THE RIPPLE EFFECT: UNRAVELLING THE CONSEQUENCES OF METALCLAD V. MEXICO ON STATE'S SOVEREIGNTY, ENVIRONMENTAL GOVERNANCE, AND INVESTMENT TREATIES

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Abstract—This article examines the consequences of the landmark Metalclad v. Mexico case on state sovereignty, environmental governance, and international investment treaties. The case, in which Metalclad Corporation successfully claimed compensation from Mexico for expropriation of its investment, has had significant implications for the development of international investment law, prompting a reassessment of the balance between investor protection and states' regulatory powers. The article delves into the impact of the case on state sovereignty and the tension that arises between foreign investors' rights and states' regulatory autonomy. It also discusses the challenges faced by states in enacting and enforcing domestic regulations. The article further explores the evolution of regulatory policies post-Metalclad, focusing on the influence of the case on environmental governance and the role of environmental protection in the dispute. It highlights the emergence of sustainable development as a key consideration in international investment agreements (IIAs), examining how the Metalclad decision has contributed to a more balanced approach that takes into account environmental concerns alongside investment protection. The analysis also considers the repercussions of the Metalclad case on the interpretation of expropriation and fair and equitable treatment in IIAs, as well as the changes it has spurred in investor-state dispute

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settlement (ISDS) mechanisms. The article underscores the rise of new investment treaties that incorporate environmental and social clauses, reflecting a growing recognition of the need to align investment policy with sustainable development objectives. In conclusion, the Metalclad v. Mexico case has had far-reaching consequences for international investment law, state sovereignty, environmental governance, and investment treaties. The case has sparked an ongoing debate over the balance between investor protection and states' regulatory powers, prompting a re-evaluation of key investment treaty provisions and leading to important changes in ISDS mechanisms. The Metalclad case has also influenced the emergence of new-generation investment treaties that incorporate environmental and social clauses, reflecting a growing recognition of the need to ensure that international investment agreements serve the broader public interest and contribute to the achievement of sustainable development goals. As international investment law continues to evolve, it is crucial to maintain a focus on achieving a balance between investment protection and the preservation of state sovereignty, environmental governance, and the pursuit of sustainable development.

Keywords: International Investment Law, State Sovereignty, Environmental Governance, Investment Treaties, Fair and Equitable Treatment

I. INTRODUCTION

The *Metalclad* v. *Mexico* arbitration case is a pivotal event in international investment law, as it highlights the complex interplay between foreign investors' rights, state sovereignty, and environmental protection. The case involved Metalclad Corporation, a US-based company, suing the Mexican government under the North American Free Trade Agreement (NAFTA) for unfair treatment and expropriation of its investment in a waste treatment facility. The arbitration tribunal ruled in favor of Metalclad, awarding it $16.7 million in damages. The decision has had far-reaching implications for state sovereignty, environmental governance, and investment treaties. This article aims to unravel the consequences of the *Metalclad* v. *Mexico* case and explore how the decision has shaped the landscape of international investment law, specifically focusing on the balance between state sovereignty, environmental protection, and the obligations of states under international investment agreements.

II. BRIEF OVERVIEW OF METALCLAD V. MEXICO CASE

The *Metalclad* v. *Mexico* case[1] began when Metalclad Corporation, a US-based company, acquired a Mexican subsidiary with the intention of constructing and operating a hazardous waste treatment facility in Guadalcazar, Mexico. Metalclad faced several obstacles, including permit denials and local opposition, ultimately leading to a declaration by the local municipality that the area surrounding the facility was a protected ecological zone. In response, Metalclad initiated arbitration under the North American Free Trade Agreement (NAFTA) in 1997, alleging that the Mexican government had breached its obligations by denying necessary permits and indirectly expropriating its investment. In 2000, the arbitration tribunal ruled in favor of Metalclad, awarding $16.7 million in damages, and determined that Mexico's actions constituted indirect expropriation and a violation of the principles of fair and equitable treatment.[2]

III. IMPORTANCE OF THE CASE IN INTERNATIONAL INVESTMENT LAW

The *Metalclad* v. *Mexico* case is significant in international investment law for several reasons. First, it was one of the first NAFTA investor-state arbitrations, setting a precedent for future investment disputes under the agreement.[3] Second, the case underscored the potential tension between foreign investors' rights and a state's ability to regulate in the public interest, drawing attention to the delicate balance of protecting investments while upholding regulatory sovereignty.[4] Third, the tribunal's decision expanded the understanding of indirect expropriation, emphasizing that not only physical takings but also regulatory measures could lead to expropriation if they significantly impact an investment's value.[5] Finally, the Metalclad case has influenced the development of new international investment agreements, inspiring states to reassess their obligations and incorporate provisions addressing environmental and social concerns.[6]

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1 *Metalclad Corporation* v. *United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (2000), https://www.italaw.com/cases/671 (last visited on October 17, 2023).

2 ibid.

3 Howard Mann, *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights* (2001), https://www.iisd.org/pdf/nafta.pdf (last visited on March 3, 2023).

4 Andrew T. Guzman, *The Design of International Agreements*, 16(4) Eur. J. Int'l L. 579 (2005).

5 Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009).

6 Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey*, OECD Working Papers on Int'l Investment, 2011/01 (2011), https://doi.org/10.1787/5kg9mq7scrwb-en (last visited on March 3, 2023).

IV. IMPACT ON STATE SOVEREIGNTY

The *Metalclad* v. *Mexico* decision has had considerable implications for state sovereignty in the realm of international investment law. The case illuminated the potential conflict between a state's right to regulate in the public interest and the protection of foreign investors' rights.[7] As a result, states have become increasingly aware of the potential legal and financial consequences of regulatory actions that might be perceived as violating investment treaty obligations.[8]

The decision has also prompted a re-evaluation of the balance between investor protection and regulatory autonomy in international investment agreements.[9] Some states have introduced new investment treaty language that preserves the right to regulate, particularly in areas like public health, safety, and the environment.[10] Furthermore, the case has encouraged a trend towards greater transparency and public participation in investor-state dispute settlement (ISDS) proceedings, which can help address concerns over state sovereignty and democratic accountability.[11]

V. TENSION BETWEEN FOREIGN INVESTORS' RIGHTS AND STATE'S REGULATORY POWERS

The *Metalclad* v. *Mexico* case brought to light the inherent tension between foreign investors' rights and a state's regulatory powers in international investment law.[12] Investment treaties, such as NAFTA, seek to promote and protect foreign investment by establishing standards of treatment, including fair and equitable treatment, national treatment, and protection against expropriation.[13] However, these standards may inadvertently create conflicts with a state's regulatory authority, particularly when foreign investors claim that regulatory measures have breached their rights under investment treaties.[14]

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[7] Stephan W. Schill, The Multilateralization of International Investment Law (2009).

[8] Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, in Evolution in Investment Treaty Law and Arbitration (Chester Brown & Kate Miles eds., 2011).

[9] Aikaterini Titi, The Right to Regulate in International Investment Law (2014).

[10] U.N. Conference on Trade and Dev. (UNCTAD), World Investment Report 2012: Towards a New Generation of Investment Policies (2012), https://unctad.org/system/files/official-document/wir2012_embargoed_en.pdf (last visited on March 3, 2023).

[11] David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community,* OECD Working Papers on Int'l Investment, 2012/03 (2012), https://doi.org/10.1787/5k46b1r85j6f-en (last visited on March 3, 2023).

[12] Andrea K. Bjorklund, *Emergency Exceptions and Compensatory Standards: Investment Treaty Standards of Treatment in Times of Crisis*, in Yearbook on Int'l Investment L. & Pol'y 2007-2008 (Karl P. Sauvant ed., 2008).

[13] Andrew Newcombe & Lluís Paradell *supra* note 5.

[14] Kathryn Gordon & Joachim Pohl *supra* note 6.

The *Metalclad* case demonstrated how a state's attempt to protect the environment could be interpreted as an indirect expropriation and a violation of fair and equitable treatment, raising concerns about the potential for regulatory chill.[15] Regulatory chill occurs when states refrain from implementing new regulations or modify existing regulations to avoid the risk of investment disputes and potential liability.[16] This may lead to a weakening of environmental, health, or safety standards to accommodate the interests of foreign investors.[17]

In response to the perceived tension between investor protection and state sovereignty, states have begun to negotiate investment treaties with provisions that reaffirm their regulatory powers.[18] Such provisions may include exceptions for public welfare objectives, explicit recognition of the state's right to regulate, and clarifications on the meaning of key standards such as expropriation and fair and equitable treatment.[19] Additionally, some states have sought to reform investor-state dispute settlement (ISDS) mechanisms to enhance transparency, public participation, and the consideration of public interest issues.[20] These efforts aim to strike a more balanced approach between foreign investors' rights and the state's ability to regulate in the public interest while minimizing potential conflicts in international investment law.[21]

VI. CHALLENGES FACED BY STATES IN ENACTING AND ENFORCING DOMESTIC REGULATIONS

States face numerous challenges when enacting and enforcing domestic regulations in the context of international investment law. One significant challenge is the potential for investment disputes arising from regulatory measures perceived as violating investment treaty obligations, as evidenced by the *Metalclad* v. *Mexico* case.[22] Such disputes can be costly, time-consuming, and may result in substantial financial liabilities for states.[23]

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15 Kyla Tienhaara *supra* note 8.

16 Stephan W. Schill, Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?, 24(5) J. Int'l Arb. 469 (2007).

17 Aikaterini Titi *supra* note 9.

18 U.N. Conference on Trade and Development (UNCTAD), Fair and Equitable Treatment: A Sequel, UNCTAD Series on Issues in International Investments Agreements II (2012), https://unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf (last visited on March 3 2023).

19 David Gaukrodger & Kathryn Gordon *supra* note 11.

20 Van Harten, G., Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration, 50 Osgoode Hall L.J. 211 (2012).

21 Andreas Kulick, Reassertion of Control over the Investment Treaty Regime: The Impact of the 2015 Amendments to the Indian Model BIT, 33(4) J. Int'l Arb. 463 (2016).

22 Andrea K. Bjorklund, The Emerging Civilization of Investment Arbitration, 113(4) Penn St. L. Rev. 1269 (2008).

23 Kathryn Gordon & Joachim Pohl *supra* note 6.

Another challenge is the risk of regulatory chill, where states may hesitate to implement new regulations or modify existing ones to avoid potential investor claims.[24] This concern can hinder the development of robust environmental, health, or safety standards, potentially undermining public welfare objectives.[25]

States must also navigate the complexities of treaty interpretation when designing and implementing regulatory measures. Investment treaty provisions, such as fair and equitable treatment and indirect expropriation, can be interpreted broadly, creating uncertainty for states attempting to balance investor protection and public interest concerns.[26]

Furthermore, states face difficulties in coordinating between different levels of government and across various regulatory agencies, which may lead to inconsistencies or conflicts in domestic regulations.[27] These challenges can be compounded by the fact that international investment agreements often contain national treatment provisions, which require states to treat foreign investors no less favorably than domestic investors.[28]

To address these challenges, states have been pursuing various strategies, such as renegotiating investment treaties to include clearer language on the state's right to regulate, incorporating exceptions for public welfare objectives, and providing guidance on the interpretation of key treaty provisions.[29] States have also sought to reform investor-state dispute settlement (ISDS) mechanisms to enhance transparency, public participation, and the consideration of public interest issues.[30] Additionally, states can improve inter-agency coordination and promote a whole-of-government approach to ensure consistency in regulatory policy and decision-making.[31]

VII. EVOLUTION OF REGULATORY POLICIES POST-METALCLAD

The *Metalclad* v. *Mexico* case has prompted significant evolution in regulatory policies and investment treaty practices in the years since the decision. One notable development is the increased emphasis on preserving the state's right to regulate in the public interest within international investment

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[24] Kyla Tienhaara *supra* note 8.

[25] Stephan W. Schill *supra* note 16.

[26] Andrew Newcombe & Lluís Paradell *supra* note 5.

[27] Andrew T. Guzman *supra* note 4.

[28] U.N. Conference on Trade and Dev. (UNCTAD) *supra* note 18.

[29] David Gaukrodger & Kathryn Gordon *supra* note 11.

[30] Van Harten, G. *supra* note 20.

[31] Aaron Cosbey & Petros C. Mavroidis, *A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO*, 17(1) J. Int'l Econ. L. 11 (2014).

agreements.[32] States have sought to renegotiate treaties or draft new ones with clearer language to affirm their regulatory powers and protect public welfare objectives, such as environmental protection, public health, and safety.[33]

Another trend in the post-Metalclad era is the inclusion of more specific definitions and guidance on the interpretation of key treaty provisions, like indirect expropriation and fair and equitable treatment.[34] These clarifications aim to reduce uncertainty and ensure a better balance between investor protection and state sovereignty.[35]

States have also pursued reforms to investor-state dispute settlement (ISDS) mechanisms to increase transparency, public participation, and the consideration of public interest issues.[36] The United Nations Commission on International Trade Law (UNCITRAL) has been working on the development of a multilateral investment court to replace the current ad hoc arbitration system, which could further enhance transparency and predictability in investment disputes.[37]

In addition to changes in investment treaties and dispute settlement mechanisms, the *Metalclad* case has spurred greater attention to domestic regulatory coherence and coordination.[38] States have recognized the importance of a whole-of-government approach to ensure consistency in regulatory policy and decision-making and to minimize potential conflicts with international investment obligations.[39]

In the post-Metalclad landscape, states have also increasingly engaged in international cooperation to address cross-border regulatory challenges.[40] This cooperation can take the form of bilateral or multilateral agreements, capacity-building initiatives, and sharing of best practices to facilitate the development and implementation of domestic regulations that are consistent with international investment obligations.[41]

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[32] Aikaterini Titi *supra* note 9.
[33] U.N. Conference on Trade and Dev. (UNCTAD) *supra* note 18.
[34] David Gaukrodger & Kathryn Gordon *supra* note 11.
[35] Andreas Kulick *supra* note 21.
[36] Van Harten, G. *supra* note 20.
[37] U.N. Comm'n on Int'l Trade Law (UNCITRAL), Possible Reform of Investor-State Dispute Settlement (ISDS): Working Group III, https://uncitral.un.org/en/working_groups/3/investor-state (last visited on March 3, 2023).
[38] Aaron Cosbey & Petros C. Mavroidis *supra* note 31.
[39] Andrew T. Guzman *supra* note 4.
[40] Karl P. Sauvant & Federico Ortino, *Improving the International Investment Law and Policy Regime: Options for the Future* (2013).
[41] Eric De Brabandere, Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications (Cambridge Univ. Press 2014).

Overall, the *Metalclad* v. *Mexico* case has served as a catalyst for the evolution of regulatory policies and investment treaty practices. States have made concerted efforts to strike a more balanced approach between investor protection and state sovereignty, while addressing the challenges posed by international investment law to their regulatory powers.[42]

VIII. INFLUENCE ON ENVIRONMENTAL GOVERNANCE

The *Metalclad* v. *Mexico* case has had a significant influence on environmental governance by highlighting the need for states to carefully balance their regulatory powers with investment treaty obligations.[43] Post-Metalclad, states have sought to include environmental exceptions and carve-outs in investment treaties to ensure they can pursue environmental policies without risking investor claims.[44] The case has also spurred increased international cooperation on environmental matters, as states recognize the importance of aligning domestic regulations with global environmental goals.[45]

IX. THE ROLE OF ENVIRONMENTAL PROTECTION IN THE METALCLAD CASE

The role of environmental protection in the *Metalclad* v. *Mexico* case was pivotal, as it brought the tension between foreign investors' rights and states' regulatory powers to the forefront of international investment law.[46] The dispute arose when Metalclad, an American company, was denied a permit to operate a hazardous waste landfill in Mexico due to environmental concerns raised by local authorities.[47] The company claimed that Mexico's actions amounted to expropriation and a breach of fair and equitable treatment under the North American Free Trade Agreement (NAFTA).[48]

The *Metalclad* case demonstrated the potential for conflicts between investor protection and environmental regulation, as the arbitral tribunal found in favor of Metalclad and ordered Mexico to pay compensation.[49] The decision sparked widespread criticism, with some commentators arguing that the tri-

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[42] Andrea K. Bjorklund *supra* note 22.
[43] Ibid.
[44] Kathryn Gordon & Joachim Pohl *supra* note 6.
[45] Karl P. Sauvant & Federico Ortino *supra* note 40.
[46] Andrea K. Bjorklund *supra* note 22.
[47] Weiler, T., *NAFTA Investment Arbitration and the Growth of International Economic Law*, 5 Bus. L. Int'l 537 (2004).
[48] Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties (Martinus Nijhoff Publishers 1995).
[49] Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law (Oxford Univ. Press 2008).

bunal had failed to adequately consider the state's legitimate environmental concerns.[50]

The case underscored the need for investment treaties to strike a balance between investor protection and the state's right to regulate in the public interest, including environmental protection.[51] In response to this concern, states have increasingly included environmental exceptions and carve-outs in their investment agreements, which allow them to adopt necessary environmental measures without risking investor claims.[52]

The *Metalclad* case has also contributed to the growing recognition of the importance of transparency and public participation in investment disputes involving environmental matters.[53] Since the case, there have been efforts to reform investor-state dispute settlement (ISDS) mechanisms to enhance transparency, public involvement, and the consideration of environmental issues in the arbitration process.[54]

X. THE EMERGENCE OF SUSTAINABLE DEVELOPMENT IN INTERNATIONAL INVESTMENT AGREEMENTS

In the wake of cases like *Metalclad* v. *Mexico*, there has been a growing emphasis on incorporating sustainable development principles into international investment agreements (IIAs) to better balance investor protection and state sovereignty.[55] Sustainable development encompasses economic, social, and environmental dimensions, and aims to reconcile investment promotion with states' ability to regulate in the public interest.[56]

Newer IIAs increasingly incorporate provisions that explicitly reference sustainable development goals, such as environmental protection, labor rights, and human rights.[57] These provisions may include general exceptions allowing states to adopt measures necessary for the protection of the environment or public health, as well as clauses that commit states to uphold high standards of environmental and labor regulation.[58]

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[50] Howard Mann *supra* note 3.

[51] Kathryn Gordon & Joachim Pohl *supra* note 6.

[52] U.N. Conference on Trade and Dev. (UNCTAD) *supra* note 18.

[53] Van Harten, G. *supra* note 20.

[54] U.N. Comm'n on Int'l Trade Law (UNCITRAL), Transparency Registry, https://www.uncitral.org/transparency-registry/registry/index.html (last visited on March 3 2023).

[55] Kate Miles, The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital (2013).

[56] U.N. Conference on Trade and Dev. (UNCTAD), World Investment Report 2014: Investing in the SDGs: An Action Plan (2014), https://unctad.org/system/files/official-document/wir2014_en.pdf (last visited on March 3 2023).

[57] Karl P. Sauvant & Federico Ortino *supra* note 40.

[58] Kathryn Gordon & Joachim Pohl *supra* note 6.

The inclusion of sustainable development in IIAs can help mitigate the risk of a regulatory chill, where states refrain from implementing necessary regulations for fear of investor claims.[59] By providing greater clarity and guidance on the balance between investor protection and state sovereignty, sustainable development provisions can help states navigate the potential tensions between their investment treaty obligations and public policy objectives.[60]

Moreover, the integration of sustainable development principles in IIAs has promoted greater coherence between investment and other international law regimes, such as trade, environmental, and human rights law.[61] This coherence can facilitate better policy coordination at the international level, ensuring that investment law and policy support broader global goals such as the United Nations Sustainable Development Goals.[62]

The emergence of sustainable development in IIAs reflects a broader shift in the investment law landscape, where states are increasingly seeking to balance investor protection with their public policy goals and commitments to sustainable development.[63]

Furthermore, some IIAs now include provisions for the establishment of committees or consultative mechanisms that focus on the promotion of sustainable development objectives, fostering dialogue and cooperation between the contracting parties.[64] These mechanisms can facilitate the exchange of best practices, capacity-building, and monitoring of compliance with sustainable development commitments.[65]

Additionally, recent trends in investor-state dispute settlement (ISDS) reform have seen the introduction of provisions aimed at enhancing the consideration of sustainable development concerns in arbitration.[66] These provisions include transparency requirements, amicus curiae participation, and the appointment of arbitrators with relevant expertise in sustainable development issues.[67]

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[59] Kyla Tienhaara *supra* note 8.

[60] Andreas Kulick *supra* note 21.

[61] Aaron Cosbey & Petros C. Mavroidis *supra* note 31.

[62] U.N. Conference on Trade and Dev. (UNCTAD), World Investment Report 2015: Reforming International Investment Governance (2015), https://unctad.org/system/files/official-document/wir2015_en.pdf (last visited on March 3 2023).

[63] Stephan W. Schill, Multilateralizing Investment Treaties through Most-Favored-Nation Clauses, vol. 27(2) Berkeley J. Int'l L. 496 (2007).

[64] James Harrison & Leong H. Sek, *Addressing the Impact of Investment Treaties on Domestic Policy: Can the South Korean Model of Investor-State Dispute Settlement Work?,* vol. 11(1) J. World Inv. & Trade 85 (2010).

[65] Van Duzer, J.A., Simons, P. & Mayeda, G.R., Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators (Commonwealth Secretariat 2013).

[66] U.N. Comm'n on Int'l Trade Law (UNCITRAL) *supra* note 37.

[67] George Kahale III, The Changing Landscape of Investment Treaty Arbitration: UNCTAD, ICSID and UNCITRAL Perspectives, 35(2) J. Int'l Arb. 117 (2018).

In summary, the emergence of sustainable development in international investment agreements reflects the growing recognition of the need to balance investor protection with states' regulatory powers and public policy goals. This shift has led to the incorporation of sustainable development provisions in IIAs, enhanced coherence between investment and other international law regimes, and the reform of ISDS mechanisms to better address sustainable development concerns.[68]

XI. BALANCING ENVIRONMENTAL CONCERNS WITH INVESTMENT PROTECTION

Balancing environmental concerns with investment protection has emerged as a critical challenge in the negotiation and implementation of international investment agreements (IIAs).[69] In light of cases like *Metalclad* v. *Mexico*, states have recognized the need to ensure that their investment treaty obligations do not unduly restrict their ability to regulate in the public interest, including for environmental protection.[70]

One approach to achieving this balance is the inclusion of general exceptions or carve-outs in IIAs, which allow states to adopt necessary measures for the protection of the environment or public health without violating their investment treaty obligations.[71] These provisions can provide greater legal certainty for states, helping them navigate the potential tensions between investor protection and their regulatory powers.[72]

In addition, some IIAs now contain provisions that explicitly require investors to comply with host state environmental regulations and standards.[73] These "investor obligations" can help ensure that foreign investments contribute to sustainable development goals and do not undermine environmental protection efforts.[74]

Another approach to balancing environmental concerns with investment protection is the integration of environmental impact assessments (EIAs) into the investment decision-making process.[75] EIAs can help identify potential environmental risks and impacts associated with proposed investments, allowing

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[68] Stephan W. Schill *supra* note 63.

[69] Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, N.Y.U. Sch. of L. Pub. L. & Legal Theory Res. Paper Series, Working Paper No. 09-46 (2009).

[70] Howard Mann *supra* note 3.

[71] Kathryn Gordon & Joachim Pohl *supra* note 6.

[72] Andreas Kulick *supra* note 21.

[73] Karl P. Sauvant & Federico Ortino *supra* note 40.

[74] U.N. Conference on Trade and Dev. (UNCTAD) *supra* note 10.

[75] Richard K. Morgan, *Environmental Impact Assessment: The State of the Art,* 30(1) Impact Assessment & Project Appraisal 5 (2012), DOI: 10.1080/14615517.2012.661557.

states to make informed decisions and impose appropriate conditions on investments to mitigate adverse environmental consequences.[76]

Finally, reforming investor-state dispute settlement (ISDS) mechanisms to enhance transparency, public participation, and the consideration of environmental issues in arbitration can further promote the balance between environmental concerns and investment protection.[77] This may include allowing amicus curiae submissions from environmental stakeholders, as well as the appointment of arbitrators with relevant expertise in environmental law and policy.[78]

In conclusion, balancing environmental concerns with investment protection is crucial for the sustainable development of the global economy. By incorporating environmental provisions in IIAs, implementing investor obligations, conducting EIAs, and reforming ISDS mechanisms, states can better ensure that investment law and policy support both investor protection and environmental goals.[79]

XII. REPERCUSSIONS ON INTERNATIONAL INVESTMENT TREATIES

The *Metalclad* v. *Mexico* case has had significant repercussions on international investment treaties, leading to a re-evaluation of the balance between investor protection and states' regulatory powers.[80] As a result, modern IIAs often include provisions aimed at safeguarding states' regulatory space, clarifying investor obligations, and promoting sustainable development.[81] Additionally, the case has spurred reforms in investor-state dispute settlement mechanisms, emphasizing transparency, public participation, and consideration of environmental issues in arbitration.[82]

XIII. SHIFT IN THE INTERPRETATION OF EXPROPRIATION AND FAIR AND EQUITABLE TREATMENT

The *Metalclad* v. *Mexico* case and subsequent investment disputes have prompted a shift in the interpretation of expropriation and fair and equitable

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[76] Ursula Kriebaum, *Regulatory Takings, Stabilization Clauses, and Sustainable Development*, in Research Handbook on Environment and Investment Law (Yannick Radi ed., 2017).

[77] Van Harten, G. *supra* note 20.

[78] George Kahale III *supra* note 67.

[79] Stephan W. Schill *supra* note 63.

[80] Andrew Newcombe & Lluís Paradell *supra* note 5.

[81] U.N. Conference on Trade and Dev. (UNCTAD) *supra* note 10.

[82] George Kahale III *supra* note 67.

treatment (FET) clauses in international investment agreements (IIAs).[83] Arbitral tribunals now tend to adopt a more nuanced approach when assessing indirect expropriation claims, considering factors such as the proportionality of the state's measure, its legitimate public purpose, and the impact on the investor's property rights.[84]

Similarly, the interpretation of FET has evolved to better reflect the balance between investor protection and states' regulatory powers.[85] Tribunals have clarified that FET does not provide absolute protection against regulatory changes, but rather protects investors against arbitrary, discriminatory, or abusive treatment by the host state.[86]

In recent years, states have also sought to narrow the scope of expropriation and FET clauses in their IIAs, incorporating more explicit language regarding their right to regulate in the public interest and linking FET to customary international law standards, such as the minimum standard of treatment.[87] These developments reflect a broader trend towards a more balanced approach to investor protection and states' regulatory autonomy in international investment law.[88]

XIV. CHANGES IN INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) MECHANISMS

The *Metalclad* v. *Mexico* case, along with other high-profile disputes, has contributed to changes in investor-state dispute settlement (ISDS) mechanisms in order to address concerns about transparency, accountability, and the balance between investor protection and states' regulatory powers.[89] One notable change is the increased emphasis on transparency, with the adoption of the United Nations Commission on International Trade Law (UNCITRAL) Transparency Rules, which provide for greater public access to information and documents related to ISDS proceedings.[90]

Another development has been the increased involvement of third parties in ISDS, with the acceptance of amicus curiae submissions from non-disputing parties, such as civil society organizations, in investment arbitration

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[83] Rudolf Dolzer & Christoph Schreuer *supra* note 49.
[84] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (2010).
[85] Stephan W. Schill *supra* note 7.
[86] Andrea K. Bjorklund *supra* note 12.
[87] U.N. Conference on Trade and Dev. (UNCTAD) *supra* note 62.
[88] Kyla Tienhaara *supra* note 8.
[89] David Gaukrodger & Kathryn Gordon *supra* note 11.
[90] U.N. Conference on Trade and Dev. (UNCTAD) *supra* note 56.

proceedings.[91] This allows for the consideration of broader public interest concerns in dispute resolution.

Moreover, states have begun to explore alternative dispute resolution methods, such as mediation and conciliation, as a means of addressing investor-state disputes in a more collaborative and efficient manner.[92]

Finally, some states have proposed the establishment of a multilateral investment court to replace the current system of ad hoc arbitration, which would centralize and institutionalize ISDS, potentially enhancing its legitimacy, consistency, and predictability.[93]

XV. THE RISE OF NEW INVESTMENT TREATIES INCORPORATING ENVIRONMENTAL AND SOCIAL CLAUSES

The *Metalclad* v. *Mexico* case and other investor-state disputes have catalyzed the rise of new investment treaties that incorporate environmental and social clauses, reflecting the growing recognition of the need to balance investment protection with sustainable development.[94] These new-generation investment treaties include provisions that explicitly recognize states' right to regulate in the public interest, particularly in areas such as environmental protection, public health, and labor rights.[95]

Additionally, these treaties often contain investor obligations, requiring foreign investors to adhere to host country environmental and social standards, as well as international norms and guidelines.[96] This shift promotes responsible business conduct and ensures that investments contribute positively to sustainable development goals (SDGs).[97]

New investment treaties also incorporate enhanced transparency provisions, including requirements for states to disclose information related to

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[91] Nathalie Bernasconi-Osterwalder, Aaron Cosbey, Lise Johnson & Damon Vis-Dunbar, *Investment Treaties & Why They Matter to Sustainable Development: Questions & Answers,* Int'l Inst. for Sustainable Dev (2013).

[92] Nathalie Bernasconi-Osterwalder & Sarah Brewin, *Investment Treaty Dispute Settlement: The Need for a New System*, 13(2) J. World Investment & Trade 231 (2012).

[93] European Commission, *Concept Paper: Investment in TTIP and Beyond - The Path for Reform* (2015), https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (last visited on March 3, 2023).

[94] U.N. Conference on Trade and Dev. (UNCTAD) *supra* note 10.

[95] Joachim Pohl, *Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence*, OECD Working Papers on Int'l Inv., 2013/01 (2013), https://doi.org/10.1787/5k3tjhjtgpgd-en (last visited on March 3, 2023).

[96] Howard Mann *supra* note 3.

[97] U.N. Conference on Trade and Dev. (UNCTAD) *supra* note 62.

environmental and social impacts of investments, and to involve stakeholders in decision-making processes.[98]

In sum, the emergence of new investment treaties incorporating environmental and social clauses represents a significant evolution in international investment law, reflecting the growing awareness of the need to align investment policy with sustainable development objectives.[99]

XVI. CONCLUSION

In conclusion, the *Metalclad* v. *Mexico* case has had far-reaching consequences for international investment law, state sovereignty, environmental governance, and investment treaties. The case has sparked an ongoing debate over the balance between investor protection and states' regulatory powers, prompting a re-evaluation of key investment treaty provisions, such as expropriation and fair and equitable treatment. It has also led to important changes in ISDS mechanisms, promoting transparency, public participation, and the consideration of environmental issues in arbitration.

Moreover, the *Metalclad* case has influenced the emergence of new-generation investment treaties that incorporate environmental and social clauses, aligning investment policy with sustainable development objectives. These treaties reflect a growing recognition of the need to ensure that international investment agreements serve the broader public interest and contribute to the achievement of sustainable development goals. As international investment law continues to evolve, it is crucial to maintain a focus on achieving a balance between investment protection and the preservation of state sovereignty, environmental governance, and the pursuit of sustainable development.

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[98] Kathryn Gordon & Joachim Pohl *supra* note 6.
[99] Kyla Tienhaara *supra* note 8.