses</i>	632
1. Regressions from Environmental Protections and Harm to Investments	632

* Andrew Mitchell is a Professor at Melbourne Law School, The University of Melbourne; Director, Global Economic Law Network; PhD (Cantab); LL.M (Harv); Grad Dip Intl L, LLB (Hons), BCom (Hons) (Melb). Email <a.mitchell@unimelb.edu.au>. James Munro is a lawyer in the Secretariat of the World Trade Organization; former Senior Legal Counsel, Department of Foreign Affairs and Trade (Commonwealth of Australia); PhD (Melb); LLB (Hons) (Melb); BA (Melb). Email: <j.munro2@gmail.com>. This Article derives in part from research supported by the Australian Research Council pursuant to the Future Fellowship scheme (project number FT130100416). This Article contains independent research and does not necessarily reflect the views of any employer, client or other entity. We thank Tania Voon for helpful comments and suggestions. Any errors or omissions are ours. © 2019, Andrew D Mitchell and James Munro.

	2. ISDS Claims Under Non-Regression Clauses	634
B.	<i>Contextual Impact of Non-Regression Clauses on Claims Under Other Provisions</i>	638
	1. Delineating the Policy Space Under Fair and Equitable Treatment	639
	2. Creating Legitimate Expectations in Connection with Fair and Equitable Treatment	641
	3. Equating a Breach of Non-Regression with a Breach of Fair and Equitable Treatment	642
III.	THE EMERGENCE OF NON-REGRESSION CLAUSES IN INTERNATIONAL INVESTMENT LAW	643
A.	<i>NAFTA and the Pollution Haven Hypothesis</i>	644
	1. Original Concerns Regarding Mexico in the Negotiation of NAFTA	644
	2. NAFTA Article 1114(2): The First Non-Regression Clause	646
	3. Non-Regression in the ‘new’ NAFTA: The United States-Mexico-Canada Agreement	648
B.	<i>The EU and the Promotion of Sustainable Development</i>	650
	1. Implications of the Treaty on the Functioning of the EU	651
	2. EU Guidance on Negotiating Preferential Trade Agreements	652
C.	<i>Proliferation of Non-Regression in Investment Treaties of Other States</i>	653
	1. Power Asymmetries	653
	2. Acculturation	655
	3. Socialization	657
D.	<i>States’ Motivations for Regressing from Domestic Environmental Protections</i>	658
E.	<i>Making Non-Regression Clauses Work: Unanswered Questions</i>	660
IV.	SCOPE, CONTENT, AND APPLICATION OF NON-REGRESSION CLAUSES IN INTERNATIONAL INVESTMENT AGREEMENTS.	662
A.	<i>Nature of the Obligation: Exhortatory Principle or Binding Rule?</i>	662
	1. The Continuum from Hard to Soft Law	662
	2. The Binding Nature of Treaty Provisions: When Should Approximates Shall	663
	3. Relevance of Dispute Settlement Linkage	665
B.	<i>Which Domestic Environmental Measures Are Covered?</i>	667
	1. Explicit Definitions of Environmental Laws	667

NO RETREAT

2.	Environmental Measures Covered in the Absence of a Definition	669
3.	The Varying Scope of Environmental Measures Covered by Non-Regression Clauses	672
C.	<i>Impugned Conduct</i>	673
1.	Types of Interference with Domestic Environmental Measures	673
a.	<i>Waiver or Derogation: The NAFTA Language.</i>	674
b.	<i>Describing the Nexus with Environmental Outcomes</i>	675
c.	<i>Omitting the Nexus Requirement</i>	676
d.	<i>Weakening, Relaxing, or Reducing Environmental Protection</i>	677
2.	The Link to Investment	678
a.	<i>Encouraging Investment</i>	679
b.	<i>Encouraging Investment to Obtain an Advantage</i>	681
c.	<i>Encouraging a Particular Investment or Investment from a Party.</i>	683
d.	<i>Affecting Investment.</i>	686
D.	<i>Other Treaty Provisions as Relevant Interpretative Context</i>	687
1.	Right to Regulate or Establish Levels of Environmental Protection	688
2.	Obligations to Establish or Improve Environmental Protections.	690
V.	CONCLUSION	691
	APPENDIX	693

I. INTRODUCTION

Recent years have seen a series of dramatic rollbacks of domestic environmental protections around the world. The Trump Administration announced in 2017 that it would repeal the Clean Power Plan,¹ which had been the premier national policy in the United States for reducing greenhouse gas emissions.² In 2018, Brazil’s Supreme Court upheld changes to its Forest Code that removed legal

1. See EPA Takes Another Step To Advance President Trump’s America First Strategy, Proposes Repeal Of “Clean Power Plan,” EPA (Oct. 10, 2017), <https://www.epa.gov/newsreleases/epa-takes-another-step-advance-president-trumps-america-first-strategy-proposes-repeal>. This is one of the highest-profile regressions among several others. Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *83 Environmental Rules on the Way Out Under Trump*, N.Y. TIMES (last updated June 7, 2019), <https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html>.

2. Remarks Announcing the Environmental Protection Agency’s Clean Power Plan, 2015 DAILY COMP. PRES. DOC. 546 (Aug. 3, 2015).

obligations to reforest 290,000 square kilometers of land (roughly the size of Italy) that had been illegally deforested.³ In 2014, a newly-elected government in Australia repealed its carbon pricing scheme, which had mandated an eighty percent reduction in greenhouse gas emissions by 2050.⁴ The European Union (EU) is reportedly seeking guarantees that the United Kingdom will not roll back its domestic environmental protections after Brexit in order to gain a competitive advantage.⁵

In this Article, we evaluate the emerging role of international investment law in addressing this kind of regression from domestic environmental protections. International investment law is a highly fragmented collection of over 3,000 treaties comprising bilateral investment treaties (BITs), plurilateral investment treaties, and preferential trade agreements (PTAs) with investment chapters, to which we refer collectively as international investment agreements (IIAs).⁶ As a discipline of public international law, international investment law is somewhat unique in that most IIAs permit private investors of one state party to bring claims of violation of the IIA directly against the other state party in whose territory its investment is located (referred to as “investor-state dispute settlement” (ISDS)).

A principle of non-regression from domestic environmental protections to encourage investment first appeared in international investment law through the *North American Free Trade Agreement* (NAFTA) signed in 1992.⁷ Although the principle was not embraced in other IIAs for many years,⁸ it has recently become ubiquitous. The inclusion in

3. Britaldo Soares-Filho et al., *Cracking Brazil's Forest Code*, 344 *Sci.* 363, 363-64 (2014).

4. Clean Energy Act 2011 (Cth) s 3(c) (i) (Austl.) (repealed 2014).

5. Jon Stone, *Brexit: EU to Make UK Sign Guarantee It Won't Slash Environmental Regulations on Leaving*, *THE INDEPENDENT* (Apr. 10, 2018), <https://www.independent.co.uk/news/uk/politics/brexit-latest-updates-eu-uk-environment-guarantee-regulations-leaving-edited-a8298136.html>.

6. We use the term IIA to refer to any treaty containing investment-related obligations, including association agreements and partnership agreements concluded by the EU. For a listing of all IIAs, see United Nations Conference on Trade and Development [UNCTAD], *INV. POL'Y HUB*, International Investments Agreement Navigator, <https://investmentpolicy.unctad.org/international-investment-agreements>.

7. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 *I.L.M.* 289 (1993) [hereinafter NAFTA].

8. See, e.g., Camille Martini, *Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting*, 50 *INT'L LAWYER* 529 (2017); Madison Condon, *The Integration of Environmental Law into International Investment Treaties and Trade Agreements: Negotiation Process and the Legalization of Commitments*, 33 *VA. ENVTL. L.J.* 102 (2015); Andrew Newcombe, *Sustainable Development and Investment Treaty Law*, 8 *J. WORLD INV. & TRADE* 357 (2007); Clive George, *Environment and Regional Trade Agreements: Emerging Trends and Policy Drivers* (OECD Trade and Environment, Working Papers No. 2014/02).

IAs of clauses that admonish states for regressing from their domestic levels of environmental protection in order to encourage foreign investment, which we refer to as non-regression clauses, is now the clear preference of major economies including the United States, China, the European Union, Brazil, Canada, Japan, and Korea. Such clauses have also been adopted in IAs amongst diverse sets of smaller and middle-sized economies. Our extensive survey summarised in the Appendix shows that over 130 countries have now concluded IAs that include the principle, most of which were signed during the past decade. The prototype non-regression clause in international investment law in the original NAFTA (1992) continues to be influential in the drafting and structure of such clauses in more recent IAs. It provides, in relevant part:

The Parties recognize that it is inappropriate to encourage investment by relaxing domestic . . . environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor . . .⁹

This original prototype reveals the two-part structure that is now reflected in most, if not all, non-regression clauses in international investment law. First, the type or nature of interference with a domestic environmental measure is described, in this example a “waiver” or “derogation.” Second, the clause delimits the circumstances in which such interferences with domestic environmental measures are proscribed. In particular, the “waiver” or “derogation” in this example is impugned only if undertaken “as an encouragement” for investment. While non-regression clauses share this two-part structure, a diversity of terminology, definitions, and textual clarifications or carve-outs can lead to significant differences in the scope and application of non-regression clauses across IAs. Nonetheless, at a high level of abstraction, non-regression clauses can be said to restrain certain types of state conduct that regress from existing levels of domestic environmental protection, particularly in circumstances where there is a nexus between the regression and inward flows of investment. Further, since their inception in NAFTA, these clauses have continued to evolve from a softer “should”-based obligation to a harder “shall”-based obligation that is now subject

9. NAFTA, *supra* note 7, art. 1114(2).

to binding dispute settlement mechanisms in several IIAs, including in the new *United States-Mexico-Canada Agreement* (the “new” NAFTA).¹⁰

We begin in section II by explaining the significance of the emergence of non-regression clauses in respect to investment treaty disputes, either as the direct basis of a substantive claim, or as relevant context in a claim under another treaty provision. In a circumstance where over fifty investment disputes have been initiated over harm caused by states’ regressions from environmental protections,¹¹ we identify various ways in which non-regression clauses may be used in ISDS or state-state disputes, even when states have chosen to preclude direct claims under them.

In section III, we seek to ascertain the reasons for which non-regression clauses have become ubiquitous in recent IIAs. As we show, the intuitive rationale for embracing this principle obscures the varying motivations of states for regressing from their environmental protections, some of which extend to safeguarding another environmental norm or public interest. The simplicity of the concept underlying non-regression clauses likewise masks deep complexities in measuring levels of environmental protection and identifying reductions in those levels. Thus, considering these complexities, we show in section IV how the drafting of existing iterations of non-regression clauses in IIAs reveals them as capacious and rudimentary norms whose scope is uncertain. Even the more precise iterations of non-regression clauses leave significant latitude for inadvertent or unforeseen interpretations.

Overall, the picture that emerges from our analysis is that a principle of non-regression from environmental protections has developed in international investment law without close analysis of its implications and impacts on different textual and contextual settings in IIAs. The variety and vagueness of language used provide little guidance to parties or arbitrators in the case of a dispute arising on compliance with a non-regression clause. The difficulties and uncertainties in forecasting and measuring the effectiveness of environmental policies and the associated science as it develops over time create unanswered problems in applying non-regression clauses in practice. The intention of preserving the environment through the inclusion of such clauses may not be

10. OFF. OF THE U.S. TRADE REP., *Agreement between the United States, the United Mexican States, and Canada*. (Nov. 30, 2018) [hereinafter USMCA], <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

11. See Yulia S. Selivanova, *Changes in Renewables Support Policy and Investment Protection under the Energy Charter Treaty: Analysis of Jurisprudence and Outlook for the Current Arbitration Cases*, 33 ICSID REV. - FOREIGN INV. L.J. 433 (2018).

realised, as the concepts of environmental protection or regression are not properly aligned with environmental objectives during the design and drafting of these clauses within a given IIA. At the same time, non-regression clauses have the potential to unintentionally increase host state liability through ISDS or state-state disputes, either as a new basis for claims or as context in support of claims under other treaty provisions.

II. IMPLICATIONS OF THE EMERGENCE OF NON-REGRESSION CLAUSES FOR INVESTMENT TREATY DISPUTES

A recent study shows that almost fifty investor-state claims have now been brought under the *Energy Charter Treaty*¹² to contest regressions from national schemes for renewable energy support that harmed investors in those schemes.¹³ Similar claims have been brought under other IIAs.¹⁴ Though many claims are pending, several have now been decided.¹⁵

Despite these cases being brought under IIAs that pre-date the emergence of non-regression clauses, they illustrate the significance of the emergence of non-regression clauses in international investment law. First, as we demonstrate in section II.A, these cases show how non-regression clauses could provide an alternative avenue for such claims in more recent IIAs that subject their non-regression clauses to ISDS, even where those claims failed under the fair and equitable treatment (FET) obligation. Second, in section II.B, we assess the interpretative role that non-regression clauses could play as relevant context in claims regarding regressions under other investment provisions. We show how the presence of non-regression clauses could materially affect the outcomes of claims despite being excluded from investor-state or state-state dispute settlement procedures. In particular, as illustrated by two recent awards, non-regression clauses could have a concrete impact in

12. Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95.

13. See Selivanova, *supra* note 11.

14. For instance, for a similar case brought under a BIT between Germany and the Czech Republic, see *JSW Solar v. Czech Republic*, PCA Case No. 2014-03, Award (Oct. 11, 2017).

15. Decided claims include: *Antin Infrastructure Services Luxembourg s.a.r.l. & Antin Energia Termosolar v. Spain*, ICSID Case No. ARB/13/31, Award, (June 15, 2018); *Antaris GMBH v. Czech Republic*, PCA Case No. 2014-01, Award (May 2, 2018); *Novenergia v. Spain*, SCC Case No. 2015/063, Award (Feb. 15, 2018); *JSW Solar*, PCA Case No. 2014-03; *Eiser v. Spain*, ICSID Case No. ARB/13/36, Award (May 4, 2017); *Charanne B.V. v. Kingdom of Spain*, SCC Case No. V 062/2012, Award (Jan. 21, 2016). For an example of a concluded regression-based claim that is unrelated to renewable energy, see *Allard v. Barbados*, PCA Case No. 2012-06, Award (June 27, 2016).

constraining host states' policy space with respect to reducing environmental protections in disputes concerning the FET standard.¹⁶ Non-regression clauses may therefore have a more significant impact on investment treaty disputes than states realize. That impact is only likely to increase if the trend towards including such clauses continues.

We focus on ISDS in this Article due to the comparative paucity of state-state disputes in international investment law. Nonetheless, as shown in the Appendix, non-regression clauses are increasingly being subject to state-state dispute settlement—including those linked to economic countermeasures—despite not being subject to investor-state dispute settlement. The issues we identify in this Article relating to the risks, complexities, and uncertainties in the interpretation and application of non-regression clauses apply equally in respect of state-state dispute settlement.

A. *Potential for Investor-State Claims to Enforce Non-Regression Clauses*

In this section, we evaluate the possibility for ISDS claims for violations of non-regression clauses in IIAs. The Appendix lists numerous IIAs that do not exempt their non-regression clauses from ISDS. Against that background, the numerous examples of existing investor-state litigation over alleged regressions by states of environmental protections within FET claims could well be portents of direct claims regarding non-regression obligations.¹⁷ We thus begin by providing a snapshot of two examples of state conduct involving regressions from environmental protections that have given rise to such claims. We then show how, despite some of those claims failing under the FET standard, they could nonetheless succeed if pursued under a non-regression clause.

1. Regressions from Environmental Protections and Harm to Investments

States are increasingly using policy tools that seek to protect the environment through stimulating investment in environmentally-beneficial technology, practices, and conduct.¹⁸ This is especially the case with

16. These awards took a similar approach in respect of analogous environmental provisions that prohibit the non-enforcement of domestic environmental laws. *See Aven v. Costa Rica*, CAFTA-DR Arb. Case No. UNCT/15/3, ¶ 413 (Sept. 18, 2018); *Adel A Hamadi Al Tamimi v. Oman*, ICSID Case No. ARB/11/33, Award, ¶¶ 388, 390 (Nov. 3, 2015).

17. For a snapshot of those claims under FET based on regressions, see Selivanova, *supra* note 11, § 4(B)(i).

18. *See, e.g.*, OECD, POLICY INSTRUMENTS FOR THE ENVIRONMENT DATABASE 2017 (2017); Alexandre Kossov et al, STATE AND TRENDS OF CARBON PRICING 2017 (World Bank, 2017).

respect to climate change, whereby it is generally recognised that significant long-term investments are required to facilitate structural changes to low-emissions economies, and in respect of which states have embraced a variety of market-based measures.¹⁹

The complexity of variables in environmental protection—such as developments in science over time and imprecise modelling and assumptions in setting policies—can make it difficult to forecast with precision the costs, effectiveness, and efficiency of the measures designed by a state to protect the environment. This is especially acute with a matter as broad and multifaceted as climate change, but is also the case with respect to environmental matters generally.²⁰

The Czech establishment of, and subsequent regression from, feed-in tariffs for solar-generated electricity provides an example of these complexities. When its feed-in tariff rates were set for electricity generated from renewables generally in 2005, the Czech government did not envisage that solar power would comprise a significant part of the renewable energy mix. Given the comparatively high cost of solar panels and the ill-suited climatic and geographical circumstances of the Czech Republic to solar electricity generation, such an outcome seemed unlikely.²¹ However, prices of solar panels subsequently collapsed by forty percent, and investment in solar power boomed. Consequently, rather than the forecast 15 GWh production of electricity from solar power by 2010, actual production of electricity from solar power was 616 GWh in 2010, growing to 2,182 GWh in 2011.²² The uptake of the feed-in tariffs was correspondingly far higher than forecast, consequently leading to a dramatic increase in consumer electric prices. To account for this unforeseen operation of the measure, the Czech government reduced its price support for solar-generated electricity; in other words, it regressed from a measure that sought to protect the environment by reducing greenhouse gas emissions.²³ This led to multiple ISDS claims by aggrieved foreign investors.

19. Kossoy, *supra* note 18, at 22-31.

20. See, e.g., Julia Black, *The Role of Risk in Regulatory Processes* in ROBERT BALDWIN, MARTIN CAVE & MARTIN LODGE, *THE OXFORD HANDBOOK OF REGULATION* 301, 317-323 (2010); Cento Vejanovski, *Economic Approaches to Regulation*, in ROBERT BALDWIN, MARTIN CAVE & MARTIN LODGE, *THE OXFORD HANDBOOK OF REGULATION* 13, 31 (2010); STUART BELL & DONALD MCGILLIVRAY, *ENVIRONMENTAL LAW*, 48 (7th ed. 2008); Daniel A. Farber, *The Implementation Gap in Environmental Law*, 16 J. KOREAN L. 3, 4-5 (2016); Brian R. Copeland & M. Scott Taylor, *Trade, Tragedy, and the Commons*, 99(3) AMER. ECON. REV. 725, 725 (2009).

21. *JSW Solar*, PCA Case No. 2014-03, Award, ¶ 375.

22. *Id.* ¶¶ 375, 377, 382.

23. *Id.* ¶¶ 385-87, 391; *Antaris GMBH*, PCA Case No. 2014-01, Award, ¶ 400.

As another example, Spain withdrew certain subsidies for renewable energy generation in the context of a broader economic emergency.²⁴ The cumulative financial liability of these subsidies had reached three percent of Spain's gross domestic product by 2012 at a time when, according to the International Monetary Fund (IMF), Spain was "enter[ing] an unprecedented double-dip recession with unemployment already unacceptably high, [and] public debt increasing rapidly."²⁵ Indeed, as part of the deal to obtain an international bailout to address its economic emergency, Spain was required specifically to take measures regarding the budgetary impact of these environmental subsidies.²⁶ The steps taken by Spain to reduce its support for renewable energy were complex and evolved over a number of years, but for present purposes, it suffices to note that they included a 20 percent reduction in the value of the feed-in tariff for eligible solar generators.²⁷ As with the Czech Republic's regressions from its support for renewable energy, Spain's regressions led to multiple ISDS claims by aggrieved foreign investors, despite these measures being a condition of the international bailout.

2. ISDS Claims Under Non-Regression Clauses

The ISDS claims, with respect to the regressions by Spain and the Czech Republic from their renewable support measures, involved alleged violations of the obligation to provide FET. This is typically interpreted to protect an investor's legitimate expectations arising from a host State's representations,²⁸ as well as from conduct that is arbitrary, grossly unfair, unjust or idiosyncratic, or that otherwise lacks

24. European Commission, Economic Papers 534, *ELECTRICITY TARIFF DEFICIT: TEMPORARY OR PERMANENT PROBLEM IN THE EU?* 27-30 (2014).

25. IMF, Country Report No. 12/202, SPAIN: 2012 ARTICLE IV CONSULTATION 5 (2012).

26. European Commission, *Spain: Memorandum of Understanding on Financial-Sector Policy Conditionality*, ¶ 31 (July 20, 2012) <ec.europa.eu/economy_finance/eu_borrower/mou/2012-07-20-spain-mou_en.pdf>.

27. *Charanne*, SCC Case No. V 062/2012, Award, ¶ 526.

28. Though the relevance and significance of an investor's 'legitimate expectations' in the context of the fair and equitable treatment is contested, the prevailing view appears to be that such considerations may be relevant to fair and equitable treatment only where the respondent State has made a "specific assurance or commitment to the investor so as to induce its expectations." See *Glamis Gold Ltd. v. United States*, NAFTA Arbitral Tribunal, Award, ¶¶ 620, 767, 799, 800, 807 (2009); see also *EDF Services Ltd. v. Romania*, ICSID Case No ARB/05/13, Award, ¶¶ 219, 292, 299, 301 (Oct. 8, 2009); *International Thunderbird Gaming Corporation v. Mexico*, NAFTA Arbitral Tribunal, Award, ¶ 147 (2006).

natural justice and due process.²⁹ Some investors have succeeded in showing that the environmental regression at issue violated this standard,³⁰ whereas others have failed.³¹

Of particular interest for this Article is whether these failed claims could have succeeded if pursued under an IIA containing a non-regression clause that is covered by ISDS. For instance, the IIA between Iran and Slovakia sets out a non-regression clause in Section B of the treaty.³² Under that provision, the parties “shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, [environmental] measures as an encouragement for the establishment, acquisition, expansion or retention in their territories, of an investment.”³³ It is ISDS procedure allows for “the submission of a claim of breach of the obligations under Section B to arbitration under this Section in accordance with this Agreement.”³⁴ On its face, this IIA permits claims under ISDS for violations of its non-regression clause.

The first issue is whether—absent any explicit exemption from ISDS³⁵—any inherent obstacle prevents an investor from bringing a claim under a non-regression clause on the basis of loss or damage caused by a regression from environmental protections. In our view, none does. Kenneth J. Vandeveldt argues, in respect of the non-regression clauses in U.S. IIAs, that claims cannot be brought under ISDS because “the primary purpose of the environment provision is to protect the environment rather than U.S. investors, and thus the provision was not intended to provide a basis for a claim by an investor

29. *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (Apr. 30, 2004). *See, e.g.*, *The Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, Award, ¶ 132 (June 26, 2006); *International Thunderbird Gaming Corp. v. Mexico*, Award, NAFTA Arbitral Tribunal, Award ¶ 194 (2006); *Merrill & Ring Forestry LP v. Canada*, ICSID Case No. UNCT/07/1, Award, ¶ 236 (Mar. 31, 2010); *Mobil Investments Canada Inc. & Murphy & Murphy Oil Corp. v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability, ¶ 152(2) (May 22, 2012); *TECO Guatemala Holdings LLC v. Guatemala*, ICSID Case No. ARB/10/17, Award, ¶ 492 (Dec. 19, 2013).

30. *Eiser*, ICSID Case No. ARB/13/36, Award; *Antin*, ICSID Case No. ARB/13/31, Award; *Novenergia*, SCC Case No. 2015/063, Award.

31. *Allard*, PCA Case No. 2012-06, Award; *JSW Solar*, PCA Case No. 2014-03, Award; *Charanne*, SCC Case No. V 062/2012, Award; *Antaris GMBH*, PCA Case No. 2014-01, Award.

32. Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, Iran-Slovk., Jan. 19, 2016, § B, art. 10.

33. *Id.* § B, art. 10.2.

34. *Id.* § B, arts. 10.1, 16.1.

35. *See, e.g.*, Agreement Between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China for the Promotion and Protection of Investments, Can.-H.K., Feb. 10, 2016; art. 20.1; Free Trade Agreement between Canada and the Republic of Korea, Can.-S. Kor., Sept. 22, 2014, arts. 8.10, 8.18.

against a host state.”³⁶ This observation may provide a rationale for explicitly exempting non-regression clauses from ISDS in the text of an IIA, but it does not provide a compelling basis for rendering claims inadmissible in the absence of such an exemption. Rather, the admissibility of claims should be based on which obligations the states party to an IIA have agreed to subject to ISDS. The text of the IIA itself its most reliable reflection of what the states parties have agreed in that regard. Thus, if a state party to an IIA violates one of its obligations and an investor suffers harm as a result, the only question of legal relevance should be whether that obligation falls within the scope of ISDS in that IIA, according to the usual rules of treaty interpretation.

The second issue is whether the regressions at issue in the claims that failed to meet the threshold for a FET violation could nonetheless violate a non-regression clause. The conclusion of the respective tribunals that the regressions at issue involved the reasonable effects of a state’s right to safeguard economic or other public interests, was a major factor in the failure of claims involving the regressions by the Czech Republic and Spain from incentives for solar energy generation.³⁷ Non-regression clauses embed no such flexibility that could ground this kind of defence.³⁸ Rather, the key legal question would be whether a regression occurred within the terms of the relevant non-regression clause, and whether the delimiting circumstances applied to that regression.³⁹

In the claims against the Czech Republic, the state derogated from the applicable environmental instruments by amending laws to remove incentives for solar producers.⁴⁰ However, the derogations sought to restore the level of environmental protection that the Czech

36. KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 744 (2009).

37. *JSW Solar*, PCA Case No. 2014-03, Award, ¶ 406 (“The contested measures were reasonable, being a carefully calibrated response to developments in the Czech solar sector at a time of economic and political uncertainty.”); *Antaris GMBH*, PCA Case No. 2014-01, Award, ¶ 444 (“[t]he Tribunal accepts that the Respondent had the rational objective of reducing excessive profits and sheltering consumers from excessive electricity price rises, and that its actions were not arbitrary or irrational”); *Charanne*, SCC Case No. V 062/2012, Award, ¶ 493 (“[t]o convert a regulatory standard into a specific commitment of the state, by the limited character of persons who may be affected, would constitute an excessive limitation on the power of states to regulate the economic in accordance with the public interest”), ¶ 536 (“it is not arbitrary, irrational or contrary to public interest for the Respondent to have implemented measures to try to limit the deficit and price increases.”); see also Selivanova, *supra* note 11, § 4B(i).

38. See *infra* Section IV.A.

39. See *infra* Section IV.B.

40. *JSW Solar*, PCA Case No. 2014-03, Award, ¶¶ 385-87, 391; *Antaris GMBH*, PCA Case No. 2014-01, Award, ¶ 400.

Government had originally intended before realising that the measures in question were operating in unforeseen ways. As one tribunal concluded, “[a]ll that the measures did was to reduce the rate of return to a level which the State had originally intended.”⁴¹

As we explain further in section IV.D, some non-regression clauses prohibit any derogation from an “environmental law,” regardless of whether the level of protection actually afforded by that law has been weakened by the derogation. For such clauses, the Czech Republic’s derogation could well give rise to a violation. However, other non-regression clauses require there to be a weakening of an “environmental *protection*.” This factual matrix illustrates the conceptual difficulties in that regard, namely in identifying the level of environmental protection afforded by a measure and the appropriate benchmark for ascertaining whether a regression has occurred. In this case, the Czech Government’s *intended* level of protection diverged substantially from the level of protection that the measure *actually* afforded, leading to two alternative benchmarks that would lead to different outcomes for whether removal of incentives amounted to a regression. As presently drafted, non-regression clauses are ill-equipped to deal with these kinds of complexities, presenting significant risks and uncertainties for states seeking to modify environmental measures.⁴² Not only does this make it difficult for states to gauge whether their policies comply with non-regression clauses, but it also affords wide discretion to arbitrators to determine the circumstances under which a state may permissibly revisit the nature and degree of its environmental protections.

The regression by Spain is more straightforward. The impugned measures in the claims against Spain derogated from both the environmental *law* at issue, as well as the originally-intended level of environmental *protection*, namely (*inter alia*) a 20 percent reduction in the value of the feed-in tariff for eligible solar generators.⁴³ This reduced incentives to invest in renewables, thus weakening climate mitigation objective of the measures in question.⁴⁴ Therefore, such claims would not

41. *Antaris GMBH*, PCA Case No. 2014-01, Award, ¶ 445; *see also JSW Solar*, PCA Case No. 2014-03, Award, ¶ 406 (“The foregoing analysis shows that the measures left the guarantees of payback and return intact for plants meeting the required parameters.”).

42. *See infra* Section IV.E.

43. *Charanne*, SCC Case No. V 062/2012, Award, ¶ 526.

44. We treat these subsidies as environmental protections in view of their concomitant treatment by Spain as part of its climate mitigation policy. *See* U.N. Framework Convention on Climate Change Secretariat, *Summary Report on the Multilateral Assessment of Spain at the Forty-Sixth Session of the Subsidiary Body for Implementation*, ¶ 6, U.N. Doc. FCCC/SBI/2017/7 (June 16, 2017).

involve similar uncertainties about whether a regression has, in fact, occurred for the purposes of a non-regression clause.

Turning to the second limb of non-regression clauses, for those clauses whose delimiting circumstances pertain to “encouraging investment” generally, or more broadly to anything “affecting investment,” a plausible case could be made for these claims. Both were intended to improve each country’s economic and fiscal circumstances in the context of challenging economic conditions.⁴⁵ To the extent that “encourage” can encompass creating economic conditions that are attractive to investors and investment,⁴⁶ these regressions could be viewed as encouraging investment. There are, however, more restrictive delimiting circumstances in some non-regression clauses, and narrower interpretations of what it means to “encourage” investment, as we will show in section IV.C.⁴⁷

Thus, depending on the features of the non-regression clause at issue, the claims for violation of the FET standard that failed in respect of Spain’s and the Czech Republic’s regressions could succeed if pursued under non-regression clauses. This possibility exists even though the respective tribunals found these regressions to be taken in the public interest.⁴⁸ These cases, therefore, demonstrate not only the potential for claims under non-regression clauses, but also their inflexible and far-reaching application.

B. *Contextual Impact of Non-Regression Clauses on Claims Under Other Provisions*

Some IIAs exclude non-regression clauses from state-state dispute settlement, ISDS, or both, so that neither a home state nor an investor could bring a claim against a host state alleging violation of such provisions. Non-regression clauses in these IIAs could nonetheless play a contextual role in the interpretation and application of FET obligations to the extent that the alleged conduct involves regressions from domestic environmental protections. A non-regression clause could play a contextual role within the customary rules of treaty interpretation as reflected in Article 31 of the Vienna Convention on the Law of

45. *JSW Solar*, PCA Case No. 2014-03, Award, ¶¶ 364, 389; *Charanne*, SCC Case No. V 062/2012, Award, ¶¶ 535-36; see *infra* Section IV.C.

46. See *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Jurisdiction, ¶ 168 (July 2, 2013).

47. See *infra* Section IV.C.

48. *JSW Solar*, PCA Case No. 2014-03, Award, ¶ 406; *Antaris GMBH*, PCA Case No. 2014-01, Award, ¶ 444; *Charanne*, SCC Case No. V 062/2012, Award, ¶¶ 494, 536.

Treaties (VCLT)⁴⁹ through three possible avenues, which we consider in turn: 1) in restricting the policy space available under an FET obligation; 2) in creating legitimate expectations with respect to the FET obligation; 3) or in demonstrating a breach of the FET obligation through a breach of the non-regression provision. We consider only the first of these avenues to be viable in practice at present.

1. Delineating the Policy Space Under Fair and Equitable Treatment

The first and most compelling avenue for using a non-regression clause as relevant context would be in delineating the policy space afforded by the FET standard. That standard affords states a certain latitude to regulate in the public interest, whether justified legally through a doctrine of police powers or through space left by the high threshold for violation set by the obligation itself.⁵⁰

As discussed in section II.A, the cases in which investors failed to demonstrate that regressions from environmental laws evinced violations of FET turned, in large part, on the conclusion that Spain and the Czech Republic reasonably exercised a State's right to safeguard economic or other public interests.⁵¹ In *Antaris GMBH v. Czech Republic*, the tribunal "accept[ed] that the Respondent had the rational objective of reducing excessive profits and sheltering consumers from excessive electricity price rises, and that its actions were not arbitrary or irrational."⁵² In *Charanne v. Spain*, the tribunal concluded that "it is not arbitrary, irrational or contrary to public interest for the Respondent to have implemented measures to try to limit the [budget] deficit and [electricity] price increases" caused by the incentives for renewable energy.⁵³ The tribunal in *JSW Solar v. Czech Republic* acknowledged explicitly that the withdrawal of governmental subsidies and reduction of consumer prices for electricity were a "carefully calibrated response" in a context of general economic crisis.⁵⁴ These considerations reflected a FET standard under which states have a right to exercise sovereign authority to legislate and to adapt their legal systems to changing

49. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 1-18232.

50. See Andrew D. Mitchell, James Munro & Tania Voon, *Importing WTO General Exceptions Into International Investment Agreements: Proportionality, Myths, and Risks*, in YEARBOOK ON INT'L INVESTMENT L. & POL'Y 2017 305, 305 (2019) for a discussion of these issues.

51. *JSW Solar*, PCA Case No. 2014-03, Award, ¶ 406; *Antaris GMBH*, PCA Case No. 2014-01, Award, ¶ 444; *Charanne*, SCC Case No. V 062/2012, Award, ¶¶ 494, 536.

52. *Antaris GMBH*, PCA Case No. 2014-01, Award, ¶ 444.

53. *Charanne*, SCC Case No. V 062/2012, Award, ¶ 536.

54. *JSW Solar*, PCA Case No. 2014-03, Award, ¶¶ 389, 406, 442.

circumstances,⁵⁵ and an understanding that international law generally extends a high measure of deference to national authorities in regulating matters within their own borders.⁵⁶

By contrast, in cases where investors succeeded in demonstrating that a host state's regression violated the FET standard, the tribunals found the regressions "[in]consistent with the assurances on the stability of the regulatory framework provided by the state and required by the [IIA]," despite a "sovereign power to amend its regulations to respond to changing circumstances in the public interest."⁵⁷

Against that background, the presence of a non-regression clause in an IIA could shed light on what constitutes a reasonable and proportionate exercise of a state's right to regulate in the public interest for the purposes of the FET obligation. Regardless of whether the IIA contains an explicit textual right to set levels of environmental protection (see below section IV.D), the very presence of a non-regression clause reflects a fetter on that sovereign right.⁵⁸ In other words, non-regression clauses could be perceived as shaping the contours of the right to regulate applicable in a given IIA. The tribunal in *Aven v. Costa Rica* was confronted with a similar issue concerning the relationship between the FET obligation in the IIA at issue and its provisions in another chapter admonishing the failure to enforce environmental laws, the latter of which were not subject to ISDS.⁵⁹ In reconciling these features, the tribunal considered that "the rules of treaty interpretation provide the answer," and it would "tak[e] into account . . . other provisions of the [IIA] . . . in construing in context the proper meaning" of the IIA, including its FET obligation.⁶⁰ With that in mind, the tribunal held that:

By signing the Treaty, Respondent has agreed that there are limits to the manner in which a Party may implement and enforce its own environmental laws. It must do so in a fair, non-discriminatory fashion, applying said laws to protect the

55. See *Antaris GMBH*, PCA Case No. 2014-01, Award, ¶ 360; *JSW Solar*, PCA Case No. 2014-03, Award, ¶¶ 442, 446; *Charanne*, SCC Case No. V 062/2012, Award, ¶¶ 500, 514.

56. *Antaris GMBH*, PCA Case No. 2014-01, Award, ¶ 360; *Charanne*, SCC Case No. V 062/2012, Award, ¶ 517.

57. See *Antaris GMBH*, PCA Case No. 2014-01, Award, ¶ 637; see also *Eiser*, ICSID Case No. ARB/13/36, Award, ¶¶ 371, 382; *Novenergia*, SCC Case No. 2015/063, Award, ¶ 658.

58. Unless, of course, the text of the IIA suggests otherwise, as in the CPTPP. See the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Feb. 21, 2018.

59. *Aven v. Costa Rica*, DR-CAFTA Case No. UNCT/15/3, ¶ 410 (Sept. 18, 2018).

60. *Id.* ¶ 411.

environment, following principles of due process, not only for its adoption but also for its enforcement.⁶¹

Ultimately, the tribunal found as a matter of fact that the complainant had not demonstrated a denial of justice manifesting as the failure to enforce properly domestic environmental laws.⁶² Nonetheless, its understanding of the relationship between the FET obligation and other environmental provisions in the IIA that were exempt from ISDS illustrate how the latter can shape the contours of the former. Likewise, the tribunal in *Hamadi Al Tamimi v. Oman* held that “Chapter 17 of the U.S.–Oman FTA entitled ‘Environment’, although it does not fall directly within the Tribunal’s jurisdiction, provides further relevant context” for interpreting its FET obligation, stating further that “[w]hen it comes to determining any breach of the minimum standard of treatment under Article 10.5, the Tribunal must be guided by the forceful defence of environmental regulation and protection provided in the express language of the Treaty.”⁶³ Thus, under an IIA containing a non-regression clause, a state’s right to regulate with respect to the environment could be interpreted as constrained with respect to regressions that encourage investment. Equally, the existence of a non-regression clause could be evidence that a regression does not reflect reasonable or proportionate conduct by a state, nor a measure in the public interest.

2. Creating Legitimate Expectations in Connection with Fair and Equitable Treatment

Non-regression clauses might also be perceived as a representation to investors that a host state will not regress from its environmental protections, thus enlivening legitimate expectations of investors against regressions that could be protected by FET obligations. Some tribunals—including those arbitrating regressions from environmental protections—have foreshadowed that promises or representations to investors can be inferred from legislative instruments.⁶⁴ From that perspective, the mere existence of a non-regression clause in an IIA could represent to an investor that a host state will not regress

61. *Id.* ¶ 413.

62. *Id.* ¶¶ 630–31.

63. *Adel A Hamadi Al Tamimi v. Oman*, ICSID Case No. ARB/11/33, Award, ¶¶ 388, 390 (Nov. 3, 2015).

64. *Antin*, ICSID Case No. ARB/13/31, Award, ¶ 366.

from its environmental protections in the manner specified in that clause.

However, the prevailing view, and that favored by other tribunals arbitrating regressions from environmental protections,⁶⁵ is that a representation must be somehow specific to the claimant investor or their investment in order to ground a relevant legitimate expectation for the purposes of the FET obligation.⁶⁶ Non-regression clauses, by contrast, are broadly-framed protections applying to investments or investors of a state party generally, as opposed to being directed at inducing certain expectations on the part specific investors and investments. A non-regression clause in an IIA is therefore unlikely to suffice in establishing such an expectation, particularly if the IIA explicitly excludes the clause from ISDS and hence from the suite of protections from which an investor can legitimately expect to benefit.

3. Equating a Breach of Non-Regression with a Breach of Fair and Equitable Treatment

A third avenue for invoking a non-regression clause as context in an FET claim would be to argue that a breach of that clause leads, in turn, to a breach of the FET standard. A breach of a host State's obligation in international law has at times given rise to violations of core investor protections, but only in exceptional cases.⁶⁷ The predominant view is that a breach of another IIA provision does not give rise, in and of itself, to a violation of FET.⁶⁸ Some IIAs enshrine this approach in their textual clarifications to the FET obligations,⁶⁹ but the same position arguably applies even in the absence of such a clarification. The argument that a violation of a non-regression clause—without more—gives rise to a violation of the FET standard is unlikely to succeed. That conclusion is enhanced with respect to IIAs that exclude the non-regression clause from ISDS and/or state-state dispute settlement, because the argument would otherwise undermine that exclusion.

65. See *JSW Solar*, PCA Case No. 2014-03, Award, ¶¶ 410-11; *Eiser*, ICSID Case No. ARB/13/36, Award, ¶¶ 362-63; *Antin*, ICSID Case No. ARB/13/31, Award, ¶ 448, 538; *Charanne*, SCC Case No. V 062/2012, Award, ¶¶ 495-497.

66. Mitchell, Munro & Voon, *supra* note 50, at 318-19.

67. As one exceptional example in respect of expropriation, see *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, ¶¶ 165, 170, 173 (June 30, 2009).

68. PATRICK DUMBERTY, *THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105 277-78* (2013); IOANA TUDOR, *THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* 183, 189, 202 (2009).

69. See, e.g., Comprehensive and Progressive Agreement for Trans-Pacific Partnership, *supra* note 58, at art 9.6.3.

III. THE EMERGENCE OF NON-REGRESSION CLAUSES IN INTERNATIONAL INVESTMENT LAW

In this section, we explain the origins and rationale for a principle of non-regression from domestic environmental protections in international investment law. We begin by outlining the development of a principle of non-regression in international investment law both in the United States and in the EU, before evaluating the proliferation of this principle amongst a diverse spectrum of other States' IIAs in recent years.

We reject the notion that the proliferation of this principle is a function solely of asymmetrical power-relations in IIA negotiations, whereby developed countries such as the US and the EU are the *demandeurs* and developing countries are the unwilling recipients of this principle.⁷⁰ Rather, its appearance in bilateral IIAs between such sets of countries as China and Georgia, Nigeria and Singapore, the United Arab Emirates and Rwanda, and Iran and Slovakia, calls for a more sophisticated explanation of how and why this principle is proliferating in international investment law. Interrelated factors of power asymmetry, acculturation, and socialization⁷¹ have together led to over 130 states subscribing to a non-regression principle in at least one IIA, generating a critical mass whereby such a principle has become standard.⁷²

Against that background, we then juxtapose the rationale for adopting non-regression clauses with the rationales of States for engaging in regressions from environmental protections in the first place. A survey of real-world examples of such regressions will reveal that their motivations extend well beyond the pragmatic pursuit of commercial interests to arguably more legitimate non-commercial motivations; such as safeguarding another public interest, protecting another environmental interest, or to account for unforeseen consequences arising from environmental laws. As we will demonstrate, non-regression clauses in IIAs fail to account for this variety in states' motivations. Further, they fail to accommodate for complexities associated with identifying environmental protection objectives and ascertaining the level of protection that an environmental protection measure actually affords. The imprecision of many clauses and the failure to accommodate the varying motivations of states for engaging in regressions risks, creating host

70. See, e.g., Sikina Jinnah & Julia Kennedy, *Environmental Provisions in US Trade Agreements: A New Era of Trade-Environment Politics*, 12 WHITEHEAD J. DISPL. & INT'L REL. 95, 105 (2011).

71. For a discussion on how forces of rationalism, socialization, and acculturation are interlinked, see Harold Koh, *Internalization through Socialization*, 54 DUKE L. J. 975, 981 (2005).

72. See *infra* Section VI.

state liability without a sufficient basis in environmental harm from a particular regulatory change.

A. *NAFTA and the Pollution Haven Hypothesis*

Mitigating against the potential for industrial relocation due to weakened environmental laws—and thus the potential for “pollution havens”—is a relatively persistent theme underlying the US advocacy of non-regression clauses in IIAs. Although initially tailored to particular concerns regarding Mexico in NAFTA, it has since become entrenched as an enduring feature of US IIAs. This is despite the continuing absence of definitive empirical evidence demonstrating the “pollution haven” hypothesis to be a real-world phenomenon,⁷³ and despite a recognition, with respect to certain IIA partners, of no risk of “pollution havens” occurring.⁷⁴

1. Original Concerns Regarding Mexico in the Negotiation of NAFTA

A rich literature developed around the time of the NAFTA negotiations that elucidates the concerns giving rise to its non-regression clause.⁷⁵ In essence, the concerns revolved around the possibility that

73. We express no views on the real-world efficacy of the inclusion of a non-regression obligation in IIAs. However, a number of empirical studies into the ‘pollution haven’ hypothesis have cast doubt on its existence as a real-world phenomenon. See, e.g., Gene Grossman & Alan Krueger, *Environmental Impact of a North American Free Trade Agreement* 36 (Nat’l Bureau of Econ. Research, Working Paper No. 3914, 1991); Robert Carbaugh & Darwin Wassink, *Environmental Standards and International Competitiveness*, 16 *WORLD COMPETITION* 81, 88-89 (1992); Gunnar S. Eskelanda & Ann E. Harrison, *Moving to Greener Pastures? Multinationals and the Pollution Haven Hypothesis*, 70 *J. DEV. ECON.* 1, 21-22 (2003); Robert J. R. Elliott & Kenichi Shimamoto, *Are ASEAN Countries Havens for Japanese Pollution-Intensive Industry?*, *THE WORLD ECON.* 236, 250 (2008); Eric Neumayer, *Pollution Havens: An Analysis of Policy Options for Dealing With an Elusive Phenomenon*, 10 *J. ENV’T & DEV.* 147, 161-64 (2001). See also OECD, *Foreign Direct Investment and the Environment: An Overview of the Literature*, Negotiating Group on the Multilateral Agreement on Investment (MAI), at 10-14, DAFFE/MAI(97)33/REV1 (Dec. 22, 1997).

74. H.R. REP. NO. 108-597, at 5 (2004); U.S. TRADE REP., FINAL ENVIRONMENTAL REVIEW OF THE AGREEMENT ON THE ESTABLISHMENT OF A FREE TRADE AREA BETWEEN THE GOVERNMENT OF THE UNITED STATES AND THE GOVERNMENT OF THE HASHEMITE KINGDOM OF JORDAN 25-26 (2002). Some commentators have suggested that, in addition to legitimate environmental concerns, certain environmentalists in the US viewed negotiations on investment obligations as a pragmatic opportunity to advance environmental issues that otherwise receive limited attention. See DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE* 27-28 (1994); Condon, *supra* note 8, at 137-38.

75. A sample of such literature and material includes: SUSAN R. FLETCHER & MARY TIEMANN, CONG. RESEARCH SERV., *TRADE AND ENVIRONMENT: TREATMENT IN RECENT AGREEMENTS—GATT*

industries would relocate to Mexico to take advantage of cost advantages flowing from a perceived laxity in Mexico's environmental standards and enforcement.⁷⁶ Similarly, there was speculation that Mexico might further weaken environmental protections, thereby reducing regulatory compliance costs, to attract inward investment.⁷⁷ The potential for such an eventuality gave rise to further concerns.

First, from an economic perspective, there was a concern that the United States⁷⁸ would be unfairly harmed by the loss of the production facilities (and jobs) that would relocate to obtain the benefit of lower environmental compliance costs.⁷⁹

Second, from an environmental perspective, there was a concern that such relocation could undermine the stronger environmental protections maintained in the United States and lead to perverse outcomes.⁸⁰ In particular, by contributing to the relocation of production facilities to a jurisdiction with comparatively weaker environmental protections and lower compliance costs, the maintenance of stronger environmental protections in the United States could perversely stimulate more pollution-intensive methods of production and less environmentally-

AND NAFTA 1, 9-10 (1994); Michael Scott Feeley & Elizabeth Knier, *Environmental Considerations of the Emerging United States-Mexico Free Trade Agreement*, 2 DUKE J. COMP. & INT'L L. 259 (1992); OFF. OF TECH. ASSESSMENT, OTA-BP-ITE-94, TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES 17-18 (1992); ANTHONY CHAPMAN, CAN. PARLIAMENT RESEARCH BRANCH, BP-327E, NORTH AMERICAN FREE TRADE AGREEMENT: RATIONALE AND ISSUES (1993); ESTY, *supra* note 74, at 27-28, 42-43, 155; Carbaugh & Wassink, *supra* note 73, at 16; Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L. J. 459, 462-464 (1994); Grossman & Krueger, *supra* note 73, at 1-4; Stanley M. Spracker, Gregory M. Brown & Anne-Margaret Connolly, *Environmental Protection and International Trade: NAFTA as a Means of Eliminating Environmental Contamination as a Competitive Advantage*, 5 GEO. INT'L ENVTL. L. REV. 669, 674-75 (1993); Daniel C. Esty & Damien Geradin, *Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements*, 21 HARV. ENVTL. L. REV. 265, 269 (1997).

76. Feeley & Knier, *supra* note 75, at 271-80; Grossman & Krueger, *supra* note 73, at 2; Comm'n for Env'tl. Cooperation, *NAFTA Effects Potential NAFTA Effects: Claims and Arguments 1991-1994*, at 508 (Nov. 1995) [hereinafter NAAEC].

77. OFF. OF TECH. ASSESSMENT, *supra* note 75, at 17-18; Esty, *supra* note 74, at 155-56; Spracker, Brown & Connolly, *supra* note 75, at 677; NAAEC, *supra* note 76, at 5-8, 10.

78. Although Canada was also a negotiating party to NAFTA, it was equivocal, if not skeptical, about the efficacy of blending trade and environment matters, possibly owing to its lack of proximity to Mexico. See, e.g., Frederick W. Mayer, *Negotiating the NAFTA: Political Lessons for the FTAA in GREENING THE AMERICAS – NAFTA'S LESSONS FOR HEMISPHERIC TRADE* 97, 104-108 (Carolyn L. Deere & Daniel C. Esty eds., 2002).

79. ESTY, *supra* note 74, at 155-56; Carbaugh & Wassink, *supra* note 73, at 82-83; Steve Charnovitz, *The North American Free Trade Agreement: Green Law or Green Spin?*, 26 L. & POL'Y INT'L BUS. 1, 37-38 (1994); Grossman & Krueger, *supra* note 73, at 2; Esty & Geradin, *supra* note 75, at 320, 333.

80. GROSSMAN & KRUEGER, *supra* note 73, at 1-2, 4; Esty & Geradin, *supra* note 75, at 313-14.

friendly products — i.e. the very outcomes that the stronger protections were intended to ameliorate. The fear was that Mexico would become a “pollution haven” and that the Mexico-U.S. border region could be especially affected by spillovers of increased pollution.⁸¹

Further, products manufactured under a weaker environmental regime would likely have some degree of cost advantage over equivalent products manufactured in the United States due to the lower environmental compliance costs.⁸² This could potentially displace the products associated with better environmental outcomes in domestic and international markets, and rouse domestic pressure to reduce the stronger environment protections in order to level the conditions of competition.

The Bush Administration conducted a study in relation to these concerns, determining that industrial relocation to Mexico on the basis of weak environmental protections would occur only in instances where both environmental compliance costs and existing trade barriers were high.⁸³ The study concluded that such factors were present in relation to only a handful of industries, and that the risk of such relocation was low.⁸⁴ Separately, the Bush Administration adopted certain measures in parallel to address issues specific to pollution along the U.S.-Mexico border.⁸⁵

2. NAFTA Article 1114(2): The First Non-Regression Clause

Despite the conclusions of the study conducted by the Bush Administration, the US proposed a non-regression clause during the NAFTA negotiations worded initially as follows:

No Party shall, as an inducement or incentive to the establishment, acquisition, or expansion of an investment of an investor of another Party, eliminate, waive, reduce, or otherwise derogate from measures of general application necessary to protect human, animal or plant life or health or the environment in its

81. Feeley & Knier, *supra* note 75, at 271-80; Grossman & Krueger, *supra* note 73, at 2; NAAEC, *supra* note 76, at 5-8.

82. Feeley & Knier, *supra* note 75, at 269-71; Carbaugh & Wassink, *supra* note 73, at 82-85.

83. CHAPMAN, CAN. PARLIAMENT RESEARCH BRANCH, *supra* note 75 (citing U.S. TRADE REP., REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES 171 (1992)).

84. See Grossman & Krueger, *supra* note 73, at 36; Carbaugh & Wassink, *supra* note 73, at 88-89; Gunnar & Harrison, *supra* note 73, at 21-22; Elliott & Shimamoto, *supra* note 73, at 250; Neumayer, *supra* note 73, at 161-64. See also OECD, *Foreign Direct Investment and the Environment*, *supra* note 73, at 10-14.

85. Feeley & Knier, *supra* note 75, at 264-267; Lawrence A. Organ & John M. Williams, *NAFTA and the Environment: The “Greening” of Mexico*, 4 DUKE ENVTL L. & POL’Y F. 62, 69 (1994).

territory, or from measures relating to the conservation of exhaustible natural resources.⁸⁶

The text of the non-regression principle ultimately agreed to by the NAFTA negotiating parties is reflected in its Article 1114(2):

The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.⁸⁷

Though conceptually like the initial proposal, it is apparent that the text evolved considerably during the negotiations. An introductory sentence setting out a statement of principle was added, and the operative obligation in the second sentence was modified from “shall” to “should.” The description of the measures covered was simplified from the initial language mirroring Article XX(b) and (g) of the *General Agreement on Tariffs and Trade 1947* (GATT)⁸⁸ to the more general formulation of “domestic health, safety or environmental measures,” and a consultation mechanism was included in the final sentence in lieu of binding dispute settlement.⁸⁹ The *North American Agreement on*

86. See NAFTA Draft Investment, June 4, 1992, <http://www.naftaclaims.com/commissionfiles/11-June041992.pdf> (last visited Jul. 10, 2018); see also INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, 1114-1 (Meg N. Kinnear, Andrea K. Bjorklund & John F. G. Hannaford, eds., The Netherlands: Kluwer Law International, 2006) [hereinafter INVESTMENT DISPUTES UNDER NAFTA (Meg Kinnear et al. eds.)].

87. NAFTA, *supra* note 7, art. 1114(2).

88. *General Agreement on Tariffs and Trade 1947*, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

89. Nothing in NAFTA explicitly exempts Article 1114(2) from its dispute settlement mechanisms (in contrast to, e.g., Article 1138 of NAFTA). Nonetheless, this intention—which flows from the use of the term ‘should’ and the inclusion of a standalone consultations mechanism for derogations from Article 1114—is reflected in the negotiating history and other materials of the parties associated with the negotiations. See United States, The North American Free Trade Agreement Implementation Act, H.R. 3450, 103rd Congress, 145 (1993); Department of External Affairs, NORTH AMERICAN FREE TRADE AGREEMENT CANADIAN STATEMENT OF IMPLEMENTATION (Can.) 152 (Jan. 1994); INVESTMENT DISPUTES UNDER NAFTA (Meg Kinnear et al. eds.), *supra* note 86, at 1114-13. As we discuss below, however, the use of the term ‘should’ and

Environmental Cooperation (NAAEC)⁹⁰ subsequently added some aspects relevant to non-regression.⁹¹ Importantly, however, neither Article 1114(2) of NAFTA nor the reflections of non-regression in the NAAEC were part of the hallmark dispute settlement procedures of the NAAEC that could ultimately result in the suspension of trade concessions under NAFTA.⁹²

3. Non-Regression in the ‘new’ NAFTA: The United States-Mexico-Canada Agreement

The subsequent developments in the United States’ approach⁹³ can be surmised from the non-regression clause found in the Trump Administration’s renegotiated NAFTA, entitled the *United States-Mexico-Canada Agreement* (USMCA).⁹⁴ In particular, Article 24.4.3 of USMCA provides:

Without prejudice to Article 24.3.1⁹⁵, the Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or

the inclusion of a standalone consultations mechanism should not otherwise be viewed as dispositive as to whether the non-regression obligation in a given treaty is exempt from its dispute settlement mechanisms. *See infra* in Section IV.A.

90. North American Agreement on Environmental Cooperation, Can.-Mex.-U.S., Sept. 8-14, 1993, 32 I.L.M. 1480 (1994) [hereinafter NAAEC].

91. For a more detailed discussion on the linkages between non-regression in Article 1114 of NAFTA and the NAAEC, see GEOFFERY GARVER, *Forgotten Promises: Neglected Environmental provisions of the NAFTA and the NAAEC*, in NAFTA AND SUSTAINABLE DEVELOPMENT 15, 18-21 (Hoi L. Kong & L. Kinvin Wroth eds., 2015).

92. Rather, those procedures were available only where a party exhibited a persistent pattern of failure to effectively *enforce* its environmental laws in a manner affecting *trade* between the parties. NAAEC, *supra* note 90, art 24.1.

93. We can ascertain that this provision reflects the U.S.’ preference from the U.S.’ stated negotiating objectives, *see* OFF. OF THE U.S. TRADE REP. - EXECUTIVE OFFICE OF THE PRESIDENT, SUMMARY OF OBJECTIVES FOR THE NAFTA RENEGOTIATION 13 (July 17, 2017) <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf>.

94. Negotiations concluded September 30, 2018. USMCA, *supra* note 10.

95. The opening reference to Article 24.3.1 relates to the State parties’ right to regulate, which entails “[t]he Parties recogniz[ing] the sovereign right of each Party to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt or modify its environmental laws and policies accordingly.” *Id.* at art. 24.3.1. We discuss this somewhat anomalous feature of the clause below. *See infra* Section IV.D.

reduces the protection afforded in those laws in order to encourage trade or investment between the Parties.

Aside from more precise drafting, the two key developments reflected in the United States' approach involve the evolution of the term "should" in the original NAFTA to "shall" in USMCA, together with the application of binding state-state dispute settlement procedures in USMCA that permit economic countermeasures in the event of a violation.⁹⁶

These developments had been incremental in the intervening 25 years between NAFTA and USMCA. Subsequent to NAFTA, the US initially used the term "shall strive" in its PTAs and model 2004 IIA in lieu of "should,"⁹⁷ before adopting the stronger "shall" as part of a bipartisan trade deal (the 'May 10 Agreement') after the Democrats took control of Congress in 2006.⁹⁸ Though secured by the Democrats in Congress, these changes were advocated by domestic interest groups, who contended that the "shall strive"-based non-regression clause in the 2004 Model IIA was a "hortatory and unenforceable provision [that] is insufficient to prevent the Model [IIA] from driving, or exacerbating environmental pollution or degradation, or unsustainable natural resource extraction, in the territories of [IIA] partners."⁹⁹ For the same reason, the May 10 Agreement also provided for non-regression

96. *Id.* at art. 24.32, 31.19.1.

97. The 2004 US Model IIA is the first model to include a non-regression and used the term "shall strive" while exempting it from State-State dispute settlement and ISDS, with the same approach being taken in the US' contemporaneous PTAs with Singapore, Chile, and Australia (albeit in Environment Chapters rather than Investment Chapters). *See* United States Model IIA 2004, art 12.1, https://ustr.gov/archive/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (last visited July 19, 2018); Australia–United States Free Trade Agreement, Aus.-U.S., art. 19.2.2, May 18, 2004, T.I.A.S. No. 6422 [hereinafter AUSFTA]; United States-Singapore Free Trade Agreement, Sing.-U.S., art. 18.2.2, May 6, 2003, https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf (last visited July 13, 2019) [hereinafter SGFTA]; United States-Chile Free Trade Agreement, Chile-U.S., art. 19.2.2 June 6, 2003, <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta> (last visited July 13, 2019) [hereinafter CLFTA]. According to Vandeveld's history of the development of the 2004 Model IIA, there was a desire to align the drafting practice in standalone IIAs with PTAs containing investment obligations. VANDELDE, *supra* note 36, at 202.

98. OFF. OF THE U.S. TRADE REP., BIPARTISAN AGREEMENT ON TRADE POLICY 2-3 (2007); Charles B. Rangel, *Moving Forward: A New, Bipartisan Trade Policy That Reflects American Values* 45 HARV. J. LEGIS. 377, 395 (2008).

99. BUREAU OF ECON. AND BUS. AFFAIRS, REPORT OF THE SUBCOMMITTEE ON INVESTMENT OF THE ADVISORY COMMITTEE ON INTERNATIONAL ECONOMIC POLICY REGARDING THE MODEL BILATERAL INVESTMENT TREATY, Sept. 30, 2009, <https://2009-2017.state.gov/e/eb/rls/othr/2009/131118.htm> (last visited July 11, 2018); *see also* Mark Kantor, *The New U.S. Model BIT: "If Both Sides Are Angry*

clauses to be subject to state-state dispute settlement linked to economic countermeasures.

Throughout this period of developments, the essential motivation for the inclusion of non-regression clauses, namely “to prevent environmental abuse as a means to gain an advantage” in international economic relations,¹⁰⁰ persisted.¹⁰¹ Though the concerns giving rise to the inclusion of the non-regression principle in NAFTA pertained specifically to Mexico, it became a more general and entrenched feature of US practice in concluding IIAs. Further, unlike the case of Mexico in NAFTA, the inclusion of non-regression clauses in subsequent BITs and PTAs does not appear to have been in response to any specific or tangible environmental concerns.¹⁰² In the case of the United States’ PTA with Australia, the Report to Congress accompanying the implementing legislation stated that “Australia’s environmental laws are world class.”¹⁰³

B. *The EU and the Promotion of Sustainable Development*

The foregoing section demonstrates that mitigating the potential for using environmental (non-) regulation as a source of competitive advantage was the founding rationale for the emergence of a non-regression principle in international investment law. The EU, however, has cited a wholly different rationale for its advocacy of non-regression clauses in its IIAs. For the EU, the inclusion of non-regression clauses is a function of issue linkage: using its negotiating leverage in the international economic sphere to further sustainable development goals internationally, thereby strengthening global environmental governance.¹⁰⁴

With You, You Must Be Doing Something Right”, 9 TRANSNAT’L DISP. MGMT. 47, 57 (2012) [hereinafter Mark Kantor, *The New U.S. Model BIT*].

100. Rangel, *supra* note 98, at 396-97, 399.

101. See BUREAU OF ECON. & BUS. AFFAIRS, REPORT OF THE SUBCOMMITTEE ON INVESTMENT OF THE ADVISORY COMMITTEE ON INTERNATIONAL ECONOMIC POLICY REGARDING THE MODEL BILATERAL INVESTMENT TREATY art. 12, Jan. 30, 2004, http://www.ciel.org/Publications/BIT_Subcmte_Jan3004.pdf (last visited July 11, 2018).

102. H.R. REP. NO. 108-597, *supra* note 74, at 5; U.S. TRADE REP., FINAL ENVIRONMENTAL REVIEW OF THE AGREEMENT ON THE ESTABLISHMENT OF A FREE TRADE AREA BETWEEN THE GOVERNMENT OF THE UNITED STATES AND THE GOVERNMENT OF THE HASHEMITE KINGDOM OF JORDAN, *supra* note 74, at 25-26.

103. H.R. REP. NO. 108-597, *supra* note 74, at 5.

104. See, e.g., COUNCIL OF THE EUROPEAN UNION, REVIEW OF THE EU SUSTAINABLE DEVELOPMENT STRATEGY (No. 10117/06) 21 (June 9, 2006), <https://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010917%202006%20INIT> (last visited Jul. 13, 2019); EUROPEAN COMMISSION, TRADE FOR ALL—TOWARDS A MORE RESPONSIBLE TRADE AND INVESTMENT POLICY, 23 (2015), http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf (last visited July 13, 2019). See

Thus, whereas the United States is motivated more by pragmatic considerations of avoiding industrial relocation and the undermining of its own environmental protections as a result of the another IIA party weakening its environmental standards, the EU is motivated more by normative considerations of promoting sustainable development globally.

1. Implications of the Treaty on the Functioning of the EU

Compared to the United States, the EU as an entity is relatively new to IIA negotiations. Though its member States have negotiated over 1,400 IIAs,¹⁰⁵ the EU itself obtained competence to negotiate IIAs only upon the entry into force of the *Treaty of Lisbon* in December 2009.¹⁰⁶ None of the model IIAs of the EU's major member states had hitherto contained references to a principle of non-regression.¹⁰⁷

The European Commission's first major statement on its international investment policy in 2010 failed to include any explicit mention of a non-regression principle.¹⁰⁸ It did, however, indicate that its approach would be guided by the principles and objectives of the EU's external action more generally, including the promotion of sustainable development. Indeed, such an approach is mandated by Article 205 of

generally GRACIA MARÍN-DURÁN AND ELISA MORGERA, ENVIRONMENTAL INTEGRATION IN THE EU'S EXTERNAL RELATIONS: BEYOND MULTILATERAL DIMENSIONS 46-51 (Hart, 2012); see also Wybe Th. Douma, *The Promotion of Sustainable Development through EU Trade Instruments*, 2 EUR. BUS. L. REV. 197 (2017); OECD, ENVIRONMENT AND REGIONAL TRADE AGREEMENTS 28-29 (2007); Sikina Jinnah & Elisa Morgera, *Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda*, 22 REV. OF EURO. CMTY & INT'L ENVTL. L. 324, 327-28, 337 (2013).

105. EUROPEAN COMMISSION, INVESTMENT 23 (2015), <http://ec.europa.eu/trade/policy/accessing-markets/investment/>.

106. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) ¶¶ 158-59 [hereinafter Treaty of Lisbon].

107. See 2008 German Model IIA, <http://italaw.com/sites/default/files/archive/ital1025.pdf>; 2003 Italian Model IIA, <http://www.italaw.com/sites/default/files/archive/ITALY%202003%20Model%20BIT%20.pdf>; 2006 French Model IIA, <http://italaw.com/documents/ModelTreatyFrance2006.pdf>; 2008 United Kingdom Model IIA, <http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchIRIResults>. Various opaque or soft references appear in the model IIAs of Finland, Austria, and the Netherlands: 2001 Finland Model IIA, preamble recital 6, <http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchIRIResults>; 2008 Austrian Model IIA, art. 4 <http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchIRIResults>; 2004 Netherlands Model IIA, preamble recital 4, <http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchIRIResults>.

108. *Trade for All-Towards a More Responsible Trade and Investment Policy*, COM (2010) 343 final (July 7, 2010).

the *Treaty on the Functioning of the European Union* (TFEU)¹⁰⁹, which requires that the EU's international investment policy pursue the objectives laid down in Chapter 1 of Title V of the *Treaty on European Union*. This included the requirement to “help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.”¹¹⁰

2. EU Guidance on Negotiating Preferential Trade Agreements

With respect to PTAs in particular, the European Commission had already foreshadowed in 2006 that it would pursue non-regression clauses regarding investment in order to support sustainable development:

Future FTAs will need to cover sustainable development concerns by addressing environmental and social issues in addition to economic considerations. . . . Building on the Commission's work on trade-related Sustainability Impact Assessments, the Commission intends incorporating environmental and social chapters and clauses *covering in particular the necessity not to relax existing standards to attract foreign investment . . .*¹¹¹

Accordingly, the EU's 2013 negotiating directives for its PTA negotiations with both the US (known as “TTIP”) and Japan explicitly connect its advocacy for a non-regression clause with its objective of sustainable development.¹¹² In contrast to the US focus on competitiveness

109. Consolidated Version of the Treaty on the Functioning of the European Union, art. 205, June 7, 2016, 2016 O.J. (C 202) 59 [hereinafter TFEU].

110. Treaty on European Union art. 21(2)(f), Feb. 7, 1992, 1992 O.J. (C 191) 35. In addition, TFEU art. 11 provides that “[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development”; TFEU, *supra* note 109, art. 5. See also GEERT VAN CALSTER & LEONIE REINS, EU ENVIRONMENTAL LAW 25-26 (2017).

111. *Global Europe: Competing in the World: A Contribution to the EU's Growth and Jobs Strategy*, at 18, SEC (2006) 1230 final (Oct. 4, 2006) (bolding removed) (emphasis added) (footnotes omitted).

112. Council of the European Union, *Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America*, ¶ 8 (No. 11103/13, Brussels, June 17, 2013); Council of the European Union, *Directives for the negotiation of a Free Trade Agreement with Japan*, ¶ 3 (No. 15864/12/Add.1/REV.2, Brussels, 29 Nov. 2012) (“The Agreement should recognise that sustainable development is an overarching objective of the Parties and that . . . [t]he Agreement should recognise that the Parties will not encourage trade or foreign direct investment by lowering domestic environmental, labour or occupational health and safety legislation and standards.”).

concerns and the possibility of undue economic harm resulting from the other party weakening environmental standards, the EU clarified with respect to the non-regression clause in its PTA with Canada that “in case of any violation of this commitment, governments can remedy such violations *regardless of whether these negatively affect an investment or investor’s expectations of profit.*”¹¹³ In other words, the non-regression clause can apply regardless of whether any actual competitive disadvantage manifests as a result of the weakening of environmental standards.

C. Proliferation of Non-Regression in Investment Treaties of Other States

Empirical studies show that provisions relating to non-regression, and to the environment generally, were largely absent from IIAs until the mid-late 2000s, with the exception of IIAs involving either the US or Canada.¹¹⁴ Yet, as of 2018, well over 130 countries have now included a principle of non-regression in some form in at least one IIA, mostly concluded in the past decade.¹¹⁵ This massive shift is due to the interrelated drivers of: asymmetrical power relations, acculturation, and socialization, which we address in turn.

1. Power Asymmetries

One explanation for the increased uptake of non-regression clauses in IIAs could relate to asymmetrical power dynamics in negotiations between capital-exporting developed countries and capital-importing developing countries.¹¹⁶ In other words, non-regression clauses are being imposed on weaker negotiating parties by dominant players. Indeed, this was essentially the case with respect to the original non-regression clause included in NAFTA.¹¹⁷ In support of that explanation, the discussion in sections III.A and III. B demonstrates that the

113. Council of the European Union, *Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States*, ¶ 8 (No. 13541/16, Oct. 27, 2016) (emphasis added).

114. See, e.g., the studies in Newcombe, *supra* note 8, at 399; Martini, *supra* note 8, at 529; George, *supra* note 8.

115. See the appendix at the end of this piece.

116. See, e.g., KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL* 386-89 (2013); Condon, *supra* note 8, at 138-139; Jinnah & Kennedy, *supra* note 70, at 105.

117. Gustavo Alanis-Ortega & Ana Karina Gonzalez-Lutzenkirchen, *No Room for the Environment: The NAFTA Negotiations and the Mexican Perspective on Trade and the Environment in GREENING THE AMERICAS – NAFTA’S LESSONS FOR HEMISPHERIC TRADE* 41, 53 (Carolyn L. Deere & Daniel C. Esty eds., 2002).

United States and the EU have been *demandeurs* of non-regression principles.

We can also infer from state practice that a principle of non-regression is now a preference of other major jurisdictions. Brazil, for instance, has included a non-regression clause in its 2015 Model IIA, demonstrating its preferred policy position. It has also included such a clause in its subsequent IIA negotiations with Ethiopia¹¹⁸ and Suriname.¹¹⁹ Japan has consistently included a non-regression clause modelled on NAFTA in the IIAs it has concluded since its IIA with Korea in 2002.¹²⁰ China did not include a non-regression clause in its IIAs with Finland or Belgium signed in 2004 and 2005 respectively, despite such provisions being a part of those countries' Model IIAs or general practice at the time.¹²¹ However, since its 2012 IIA with Canada,¹²² China has tended to include increasingly stringent non-regression clauses, including in its IIAs with Tanzania (2013),¹²³ Korea (2015),¹²⁴

118. Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation art. 16.2, Braz.-Eth., Apr. 11, 2018 (not yet in force).

119. Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the Republic of Suriname art. 16.2, Braz.-Surin., May 2, 2018 (not yet in force).

120. The exception is Japan's IIA with Iran: Agreement between Japan and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investment, Feb. 5, 2016 (entered into force May 26, 2017).

121. See Agreement between the Belgium-Luxembourg Economic Union and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments, June 6, 2006 (entered into force Dec. 1, 2009); Agreement between the Government of the Republic of Finland and the Government of the People's Republic of China on the Encouragement and Reciprocal Protection of Investments, Nov. 15, 2004 (entered into force Nov. 15, 2006); 2001 Finland Model IIA, preambular recital 6: <http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchIRIRResults>; Agreement between the United Arab Emirates on the one hand, and the Belgian-Luxembourg Economic Union, on the other hand, on the Reciprocal Promotion and Protection of Investments art. 5, Mar. 5, 2004 (entered into force Aug. 12, 2007); Agreement between the Belgian-Luxembourg Economic Union and the Government of the Republic of Guatemala on the Reciprocal Promotion and Protection of Investments art. 13, Apr. 14, 2005 (entered into force Sept. 1, 2007).

122. Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments art. 10, Mar. 24, 2013 (entered into force Apr. 17, 2014).

123. Agreement Between the Government of the People's Republic of China and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments, Sept. 9, 2012 (entered into force Oct. 1, 2014).

124. Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea arts. 12.16, 16.5.2, June 2, 2015 (entered into force Dec. 20, 2015).

Hong Kong (2017),¹²⁵ and Georgia (2018).¹²⁶ India, by contrast, excluded a non-regression clause from its 2016 Model IIA,¹²⁷ despite having earlier accepted such a clause in its IIAs with Japan (2011) and Korea (2010).¹²⁸ Korea has also tended to exclude non-regression clauses from its BITs¹²⁹ but has included them in its PTAs containing investment obligations, such as with the Colombia (2016),¹³⁰ Australia (2014),¹³¹ and Canada (2014).¹³²

2. Acculturation

Although most major jurisdictions have demonstrated a preference for non-regression clauses in their IIAs, their asymmetrical power in IIA negotiations cannot explain fully the proliferation of this principle in international investment law in recent years. Non-regression clauses have also appeared in IIAs between diverse sets of negotiating parties that would not ordinarily be associated with hegemonic tendencies in this sphere of international law.¹³³ For instance, the IIAs between Guatemala and Trinidad and Tobago, and between Iran and Slovakia,

125. Mainland and Hong Kong Closer Economic Partnership Arrangement Investment Agreement art. 25, June 28, 2017.

126. Free Trade Agreement between the Government of the People's Republic of China and the Government of Georgia art. 9.2, May 13, 2017 (entered into force Jan. 1, 2018).

127. *See* India Model IIA, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf (last visited July 19, 2019).

128. Comprehensive Economic Partnership Agreement between Japan and the Republic of India art. 99, Feb. 16, 2011 (entered into force June 30, 2011); Comprehensive Economic Partnership Agreement between the Republic of Korea and the Republic of India art. 10.16.2, Aug. 7, 2009 (entered into force Jan. 1, 2010).

129. *See, e.g.*, Agreement between the Government of the Republic of Korea and the Government of the Republic of Kenya for the Promotion and Protection of Investments, Aug. 7, 2014 (entered into force May 3, 2017); Agreement between the Government of the Republic of Korea and the Government of the Republic of Cameroon for the Promotion and Protection of Investments, Dec. 24, 2013 (entered into force Apr. 13, 2018).

130. Korea-Colombia-Free Trade Agreement art. 16.4.3, Feb. 21, 2013 (entered into force July 15, 2016).

131. Korea-Australia Free Trade Agreement art. 18.2.3, Apr. 18, 2014 (entered into force Dec. 12, 2014).

132. Canada-Korea Free Trade Agreement, *supra* note 35, arts. 8.10, 17.5.3.

133. *See, e.g.*, Investment Promotion and Protection Agreement between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore art. 10, Nov. 4, 2016 (not yet in force); Agreement between the United Arab Emirates on the one hand, and the Belgian-Luxemburg Economic Union, on the other hand, on the Reciprocal Promotion and Protection of Investments art. 5, Mar. 5, 2004 (entered into force Aug. 12, 2007); Agreement between the Republic of Guatemala and the Republic of Trinidad and Tobago on the Reciprocal Promotion and Protection of Investments art. 16, Aug. 13, 2013 (entered into force June 23,

contain essentially the same obligation that they “shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, domestic environmental legislation as an encouragement for . . . an investment.”¹³⁴

This dynamic calls for a different or additional explanation to that based on power imbalances. One explanation is that the adoption of the principle is a function of acculturation, that is, conforming to norms out of a sense of appropriateness by mimicking a dominant or influential reference group.¹³⁵ In that way, states¹³⁶ may take note of the appearance of a principle of non-regression in the major IIAs of dominant players and adopt it in order to conform to perceived global standards regarding the kind of norms or matters that should be included in IIAs.¹³⁷

One study focusing on environment norms in PTAs showed that environmental norms tend to be copied from older agreements, and that the older the norm, the more likely it was to be adopted.¹³⁸ The authors postulated that “it can be inefficient to search for novel solutions where a wide and diverse pool already exists” and hence “considerably less risky, less expensive, and more efficient to utilize norms already in circulation.”¹³⁹ Thus, states may copy non-regression clauses from existing IIAs out of a sense of conformity. As states tend to cling to precedents in international investment law,¹⁴⁰ the desire to conform could extend to copying non-regression clauses from their own past IIAs, despite

2016); Agreement between the Slovak Republic and the Islamic Republic of Iran, *supra* note 32, § B, art. 10.1.

134. Agreement between the Republic of Guatemala and the Republic of Trinidad and Tobago on the Reciprocal Promotion and Protection of Investments art. 16, Aug. 13, 2013 (entered into force June 23, 2016); Agreement between the Slovak Republic and the Islamic Republic of Iran, *supra* note 32, § B, art. 10.1.

135. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L. J. 621, 639, 642-44 (2004); Asher Alkoby, *Theories of Compliance with International Law and the Challenge of Cultural Difference*, 4 J. OF INT'L L. & INT'L REL. 151, 166 (2008).

136. It is, of course, not ‘states’ themselves that are socialized, but relevant individuals within them. See Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 DUKE L. J. 983, 984 (2005).

137. Goodman & Jinks, *supra* note 135, at 642-44.

138. Jean Frederic Morin, Joost Pauwelyn & James Hollway, *The Trade Regime as a Complex Adaptive System: Exploration and Exploitation of Environmental Norms in Trade Agreements*, 20 J. INT'L ECON. L. 365, 383-86 (2017).

139. *Id.* at 383.

140. See, e.g., VANDELDE, *supra* note 36, at 111-12; CHESTER BROWN, COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 1 (2013).

having been compelled to adopt such clauses by a stronger negotiating party in those earlier IIAs.¹⁴¹

One example of acculturation at play might be the Southern African Development Community (SADC) Model IIA, whose Article 22 includes a non-regression clause almost identical to Article 1114(2) of NAFTA. The SADC's commentary accompanying Article 22 explains its inclusion solely in terms of its concomitant inclusion in NAFTA and the fact that it had already been adopted in an existing SADC IIA.¹⁴² On its face, this explanation suggests conformity with norms out of a sense of appropriateness by mimicking a dominant reference group. An explanation based on acculturation would be particularly apt where states copy verbatim (or almost verbatim) the text of a major precedent, such as NAFTA.

3. Socialization

An explanation based on acculturation is less persuasive where it is apparent that states have innovated in the text of the non-regression clause. For instance, the IIA between the United Arab Emirates and the Belgian-Luxemburg Economic Union eschews the widely-adopted “waive or otherwise derogate” formulation from NAFTA in favour of the phrase: “[n]o Contracting Party shall *change or relax* its domestic environmental legislation to encourage investment.”¹⁴³ As another example, the PTA between Vietnam and the Eurasian Economic Union¹⁴⁴ supplemented the NAFTA formulation of “*encourage* investment” with a requirement that such encouragement be “to *gain [an] . . . investment advantage* by weakening.”¹⁴⁵

These kinds of singular innovations in non-regression clauses suggest that their inclusion is explained by something more than conforming

141. For instance, Mexico initially opposed such a provision in NAFTA. See ALANIS-ORTEGA & GONZALEZ-LUTZENKIRCHEN, *supra* note 117, at 53. However, it accepted the provision shortly afterwards in its IIA with a significantly smaller jurisdiction, Switzerland. See Agreement between the Swiss Confederation and the United Mexican States on the Promotion and Reciprocal Protection of Investments art. 3, July 10, 1995 (entered into force Mar. 14, 1996).

142. Southern African Development Community, *SADC Model Bilateral Investment Treaty Template with Commentary* 41 (2012).

143. Agreement between the United Arab Emirates on the one hand, and the Belgian-Luxemburg Economic Union, on the other hand, on the Reciprocal Promotion and Protection of Investments art. 5, Mar. 5, 2004 (entered into force Aug. 12, 2007) (emphasis added).

144. The Eurasian Economic Union is comprised of Russia, Kazakhstan Kyrgyzstan, Belarus, and Armenia.

145. Free Trade Agreement between the Eurasian Economic Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part art. 12.4.3, May 29, 2015 (entered into force Oct. 5, 2016) (emphasis added).

to the norms of an influential reference group. Rather, they suggest that the negotiating parties—or at least one negotiating party—had internalised and reflected on the content and meaning of the norm and determined that its inclusion was desirable, subject to certain refinements or clarifications to improve its drafting. Thus, a further explanation for the proliferation of non-regression clauses in IIAs pertains to a process of socialization, whereby States have become persuaded of the desirability of the norm itself.¹⁴⁶

D. *States' Motivations for Regressing from Domestic Environmental Protections*

As the foregoing sections demonstrate, the founding rationale for non-regression clauses in international investment law was, somewhat pragmatically, to mitigate the potential for using environmental (non-) regulation as a source of competitive advantage in attracting capital. The EU's motivation appears to go further by pursuing non-regression clauses for the normative of promoting sustainable development. Non-regression clauses have since proliferated through the interrelated mechanisms of power asymmetries, acculturation, and socialization to become standard aspects of modern IIAs.

An implicit assumption in the case for including non-regression clauses in IIAs, therefore, is that regressions by States are designed to reduce environmental compliance costs for business in order to enhance competitiveness, or that such regressions undermine sustainable development generally.

Having surveyed a variety of regressions from environmental protections, this implicit assumption is borne out in some instances. For instance, upon announcing its proposed repeal of the Clean Power Plan, which had been designed to reduce carbon dioxide emissions from electrical power generation by thirty-two percent by 2030, the Trump Administration cited “\$33 billion in avoided compliance costs” as a primary rationale.¹⁴⁷ Likewise, the Australian Government's explanation for repealing Australia's carbon pricing scheme included “boost[ing] Australia's economic growth,” “enhance[ing] Australia's international competitiveness,” and “remov[ing] the cost pressures faced by business as a result of the carbon tax.”¹⁴⁸ The newly-elected

146. See Andrew Moravcsik, *The Origins of Human Rights Regimes*, 54(2) INT'L ORG. 217, 223-24 (2002); Goodman & Jinks, *supra* note 135, at 635-36; Koh, *supra* note 71, at 976-77.

147. EPA, *supra* note 1.

148. Revised Explanatory Memorandum, Clean Energy Legislation (Carbon Tax Repeal) Bill 2014, 5, https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5311_ems_144677a8-32fc-4fab-94b945e90b54927f/upload_pdf/14167rem.pdf;fileType=application%2Fpdf.

Government of Ontario recently gave similar reasons for its proposed repeal of the Ontario emissions trading scheme.¹⁴⁹

However, the examples of the regressions by the Czech Republic and Spain discussed in section II.A reveal a more nuanced picture. Spain was motivated by safeguarding another public interest, namely addressing an economic emergency and securing an international bailout package.¹⁵⁰ The Czech Republic was motivated to address an unforeseen change in circumstances (the collapse in the price of solar panels) and to correct dramatic errors in its forecast modelling when designing the policy (an uptake of 15 GWh from solar, as opposed to the eventuality of 2,182 GWh).¹⁵¹ The EU was motivated to protect another environmental value—unanticipated land-clearing in other jurisdictions; with potentially adverse impacts on biodiversity, water quality, and greenhouse gas emissions¹⁵²—when it regressed from its promotion of biofuels to reduce greenhouse gas emissions in the transportation sector by imposing limitations on permissible sources of biofuel that could be used for that purpose.¹⁵³ Australia was motivated by a desire to harmonise with the internationally-dominant EU emissions trading scheme when it rescinded its minimum price floor of AUS 15 for carbon units in its (now-repealed) emissions trading scheme. This opened the scheme to international prices as low as AUD 3.60 and weakening the incentives to invest to climate mitigation.¹⁵⁴

Thus, regressions from domestic environmental protections can sometimes be condemned as seeking to advance commercial interests, but this is not always a state's motivation for such shifts. Non-commercial motivations may be present particularly when a change takes place

149. Office of the Premier, *A Government for the People: Speech from the Throne*, 12 July 2018.

150. European Commission, *Spain: Memorandum of Understanding on Financial-Sector Policy Conditionality*, ¶ 31 (July 20, 2012), ec.europa.eu/economy_finance/eu_borrower/mou/2012-07-20-spain-mou_en.pdf (last accessed July 18, 2019).

151. *JSW Solar*, PCA Case No. 2014-03, Award, ¶ 375.

152. *Id.* See also European Parliament, *EU biofuels policy: Dealing with indirect land use change*, Briefing (Jan. 2015), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545726/EPRS_BRI\(2015\)545726_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545726/EPRS_BRI(2015)545726_REV1_EN.pdf) (last visited July 18, 2019). One of the environmental values was tacitly the same in this example, namely reducing greenhouse gas emissions through increased biofuel usage vis-à-vis reducing greenhouse gas emissions from land clearing.

153. European Parliament, *EU biofuels policy: Dealing with indirect land use change*, Briefing (Jan. 2015), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545726/EPRS_BRI\(2015\)545726_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545726/EPRS_BRI(2015)545726_REV1_EN.pdf) (last visited July 18, 2019) (Preambular recitals 4, 5, 17, 28).

154. See Alexandre Kossoy et al., *Mapping Carbon Pricing Initiatives: Developments and Prospects* 53-54 (2013) <https://openknowledge.worldbank.org/bitstream/handle/10986/15771/77955.pdf?sequence=1>.

with respect to the original data, assumptions, or balance of interests that produced the initial level of environmental protection (including external events such as economic emergency). Not only does this reveal the assumption implicit in the rationales for adopting non-regression clauses to be partially flawed, but as we show in section II.A, the text of non-regression clauses in IIAs fails to account for these alternative motivations for regressing from environmental protections, thereby exposing host states unintentionally to liability for such reasonable conduct.

E. *Making Non-Regression Clauses Work: Unanswered Questions*

As already discussed and as illustrated in the Appendix, it is not uncommon for states to subject their non-regression clauses to ISDS or state-state dispute settlement procedures. The corollary is that States intend such clauses to be capable of practical operation and application. However, the simplicity of concept underlying non-regression clauses masks deep complexities in measuring levels of environmental protection and identifying reductions in those levels.

To be operational, the principle of non-regression from domestic environmental protections requires, at a minimum, the identification of a domestic environmental protection, and a benchmark against which to assess whether the State has regressed from such protection.

However, the subject matter of a domestic measure for protecting the environment can be identified at different levels of abstraction, and differing qualitative and quantitative goals may exist regarding the degree to which the measure is intended to contribute to the protection of that subject matter. For instance, in 2010 Australia introduced a renewable energy target whereby twenty percent of its electricity would be generated from renewable sources by 2020, compared to its 1997 levels.¹⁵⁵ Based on contemporaneous projections forecasting electricity demand over the coming decade, the target of twenty percent was quantified in legislation as mandating 41,000GWh of electricity generated from renewable sources by 2020.¹⁵⁶ Over time, those projections proved inaccurate, and by 2014 it appeared that the 41,000GWh mandate would result in a renewable energy mix of twenty-eight percent by 2020.¹⁵⁷ In a context where electricity prices were rising at rates that

155. Climate Change Authority, *2014 Renewable Energy Target Review—Report*, 17, <http://www.climatechangeauthority.gov.au/reviews/2014-renewable-energy-target-review/report> (last visited July 18, 2019).

156. *Id.* The 41,000 GWh target was for large-scale generation, with an ancillary but separate target for small-scale generation, combining to fulfill the goal of twenty percent.

157. *Id.*

were politically, socially, and economically unacceptable,¹⁵⁸ the 41,000GWh target was reduced in 2015 to 33,000GWh,¹⁵⁹ which would still reflect a renewable energy mix of approximately 23.5% by 2020.¹⁶⁰ This was more than the twenty percent target originally envisaged by the scheme.

In such a case, the quantum of electricity (i.e. 41,000GWh vs 33,000 GWh) is one indication of the environmental objective, whereas the percentage of renewable energy mix (i.e. twenty percent vs. 23.5%) is another. These differing articulations of the level of environmental protection produce diverging outcomes for whether the respective changes involved a regression. Relatedly, it is unclear whether the focus should be on the level of protection that was originally intended (albeit incorrectly quantified due to deficient modelling), or on the actual level of protection that was quantified and enshrined in legislation. Further, the legislation mandating the renewable energy target was directed at “reduc[ing] emissions of greenhouse gases in the electricity sector.”¹⁶¹ This was part of a wider suite of policies to achieve the overall goal of reducing Australia’s *aggregate* greenhouse gas emissions by 26-28 percent below 2005 levels by 2030.¹⁶² Therefore, the appropriate domestic environmental protection could alternatively be conceived at a higher level of abstraction as the aggregate 26-28 percent target.

The concept underlying non-regression clauses is deceptively simple. It does not self-evidently reveal how to identify and delimit the given environmental protection objective at issue, nor how to account for errors in the design of the measure and unforeseen developments in the science or effectiveness of the measure. Scope exists for legitimate diverging approaches that produce contradictory outcomes, and IIA non-regression clauses are presently ill-equipped to accommodate these nuances. Thus, despite the concept underlying non-regression

158. The renewable energy target was not the sole, nor necessarily the main, reason for which energy prices had increased substantially. *See id.* at 24-27; *see also* Warburton Review (Expert Panel on the Renewable Energy Target Review), *Renewable Energy Target Scheme—Report of the Expert Panel*, ii-iii (2014) (attributing the cost burden of the renewable energy target to around 4 percent of retail electricity prices).

159. *See* Explanatory Memorandum, Renewable Energy (Electricity) Amendment Bill 2015.

160. The Hon. Greg Hunt MP (Minister for the Environment) and The Hon. Ian Macfarlane MP (Minister for Industry and Science), *Certainty and Growth For Renewable Energy Joint Media Release* (Press Release, June 23, 2015).

161. *Renewable Energy (Electricity) Act 2000* (Cth) § 3.

162. Australian Government, *Australia’s Intended Nationally Determined Contribution to a New Climate Change Agreement 2* (UNFCCC NDC Registry, Aug. 2015).

clauses being deceptively simple, their application in practice has the potential to be inflexible and lead to capricious results.

IV. SCOPE, CONTENT, AND APPLICATION OF NON-REGRESSION CLAUSES IN
INTERNATIONAL INVESTMENT AGREEMENTS

We turn now to evaluate how the principle of non-regression from domestic environmental protections is reflected in the text of IIAs. We evaluate the scope, content and application of non-regression clauses by reference to what measures are covered and what conduct is prohibited. Our assessment reveals a wide variety of textual approaches, with significant divergences in the particular environmental measures covered, the character of the obligation as an exhortatory principle or mandatory duty, the precise nature of the impugned regressive conduct, and the circumstances in which the provision applies, such as to specific investors or to investment flows generally. Some non-regression clauses are highly precise. Others are capacious and vague, potentially prohibiting any change—however minor and whatever the reason—to an environmental measure whose effectiveness is reduced. Several iterations evoke the debate surrounding scope and meaning of FET in international investment law, whose vague and untethered drafting in many IIAs subsequently caused significant confusion and consternation amongst some states.¹⁶³ The variety of non-regression clauses, their ambiguity, and potentially expansive scope, create a similar potential for uncertainty, unpredictability, and significant impact in the context of investment treaty disputes (as discussed further in section IV.C), particularly given the failure in many instances to appreciate the complexities of environmental protection and regression identified in section III.E.

A. *Nature of the Obligation: Exhortatory Principle or Binding Rule?*

1. The Continuum from Hard to Soft Law

We have described in subsection III.A how the operative obligation of non-regression in US practice evolved textually over time from “should” to “shall strive” to “shall,” with corresponding evolutions in the extent to which the obligation was subject to binding dispute settlement linked to economic countermeasures. These differences are replicated across IIAs generally. Some early non-regression clauses are limited to expressions of principle in the preamble of an IIA, whereas

163. See, e.g., Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6(3) J. WORLD INV. & TRADE 357, 360, 364 (2005); cf. SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION 303, 306 (2009).

others take the NAFTA approach of “should”-based obligations or the subsequent US approaches of obligations based on “shall strive” or “shall.”¹⁶⁴

The evolution of these approaches aligns, to some degree, with the concept of “legalisation” in international law, based on a continuum from varied forms of “soft law” to “hard law.”¹⁶⁵ In this continuum, hard law refers to norms framed in mandatory terms and with higher precision and oversight by independent adjudication, whereas soft law is framed in aspirational terms, often vague in content, and exempt from adjudicatory procedures.¹⁶⁶ Iterations of the non-regression principle that impose “shall”-based obligations clearly reflect a “hard legal rule” in this schema.¹⁶⁷ Iterations using formulations of “should” or “shall strive” could likewise be characterized as “hortatory, creating at best weak legal obligations,” akin to soft law.¹⁶⁸

2. The Binding Nature of Treaty Provisions: When Should Approximates Shall

However, it would be erroneous to dismiss provisions based on terms such as “should” as “non-binding.”¹⁶⁹ Rather, treaty provisions are binding under international law, pursuant to their terms.¹⁷⁰ The term “should” is capable of connoting not only an aspiration, but also a duty or responsibility, albeit something less prescriptive than “shall.”¹⁷¹ The jurisprudence of both international investment arbitrations and the World Trade Organization (WTO)¹⁷² has led to the interpretation of a

164. See Appendix.

165. Kenneth W. Abbott et al., *The Concept of Legalization*, 54(3) INT'L ORG. 401, 401-03 (2000).

166. *Id.* at 404.

167. *Id.* at 410.

168. *Id.* at 412.

169. See, e.g., Alberto Szekely, *A Commentary on the Softening of International Environmental Law*, 91 AM. SOC'Y OF INT'L L. PROC. 234, 239-40 (1997); Christina L. Beharry & Melinda E. Kuritzky, *Going Green: Managing the Environment through International Investment Arbitration*, 30 AM. U. INT'L L. REV. 383, 395-96 (2015).

170. “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Vienna Convention on the Law of Treaties, *supra* note 49, art. 26.

171. See, e.g., Occidental Expl. & Prod. Co. v. Ecuador, Case No. UN3467, Award, ¶ 70 (London Ct. of Int'l Arb. 2004); Appellate Body Report, *EU—Countervailing Measures on Certain Polythylene Terephthalate From Pakistan*, ¶ 5.112, WTO Doc. WT/DS486/AB/R (adopted May 16, 2018).

172. In this Article, while giving primacy to interpretations and interpretive methods developed in international investment arbitrations, we also consider those developed in the WTO dispute settlement system. We use WTO jurisprudence to shed light on possible interpretive approaches to terms and concepts in non-regression clauses in IIAs for which no precedent or

number of “should”-based provisions as setting out a normative duty to engage in (or refrain from) certain conduct; while recognising that the choice of “should” over “shall” embeds a degree of flexibility in how the duty is applied or followed in a given instance.¹⁷³

For instance, if a state declines to follow the duty on a basis that can be considered legitimate within the framework of the duty itself or the treaty more generally, it may not violate the “should”-based provision. However, if a state has no justification for declining to follow the duty, or if the justification is wholly inconsonant with the duty itself or the object and purpose of the treaty more generally, it could well be found to violate the “should”-based provision. In other words, all else being equal, a state may be bound to abide by the duty reflected in a “should”-based provision.

This understanding of the function of the term “should” is warranted, particularly in iterations of the principle of non-regression

guidance currently exists, whilst careful to adapt it as relevant to different contexts. As a separate body of law, we acknowledge the limitations of WTO jurisprudence. While some investment tribunals have drawn on WTO jurisprudence, others have eschewed it. *See generally* J. ROMESH WEERAMANTRY, *TREATY INTERPRETATION IN INVESTMENT ARBITRATION* 122-23 (2012); TARCISIO GAZZINI, *INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES* 230-32, 309-10 (2016). The use of WTO jurisprudence may be particularly apt where the IIA in question is a PTA that encourages or requires adjudicators in state-state dispute settlement to apply WTO jurisprudence. *See also, e.g.*, Free Trade Agreement between the Republic of Korea and Australia, S. Kor.-Austl., art. 20.5, Apr. 8, 2014 (entered into force Dec. 12, 2014); Free Trade Agreement between the Government of Australia and the Government of the People’s Republic of China, Austl.-China, June 17, 2015 art. 15.9.2. For a discussion of the legal bases for taking WTO jurisprudence into account in an investment arbitration, see Voon, Mitchell & Munro, *supra* note 50.

173. In international investment law, a number of tribunals have interpreted “should”-based provisions as imposing some form of duty or obligation on a state, albeit less forceful than an obligation based on “shall.” *See, e.g.*, Grand River Enters. Six Nations, Ltd. and others v. United States of America, Decision on Objections to Jurisdiction, ¶ 58 (UNCITRAL Arbitration 2006); El Paso v. Argentina, ICSID Case No. ARB/03/15, Jurisdiction, ¶ 106, 110 (Apr. 27, 2006); Occidental Expl. and Prod. Co. v. Ecuador, Case No. UN3467, *supra* note 171, at ¶ 70; Enron v. Argentina, ICSID Case No. ARB/01/3, Jurisdiction, ¶ 65 (Jan. 14, 2004). On the other hand, where the text and context has indicated explicitly that a “should”-based provision is intended to lie outside the framework of the IIA itself, tribunals have construed such provisions as “not creat[ing] a mandatory obligation for the State.” *See* Vincent J. Ryan, Schooner Capital LLC, and Atlantic Inv. Partners LLC v. Poland, ICSID Case No. ARB(AF)/11/3, Award, ¶ 285, 288 (Nov. 24, 2015). With respect to WTO jurisprudence, for instances of “should”-based provisions being construed as imposing some form of duty or obligation, see Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, ¶ 187, WTO Doc. WT/DS70/AB/R (adopted Aug. 2, 1999); Panel Report, *US – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 7.575, WTO Doc. WT/DS406/R (adopted Sept. 2, 2011); Panel Report, *Korea—Import Bans, and Testing and Certification Requirements for Radionuclides*, ¶ 7.429, WTO Doc. WT/DS495/R (adopted Feb. 22, 2018); Panel Report, *Guatemala—Definitive Anti-Dumping Measure of Grey Cement from Mexico*, n. 854, WTO Doc. WT/DS156/R (adopted Oct. 24, 2000).

based on NAFTA, whereby a statement of principle admonishing regressions to encourage investment is followed by language that operationalizes this principle, setting out the particular conduct that “should” not be undertaken. This two-pronged structure involving an initial statement of principle followed by a more specific admonition of certain conduct suggests that the latter is not merely hortatory. If states parties had intended such non-regression clauses to be hortatory, they could have included the initial statement of principle without the additional “should”-based operationalizing language. Some IIAs do take that approach.¹⁷⁴

3. Relevance of Dispute Settlement Linkage

Some IIAs explicitly exempt their “should”-based non-regression clauses from dispute settlement procedures.¹⁷⁵ The very existence of an exemption suggests that the provision is of a nature that could be subject to dispute settlement—i.e. that it otherwise is capable of being operative and imposing an enforceable duty on the parties to the IIA. Conversely, other IIAs appear to subject their “should”-based non-regression clauses to investor-state and state-state dispute settlement.¹⁷⁶ The application of binding dispute settlement procedures to an obligation in international law does not affect the binding nature of the

174. *See, e.g.*, Agreement for the Promotion and Protection of Investment between the Government of the Republic of Austria and the Government of the Kyrgyz Republic, Austria-Kyrg., art. 4, Apr. 22, 2016; Peru-Australia Free Trade Agreement art. 19.3.3, Feb. 12, 2018.

175. *See, e.g.*, Agreement Between the Government of Canada and HKSAR, Can.-H.K., *supra* note 35, art. 20.1; Canada-Korea Free Trade Agreement, *supra* note 35, arts. 8.10, 8.18.

176. *See, e.g.*, 2004 Canada Model Investment Agreement art. 22; Agreement among the Government of Japan, the Government of the Republic of Korea and the Government of the People’s Republic of China for the Promotion, Facilitation and Protection of Investment, art. 23, May 13, 2012 (“should”-based non-regression clause), art. 15.2 (ISDS covering all obligations in the Agreement), art. 15.12 (exempting certain obligations, but not art 23), and art. 17 (state-state dispute settlement covering all aspects of Agreement); Agreement between the Government of the Republic of Colombia and the Government of the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments, Colum.-Turk., art. 11.2, May 13, 2012 (“should” —based non-regression clause), art. 12.2 (coverage of all provisions except arts 3 and 15), and art. 14.1 (covering all provisions); Agreement between the Government of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment, Japan-Kenya, art. 15, Aug. 28, 2016 (“should”-based non-regression clause) and art. 22 (covering all obligations in the Agreement); Comprehensive Economic Partnership Agreement between the Republic of India and the Republic of Korea, India-S. Kor., art. 10.16.2, Aug. 7, 2009 (“should”-based non-regression clause), art. 10.21.1 (covering all obligations in the Investment Chapter), and art. 14.2.1 (covering all aspects of the Agreement).

obligation itself.¹⁷⁷ It can, however, assist in shedding light on the character of non-regressions clauses in international law as aspirational statements or operational duties, particularly those based on terms such as “should.”

The other “soft law” formulation of non-regression clauses commonly used in international investment law is “shall strive.” As with “should”-based iterations, provisions using “shall strive” as their operative obligation have variously been exempt from,¹⁷⁸ and subject to,¹⁷⁹ binding ISDS and state-state dispute settlement procedures. Although they do not presuppose or prescribe any particular outcome, obligations framed as “shall strive” are nonetheless substantive commitments that are capable of being infringed.¹⁸⁰ For instance, if a party to such a commitment engages in conduct that manifestly undermines or subverts the principle of non-regression reflected in such provisions, it cannot be said to have “strived” to abide by that principle.

Increasingly common in recent IIAs, particularly those of major jurisdictions, are non-regression clauses with “shall” as the operative obligation.¹⁸¹ The unqualified use of “shall” is typically understood as the most stringent articulation of an obligation in international law, connoting a mandatory course of conduct.¹⁸² Although some IIAs pair their “shall”-based non-regression clauses with binding dispute settlement linked to economic countermeasures,¹⁸³ others exempt their

177. Rather, the binding character of treaties flows from their nature as legal instruments. *See also* Vienna Convention on the Law of Treaties, *supra* note 49, art. 26 (“every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

178. *See, e.g.*, AUSFTA, *supra* note 97, art. 19.7.5.

179. *See, e.g.*, Agreement Between the Belgium-Luxembourg Economic Union, on the One Hand, and Montenegro, on the Other Hand, on the Reciprocal Promotion and Protection of Investments arts. 5.2, 12, 13, Feb. 16, 2010. Article 5.2 contains the non-regression clause. *Id.* at art. 5.2.

180. *See, e.g.*, Panel Report, *United States—Anti-Dumping and Countervailing Measures on Steel Plate from India*, ¶ 7.113-7.114, WTO Doc. WT/DS206/R (adopted June 28, 2002) (“explore”).

181. *See, e.g.*, Free Trade Agreement between the Government of the People’s Republic of China and the Government of Georgia, China-Geor., art. 9.2, China-Geor., May 13, 2017 (entered into force Jan. 1, 2018); Comprehensive Economic and Trade Agreement between Canada and the European Union art. 24.5.2, Can.-EU, Oct. 30, 2016 (not yet in force but provisionally applied in part) [hereinafter CETA]; EU-Japan Economic Partnership Agreement art. 16.2.2, UE-JAP., July 17, 2018 (not yet in force) [hereinafter EU-Japan Economic Partnership Agreement]; Comprehensive & Progressive Agreement on Trans-Pacific Partnership, *supra* note 58, art. 20.3.6.

182. BRYAN A. GARNER, GARNER’S DICTIONARY OF LEGAL USAGE 952-54 (3rd ed. 2011); *Shall*, BLACK’S LAW DICTIONARY (Bryan A. Gardner ed., 10th ed. 2014); *see also* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 431-32, appendix G (2nd ed. 2007).

183. Comprehensive & Progressive Agreement on Trans-Pacific Partnership, *supra* note 58, art. 20.23.

“shall”-based equivalents from dispute settlement entirely.¹⁸⁴ In between these extremes, the EU pursues an approach whereby its “shall”-based non-regression clauses are overseen by independent adjudicatory bodies whose judgments are neither binding nor linked to economic countermeasures.¹⁸⁵

B. *Which Domestic Environmental Measures Are Covered?*

1. Explicit Definitions of Environmental Laws

Some IIAs explicitly define the scope of environmental measures that are covered by their non-regression clauses. The first such definitions appeared with respect to the non-regression clauses in US PTAs with Singapore, Chile, and Australia, which were all negotiated around 2003–2004.¹⁸⁶ Those non-regression clauses apply to “environmental laws,” defined as follows:

[E]nvironmental law means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through:

- (a) the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;
- (b) the control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto; or
- (c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas, in areas with respect to which a Party exercises sovereignty, sovereign rights, or jurisdiction, but does not

184. *See, e.g.*, Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, Braz.-Eth., art. 24.3, Apr. 11, 2018 (not yet in force); Free Trade Agreement between the EFTA States and the Central American States art. 9.10.4, June 24, 2013 (not yet in force); Free Trade Agreement between Colombia and the Republic of Korea, Colum.-S. Kor., art. 20.2, Feb. 21, 2013 (entered into force July 15, 2016).

185. *See, e.g.*, CETA, *supra* note 181, arts. 24.15, 24.16; EU-Japan Economic Partnership Agreement, *supra* note 181, art. 16.18.

186. This definition was included in art 45 of the NAAEC signed in 1993. However, the NAAEC contains neither investment obligations nor an investment-based non-regression clause, and we therefore do not treat it as an IIA. NAAEC, *supra* note 90, art. 45.

include any statute or regulation, or provision thereof, directly related to worker safety or health.

For the purposes of this Article, the primary purpose of a particular statutory or regulatory provision shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part. A particular provision whose primary purpose is not the protection of the environment or the prevention of a danger to human, animal, or plant life or health is not an environmental law as defined by this Article.¹⁸⁷

Other iterations following this basic structure are found in IIAs involving, *inter alia*, Canada,¹⁸⁸ the EU,¹⁸⁹ and Korea,¹⁹⁰ as well as the recent *Comprehensive & Progressive Agreement for Trans-Pacific Partnership* (CPTPP).¹⁹¹

This type of definition requires the “primary purpose” of the particular provision at issue to be either “the protection of the environment” or “the prevention of a danger to human, animal, or plant life or health.” Identifying the “primary purpose” of a legal instrument or provision involves identifying and characterizing its objective, which would likely be ascertained by reference to the text of the measure, its design, architecture, structure, legislative history, and its operation.¹⁹² This definition is based on the “purpose” rather than the effects of the law.¹⁹³

187. AUSFTA, *supra* note 97, art. 19.9; SGFTA, *supra* note 97, art. 18.9; CLFTA, *supra* note 97, art 19.9.

188. Canada-Korea Free Trade Agreement, *supra* note 35, art 17.17.

189. CETA, *supra* note 181, art 24.1.

190. Korea-United States of America-Free Trade Agreement, Kor.-U.S., art. 20.11, June 30, 2007, 125 Stat. 428 (entered into force Mar. 15, 2012).

191. Comprehensive & Progressive Agreement on Trans-Pacific Partnership, *supra* note 58, art. 20.1.

192. For examples of investment tribunals characterizing domestic law within a particular objective or subject matter in this way. See *Devas v India*, Award, Case No. 2013-09, ¶¶ 354, 357-358, 368-370 (Perm Ct. Arb. 2016) (assessing whether a domestic measure can be characterized as serving an “essential security interest”); *Occidental Expl. and Prod. Co. v. Ecuador*, Case No. UN3467, *supra* note, at ¶¶ 157, 161, 166, 176, 190 (assessing whether a domestic measure can be characterized as a taxation measure). For an articulation of this approach in WTO jurisprudence, see Appellate Body Report, *US—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 385, WTO Doc. WT/DS384/AB/R (adopted June 29, 2012).

193. In that regard, this approach can be distinguished from other provisions in international law whereby a purposive approach based on the regulatory intent, of a measure, or its ‘aims and effects’, have been rejected. See, e.g., Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 5.90-5.93, 5.105-5.116, WTO Doc. WT/

For instance, a tax on coal may have the effect of reducing coal consumption and therefore emissions, but the tax may be primarily directed at raising revenue rather than environmental concerns. In focusing on the “primary” purpose, the definition excludes measures with an ancillary or complementary purpose of environmental protection in tandem with another primary purpose such as promoting energy security.¹⁹⁴ Some iterations also limit the scope of the laws covered to those maintained by central governments, excluding the environmental measures of provincial or regional governments.¹⁹⁵

2. Environmental Measures Covered in the Absence of a Definition

Many other IIAs, however, omit any explicit definition for the measures subject to their non-regression clauses.¹⁹⁶ Further, a diversity of terminology is used to denote the types of measures that are covered. For instance, the formulations based on NAFTA refer to “environmental measures,”¹⁹⁷ whereas the Brazilian Model IIA refers to “environmental

DS400/AB/R (adopted May 22, 2014). For a discussion of the merits of a purposive approach in other contexts in international law, see Heinrik Horn & Petros Mavroidis, *Still Hazy after All These Years: The Interpretation of National Treatment in the GATT/WTO Case-law on Tax Discrimination*, 15 EURO. J. INT'L L. 39, 55-62 (2004).

194. For examples of cases involving measures with multiple objectives, see Panel Report, *US—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 115, WTO Doc. WT/DS406/R (adopted Sept. 2, 2011); Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 325, 331, WTO Doc. WT/DS381/AB/R (adopted May 6, 2012).

195. See, e.g., 2012 US Model IIA, art 12.4, <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>; Canada-Korea Free Trade Agreement, *supra* note 35, Annex 17-B.

196. See, e.g., Agreement between the Government of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment, Jap.-Kenya, art. 15, Aug. 28, 2016 (entered into force Sept. 14, 2017); Agreement between the Slovak Republic and the Islamic Republic of Iran, *supra* note 32, § B, art. 10.1; Agreement between the Swiss Confederation and the United Mexican States on the Promotion and Reciprocal Protection of Investments art. 3, July 10, 1995 (entered into force Mar. 14, 1996); Free Trade Agreement between the Government of the People's Republic of China and the Government of Georgia, China-Geor., art. 9.2, May 13, 2017 (entered into force Jan. 1, 2018).

197. See, e.g., Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, Can.-China, art. 10, Mar. 24, 2013 (entered into force Apr. 17, 2014); Agreement between the Government of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment, *supra* note 196, art. 15; Agreement between the Swiss Confederation and the United Mexican States on the Promotion and Reciprocal Protection of Investments art. 3, July 10, 1995 (entered into force Mar. 14, 1996).

legislation,¹⁹⁸ and the IIA between Korea and China refers to “environmental laws, regulations, policies and practices.”¹⁹⁹

In the absence of explicit definitions, these terms would be interpreted in the usual way according to public international law, particularly because the term “environment” has no consistent or universal meaning in international law.²⁰⁰ Pursuant to Article 31(1) of the VCLT, a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”²⁰¹

The *Lexicon of Environmental Law* contains no definition of “environment,”²⁰² and the *Oxford English Dictionary* defines the term somewhat capaciously as: “[t]he natural world or physical surroundings in general, either as a whole or within a particular geographical area, esp. as affected by human activity.”²⁰³ The *OECD Glossary of Statistical Terms* defines the “environment” as “the totality of all the external conditions affecting the life, development and survival of an organism,”²⁰⁴ and the *System of Environmental-Economic Accounting 2012* developed by the United Nations, IMF, World Bank, and other organizations, states that, “the environment includes all living and non-living components that constitute the biophysical environment, including all types of natural resources and the ecosystems within which they are located.”²⁰⁵ These broad definitions are somewhat unsatisfying in that they could overlay other objectives such as “public health” and “energy security.” A respondent state could therefore seek to reframe an ostensibly

198. Brazil Model IIA, art 16.2.

199. Free Trade Agreement between the Government of the People’s Republic of China and the Government of the Republic of Korea, China-S. Kor., art. 16.5.3, June 1, 2015 (entered into force Dec. 20, 2015).

200. VED P. NANDA & GEORGE PRING, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY FOR THE 21ST CENTURY 5-6 (Nijhoff, 2013); PHILIPPE SANDS ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 13-15 (2012); STUART BELL & DONALD MCGILLIVRAY, ENVIRONMENTAL LAW 7-8 (7th ed. 2008); PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, INTERNATIONAL LAW AND THE ENVIRONMENT 4-5 (3rd ed. 2009).

201. Vienna Convention on the Law of Treaties, *supra* note 49, art 31.1. See also RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 30 (2012).

202. CÉDRIC VIALE, LEXICON OF ENVIRONMENTAL LAW (Brill, 2012).

203. *Environment*, OXFORD ENGLISH DICTIONARY (2d. ed. 1989), <http://www.oed.com.ezp.lib.unimelb.edu.au/view/Entry/161835?rskkey=GyMUmV&result=3&isAdvanced=false#eid>.

204. OECD, *Glossary of Statistical Terms*, definition of “environment” (referencing Glossary of Environment Statistics, Studies in Methods, Series F, No. 67, United Nations, New York, 1997), <https://stats.oecd.org/glossary/detail.asp?ID=813> (accessed Sept. 1, 2018).

205. United Nations, EU, Food and Agriculture Organization of the United Nations, IMF, OECD, *System of Environmental-Economic Accounting 2012 Central Framework* ¶ 2.12 (United Nations, 2014).

“environmental” measure as being directed at another objective. In that regard, it is unclear whether the classification of a measure as “environmental” in non-regression clauses is exclusive or may coexist with other such characterizations. The “primary purpose” test resolves the issue in the explicit definition extracted above in favor of an exclusive approach.

The second element in the undefined terms relates to the category of instruments or actions covered, such as “measures,”²⁰⁶ “legislation,”²⁰⁷ “laws, regulations and standards,”²⁰⁸ and “policies or practices.”²⁰⁹ The term “measures” is the most capacious of these variants, encompassing not only laws, regulations, and other instruments of a state, but also any action or omission that can be attributed to it (including by binding and non-binding measures).²¹⁰ The term “legislation” excludes non-binding instruments and specific actions or omissions by a state, but has otherwise tended to be interpreted broadly as the legal framework in which rules and norms are given binding effect, such as laws, regulations or other binding instruments.²¹¹ Terms such as “standards,” “policies,” and “practices” extend the scope of the measures covered beyond binding instruments to cover non-binding norms of conduct attributable to the state in question.²¹²

206. *See, e.g.*, Agreement between the Government of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment, *supra* note 196, art. 15.

207. *See, e.g.*, Brazil Model IIA, art 16.2; Agreement between the Republic of Guatemala and the Republic of Trinidad and Tobago on the Reciprocal Promotion and Protection of Investments art. 16, Aug. 13, 2013 (entered into force June 23, 2016).

208. *See, e.g.*, Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments, Switz.-Geor., art. 3.3, June 3, 2014 (entered into force Apr. 17, 2015).

209. *See, e.g.*, Free Trade Agreement between the Eurasian Economic Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part art. 12.4.2, May 29, 2015 (entered into force Oct. 5, 2016).

210. *Saluka Investments B.V. v. Czech Republic*, Partial Award, ¶ 459 (UNCITRAL 2006); *Frontier Petroleum Services Ltd. v. Czech Republic*, Final Award, ¶¶ 223-224 (UNCITRAL 2010). *See also* Fisheries Case (Can. v Spain), Judgment, 1998 I.C.J. Rep. 432, ¶ 66 (Dec. 4); Int’l Law Comm’n, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, at 4 (2001), legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

211. *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, ¶¶ 18, 371 (Mar. 8, 2017); Appellate Body Report, *US—Large Civil Aircraft (2nd Complaint)*, ¶ 750, WTO Doc. WT/DS353/AB/R (adopted Mar. 8, 2012).

212. *See, e.g.*, Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, ¶¶ 10.43, 10.45, WTO Doc. WT/DS44/R; Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, ¶¶ 196-97, WTO Doc. WT/DS294/AB/RW; Appellate Body Report, *Argentina—Measures Affecting the Importation of Goods*, ¶ 5.107, WTO Docs.

3. The Varying Scope of Environmental Measures Covered by Non-Regression Clauses

Based on the foregoing discussion, it is apparent that the types of measures covered by non-regression clauses in international investment law vary significantly between IIAs. At one end of the spectrum, non-regression clauses apply to an explicitly-defined set of measures comprising legally-binding instruments (or individual provisions thereof) that are maintained by the central level of government, whose primary purpose is the protection of the environment or the prevention of dangers to health, and which are implemented through either the regulation of toxic and non-toxic pollutants, or the conservation of the natural environment. At the other end of the spectrum, non-regression clauses can apply to any act or omission attributable to a state that has an “environmental” character, potentially extending to any impact on the “natural world or physical surroundings in general.”

Environmental measures that are implemented through non-legal instruments, such as executive policies or moratoria, may not be captured by some non-regression clauses that focus on legally binding instruments.²¹³ Conversely, where an environmental protection objective subsists as a non-binding policy but the implementing mechanism is contained in a legal instrument, the repeal of the implementing mechanism could comprise a regression regardless of whether the environmental protection objective remains unchanged or is implemented through some other means.²¹⁴

Finally, some IIAs exempt taxation, subsidies, or government procurement from their scope.²¹⁵ These represent common tools through which environmental protections are implemented and could narrow

WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R; Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶ 181, WTO Doc. WT/DS350/AB/R; Appellate Body Report, *European Communities and Certain member States—Measures Affecting Trade in Large Civil Aircraft*, ¶ 794, WTO Doc. WT/DS316/AB/R.

213. One example might be the Trump Administration’s reversal of the moratorium on new coal leases on federal land. See Donald Trump, President, U.S., Remarks by President Trump at the Unleashing American Energy Event (June 29, 2017).

214. One example might relate to Australia’s 2020 renewable energy target, wherein the unchanged and unaffected policy of twenty percent renewables by 2020 was a non-binding policy, but the mandated level of electricity from renewables, which was reduced from 41,000 GWh to 33,000 GWh, was contained in legislation. See *supra* Section III.E; see also Explanatory Memorandum, *supra* note 159; *Certainty and Growth for Renewable Energy Joint Media Release*, *supra* note 160 (Press Release, June 23, 2015).

215. See ANDREW NEWCOMBE AND LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 507-508 (2009).

substantially the range of environmental measures that would be subject to non-regression clauses in IIAs.²¹⁶

C. *Impugned Conduct*

In this section, we describe the various courses of conduct by a state that are prohibited by non-regression clauses in international investment law. We show how some non-regression clauses admonish not only regressions from environmental protections that are intended to obtain a competitive advantage, but also regressions directed at protecting other public interests and different environmental values, or that account for unforeseen developments in the operation of the measure or external conditions.

Most—if not all—non-regression clauses in international investment law exhibit a two-part structure. First, the type or nature of interference with a domestic environmental measure is described, such as a “waiver” or “derogation.”²¹⁷ Second, there is a delimitation of the circumstances in which these interferences with domestic environmental measures are proscribed.²¹⁸ For instance, the “waiver” or “derogation” in question may only be impugned if undertaken in order to “encourage” investment. In this section, we expand upon these two facets of the conduct impugned by non-regression clauses in IIAs, demonstrating wide variations in the types of conduct and measures that are legally capable of falling within their ambit.

1. Types of Interference with Domestic Environmental Measures

The types of interferences with domestic environmental protections that are impugned by non-regression clauses vary between “derogations,” “waivers,” “weakenings,” “reductions,” “changes,” “relaxations,” “amendments,” and “repeals.” Whether such interferences necessarily require an adverse impact on the environment depends on the text and possibly the context of the provision in question. At least some non-regression clauses apply to any amendment to environmental legislation regardless of any nexus to adverse impacts on the environment, whereas other non-regression clauses are activated only upon a showing of a weakening or reduction of environmental protections afforded by the law in question. Even where non-regression clauses more clearly

216. See, e.g., OECD, POLICY INSTRUMENTS FOR THE ENVIRONMENT DATABASE 2017, 2 (2017) (“Environmentally related taxes represent about a third of the instruments in the PINE database”); *id.* at 9 (“More than 900 environmentally motivated subsidies in 53 countries”).

217. See, e.g., NAFTA, *supra* note 7, art. 1114(2).

218. See *supra* Section I; see *infra* Section IV.C.2.

require a weakening of an environmental protection, they leave open how to identify that environmental protection and the benchmark against which to assess whether a regression has occurred.

a. Waiver or Derogation: The NAFTA Language

As explained earlier, non-regression clauses in international investment law originate in NAFTA. Many other IIAs replicate the approach and terminology reflected in NAFTA's non-regression clause. Namely an initial statement of principle that is integrated into the operative obligation through a connecting term such as "[a]ccordingly," as well as the use of the terms "waive" and "derogate" to denote the proscribed types of interference with domestic environmental measures. A variation of this approach is found in the IIA between the EU and the Southern African Development Community, which provides: "Recognising that it is inappropriate to encourage trade or investment by weakening or reducing domestic levels of . . . environmental protection, a Party shall not derogate from . . . its environmental and labour laws to this end."²¹⁹ It is important, therefore, to ascertain what is meant by "waive" and "derogate" in this context. The ordinary meaning of "waive" is "[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.); to give up (a right or claim) voluntarily," or "[t]o refrain from insisting on (a strict rule, formality, etc.); to forgo."²²⁰ The ordinary meaning of "derogate" is "to detract"²²¹ or "[t]he partial repeal or abrogation of a law by a later act that limits its scope or impairs its utility and force."²²² Thus, the non-regression clauses using these terms proscribe the voluntary non-application of, or exemption from, an environmental measure ("waive"), as well as the repeal of such a measure or an

219. Economic Partnership Agreement Between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, art. 9.3, June 10, 2016 (not yet in force).

220. *Waive*, BLACK'S LAW DICTIONARY (Bryan A. Gardner ed., 10th ed., 2014). The *Oxford English Dictionary* likewise provides "[t]o relinquish (a right, claim, or contention) either by express declaration or by doing some intentional act which by law is equivalent to this; to decline to avail oneself of (an advantage); to refuse to accept (some provision made in one's favour)" or "To refrain from insisting upon, give up (a privilege, right, claim, etc.); to forbear to claim or demand": see *Waive*, OXFORD ENGLISH DICTIONARY (2d. ed. 1989), <http://www.oed.com.ezp.lib.unimelb.edu.au/view/Entry/225159?rsk=wt7dqe&result=2&isAdvanced=false#eid>.

221. BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 268 (3rd ed. 2011).

222. BLACK'S LAW DICTIONARY, *supra* note 220, at *Derogation*. The *Oxford English Dictionary* likewise provides "[t]o repeal or abrogate in part (a law, sentence, etc.); to destroy or impair the force and effect of; to lessen the extent or authority of" or "To detract from; to lessen, abate, disparage, depreciate." See OXFORD ENGLISH DICTIONARY *supra* note 220, at *Waive*.

amendment that somehow impairs or limits its effectiveness or scope (“derogate”).²²³

b. Describing the Nexus with Environmental Outcomes

Through connecting terms such as “accordingly” or “to this end,” the statement of a principle admonishing the “relaxation” of environmental measures, or the “weakening” or “reduction” of protections afforded in those measures, is imported into the substance of “waive” and “derogate.” In particular, these connecting terms create a nexus between the waiver or derogation in question, and the adverse environmental outcome referenced in the statement of principle. Therefore, if a waiver or derogation has no impact on the environment—for instance, a “partial repeal” of an environmental law that is limited to aspects on consumer protection²²⁴—it would not be captured by these non-regression clauses.

Some IIAs go further, clarifying more precisely the nexus between the “waiver” or “derogation” and the impact on the environment, such as the IIA between China and Georgia:

The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in its environmental laws, regulations, policies and practices. Accordingly, neither Party shall waive or otherwise derogate from such laws, regulations, policies and practices *in a manner that weakens or reduces the protections afforded in those laws, regulations, policies and practices.*²²⁵

A similar clarification is made in the new USMCA non-regression clause.²²⁶ Although such clarifications afford more precise guidance on how to ascertain whether a “waiver” or “derogation” has occurred, we

223. We thus disagree with Vandevelde’s contention that these provisions exclude amendments. “[T]he provision does not address the situation where a host state amends its environmental laws including the situation where the amendment is regarded as weakening the law. Rather the provision is intended to discourage waiving or derogating from a law in force.” VANDELDELDE, *supra* note 36, at 743.

224. For instance, a climate law or policy may impose obligations to refrain from arbitrarily increasing consumer prices. *See, e.g.*, GREG COMBET, MINISTER FOR CLIMATE CHANGE AND ENERGY EFFICIENCY, SECURING A CLEAN ENERGY FUTURE: IMPLEMENTING THE AUSTRALIAN GOVERNMENT’S CLIMATE CHANGE PLAN 11, 17 (2012).

225. Free Trade Agreement between the Government of the People’s Republic of China and the Government of Georgia, China-Geor., art. 9.2, May 13, 2017 (entered into force Jan. 1, 2018).

226. USMCA, *supra* note 10, art. 24.4.3.

recall that the concept of “environmental protection” raises its own difficulties. As illustrated in section III.E, there are often multiple plausible ways of identifying an “environmental protection” in a given instance, which can lead to materially different benchmarks for ascertaining whether a “regression” has occurred. As described earlier, Australia reduced its renewable energy target by 2020 from 41,000 GWh to 33,000 GWh, which would on its face appear to be manifest a “derogation” from the its renewable energy legislation.²²⁷ However, changes in forecast electricity demand meant that this putative “derogation” still represented an *increase* in the intended level of renewable energy from twenty percent of the overall electricity supply to 23.5 percent by 2020. In any case, the overall climate mitigation target of a twenty-six percent reduction by 2030, to which this renewable energy law was intended to contribute, remained unchanged. Thus, despite clarifying that a “waiver” or “derogation” must involve a reduction in the protections afforded by the environmental “law, regulation, policy or practice” in question, this non-regression clause provides no guidance on how to identify the level of protection afforded by that “law, regulation, policy or practice.”

c. Omitting the Nexus Requirement

Other IIAs omit any such nexus to the weakening of an environmental protection—either explicitly or through a connecting term to a statement of principle or through other context²²⁸—from the operative obligation in their non-regression clauses. For instance, the IIA between Guatemala and Trinidad and Tobago provides, “A Contracting Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, domestic environmental legislation as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment.”²²⁹ In such instances, the legal focus is on

227. *See supra* Section II.A.

228. *See, e.g.*, Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation, N.Z.-Taiwan ch. 17, art. 2.3, July 10, 2013, 2013 NZTS 11 [hereinafter New Zealand-Taiwan Agreement]; Agreement between the United Arab Emirates on the one hand, and the Belgian-Luxemburg Economic Union, on the other hand, on the Reciprocal Promotion and Protection of Investments art. 5, Mar. 5, 2004 (entered into force Aug. 12, 2007); Agreement between the Republic of Guatemala and the Republic of Trinidad and Tobago on the Reciprocal Promotion and Protection of Investments art. 16, Aug. 13, 2013 (entered into force June 23, 2016).

229. Agreement between the Republic of Guatemala and the Republic of Trinidad and Tobago on the Reciprocal Promotion and Protection of Investments art. 16, Aug. 13, 2013 (entered into force June 23, 2016).

whether there has been an exemption from, repeal of, or amendment to, an environmental law, as opposed to whether the actual level of environmental protection afforded by the law has been thereby reduced. The conceptual difficulties with respect to the identification of a given “environmental protection” and the appropriate benchmark against which to assess regressions does not arise. Rather, the benchmark is the environmental law itself. Accordingly, returning to the example of Australia’s renewable energy target, the amendment to the law reducing the target from 41,000 GWh to 33,000 GWh by 2020 would clearly manifest as a “derogation.” Questions relating to whether this reduction actually diminished the level of environmental protection that the law was intended to guarantee—namely, due to changes in the forecast demand for electricity, and due to the underlying policy goal of twenty percent renewables remaining unaffected—would not be legally relevant for this kind of non-regression clause.

d. Weakening, Relaxing, or Reducing Environmental Protection

Although the terms “waive” and “derogate” are the most common descriptors of the types of interference with domestic environmental protections that are impugned by non-regression clauses in IIAs, other terminology exists. Some IIAs prohibit the “weakening” or “reduction” of domestic environmental protections.²³⁰ The IIA between the Belgian-Luxembourg Economic Union and the United Arab Emirates provides, “No Contracting Party shall change or relax its domestic environmental legislation to encourage investment, or investment maintenance or the expansion of the investment that shall be made in its territory.”²³¹ The term “relax” in the context of “domestic environmental legislation” would connote “[t]o make less strict or severe; to mitigate, tone down; to make less forceful,” thus conveying something similar to “derogate.”²³² By contrast, the term “change” is neutral and conveys no concomitant sense of impairment or weakening. Rather, “change” would encompass *any* amendment to “domestic environmental legislation” in

230. See, e.g., Free Trade Agreement between the Eurasian Economic Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part art. 12.4.3, May 29, 2015 (entered into force Oct. 5, 2016); Free Trade Agreement Between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, art. 13.7.2, Sept. 16, 2010, 2011 O.J. (L127) [hereinafter EU-South Korea Agreement].

231. Agreement between the United Arab Emirates on the one hand, and the Belgian-Luxembourg Economic Union, on the other hand, on the Reciprocal Promotion and Protection of Investments art. 5, Mar. 5, 2004 (entered into force Aug. 12, 2007).

232. *Relax*, OXFORD ENGLISH DICTIONARY (2d. ed. 1989), <http://www.oed.com.ezp.lib.unimelb.edu.au/view/Entry/161835?rsk=GYMUmV&result=3&isAdvanced=false#eid>.

the circumstances provided for. The Brazilian Model IIA is more explicit in that regard through its express reference to “amendments” or “repeals” (as opposed to “derogations” or “changes”):

The Parties recognize that it is inappropriate to encourage investment by lowering the standards of their labor and environmental legislation or measures of health. Therefore, each Party guarantees it shall not *amend or repeal, nor offer the amendment or repeal* of such legislation to encourage the establishment, maintenance or expansion of an investment in its territory, to the extent that such amendment or repeal involves decreasing their labor, environmental or health standards.²³³

However, unlike the IIA between the Belgian-Luxembourg Economic Union and the United Arab Emirates, the Brazilian Model IIA additionally requires that such amendments or repeals must “decrease their . . . environmental . . . standards.” In that way, it covers similar ground as IIAs using the term “derogate” in connection with a reference to the weakening of environmental protections. However, the Brazilian Model IIA does not include *exemptions* from environmental legislation, and would be unlikely to cover the “waivers” that are included in the iterations referred to above.

2. The Link to Investment

The second aspect of non-regression clauses’ structures sets out the various circumstances in which an interference with a domestic environmental protection is proscribed. A variety of limitations are used in IIAs’ different non-regression clauses to set parameters on when they may be invoked. The concept of “encouraging” investment is routinely used to limit the class of regressions covered, despite being imprecise and broader than the underlying intention to capture incentives designed to obtain a competitive advantage.²³⁴ Such “encouragement” pertains in some cases to all investments regardless of source but is limited in other cases to investments sourced from a specific investor, or from another party to the IIA in question. The term “affecting” offers a far broader legal standard by potentially encompassing any regression that has an effect—regardless of the form or magnitude—on investment.

233. Brazil Model IIA, *supra* note 198, art. 16.2.

234. *See infra* Section IV.C.2(a).

NO RETREAT

a. Encouraging Investment

The original non-regression clause in international investment law, namely that reflected in NAFTA, proscribes regressions only where they act “as an *encouragement* for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.”²³⁵ The formulation “as an *encouragement*” has since been replicated frequently,²³⁶ with “to encourage investment” appearing as a variation in some IIAs,²³⁷ and with the formulation “encourage investment *by relaxing*” appearing in the opening statements of principle in many non-regression clauses.²³⁸

The ordinary meaning of “encourage” is to “incite, induce, instigate; in weaker sense, to recommend, advise,” and to “stimulate (persons or personal efforts) by assistance, reward, or expressions of favour or approval.”²³⁹ A tribunal construing the similar concept of “promot[ing] investment” understood it as referring to a “duty to create the conditions for the flowing of investments by nationals of one State into the

235. NAFTA, *supra* note 7, art. 1114(2) (emphasis added).

236. *See, e.g.*, Agreement between the Swiss Confederation and the United Mexican States on the Promotion and Reciprocal Protection of Investments art. 3, July 10, 1995 (entered into force Mar. 14, 1996); Agreement between Japan and the Republic of Iraq for the Promotion and Protection of Investment, Iraq-Japan, art. 22, June 7, 2012, *Nikokukan Joyakusha*, 1, 11 [hereinafter Japan-Iraq BIT]; Agreement between the Slovak Republic and the Islamic Republic of Iran, *supra* note 32, § B, art. 10.1; Comprehensive Economic Partnership Agreement between Japan and the Republic of India art. 11, Feb. 16, 2011 (entered into force June 30, 2011); Agreement among the Government of Japan, the Government of the Republic of Korea and the Government of the People’s Republic of China for the Promotion, Facilitation and Protection of Investment, art. 23, May 13, 2012.

237. *See, e.g.*, Free Trade Agreement between the Eurasian Economic Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part art. 12.4.3, May 29, 2015 (entered into force Oct. 5, 2016); Free Trade Agreement between the EFTA States and the Central American States art. 12.4.3, June 24, 2013 (not yet in force); EU-South Korea Agreement, *supra* note 230, art. 13.7.2.

238. *See, e.g.*, NAFTA, *supra* note 7, art. 1114(2); Agreement between the Swiss Confederation and the United Mexican States on the Promotion and Reciprocal Protection of Investments art 3, July 10, 1995 (entered into force Mar. 14, 1996); Japan-Iraq BIT, *supra* note 236, art. 22; Agreement between the Slovak Republic and the Islamic Republic of Iran, *supra* note 32, § B art 10.1; Comprehensive Economic Partnership Agreement between the Republic of Korea and the Republic of India art. 10.16.2, Aug. 7, 2009 (entered into force Jan. 1, 2010); Agreement among the Government of Japan, the Government of the Republic of Korea and the Government of the People’s Republic of China for the Promotion, Facilitation and Protection of Investment art.23, May 13, 2012 (entered into force May 17, 2014).

239. *Encourage*, OXFORD ENGLISH DICTIONARY (2d. ed. 1989), <http://www.oed.com.ezp.lib.unimelb.edu.au/view/Entry/61791?rskey=DgSmfg&result=2&isAdvanced=false#eid>.

territory of the other State.”²⁴⁰ The prepositions “as,” “to,” and “by” describe the relationship between the “encouragement” on one hand, and the “derogation,” “waiver,” or other regression, on the other hand. These prepositions suggest that, in order to fall within the scope of the non-regression clause, the regression must be the mechanism through which the “encouragement” is given effect.²⁴¹ For instance, if the regression at issue involves lifting a prohibition on investment in a national reserve, it clearly manifests directly as the mechanism that encourages investment.

In other cases, there may be intermediary steps between the regression at issue and a putative encouragement of investment. For instance, the Trump Administration explained its proposal to repeal the Clean Power Plan in terms of “\$33 billion in avoided compliance costs.”²⁴² It was thus not the regression itself that could be said to encourage investment, but rather, the resulting reduction in compliance costs on business in a sector of the economy.

The more intermediary steps between the regression and the encouragement, the more difficult it may be to demonstrate that the regression is the mechanism through which an “encouragement” is given effect. For instance, as discussed in section II.A, Spain reduced its feed-in tariffs as part of ameliorating a broader economic crisis and avoiding a default on public debt.²⁴³ In such a case, a series of intermediary steps would be required to link that regression to a putative encouragement for investment. The regression was intended to lead to an improvement in public accounts, which was in turn intended to stabilise the economy, which would in turn create more favourable conditions for economic growth and, therefore, stimulate investment. Thus, although it is not difficult to link regressions intended to improve overall economic conditions with a desire to stimulate investment, it is not immediately clear whether this would be enough to show that the regression is “to” encourage investment. In that regard, it is significant that many iterations use the formulation “as *an* encouragement,” indicating that the

240. Philip Morris v. Uruguay, ICSID Case No. ARB/10/7, Award, ¶ 168 (July 2, 2013).

241. See, e.g., Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, ¶ 172, WTO Doc. WT/DS367/AB/R (Nov. 29, 2010) (“The word ‘to’ in adverbial relation with the infinitive verb ‘protect’ indicates a purpose or intention. Thus, it establishes a required link between the measure and the protected interest.”).

242. EPA, *supra* note 1.

243. IMF, Country Report No. 12/202, SPAIN: 2012 ARTICLE IV CONSULTATION 5 (2012); European Commission, *Spain: Memorandum of Understanding on Financial-Sector Policy Conditionality*, ¶ 31 (July 20, 2012), ec.europa.eu/economy_finance/eu_borrower/mou/2012-07-20-spain-mou_en.pdf (last accessed July 19 2018).

regression need not be the only mechanism used to contribute to the encouragement of investment in a given instance. Rather, the use of “*an* encouragement” as opposed to “*the* encouragement” foreshadows that regression could be part of several influences which ultimately lead to a stimulation of investment.

Where there are multiple intermediary steps between the regression and a putative encouragement for investment, evidence that a state subjectively intended the regression to encourage investment would likely be dispositive.²⁴⁴ For instance, the Australian government stated explicitly that the repeal of its emissions trading scheme, which reduced compliance costs on certain businesses, was intended *inter alia* “to get rid of [a] . . . \$15 billion burden on investment.”²⁴⁵ In such a case, it would be difficult for Australia to argue that this regression did not manifest “as an encouragement” for investment. As another example, President Trump explained the purpose of the repeal of the Clean Power Plan in terms of “creat[ing] American jobs and . . . grow[ing] American wealth,” as well as “bringing back our jobs.”²⁴⁶ Absent such evidence of subjective intent, other “objective” evidence concerning the structure and design of the regression and the context surrounding its adoption could also reveal it as an instrument to encourage investment, either directly or indirectly.²⁴⁷

b. Encouraging Investment to Obtain an Advantage

Although the term “encourage” is ubiquitous in non-regression clauses in international investment law, it does not necessarily reflect the most precise drafting or articulation of their intended scope. As described in section III.A, the underlying purpose of the original non-regression clause in NAFTA was to prevent its parties from weakening environmental protections in order to obtain a competitive advantage in attracting investment. The term “encourage,” however, is broader than that purpose. It applies to any stimulation or inducement of investment arising from a regression from environmental protection,

244. Lorand Bartels, *Human Rights, Labour Standards, and Environmental Standards in CETA*, in MEGA-REGIONAL TRADE AGREEMENTS: CETA, TTIP, AND TISA: NEW ORIENTATIONS FOR EU EXTERNAL ECONOMIC RELATIONS 202, 206 (Stefan Griller et al. eds., 2017).

245. See Second Reading Speech, Clean Energy Legislation (Carbon Tax Repeal) Bill 2014 (Cth) (Austl.) [hereinafter Second Reading on Carbon Tax Repeal].

246. Press Release, The White House, *Remarks by President Trump at Signing of Executive Order to Create Energy Independence* (Mar. 28, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-executive-order-create-energy-independence/> [hereinafter Trump Remarks at Signing of Executive Order].

247. BARTELS, *supra* note 244.

regardless of whether the regression was intended to obtain a competitive advantage.²⁴⁸ For instance, we described in section III.D how Australia rescinded the price floor in its emissions trading scheme to link with the EU's scheme. The linking of these schemes was clearly intended to *encourage* investment in each other's carbon market through enabling the purchases and holdings of each other's emissions permits.²⁴⁹ However, this "encouragement" was unrelated to any desire on the part of one state to obtain a competitive advantage in attracting flows of capital or inducing industrial relocation.²⁵⁰

Some non-regression clauses after NAFTA address this gap by more clearly articulating what the inducement must be in order to obtain a competitive advantage. For instance, the non-regression clause in the PTA between the Eurasian Economic Union²⁵¹ and Vietnam uses the formulation "[n]either Party shall seek to *encourage or gain trade or investment advantage* by weakening. . . ."²⁵² The IIA between the EU and the CARIFORUM states²⁵³ similarly provides that "the Parties agree not to encourage . . . foreign direct investment to *enhance or maintain a*

248. See *supra* Section IV.C.2(a); see also Encourage, *supra* note 239.

249. See Second Reading Speech, *Clean Energy Amendment (International Emissions Trading and Other Measures) Bill 2012* (Cth) (Austl.) ("[The carbon price is now] creat[ing] a powerful incentive for all businesses to cut their pollution by investing in clean technology or finding more efficient ways of operating . . . [The linking arrangement] ensures that Australian businesses have access to a broader range of credible, low-cost abatement . . . from a more established market."); see also European Commission Memorandum IP/12/631, FAQ: Linking the Australian and European Union emissions trading systems (Aug. 28, 2012) ("Removing the price floor will simplify the pathway towards full linking, and was an element of the linking package agreed between Australia and the European Commission. By connecting Australian and European carbon markets, linking will ensure a single price for Australian and European carbon units. *This provides investors with long term certainty on the price of carbon pollution*, which largely removes the need for a price floor in the flexible price period.") (emphasis added) [hereinafter European Commission Memo on Emissions Trading Systems].

250. See European Commission Memo on Emissions Trading Systems, *supra* note 249; *Linking and Australian Liable Entities*, DEP'T OF CLIMATE CHANGE AND ENERGY EFFICIENCY, (full text on file with the authors).

251. The Eurasian Economic Union includes Russia, Kazakhstan Kyrgyzstan, Belarus, and Armenia.

252. Free Trade Agreement between the Eurasian Economic Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part, art. 12.4.3, May 29, 2015 (entered into force Oct. 5, 2016) (emphasis added).

253. The CARIFORUM States party to this IIA include Antigua and Barbuda, the Bahamas, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St Christopher and Nevis, St Lucia, St Vincent and the Grenadines, Suriname, and Trinidad and Tobago. Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community, of the other part, Oct. 15, 2008, 2008 O.J. (L289) (emphasis added) [hereinafter Economic Partnership Agreement].

competitive advantage by lowering. . . .”²⁵⁴ Other IIAs use the formulation “with the *sole intention to encourage* investment,”²⁵⁵ which presumably narrows the scope of regressions covered to those that are exclusively and directly intended to induce investment, such as removing an investment ban on offshore oil drilling.²⁵⁶ The Chairman’s proposed text for a non-regression clause in the Multilateral Agreement on Investment included the “interpretive note” that “[t]he Parties recognise that governments must have the flexibility to adjust their overall . . . environmental . . . standards over time for public policy reasons other than attracting foreign investment.”²⁵⁷ Absent these textual clarifications, the term “encourage” could well cover regressions that remedy unanticipated economic or environmental harm, or that account for other unforeseen circumstances, but which are ultimately designed to improve economic circumstances and thereby stimulate investment.

c. Encouraging a Particular Investment or Investment from a Party

Some non-regression clauses appear to further delimit the circumstances covered by requiring that the “encouragement” made by a regression be specific to a particular investment. For instance, the Chairman’s proposed text for a non-regression clause in the Multilateral Agreement on Investment referred to “an encouragement to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition *of an investment of an investor*,”²⁵⁸ which the Chairman intended to be “limited to domestic measures and the circumstances *of a particular investment*.”²⁵⁹ By contrast, other IIAs refer unambiguously to investment flows generally, such as “an encouragement for the establishment, acquisition or expansion *of investments in its territory*”²⁶⁰ or “to encourage *investment from another*

254. *Id.* art. 188.1.

255. Free Trade Agreement between the EFTA States and the Central American States art. 9.10.4, June 24, 2013 (not yet in force); Free Trade Agreement between the EFTA States and the Republic of Albania art. 34.2, Dec. 17, 2009, <https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/Albania/EFTA-Albania-Free-Trade-Agreement.pdf>.

256. *See, e.g.*, Press Release, U.S. Dep’t of the Interior, Secretary Zinke Announces Plan for Unleashing America’s Offshore Oil and Gas Potential (Jan. 4, 2018).

257. OECD, CHAIRMAN’S NOTE ON ENVIRONMENT AND RELATED MATTERS AND ON LABOUR, DAF/MAI(98)10, (Mar. 9, 1998).

258. *Id.* at 2 (emphasis added).

259. *Id.* at 6 (emphasis added).

260. *See, e.g.*, Agreement among the Government of Japan, the Government of the Republic of Korea and the Government of the People’s Republic of China for the Promotion, Facilitation and Protection of Investment art. 23, May 13, 2012.

Party.”²⁶¹ Especially when read against these broader formulations, the textual reference to “*an* investment of *an* investor” could suggest that the encouragement must be made to a particular investor with respect to an identifiable investment.²⁶² However, the use of the article adjective “an” does not inevitably denote a specifically-identifiable investment. Rather, it could also refer to “an” investment in the sense of one of a generalised class.²⁶³

Therefore, the context in which this phrase subsists could be determinative in ascertaining whether it should be read as limiting an encouragement to specific investments or, alternatively, as applying to “an investment” in a general, non-specific sense. For instance, despite using this formulation, NAFTA also specifies that its non-regression clause applies, somewhat exceptionally, to “*all investments* in the territory of the Party.”²⁶⁴ Additionally, the introductory statement of principle in its non-regression clause indicates that “it is inappropriate to *encourage investment*” generally, and its operative obligation applies not only to existing investments but also to the “establishment” of investments—that is, possible future investments that do not yet exist. These elements of context suggest that it may be erroneous to read “of *an* investment of *an* investor” as narrowing the scope of NAFTA’s non-regression clause to instances where an encouragement is made only with respect to a specific, identifiable investment.²⁶⁵

Some IIAs limit their non-regression clauses to encouragements of flows of capital from the other States parties. For instance, the non-regression clause in the new USMCA applies only to “investment *between the Parties*.”²⁶⁶ Such a limitation would appear to evince an intention that the non-regression clause is concerned only with undue industrial relocation or other capital flows out of one State party and into

261. Free Trade Agreement between the EFTA States and the Central American States art. 9.4.2, June 24, 2013 (not yet in force).

262. *An*, OXFORD ENGLISH DICTIONARY (2d. ed. 1989), <http://www.oed.com.ezp.lib.unimelb.edu.au/view/Entry/4?rskey=AMakno&result=3&isAdvanced=false#eid>. In a more definite sense: one, a certain, a particular; the same, one and the same. Now chiefly in a time (see time n. 18a) and in phrases after at, of, to, etc.”

263. *Id.* “Used in an indefinite noun phrase referring to something not specifically identified (and, frequently, mentioned for the first time) but treated as one of a class: one, some, any (the oneness, or indefiniteness, being implied rather than asserted).”

264. NAFTA, *supra* note 7, art. 1101(1)(c) (emphasis added).

265. We would therefore cast doubt over Vandeveldel’s view that this provision is capable of applying only with respect to “particular investors or investments” as opposed to “creat[ing] a more attractive investment environment” generally. VANDEVELDE, *supra* note 36, at 743.

266. *See* USMCA, *supra* note 10, art. 24.4.3; *see also* Free Trade Agreement between the EFTA States and the Central American States art. 9.4.2, June 24, 2013 (not yet in force).

another. However, such an approach leaves room for a state party to regress from its environmental protections in order to encourage investment from *other* jurisdictions. This could disadvantage existing investments within that state party that are owned by investors of another state party to the IIA. This is because the host state would be prohibited by the IIA's non-regression clause from offering the benefits of a regression from its environmental protection to investors of another state party, which in turn means investors would not be able to access the benefits of the regression vis-à-vis investors of non-state-parties.²⁶⁷ Thus, other IIAs make clear that their non-regression clauses can be violated regardless of the source of capital that is encouraged through a regression from environmental protections. For instance, the IIA between Japan and Iraq applies to "investments in its Area by investors of the other Contracting Party and of a non-Contracting Party."²⁶⁸

These two constraints on the focus of the "encouragement" at issue, namely that it be directed towards a specific investment or towards investment flows from another party to the IIA, are especially significant for the scope of the non-regression clauses in which they subsist. By requiring a nexus to a specific investment or jurisdiction from which the capital must originate, such constraints would likely exclude regressions that are designed to improve the climate for investment generally.

For instance, the repeal of Australia's emissions trading scheme was explicitly intended "to get rid of [a] ... \$15 billion burden on investment" by reducing compliance costs.²⁶⁹ However, the scheme had applied in a relatively non-discriminatory way to any facility emitting above a certain threshold of greenhouse gas; its repeal was not focused on stimulating investment from any particular jurisdiction or on inducing a specific investor to make or expand an investment.²⁷⁰ Likewise, the respective derogations from the subsidies, targets and price supports for renewable energy by Spain and the Czech Republic that are described in section II were all ultimately directed at improving conditions for economic growth and investment. They were not undertaken with a view to inducing investment from a particular source or investor.

The Trump Administration's repeal of the Clean Power Plan, by contrast, was intended explicitly to improve conditions for coal producers,

267. VANDEVELDE, *supra* note 36, at 391-92, 744.

268. Japan-Iraq BIT, *supra* note 236, art. 22 (emphasis added).

269. *See* Second Reading on Carbon Tax Repeal, *supra* note 245.

270. *See generally* COMMONWEALTH OF AUSTRALIA, SECURING A CLEAN ENERGY FUTURE: THE AUSTRALIAN GOVERNMENT'S CLIMATE CHANGE PLAN 104 (2011).

and could thus be considered as an encouragement to a specific set of investors.²⁷¹ The Trump Administration's reversal of moratoria on offshore oil drilling and leasing of federal land for coal production could likewise be considered sufficiently specific, especially if only a limited set of investors could plausibly exploit those investment opportunities.²⁷² However, none of the examples we have surveyed in this Article are facially targeted at inducing investment from a particular jurisdiction. This suggests that requiring the encouragement for investment must be "between the parties" presents an unusually high burden in practice.

d. Affecting Investment

As an alternative method of delimiting the circumstances in which an interference with a domestic environmental protection is proscribed, some IIAs use the term "affecting" in lieu of "encouraging." For instance, the IIA between New Zealand and Chinese Taipei provides:

3. The Parties recognise the importance of mutually supportive trade and environment policies and practices that support efforts to improve environmental protection, promote sustainable management of natural resources and enhance trade between the Parties. Accordingly:

(a) each Party shall not weaken, derogate from . . . its environmental laws, regulations and policies *in a manner affecting trade or investment between the Parties*. . . .²⁷³

The term "affecting" is significantly broader in scope than "encouraging." In particular, the impact of a regression on investment need not be limited to an inducement to establish, expand, or retain investments. It could also conceivably include *any* effect of a regression by one state party on an investment in its territory of an investor of another state party. This is because the ordinary meaning of the term "affecting" refers to anything that has "an effect on" investment.²⁷⁴ An arbitral panel interpreting "affecting" in a similar provision concluded that evidence of actual trade effects was not required in order to

271. Trump Remarks at Signing of Executive Order, *supra* note 246.

272. *See, e.g.*, Remarks on Efforts to Promote Domestic Energy Production, *supra* note 213.

273. New Zealand-Taiwan Agreement, *supra* note 228, ch. 17, art. 2.3 (emphasis added).

274. WTO, Panel Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, para. 220, WTO Doc. WT/DS27/AB/R (Sept. 9, 1997).

demonstrate that a measure was “affecting trade,”²⁷⁵ but that the context of the term suggested that evidence of some modification in actual or potential conditions of competition would be required.²⁷⁶ Such an approach may be slightly stricter than “any effect on” investment, but would nonetheless present a relatively low bar.

The United States has also used the term “affecting” in the non-regression clauses in a number of its more recent IIAs, albeit retaining the term “to encourage” in their opening statement of principle.²⁷⁷ In such instances, it is unclear what interpretive role could be played by the concept of “encouragement.” On the one hand, it could be argued that the “effect” on investment must involve some form of encouragement. On the other hand, the negotiating parties patently chose “affecting” instead of “encouraging” in the operative obligation of the non-regression clause, and hence to embed the concept of “encouragement” within the term “affecting” it would render that drafting choice inutile. In support of the latter position, an arbitral panel construing the term “affecting” in a similar provision in the context of labour protections made no reference to contextual elements referencing the concept of “encouragement.”²⁷⁸

D. Other Treaty Provisions as Relevant Interpretative Context

In many IIAs, their non-regression clause represents their only aspect relating to the environment.²⁷⁹ As such, no other contextual or purposive elements would appear to shed no directly definitive light on the interpretation of these non-regression clauses. Some IIAs include other

275. *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR: Final Report of the Panel*, INT’L TRADE ADMIN. ¶ 177 (June 14, 2017), [https://www.trade.gov/industry/tas/Guatemala%20%20E2%80%93%20Obligations%20Under%20Article%2016-2-1\(a\)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf](https://www.trade.gov/industry/tas/Guatemala%20%20E2%80%93%20Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf) [hereinafter Final Report of Article 16.2.1(a) Panel].

276. *Id.* ¶¶ 165, 175, 190.

277. Korea-United States of America-Free Trade Agreement, Kor.-U.S., art. 20.3.2, June 30, 2007, 125 Stat. 428 (entered into force Mar. 15, 2012); Trade Promotion Agreement, Colom.-U.S., art. 18.3.2, Nov. 22, 2006, <https://ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text> [hereinafter Colombia-U.S. FTA].

278. See the absence of any reference to “encourage”—despite the inclusion of this concept in the related provision of Article 16,2,2 – in Final Report of Article 16.2.1(a) Panel, *supra* note 275, art. 16.2.2.

279. *See, e.g.*, Agreement between the Swiss Confederation and the United Mexican States on the Promotion and Reciprocal Protection of Investments art. 3, July 10, 1995 (entered into force Mar. 14, 1996); Japan-Iraq BIT, *supra* note 236, art. 22; Agreement between the Republic of Guatemala and the Republic of Trinidad and Tobago on the Reciprocal Promotion and Protection of Investments art. 16, Aug. 13, 2013 (entered into force June 23, 2016).

elements that address, at least in part, the same subject matter as non-regression clauses. In general terms, these relevant contextual elements fall into one of two categories: (i) provisions recognising a right to regulate or a right to set levels of environmental protection; and (ii) provisions on maintaining, improving or not weakening environmental protection.²⁸⁰ We discuss each in turn.

1. Right to Regulate or Establish Levels of Environmental Protection

Perhaps the most pertinent aspect of context—or at least the aspect most in tension with a non-regression clause—is the inclusion in some IIAs of a provision (often entitled “Right to Regulate”) that enshrines a party’s “sovereign right . . . to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt or modify its environmental laws and policies accordingly.”²⁸¹ A “sovereign right” to “modify” environmental laws and “establish” their levels of protection could encompass not only increases in these levels, but decreases as well. Such a right is inconsonant with the prohibition in non-regression clauses against decreases in levels of environmental protection and derogations from environmental laws. In view of that tension, a key question is how such a “sovereign right” affects the interpretation and practical operation of non-regression clauses.

The principle of effectiveness in treaty interpretation is the primary tool for resolving these kinds of tensions. That principle is founded on the proposition that it would make no sense for drafters to include provisions that contradict one another, or to include some provisions that are effectively redundant due to the practical application of other provisions.²⁸² Accordingly, this principle stipulates that interpretations that would render other provisions void of meaning, or that would lead to a conflict with other aspects of the treaty, should be avoided.²⁸³ Rather,

280. See *infra* Section IV.D.1, IV.D.2.

281. See, e.g., Comprehensive and Progressive Agreement for Trans-Pacific Partnership, *supra* note 58, art. 20.3.2; CETA, *supra* note 181, art. 24.3; Agreement Between the Slovak Republic and the Islamic Republic, *supra* note 32, § B art. 10.2; Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, art. 9.1, June 10, 2016 (not yet in force); Comprehensive Economic Partnership Agreement between Japan and the Republic of India art. 8, Feb. 16, 2011 (entered into force June 30, 2011).

282. ISABELLE VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY 285-287 (2009); J. ROMESH WEERAMANTRY, TREATY INTERPRETATION IN INVESTMENT ARBITRATION 66-70 (2012).

283. GRAHAM COOK, A DIGEST OF WTO JURISPRUDENCE ON PUBLIC INTERNATIONAL LAW CONCEPTS AND PRINCIPLES 282 (2015); WEERAMANTRY, *supra* note 282, at 145.

in interpreting a treaty, it should be presumed that provisions are cumulative and complementary.²⁸⁴

Accordingly, non-regression clauses and their textual “sovereign rights” to set levels of environmental protection can be read harmoniously by construing such “sovereign rights” as contingent upon not regressing from levels of protection as a means of encouraging investment. While this would curtail the “sovereign right” to some extent, it would represent the only reading that affords both provisions meaning. On such a reading, the “sovereign right” to increase levels of protection would persist, as would the “sovereign right” to decrease levels of protection and regress from environmental laws in circumstances not covered by the non-regression clause, such as where such regressions do not encourage investment. An alternative reading whereby the “sovereign right” is posited as absolute and unconstrained by the non-regression clause would deprive the latter of any practical meaning. Indeed, Canada and the EU clarified in a joint interpretative statement that the “sovereign right” to set levels of environmental protection does not override their “agree[ment] not to lower levels of environmental protection in order to encourage trade or investment.”²⁸⁵

Other IIAs, however, include seemingly opposite clarifications on the relationship between these two provisions. For instance, both the CPTPP and USMCA include the principle that “[t]he Parties recognise the sovereign right of each Party to establish its own levels of domestic environmental protection,” and with the subsequent clarification in their non-regression clauses that, “[w]ithout prejudice to paragraph 2, the Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from. . . .”²⁸⁶ On its face, the term “without prejudice” conveys that the non-regression clause “in no way harms or cancels the legal rights or privileges of a party” provided in paragraph 2, namely the “sovereign right” to set levels of protection (including modifications both upwards and downwards).²⁸⁷ Because this interpretation would render the non-regression clause meaningless, it may be possible to argue that the qualification “without prejudice” applies only to the first sentence of the provision, leaving the operative obligation in the

284. VAN DAMME, *supra* note 282, at 285-87; WEERAMANTRY, *supra* note 282, at 66-70.

285. CETA, *supra* note 181, art. 8.

286. Comprehensive and Progressive Agreement for Trans-Pacific Partnership, *supra* note 58, art. 20.3.6 (emphasis added); USMCA, *supra* note 10, art. 24.4.3 (referring to “Without prejudice to Article 24.3.1” in view of the different placement of the “right to regulate” paragraph).

287. BRYAN A. GARNER, GARNER’S DICTIONARY OF LEGAL USAGE 949 (3rd ed. 2011) (“without prejudice”).

second sentence unqualified. However, this would be a strained interpretation, negated by the connector “[a]ccordingly” at the beginning of the second sentence.

2. Obligations to Establish or Improve Environmental Protections

A second aspect of relevant context in some IIAs is a provision on maintaining appropriate (or high) levels of environmental protection, and seeking to improve those protections. For instance, the IIA between the EFTA States and Central American States provides:

2. Each Party shall seek to ensure that its laws, policies and practices provide for and encourage high levels of environmental and labour protection, appropriate to its social, environmental and economic conditions and consistent with the internationally recognised standards, principles and agreements referred to in Articles 9.5 and 9.6, and shall strive to improve the levels of protection provided for in those laws and policies.²⁸⁸

Provisions covering similar ground are found in IIAs between China and Korea,²⁸⁹ Iran and Slovakia,²⁹⁰ the United States and Colombia,²⁹¹ and the EU and Canada.²⁹² The IIA between Japan and India requires its parties to “ensure that its laws and regulations provide for adequate levels of environmental protection.”²⁹³ The significance of these kinds of provisions lies in their reinforcement of the view that the “sovereign right” to set levels of environmental protection is not unfettered (unless, of course, the text indicates otherwise). Rather, these kinds of provisions place limited caveats on a State’s right to set its levels of environmental protection. They present an overall picture in which non-regression clauses establish the floor beyond which levels of environmental protection should not fall, with these other elements exhorting the parties to pursue higher and improved levels of protection.

288. Free Trade Agreement between the EFTA States and the Central American States art. 9.3.4, June 24, 2013 (not yet in force).

289. Free Trade Agreement between the Government of the People’s Republic of China and the Government of the Republic of Korea art. 16.3.2, June 2, 2015 (entered into force Dec. 20, 2015).

290. Agreement between the Slovak Republic and the Islamic Republic of Iran, *supra* note 32, § B, art. 10.2.

291. Colombia-U.S. FTA, *supra* note 277, art. 18.1.

292. CETA, *supra* note 181, art 24.3.

293. Comprehensive Economic Partnership Agreement between Japan and the Republic of India art. 8.1, Feb. 16, 2011 (entered into force June 30, 2011).

V. CONCLUSION

The relatively fast and broad dissemination of non-regression clauses in IIAs provides one example of how state practice with respect to such treaties can evolve, as well as the difficulty of predicting how the inclusion of particular language or clauses may affect a state's rights and obligations. While the existence of non-regression clauses has become commonplace, and many follow similar drafting patterns, wide variation exists in the particular wording used and consequently in the implications of these clauses for achieving their environmental objectives without unnecessarily compromising host state regulatory autonomy. The origins and rationales for these clauses, which were initially derived from NAFTA, have now splintered into a whole range of other approaches by other states, including a separate EU approach. The frequency of such clauses in IIAs demonstrates that their inclusion rests not only on the dominance of parties such as the United States and the EU but also on factors of acculturation and socialization.

While the notion that a state should not reduce the level of protections it offers to the environment to promote investment seems simple, its operationalisation is anything but. Complexities arise even in understanding concepts as fundamental to non-regression clauses as environmental protection and regression. The varying motivations for changing or reducing a particular environmental measure include not only reducing compliance costs for business but also more policy-oriented reasons such as protecting other environmental interests or other public interests or addressing unforeseen consequences of the existing measure. Such motivations and measurements of the levels of environmental protection and regression are further complicated by real-world developments, including economic or social emergencies or scientific advances in predicting environmental impacts. Existing non-regression clauses do not fully address the variety of motivations that a host state may have in altering its environmental measures or the different quantitative and qualitative aspects that may be incorporated in an environmental objective or a mechanism to pursue that objective. The imprecision of many clauses creates a risk of creating host State liability without a sufficient basis in environmental harm from a particular regulatory change.

In drafting a new IIA, a state may be under the impression that a non-regression clause provides a means of signalling the importance of environmental protection without increasing its risk of liability, particularly if the obligation not to regress is framed as "should" or "shall strive" rather than "shall," and if the clause is not subject to ISDS or state-state dispute settlement. This impression is likely to be strengthened by the popularity

of non-regression clauses in the practice of not only powerful entities such as the EU and the United States, but also more than 130 countries of different geographic and economic backgrounds around the world. Yet even an obligation that does not appear “binding” on its face can create expectations, at the international legal level, of host state conduct; and the exclusion of such a clause from dispute settlement does not prevent its use as interpretative context in, delineating the degree of policy space a host State has under the FET obligation. Therefore, potential exists not only for direct claims of violation of non-regression clauses, but also for indirect reliance on such clauses in supporting claims of other treaty breaches. The potential these eventualities is further increased by the recent use among various countries of approaches to environmental regulation that might be seen as regressive.

Although the purpose of preventing environmental degradation and lowering of environmental standards cannot be questioned, the role of non-regression clauses in achieving that purpose requires refinement in treaty drafting. Greater precision is needed to be able to distinguish—or at least to understand the States’ intentions as regards the distinction between—changes in environmental regulation that do not hinder their underlying environmental objective and those that do. For example, an IIA that does not link the non-regression clause to environmental outcomes may unintentionally capture regulatory behaviour that does not reduce environmental protection in practice. An IIA that focuses on the legal form of environmental protections rather than their operation in practice may be at once over-inclusive and under-inclusive. The relationship between the non-regression clause and the encouragement of investment—which provides the basis for including such a clause in an IIA—is also vague, and even broader in those IIAs that refer to regressions that ‘affect’ investment. Conversely, IIAs that link regression to encouragement of a particular investment or investment from a party to the IIA may constrain the concept of encouragement to the point that it undermines the underlying intention of non-regression.

Further care is required in the drafting of non-regression clauses to both prevent these seemingly benign provisions from becoming unduly burdensome on host states as they attempt to regulate to protect the environment in good faith, and create a closer link between the concept of non-regression and the environmental objectives underlying it. A failure to pay greater attention to the wording of these clauses risks allowing them to become another unexpected means of increasing host state liability under the already maligned investment regime, without any corresponding benefit to the environment or the economy.

NO RETREAT

APPENDIX

Recent non-regression clauses by country²⁹⁴

Country	Recent non-regression clause	Nature of provision	Applicability of dispute settlement
Albania	FTA with EFTA (protocol signed 2015)	“shall”	Exempt from state-state dispute settlement
Angola	IIA with SADC (signed 2006)	“shall”	Not exempt from investor state dispute settlement; not exempt from state-state dispute settlement
Antigua & Barbuda	FTA with EU (signed 2008)	“agree to”	State-state dispute settlement without binding outcome/sanctions

294. This Appendix is based on data as of January 2019. There may be more recent cases of states subscribing to non-regression clauses. We have sought to identify the most recent non-regression clause that a state has included in an IIA. We do not claim this to be a comprehensive list, and it is possible that a state may have concluded a more recent IIA containing a non-regression clause—for instance, an IIA that has been signed but whose text is not yet public, or which has not been included on relevant databases. Our methodology was to utilize the search tools on the UNCTAD Investment Policy Hub (see <http://investmentpolicyhub.unctad.org/>), as well as the databases of SICE, see *Trade Agreements in Force*, SICE FOREIGN TRADE INFO. SYS., http://www.sice.oas.org/agreements_e.asp (last visited July 8, 2019) and the WTO, see *Regional Trade Agreements Database*, WORLD TRADE ORG., <https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (last updated June 24, 2019). We also cross-checked against the IIA databases of individual negotiating parties, such as the EU, EFTA, the US, Japan, China, and Canada. While this table covers recent non-regression clauses concluded by states, it does not measure the density of a given state’s non-regression clauses (that is, how frequently it has subscribed to such provisions). Further, the fact that a state may have subscribed to a “should”-based non-regression clause in its most recent IIA does not preclude the possibility that it has previously subscribed to more stringent “shall”-based provisions in earlier IIAs with other negotiating partners.

CONTINUED			
Country	Recent non-regression clause	Nature of provision	Applicability of dispute settlement
Armenia	Partnership Agreement with EU (signed 2017)	“shall”	State-state dispute settlement without binding outcome/sanctions
Australia	CP-TPP (signed 2018)	“shall”	State-state dispute settlement; economic sanctions
Bahamas	FTA with EU (signed 2008)	“agree to”	State-state dispute settlement without binding outcome/sanctions
Bahrain	IIA with Belgian-Luxembourg Economic Union (signed 2006)	“shall strive”	Not exempt from ISDS; not exempt from state-state dispute settlement
Bangladesh	IIA with Turkey (signed 2012)	“shall”	Not exempt from ISDS; not exempt from state-state dispute settlement
Barbados	IIA with Belgian-Luxembourg Economic Union (signed 2009)	“shall strive”	Not exempt from ISDS; not exempt from state-state dispute settlement
Belarus	FTA with Vietnam (signed 2015; Eurasian Economic Union)	“shall”	Exempt from state-state dispute settlement

NO RETREAT

CONTINUED			
Country	Recent non-regression clause	Nature of provision	Applicability of dispute settlement
Belize	FTA with EU (signed 2008)	“agree to”	State-state dispute settlement without binding outcome/ sanctions
Benin	IIA with Canada (signed 2013)	“should”	Exempt from ISDS; not exempt from state-state dispute settlement
Bosnia & Herzegovina	FTA with EFTA (signed 2013)	“shall”	Exempt from state-state dispute settlement
Botswana	FTA with EU (signed 2016)	“shall”	Not exempt from state-state dispute settlement
Brazil	IIA with Suriname (signed 2018)	“shall”	Exempt from state-state dispute settlement
Brunei	CP-TPP (signed 2018)	“shall”	State-state dispute settlement; economic sanctions
Burkina Faso	IIA with Canada (signed 2015)	“should”	Exempt from ISDS; not exempt from state-state dispute settlement
Cambodia	IIA with Japan (signed 2007)	“should”	Not exempt from ISDS; not exempt from state-state dispute settlement

CONTINUED			
Country	Recent non-regression clause	Nature of provision	Applicability of dispute settlement
Cameroon	IIA with Canada (signed 2014)	“should”	Exempt from ISDS; not exempt from state-state dispute settlement
Canada	CP-TPP (signed 2018)	“shall”	State-state dispute settlement; economic sanctions
Chile	CP-TPP (signed 2018)	“shall”	State-state dispute settlement; economic sanctions
China	FTA with Georgia (signed 2017)	“shall”	Exempt from state-state dispute settlement
China – Hong Kong	FTA with Georgia (signed 2018)	“shall”	Exempt from state-state dispute settlement
Colombia	FTA with Korea (signed 2013)	“shall”	Exempt from state-state dispute settlement
Congo, Democratic Republic	IIA with SADC (signed 2006)	“shall”	Not exempt from ISDS; not exempt from state-state dispute settlement
Costa Rica	FTA with EFTA (signed 2013)	“shall”	Exempt from state-state dispute settlement

NO RETREAT

CONTINUED

Country	Recent non-regression clause	Nature of provision	Applicability of dispute settlement
Dominica	FTA with EU (signed 2008)	“agree to”	State-state dispute settlement without binding outcome/ sanctions
Dominican Republic	FTA with EU (signed 2008)	“agree to”	State-state dispute settlement without binding outcome/ sanctions
Ecuador	FTA with EFTA (signed 2018)	“should” (art 4.6) “shall” (art 8.4)	“shall” exempt from state-state dispute settlement; “should” not exempt from state-state
Egypt	FTA with EFTA (signed 2007)	“recognize inappropriate”	Not applicable
El Salvador	FTA with EU (signed 2012)	“shall”	State-state dispute settlement without binding outcome/ sanctions
Ethiopia	IIA with Brazil (signed 2018)	“shall”	Exempt from State-state dispute settlement (art 24)
European Union	FTA with Japan (signed 2018)	“shall”	State-state dispute settlement without binding outcome/ sanctions
Gambia	IIA with Turkey (signed 2013)	preambular recital	Not applicable

CONTINUED			
Country	Recent non-regression clause	Nature of provision	Applicability of dispute settlement
Georgia	FTA with China (signed 2017)	“shall”	Exempt from state-state dispute settlement
Grenada	FTA with EU (signed 2008)	“agree to”	State-state dispute settlement without binding outcome/ sanctions
Guatemala	IIA with Trinidad and Tobago (signed 2013)	“shall”	Not exempt from ISDS; not exempt from state-state dispute settlement
Guinea	IIA with Canada (signed 2015)	“should”	Exempt from ISDS; not exempt from state-state dispute settlement
Guyana	FTA with EU (signed 2008)	“agree to”	State-state dispute settlement without binding outcome/ sanctions
Haiti	FTA with EU (signed 2008)	“agree to”	State-state dispute settlement without binding outcome/ sanctions

NO RETREAT

CONTINUED			
Country	Recent non-regression clause	Nature of provision	Applicability of dispute settlement
Honduras	FTA and environmental side agreement with Canada (signed 2013)	“should” (FTA); “shall” (side agreement)	“should” exempt from ISDS; not exempt from state-state dispute settlement with economic sanctions; “shall” covered by state-state dispute settlement without binding outcome/sanctions
Iceland	FTA with Ecuador (EFTA) (signed 2018)	“should” (art 4.6) “shall” (art 8.4)	“shall” exempt from state-state dispute settlement; “should” not exempt from state-state
India	FTA with Japan (signed 2011)	“should”	Not exempt from ISDS; not exempt from state-state dispute settlement
Iran	IIA with Slovakia (signed 2016)	“shall”	Not exempt from ISDS; not exempt from state-state dispute settlement
Iraq	IIA with Japan (signed 2012)	“should”	Not exempt from ISDS; not exempt from state-state dispute settlement
Israel	IIA with Japan (signed 2017)	“recognise inappropriate”	Not applicable.

CONTINUED			
Country	Recent non-regression clause	Nature of provision	Applicability of dispute settlement
Ivory Coast	IIA with Canada (signed 2014)	“should”	Exempt from ISDS; not exempt from state-state dispute settlement
Jamaica	FTA with EU (signed 2008)	“agree to”	State-state dispute settlement without binding outcome/sanctions
Japan	FTA with EU (signed 2018)	“shall”	State-state dispute settlement without binding outcome/sanctions
Jordan	IIA with Canada (signed 2009)	“should”	Exempt from ISDS; not exempt from state-state dispute settlement
Kazakhstan	Partnership Agreement with EU (signed 2015)	“shall”	State-state dispute settlement without binding outcome/sanctions
Kenya	IIA with Japan (signed 2016)	“should”	Not exempt from ISDS; not exempt from state-state dispute settlement
Korea (South)	FTA with China (signed 2015)	“should” / “shall”	“should” obligation not exempt from ISDS; “shall” obligation exempt from state-state dispute settlement

NO RETREAT

CONTINUED			
Country	Recent non-regression clause	Nature of provision	Applicability of dispute settlement
Kuwait	IIA with Japan (signed 2012)	“should”	Not exempt from ISDS; not exempt from state-state dispute settlement
Kyrgyz Republic	IIA with Austria (signed 2016)	“recognise inappropriate”	Not applicable.
Laos	IIA with Japan (signed 2008)	“should”	Not exempt from ISDS; not exempt from state-state dispute settlement
Lesotho	FTA with EU (signed 2016)	“shall”	Not exempt from state-state dispute settlement
Madagascar	IIA with SADC (signed 2006)	“shall”	Not exempt from investor-state dispute settlement; not exempt from state-state dispute settlement
Malawi	IIA with SADC (signed 2006)	“shall”	Not exempt from investor state dispute settlement; not exempt from state-state dispute settlement
Malaysia	CP-TPP (signed 2018)	“shall”	State-state dispute settlement; economic sanctions

CONTINUED			
Country	Recent non-regression clause	Nature of provision	Applicability of dispute settlement
Mali	IIA with Canada (signed 2014)	“should”	Exempt from ISDS; not exempt from state-state dispute settlement
Mauritius	IIA with Egypt (signed 2014)	preambular recital	Not applicable
Mexico	CP-TPP (signed 2018)	“shall”	State-state dispute settlement; economic sanctions
Moldova	Partnership Agreement with EU (signed 2014)	“shall”	State-state dispute settlement without binding outcome/ sanctions
Mongolia	IIA with Canada (signed 2016)	“should”	Exempt from ISDS; not exempt from state-state dispute settlement
Montenegro	FTA with EFTA (signed 2011)	“shall”	Exempt from state-state dispute settlement
Morocco	FTA with US (signed 2004)	“shall strive”	Exempt from dispute settlement
Mozambique	IIA with Japan (signed 2013)	“shall”/ “should”	Not exempt from ISDS; not exempt from state-state dispute settlement

NO RETREAT

CONTINUED			
Country	Recent non-regression clause	Nature of provision	Applicability of dispute settlement
Myanmar	IIA with Japan (signed 2013)	“shall”/“should”	Not exempt from ISDS; not exempt from state-state dispute settlement; both cover all obligations in IIA.
Namibia	FTA with EU (signed 2016)	“shall”	State-state dispute settlement without binding outcome/sanctions
New Zealand	CP-TPP (signed 2018)	“shall”	State-state dispute settlement; economic sanctions
Nicaragua	FTA with EU (signed 2012)	“shall”	State-state dispute settlement without binding outcome/sanctions
Nigeria	IIA with Singapore (signed 2016)	“should”	Not exempt from ISDS; not exempt from state-state dispute settlement
Norway	FTA with Ecuador (EFTA) (signed 2018)	“should” (art 4.6)/“shall” (art 8.4)	“shall” exempt from state-state dispute settlement; “should” not exempt from state-state

CONTINUED			
Country	Recent non-regression clause	Nature of provision	Applicability of dispute settlement
Oman	IIA with Japan (signed 2015)	“shall”/“should”	Not exempt from ISDS; not exempt from state-state dispute settlement
Panama	FTA with EFTA (signed 2013)	“shall”	Exempt from state-state dispute settlement
Papua New Guinea	IIA with Japan (signed 2011)	“should”	Not exempt from ISDS (art 15); not exempt from state-state dispute settlement (art 14)
Peru	CP-TPP (signed 2018)	“shall”	State-state dispute settlement; economic sanctions
Philippines	FTA with EFTA (signed 2016)	“shall”	Exempt from state-state dispute settlement
Qatar	IIA with Belgian-Luxembourg Economic Union (signed 2009)	“shall strive”	Not exempt from ISDS; not exempt from state-state dispute settlement
Russia	FTA with Vietnam (signed 2015; Eurasian Economic Union)	“shall”	Exempt from state-state dispute settlement

NO RETREAT

CONTINUED			
Country	Recent non-regression clause	Nature of provision	Applicability of dispute settlement
Rwanda	IIA with US (signed 2008)	“shall strive”	Exempt from ISDS; exempt from state-state dispute settlement
Saint Kitts & Nevis	FTA with EU (signed 2008)	“agree to”	State-state dispute settlement without binding outcome/ sanctions
Saint Lucia	FTA with EU (signed 2008)	“agree to”	State-state dispute settlement without binding outcome/ sanctions
Saint Vincent and the Grenadines	FTA with EU (signed 2008)	“agree to”	State-state dispute settlement without binding outcome/ sanctions
Saudi Arabia	IIA with Japan (signed 2013)	“should”	Not exempt from ISDS; not exempt from state-state dispute settlement
Senegal	IIA with Canada (signed 2014)	“should”	Exempt from ISDS; not exempt from state-state dispute settlement
Serbia	IIA with Canada (signed 2014)	“should”	Exempt from ISDS; not exempt from state-state dispute settlement

CONTINUED			
Country	Recent non-regression clause	Nature of provision	Applicability of dispute settlement
Singapore	CP-TPP (signed 2018)	“shall”	State-state dispute settlement; economic sanctions
South Africa	FTA with EU (signed 2016)	“shall”	Not exempt from state-state dispute settlement
Suriname	IIA with Brazil (signed 2018)	“shall”	Exempt from state-state dispute settlement
Swaziland	FTA with EU (signed 2016)	“shall”	Not exempt from state-state dispute settlement
Switzerland	FTA with Ecuador (EFTA) (signed 2018)	“should” (art 4.6)/“shall” (art 8.4)	“shall” exempt from state-state dispute settlement; “should” not exempt from state-state
Chinese Taipei	FTA with New Zealand (signed 2013)	“shall”	Exempt from state-state dispute settlement
Tajikistan	IIA with Austria (signed 2011)	“recognize inappropriate”	Not applicable
Tanzania	IIA with Canada (signed 2013)	“should”	Exempt from ISDS; not exempt from state-state dispute settlement

NO RETREAT

CONTINUED			
Country	Recent non-regression clause	Nature of provision	Applicability of dispute settlement
Togo	IIA with Belgian-Luxembourg Economic Union (signed 2009)	“shall”	Not applicable
Trinidad and Tobago	IIA with Guatemala (signed 2013)	“shall”	Not exempt from ISDS, nor from state-state dispute settlement
Turkey	IIA with Colombia (signed 2014)	“should”	Not exempt from ISDS; not exempt from state-state dispute settlement
Ukraine	IIA with Japan (signed 2015)	“should”	Not exempt from ISDS; not exempt from state-state dispute settlement
United Arab Emirates	IIA with Colombia (signed 2017)	“should”	Not exempt from ISDS; not exempt from state-state dispute settlement
United States	FTA with Korea (signed 2007)	“shall”	State-state dispute settlement; economic sanctions
Uruguay	IIA with Japan (signed 2015)	“shall”/“should”	Not exempt from ISDS; not exempt from state-state dispute settlement

CONTINUED			
Country	Recent non-regression clause	Nature of provision	Applicability of dispute settlement
Uzbekistan	IIA with Japan (signed 2008)	“should”	Not exempt from ISDS; not exempt from state-state dispute settlement
Vietnam	CP-TPP (signed 2018)	“shall”	State-state dispute settlement; economic sanctions
Zambia	IIA with SADC (signed 2006)	“shall”	Not exempt from ISDS; not exempt from state-state dispute settlement
Zimbabwe	IIA with SADC (signed 2006)	“shall”	Not exempt from ISDS; not exempt from state-state dispute settlement