

INTERNATIONAL ENVIRONMENTAL OBLIGATIONS  
AND INVESTORS' CLAIMS: ARE STATES  
BETWEEN THE HAMMER AND THE ANVIL?

MARCO SEREGNI\*

I. INTRODUCTION . . . . .	421
II. THE NON-COMPLIANCE MECHANISMS IN MEAs . . . . .	422
III. ENVIRONMENTAL LAW RELATED ISSUES IN LITIGATION OR ARBITRATION WITH PRIVATE PARTIES . . . . .	425
A. <i>The private enforcement of climate change         obligations before the courts</i> . . . . .	425
B. <i>Environmental protection issues in investment         arbitration</i> . . . . .	427
IV. CLOSING REMARKS . . . . .	430

I. INTRODUCTION

International environmental law is a relatively recent branch of law, which has developed hectically in the last fifty years.<sup>1</sup> Nowadays, hundreds of multilateral environmental agreements (MEAs) are in force.<sup>2</sup> Those instruments, albeit not always binding,<sup>3</sup> have led to a significant increase in the obligations upon States to deal with environmental issues. Un-

---

\* LL.M. Candidate in the International Legal Studies program at New York University School of Law (Class of 2023). As an Italian qualified lawyer, I regularly represent corporations in commercial disputes before international arbitral tribunals. While at NYU, I am focusing my studies on public international law, and specifically the interaction between human rights, environmental protection, and investment law. I would like to thank the editors of the N.Y.U. Journal of International Law & Politics for their thoughtful comments and edits. All remaining errors are my own.

1. Edith Brown Weiss, *The Evolution of International Environmental Law*, 54 JAPANESE Y.B. INT'L L. 1 (2011).

2. *Id.*

3. For instance, the Paris Agreement is considered a mixed agreement, with binding procedural obligations and aspirational substantive commitments. Meinhard Doelle, *In Defence of the Paris Agreement's Compliance System: The Case for Facilitative Compliance*, in DEBATING CLIMATE LAW 86, 95 (Benoit Mayer & Alexander Zahar eds., 2021).

surprisingly, in turn, issues of compliance and enforcement rose to prominence.<sup>4</sup>

Two additional trends are worth of mention. On the one side, private parties are increasingly suing State entities before domestic courts claiming violation of environmental protection commitments<sup>5</sup> and requesting redress or specific performance.<sup>6</sup> On the other, investors are filing claims before arbitral tribunals requesting compensation from States due to the implementation of environmental protection measures allegedly affecting their investment.<sup>7</sup>

This contribution analyzes the States' position vis-à-vis private parties considering the two mentioned developments. At first sight, States may risk being exposed to claims by private parties for reasons of either compliance with their environmental protection commitments or the absence thereof. The present paper tackles this tension, striving to determine whether a contradiction exists and suggesting possible approaches to the problem.

## II. THE NON-COMPLIANCE MECHANISMS IN MEAs

Besides the usual enforcement hurdles of international law,<sup>8</sup> the enforcement of MEAs poses additional challenges due to the broad scope of many provisions and the limited powers of the compliance authorities.<sup>9</sup> While at the outset the

---

4. U.N. ENVTL. PROGRAM, MANUAL ON COMPLIANCE WITH AND ENFORCEMENT OF MULTILATERAL ENVIRONMENTAL AGREEMENTS, at 29, U.N. Doc. DEC/0817/NA (2006).

5. The term environmental protection commitments refers to the obligations arising from both the binding provisions of MEAs and their soft law provisions. Doelle, *supra* note 3, at 86.

6. Anna-Julia Saiger, *Domestic Courts and the Paris Agreement's Climate Goals: The Need for a Comparative Approach*, 9 TRANS. ENVTL. L. 37, 37-38 (2020).

7. Jones Day, *Climate Change and Investor-State Dispute Settlement*, JONES DAY INSIGHTS (Feb. 2022), <https://www.jonesday.com/en/insights/2022/02/climate-change-and-investorstate-dispute-settlement>.

8. See Quincy Wright, *Enforcement of International Law*, 38 PROC. OF THE AM. SOC'Y INT'L L. AT ITS ANN. MEETING, 77 (1944) (discussing the underlying legal, political, psychological, and technical problems).

9. Carl Bruch, *Is International Environmental Law Really "Law"? An Analysis of Application in Domestic Courts*, 23 PACE ENVTL. L. REV. 423, 424 (2006).

problem was not perceived as pressing,<sup>10</sup> there is now consensus that “[t]oo often, implementation and enforcement of environmental laws and regulations falls far short of what is required to address environmental challenges.”<sup>11</sup> It therefore becomes relevant to identify the most appropriate means to ensure that States abide by their obligations under the MEAs.

There has long been a debate on whether any non-compliance mechanism in a MEA should have a facilitative or an enforcement purpose.<sup>12</sup> Here, it suffices to mention the major differences between the two systems. Facilitative mechanisms tend to privilege a managerial approach, which refrains from sanctioning the States and aims at helping them to reach compliance.<sup>13</sup> The traditional tools are the provision of technical and financial assistance to States and the issuance of recommendations.<sup>14</sup> Instead, enforcement mechanisms are mainly aimed at sanctioning States in the case of non-compliance. *Inter alia*, those systems envisage a finding of non-compliance, a compliance action plan, and, in case of continued violation, sanctions. The harsher sanctions, which may entail the suspension of rights and privileges, are however rarely applied in practice.<sup>15</sup>

Despite the differences, the two systems are not mutually exclusive. For instance, the 1997 Kyoto Protocol provided for a compliance committee with two branches, one focused on facilitation and the other on enforcement. The system, albeit plagued by some initial delays and procedural difficulties,

---

10. Mary Ellen O’Connell, *Enforcement and the Success of International Environmental Law*, 3 *IND. J. GLOBAL LEGAL STUD.* 47, 56 (1995-1996). *But see* Andrew Watson Samaan, *Enforcement of International Environmental Treaties: An Analysis*, 5 *FORDHAM ENVTL. L. J.* 261, 273 (1993).

11. U.N. ENVTL. PROGRAM, ENVIRONMENTAL RULE OF LAW FIRST GLOBAL REPORT, at viii, U.N. Doc. DEL/2227/NA (2019).

12. Jane Bulmer, *Compliance regimes in multilateral environmental agreements*, in *PROMOTING COMPLIANCE IN AN EVOLVING CLIMATE REGIME* 55, 65-66 (Jutta Brunnée et al. eds., 2011). Moreover, while adversarial dispute resolution mechanisms are often present in MEAs, their use in practice is limited. *Id.* at 56.

13. Anna Huggins, *The Paris Agreement’s Article 15 Mechanism: An Incomplete Compliance Strategy*, in *DEBATING CLIMATE LAW* 99, 101 (Benoit Mayer & Alexander Zahar eds., 2021).

14. Bulmer, *supra* note 12 at 71.

15. *Id.*

proved to work properly, reinforcing the idea of the opportunity of combining enforcement and facilitation measures.<sup>16</sup>

That notwithstanding, when the time came to negotiate the Paris Agreement, political compromise led to the inclusion of a facilitative mechanism only.<sup>17</sup> Article 15 of the Paris Agreement provides for the establishment of an expert-based committee that shall be “facilitative in nature and function in manner that is transparent, non-adversarial and non-punitive.”<sup>18</sup> Subsequently, it was clarified that the Committee “shall neither function as an enforcement or dispute settlement mechanism, nor impose penalties or sanctions, and shall respect national sovereignty.”<sup>19</sup> In practice, the Committee may engage in a dialogue with the State concerned, assist with finance, technology, and capacity-building bodies, make recommendations, and issue findings of non-compliance.<sup>20</sup>

While some scholars hailed the system as one that “plays an important role in motivating compliance, improving implementation, and increasing ambition over time,”<sup>21</sup> there have also been negative reactions.<sup>22</sup> It is probably still too early to determine the efficacy of the Committee.<sup>23</sup> It is already clear, however, that no strong public enforcement mechanism is currently in place to deal with the States’ non-compliance.

---

16. Meinhard Doelle, *Compliance and Enforcement in the Climate Change Regime*, in CLIMATE CHANGE AND THE LAW 165, 188 (Erkki Hollo et al. eds., 2012). Cf. Doelle, *supra* note 3, at 88 (observing that under the Kyoto Protocol “it was norm building rather than penalties that ultimately motivated compliance.”).

17. Rafael Leal-Arcas & Antonio Morelli, *The Resilience of the Paris Agreement: Negotiating and Implementing the Climate Regime*, 31.1 GEO. ENVTL. L. REV. 1, 3 (2018).

18. Paris Agreement to the United Nations Framework Convention on Climate Change art. 15, Dec. 12, 2015, T.I.A.S. No. 16-1104.

19. U.N. Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, at 60, U.N. Doc. FCCC/PA/CMA/2018/3/Add.2 (Mar. 19, 2019).

20. *Id.* at 63.

21. Doelle, *supra* note 3, at 86.

22. Huggins, *supra* note 13, at 109. See also Alexander Zahar, *A Bottom-Up Compliance Mechanism for the Paris Agreement*, 1 CHIN. J. ENV. L. 69, 98 (2017).

23. Only in August 2022 has the Committee recommended to the Conference of the Parties the adoption of its draft rules of procedure. See U.N. Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, 5, U.N. Doc. FCCC/PA/CMA/2022/2 (Aug. 19, 2022).

### III. ENVIRONMENTAL LAW RELATED ISSUES IN LITIGATION OR ARBITRATION WITH PRIVATE PARTIES

Absent any strict legal enforcement at the international level, private parties' claims before domestic courts may push States towards compliance with their international environmental commitments. At the same time, however, certain States' measures designed to foster environmental protection increasingly fall under the scrutiny of investment arbitration tribunals, which must adjudge compensation claims brought by investors challenging those measures.

#### A. *The private enforcement of climate change obligations before the courts*

The idea of entrusting the enforcement of international environmental law to domestic courts is not recent.<sup>24</sup> In a nutshell, States should enact regulations considering their obligations flowing from the MEAs, and domestic courts should in turn police their enforcement. The litigation would be between private parties and the judiciary would side with the legislator in bringing the State in compliance with its international obligations.<sup>25</sup>

Quite a different matter, instead, is a private party filing a case before a domestic court challenging the State's failure to implement domestic measures in line with its international obligations.<sup>26</sup> That situation was less common,<sup>27</sup> and understandably so. In addition to the critical issue of standing, further difficulties concern the degree of discretion that a State has in implementing its international obligations and the limits of the judiciary power to impose a certain conduct upon the State.<sup>28</sup>

24. O'Connell, *supra* note 10, at 57.

25. *Id.* at 57-58.

26. Esmeralda Colombo, *Enforcing International Climate Change Law in Domestic Courts: A New Trend of Cases for Boosting Principle 10 of the Rio Declaration*, 35 UCLA J. ENVTL. L. & POL'Y 98, 124 (2017).

27. See Ivano Alogna and Eleanor Clifford, *Climate Change Litigation: Comparative and International Perspectives*, BRITISH INST. OF INT'L AND COMP. L. (2020), [https://www.biicl.org/documents/88\\_climate\\_change\\_litigation\\_comparative\\_and\\_international\\_report.pdf](https://www.biicl.org/documents/88_climate_change_litigation_comparative_and_international_report.pdf).

28. *Id.* at 7.

However, ever since the seminal *Urgenda* case in 2015, where the Dutch courts ordered the Netherlands to curb its emissions to comply *inter alia* with its commitments under the Paris Agreement,<sup>29</sup> climate change litigation has increased.<sup>30</sup> An overview of a few such cases follows.

In *Earth Africa Johannesburg v. The Minister for Environmental Affairs* (2017), an environmental NGO filed a lawsuit arguing that the Minister for Environmental Affairs had granted an environmental authorization for the construction of a new coal-fired plant without considering its climate change impact.<sup>31</sup> In determining that the applicable law required the consideration of climate change impact, the High Court of Pretoria found that a “climate change impact assessment is necessary and relevant to ensuring that the proposed coal-fired power station fits South Africa’s peak, plateau and decline trajectory as outlined in the NDC” under the Paris Agreement.<sup>32</sup> The Court consequently set aside the Minister’s decision.<sup>33</sup>

Other courts have adopted a more cautious approach, refraining from using a State’s commitments under the Paris Agreement as a parameter of compliance of domestic measures. In *R v. Heathrow Airport* (2020), the Supreme Court of England and Wales overturned the Court of Appeals’ finding, which read that “[t]he Paris Agreement ought to have been taken into account by the Secretary of State” when deciding on the government’s policy in favor of the construction of a third runway at Heathrow airport.<sup>34</sup> Notably, the Supreme Court found that mere ratification of the Paris Agreement had only effects at the international level and, absent a domestic implementation, did “not constitute a commitment operating on the plane of domestic law to perform obligations under the treaty.”<sup>35</sup>

---

29. Rb. Den Haag 24 juni 2015, RvdW 2015 (Stichting Urgenda/De Staat der Nederlanden) (Neth.).

30. *E.g.* Alogna, *supra* note 27, at 4.

31. *Earthlife Africa v. Minister of Environmental Affairs* 2017 (2) SA 519 (GP) (S. Afr.).

32. *Id.* ¶ 90, at 36.

33. *Id.* at 49.

34. *R v. Secretary of State of Transport* [2020] EWCA (Civ) 214, § 283 (Eng.).

35. *R v. Heathrow Airport Ltd* [2020] UKSC 52, § 108 (Eng.).

Faced with mixed results before domestic courts, private enforcement attempts recently escalated before international courts. In 2020, six young Portuguese citizens filed an application before the European Court of Human Rights against Portugal and thirty-two other States, denouncing the States' non-compliance with their commitments under the Paris Agreement and alleging violation of their rights to life and to a healthy and protected environment.<sup>36</sup> The Chamber dealing with the case in June 2022 relinquished jurisdiction in favor of the Grand Chamber,<sup>37</sup> thereby acknowledging that the case "raises a serious question affecting the interpretation of the Convention or . . . a risk of inconsistency with a previous judgment of the Court."<sup>38</sup>

While said decision may provide a further spurt to climate change litigation against States, the trend of private litigation before domestic (or international) courts to challenge States' measures in contrast with commitments under MEAs is here to stay. Albeit not necessarily directly, this tendency is likely to play a relevant role in integrating the mild non-compliance mechanisms under the MEAs and pressuring States towards enacting environmental protection regulations. It seems therefore appropriate to conclude that private climate litigation may strengthen the "legitimacy [of the climate regulatory framework] and . . . bring about an increased acceptance of such principles and results among the societal values of each State."<sup>39</sup>

#### B. *Environmental protection issues in investment arbitration*

In a scenario where States increasingly enact environmental related measures, corporations may see their investments adversely affected by the State's conduct. The problem is not

---

36. *Information Note on the Court's case-law 246*, Eur. Ct. H.R. (Dec. 2020), [https://www.echr.coe.int/Documents/CLIN\\_246\\_BIL.pdf](https://www.echr.coe.int/Documents/CLIN_246_BIL.pdf).

37. *Grand Chamber to examine case concerning global warming*, 226 Eur. Ct. H.R. Registry (2022).

38. *The Grand Chamber, FAQ*, Eur. Ct. H., [https://www.echr.coe.int/Documents/FAQ\\_GC\\_ENG.pdf](https://www.echr.coe.int/Documents/FAQ_GC_ENG.pdf) (last visited Nov. 2022). At the time of writing of this article, the Grand Chamber had yet to issue its judgement.

39. Colombo, *supra* note 26, at 110.

just theoretical, as one tracker identified sixteen arbitration proceedings commenced against States on that basis.<sup>40</sup>

Just a few months ago, an arbitral tribunal awarded the English company Rockhopper EUR 185 million as compensation for lost profits deriving from Italy's decision to impose a ban on the drilling activities in an off-shore area in the Adriatic Sea.<sup>41</sup> The Arbitral Tribunal clarified that it was not questioning Italy's decision to impose the ban, nor the underlying political and environmental reasons. However, since Italy had approved the environmental impact assessment for the project and Rockhopper had filed its application for the concession, the latter had a right to obtain the permit, which was later violated by the decision to reinstate the ban on the drilling activities.<sup>42</sup> Therefore, Italy's conduct amounted to a direct expropriation of Rockhopper's investment under the Energy Charter Treaty (ECT), which engendered the investors' right to obtain full compensation for the harm suffered.<sup>43</sup>

While *Rockhopper* concerned the withdrawal of a permit, other pending cases relate to different situations. In two ECT arbitration cases filed in 2021 against the Netherlands,<sup>44</sup> two energy companies claimed that the Dutch government failed to allow adequate time and resources to transition away from coal.<sup>45</sup> Notably, the investors challenged a law that gradually prohibits the production of electricity with the use of coal plants, which was enacted in 2019 precisely in the context of

---

40. See *Non-U.S. Climate Change Litigation – Trade and Investment*, SABIN CTR. FOR CLIMATE CHANGE L. (Oct. 30, 2022), <http://climatecasechart.com/non-us-case-category/investor-state-dispute-settlement/>.

41. *Rockhopper Italia S.P.A. et al. v. Italian Republic*, ICSID Case No. ARB/17/14, Award (Aug. 23, 2022). On October 31, 2022, ICSID Secretary-General registered an application for annulment of the award filed by Italy. At the time of writing of this article, the application was still pending.

42. *Id.* ¶¶ 191-203, at 80-84.

43. *Id.* ¶ 208, at 85.

44. Stan Putter, *The Netherlands Coal Phase-Out and the Resulting (RWE and Uniper) ICSID Arbitrations*, KLUWER ARB. BLOG (Aug. 24, 2021), <http://arbitrationblog.kluwerarbitration.com/2021/08/24/the-netherlands-coal-phase-out-and-the-resulting-rwe-and-uniper-icsid-arbitrations>.

45. Catherine Higham & Joana Setzer, *Investor-State Dispute Settlement' as a new avenue for climate change litigation*, GRANTHAM RES. INST. ON CLIMATE CHANGE & ENV. 1, 4 (June 2, 2021).

the Dutch government's attempt to comply with its commitments under the Paris Agreement.<sup>46</sup>

For completeness, albeit going in a somewhat different direction, reference shall be made also to the claims filed by investors against a State's decision to roll back incentives plan for renewable sources. Those cases, which reached diverging outcomes,<sup>47</sup> concerned situations where the investors' interests seemed to be aligned with climate protection. Although the point has been raised to note that many investment treaties are not *per se* contrary to environmental protection,<sup>48</sup> the underlying issue of the States' leeway in environmental regulation remains critical. Against this background, law firms are suggesting that their clients to gear up for claims in case of adoption by States of environmental measures adverse to their investment.<sup>49</sup> Considering that a recent estimate of all States' combined liability exposure to oil and gas investors may amount to USD 340 billion,<sup>50</sup> the potential chilling on environmental protection measures becomes apparent.

Moreover, while the author is not aware of instances where the same measure has been challenged by private parties in opposite directions, *i.e.* before domestic courts for not being in line with the State's international commitments under MEAs and before arbitral tribunals alleging breach of an investment treaty, the problem might well arise in the future. More than a contemporaneous challenge, though, it is more likely that the State's action be impugned by private par-

---

46. Putter, *supra* note 44. At the time of writing of this article, the arbitral tribunals had yet to issue their awards.

47. See Jack Biggs, *The Scope of Investors' Legitimate Expectations under the FET Standard in the European Renewable Energy Cases*, 36 ICSID REV. - FOREIGN INV. L. J. 99, 108 (2021) (observing that the tribunals' contrasting approaches originated from a different understanding of "(i) what constitutes a specific commitment from a government to an investor; and (ii) the margin of appreciation granted to governments to regulate in the public interest").

48. See Caroline Simson, *190M Award Fans Flames Against Investor-State Arbitration*, LAW 360 (Sep. 14, 2022, 10:28 PM), <https://www.law360.com/articles/1529947>.

49. Courtney Lotfi, *Predicted Rise in Climate-Related Investment Arbitration Claims on the Horizon*, JONES DAY (Aug. 3, 2022), <https://www.jonesday.com/en/insights/2022/08/predicted-rise-in-climaterelated-investment-arbitration-claims-on-the-horizon>.

50. Kyla Tienhaara et al., *Investor-state disputes threaten the global green energy transition*, 376 SCI. 6594, 701, 703 (2022).

ties at different stages. The Dutch situation described above is telling. After the *Urgenda* case, the Dutch government was required to take on more ambitious goals in terms of environmental protection, and the pending *RWE* and *Uniper* investment arbitration cases revolve precisely around one of the measures undertaken by the government to that end.

Therefore, the key issues remain the States' margin of discretion in implementing their international environmental commitments and how the risk of challenges from private parties or investors may influence the exercise of said discretion.

#### IV. CLOSING REMARKS

The above snapshot suggests that a tension between the States' commitments under the MEAs and certain investors' rights exists. Given the increase of MEAs and the development of the private enforcement thereof before domestic courts, the issue is also of significant relevance. It should therefore come as no surprise that for UNCTAD, "[t]he risk of investor-State dispute settlement (ISDS) being used to challenge climate policies is a major concern."<sup>51</sup>

Despite fair consensus on the existence of the problem, it proved almost impossible to identify an appropriate remedy. A first option is for States to withdraw from the relevant investment treaty. For instance, partially in response to some of the above-mentioned cases, Italy and most recently Poland, Spain, the Netherlands, France and Germany have decided to withdraw from the ECT.<sup>52</sup> Interestingly, both the Spanish Minister for ecological transition,<sup>53</sup> President Macron,<sup>54</sup> and members

---

51. *Treaty-Based Investor-State Dispute Settlement Cases and Climate Action*, U.N. CONF. ON TRADE & DEV. (UNCTAD), IIA Issues Note no. 4, 2 (Sep. 2022), [https://unctad.org/system/files/official-document/diaepcbinf2022d7\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf).

52. Susannah Moody, *Germany latest to quit ECT*, GLOB. ARB. REV. (Nov. 11, 2022), <https://globalarbitrationreview.com/article/germany-latest-quit-ect>.

53. Toby Fisher, *Spain announces withdrawal from ECT*, GLOB. ARB. REV. (Oct. 13, 2022), <https://globalarbitrationreview.com/article/spain-announces-withdrawal-ect>.

54. Caroline Simson, *France Joins Netherlands in Leaving Energy Charter Treaty*, LAW 360 (Oct. 21, 2022, 6:14 PM), <https://www.law360.com/internationalarbitration/articles/1542326/france-joins-netherlands-in-leaving-energy-charter-treaty>.

of the German federal parliament<sup>55</sup> adduced the incompatibility of the ECT with climate change commitments as one reason for withdrawal.

While this drastic solution may yield results in terms of States' looser constraints in implementing environmental protection measures, there exist at least two potential counterarguments. First, it hardly occurs that the optimal solution to overcome the tension between two competing interests involves the outright elision of one of them, and there is at least a plausible claim that certain investment treaties "are really an important backbone to commercial decisions that people are taking."<sup>56</sup> Second, many of those investment treaties provide in any case for sunset clauses, enabling the investors to bring proceedings against States for a number of years after the withdrawal.<sup>57</sup>

Other milder solutions, such as introducing clauses that enable States to adopt measures for public interest reasons, without facing the risk of claims by investors, proved to be no silver bullets. In practice, the vague wording of these exceptions grants significant discretion to investment tribunals called to determine whether a State's measure is covered, with consequent diverging results.<sup>58</sup> Ongoing initiatives, fortunately, appear to foster a broader rethinking of investment treaties to ensure a smoother interplay with MEAs.<sup>59</sup>

Another option is to identify the ratification of certain MEAs as a "warning signal," which would render more difficult for investors to subsequently argue that they had an expectation on a State's course of conduct in contrast with the MEA.<sup>60</sup> This option appears more promising, since it accounts for the interplay between the two sources of obligations. The open-ended and long-term commitments taken upon by States under the MEAs, however, hardly reconcile with the idea of a specific pre-determined path of conduct.

---

55. Moody, *supra*, note 52.

56. Simson, *supra* note 48, para. 20.

57. Tienhaara, *supra* note 5050.

58. Simson, *supra* note 4848.

59. See, e.g., *Survey of climate policies for investment treaties*, ORG. FOR ECON. CO-OPERATION AND DEV. (Oct. 11, 2022), [https://one.oecd.org/document/DAF/INV/TRI/WD\(2022\)3/en/pdf](https://one.oecd.org/document/DAF/INV/TRI/WD(2022)3/en/pdf).

60. David Hunter et al., *The Paris Agreement and Global Climate Litigation after the Trump Withdrawal*, 34 MD. J. INT'L L. 224, 246-247 (2020).

In sum, finding a satisfactory solution to the problem is no easy task. Any such endeavor, though, should probably consider the following entry points.

Pretending to solve the tension with some pen traits on the investment treaties appears quite naïve. Instead, any reform discussion should pay close attention to the scope and nature of States' obligations under the MEAs. Likewise, the extent and effectiveness of any non-compliance mechanism and of private litigation against States in case of breach of the environmental protection commitments becomes relevant. If it is true that States tend to breach international law obligations when they have no more economic interest in abiding by them,<sup>61</sup> determining the stakes on the table in terms of expected exposure seems like a good starting point.<sup>62</sup>

Another issue is the multiplicity of fora in action. The enforcement of obligations arising from MEAs normally occurs before treaty-based entities or, as shown, before domestic or international courts. To the contrary, investors' claims are usually adjudicated by private arbitral tribunals, which are not bound by any strict rule of precedent. Therefore, the risk of conflict between the States' measures in light of the MEAs and the investors' rights and expectations remains. MEAs and investment treaties are both binding upon States and have a different sphere of application, but may be engaged by the same State's conduct. In those instances, the hierarchical value of the private parties' rights corresponding to the States' obligations may become decisive. In that regard, the right to a healthy environment has recently raised to prominence, being protected in over 150 jurisdictions<sup>63</sup> and recognized as a human right.<sup>64</sup> Therefore, conflicts between a State's environ-

---

61. See Wright, *supra* note 8, at 77.

62. Cf. Joyeeta Gupta et al., *Lessons learnt from international environmental agreements for the Stockholm + 50 Conference: Celebrating 20 Years of INEA*, INT'L ENVTL. AGREEMENTS 229, 242 (2022) (warning against the risk of prevalence of economic interests over social/ecological interests since only the former may be easily quantified in monetary terms).

63. Yann Aguila, *The Right to a Healthy Environment*, INT'L UNION FOR CONSERVATION OF NATURE (Oct. 29, 2021), <https://www.iucn.org/news/world-commission-environmental-law/202110/right-a-healthy-environment>.

64. *In historic move, UN declares healthy environment a human right*, U.N. ENV'T PROGRAMME (UNEP) (Jul. 28, 2022), <https://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right>.

mental protection measure and an investor's rights may be increasingly solved in the former's favor due to a comparatively higher rank of the corresponding individual right.<sup>65</sup> However, since States retain a margin of discretion in enacting their policies and the protection of certain investors' rights remains relevant, a delicate case-by-case balance will likely be necessary regardless.

In conclusion, considering the broad wording of key provisions in both MEAs and investment treaties, as well as the peculiarities of the related enforcement mechanisms, finding States between the hammer and the anvil in relation to the adoption of environmental protection measures is quite an overstatement. Nonetheless, the existence of a persistent tension is undeniable, and the measures currently available do not appear fit to ensure a smooth solution. While in the medium to long term the international political and legal agenda seems to be oriented towards an increased relevance for environmental protection, the investors' expectations under the treaties and the subsequent risk of States' liability are factors that will likely continue to influence the development of this area of law.

---

65. See Alison FitzGerald et al., *Human rights and international investment arbitration: a snapshot*, NORTON ROSE FULBRIGHT INT'L ARB. REP., issue 18, at 20 (May 2022) (noting that “[i]nternational arbitral tribunals in investor-state disputes have been increasingly open to drawing on human rights norms and jurisprudence when interpreting and applying international investment agreements”).