SUSTAINABLE FREE TRADE: HOW ISDS CAN HINDER SUSTAINABLE GOVERNANCE IN DEVELOPING NATIONS

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Preface

Writing this thesis took close to an entire year and it would definitely not have been possible without the support of those around me. First, I would like to thank professor Elena De Nictolis for her insights and comments to improve my work, as well as professors Riccardo Sallustio and Jan Lust for theirs. Furthermore I want to thank my family, friends, and girlfriend Ingeborg for their enthusiastic support of this project. I could not have done this without them.

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Introduction

Existing in some way since the 1950s but expanded and institutionalised in decades after, Investor State Dispute Settlement or ISDS has become an integral, though controversial part of the international economic ecosystem.[1] Designed as a mechanism to be included in international investment and trade treaties through which international investment is more effectively protected from possible harmful or discriminating legislation by the government in which is being invested, it was initially seen as a method to protect the rights to property of the investing company, whilst protecting the rights and sovereignty of the invested-in country. This ought to be done through the establishment of an independent and international arbitration which both parties agree upon, which judges any claim done by the company on the grounds of the specific treaty between the investor's nation of origin and the nation that is invested in.

Through the independence of arbitration, meaning this belonging to neither nation but set up specifically for the claim at hand, this system provides on paper a fair system which balances the interests of the investor company and the investment-receiving nation. It is here however that theory and practice diverge, and where the main criticisms of the ISDS system originate. ISDS has been criticised for its lack of transparency, perceived illegitimacy and the limitations it places on states' capacity to regulate[2]. Some academics such as Soares argue that in a great many cases the judge has affirmed the state's right to regulate in a non-discriminatory way. This paper however argues that this is less so the case for environmental regulations, where ISDS poses a real threat to a state's capacity to engage in sustainable governance. Given the reality of ISDS cases being mostly against developing states, as well as these states' often already reduced capacity to engage in sustainable governance, combined with the natural wealth so often found in these states, this paper will engage in analysis and criticism of the environmental regulatory consequences of ISDS claims in developing nations, using Peru as a main case study. The paper will thus seek to answer the question; "In which ways do ISDS mechanisms hinder the capacities

[1] Soares, Caio Cesar. "Investor-State Dispute Settlement: An Analysis of the Reform Proposals on Its Institutional Structure." *Available at SSRN 2984581* (2017).
[2] Soares, "Investor-State Dispute Settlement."

of developing nations to engage in sustainable development?". The hypothesis being that arbitration and the threat thereof discourages and brings regulatory chill to developing countries with regards to sustainable governance.

Literature review

The functioning of international arbitration has been a hot topic ever since its true inception from the 1950s onwards, initially seen as a dispute resolution method that was "effective, neutral, efficient, and perhaps most important, globally enforceable".[3] As Karton explains, all arbitration begins with a dispute within what is usually a contract between two or more international actors, often between investors and states.[4] Habermas sees that the growth in arbitration in the second half of the twentieth century must be seen as the spread of the global economy, with the development of arbitration truly only beginning when international investments in states with wholly different legal codes were becoming increasingly common.[5] This development, it can be argued, has 'built' the modern globalised economy, through a protection mechanism for global investment. Puig and Strezhnev identify however in their work a dissatisfaction with the current state of arbitration as originating in the idea that it tends to protect rich corporations whilst doing little for the - often developing - nations in which is being invested.[6] They however acknowledge also the possibility for ISDS to create a beneficial environment for both parties, where larger potential conflicts are brought back to the courtroom instead of the battlefield.[7] Here then they see that international arbitration can act as a way to help retain a peaceful world.

Puig and Strezhnev however also argue that there is within arbitration between parties that are part of the developed and developing world respectively some sort of 'David Effect'.[8] What this

[3] Joshua Karton, "International Arbitration as Comparative Law in Action," Journal of Dispute Resolution 2020, no. 2 (Spring 2020): 296.
[4] Karton, "International Arbitration," 296.
[5] Habermas, Jürgen. "Plea for a Constitutionalization of International Law." *Philosophy & Social Criticism* 40, no. 1 (2014): 5.
[6] Puig, Sergio, and Anton Strezhnev. "The David effect and ISDS." *European Journal of International Law* 28, no. 3 (2017): 758
[7] Puig and Strezhnev, "The David Effect," 759.
[8] Puig and Strezhnev, "The David Effect," 761.

then means is a bias towards the developing nations by arbitrators as they are seen as underdogs. It must however also be seen that any advantage that developing states would have regarding the sympathies of arbitrators is largely negated by the fact that the states themselves cannot start arbitration against the investors, it is in essence a one way street.[9] Where the otherwise very rich analysis by Puig and Strezhnev fails is in the consideration of the environmental realm, whereby arbitration or even its threat can mitigate efforts by developing nations to engage in sustainable governance, a phenomenon called regulatory chill.

This regulatory chill arising from arbitration is another debated issue academically. Berge et al., show how within a state with as they name it 'high governance capacity', the insecurity of pending and lost arbitration does create an empirically noticeable regulatory chill to environmental legislation.[10] The distinction between high governance capacity and low governance capacity describes the degree to which governments can efficiently implement and monitor legislation, especially when it is faced with uncertainty around liability.[11] Low capacity states then are those that struggle with effective governance, and it then makes sense that arbitration cases have little effect on regulatory chill, regulatory levels are then low already. For the sake of this thesis then, the author shall take into account primarily developing states with relatively high functioning government structures, and it will be less applicable to countries without effective central governance such as, for example, the Democratic Republic of the Congo.

Expanding on regulatory chill coming from either ISDS proceedings or the mere threat of them, Tienhaara identifies various types of possible regulatory chills. Firstly internalisation chill, whereby according to Tienhaara policymakers avoid arbitration by not even drafting the policy, in a preemptive manner trying to steer clear from the arbitration that is expected to come from the introduction of a specific policy.[12] This threat is understandably extremely difficult to quantify, as it concerns behavioural changes in policymakers. Secondly Tienhaara identifies

[9] Baltag, Crina. "Reforming the ISDS System: In Search of a Balanced Approach." *Contemp. Asia Arb. J.* 12 (2019): 288.
[10] Berge, Tarald Laudal, and Axel Berger. "Does Investor-State Dispute Settlement Lead to Regulatory Chill? Global Evidence from Environmental Regulation." *Journal of International Dispute Settlement* 12, no. 1 (2019): 22.
[11] Berge and Berger, "Does ISDS Lead to Regulatory Chill?," 3.
[12] Tienhaara, Kyla. Regulatory chill in a warming world: the threat to climate policy posed by investor-state dispute settlement. *Transnational environmental law*, 2018, vol. 7, no 2, p. 233.

threat chill, which she describes as 'the chilling of specific regulatory measures that have been proposed by governments following the threat to arbitrate'.[13] Tienhaara sees additionally that especially in developing nations the threat chill is often significant, as there exist limited government capacities to cover the high costs of arbitration. This goes for cases that states both win and lose, as just the legal costs of arbitration can be large enough to put a strain on government finances.

A third type of regulatory chill that Tienhaara identifies is that of cross-border chill.[14] This type of chill can be seen as the precedential nature of arbitration, wherein aggressive arbitration in one jurisdiction is used to instil fear in other countries that are considering implementing similar legislation to the one being in arbitration.[15] *Philip Morris v Uruguay* is a prime example of this. This case, though not in the realm of environmental arbitration, clearly shows how aggressive arbitration by a multinational can stump efforts by governments to counteract harmful practices. Philip Morris argued in this case that efforts by the Uruguayan government to ensure that tobacco was only sold in plain packaging would restrict use of trademarks and discriminate against tobacco companies, as other sellers of harmful substances such as breweries were not subject to this.[16] Philip Morris claimed compensation of 22.3 million USD. This was not such a great amount, but it is evident that if arbitration ruled in favour of Philip Morris, this would have greatly chilled efforts for legislators worldwide to regulate in public health affairs.[17]

Tanaya however sees that "The ISDS system is meant to keep a check on states so that they do not treat foreign investors unfairly. Further, most ISDS claims involve administrative acts rather than legislative acts, and hence should be welcomed as a check on executive overreach."[18] For this reason then, the direct impact of arbitration on regulatory chill would not seem as

[13] Tienhaara, "Regulatory Chill in a Warming World," 235.
[14] Tienhaara, "Regulatory Chill in a Warming World," 237.
[15] Tienhaara, "Regulatory Chill in a Warming World," 238.
[16] Lencucha, Raphael. "Philip Morris versus Uruguay: health governance challenged." *The Lancet* 376, no. 9744 (2010): 853.
[17] Voon, Tania. "Philip Morris v. Uruguay: Implications for Public Health: Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016 (Piero Bernardini, Gary Born, James Crawford)." *The Journal of World Investment & Trade* 18, no. 2 (2017): 329.
[18] Thakur, Tanaya. "Reforming the investor-state dispute settlement mechanism and the host state's right to regulate: a critical assessment." *Indian Journal of International Law* 59, no. 1 (2021): 184.

significant. Furthermore, she argues that since legislators often remain unaware of the impacts of ISDS, this system cannot realistically be the main cause for regulatory chill in legislative spheres.[19] It must however be understood that the precedent of arbitration rulings naturally influence legislative proceedings, and to see the two as separate pillars seems quite inaccurate. The assumption that legislators remain unaware of impacts of ISDS also seems presumptive at best as the passing of any important legislation which relates to sectors that fall under a BIT or FTA naturally will consider prior arbitration on these sectors.

Desierto furthermore sees merit in the current state of international arbitration, regardless of the common criticism that the system receives, often surrounding regulatory chill. Firstly, she sees that arbitration is "distinct among other international dispute resolution mechanisms for its emphasis on party autonomy, the core principle that allows disputing parties to determine the applicable law governing the merits of a dispute, which they consent to submit to arbitrators that are also freely appointed by the parties themselves".[20] Desierto then finds that international arbitration is a more fluid system whereby both parties can work towards a compromise solution that is "to the satisfaction of both parties"[21]. This fluidity, Gotti argues, does bring a larger need for transparency, impartiality and independence.[22] Reason for this is that the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration does not clearly outline the need for independence of arbitrators to either party in arbitration.[23] It merely states that there ought to be 'due regard' to 'such considerations' as are 'likely' to secure independence of arbitration.[24] Though the argument of Desierto on the positives for larger flexibility in arbitration then hold merit, we can see following Gotti that in the base documents for international arbitration there is a clear need for clarifying language to ensure the independence and transparency of proceedings. Desierto however sees this increasing

[19] Thakur, "Reforming ISDS and the Right to Regulate," 184.
[20] Diane A. Desierto, "Rawlsian Fairness and International Arbitration," University of Pennsylvania Journal of International Law 36, no. 4 (Summer 2015): 945.
[21] Desierto, "Rawlsian Fairness and International Arbitration," 945.
[22] Gotti, Maurizio. "Exercising Power and Control in Arbitration Proceedings." *International Journal for the Semiotics of Law-Revue Internationale de Sémiotique Juridique* 24 (2011): 183.
[23] Gotti, "Exercising Power and Control in Arbitration," 182.
[24] United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006, accessed 22/2/2025, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.

institutionalisation as a negative development, whereby both the costs and fluidity of proceedings decrease.[25]

Desierto further analyses four arguments around fairness that many scholars use to criticise international arbitration. These criticisms are; the procedural due process or arbitrariness of proceedings, the lack of standardised methodologies in arbitration, the finality of arbitration rulings given the limited possibility for appeal, and the unregulated composition of arbiters/the limited rights of participation available for third parties.[26]

The first area where Desierto's analysis fails is in the assumption that states in international arbitration are free to consent in arbitration. Although states are a free partner in arbitration and at one point a state has consented to building the basic structures of international arbitration through the signing of investment treaties which include arbitration rules, it is evident that governments change and that this initial decision to consent to arbitration takes away much of the possibility for later governments to protest against arbitration. She argues that this is a rare occurrence and that it should not be used as an argument, but this assumption seems rather simplistic. There is further some naivete in the assertion that the general rule of arbitration "the parties shall be treated with equality" actually works.[27] It may be seen that there is an inherent interest for arbitrators to be friendly towards investors, as without disputes arising from them investing in other countries the arbitrators would be without a job. She also sees that investors have little influence in the drafting of treaties between the two states in bilateral investment treaties, and whilst this is true it does not seem like a strong argument.[28] There is no incentive for the investors' state to agree to a treaty which is harmful for domestic investors, as this would also hurt the nation's own economy. Desierto's further argument that states joining the ICSID system was done under equal footing and voluntarily neglects the power relations and colonial history of the world.[29] This argument shall be expanded upon in Chapter 1, but for now suffice to say that

[25] Desierto, "Rawlsian Fairness and International Arbitration," 949.
[26] Desierto, "Rawlsian Fairness and International Arbitration," 954.
[27] Desierto, "Rawlsian Fairness and International Arbitration," 964.
[28] Desierto, "Rawlsian Fairness and International Arbitration," 967.
[29] Desierto, "Rawlsian Fairness and International Arbitration," 983.

the ICSID is a “neutral” system that is uninfluenced by the time wherein it was constructed is quite inaccurate.

Methodology

The use of qualitative case studies in legal research is something that is still debated academically as it would divert attention from the normativity of legal studies. The author however sees, following arguments made by Argyrou, that within the context of interdisciplinary legal research such as the one presented in this thesis there is merit in an in-depth case study analysis.[30] The reason for this is, as Banakar argues, doing so can help bring to light the ‘truth of law’, meaning the real experienced outcomes of normative law.[31] Argyrou then outlines that the effort of clarifying flaws within legal documents requires "the consideration of the social references underlying the law, as well as the effect and the impact of the current law on certain social constructs in practice”.[32] This then epistemologically creates a space for case study research in legal studies and can bring to light problems that are currently affecting treaties and laws more potently than mere doctrinal research can.[33]

Although the inclusion of case studies in interdisciplinary legal research is thus clearly of value, the author must acknowledge that there are some common pitfalls and hazards to this which ought to be addressed to ensure academic validity of the analysis. One such pitfall is that the introduction of the case study can reflect more the views of the researcher than the subject itself, there is thus a possibility of bias creeping into research through the choice of one specific case study and the inclusion and exclusion of particular pieces of information. A second hazard that ought to be acknowledged is that it is difficult or impossible to replicate a case study. What is then necessary in the use of case studies in interdisciplinary legal research is utmost transparency about what information is used, and if not all available data is used then a good reasoning on

[30] Argyrou, A. "Making the Case for Case Studies in Empirical Legal Research." Utrecht Law Review 13, no. 3 (2017): 95.
[31] R. Banakar, ‘Reflections on the Methodological Issues of the Sociology of Law’, (2000) 27 Journal of Law and Society, no. 2, p. 274.
[32] Argyrou, "Making the Case for Case Studies," 97.
[33] Argyrou, "Making the Case for Case Studies," 97.

why this is ought to be provided. Furthermore, the research itself can be partially redesigned to identify and eliminate any researcher biases in the study.

In an effort to mitigate the potential biases arising from case study research, this thesis will furthermore employ a method of process tracing. This qualitative research method uncovers causal mechanisms using detailed, within-case empirical analysis of how a causal process plays out in an actual case.[34] Process tracing is a valuable method as it allows for strong causal links in a single-case real world setting. In using process tracing to build a theory, a stringent and in-depth analysis is done of a single case, uncovering the reasons why a particular phenomenon occurs. It therefore does not merely summarise descriptively what happens, but seeks a reason for this. The thesis will then utilise a *systems-understanding* variant of process tracing, whereby an in-depth analysis on the functioning of each part of the causal mechanisms produces a more potent inference between processes.[35] Naturally, an effort to uncover the causal mechanisms of international arbitration inhibiting developing nations from engaging in environmental governance ought to have no significant causal gaps, every finding and argument should logically lead to the next.

In process tracing, a myriad of tests are used to evaluate strengths and weaknesses of hypothesised causal relationships.These tests theoretically show that an event or process took place, a different event or process occurred thereafter, and that the first event or process was the cause of the latter. For this thesis' sake, it should then hold that the establishment of an 'unequal' arbitration system led to a greater difficulty for developing states to engage in sustainable governance, and that the arbitration system is the main cause of this.
The two process tracing tests that shall be utilised in this thesis are the smoking gun test and the hoop test. These shall be explained further below.

The hoop test indicates that a specific causal-process observation needs to be present for a hypothesis to be valid.[36] If this observation is not present, the hypothesis is eliminated. However,

[34] Mahoney, J. (2012). The Logic of Process Tracing Tests in the Social Sciences. Sociological Methods & Research, 41(4), 570. https://doi.org/10.1177/0049124112437709
[35] Beach, Derek. *Process tracing methods*. Springer Fachmedien Wiesbaden, 2020: 703.
[36] Mahoney, "Logic of Process Tracing Tests," 571.

passing this test does not necessarily prove a hypothesis either. The hoop test is carried out by finding whether 'the case possesses all conditions that are known to be necessary for the cause or outcome'.[37] A hoop test in this thesis would then be whether sustainable governance in developing states is empirically more effective in states with less (stringent) investment treaties. If this is true, it strengthens the hypothesis that arbitration and sustainable governance are negatively linked, but does not confirm it. On the other hand, if it is seen that states with less treaties or arbitration have worse sustainable governance track records would suggest that the hypothesis is irrelevant, but does not automatically eliminate it. For this reason, the thesis shall in the final chapter test the theory against other cases.

The second test that shall be applied is the smoking gun test. In a smoking gun test, the aim is to find clear and indisputable evidence indicating a causal relationship. The smoking gun test then confirms the hypothesis if it is present. Failing the smoking gun test does not automatically mean the hypothesis is wrong, however it does weaken the argument in favour of the hypothesis. For the sake of the hypothesis presented in this article, the author will seek indicative evidence within treaties and legislations which point without a doubt towards the fact that it is through the treaties and arbitration arising from it that developing states were/are unable to engage in sustainable governance or where because of treaties and/or arbitrations that developing states have repealed or weakened environmental regulations.

Case study selection

As mentioned in the introduction and methodology, this article shall be investigating the research question employing an example country for sake of illustration as well as depth of analysis. The chosen case study nation is Peru, focusing on the arbitration cases *Doe Run v Peru* and *Bear Creek Mining Corporation v Peru*. A short introduction of both the nation of Peru and the case shall follow below, with the case study worked out further following the chapters on the development of ISDS and environmental law respectfully.

[37] Mahoney, "Logic of Process Tracing Tests," 575.

Peru is a nation of 34 million people located on the west side of South America, bordering Ecuador, Colombia, Brazil, Bolivia, Chile and the Pacific ocean. The state of Peru is largely built up in three distinct geographical regions, la costa (the coast), la sierra (the Andes highlands), and la selva (the Amazon rainforest). This wealth in geographical and climatic regions is matched with a wide variety in natural resources such as timber, coal, gold, silver, lithium and rare earth minerals.[38] Despite this great natural wealth, Peru remains a lower middle-income country, with a GDP per capita of $8.290 USD per year.[39] The state is ranked as a hybrid regime by the 2023 Economist Democracy Index.[40] It has gone through a tumultuous number of years politically, with five different presidents in charge from 2016 to 2023.[41] Most recently in 2022 left-wing president Pedro Castillo was impeached by Congress, with his then vice-president Dina Boluarte succeeding him. The impeachment of president Castillo followed his attempted dissolution of Congress, after the Lima elite-led Congress blocked essentially all legislation that Castillo wanted to pass. The succession by Boluarte was seen by many on the left as well as indigenous communities as a threat, with the new government being extremely unpopular across the board, with her current approval rating hovering around a mere 5%.[42] These protests resulted in protests and subsequently the Juliaca and Ayacucho massacres, where government forces shot live ammunition at protesters, resulting in over 20 dead and hundreds injured.[43] Following the unrest in specifically the southern part of the country, president Boluarte attempted to argue that the oft-neglected regions full of unrest of Puno and Juliaca did not represent the country.[44] This not only made the unrest worse, it highlights the strong divide within Peru between the Lima-based elite and the rest of the country, a remnant of colonial times.

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[38] Javier Arellano-Yanguas, "A Thoroughly Modern Resource Curse? The New Natural Resource Policy Agenda and the Mining Revival in Peru," *IDS Working Paper* 300 (2008): 10.
[39] International Monetary Fund (IMF), "Peru," accessed 22/2/2025, https://www.imf.org/external/datamapper/profile/PER.
[40] Our World in Data, "Democracy Index (EIU)," accessed 22/2/2025, https://ourworldindata.org/grapher/democracy-index-eiu.
[41] Barrenechea, Rodrigo, and Alberto Vergara. "Peru: The danger of powerless democracy." *Journal of Democracy* 34, no. 2 (2023): 77.
[42] "Peru: Opinion on the Appointment of Dina Boluarte as President 2022," Statista, accessed 21/5/2025, https://www.statista.com/statistics/1356720/opinion-on-the-appointment-of-Peruvian-president-boluarte/
[43] Bartlomiej Znojek, "Peru enters a new stage in its political crisis", *The Polish institute of international affairs* (2022): 2.
[44] "Peru's Protest Deaths Reflect Historical Divisions, Analysts Say," *CNN*, March 10, 2023, accessed 22/2/2025, https://edition.cnn.com/2023/03/10/americas/Peru-protester-deaths-historical-divisions-intl/index.html.

Though there is a strong divide in political say between Lima and the rest of the country, Peru does have a theoretically well developed institutionalisation of consultation of indigenous peoples for economic projects of any kind, following ILO Convention 169 of 1989. This document is legally binding and self-executing for Peru after its ratification. Article 7 of this convention states that indigenous peoples have the right to decide their own priorities and shall participate in the formulation of any plan and programme for development which may affect them.[45] Though this is undoubtedly a positive development, we must see that Article 34 of the same convention state that the "nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner", meaning unfortunately that the legal protection of indigenous rights and consultation is not as well enshrined as may at first glance seem.[46] Furthermore, the communities that are designated in Peru as indigenous and thus fall under this Convention are predominantly located in the Amazon rainforest. This means that communities in the Andes, where the vast majority of the lucrative mining industry is located, do not have the right to participate in drafting plans over their own land.[47]

In considering the potential environmental damage in Peru following pollution, it is good to briefly consider what is at stake of being lost in terms of biodiversity and natural wealth. Peru is one of the most biodiverse countries on earth, a "global center for species richness of vertebrates, invertebrates, and plants, with numerous known endemic species of mammals, reptiles, amphibians, flowering plants and ferns."[48] Consequently, around 17% of the land area of the country is in one form or another legally protected.[49] The variance of (endemic) species follow the rich geographic variance of the nation, ranging from species especially adapted to live in the hot desert areas in the north of the country to ones that thrive in the cloud forests of the eastern slopes of the Andes mountain range.

[45] International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, art. 7, adopted June 27, 1989, entered into force September 5, 1991
[46] ILO Convention No. 169, art. 34.
[47] Lust, Jan. "Mining in Peru: Indigenous and peasant communities vs. the state and mining capital." *Class, Race and Corporate Power* 2, no. 3 (2014): 11.
[48] Rodríguez, Lily O., and Kenneth R. Young. "Biological diversity of Peru: determining priority areas for conservation." *AMBIO: A Journal of the Human Environment* 29, no. 6 (2000): 329.
[49] Zinngrebe, Yves M. "Conservation Narratives in Peru: Envisioning Biodiversity in Sustainable Development." *Ecology and Society* 21, no. 2 (2016): 2.

The Peruvian economy as a whole is greatly dependent on the mining industry and Foreign Direct Investment (FDI) to finance this. Illustrating this, the mining industry is responsible for over 60% of the value of exports of the country.[50] It is apparent that foreign owned companies are integral to this structure, where the copper industry, which accounts in itself for half of the country's exports, is for 99% in the hands of a mere 10 international corporations.[51]
There is a distortion between the international ownership of the mines in the country and the destination of export-bound products, where the main owners of mines in the country are Western nations but the main destination of products is China. In fact, China imports more than twice the amount from Peru than the United States does, at 22.5 billion USD against 9.3 billion USD respectively.[52]

The Peruvian economy has grown substantially in the country in the 21th century, averaging 6.3% economic growth annually from 2000 to 2013.[53] Correspondingly, the poverty rate fell from 59% in 2004 to 24% in 2013, an impressive 35 percentage point decrease, resulting in 9 million people moving up into a developing middle class.[54] Multiple reasons for the high economic growth have been proposed, some of these are:

- Tariff decreases following the signing of FTAs beginning in the 1990s, lowering average tariffs from 66% in 1990 to 6% in 2013.[55]
- Privatization of formerly state-owned industries such as mining, where it now exceeds many of its peers in private sector participation.[56]
- Labor market reform where although Peru still lags behind its neighbours, substantial improvements (from the employers side) have been made with regards to firing costs and contracting legislation.[57]

[50] Bibi, Samuele, and Sebastian Valdecantos. "The Price (and Costs) of Macroeconomic Stability in Peru: Some Lessons on the Implications of FDI‐driven Growth." *Development and Change* 54, no. 5 (2023): 1137.
[51] Bibi and Valdecantos, "Price of Macroeconomic Stability in Peru," 1137.
[52] "Peru," *OEC - The Observatory of Economic Complexity*, accessed 16/2/2025, https://oec.world/en/profile/country/per.
[53] Rossini, Renzo, and Alejandro Santos. "Peru's recent economic history: From stagnation, disarray, and mismanagement to growth, stability, and quality policies." *Peru: Staying the course of economic success* (2015): 9.
[54] Ross, Kevin, and Juan Alonso Peschiera. "Explaining the Peruvian Growth Miracle" *Peru: Staying the Course of economic success* (2015): 38.
[55] Ross and Peschiera, "Explaining the Peruvian Growth Miracle," 40.
[56] Ross and Peschiera, "Explaining the Peruvian Growth Miracle," 40.
[57] Ross and Peschiera, "Explaining the Peruvian Growth Miracle," 41.

- The Peruvian economy is largely dependent on prices of its natural resources on the global market. Investment spending in fact contributed around 3% of the higher-than 6% average GDP growth over the 2004-2013.[58]

It is apparent that the Peruvian economy, regardless of an impressive run of growth in the 21st century, retains this high level of dependency on prices of natural resources. This is in part because around 70% of investment in the country goes to the further development of the mining sector instead of alternatives.[59] Although it can be argued that this is not in itself a problem, as the mining industry employs a substantial portion of Peruvians and accounts for up to 15% of the economy, it is apparent that further investment into this sector brings the country more deeply into an extractivist model.[60] The country furthermore does not substantially invest in manufacturing plants to use the mined resources, meaning that the value added remains rather low. Samuele and Valdecantos furthermore see that "using positive financial flows to finance a constant trade deficit might put a country into a dangerous situation of external indebtedness, leading it, under certain conditions, to a Ponzi situation."[61] The implication of such a situation is that the moment investment dries up, for example when commodity prices drop, the entire macroeconomic stability of the country becomes at risk of collapsing.

Tax income from mining in Peru is distributed in a manner whereby 50% of tax revenues in the state go to the national government, 12.5% to the regional authorities and 37.5% to municipal authorities.[62] This is on paper a laudable programme, aimed at mitigating more effectively the negative externalities of mining activity in a particular region. It must however be seen that the actual amounts that mining corporations in Peru are taxed are quite frankly astonishingly low for an industry of its magnitude and for the impacts that it has on surrounding communities.[63] This has been a point of unrest within Peru, where member of the board of the Peruvian central bank

[58] Ross and Tashu, "Investment Dynamics in Peru," 51.
[59] Vtyurina, Svetlana. "Fiscal Framework Alternatives for a Resource-Rich Country". *Peru: Staying the Course of economic success* (2015): 100.
[60] Lust, Jan. "Objective and subjective conditions for the continuity of the Peruvian extractive development model." *Globalizations* 16, no. 7 (2019): 1234.
[61] Bibi and Valdecantos, "Price of Macroeconomic Stability in Peru," 1142.
[62] Aresti, María Lasa. "Mineral revenue sharing in Peru." *Natural Resource Governance Institute* (2016): 21.
[63] Lust, Jan. "Objective and subjective conditions for the continuity of the Peruvian extractive development model." *Globalizations* 16, no. 7 (2019): 1237.

Diego Macera has argued:"If we want to help the legitimacy of the mining and extractive industries, a fundamental part is that the people see benefits and rents from extractive activity and that this translates in a better quality of life for them."[64] The fact that this has not been the case is a main reason why leftist anti-establishment candidate Pedro Castillo won 88% of constituencies with mining activity in the 2021 Peruvian presidential election.[65]

To finish the chapter on the case study selection, the relevant free trade agreement between the United States and Peru which is central to this thesis was introduced in 2009 during the government of then-president Toledo. The agreement was at the time hailed as one of the most environmentally friendly free trade agreements, with great consideration to the protection of the natural world and to the mitigation of the potential damages that economic activities can bring. For illustration, an analysis of chapter eighteen of the free trade agreement follows;

Article 18.1 stipulates the right of each party in the agreement to "establish its own levels of domestic environmental protection and environmental development priorities" which ought to "provide for and encourage high levels of environmental protection and shall strive to continue to improve its respective levels of environmental protection."[66] Article 18.3.1(b)(i) recognises the retained right of both states to "exercise prosecutorial discretion and to make decisions regarding the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities", reflecting a *reasonable, articulable* decision.[67] Most notably, Article 18.3.2 states the inappropriateness of weakening environmental standards to encourage investment and trade.[68] Furthermore, Article 18.6 established an Environmental Affair Council which is tasked with providing periodical reports to the Free Trade Commission, provide public participation relating to the free trade agreement, and submit recommendations to the

[64] Author's translation of part of the article "Pedro Castillo ganó en 88% de localidades con conflictos mineros," *La República*, April 26, 2021, https://larepublica.pe/elecciones/2021/04/26/elecciones-2021-pedro-castillo-gano-en-88-de-localidades-con-conflictos-mineros-pltc

[65] "Pedro Castillo ganó en 88% de localidades con conflictos mineros," *La República*, April 26, 2021, https://larepublica.pe/elecciones/2021/04/26/elecciones-2021-pedro-castillo-gano-en-88-de-localidades-con-conflictos-mineros-pltc.

[66] United States-Peru Trade Promotion Agreement, art. 18.1, signed April 12, 2006, entered into force February 1, 2009, https://ustr.gov/trade-agreements/free-trade-agreements/Peru-tpa/final-text

[67] US-Peru Trade Promotion Agreement, art 18.3.1(b)(i).

[68] US-Peru Trade Promotion Agreement, art 18.3.2.

parties of the free trade agreement concerning environmental affairs.[69] These provisions are naturally normatively significant, but as Vinuales argues, they fail in solving potential conflicts between international investment law and international environmental law.[70] This idea shall be expanded upon in Chapter 2.

Regarding the rights to nationalisation or expropriation under the Peru-US FTA, Article 10.7 states that there shall be no nationalisation or expropriation except for reason of public purpose, in a non-discriminatory manner on payment of adequate and effective compensation which is in accordance with due process of law.[71] This compensation ought then to be reflective of the real value of the investment at the time of expropriation, plus interest at a *reasonable* rate.[72] Notably, Article 10.11 stipulates that "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."[73]

Given these clauses in the Peru-US free trade agreement, it is not difficult to see how it was hailed as one of the most environmentally friendly trade agreements ever to be signed. It is therefore striking that in 2008 and 2009, Peru was rocked by protests directly in opposition to the agreement, specifically relating to environmental concerns and the erosion of rights of indigenous peoples under the free trade agreement.[74] These protests related to the development of oil projects in the Peruvian Amazon and the corresponding wavering of protected status of the Amazon rainforest following the Peruvian ratification of the FTA. This seems to contradict the aims of Chapters 18 and 10 of the agreement, yet as Vinuales has argued and shall become apparent, the environmental standards of the Peru-US FTA are not as strong as at first glance.

[69] US-Peru Trade Promotion Agreement, art 18.6.
[70] Jorge E. Viñuales, *Foreign Investment and the Environment in International Law* (2012), 142.
[71] US-Peru Trade Promotion Agreement, art 10.7
[72] US-Peru Trade Promotion Agreement, art 10.7
[73] US-Peru Trade Promotion Agreement, art 10.11
[74] *Public Citizen*, "The Peru Free Trade Agreement: One Year Later," accessed 22/2/2025, https://www.citizen.org/wp-content/uploads/Perufta-oneyear.pdf.

Chapter 1. ISDS - history and future

1.1 ISDS proceedings

In an effort to clarify ISDS, the regular proceedings of arbitration shall now be laid out, illustrated with the example of the Peru-US free trade agreement that is central to this thesis. Under the FTA, dispute settlement provisions apply when a measure of either party is inconsistent with the obligations of the FTA, or when a party has not carried out obligations stipulated in the agreement.[75] If the matter cannot be resolved through negotiation within a given time, any party of the FTA may request the establishment of an arbitral panel.[76] This arbitral panel ought to consist of independent lawyers competent in the field of law at hand, and be judged solely on merits and impartiality.[77] Both parties are allowed to pick one of the arbitrators, and a third is agreed upon by consensus by both parties, this arbitrator will also act as chair.[78]

The parties in arbitration have a right to at least one hearing before the panel, which is open to the public.[79] These hearings, as well as all communication, can be done in both the national language of the claimant and of the host country to ensure effectiveness.[80] The panel also considers the requests and comments of non-governmental entities with a real stake in the matter at hand.[81] After sufficient consultation, the panel ought to publish findings outlining its initial report on whether or not the provisions of the agreement have been breached, as well as recommendations for resolution.[82] After a final round of comments by parties based on the initial report, a final report is made by the panel with its ruling.[83] A major criticism of the system that is important to understand is that fundamental concepts of investment treaties can be interpreted in different manners by different arbitrators, leading to an at times legally inconsistent system wherein different arbitrators vehemently disagree with awards given, or the lack thereof.

[75] US-Peru Trade Promotion Agreement, art 21.2.1(a)
[76] US-Peru Trade Promotion Agreement, art 21.6
[77] US-Peru Trade Promotion Agreement, art 21.8
[78] US-Peru Trade Promotion Agreement, art 21.9
[79] US-Peru Trade Promotion Agreement, art 21.10
[80] US-Peru Trade Promotion Agreement, art 21.10.1(f)
[81] US-Peru Trade Promotion Agreement, art 21.10.1(d)
[82] US-Peru Trade Promotion Agreement, art 21.13
[83] US-Peru Trade Promotion Agreement, art 21.14

This is a slightly simplified overview of the proceedings of arbitration, but gives an adequate understanding for the sake of this paper. We now turn our gaze to see why it is that parties sign these agreements.

1.2 Why parties sign agreements

The question of parties agreeing to trade agreements must take into account that the rationale for this is different between developed states and developing states. The reasons for developed states can most accurately first be explained from the position of investors in these states. Arbitration is seen as desirable from the investors' point of view in case the domestic courts in the host countries are not seen as impartial enough.[84] This means that the investor may see that domestic courts would be biased in favour of the host country or in any way be influenced by the government of said country. Investors can then through the existence of trade agreements be more confident that their investments are not hurt by hostile actions from the host government. What is meant by hostile actions against investors and investments differs between treaties and legislations, but generally such actions as nationalisation, expropriation, discriminatory regulation, confiscatory taxation and arbitrary fines for the company fall under this.[85] Furthermore, the erasure of tariffs accompanying free trade agreements opens up new markets, predominantly for companies in developed states. We can further see that there is a geopolitical nature of investment treaties, whereby the signing of these agreements and the following strengthening of economic ties between the countries brings them closer together, as has been done between the United States and states in Central America, to thank them for their efforts in the war on drugs.[86] Overall we can then see that these agreements are signed from the perspective of the developed world predominantly to globalise and protect the activity of its companies, as well as increase geopolitical influence in the world.

[84] Choi, Won-Mog. "The present and future of the investor-state dispute settlement paradigm." *Journal of International Economic Law* 10, no. 3 (2007): 735.
[85] Konrad, Kai A. "Large investors, regulatory taking and investor-state dispute settlement." *European Economic Review* 98 (2017): 342.
[86] Arshad, Noraiz, Saira Akram, Muqarrab Akbar, and Muhammad Aqeel. "Geopolitics of Central America and USA: An Economic Perspective." *Bulletin of Business and Economics (BBE)* 12, no. 3 (2023): 346.

Turning our attention to governments in developing countries, they have firstly argued that the additional investment that is expected after signing a BIT or FTA increases investment, therefore increasing the amount of jobs and lowering unemployment. In general, there is a prevailing idea among governments that signing bilateral investment treaties increases domestic economic growth. One more important consideration from the government can be that investments following the signing of BITs and FTAs helps to diversify the country's economy, where instead of the production and export of mere raw goods, more finished products which are often much more valuable can be exported. There is furthermore the idea that the increase in investment can help improve the physical and digital infrastructures of developing states. It can thus be seen that the hope for governments of developing states is that through signing agreements and increasing FDI, the country can join in and increase its share of the global economic output.

It must however also be seen that especially developing states encounter some large negative effects of signing these agreements, as in doing so legislators in essence write away some of the power their judicial system has to unknown arbitrators that the government cannot have a say over. Furthermore, the opening up of domestic industries to foreign goods by the erasure of tariffs allows for companies to engage in dumping, selling leftover products for below market-value prices in other states.[87] This can then hurt domestic production. A point which shall be explained further later on in this thesis is that increased investment in extractive industries such as mining in a sense 'deepens' the country's reliance on these often highly polluting industries, making economic diversification more difficult. The erasure of barriers for investment also opens up a myriad of avenues for companies to engage in more polluting activities than would be legal in their home countries, although as we have seen many FTAs include seemingly stringent environmental provisions. These seemed reasonable, however as we shall see in chapter 3, in effect environmental regulations by the host country definitely fall under reasons for investing companies to start arbitration. This then is exceptionally counterproductive to efforts to curb climate change and the effects of pollution in developing states. As efforts to counter climate change have taken centre stage globally, the urgency of addressing a system which hinders the power of countries to protect their own environment seems clear. We will now, for a

[87] Ndzibah, Emmanuel. "CSR in Ghana? Diversity should not mean dumping." *Management of Environmental Quality: An International Journal* 20, no. 3 (2009): 273.

full picture of how the world got to this place, describe the development of ISDS from its origins in decolonisation to the golden age of ISDS in the 1990s and 2020s.

1.3 ISDS and colonialism

2024 Nobel Prize winners in economics Acemoglu, Johnson and Robinson, in their 2005 work "Institutions as the Fundamental Cause of Long-Run Growth", see that not only institutions in a country determine its broad political power, but that there is a strong link between the control over natural resources and the 'de facto political power'.[88] This is a valuable observation with regards to the development of international investment law, where there is a striking history regarding the rights of states with respect to their own natural resources. Stipulated in the 1962 United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources, states have an absolute right to nationalisation in order to recover its natural resources, providing "appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law" was present.[89] Later on, with the United Nations Commission on Trade and Development or UNCTAD affirming the sovereign right of all states to nationalise industries, as well as the 1974 United Nations Charter of Economic Rights and Duties of States strengthening this argument, it seemed that rights of exploitation as well as protection of a state's natural wealth became well ingrained in the international legal system.[90] It is here however that two details of these Charters and Resolutions must be discussed; they passed without the support of a single developed nation, and are not legally enforceable. Though the reasons for this disagreement between developing and developed nations regarding states' rights is ongoing, it is not difficult to see that given the colonial history of the West, its exploitative investments that accompanied it and the control and influence that many states retained in newly independent states in the developing world these Western states did not want to grant legitimacy to any piece of paper that would morally and

[88] Acemoglu, Daron, Simon Johnson, and James A. Robinson. "Institutions as a fundamental cause of long-run growth." *Handbook of economic growth* 1 (2005): 391.
[89] Ryan, Christopher M. "Discerning the Compliance Calculus: Why States Comply with International Investment Law." *Ga. J. Int'l & Comp. L.* 38 (2009): 69.
[90] Ryan, "Discerning the Compliance Calculus," 69.

legally discredit an exploitation that remained after the political independence of their former colonies. On the other side, developing states did not want to grant legitimacy to any system that they did not help build. Seeing that nationalisation of colonial era investments was becoming increasingly probable, developed nations came up with what is named the Hull Formula. This formula, on paper neutral but given the practical flow of investment from the developed world to the developing being highly in favour of wealthy nations, stipulated that any nationalisation of (colonial) companies or investments must be compensated in an adequate and prompt manner.[91] Though the Hull formula is theoretically neutral, it does not specify an inherent difference between developed and developing countries, meaning theoretically an investor in a developing nation can bring arbitration to a developed one, it must be seen that in practice this is exceedingly rare. The amount of compensation in arbitration under the Hull formula was to be set as "an amount equivalent to the value of property taken in a form economically usable by the foreign national".[92] It can quite well be seen that this provision is problematic for a number of reasons, not the least of which being the fact that the valuation of the expropriated assets is "circumstantial to a considerable degree".[93] What this means in practical terms is that any valuation of an asset that is expropriated by a country is subject to market fluctuations and political relations between the states involved, and a full value of the property taken is almost regularly impossible to pinpoint.

Developing nations, quite understandably, strongly opposed this formula, seeing it as developed nations attempting to unfairly profit off of their natural wealth one last time after having done so for centuries already, as well as seeing that this formula decreased the functional sovereignty of the state.[94] The question can be asked whether the moral justification of the Hull formula and of arbitration in times of expropriation is even existent, when one takes the point of view of the developing state. These nations have generally had a recent history rife with oppression and exploitation by Western states. Though conservative authors have historically employed the argument that Western colonialism also brought modernity to these regions, it is impossible to

[91] Kadir, M. Ya'kub Aiyub. "Hull Formula and Standard of Compensation for Expropriation in Postcolonial States." *Kanun Jurnal Ilmu Hukum* 19, no. 2 (2017): 234.
[92] Patrick M. Norton, "A Law of the Future or a Law of the Past--Modern Tribunals and the International Law of Expropriation," American Journal of International Law 85, no. 3 (July 1991): 476.
[93] Norton, "A Law of the Future or a Law of the Past," 489.
[94] Murphy, John. "Compensation for Nationalization in International Law." *S. African LJ* 110 (1993): 85.

see this as an excuse for the untold amount of suffering that it has inflicted upon the countries that were colonised. In addition, it was not uncommon for Western colonialism to strip away a well functioning pre-existent state apparatus and install its own highly exploitative socio-economic structures, which was the case in Peru and India for instance, with the Inca and Mughal empires respectively, further discrediting the idea that Western presence brought significant development to the regions. Again following Acemoglu, Johnson and Robinson, we can see that there was a clear division between the types of economic and political institutions that were implemented in colonies, differing based on the availability of resources.[95] One of the most striking examples of this, unfortunately, is once more Peru. During colonial times, Peru functioned under the *hacienda* system, a system which "combined mechanisms of coercion with other, more subtle forms of symbolic violence", and "constituted a nucleus of political and military might, a fundamental model of paternalism".[96] The raison d'etre for this system was that of exploitation of the great wealth of natural resources in the country, as well as the large indigenous population necessitating, in the Spanish' eyes, a hierarchical and authoritarian system which, as seen in the political and cultural division between Lima and the rest of the country, persists to this day.[97] This can be juxtaposed with the colonial institutions that have been set up in, for example the early United States which, non-abundant in natural resources, built political institutions with a stronger focus on representation and protection of property rights as there was no ground for extractionary institutions.[98]

It can then, admittedly radically, be argued that expropriation and nationalisation by developing states is at times a mere reclaiming of economic sovereignty that was stripped by centuries of colonial rule. Employing this line of thought, the argument of where compensation ought to go becomes entirely reversed. It can then be seen that the immense degree of exploitation and profit that Western states have had over the centuries, and the damage that this has caused to the regions under colonisation, would warrant in a strange way arbitration theoretically in the exact

[95] Acemoglu, Daron, Simon Johnson, and James A. Robinson. "Institutions as a fundamental cause of long-run growth." *Handbook of economic growth* 1 (2005): 387.
[96] Giordano, Verónica. "La resistencia simbólica en las haciendas de la sierra sur Peruana." *Estudios Sociales* 11, no. 1 (1996): 165.
[97] Cox Hall, Amy, M. Cristina Alcalde, and Florence E. Babb. "Revisiting race and ethnicity in Peru: Intersectional and decolonizing perspectives." *Latin American and Caribbean Ethnic Studies* 17, no. 1 (2022): 4.
[98] Acemoglu, Johnson, and Robinson, "Institutions as a Fundamental Cause," 425.

different direction. This is quite likely an impossible idea, but just working from the moral standpoint it warrants thinking about. It must of course also be taken into account that not all states we see as Western in the twenty first century have colonial pasts, but it remains an interesting consideration for those that do.

1.4 GATT/WTO - The erasure of trade barriers

The General Agreement on Tariffs and Trade or GATT for short began as a tariff reduction agreement in 1947 between 23 states, establishing rights and obligations for the ratifying states regarding the freedom of trade and rights of investors in other countries.[99] It established among others that no product from a contracting state coming into the territory of another contracting state would be subject to additional taxation which would not apply to domestic products, therefore levelling the playing field between countries dramatically.[100] As most of the world during this time was colonised by Western powers, an important consideration in effectuating the GATT was its relation with colonised areas and peoples. Article XXVI:5 (a) of the General Agreement stipulated that when supported by the Western overlord, colonies could receive the same benefits from membership as the home country.[101] This seemed positive, however the colonies were not able to vote on decisions in the WTO so held no power over their own trade regulations.

Article XX of GATT outlines general exceptions wherein states, if not done in an arbitrary or discriminatory manner, retain regulatory power for the protection of human, animal or plant life, and the conservation of exhaustible natural resources.[102] Although the word environment is not explicitly mentioned in the article, it ought to be seen that the exceptions it allows for are in the modern day grouped under the terms ‘environmental’ and ‘sustainable’.[103] This article has

[99] Goldstein, Judith L., Douglas Rivers, and Michael Tomz. "Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade." *International organization* 61, no. 1 (2007): 40.
[100] General Agreement on Tariffs and Trade, October 30, 1947, 55 U.N.T.S. 194, art. 3.
[101] Goldstein, Judith L., Douglas Rivers, and Michael Tomz. "Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade." *International organization* 61, no. 1 (2007): 41.
[102] Charnovitz, Steve. "Exploring the environmental exceptions in GATT Article XX." *J. World Trade* 25 (1991): 38.
[103] Charnovitz, "Environmental Exceptions in GATT Article XX," 38.

famously been included in *Korea-beef*, wherein the United States and other trade allies made an appeal that protectionary measures implemented by South Korea were illegal under GATT. The WTO Appellate Body confirmed that measures taken under GATT article XX ought to pass the balancing act that it achieves a legitimate goal and there is no less-restrictive manner in which to reach that goal.[104] We must however consider that cases relating to article XX have a low rate of success, hovering around one in 10.[105] Though measures taken by governments are regularly seen as justifiable, the WTO Appellate body in most cases deem these as being discriminatory against a particular producer.[106]

A major provision in GATT is that members are not only allowed to reinstate protectionist measures under certain circumstances, but are additionally allowed to ignore the provisions of GATT in relation to specific member states.[107] This is used for example in the trade embargo the United States has enforced on Cuba.[108] Considering the special positions of colonies in the World Trade Organisation and the GATT, as well as the allowed exceptions for specially contentious international relationships, it can be seen that the GATT is strongly influenced by the preexisting network of protectionism, and offers significant ways out of its own presupposed purpose.[109] Lastly, an exception exists under GATT article XXI whereby the provisions of the agreement can be terminated by a member state in case this is deemed to serve national security interests by the country's government. As this shall be of importance later, this argument of national security shall be laid out in its current form.

The concept of national security interests is defined in various manners by different legislators, whereby ideas such as "public order" and "security interests" are used predominantly.[110] These terms relate to objectives the government has set for itself which it sees as integral for the

[104] Regan, Donald H. "The meaning of 'necessary' in GATT Article XX and GATS Article XIV: the myth of cost–benefit balancing." *World Trade Review* 6, no. 3 (2007): 348.
[105] Moran, Niall. "The first twenty cases under GATT article XX: tuna or shrimp dear?." *International Economic Law: Contemporary Issues* (2017): 7.
[106] Moran, "First Twenty Cases Under GATT Article XX," 8.
[107] Goldstein, Judith L., Douglas Rivers, and Michael Tomz. "Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade." *International organization* 61, no. 1 (2007): 43.
[108] Leal, Oscar Barrero. "Cuba and the United States: An Overview of the Embargo Analyzed Under the Current World Trade Organization Law." *Dos mil tres mil* 17 (2015): 90.
[109] Goldstein, Rivers, and Tomz, "Institutions in International Relations," 37.
[110] Blanco, Sebastián Mantilla, and Alexander Pehl. *National security exceptions in international trade and investment agreements: justiciability and standards of review*. Springer Nature, 2020: 66.

day-to-day and long term stability and prosperity of the country. In the drafting stage of investment treaties it is usually defined what these security interests are for all respective countries, and how a balance ought to be struck between the opening up for international investment of the economies and protection of those resources and sectors deemed too essential.
Broadly speaking, the essential security interests in investment treaties are deemed self-judging, meaning that the host country itself retains jurisdiction over this, although in most treaties it must be deemed 'in good faith', meaning that any action defending perceived essential security threats in a state must cannot be done with the seemed intent of being specifically aimed at a particular partner or company.[111] A further intricacy of the wording regarding essential security threats is that many investment treaties, such as the free trade agreement between Peru and the United States, mention 'measures necessary' instead of 'measures deemed necessary', which although quite similar in wording contain two almost opposing meanings. Measures necessary entails any action that would lead to the protection of a an essential security interest in the host country then tested in merit by whether it actually protects this interest, whereas 'measures deemed necessary' can be debated upon and is therefore a provision that is significantly easier for claimants to 'disprove' in arbitration.

1.5 The New York Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards is the main document building the legal regime of international arbitration agreements.[112] It focuses on the setting of universally accepted standards regarding arbitration awards and treaties. It can however be seen that ascribing to the Convention not only sets the standards in terms of internationally recognised arbitral, but also binds national governments to the full acceptance of the outcomes of arbitration that happens under provisions of the Convention.[113] The Convention states that domestic defences, meaning domestic standard/rule setting, can only be accepted in arbitration when it falls within the scope of Articles II and V(1)(d) of the Convention, which

[111] Mantilla Blanco and Pehl, National Security Exceptions, 27.
[112] Born, Gary B. "The New York Convention: A Self-Executing Treaty." *Mich. J. int'l l.* 40 (2018): 115.
[113] Born, "The New York Convention," 115.

outline allowed exceptions to the provisions of the Convention.[114] One of the main reasons why the New York Convention is of such significance is that it is regarded as a self-executing treaty, meaning that the rules stipulated within it can be directly applied within courts of contracting parties, as opposed to non self-executing treaties whose provisions have to be backed up by implementation of the national legislator before it comes into effects. From this self-executing nature of the Convention, it can be seen that in a sense the legislative power of contracting countries is limited from the moment of ratification onwards, this contested point shall be elaborated in the following part using the Calvo doctrine.

1.6 ICSID

The International Centre for Settlement of Investment Disputes or ICSID is the leading institution for international arbitration, established in the 1960s following the Convention on the Settlement of Investment Disputes between States and Nationals of Other states.[115] The ICSID is a major actor in arbitration resolution. Generally the consent to arbitration being handled at the ICSID is included in international investment treaties, therefore both countries (or all in a multilateral treaty) must consent to ICSID arbitration procedures prior for this to occur here.
The manner in which the ICSID as an extension of the World Bank came into existence deserves some explanation, starting with arguments which the representatives from the World bank produced in defence of the creation of the ICSID. Dutch legal scholar and lead drafting contributor to the creation of the ICSID Aron Broches generally defended the creation of the ICSID using a range of arguments.

First among these arguments was the need for an impartial and independent arbitration forum, whereby integrity and value of arbitration rulings is defended by having these done by independent and neutral experts on the matter instead of biased national courts or politicians.[116]
Further arguments to defend the creation of the ICSID relate to the legal certainty and protection against excessive claims for damages resulting from for example expropriation by a home

[114] Born, "The New York Convention," 115.
[115] Musa, Ruqiya BH, and Martina Polasek. "The origins and specificities of the ICSID enforcement mechanism." *Enforcement of Investment Treaty Arbitration Awards* (2015): 13.
[116] Trakman, Leon E. "The ICSID under siege." *Cornell Int'l LJ* 45 (2013): 610.

state.[117] It can be seen then that the ICSID was meant to be a facilitator in promoting foreign trade and investment through the creation of this, on paper, neutral forum for dispute resolution.

To appeal to developing states, seeing that their support for the Centre was integral for its success, Aron Broches argued for the voluntariness of the facilities of the ICSID and capabilities for home states to retain their own national and international investment law which the ICSID would deem applicable and use in its work, stipulated in Article 42(1) of the Convention.[118] Broches was careful not to use wording which would indicate that the ICSID oughted to replicate the United Nations in creating a permanent diplomatic institution, but rather a forum for efficient resolution of conflicts led by experts and scholars instead of politicians and diplomats.[119] The Convention further did not stipulate normative rules on the treatment by home states of the property of foreign investors.[120]

It is a striking fact that even the creation of a mere forum for dispute resolution was rejected by a significant number of developing states, among which all Latin American states. One of the most striking arguments was brought forward by the delegate of Brazil, who argued that the limited power that national courts would have under the forum in the "administration of justice" would create a system whereby international investors are protected more strongly than nationals, violating the equality before the law.[121]

It is then clear that the Brazilian delegation, and the delegates from Latin America in general, saw the creation of the ICSID as infringing on the sovereignty and capabilities of domestic courts and legislators. These ideas at least in part come from ideas stipulated by Argentinian legal scholar Carlos Calvo, who argued among others that international arbitration and the very idea that a host government would be at least partially responsible for the losses that an international investor makes in the event of instability would create a system whereby there

[117] Trakman, Leon E. "The ICSID under siege." *Cornell Int'l LJ* 45 (2013): 609.
[118] Schreuer, Christoph. "The development of international law by ICSID tribunals." *ICSID Review-Foreign Investment Law Journal* 31, no. 3 (2016): 731.
[119] Lowenfeld, Andreas F. "The ICSID convention: Origins and transformation." *Ga. J. Int'l & Comp. L.* 38 (2009): 51.
[120] Lowenfeld, "The ICSID Convention," 51.
[121] Lowenfeld, "The ICSID Convention," 54.

exists an “unjustifiable inequality between nationals and foreigners”.[122] Furthermore, he argued that “governments of powerful nations which exercise or impose this pretended right against states, relatively weak, commit an abuse of power and force which nothing can justify and is as contrary to their own legislation as to international practice and political expediency”.[123]

Luis Drago, Argentinian minister of foreign affairs in 1902, further elaborated on these ideas and created what is commonly named the Drago doctrine. This doctrine stipulates that investors take into account the resources of the country, as well as the security risks and therefore invest accordingly.[124] He then argues that any intervention to recuperate debts incurred by international investors as a result of instability or the potential civil wars can never justify intervention both militarily and financially, as this would, according to Drago, go against the very ideas of the independence and sovereignty of states.[125]

The Drago and Calvo doctrines have been instrumental in shaping Latin American resistance against the ICSID and more broadly the development of an international arbitration system. Although most countries in the region have since 1966 joined the ICSID, it is apparent that even now Brazil refuses to involve itself in traditional BITs.[126] Ecuador left the ICSID but rejoined in 2021. Though many investment treaties currently include an essentially “local first” arbitration clause, meaning that options in local courts for dispute resolution need to be exhausted first before the option for international arbitration becomes open, the Calvo doctrine still plays a major role in reluctance against the international arbitration system in Latin America and will be addressed once more in Chapters 3 and 4.

[122] Hershey, Amos S. "The Calvo and Drago Doctrines." *American Journal of International Law* 1, no. 1 (1907): 27.
[123] Hershey, "The Calvo and Drago Doctrines," 28.
[124] Hershey, "The Calvo and Drago Doctrines," 29.
[125] Hershey, "The Calvo and Drago Doctrines," 31.
[126] Gomez, Katia Fach. "Latin America and ICSID: David versus Goliath." *Law & Bus. Rev. Am.* 17 (2011): 218.

1.7 1990s - 2010s, the golden age of ISDS

In line with the previously elaborated arguments regarding the seemingly strange willingness of states to sign treaties that hurt their own sovereignty, namely the hope of attaining higher levels of Foreign Direct Investment (FDI) and gaining a generally better standing internationally, it comes as no surprise that the 1990s, the peak of international liberalism, also saw the peak in amount of investment treaties signed, peaking at around 120 each year.[127] Though it is still a disputed topic, it can be seen that in addition to the better international standing, the initial low amount of arbitration against developing nations hid the hurtful nature of ISDS, potentially showcasing that governments of developing nations did not properly understand the implications of this mechanism. The amount of times arbitration has been started under investment treaties, almost exclusively in a developed-developing nation relationship, has risen sharply since.

The development of ISDS took flight in the 1990s, with over 1000 separate treaties being signed from 1990 to 1997.[128] This time came about during a time of great global instability, with the dissolution of the Soviet Union and ending of opposition to ISDS in Latin America following a continent-wide debt crisis being the main drivers of this development.[129] This rise in investment treaties has been accompanied by a simultaneous rise in discontent with the system. Arising in large part from criticism that the current system would be skewed towards investors, would be a threat to national sovereignty, and are procedurally inconsistent.[130] Furthermore, there exists a common criticism that the procedures of arbitration are far too lengthy, often lasting for over 4 years.[131] Having considered the origins and rise of international arbitration extensively, it is now time to focus on the simultaneous development of international environmental law.

[127] Montal, Florencia. "Rage against the regime: Policy responses to international investment arbitration." (2019): 11.
[128] Gus Van Harten, "Origins of ISDS Treaties," in *The Trouble with Foreign Investor Protection* (Oxford: Oxford University Press, 2020), 28, https://doi.org/10.1093/oso/9780198862146.001.0001.
[129] Van Harten, "Origins of ISDS Treaties," 20.
[130] Behn, Daniel. "Legitimacy, evolution, and growth in investment treaty arbitration: empirically evaluating the state-of-the-art." *Geo. J. Int'l L.* 46 (2014): 367.
[131] Behn, "Legitimacy in Investment Treaty Arbitration," 376.

Chapter 2. Sustainability and development

2.1 Development of environmental law

Briefly going chronologically through the development of international environmental law, it can be argued that much of current day environmental law originates with the 1992 United Nations Conference on Environment and Development, colloquially also named the Rio declaration.[132] Though the Stockholm Conference of 1972 established for example the United Nations Environment Programme (UNEP), it must be seen that the Rio Declaration expanded upon pre-existing environmental law in pivotal ways.

A most significant aspect of the Rio Declaration was the fact that the international community endorsed the idea that there is a differentiated responsibility between developed states and developing states with regards to curbing environmental pollution and enhancing sustainable development.[133] This idea was postulated in Principle 7 of the declaration. It is striking to see that no party was particularly happy with the wording of this principle, which warrants some explanation. Developed states were unhappy because additional responsibility was placed for their historic environmental degradation, where developing states saw the text as not going far enough in obligating developed states to recompense for their past environmental pollution.[134]

The 1997 Kyoto Protocol expanded upon the idea of developed state responsibility for decreasing environmental degradation, bringing forth more and binding obligations. It was the first treaty to impose upon developed states binding targets for the reduction of their GHG emissions, this is significant regardless of the rather low (5.2% decrease) figure, given that all other efforts to impose an obligation could only arrive at voluntary activities.[135] The Kyoto Protocol has however also seen its fair share of criticism, in large part stemming from its

[132] Handl, Günther. "Declaration of the United Nations conference on the human environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992." *United Nations Audiovisual Library of International Law* 11, no. 6 (2012): 3.

[133] French, Duncan. "Developing states and international environmental law: The importance of differentiated responsibilities." *International & Comparative Law Quarterly* 49, no. 1 (2000): 35.

[134] French, "Developing States and International Environmental Law," 36.

[135] Böhringer, Christoph. "The Kyoto protocol: a review and perspectives." *Oxford Review of Economic Policy* 19, no. 3 (2003): 457.

designation of China and India as developing nations and therefore refraining from setting any emissions reduction targets for these countries.[136] It is for this reason, among others, that the United States has refused to ratify the Kyoto Protocol, citing too high costs for US industry.[137]

These additional responsibilities for developed states have been justified mostly using the arguments that these states have historically emitted the most greenhouse gases and engaged in the farthest reaching environmental degradation, and their larger capabilities of dealing with the effects of this.[138] There are however additional justifications for this differentiated approach, these being;

- The understanding that international obligations ought to consider the specific capabilities and needs of developing states.[139]
- The idea of a 'global partnership', that merely domestic efforts will not be able to solve problems of pollution and environmental degradation and therefore there needs to be strong international assistance to ensure sustainable development.[140]
- An offer of assistance can bring those countries that would otherwise be unwilling to cooperate to signing environmental treaties.[141]

Finalising the brief chronological explanation of the development of environmental law, we arrive at the 2015 Paris Agreement. One of the most instrumental aspects of the Paris Agreement is the assertion that although differentiated responsibility exists, developing states also have an obligation to mitigate environmental degradation.[142] In this light, NDCs or Nationally Determined Contributions ought to be developed by all signatory states of the declaration.[143] Furthermore, the Paris agreement set out standards of reviewing the progress towards emissions goals, both nationally and globally.[144]

[136] United Nations Framework Convention on Climate Change (UNFCCC), *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, adopted December 11, 1997, entered into force February 16, 2005, Annex B.
[137] Böhringer, "The Kyoto Protocol," 457.
[138] French, "Developing States and International Environmental Law," 46.
[139] French, "Developing States and International Environmental Law," 46.
[140] French, "Developing States and International Environmental Law," 46.
[141] French, "Developing States and International Environmental Law," 46.
[142] Savaresi, Annalisa. "The Paris Agreement: a new beginning?." *Journal of Energy & Natural Resources Law* 34, no. 1 (2016): 22.
[143] Savaresi, "The Paris Agreement: a new beginning?," 18.
[144] Savaresi, "The Paris Agreement: a new beginning?," 21.

The field of environmental law can best be understood from three perspectives, public international environmental law, national environmental law, and transnational law.[145]

Kim and Mackey see the development of international environmental law as a complex adaptive system (CAS), meaning a system in which large networks without a central node are constantly adapting and evolving.[146] International environmental law is best understood as "a body of special international law in that the various environmental agreements all seek to address problems involving the human relationship to the natural world. The field has developed a certain level of coherence through incorporation of unifying principles in nearly every major multilateral environmental agreement, such as the obligation to avoid transboundary harm and the principle of common but differentiated responsibilities as discussed prior. Viewed as a part of the landscape of international law generally, then, it is justifiably understood as a closely connected and deeply intertwined field of law."[147] Treaties on international environmental law are often not static agreements between states in a certain point in time but represent a dynamic and ever changing arrangement between all parties, whereby the text of the treaty represents merely the beginning and the intricacies are worked on on a dynamic case by case and country by country basis.[148]

International and national environmental law overlap in significant ways, whereby certain aspects in this fast evolving field of law originating in the international sphere become part of national legislation and vice versa.[149] Here then we can see that the transnational-ness of environmental concerns within a global system of nation states necessitates "standard setting of international legal processes, governmental and non-governmental networks, and judicial influence and cooperation across borders".[150]

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[145] Yang, Tseming, and Robert V. Percival. "The emergence of global environmental law." *Ecology LQ* 36 (2009): 617.

[146] Kim, Rakhyun E., and Brendan Mackey. "International environmental law as a complex adaptive system." *International Environmental Agreements: Politics, Law and Economics* 14 (2014): 6.

[147] Long, Andrew. "Developing linkages to preserve biodiversity." *Yearbook of International Environmental Law* 21, no. 1 (2010): 47-48.

[148] Kim and Mackey, "International Environmental Law as a Complex Adaptive System," 15.

[149] Yang and Percival, "Emergence of Global Environmental Law," 623.

[150] Yang and Percival, "Emergence of Global Environmental Law," 625.

Investment law and both domestic and international environmental law can be potentially conflicting in a myriad of areas, whereby established investment law/standards stipulate a different course of action than established domestic/international environmental law. In these cases, there is what Vinuales calls a 'legitimacy conflict', between the protection of investors and environmental considerations.[151] Traditionally, almost every conflict in arbitration was seen as a conflict of legal validity, wherein environmental regulations adopted by states were seen as nothing more than a disguised illegal protectionism, and placed lower in hierarchy than investment law.[152] A striking example of this legitimacy conflict can be found in *Rockhopper v Italy*, wherein the majority of arbitrators rejected claims that environmental concerns are of importance in determining whether measures taken constitute expropriation.[153] *Perenco Ecuador Limited v. The Republic of Ecuador* did establish that environmental concerns are valid and legitimate, however it must be seen also within the final award that tribunals remain of the opinion that this legal validity is lower than that of investment protection.[154]

Tensions between the legitimacy of regulations and rights of investors boil down regularly to considerations in arbitration of the 'right to regulate', this notion outlines the right of authorities in host states to regulate for the public interest.[155] This right is used by host states to regulate a myriad of public objectives such as health, safety, and environment.[156] Another situation where the right to regulate is commonly invoked is one which shall be of importance in the case studies later, expropriation. Here, the discussion is how far a host state is allowed to go in enforcing regulations which lower the value of the investment in an effort to protect public interest.
In manners of public importance, the right to regulate does not give states an absolute mandate to act in any way it so wishes. The standard of fair and equitable treatment (FET) outlines that regardless of situations where there would be a tangible reason for regulation by a state to protect

[151] Jorge E. Viñuales, *Foreign Investment and the Environment in International Law* (2012), 23.
[152] Schill, Stephan W. "Developing a framework for the legitimacy of international arbitration." In *Legitimacy: Myths, Realities, Challenges (ICCA Congress Series, 18)(Alphen aan den Rijn: WoltersKluwer, 2015)*: 15.
[153] "Polluter Doesn't Pay: The Rockhopper v. Italy Award," *EJIL: Talk!*, accessed 20/3/2025, https://www.ejiltalk.org/polluter-doesnt-pay-the-rockhopper-v-italy-award/.
[154] Harrison, James. "Environmental Counterclaims in Investor-State Arbitration: Perenco Ecuador Ltd v Republic of Ecuador, ICSID Case No ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015 (Peter Tomka, Neil Kaplan, J Christopher Thomas)." *the journal of world investment & trade* 17, no. 3 (2016): 482.
[155] Vera Korzun, "The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-outs," *Vanderbilt Journal of Transnational Law 50*, no. 2 (March 2017): 373.
[156] Korzun, "The Right to Regulate in Investor-State Arbitration," 373.

public interests, the actions undertaken still cannot be discriminatory or lead to direct expropriation.[157] FET then addresses such activities on behalf of the government which are not immediately against specific provisions of an agreement, but are generally 'deemed to be inconsistent with the object and purpose of the agreement.'[158] Any regulation which the government then carries out in an effort to protect public interests must be done, as seen earlier in the thesis, in *good faith*. A further manner of investor protection, linked to the mentioned fair and equitable treatment, is the protection of legitimate expectations of the investor. The 'legitimate expectation' outlines the expected profitability of an investment in light of the legislative and fiscal landscape in the host country at the moment of investment.[159] It can be seen that inconsistency in terms of the legislative landscape of the host state can complicate planning in investing companies and does not aid in bringing about an investor-friendly atmosphere.[160]

2.2 Resources, development and violence

The link between the abundance of natural resources and economic development is a complex issue which still needs solving. Multiple fields of theory exist with polar opposite outcomes, either natural resource abundance encourages economic growth or it impedes it.[161] In the case of Peru it is clear that at face value the abundance of natural resources is a clear contributor to economic growth, as has been discussed in the case study selection chapter. One must however also consider, especially when an economy is built up of a small number of large revenue sources, whether the money arising from these activities encourages development in a broad sense and good governance.

[157] Dolzer, Rudolf. "Fair and Equitable Treatment: Today's Contours," S*anta Clara Journal of International Law 12*, no. 1 (2013): 11.
[158] Dolzer, "Fair and Equitable Treatment," 12.
[159] Henckels, Caroline. "Legitimate expectations and the rule of law in international investment law." *Investment Protection Standards and the Rule of Law (Oxford University Press 2023)*: 3.
[160] Dolzer, "Fair and Equitable Treatment," 12.
[161] Al Mamun, Md, Kazi Sohag, and M. Kabir Hassan. "Governance, resources and growth." *Economic Modelling* 63 (2017): 238.

A major fear in states with abundant natural resources is that of elite capture, whereby an elite can "govern without needing to negotiate power with other centers of power."[162] It is visible that this is strongly the case in Peru, where a Lima-based elite holds considerable power over all parts of government. This urban-periphery power structure is a leftover from colonial times and still holds particular sway over the country, also in social standing where people living in the highlands or rainforest are seen as 'lesser' than their urban counterparts.[163] During the presidencies of Alan Garcia (2006-2011) and Alejandro Toledo (2001-2006), a time where economic growth was the highest it had been in recent memory, the free trade agreements researched in this thesis were signed, and the most socio-economic violence in decades had been registered, a staggering 72% of the Peruvian Amazon was earmarked as open to exploitation.[164] Almost every single one of the areas opened to exploitation interfered with lands which are/were legally held by indigenous peoples.[165] Though indigenous held lands are legally protected under the ILO Convention and Peruvian domestic law, Garcia forced through legislation which will be discussed allowing for easier designation of their lands as open to investment.

For Garcia, in a speech which illustrates both his opposition to environmental protections and enthusiasm for international investment in mining and hydrocarbons in the country; "Of course, mining did once destroy it [the environment, auth] and today's environmental problems are basically due to yesterday's mines, but today mines live alongside cities without any problems; and, in any case, it all depends on how struct the state is in its technology demands of mining companies and in negotiating a greater financial and employment share for the departments where the mines are located."[166]

What is striking here is not just the openness that the president of Peru had regarding the opening up of his country's territory towards potentially destructive activities, though he denies the destructiveness, but the remained insistence that the benefits of this economic activity depends

[162] Gustafsson, Maria‐Therese, Roger Merino, and Martin Scurrah. "Domestication of international norms for sustainable resource governance: Elite capture in Peru." *Environmental Policy and Governance* 30, no. 5 (2020): 229.
[163] Escobedo, Luis. "Colonial heritage in multi-ethnic societies: undercover racism in twenty-first-century Peru." *Studia z Geografii Politycznej i Historycznej* 02 (2013): 120.
[164] Andreucci and Kallis, "Governmentality and Resource Extraction in Peru," 99.
[165] Andreucci and Kallis, "Governmentality and Resource Extraction in Peru," 99.
[166] Andreucci and Kallis, "Governmentality and Resource Extraction in Peru," 100.

on the position of the state in enforcing adherence to strict technological, labour and financial regulations. This will be addressed once more later on in the hypothesis testing, but for now it suffices to point out that it would seem that even those in developing states who are most supportive of activities of international mining corporations assert that the state ought to retain regulatory capacities on used technology, financial compensation and labour distribution from international investment.

Chapter 3. Case study Peru

3.1 Sustainable Peru

Before elaborating on the consequences of the US-Peru FTA, building on what has been mentioned in the case selection, it is of importance to enquire into the nature of sustainable development in Peru itself. This shall be done in a twofold manner, public and private. We shall start with the latter.

One of the main private initiatives in Peru regarding sustainable development that warrants talking about is Peru sostenible, sustainable Peru. This is a business cooperative that started in the 90s in an effort to help counter the wave of terrorism and unrest that was plaguing the country at the time.[167] From 2006 onwards, their aim of a peaceful, prosperous and democratic Peru has included the UN sustainable development goals. This is done not only through the organisation of courses and management tools enabling business leaders to focus increasingly on environmentally and socially sustainable business activities, but also through the creation of multi-stakeholder spaces that address local, regional and national challenges that need to be overcome to achieve the SDGs and address ESG.[168] Companies that have joined this initiative range in sectors from such ones as banks to energy and consulting firms, as well as construction, textiles and telecommunications.

[167] Peru Sostenible, "Red de Empresas," accessed 23/2/2025, https://Perusostenible.org/redeempresas/.
[168] World Business Council for Sustainable Development (WBCSD), "Peru Sostenible," accessed 23/2/2025, https://www.wbcsd.org/global-network/Peru-sostenible/#.

Briefly considering the progress that Peru has made in terms of sustainable development tracking its SDG achievements, we can see that eventhough it is performing marginally better than the regional average, there is still significant work to be done.[169] As it stands now, only one of the sustainable development goals have been achieved, quality education. This sustainable development goal focuses primarily on "inclusive and equitable quality education", focusing primarily on availability of pre-primary, primary and secondary education.[170] A notable exclusion from this goal is tertiary education, meaning universities. Some notable SDG indicators that have been decreasing over the last years are the protection of fundamental labour rights, clean water score, child labour, as well as mean areas that are protected in both terrestrial and freshwater sites important to biodiversity.[171]

Broader social sustainability in the country, defined as the development of communities, cultures and persons in search of a dignified, healthy and equitable life,[172] is for this thesis inextricably linked with environmental sustainability. In Peru, the protection of the fundamental and constitutional rights of persons and communities lies with the social Ombudsman or Defensoria del Pueblo.[173] The Defensor del pueblo investigates and presents annual reports on infringements on rights of the population to the Peruvian congress, it has the right of initiative in drafting of new laws and all public bodies must cooperate with it when the Defensor requires them to.[174] This Defensor del Pueblo however can be fired and replaced by Congress at any time, making it a fundamentally unstable position where strongly criticizing those in power could potentially be disadvantageous. Alongside this it must be understood that individuals holding views which do not align with extractivist development in Peru, focusing more strongly on environmental and

[169] Sustainable Development Report, "Peru - Country Profile," accessed 23/2/2025, https://dashboards.sdgindex.org/profiles/Peru.
[170] Sustainable Development Report, "Peru - Country Profile," accessed 23/2/2025, https://dashboards.sdgindex.org/profiles/Peru.
[171] Sustainable Development Report, "Peru - Country Profile," accessed 23/2/2025, https://dashboards.sdgindex.org/profiles/Peru.
[172] Jara, Ruth Caldas, Bessy Castillo Santa María, and Freddy William Castillo Palacios. "Gobernanza territorial para el desarrollo sostenible de Peru." *Revista Metropolitana de Ciencias Aplicadas* 4, no. 3 (2021): 51.
[173] Defensoría del Pueblo del Peru, "Quiénes Somos," accessed 19/02/2025, https://www.defensoria.gob.pe/quienes-somos/.
[174] Yupanqui, Samuel B. Abad. "La defensoría del Pueblo: La experiencia Peruana." *Teoría y realidad constitucional* 26 (2010): 485.

social repercussions of highly polluting investments in the country, are often set aside as communists or terrorists. Case in point in this regard is professor Jan Lust, whose work has been used extensively for the research of this thesis and agreed to an interview in light hereof. Being highly critical of extractivist models of development, Mr Lust was ousted from his professorial position in Lima on grounds of suspected "terrorist support". Much of this opposition comes from Lima-based individuals who hold fundamentally different ideas regarding the (spiritual) importance of land and healthy environments. The information industry in the country is furthermore predominantly within the hands of these few individuals, leading to a situation wherein resistance and popular movements against the extraction of natural resources in a community are branded 'communist' and 'terrorist' more often than not.

Regardless of a perceived political indifference to the plight of its indigenous population with regards to the extraction of natural resources, we must understand that the Peruvian government has still attempted in many cases to regulate on grounds of environmental matters leading to arbitration. This often follows intense social opposition that became too much for the Peruvian government to ignore. For this reason the case study of Peru remains valuable.
The lack of progress in important aspects of sustainable development is striking and seems to be in direct contradiction to what was expected from the inclusion of language purportedly ensuring protection in the investment treaty.[175] The real outcomes of the FTA shall therefore be outlined in the next section, including legislative changes that president Garcia used his FTA implementation rights for, without consulting the Peruvian Congress. The specific legislative changes that were made under Garcia with regards to the FTA shall be outlined in the next section, focusing on labour rights and environmental protection.

3.2 USA - Peru FTA

The US-Peru FTA ought to be understood in the light of preceding agreements between the United States and Andean states under the Andean Trade Preference Act of 1991, whereby

[175] United States-Peru Trade Promotion Agreement, art. 18.1, signed April 12, 2006, entered into force February 1, 2009, https://ustr.gov/trade-agreements/free-trade-agreements/Peru-tpa/final-text

Bolivia, Peru, Ecuador and Colombia received far-reaching duty-free access to US markets in an effort to fight the production of drugs, predominantly cocaine.[176] This agreement, which was in 2002 renewed to become the Andean Trade Promotion and Drug Eradication Act and was bound to expire in 2008, eventually morphed into free trade agreements between the United States and three of the four states involved, being Peru, Colombia and Ecuador[177]. Bolivia refused the signing of a free trade agreement.

As mentioned prior, the free trade agreement had the overall aim to increase the amount of FDI coming into Peru and boosting the exporting value of the economy. In this regard we can see that the free trade agreement has largely succeeded. Accounting for global and regional trends, there is a clear increase in export of Peruvian goods, going from around 30 billion USD at the time of the ratification of the FTA to over 50 billion USD in 2017.[178]

Having established in the chapter on case study selection that the free trade agreement between the United States and Peru includes far-reaching environmental clauses, it is striking to see that there has been large-scale opposition and criticism with regards to the treaty on environmental and social issues. A first source of weakness in the Peru-US FTA with regards to environmental regulation can be found in Article 18.3.3, where it states "Paragraph 2 shall not apply where a Party waives or derogates from an environmental law pursuant to a provision in law providing for waivers or derogations, provided that the waiver or derogation is not inconsistent with the Party's obligations under a covered agreement", where Paragraph 2 relates to the inappropriateness of weakening environmental standards of decreasing protections in areas that affect trade between the two nations.[179] What this means essentially is that if there is a pre-existing legal way to decrease environmental standards in either Party, then this can still be done.

[176] Lombana, Monica P. "Free trade agreements between Peru, Colombia, and the United States." *American Journal of Economics and Sociology* 79, no. 1 (2020): 200.
[177] Lombana, "Free Trade Agreements in Peru and Colombia," 200.
[178] Lombana, "Free Trade Agreements in Peru and Colombia," 209.
[179] United States-Peru Trade Promotion Agreement, art. 18.3.3., signed April 12, 2006, entered into force February 1, 2009, https://ustr.gov/trade-agreements/free-trade-agreements/Peru-tpa/final-text

Much of the criticism following the signing of the FTA has come from legislative changes in Peru to align its laws with the provisions set out concerning the protection of investor's rights to forestry, mining and other national resources in Peru.[180] Though it may seem that this concerns a Peruvian domestic issue and is not necessarily an area where the FTA is at fault, it must be seen that the Bush administration and the United States Trade Representative office had a direct influence on the pushing through of anti-environmentalist laws. Teams of administrators from the Bush administration had a direct role in the drafting of the new environmental laws in Peru, among which were;

- Legislative Decree 1064 promoting privatization of indigenous lands.[181]
- Legislative Decree 1079 eliminating laws that limit the power of eminent domain in protected natural areas.[182]
- Legislative Decree 1089 allowing for the eviction of inhabitants from land which is deemed "unused".[183]
- Legislative Decree 1015 eliminating consultation with indigenous communities that live in areas where investors want to invest, this decree was later repealed after violent protests.[184]

In addition to the Bush administration sending experts to aid in the deconstruction of Peruvian environmental law to align with investor protection rights under the FTA, the then head of the US trade office Susan Schwab argued exactly that what free trade agreements do is "implement reforms that we should probably be doing anyway but that could be difficult politically. Part of

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[180] *Public Citizen*, "The Peru Free Trade Agreement: One Year Later," accessed 22/2/2025, https://www.citizen.org/wp-content/uploads/Perufta-oneyear.pdf.
[181] Peru, Legislative Decree No. 1064, Diario Oficial El Peruano (July 28, 2008), https://busquedas.elPeruano.pe/normaslegales/decreto-legislativo-que-aprueba-el-regimen-de-tierras-decreto-legislativo-n-1064-251922-1/.
[182] Peru, Legislative Decree No. 1079, Diario Oficial El Peruano (June 28, 2008), https://busquedas.elPeruano.pe/normaslegales/decreto-legislativo-que-aprueba-la-ley-de-promocion-de-la-inv-decreto-legislativo-n-1079-251923-1/.
[183] Peru, Legislative Decree No. 1089, Diario Oficial El Peruano (June 28, 2008), https://busquedas.elPeruano.pe/normaslegales/decreto-legislativo-que-aprueba-la-ley-de-promocion-de-la-inv-decreto-legislativo-n-1089-251924-1/.
[184] Peru, Legislative Decree No. 1015, Diario Oficial El Peruano (May 20, 2008), https://busquedas.elPeruano.pe/normaslegales/decreto-legislativo-que-aprueba-la-ley-de-promocion-de-la-inv-decreto-legislativo-n-1015-251925-1/.

our effort is working with Peruvian authorities to help them get there."[185] In this light it can be seen that the Peru-USA FTA and USTR actively promoted the decrease in Peruvian legislative power concerning its own environment.

These US-led legislative changes in Peru created a political scandal which turned deadly in 2008 and 2009 when the Asociacion Interetnica de Desarrollo de la Selva or AIDESEP, a Peruvian indigenous rights organisation, began a period of civil disobedience. President Garcia, who we discussed before in light of his opposition to indigenous groups and encouragement of opening up the Peruvian Amazon and reserves to investment, consequently sent in the army and the following days saw fighting which left 23 police agents and 10 indigenous people dead, with another 150 indigenous gravely wounded. This violence attracted large national attention and as a result, president Garcia closed various radio and television stations in the country. This was done nominally because these stations lacked proper registrations, however this has been contended on the grounds that it was specifically these stations which broadcasted and mentioned the ongoing violence.[186] All stations, fully coincidentally, "regained their proper licenses" shortly after the violence had subsided.

Legislative Decree 1089 regarding the eviction of indigenous peoples from "unused lands" is especially problematic given that only 5% of indigenous communities in the country have been able to establish a legally recognized property tile in the country, meaning that 95% of indigenous communities inhabit land which legally can be seen as "unused".[187] Though there have been improvements in the system of formal registration of lands for indigenous peoples since the establishment of the Commercial Court system in the country in 2005, the lengthiness and high cost of registration make this an impossibility for many communities.[188]

There is a further point of interest within Peruvian constitutional law when seen from the lens of the prior mentioned Calvo doctrine where Articles 55 and 63 seem to provide a contradiction.

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[185] *Public Citizen*, "The Peru Free Trade Agreement: One Year Later," accessed 22/2/2025, https://www.citizen.org/wp-content/uploads/Perufta-oneyear.pdf.
[186] Simon Romero, "Clashes in Peru Over Land Decrees," The New York Times, June 3, 2009, https://www.nytimes.com/2009/06/04/world/americas/04Peru.html.
[187] Jo-Marie Burt, "Peru," in Countries at the Crossroads 2011 (Washington, DC: Freedom House, 2011)
[188] Burt, "Peru," in Countries at the Crossroads 2011.

Article 55 of the constitution states that "Treaties formalized by the State and in force are part of national law"[189], where article 63 explains the following "National and foreign investments are subject to the same conditions".[190] Where this, from the lens of the Calvo doctrine, becomes interesting is that Article 55 allows for additional ways of arbitration that are not open for national investors, then creating a question of whether articles 63 and 55 can simultaneously be true. Given that Peru follows a monist system, whereby international treaty obligations are enshrined into domestic law so long as they do not interfere with the Constitution, we must identify that there is a conflict of rights within the Peruvian constitution itself.

3.3 Canada-Peru FTA

The Canada-Peru free trade agreement which lays at the core of the Bear Creek case shall be considered briefly and predominantly on relevant issues. Reason for this is that much of the agreement is the same as the US-Peru treaty and, different from the US-Peru free trade agreement, no domestic legislative changes and widespread social opposition accompanied the signing. Whether this is a sign of a more amicable perception of Canadian investors or another reason is outside of the scope of this thesis. It is established that the Canada-Peru free trade agreement came about not so much to boost Canadian exports to Peru, but to 'level the playing field' between itself and other states which already signed trade agreements with Peru such as the United States.[191] Canada has become a major trading partner for Peru however, with around 12% of total exports being destined for the country.[192]

The Canada-Peru free trade agreement differs from the US-Peru agreement in a few relevant fields, predominantly that the chapters on labour and the environment are separate in the

[189] Constitución Política del Peru de 1993, Art. 55, accessed 23/2/2025, https://www4.congreso.gob.pe/_constitucion/.
[190] Constitución Política del Peru de 1993, Art. 63, accessed 23/2/2025, https://www4.congreso.gob.pe/_constitucion/.
[191] Kirk Bennett, "Canada's Bilateral Free Trade Agreement Strategy in Latin America: A Strategic Analysis" (2011), 67.
[192] Bennett, "Canada's Bilateral Free Trade Strategy in Latin America," 69.

Agreements on Environmental and Labour cooperation respectively.[193] The Agreement on Environmental Cooperation, different from the corresponding chapter in the US-Peru FTA, establishes a Committee on the Environment containing representatives of both Peru and Canada.[194] This committee discusses and considers the progress of the implementation of the agreement and publishes an annual report on actions taken by either Party pursuant to its obligations under the agreement.[195] This Committee not only focuses on matters of biodiversity but additionally strongly on matters of protecting indigenous and local communities, which shall be relevant for the Bear Creek case.

3.4 Mining in Peru - Doe Run and Bear Creek

As mentioned prior, mining plays a significant role in the Peruvian economy. 60% of the country's exports are mining products, with copper comprising about half of this amount.
The mining operations are however not without social opposition, as Mundaca outlines. There exists a high willingness to pay to avoid working in mining operations.[196] This indicates a deep rooted opposition to the activities in local communities and is especially striking given that these are quite often the poorest communities themselves. To people living in the regions wherein mining corporations are active, there are often little to no perceived benefits to these activities. This is regardless of a programme of prior mentioned fiscal decentralisation programmes on account of the Peruvian government wherein revenue streams arising from the taxation of mining activities and exports are more directly allocated to the localities affected directly by mining.

[193] Canada-Peru Free Trade Agreement, Chapter 17: Environment, and Chapter 18: Labour, signed May 29, 2008, entered into force August 1, 2009, accessed 23/2/2025, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/Peru-perou/index.aspx?lang=eng
[194] Canada-Peru Agreement on the Environment, Article 8: Committee on Environmental Cooperation, signed May 29, 2008, entered into force August 1, 2009, accessed 22/2/2025, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/Peru-perou/index.aspx?lang=eng
[195] Canada-Peru Agreement on the Environment, Article 8: Committee on Environmental Cooperation, signed May 29, 2008, entered into force August 1, 2009, accessed 22/2/2025, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/Peru-perou/index.aspx?lang=eng
[196] Mundaca, Gabriela. "Economic valuation of environmental and health impacts from mining: the case of Peru." *Environment, Development and Sustainability* 26, no. 1 (2024): 2436.

One must however consider that the monetary amounts of this redistribution are rather low, with the entire redistribution budget decreasing year to year.[197] In an interview conducted by the author of this thesis with professor of development studies Jan Lust, it furthermore became clear that the realised allocation of mining tax revenues are done based on political affiliation of the regional government, resulting in a situation wherein only regions with governments that stay quiet and compliant to the right-wing national government receive support.

The decision to include specifically these cases is that, starting with *Bear Creek v Peru*, it shows clearly the position within the decision making process with regards to the investment what the position of indigenous peoples is and in which ways they ought to be consulted. It shall become apparent that the dissenting opinion of professor Philippe Sands in this case presents us with a strong argument towards the improvement of ISDS mechanisms. *Doe Run v Peru* in comparison shows how regulations coming from environmental concerns can be stalled for years as a result of arbitration proceedings by the investor. The following part shall begin with this case, and be finished with related cases in different legislations.

3.4.1 Doe Run v Peru

From 1974 to 1997, mining activity was in the hands of the Peruvian government through Centromin, a state-owned enterprise.[198] Centromin in 1996 published the Programa de Adecuación y Manejo Ambiental (hereafter PAMA) outlining how mining activity in the area would within a ten year period align with environmental regulations in Peru. Then in 1997, under Peruvian president Alberto Fujimori, Peru re-privatised much of the mining industry in the country and the mines of La Oroya came under ownership of American corporation Doe Run Peru, a subsidiary of New York based Renco Group. Part of the contract which transferred ownership from Centromin (the Peruvian state) towards Doe Run was the assurance that Doe Run would implement obligations set out under the prior mentioned PAMA. Under the new deal the Peruvian state would take responsibility for clearing the pollution that was a result of the

[197] Aresti, María Lasa. "Mineral revenue sharing in Peru." *Natural Resource Governance Institute* (2016): 31.
[198] Fédération Internationale des Ligues des Droits de l'Homme (FIDH), Peru: Metallurgical Complex of La Oroya (Paris: FIDH, 2012): 6.

mining activity of the prior decades, where Doe Run would ensure that production in the site would be within environmental limits before 2007. Doe Run applied for multiple extensions to the implementation of the PAMA, receiving an extension until 2009, then until May of 2012. A third extension sought by Doe Run was refused by the Peruvian government, as the company had already gotten 5 extra years to implement the contractually obligatory infrastructure and civil society in the area was strongly against any further extension.[199]

It is notable to see that the Peruvian government has also not yet fulfilled its obligations of clearing up prior pollution in the area, arguing that it is a waste of resources when Doe Run has not fulfilled its obligations of reducing outcoming pollution. Logically this is defensible, as clearing up pollution when there are significant amounts released would amount to "dweilen met de kraan open", a Dutch saying which can be translated to mopping with the faucet on, an activity that is entirely pointless and neglects the source of the problem.

Illustrating the degree to which the activities of Doe Run Peru affected neighbouring communities, it is useful to elaborate shortly on pollution numbers during operation of the mine by Doe Run Peru. First it must be understood that during the years where Doe Run operated the mine (1997-2009), daily pollution was significantly higher than during the Centromin era.[200] Findings from studies done by the University of Missouri showed that, among others; 98% of children up to 12 years old had elevated lead levels in their blood, toxic metal amounts in blood of all the population exceeded safe levels three to six times, and the effects of pollution from the La Oroya mine exceeded far from the city itself, to the entire watershed of the Mantaro river.[201]
A striking figure is the decrease in levels of pollution following the forced closure of the mine in 2009, which will be further explained below. This closure saw the levels of sulphur dioxide (SO2) decrease by 99.54% in the area around the mine. Further effects of the closure of the mine were a 98.82% decrease in lead levels in the blood, 99.37% decrease in arsenic and 93.42% decrease in cadmium.[202]

[199] Fédération Internationale des Ligues des Droits de l'Homme (FIDH), Peru: Metallurgical Complex of La Oroya (Paris: FIDH, 2012): 8.
[200] FIDH, Peru: Metallurgical Complex of La Oroya, 10.
[201] FIDH, Peru: Metallurgical Complex of La Oroya, 11.
[202] FIDH, Peru: Metallurgical Complex of La Oroya, 13.

Doe Run Peru in 2009 stated that it could not afford the necessary minerals to continue running the mining plant in La Oroya, stating as cause the initial non-extension of the PAMA contract in 2009, because of which Doe Run Peru's lenders would not renew a loan necessary for the day to day operations of the plant.[203] Then on April 7th 2011, Renco Group came forward announcing the commencement of formal international arbitration against the Peruvian government under the Peru-US free trade agreement (FTA), claiming 800 million dollars for alleged unfair treatment of Doe Run Peru by the government and placing liability for all judgments relating to prior lawsuits on the Peruvian government. These prior lawsuits have been put forward by activist groups in both Peru and the United States, relating to the excessively high concentrations of harmful substances in the La Oroya area as a result of mining activity. Renco further considers the refusal of the Peruvian government to grant a third extension of the PAMA contract, which was already in place when Doe Run acquired the site, to be unfair treatment under Article 10.5 of the agreement.[204] In the end, the tribunal in 2016 rejected the claims by Doe Run, and established that Peru did not have to pay the claimed 800 million USD.[205] The tribunal did also reject the claim by Doe Run that Peru's actions had broken the FET standard, arguing that the actions of the Peruvian government were reasonable and justified under circumstances.

The significance of this case is then not in only the outcome of the case, as it was concluded in favour of the investor, but in the very possibility that a company which consistently has not lived up to environmental standards and has in fact aimed to weaken them, is still in a position to sue a government when it enforces its environmental contracts and standards.

Following this, a second case regarding the La Oroya mines owned by Doe Run started in 2016. This followed litigation started in the United States between people who claimed to be victims of Doe Run's purported environmental negligence, and the Renco Group/Doe Run. The company sought once more to place guilt on the Peruvian government, as it claimed it had not followed the provisions of the 1997 contract between itself and Doe Run regarding the cleaning up of prior

[203] FIDH, Peru: Metallurgical Complex of La Oroya, 8.
[204] FIDH, Peru: Metallurgical Complex of La Oroya, 20.
[205] Doe Run Peru S.R.L. v. Republic of Peru, ICSID Case No. UNCT/13/1, Final Award (November 9, 2016)

emissions.[206]The Peruvian government in response argued that, in addition to the points outlined in the first litigation regarding extensions of the PAMA, that Doe Run in fact requested multiple modifications of the agreement and then did not follow up on the provisions in its own right.[207] In the end, Doe Run retracted its claims against Peru in late 2023, no longer pursuing arbitration.

3.4.2 Bear Creek v Peru

The second case study of this work shall be *Bear Creek v Peru*, working within the same host state for reasons of clarity in relevant legislation and political situations. This case, which followed a retracted court procedure by Canadian mining corporation Bear Creek Mining Corporation under Peruvian law started on the 28th of November 2014, with the aim for reimbursement of lost investment and potential lost profit in the Santa Ana mine near the city of Puno, amounting to a claimed amount of $522 million.[208] This case is notable as it is the one of the first cases where the 'social license to operate' was considered extensively. The case was started following the revocation of a Supreme Decree by the Peruvian government which designated the project as being one of public necessity, a requirement under Peruvian law for international investments.[209] This revocation was preceded by a period of extensive social unrest and opposition to the plans for the Santa Ana mine, wherein it was understood by local people that there was a strongly skewed distribution of the profits and costs of the project, costs being understood predominantly in social and environmental terms.[210]

The social license to operate mentioned above relates to the support of local and indigenous communities for an investment project, this notion is commonly not considered part of 'hard law'. Nevertheless, the Tribunal in *Bear Creek v Peru* asserted that relevant documents of

[206] Doe Run Peru II S.A. v. Republic of Peru, Notice of Arbitration, ICSID Case No. UNCT/18/1 (October 23, 2018)
[207] Doe Run Peru II S.A. v. Republic of Peru, Respondent's Comments, ICSID Case No. UNCT/18/1, para. 13, (December 3, 2019)
[208] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, para. 572 (November 30, 2017).
[209] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, para. 213 (November 30, 2017).
[210] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands, para. 33 (November 30, 2017).

international investment law did see that consulting indigenous peoples is imperative.[211] Peru argued during the arbitration proceedings that Bear Creek Mining Corporation had created the social opposition itself through inadequate efforts to consult local communities.[212] This would be a similar situation to Ecuador's defence in *Copper Mesa Mining Corporation v. Republic of Ecuador,* a case where unwillingness of the company to obtain social support lead to a substantial reduction of damages awarded.[213] This claim was partly upheld by the Tribunal, which saw that Bear Creek could have done more but that this was not legally necessary. The fact that this was accepted was already noteworthy, as a similar situation in *Quiborax SA and Non Metallic Minerals SA v Bolivia* saw community interests left out.[214] Furthermore, the majority opinion of the Tribunal saw that obtaining the social license to operate is the responsibility of the government through a thorough monitoring of the investor, voicing concerns and engaging with local communities.[215] The tribunal furthermore saw that the social license to operate was unlikely to be obtained by any investor of the Santa Ana mine.[216]

The Tribunal in 2017 ruled in favor of the investor. It argued that the Peruvian government indirectly expropriated the Santa Ana mine from Bear Creek Mining Corporation through the revocation of Supreme Decree 083-2007, thereby breaking the FET standard.[217] The Tribunal disregarded arguments related to Bear Creek's lack of received permits, even though, in the Tribunal's own words; "it had not received many of the government approvals and environmental permits it needed to proceed".[218] A refusal of granting of further permits instead

[211] Paine, Joshua. "Bear Creek Mining Corporation v Republic of Peru: Judging the social license of foreign investments and applying new style investment treaties." *ICSID Review-Foreign Investment Law Journal* 33, no. 2 (2018): 342.
[212] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, para. 643 (November 30, 2017).
[213] Muchlinski, Peter. "Can International Investment Law Punish Investor's Human Rights Violations? Copper Mesa, Contributory Fault and its Alternatives." *ICSID Review-Foreign Investment Law Journal* 37, no. 1-2 (2022): 364.
[214] *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia.* International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/06/2. Award. September 16, 2015, paras. 246–54. https://www.italaw.com/cases/460 (accessed [20/3/2025).
[215] Marcoux, Jean-Michel, and Andrew Newcombe. "Bear Creek Mining Corporation v Republic of Peru: Two Sides of a 'Social License' to Operate." *ICSID Review-Foreign Investment Law Journal* 33, no. 3 (2018): 654.
[216] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, para. 599 (November 30, 2017).
[217] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, para. 449 (November 30, 2017).
[218] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, para. 600 (November 30, 2017).

of revoking granted ones could have been more successful for the Peruvian government, like the Salvadoran government did in *Pac Rim Cayman LLC v. Republic of El Salvador.*[219]

The Tribunal in *Bear Creek v. Peru* did not award the investor the sought $522 million, but rather obligated the Peruvian state to reimburse Bear Creek for the investments already made in the project, amounting to $18.2 million, plus 75% of the arbitration costs of Bear Creek, another $5.98 million.[220]

The dissenting opinion of Arbitrator Sands is highly interesting in this regard. He argued that this responsibility to obtain a social license to operate is not in fact one of the government but of the investor itself and that the tribunal should have taken Bear Creek's failure to do so into account. In his dissenting opinion he states "It is blindingly obvious that the viability and success of a project such as this, located in the community of the Aymara peoples …. was necessarily dependent on local support".[221] The defense in *South American Silver Limited v. The Plurinational State of Bolivia* employed the same legal reasoning, once more to no avail.[222]

Furthermore, he outlines that the manner in which Bear Creek obtained ownership of the Santa Ana project was contentious, as it used one of its low-level employees to obtain ownership over the site and necessary permits which it, as an international corporation, was not able to obtain.[223] It is therefore clear as day that the project would encounter substantial social opposition from surrounding communities. To bring further power to the claim that Bear Creek can be held responsible for the social opposition, professor Sands employs article 169 of the ILO convention, which was further explained in this work in the case study selection chapter. Though the ILO convention specifically brings obligations to states rather than private parties, *Urbaser v Argentina* established that the obligations not to engage in activities which directly counteract the

[219] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, para. 3.21 (October 14, 2016).
[220] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, para. 738 (November 30, 2017).
[221] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands, para. 6 (November 30, 2017).
[222] Radhuber, Isabella M. "Indigenous struggles for a plurinational state: An analysis of indigenous rights and competences in Bolivia." *Journal of Latin American Geography* (2012): 175.
[223] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands, para. 6 (November 30, 2017).

rights provided for under the binding human rights treaties apply to both public and private parties.[224]

He summarizes his position as such "The Canada-Peru FTA is not, any more than ICSID, an insurance policy against the failure of an inadequately prepared investor to obtain such a (social, author) license".[225] Therefore, although professor Sands still agrees with the majority opinion that actions of the Peruvian government were unlawful in regards to the indirect expropriation under the Canada-Peru FTA, his dissenting opinion places a much stronger responsibility on the investor rather than the state. It is here then that a potential reform of international arbitration rules can arise, whereby it is commonly understood that the approval of an investment in a community must be preceded with explicit consent from that community. This idea shall be worked out later on in the next chapter. From these case studies, we can see that there exist structural imbalances in free trade agreements. Even when host countries prevail in court against international investors, it must be seen that the very fundamentals of the current international arbitration/ISDS system allows for the avoiding of responsibility on account of investors, as well as creates a chilling effect in terms of sustainable governance.

3.4.3 Other cases

Eco Oro v Colombia

Another striking example of how investor-state dispute settlement can hurt states' capacity for sustainable governance is the *Eco Oro v Colombia* case. In this case revolving around the construction of an open pit mine in protected wetlands in the Colombian highlands Eco Oro, a Canadian mining company, argued that measures taken by the Colombian state amounted to indirect expropriation.[226] Reason for this is that although various explorations of the site had already been approved and made by the company, the Colombian Constitutional Court refused to

[224] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic,* ICSID Case No. ARB/07/26, Award, para. 1199 (December 8, 2016)
[225] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands, para. 37 (November 30, 2017).
[226] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Award, para. 6 (March 9, 2021).

grant a final exception to the rule banning extractive activities in protected nature reserves.[227] The Colombian-Canadian free trade agreement includes a GATT Article XX-esque provision stating that, except when done in a discriminatory manner, the treaty cannot be used in arbitration to prevent states from enforcing regulations or taking measures aimed at the protection of the environment.[228] Regardless of this, and regardless of prior mentioned objections regarding liability with compensation from both the Colombian and notably the Canadian governments, the tribunal sought to find an exact amount of damages to be compensated by Colombia to Eco Oro.[229] In its final award however, only the loss of opportunity by Eco Oro was found to be compensable. The tribunal saw no way of quantifying this, meaning that regardless of a found Colombian breach of article 805 of the Canada Colombia FTA, the tribunal could not award compensation to Eco Oro.[230] The decision to seek for an award, though noteworthy, is not why this case is of consideration here however, as the fact that no compensation was awarded was found on little more than the technicality of the higher threshold for calculating the loss of opportunity. Notable then is the found liability in this case regardless of the express wishes to the contrary by not only the respondent's home state by that of the claimant as well.

Methanex v United States

It is proper following the preceding cases to include one of the, admittedly fewer, cases where environmental regulation were seen as necessary for public health and do not require compensation by the host state. Though it strays slightly from the overarching topic of this thesis, being focused on developing states, it can still provide a valuable insight in successful defenses on environmental or health grounds for states. *Methanex v United States* revolved around measures of the governor of California banning MTBE as a gasoline additive, citing concerns of public health and environmental damage in the release of this compound in ground water.[231] Methanex started arbitration under NAFTA in 1999 citing a lack of scientific evidence

[227] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Award, para. 165 (March 9, 2021).
[228] Canada-Colombia Free Trade Agreement, Annex 811, art. 2(b), October 21, 2008.
[229] Ortino, Federico. "ISDS and its transformations." *Journal of International Economic Law* 26, no. 1 (2023): 186.
[230] Clara María López Rodríguez, "Eco Oro v. Colombia: How Perplexed Is Determining Quantum?," *Cambridge International Law Journal* (blog), October 14, 2024, https://cilj.co.uk/2024/10/14/eco-oro-v-colombia-how-perplexed-is-determining-quantum/.
[231] Methanex Corporation, *Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the North American Free Trade Agreement*, 2 (1999), https://www.state.gov/documents/organization/39906.pdf.

for the damage of MTBE to public health, failure to consider alternative options and failure to take into consideration the legitimate interests of the company, later adding that the inclusion of MTBE in gasoline even had substantial environmental benefits over other gasoline additives.[232][233] The company thereupon claimed damages of 970 million USD.[234] In both the partial and final awards however, the tribunal found that the Californian ban on the use of MTBE in gasoline in the state was not discriminatory under chapter 11 article 1105 of NAFTA.[235] It subsequently became a landmark case in protection of public health and thereby reinforced states' power to regulate on matters of environmental protection, in the same vein as *Infinito Gold Ltd. v. Republic of Costa Rica.*[236]

3.5 Hypothesis testing

To consider whether the case studies used in this thesis pass the hoop test and smoking gun test, it is useful to briefly outline both once more. The hoop test is the 'simplest' of these two, whereby merely the existence of minimal evidence needs to be proven. It does not necessarily prove the hypothesis, however a hypothesis must be able to pass this test in order to be true. It is therefore a good starting point in the test. This test is done in this thesis by analysing within the case studies whether there exist the following;

- Arbitration started on the grounds of sustainable (either social or environmental) legislation or regulation.
- Arbitration ruling in favour of the investor, the case can also still be pending with high likelihood that the arbitration rule in favour of the investor.
- An impact on drafting of policy or the lack thereof, indicating regulatory chill.

[232] Methanex Corporation, *Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the North American Free Trade Agreement*, 2–3 (1999), https://www.state.gov/documents/organization/39906.pdf.
[233] Methanex Corporation, *Second Amended Statement of Claim*, 34 (June 12, 2002), https://www.state.gov/documents/organization/39908.pdf.
[234] Methanex Corporation, *Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the North American Free Trade Agreement*, 4 (1999), https://www.state.gov/documents/organization/39906.pdf.
[235] Gaines, Sanford E. "Methanex Corp. v. United States." *American Journal of International Law* 100, no. 3 (2006): 688.
[236] Government of Costa Rica, "Costa Rica Prevails in International Arbitration Case Against Infinito Gold" (Press Release, San José, March 4, 2021), https://www.italaw.com/cases/2258.

In *Doe Run v Peru* and *Bear Creek v Peru*, we see a situation where large international investors did not follow sustainability legislation, subsequently were punished for this by the government of Peru and were able to sue the government, winning in the case of Bear Creek, on the basis of the free trade agreement between the governments of Peru and the United States/Canada. Both cases will be analysed with regards to their passing of the hoop test separately.

Doe Run v Peru highlights how regardless of egregious environmental pollution, lowering environmental standards and extended deadlines that were already set during the takeover of the plant, international investors are still within their rights to sue host governments under provisions of free trade agreements if subject to legislation or regulation which hurts the profitability of the company. Although arbitrators, after 5 years of arbitration in the first case and another 7 years in the second case, decided that Peru did not have to pay Doe Run any compensation, it is abundantly obvious that the very fact this is possible presents a problem.
It is quite possible that this case has resulted in regulatory chill, meaning that the rights of investors are perceived as higher than sustainable governance, and subsequently there is little sustainable regulation as a result of arbitration.

The *Bear Creek v Peru* case builds on this, for one because the arbitrators in this case ruled in favour of the investor. The license of public necessity, given out by the Peruvian government, was revoked following extensive social resistance against Bear Creek's Santa Ana mine. Although the Peruvian government had not given out many of the necessary environmental licenses, and as previously established it was unlikely for Bear Creek to be able to obtain these anyway, Bear Creek was able to sue the Peruvian government and win, although it was not awarded the full 522 million USD it sought. The case highlights that even projects which have a close-to-zero chance of success otherwise (because of the lacking licenses) can still, under the trade agreement, penalise governments into halting sustainable regulation or discouraging them from engaging in it.

We must then see that the hoop tests are passed by the case studies employed in this thesis, there is the minimal necessary evidence that a link exists between trade agreements and abilities to engage in sustainable governance in developing states. This link shows itself in regulatory chill

and penalising of sustainable governance in these states. The hoop test alone however is not a definitive proof of a causal link between free trade agreements and the lack of sustainable governance however. For this reason we shall employ the smoking gun test.

The smoking gun test stipulates that there must be irrefutably supporting evidence that the hypothesis is true. In this case, it can be found potentially in speeches by the president or ministers, or relevant legislation passed after the finalisation of an arbitration case.
The comments by USTR Schwab relating to legislative changes in Peru to bring its regulation landscape more in line with the provisions of the free trade agreement are evidence which strongly supports the hypothesis of this thesis. Again for illustration the specific comment;

"What free trade agreements enable a country to do, and I am talking about the United States and its trading partner, is implement reforms that we should probably be doing anyway but that could be difficult politically. Part of our effort is working with Peruvian authorities to help them get there."[237]

What is telling about these comments is that though she mentions it in light of the agreement with Peru, it is evident in the first sentence that what is meant is a more broad and general situation. Given that the regulations she comments about were largely meant for the opening up of the country to immense exploitation, and that these legislations were prepared by a team of the president of the United States himself, we can see here that there is a deliberate effort on account of a developed state to have a developing state open its economy for highly polluting exploitation under the guise of an agreement that is environmentally beneficial. As we have seen in chapter 2, president Garcia himself was largely in favour of opening the country towards international investment and extractive economic activity. What must be understood however is that his support was largely dependent on the idea that the state would still, in case of pollution or harmfully low financial compensation, be able to force companies to alter their ways. This evidently is in many cases not realistic.

[237] *Public Citizen*, "The Peru Free Trade Agreement: One Year Later," accessed 22/2/2025, https://www.citizen.org/wp-content/uploads/Perufta-oneyear.pdf.

As seen from the case studies employed in this thesis, there is a strong link between investor-state dispute settlement arbitration stemming from international investment treaties and inability in developing states to engage effectively in sustainable governance. The case studies illustrated how even in cases where the company either did not carry out environmental measures it was contractually obligated to, or where the company did not obtain its necessary social and environmental licenses in time, international investors are able to sue governments, predominantly in developing states, when they attempt to regulate in a manner so as to protect their own communities. As seen in *Methanex v United States,* there exists avenues for states to engage in environmental matters under trade agreements, but there is a crucial difference between these cases. *Methanex v United States* related to a blanket ban on the usage of MTBE on environmental and health grounds, whereas *Doe Run v Peru*, *Bear Creek v Peru* and the briefly discussed *Eco Oro v Colombia* cases relate to concerns over specific projects or investments. We can thus see a discernible weakness in the abilities of states to engage in sustainable governance when an investment already produces extraordinary amounts of pollution or social harm, as in the *Doe Run v Peru* case, or threatens to do so, as in *Eco Oro v Colombia* and *Bear Creek v Peru.*

Even in cases where arbitration rules in favour of the host state like *Doe Run v. Peru*, there is still a threat of regulatory chill as seen earlier. It is therefore absolutely imperative if we want to create a system wherein investor rights are protected whilst promoting environmental protection and governance, that the global ISDS system be reconfigured. In the next chapter, this thesis will conclude with a number of possible avenues in this regard.

Chapter 4. The future of ISDS

4.1 ISDS in a changing world

In assessing how the future of ISDS can be shaped in a manner that is more sustainable in social, environmental and done on equitable terms, it is most useful to once more briefly outline key issues with the current system.

- International arbitration is done by for-profit judges with little outside judicial review. This leads to a situation where, although arbitrators are generally chosen with consent from both parties, arbitrators involved have a vested interest in an increase in the amount of claims being made, i.e. increasing their own income.[238]
- The system exists without counterbalancing measures where states can countersue under international arbitration rules whenever a company does not abide by the provisions of the investment agreement.[239]
- Provisions in terms of environmental concerns are vague and often perceived as lower in hierarchy than investment protection.[240]
- There does not exist a maximum in how much claimants can sue a government for, potentially and on occasions leading to absurd amounts being claimed from host governments.[241]
- ISDS mechanisms are only open to international investors, creating a fundamentally unequal system between them and domestic investors.[242]
- Arbitrators in ISDS proceedings are not as bound to formal law as in other fields, meaning they can use the same terms such as free and equitable treatment in different ways.

In considering manners in which ISDS procedures can become more equitable and in line with global climate change efforts, a fundamental issue we must consider is the unbalanced reality whereby investors can bring claims to host states but subdivisions of states cannot bring arbitration to investors that are affecting them, nor is there a possibility of appeal by states.[243] Although the ICSID Convention states in Article 36; "Any Contracting State or any national of a

[238] Gus Van Harten, "Intimidating Sovereigns," in *The Trouble with Foreign Investor Protection* (Oxford: Oxford University Press, 2020), 100, https://doi.org/10.1093/oso/9780198866213.003.0006
[239] Van Harten, "Intimidating Sovereigns," 100.
[240] Van Harten, "Intimidating Sovereigns," 100.
[241] Van Harten, "Intimidating Sovereigns," 100.
[242] Van Harten, "Intimidating Sovereigns," 100.
[243] United Nations Conference on Trade and Development (UNCTAD), *Reform of Investor-State Dispute Settlement: In Search of a Roadmap* (New York and Geneva: United Nations, 2013), 8.

Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party"[244], it is evident from the *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others* claim that 'subdivisions' or provinces are not in position to represent the country under ICSID arbitration rules.[245] Whilst there is theoretically some merit to this idea, as provinces ought to be able to reach and receive support from their respective national legislatures, it nevertheless fundamentally lowers judicial access between international investors and the regional regulators in which they operate. What can be seen from the *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others* in this regard is that there exist cases where the national government for one reason or another does not want to engage in arbitration, leaving those affected without access to ICSID arbitration.[246]

Revisiting the Calvo doctrine, it can thus be seen that much of his criticism of international arbitration has remained largely true, regardless of the recent inclusion of provisions on environmental and social issues. Predominantly his criticism of the two-tiered system of justice in international arbitration, whereby large international investors (and states following the ICSID Convention) can start arbitration, national investors and national subdivisions are left in the dark.

4.2 Improvements to ISDS

Enquiring into improvements to the global ISDS system, we must first consider efforts which have already been made or proposed. In doing so a number of procedural changes within existing agreements as well as ones recently theorised will be included.

One of the first improvements we will touch upon in this regard is the 2019 Dutch Model BIT, where Article 7(1) states; "Investors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental

[244] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), art. 36, March 18, 1965, 575 U.N.T.S. 159.
[245] Baltag, Crina. "Reforming the ISDS System: In Search of a Balanced Approach." *Contemp. Asia Arb. J.* 12 (2019): 297.
[246] Baltag, "Reforming the ISDS System," 298.

protection and labor laws."[247] Although this may seem like a minor detail, it is a provision that is absent from the US-Peru FTA. This can be relevant in cases similar to that of Doe Run, used in this thesis. In this regard the tribunal had to establish for its decision that there was pre-existing financial mismanagement of the plant and contributory fault by the company, alongside the reason given that although the Peruvian actions counted as indirect expropriation it was within the scope of responsibilities to protect public health. Though this reasoning is entirely valid, a provision like the one in the Dutch Model BIT expressly brings responsibilities to investors, whereas in a similar case under this BIT the tribunal merely ought to look at whether the investor followed the regulations in full.

Regarding improvements within ISDS for social rights, we return briefly to the dissenting opinion of professor Sands in the Bear Creek case. It has been established by the tribunal in this case that the responsibility for a "social license" lies with the host state itself instead of the investor, which ought to carry out activities to gain public support but is not finally responsible for the social license. The case *Urbaser v Argentina* however established the responsibility of all parties in protecting everyone's human rights, regardless of whether it is a state or a private investor. As previously mentioned, ILO Convention 169 Article 7 further relates to the right of decision for indigenous peoples with regards to their own economic, social and cultural development. When considering that an investment such as a mine or other extractive project more often than not is constructed with large potential negative effects on surrounding communities, it can be argued that the lack of a social license given by the community to the investor is a blatant breach of the human rights of these communities. Aside from this, it can also be argued that it is a breach of the, in many countries legally binding, ILO Convention 169. It must therefore be considered that the social license, in countries which have ratified ILO Convention 169, must be given by the community surrounding the potential site of extraction and that the argument of this being the responsibility of the state is demonstrably false. For this reason, a major improvement with precedent is the establishment of the standard that the company ought to receive the social license, and not the government.

[247] *Agreement on Reciprocal Promotion and Protection of Investments Between the Kingdom of the Netherlands and [Country],* art. 7(1) (2019).

4.2.1 UNCITRAL Working Group III

Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) focuses specifically on measures to reform ISDS to ensure it becomes more equitable in light of the Sustainable Development Goals (SDGs).[248] The Working Group focuses on theorising a number of reform options for ISDS, both structural and procedural.[249] This Working Group is led by governments but inclusive to non-governmental organisations and other stakeholders, ensuring a broad and varied range of inputs.[250] In its contribution on the right to regulate provision, the Working Group theorised a seemingly radical solution, excluding certain sectors such as extractive industries from arbitration in their entirety.[251] This does not immediately mean that arbitration will be impossible for companies which engage in these activities, it outlines merely that there is no advance consent from both parties to allow this in the signing of investment treaties. Arbitration rules for these industries are then negotiated separately from others, wherein governments are able to place much more stringent rules on companies whose activities bring the risk of large scale pollution or social harm.

A further possibility produced by the Working Group is a 'procedural filter for public welfare measures.'[252] This stipulates that "measures taken by a Party for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the basis for an arbitration claim initiated by an Investor under this Section."[253] It differs from the preceding as it does not disallow arbitration for an entire industry, but rather focuses on the industries where arbitration would still be allowed (non-extractive). Both of these would greatly increase the abilities of states to engage in sustainable governance.

[248] Office of the High Commissioner for Human Rights (OHCHR), *UNCITRAL Working Group III: Investor-State Dispute Settlement Reform*, United Nations, March 12, 2025, 1,
[249] OHCHR, UNCITRAL Working Group III, 1.
[250] OHCHR, UNCITRAL Working Group III, 3.
[251] OHCHR, UNCITRAL Working Group III, 3.
[252] OHCHR, UNCITRAL Working Group III, 4.
[253] OHCHR, UNCITRAL Working Group III, 4.

4.2.2 International investment court

A permanent international investment court, akin to the permanent court of arbitration in The Hague, has been proposed as a solution to many of the issues which plague ISDS as of now. Although the permanent court of arbitration already plays a minor role in investment arbitration, its activities in this regard are mainly aimed at administrative support and the provision of facilities for arbitration. It does not function as a proper investment court, bringing some to the conclusion that one ought to be constructed. The benefits of the international investment court or IIC are clear, addressing many of the issues regarding impartiality, independence and access to arbitration which have been extensively explained in this thesis.

The most extensive effort to create an investment court comes from the European Union. In 2015 the European Commission proposed the establishment of an Investment Court System (ICS), whereby a permanent body with judges is elected by states for a fixed term.[254] These judges then do not have a financial incentive to rule in favor of any party, as they are paid a fixed amount regardless of judgments.[255] Furthermore, it is proposed in this ICS system that a two-tier tribunal be established, whereby the first rules on a specific case and a second is used for appeals by either party. In this way, it is theorised that 'cherry picking' of judicial precedents is made more difficult, as the two-tier system makes it simpler to file appeals. In this way any biased ruling can be overturned much easier. In the CETA and EU-Vietnam FTAs, the international investment court has fifteen judges, five from an EU member state, five from the contracting party and five from third states.[256] These judges are appointed for a duration of four to six years, appointed in groups of three to cases randomly, with one judge from the EU, one from the contracting party and one from the third nation.[257] Judges under the ICS system are not allowed to work in two arbitrations at once, this diminishes the risk that an arbitrator rules in such a manner which will

[254] Yang, Xiaoyu. "Investment Court System: A Cure for the 'Broken' ISDS." *Academic Journal of Humanities & Social Sciences* 6, no. 7 (2023): 91.
[255] Yang, "Investment Court System," 93.
[256] Titi, Catharine. "The European Union's proposal for an international investment court: Significance, innovations and challenges ahead." *Transnational Dispute Management* 1 (2016): 9.
[257] Titi, "The EU's Proposal for an Investment Court," 10.

help them in other cases wherein they work, as arbitral rewards are commonly built upon prior rulings.

A major issue that this ICS attempts to solve is the problem of access to arbitration coming from the costs that are generally associated with it. Smaller companies normally do not pursue arbitration, even when they are in a position where they would win the case because of the high costs. The proposed ICS addresses this by allowing smaller companies, when the sought after compensation is fittingly low, to request arbitration to be done by one single judge instead of three.[258] This possibility does not exist in the appeal court however.

We must however recognize that the establishment of an international investment court still carries with it some challenges and drawbacks. First among these is the idea that the appointed judges in an international investment court can genuinely be entirely impartial and independent, it is evident that this is a dubious claim at best as even appointments at institutes such as the International Court of Justice or ICJ can be argued to be politically influenced.[259] Although in the proposal by the European Commission it is stated that a permanent court can in time become a cost-saving institution, it is unclear whether this will actually be the case and who will pay for realised costs of the court.[260] Furthermore the retainer fee of around 2000 euro a month for judges to be ready at any point for cases is much lower than normal rates for arbitration judges, making it less desirable from the judge's point of view to work in the investment court.
A further criticism of this proposal is that, given that the system must exist *ex ante* to any arbitration, meaning the judges are appointed to the international investment court prior to the commencement of arbitration, states gain a stronger say in the makeup of the court and thus a perceived advantage vis a vis private parties in the proceedings.[261]

[258] Titi, "The EU's Proposal for an Investment Court," 22.
[259] Brower, Charles N., and Jawad Ahmad. "From the two-headed nightingale to the fifteen-headed Hydra: the many follies of the proposed International Investment Court." *Fordham Int'l LJ* 41 (2017): 793.
[260] Brower and Ahmad, "From the Two-Headed Nightingale to the Fifteen-Headed Hydra," 794.
[261] Brower and Ahmad, "From the Two-Headed Nightingale to the Fifteen-Headed Hydra," 811.

4.2.3 Police powers

The police powers doctrine, originating within the American legal tradition but used globally in arbitration[262], states that a measure which falls under the state's police powers cannot constitute an indirect expropriation and therefore does not oblige the state to compensate.[263] This is where it differs from the right to regulate. It must be clear however that this doctrine does not allow the state to act in any way it so wishes, with its application mostly relating to matters of public health and safety.[264] Furthermore, the police power doctrine may cover only those measures which are deemed reasonable, in good faith, and non-discriminatory. Which powers fall under this term are vague, yet it is commonly understood that what falls under this doctrine must be understood as the state possessing "an inherent right to regulate in protection of the public interest and does not act wrongfully when, pursuant to this power, it enacts *bona fide*, non-discriminatory and proportionate regulations in accordance with due process."[265]

This doctrine is commonly not used in environmental arbitration yet, although the *Chemtura v Canada* case introduces that measures taken by government agencies in an effort to protect human health and notably the environment can fall under police powers and therefore does not necessarily constitute a compensable expropriation.[266] There is however as of now not a clear delineation of what falls under the police powers, making the responsibility for this fall on the individual arbitrator. Lately efforts in this regard have been made however, as an example we can take the Investment Agreement for the Common Investment Area of the Common Market for Eastern and Southern Africa (COMESA), where it is stated; 'Consistent with the right of states to regulate and the customary international law principles on police powers (sic), bona fide

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[262] *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, July 30, 2010, para. 148, accessed via Jus Mundi, https://jusmundi.com/en/document/decision/en-suez-sociedad-general-de-aguas-de-barcelona-s-a-and-interagua-servicios-integrales-de-agua-s-a-v-argentine-republic-decision-on-liability-friday-30th-july-2010.

[263] Titi, Catharine. "Police powers doctrine and international investment law." In *General Principles of Law and International Investment Arbitration*, pp. 323.

[264] Titi, "Police Powers Doctrine and Investment Law," 324.

[265] "Police Powers Doctrine," accessed via Jus Mundi, https://jusmundi.com/en/document/publication/en-police-powers-doctrine.

[266] *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, August 2, 2010, accessed via Jus Mundi, https://jusmundi.com/en/document/decision/en-crompton-chemtura-corp-v-government-of-canada-award-monday-2nd-august-2010.

regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article.'[267]

The explicit inclusion of this doctrine constitutes a major breakthrough in states' future ability to regulate on environmental matters. Although naturally and logically limited as the regulation must be *bona fide*, non-discriminatory, and proportional, it allows for substantially further reaching measures taken by governments when investments turn out to be harmful to public health or the (local) environment. It is however here that a weakness arises, as with the other measures discussed above. Specific mentions to police powers, the investment court and other measures discussed are not prevalent in older generations of investment agreements, meaning that regardless of developments in arbitration, states can be "stuck" with older agreements if the counterparty does not agree to renegotiation. The UNCTAD has outlined this renegotiation as one of the options for states for the reform of international investment agreements. [268] This shall be discussed below, including some strategies adopted by specifically Latin American developing countries.

4.3 Termination and renegotiation of agreements

In existing investment treaties between states wherein provisions such as the one in the Dutch Model BIT are lacking, a final option for states wishing greater control over the (circumstances of) exploitation of their natural resources is the termination of the trade agreements, with or without consent to renegotiation. This has been done by numerous states for a range of reasons, something that is exemplified well by the cases of Ecuador and India. Ecuador unilaterally terminated its investment treaties in 2008, 2011 and 2016 out of environmental and constitutional concerns, following the adoption of a new constitution in 2008 whereby jurisdiction could no

[267] Titi, "Police Powers Doctrine and Investment Law," 337.
[268] International Institute for Sustainable Development (IISD), *Terminating Bilateral Investment Treaties: Best Practices Series* (Winnipeg: IISD, 2020), 1, https://www.iisd.org/publications/guide/iisd-best-practices-series-terminating-bilateral-investment-treaty.

longer be handed over to international arbitration.[269] India unilaterally terminated its BITs with 61 states in 2016, following the publication of a revised Indian Model BIT in 2015.[270] It must be understood that the termination of an investment treaty is done ideally with the mutual consent of both, or all in case of a multilateral treaty, states involved. States are free to find ways in which termination by mutual consent is done, commonly through clauses in newly negotiated investment treaties which terminate the old treaty.[271] If termination by mutual consent is not an option, states are in all circumstances free to terminate the treaty unilaterally, as per Article 56 of the Vienna Convention on the Law of Treaties.[272] Caveat to this is that the termination cannot be done same-day but must be carried out according to the termination clause- and period of the agreement, commonly being 6 months. If the termination is not compliant with these rules, the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) outline terminating state responsibilities with regard to the investor.[273] These responsibilities are enshrined in sunset clauses of the agreement, meaning clauses which remain in force for a certain amount of time post-termination of the treaty. Though developing states have seen termination of treaties which they perceive as harmful to public interests as a possible avenue, it must be understood that the termination of treaties is a decision with far reaching consequences and therefore not desirable.[274]

[269] International Institute for Sustainable Development (IISD), *IISD Best Practices Series: Terminating a Bilateral Investment Treaty* (Winnipeg: IISD, 2020), 7, https://www.iisd.org/publications/guide/iisd-best-practices-series-terminating-bilateral-investment-treaty
[270] IISD, Terminating a Bilateral Investment Treaty, 8.
[271] IISD, Terminating a Bilateral Investment Treaty, 11.
[272] Vienna Convention on the Law of Treaties, art. 56, May 23, 1969, 1155 U.N.T.S. 331.
[273] Reinisch, August, and Sara Mansour Fallah. "Post-Termination Responsibility of States?—The Impact of Amendment/Modification, Suspension and Termination of Investment Treaties on (Vested) Rights of Investors." *ICSID Review-Foreign Investment Law Journal* 37, no. 1-2 (2022): 103.
[274] Montal, Florencia. "Rage against the regime: Policy responses to international investment arbitration." (2019): 150.

Discussion

The initial hypothesis of this thesis must be seen as only partly accurate, as it cannot be said that in agreeing to arbitration by signing investment treaties, states cannot at all regulate on environmental matters anymore. Rather, measures taken with regards to specific highly polluting investments can be hindered by trade agreements under provisions of the fair and equitable treatment and non-discrimination clauses. Although the inclusion of these is naturally integral to a functional ISDS system, it must be seen that in the face of increasing climate change we cannot continue in this same manner. This thesis has, alongside identification of the problem using in-depth analysis of the development of arbitration, environmental law and case studies, provided a blueprint of various possible avenues for the improvement of this mechanism.

One potential weakness that arises out of the chosen research methodology of this thesis is the replicability in other countries. The author has sought to address this issue by including case studies from other countries later on in the dedicated chapter, as well as relating the Peruvian cases with other arbitration cases in different legislations. Admittedly, the degree to which this thesis builds upon experiences of Peru does seemingly lower the replicability. The author holds that the inclusion of case studies was valuable for reasons of clarity and illustration, but further research will be helpful in confirming that other developing states experience the same difficulties in carrying out sustainable governance because of provisions in free trade agreements. Further research can additionally find how communities in resource-rich developed states such as Canada can become victims to the same developments as here researched.

Conclusion

The findings of this thesis are significant in a number of ways, having investigated issues with the current ISDS system and proposed a number of avenues for the improved development of environmental justice in international investment law in light of increasing climate change and environmental awareness. The results of this thesis highlight that there exists predominantly within resource rich developing states where extractive companies are active, a difficulty of counteracting pollution arising from these activities. This originates in large part from contemporary standards in international investment law, which prioritise the protection of made investments over environmental and social concerns. Insofar as social concerns are addressed, the responsibility for obtaining social support of an investment is placed predominantly with the host government rather than with the investor, further strengthening the dichotomy.

In conclusion this thesis has demonstrated, using a wide array of cases but focusing on two in the state of Peru, that investor state dispute settlement as it exists today can have detrimental effects on the abilities of developing states to engage in sustainable governance. Although the theoretical protection of international investors from measures taken by a government is laudable, one must simultaneously recognize that in its current form this system ensures that highly polluting extractive industries in developing countries are close to impossible to regulate. Given that many of the minerals mined in developing countries are used for the 'green revolution' in developed states, it becomes not merely a legal question but a moral one that an answer must be found for. Can the world justify that in its quest for sustainability, developing countries which have historically already suffered under colonialism and extractive economic models continue to pay the price for others' development. As has likely been clear to the reader, the author takes a firm stance in this question. A fundamental restructuring of international arbitration must occur if we are to work towards a future world wherein all countries, all humans, and all life on earth are able to thrive. This is a daunting task and one which surely will come with opposition and problems of itself, however it is not only morally the only right direction to move in, but the only direction we can move in if we are to ensure prolonged and sustainable life on this planet.

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