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Report on use of ESG contractual obligations and related disputes

ESG Subcommittee of the
IBA Arbitration Committee

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A. INTRODUCTION

By Angeline Welsh KC, Essex Court Chambers; Vice-Chair, IBA Arbitration Committee
Co-Chair, ESG Subcommittee, 2020/2021

I. Introduction to ESG, and ESG obligations

Over the past decade there has been a proliferation of laws, regulations and soft law instruments that has converged to create a framework around businesses' responsibility for environmental, social and governance issues ("**ESG**"). While ESG is not defined consistently across all relevant instruments, a broad spectrum of issues is usually prescribed to the ESG banner, including anti-corruption and bribery efforts, protection of the environment and prevention of climate change and human and labour rights, particularly through the supply chain.

A comprehensive review of all the applicable guidance and regulations is outside the scope of this introduction, but it is helpful for context to highlight some which are relevant to specific groups of entities which may use arbitration as a dispute resolution mechanism:

- For corporates, these include the OECD Guidelines for Multinational Enterprises,[1] the UN Global Compact,[2] and the UN Guiding Principles on Business and Human Rights,[3] and specific national laws, such as the UK and Australian Modern Slavery Acts, the French Duty of Vigilance Law, the Netherlands Child Labour Due Diligence Law, UK and New Zealand climate-related financial disclosure regulations, or the forthcoming EU corporate sustainability due diligence directive.
- For investors, these include the Equator Principles,[4] the Global Investor Coalition on Climate Change,[5] various guidelines published by the Investment Association,[6] and the UN Principles of Responsible Investment.[7] EU legislation has been implemented on sustainable finance[8] and the UK and New Zealand are requiring climate-related financial disclosure from institutional investors.

1 The OECD Guidelines set out principles and standards for responsible businesses to operate in a global context consistent with applicable laws and internationally recognised standards. They also include a built-in grievance mechanism, which allows complaints against a company registered or operating in a country that has adopted the guidelines but which has breached them. See https://mneguidelines.oecd.org/mneguidelines/

2 This is a voluntary initiative for companies committed to sustainability and responsible business practice. Signatories must support ten principles in these areas and report annually on progress. See https://www.unglobalcompact.org/

3 A global standard for preventing and addressing the risk of adverse human rights impacts linked to business activities. See: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

4 A set of voluntary guidelines to lenders for assessing and managing the environmental and social impacts of the projects that they invest in, the fourth version of which was published in July 2020. See https://equator-principles.com/

5 See https://www.parisalignedassetowners.org/

6 See https://www.theia.org/campaigns/sustainability-and-responsible-investment

7 The UN Principles of Responsible Investment are a set of global voluntary guidelines for institutional investors on integrating ESG issues into their investment decisions. See https://www.unpri.org/

8 Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector; Regulation (EU) 2019/2089 amending Regulation (EU) 2016/1011 (BMR) as regards EU climate transition benchmarks, EU Paris-aligned benchmarks and sustainability-related disclosures for benchmarks; Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment.

- For insurers, these include the Principles for Sustainable Insurance.[9]

In light of increasing potential legal and regulatory liability, as well as concerns about reputation and brand value, businesses have begun to take steps to regulate responsibility (externally and internally) for ESG issues. There are increasing governance mechanisms. For example, poor governance may heighten the risk of bribery or sanctions breaches, which could lead to significant fines, market access restrictions and reputational damage. In some instances, parent companies have been held liable for the ESG-related actions of their subsidiaries.[10] Further, the growing scrutiny of investors and customers into company practices supports a market-based rationale for complying with higher ESG standards.

II. Aim of this report

The ESG Subcommittee of the IBA Arbitration Committee, with the assistance of the IBA Business Human Rights Committee, set out to establish what role arbitration may have to play in the resolution of contractual ESG disputes. To investigate these questions, the ESG Subcommittee adopted three lines of research: (i) desk research; (ii) a survey conducted by the IBA ESG Subcommittee in 2021 of in-house counsel and compliance staff members at large multinationals (***Survey***), supported by (iii) roundtable discussions in 2021 and 2022 with in-house counsel to discuss the types of ESG clauses which were seen in practice and the extent to which in-house counsel had experience of resolution of such disputes and the appropriateness of certain dispute resolution mechanisms, including arbitration. The questions which were posed as part of the 2021 survey can be found at Annex A of this Report.

Given that arbitration is a consensual process, it is likely to play a role in business-to-business disputes in relation to ESG obligations where arbitration clauses are included in contracts which also contain ESG obligations. Alternatively, where ESG obligations are included in investment treaties between states and because such treaties typically include arbitration as a means of dispute resolution, we are likely to see ESG concerns addressed through arbitration proceedings. For this reason, Chapters B and C survey the ESG obligations found in contracts and investment treaties respectively and how and where they may play a role in dispute resolution.

Chapter D describes what dispute resolution procedures have been adopted to resolve ESG disputes, including arbitration.

9 In June 2012, over 25 insurers endorsed a set of principles on environmental, social and governance issues for insurers to adopt in their decision making. See https://www.unepfi.org/psi/wp-content/uploads/2012/06/PSI-document.pdf

10 For example, in April 2019, the UK Supreme Court handed down a judgment in *Lungowe v Vedanta* [2019] UKSC 20 which found that a company may have a duty of care to prevent its foreign subsidiaries or suppliers from causing harm to people affected by their operations, particularly where the company has demonstrated the assumption of a duty through corporate policies or commitments. (see https://www.supremecourt.uk/cases/uksc-2017-0185.html). In *Nevsun Resources Ltd. v Araya*, the Supreme Court of Canada declined to dismiss a series of customary international law claims brought by Eritrean refugees against a Canadian mining corporation for grave human rights abuses committed in Eritrea.

III. Executive summary of Report

ESG clauses

There has been a proliferation of ESG specific requirements in commercial contracts in the last ten years, driven by reference to increasing legislation and regulation in this area and voluntary standards. The purpose of such clauses is not only to avoid harmful business practices, but also to improve stakeholder relationships, achieve wider reputational benefits and ensure regulatory compliance.

While it is impossible to identify all the types of ESG clauses which tend to arise in commercial contracts, such clauses usually take the form of due diligence requirements or compliance obligations, monitoring and reporting requirements, and warranties and indemnities. They often refer to ESG guidance and standards such as the Equator Principles, the UN Guiding Principles on Business and Human Rights and the Green Loan Principles. Such clauses may also specify the consequences that flow from breach of such clauses, including an agreed remediation process, termination or the payment of damages as a result of the breach. Model ESG clauses are available, including, for example, model clauses developed by The Chancery Lane Project and the American Bar Association.

The Survey confirms that corporations (regardless of sector) undertake ESG due diligence as part of their usual investment process. Some respondents noted that the results of ESG due diligence can cause corporations not to enter into contracts with the relevant counterparty. Responses to the Survey also noted a significant use of ESG warranties across different size organisations and sectors. Compliance and performance metrics are most commonly found in supply contracts and shareholder agreements, and this is likely to increase as a consequence of increased pressure to disclose and report on carbon budgets. In terms of ESG clauses providing for consequences of a breach, the Survey revealed a mixed use of termination, indemnification and remediation provisions. One would expect to see an increased inclusion of termination rights for breach of ESG obligations, and termination relying on them, as regulation in this area increases.

ESG obligations in investment treaties

States are seeking investment that furthers the E, S and G elements of their sustainability agenda. This is reflected in some of the language adopted in some of the modern model investment treaties. As a result, there are increasing examples of preambles (which describe the purpose, motive and considerations of the underlying treaty and are therefore important for the interpretation of these treaties) which show an increased focus on investment as a means to further "sustainable" development.

Specific substantive ESG-related standards are making an appearance in model investment treaties, though these range from voluntary standards to requiring specific language. More frequently, investment treaties include a specific carve out for the State's right to regulate on certain issues, including ESG matters.

At the same time, other less direct mechanisms in investment treaties are expected to incentivise States and investors to comply with international ESG standards, such as treaties which empower arbitral tribunals to take into account an investor's compliance with relevant standards when awarding compensation, the possibility of counterclaims being brought by States on the basis of an investor's human rights obligations and State to State mechanisms which empower the States to discuss corporate social responsibility (**CSR**) standards, environmental protection and human rights standards.

This increasing concern with ESG in the context of investment treaties and investment treaty claims—as regards both State and investor behaviour—reflects a broader trend in international policy and treaty making. For example, the Paris Agreement on Climate Change contains an explicit goal "to make finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development". This will, in turn, affect the rights and obligations afforded to domestic and foreign investors in their territories.

Resolution of ESG disputes

While initially ESG disputes have been prevalent before domestic courts, it is expected that contractual disputes will rise as more and more ESG clauses are incorporated into commercial contracts. While there have been several initiatives to cater specifically for the resolution of ESG disputes – for example, the CEDR Business and Human Rights initiative for mediation of such disputes, and the Hague Rules on Business and Human Rights Arbitration – it appears from the Survey results that one of the most important factors for choice of dispute resolution mechanisms in order to resolve ESG disputes is confidentiality. This bucks against the trend towards transparency which is found in business and human rights specific initiatives. This may reflect the importance of reputational concerns of business in relation to ESG matters. It may also reflect the practical reality that ESG clauses are likely to be included as boilerplate clauses in commercial contracts which are principally concerned with the subject matter of that contract, and thus the choice of dispute resolution clause for the relevant commercial contract is likely to be driven by whatever is standard for that subject matter or its peculiarities, rather than what is more preferred in the case of an ESG dispute. All of this points to the likelihood that arbitration will be increasingly used to resolved ESG disputes, especially contractual disputes.

B. TRENDS IN ESG CLAUSES

By Julianne Hughes-Jennett and Nayomi Goonesekere, Quinn Emmanuel LLP

I. Introduction

As explained in the Introduction, ESG as a concept has taken on an increasingly significant role within the wider business community. One way in which companies can embrace sustainable business practices is through incorporating ESG factors into commercial contracts. As such, there has been a proliferation of ESG specific requirements in commercial contracts over the last ten years, including by reference to increasing legislation and regulation in this area and voluntary standards. These clauses are incorporated into many different types of contracts such as supply contracts, transactional documents, public sector contracts, employment agreements, shipping agreements, and insurance agreements.

This is especially true in the context of supply chains, mergers and acquisitions ("**M&A**") and the loan market, where there is a growing momentum to avoid supporting, purchasing or being otherwise involved with harmful business practices, including through inculcating ESG practices throughout a companies' value chain. Accordingly, this chapter analyses ESG clauses as they arise in three types of contracts, namely: (i) supply contracts; (ii) share sale and purchase agreements ("**SPAs**"); and (iii) loan agreements, and is supplemented by other types of contracts, where they provide for relevant examples.

Regardless of the industry, sector or type of contract, ESG clauses provide for socially conscious standards of behaviour, and relate to, *inter alia*:

(i) environmental laws or regulations, such as the use of specific products or packaging and shipment requirements;

(ii) human or social rights or labour rights, including laws or regulations that prohibit the engagement of child labour or impose obligations to provide a healthy and safe work environment or to take steps to ensure that the companies are not supporting harmful practices through their supply chain, such as the Modern Slavery Act 2015 in the UK

(iii) obligations to withhold from engaging in or working with companies linked to bribery and other corrupt practices, including laws or regulations such as Foreign Corrupt Practices Act 1977 in the US and Bribery Act 2010 in the UK; and

(iv) compliance with voluntary standards for ESG issues such as the United Nations ("**UN**") Guiding Principles on Business and Human Rights, Equator Principles and the International Finance Corporation ("**IFC**") Performance Standards.

By introducing these commitments into contracts, companies seek not only to avoid harmful business practices, but also to improve stakeholder relationships, achieve wider reputational benefits and ensure regulatory compliance.

In particular, recent regulatory initiatives, such as the proposed European Union ("**EU**") Corporate Sustainability Due Diligence Directive, which was approved by the European Parliament on 1 June 2023, the French Corporate Duty of Vigilance Law of 2017, Norway's Transparency Act of 2022, the Dutch Child Labour Due Diligence Law 2022 and the German Act on Corporate Due Diligence in Supply Chains 2023, require companies to report on their ESG performance and practice and in turn will influence the ESG commitments they undertake and require of other companies.

In order to better understand the prevalence (or not) of ESG contractual clauses, their impact on business and human rights and the types of disputes which may arise under them, this chapter analyses: (i) types of ESG clauses; (ii) claims relating to such clauses before domestic courts; (iii) international arbitration and multilateral development institutional mechanisms; and (iv) current best practice.

II. Types of ESG clauses and how they arise in commercial contracts

ESG contractual clauses come in different shapes and sizes so it has hard to do more than describe the general nature of such clauses. Typically, they seek to achieve reporting and transparency obligations in respect of ESG matters, the setting of targets such as plans for a net zero transition or the maintenance of a minimum ESG sustainability rating for the life of a contract. These clauses usually take the form of due diligence requirements or compliance obligations, monitoring and reporting requirements, and warranties and indemnities. They may also specify the consequences that flow from the breach of ESG obligations such as the entry into an agreed remediation process, termination, or the payment of damages as a result of breach. Each of these types of clauses are examined in turn below, with illustrations from popularly used model clauses and other examples in usage.

i. ESG warranties

An ESG warranty is an ESG-related assurance or promise in a contract that can give rise to a claim for damages when breached. They usually arise in transactional documents such as SPAs in M&A.

In many instances traditional warranties in SPAs overlap with ESG warranties as they relate to similar issues such as legal and tax compliance, anti-bribery, anti-money laundering, data privacy, and environmental and safety matters. If a company is sensitive to a particular ESG issue, then more focused warranties can be crafted to target specific requirements. Such clauses may capture ESG issues relevant to the buyer, including its jurisdiction and industry, risks revealed during due diligence and other matters that come to light between the signing and closing of a deal. Specific ESG warranties can also take the form of a confirmation that adequate ESG policies have been adopted by the target, that the target complies with specific ESG voluntary standards or that there have been no adverse ESG incidents during a specific period of time. For instance, businesses that are exposed to a higher risk of impact to safety or the environment may warrant to maintain a management system that is certified to voluntary international standards such as ISO 140001.[11]

11 ISO 14001:2015 specifies the requirements for an environmental management system that an organization can use to enhance its environmental performance. ISO 14001:2015 is intended for use by an organization seeking to manage its environmental responsibilities in a systematic manner that contributes to the environmental pillar of sustainability.

Similarly focused ESG warranties are found in supply contracts. A business seeking an express environmental and climate change warranty from a supplier may consider a clause to the following effect: *"The Supplier warrants that it has implemented an environmental management system for managing its environmental risks certified to ISO 14001 or an equivalent standard from a UKAS accredited body and shall comply and maintain certification requirements throughout the term."*

ii. ESG due diligence clauses

ESG due diligence is usually undertaken as a part of an investment process. Due diligence activities may include surveys linked to ESG criteria, health and safety checks, climate change exposure assessments, and other assessments tailored to risk based on the Equator Principles or UN Guiding Principles on Business and Human Rights.

In connection with capital market transactions, ESG due diligence questionnaires, form an essential part of the overall due diligence review of a company, and help better understand liabilities and risks, especially for the prospective purchaser. The Chancery Lane Project has devised a question on sustainability Capital Markets ESG Due Diligence Questionnaire that seeks to verify the suitability of the target's sustainability policy in the following manner:

> 1.2 Does the Company have an environmental or sustainability policy which sets out commitments and targets to improve the Company's sustainability standards. The policy should include:
>
> 1.2.1 its environmental footprint;
>
> 1.2.2 examples of where the Company has mapped its impact against the UN Sustainable Development Goals; and/or
>
> 1.2.3 examples of where the Company has applied any other external sustainability standards.
>
> 1.3 If yes to any of the questions in 1.2, please provide relevant details, including a copy of such environmental or sustainability policy.[12]

In order to ensure sound environmental practices and social responsibility in project finance, certain financial institutions that engage in large scale infrastructure and industrial projects adopt the Equator Principles which came into effect on 1 October 2020 ("**Equator Principles**") in loan agreements. The Equator Principles provide for the financial institutions to *"fulfill* [the] *responsibility to respect Human Rights in line with the* [UN Guiding Principles on Business and Human Rights] *by carrying out human rights due diligence."* This broad undertaking is aimed at ensuring business enterprises respect and remedy human rights abuses they cause or contribute to with reference to all internationally recognized human rights expressed in the International Bill of Human Rights and the International Labour Organization Declaration on Fundamental Principles and Rights at Work.[13]

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12 The Chancery Lane Project, Climate clause – Capital Markets ESG Due Diligence Questionnaire, 18 June 2022, available at: https://chancerylaneproject.org/climate-clauses/capital-markets-esg-due-diligence-questionnaire/ (last visited on 11 July 2023).

13 Equator Principles, EP4, July 2020, p 3 available at: https://equator-principles.com/app/uploads/The-Equator-Principles_EP4_July2020.pdf (last visited on 20 July 2023); United Nations ("UN") Working Group on Business and Human Rights, United Nations Guiding Principles on Business and Human Rights ("**UN Guiding Principles on Business and Human Rights**") - An Introduction, available at https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf (last visited on 20 July 2023).

Multilateral development banks such as organisations constituting the World Bank Group mandate sustainability assessments as part of their support packages. IFC clients whose projects go through the IFC credit review process are required to adhere to the IFC Performance Standards, "*that provide guidance on how to identify risks and impacts, and are designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way, including stakeholder engagement and disclosure obligations of the client in relation to project-level activities*".[14] Similarly clients of the Multilateral Investment Guarantee Agency ("**MIGA**") must adhere with MIGA environmental and social due diligence requirements, performance standards and World Bank Group Environmental, Health and Safety Guidelines. ESG due diligence clauses therefore arise in related lending agreements. For instance, the MIGA template contract of guarantee for non-shareholder loans contains a clause requiring the guarantee holder to *"deliver to MIGA the documents"* on an on-going basis in relation to its due diligence checks.[15]

With the proliferation of laws requiring due diligence, the ABA Working Group noted a move towards due diligence requirements in a contract:

> The same two reasons—operational effectiveness and enforced legal requirements— that compel the addition of buyer responsibilities within MCCs 2.0 also require the move from representations and warranties to human rights due diligence. For many MNEs there is not much of a risk calculus on this score; simply put, human rights due diligence is currently required by French law and Dutch law and will likely be required very soon by EU law.[16]

In line with these reasons the American Bar Association Model Contract Clauses 2.0 ("**ABA MCCs 2.0**") provides a model clause that imposes mutual obligations on buyers and sellers with respect to combatting abusive practices in supply chains through human rights due diligence as follows:

> Buyer and Supplier each covenants to establish and maintain a human rights due diligence process appropriate to its size and circumstances to identify, prevent, mitigate and account for how each of Buyer and Supplier addresses the impacts of its activities on the human rights of individuals directly or indirectly affected by their supply chains, consistent with the 2011 United Nations Guiding Principles on Business and Human Rights. Such human rights due diligence shall be consistent with guidance from the Organisation for Economic Co-operation and Development for the applicable party's sector (or, if no such sector-specific guidance exists, shall be consistent with the 2018 OECD Due Diligence Guidance for Responsible Business Conduct).[17]

Further obligations are imposed on all agents, sub-contractors and consultants associated with the business enterprise to *"disclose information on all matters relevant to the human rights due diligence process in a timely and accurate fashion."*[18]

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14 International Finance Corporation ("**IFC**"), IFC Performance Standards on Environmental and Social Sustainability, 1 January 2012, available at: https://www.ifc.org/en/types/insights-reports/2012/publications-handbook-pps (last visited on 11 July 2023). See also description on the IFC's website: https://www.ifc.org/en/insights-reports/2012/ifc-performance-standards (last visited 15 August 2023).

15 Multilateral Investment Guarantee Agency ("**MIGA**"), Understanding MIGA's Environmental and Social Due Diligence Process, available at: https://www.miga.org/sites/default/files/2018-06/Understanding_MIGA_ES_Due_Diligence_Process.pdf (last visited on 11 July 2023); MIGA template contract of guarantee for non-shareholder loans, available at: https://www.miga.org/sites/default/files/2019-05/MIGA%20NHFO-SOE%20Template%20%5B2016%20FORMS%20-%20OCTOBER%202016%5D.pdf (last visited on 11 July 2023).

16 https://www.americanbar.org/content/dam/aba/administrative/human_rights/contractual-clauses-project/mccs-full-report.pdf, p. 10.

17 American Bar Association Model Contract Clauses 2.0 ("**ABA MCCs 2.0**"), Clause 1.1(a).

18 ABA MCCs 2.0, Clause 1.1(b).

iii. ESG performance metrics, monitoring and reporting

ESG-related performance metrics, monitoring and reporting clauses are adopted by corporations that seek to incorporate ESG compliance throughout their value chains. They may include:

- Reporting and transparency in relation to environmental matters or social matters that a corporation has agreed or is required to monitor/audit.
- Reducing greenhouse gas ("**GHG**") emissions and setting targets and a plan for transition to net zero.
- Maintaining a minimum ESG sustainability rating for the life of the contract.
- The right of one company to audit the compliance of another company with a specific ESG regulation, standard, target or warranty, and take action in line with the results.

The Chancery Lane Project model clause below on "net zero standard for suppliers" provides an example that can be used by corporations to extend ESG requirements to suppliers:

> The Supplier acknowledges and understands the Customer's Net Zero Target. Accordingly, the Supplier agrees to measure, manage and report the Total Emissions in accordance with the provisions of this clause ... and to develop and implement a plan of continual improvement with the objective of reducing the Total Emissions as rapidly as possible to contribute to efforts to limit global temperature increase to 1.5 degrees Celsius above pre-industrial levels.[19]

For project finance and project-related corporate loan agreements, financiers that adopt the Equator Principles can require clients to covenant in financial documents to provide compliance reports where the frequency of the reports are to be proportionate to *"the severity of the impacts or as required by law, but not less than annually"* in a format that:

> i) document compliance with the [Environmental and Social Management Plan] and Equator Principles Action Plan (where applicable), and ii) provide representation of compliance with relevant local, state and host country environmental and social laws, regulations and permits.[20]

Clients may further be obligated to report information with respect to GHG emissions and project-specific biodiversity data, as follows:

> report publicly, on an annual basis, GHG emission levels (combined Scope 1 and Scope 2 Emissions, and, if appropriate, the GHG efficiency ratio12) during the operational phase for Projects emitting over 100,000 tonnes of CO2 equivalent annually. Refer to Annex A for detailed requirements on GHG emissions reporting.
>
> [and]

19 The Chancery Lane Project, Climate clause – The Net Zero Standard for Suppliers, available at: https://chancerylaneproject.org/climate-clauses/the-net-zero-standard-for-suppliers/ (last visited on 11 July 2023).

20 Equator Principles, EP4, July 2020, p 14.

share commercially non-sensitive Project-specific biodiversity data with the Global Biodiversity Information Facility (GBIF) and relevant national and global data repositories, using formats and conditions to enable such data to be accessed and re-used in future decisions and research applications.[21]

iv. Compliance requirements

A robust ESG compliance framework through specific compliance clauses in contracts allows businesses to align business goals with ESG values. Such clauses are featured in supply chain contracts where a provision may cross-refer the application of a supplier code of conduct to the activities of the supplier. Such codes of conduct are commonplace in supply chains; and their content may vary from one organisation to another. Some codes cover key issues such as workforce and labour issues, ethical sourcing and environmental commitments at a high level, while others cover more specific concerns.[22]

The supplier code of conduct governing procurement activities of the UK Department of Health and Social Care provides a broad ESG based compliance commitment in relation to human rights and workforce matters. The supplier code requires that "*[the supplier and its] sub-contractors… ensure that slavery, including forced and compulsory (bonded) labour and human trafficking are not present in [its] business and operations.*"[23] The code further calls for the supplier to: *"abide by the principles of the United Nations' Global Compact, United Nations Universal Declaration of Human Rights, 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work."*[24]

Similarly broad ESG commitments are found in the Equator Principles where the client is required in the loan agreement to *"comply with the [Environmental and Social Management Plan] and [Equator Principles Action Plan] (where applicable) during the construction and operation of the Project in all material respects"*. An Environmental and Social Management Plan is usually prepared by the client and addresses issues raised in the assessment process (such as the environmental and social risks and scale of impacts of the proposed project) and incorporates actions required to comply with applicable standards. The Equator Principles Action Plan outlines gaps and makes further commitments for financial institutions that adopt the Equator Principles to meet the requirements of the applicable standards.[25]

Alternatively, more direct ESG commitments may appear in the body of a supply contract without reference to a separate code of conduct. The Chancery Lane Project offers a model clause which provides in the body of the contract for the supplier to ensure compliance with environmental and climate change laws and policies in its operations, as follows:

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21 Equator Principles, EP4, July 2020, p 16.

22 *See* for e.g., Nike, Inc. (n.d.), Human Rights and Labour Compliance Standards, https://about.nike.com/en/newsroom/resources/human-rights-and-labor-compliance-standards (last visited on 20 April 2023). Apple Inc., Apple Supplier Code of Conduct, available at: https://www.apple.com/supplier-responsibility/pdf/Apple-Supplier-Code-of-Conduct-and-Supplier-Responsibility-Standards.pdf (last visited on 11 July 2023); PVH Corp., Corporate Responsibility: Supply Chain Standards and Guidelines for Meeting PVH's Shared Commitment, available at: https://pvh.com/-/media/Files/pvh/responsibility/PVH-CR-Supply-Guidelines.pdf (last visited on 11 July 2023); General Motors, Supplier Code of Conduct, available at: https://www.gmsustainability.com/_pdf/policies/GM_Supplier_Code_of_Conduct.pdf (last visited on 11 July 2023).

23 Gov.uk, Guidance: DHSC Supplier Code of Conduct, 25 July 2022, available at: https://www.gov.uk/government/publications/dhsc-supplier-code-of-conduct/dhsc-supplier-code-of-conduct (last visited on 20 April 2023).

24 Gov.uk, Guidance: DHSC Supplier Code of Conduct, 25 July 2022, available at: https://www.gov.uk/government/publications/dhsc-supplier-code-of-conduct/dhsc-supplier-code-of-conduct (last visited on 20 April 2023).

25 Equator Principles, EP4, July 2020, pp 11 and 14.

> Each Party shall conduct its business with due diligence, in an efficient and environmentally responsible manner, adhering fully to the Environmental Action Plan, the Environmental Legislation, the Environmental Standards and Guidelines and the Sustainability Policy and ensuring that all its operations are carried out in accordance therewith.[26]

Certain contracts also provide for the cascading of supplier commitments to sub-contractors and sub-suppliers.

The Green Loan Principles ("**GLP**") and the Sustainability Linked Loan Principles provide standards to incorporate ESG frameworks into loans.[27] As such, compliance clauses feature in loan agreements, where ESG loans such as green loans and sustainability linked loans tend to have bespoke ESG requirements.

The Chancery Lane Project also provides a set of widely applicable draft clauses that can be used to incorporate the GLP into a standard Loan Market Association ("**LMA**") facility agreement. These clauses specify the amounts borrowed under a green facility that must be applied towards the eligible green project and suggest environmental sustainability strategies that the borrower is obliged to implement.[28]

v. Contractual remedies

Contracts include clauses that require a party to prevent or mitigate potential adverse impacts and remediate actual adverse impacts of ESG-related harm. The purpose of remediation is to *"restore, to the extent commercially practical, the affected persons to the situation they would have been in had the adverse* [ESG] *impacts not occurred."*[29] Remediation clauses can arise in varying contexts including supply chain contracts, loan facilities and joint-venture agreements.

Distinct ESG remedies are contained in the ABA MCCs 2.0 and the proposed EU Corporate Sustainability Due Diligence Directive which provide clauses that emphasise remediation as a means to address and restore adverse ESG impacts.

In the human rights context, the UN Guiding Principles on Business and Human Rights emphasise the importance of remedy as one of its three key pillars. Examples clauses and regulation echo this emphasis on redressing human rights impacts. In the context of supply chain contracts, the ABA MCCs 2.0 sets out how any identified human rights impacts linked to contractual activity should be remediated.[30] Here, remediation should be *"proportionate to the adverse impact"* and may take the form of *"apologies, restitution, rehabilitation, financial and non-financial compensation"*.[31] The ABA MCCs 2.0 also provides for the supplier to notify the buyer about potential or actual violations and establishes parties' duty to fully cooperate in the investigation thereof. In the event of breach of human rights standards, the buyer can: (i) demand appropriate assurances; (ii) obtain an injunction with respect

26 The Chancery Lane Project, Sustainability Clauses in Supply Chain Contracts, 10 May 2022, available at: https://chancerylaneproject.org/climate-clauses/sustainability-clauses-in-supply-chain-contracts/ (last visited on 20 April 2023).

27 Global principles published jointly by the Loan Market Association, the Asia Pacific Loan Market Association and the Loan Syndication and Trading Association.

28 The Chancery Lane Project, Green Loan Starter Pack, 19 October 2022, available at https://chancerylaneproject.org/climate-clauses/green-loan-starter-pack/ (last visited on 21 April 2022).

29 ABA MCCs 2.0, Clause 2.3(b).

30 ABA MCCs 2.0, Clause 2.

31 ABA MCCs 2.0, Clause 2.3(b).

to non-compliance; (iii) require the supplier to terminate an agreement or affiliation with a specific factory, terminate a subcontract or remove an employee; (iv) suspend payments pending remedial action; (v) avoid or cancel the agreement; and (vi) obtain damages.[32]

In a similar vein, where adverse human rights and environmental impacts are not prevented or adequately mitigated, under the proposed EU Corporate Sustainability Due Diligence Directive, companies can refrain from entering into new relations with the same company or can temporarily suspend commercial relationships whilst pursuing preventive and minimisation efforts or even terminate the business relationship depending on the severity of the potential adverse impact.[33]

vi. Indemnity clauses

A contract may require one party to indemnity the other for specific losses that arise from the breach of ESG contractual commitments. A general indemnity clause, as provided for in the ABA MCCs 2.0, can capture a range of losses in a supply chain context in the following manner:

> Supplier shall indemnify, defend and hold harmless Buyer and its officers [...] against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, penalties, fines, costs or expenses of whatever kind, including, without limitation, the cost of storage, return, export or destruction of Goods, the difference in cost between Buyer's purchase of Supplier's Goods and replacement Goods, reasonable attorneys' fees, audit fees that would not have been incurred but for Supplier's [...] Breach.[34]

Indemnity clauses can also arise in other corporate relationships, such as in insurance policies, that extend the scope of a policy to indemnify the insured against losses arising from climate change litigation. The Chancery Lane Project's "Insurance: Disclosure and Mitigation of Pending Climate Change Litigation" clause states, with respect to indemnification:

> ... the Insurer[s] will indemnify the Insured [and/or Additional Insureds] for any sums that the Insured may be legally liable to pay as a result of a Pending Climate Change Litigation, up to the maximum amount of GBP [X] per claim.[35]

vii. Termination clause

Termination clauses offer contracting parties the opportunity to provide for termination in the event of severe ESG adverse impacts or where there is an alternative that helps develop better improve environmental, social and governance practices. In a supply chain context, if the supplier's environmental practices are inconsistent with good environmental practice and policy, as specified in the contract, the other party will be entitled to terminate the contract.[36] Contracts can also envisage

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32 ABA MCCs 2.0, Clause 6.2.

33 European Union ("**EU**") Corporate Sustainability Due Diligence Directive Proposal, Article 7(5), 23 February 2022, available at: Register of Commission Documents - COM(2022)71 (europa.eu) (last visited on 11 July 2023).

34 American Bar Association, Balancing Buyer and Supplier Responsibilities, Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0, available at: Full Report: Balancing Buyer and Supplier Responsibilities in International Supply Chains (americanbar.org) (last visited on 11 July 2023).

35 The Chancery Lane Project, Insurance: Disclosure and Mitigation of Pending Climate Change Litigation, 29 September 2021, available at: Insurance: Disclosure and Mitigation of Pending Climate Change Litigation | The Chancery Lane Project (last visited on 11 July 2023).

36 The Chancery Lane Project, Green Termination Provision (Short Form), 24 September 2021, available at: Green Termination Provision (Short Form) | The Chancery Lane Project (last visited on 11 July 2023).

the option to switch suppliers, if the existing supplier is unable to match a "greener" offer from an alternative supplier, as follows:

> 1. Without affecting any other right or remedy available to it, the [Customer] may terminate this [document] by giving [three months'] written notice to the [Supplier]:
>
> 1.1 if the [Customer], acting in good faith and having made a reasonable comparison of the [Supplier] and other available suppliers of the same or similar [Services], has decided to switch to an alternate supplier to provide the [Services] (the New Supplier), and engaging the New Supplier will allow the [Customer] to reduce the [Customer]'s Carbon Footprint...[37]

Similar termination clauses appear in shipping agreements, where a customer may be enabled to terminate a shipping agreement without penalty if the carrier is unable to match the green credentials of a competitor, as follows:

> 1.1 Without affecting any other right or remedy available to the Customer, the Customer may serve written notice (Notice of Greener [Carrier/ Shipper]) on the [Carrier/ Shipper] that a third party supplier (the Greener [Carrier/ Shipper]):
>
> 1.1.1 has a lower Carbon Footprint than the [Carrier/ Shipper];]
>
> 1.1.2 can [perform/ procure/ deliver] [the Services] with lower emissions of GHGs than the [Carrier/ Shipper]; and
>
> 1.1.3 can deliver the Green Improvement.[38]

The EU Corporate Sustainability Due Diligence Directive however cautions that, in line with international standards, the party that decides to terminate, should consider the possibility that termination may exacerbate adverse impacts. Hence, it states: *"this Directive should ensure that disengagement is a last-resort action."*[39] This is in line with the UN Guiding Principles on Business and Human Rights, where enterprises are encouraged to use leverage before considering terminating relationships. Leverage is considered to exist where an enterprise has the ability to effect change in the wrongful practices of an entity that causes harm. Termination should be considered in situations where the enterprise lacks leverage to prevent or mitigate adverse impacts and is unable to increase its leverage by offering capacity-building or other incentives.[40]

A participant in the roundtable discussions explained that, in relation to certain ESG clauses, and especially modern slavery clauses, they had not provided for termination as a remedy for a breach. Instead, their clauses were structured so as to incentivise addressing these issues; if the issues arise, the companies in the supply chain work together to improve systems. For example, there might be a requirement to notify up the chain any modern slavery issues identified within a business, following which there is a specific procedure that might be followed that is set out in a code of conduct. A key

37 The Chancery Lane Project, Termination for Greener Supplier, available at: Termination for Greener Supplier | The Chancery Lane Project (last visited on 11 July 2023).

38 The Chancery Lane Project, Green Fuel Requirement and Termination for Greener Carrier or Shipper (Maritime), 15 August 2022, available at: Green Fuel Requirement and Termination for Greener Carrier or Shipper (Maritime) | The Chancery Lane Project (last visited on 11 July 2023).

39 EU Corporate Sustainability Due Diligence Directive Proposal, Preambular Provision 32, 23 February 2022, available at: Register of Commission Documents - COM(2022)71 (europa.eu) (last visited on 11 July 2023).

40 UN Guiding Principles on Business and Human Rights, Guiding Principle 19 and commentary, available at: https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last visited on 20 July 2023).

concern is avoiding damage to reputation from contracting with companies implicated in modern slavery scandals, hence the preference to work together to ensure there is no modern slavery.

III. ESG contractual clauses in litigation and international arbitration

The contractual provisions discussed thus far are new and innovative, and accordingly, remain largely untested before courts or tribunals. However, in light of the broad ESG obligations that they entail, it is likely that they will inevitably lead to disputes that concern complex questions of contractual interpretation, enforceability, and compliance. Disputes may also concern more traditional breach of contract claims in respect of non-performance of ESG obligations and breach of ESG representations and warranties.

Separate to contractual claims, the recent wave of ESG litigation has heralded a new era of ESG litigation challenging private entities with claims founded not only on environmental laws but also human rights, fraud and misleading conduct and other ESG obligations.[41] This rise in ESG litigation around the world, coupled with the increased focus on ESG by businesses, is likely to act as a catalyst for private parties to commence further proceedings based on the different types of ESG clauses discussed in this chapter. With the increased incorporation of ESG-related provisions in contracts by large multinationals that operate globally, it can be expected that international arbitration will be the chosen destination for the resolution of ESG-related contractual disputes.

Although ESG contractual claims are currently unusual, the two recent decisions in *MDW Holdings Limited v. Norvill* and *Solvay Specialty Polymers Italy v. Edison S.p.A*, as discussed briefly below, demonstrate what is to come in the realm of claims for breach of environmental warranties in SPAs.

MDW Holdings Limited v. Norvill,[42] concerned a waste disposal business called G. D. Environmental Services Limited ("**GDE**") which collected, processed and disposed of dry and wet waste, including certain hazardous waste (leachate). In 2015, a due diligence process was conducted before MDW Holdings Limited entered into an SPA to purchase the entire issued capital of GDE from the Norvills. During the due diligence, GDE failed to disclose its ongoing breaches of applicable environmental laws and permits, in particular with respect to trade effluent discharge consents and the related investigations conducted by the regulator. In the SPA, however, the Norvills warranted that GDE had complied with applicable environmental laws and permits, and that there were no facts or circumstances which could lead to a breach of such laws or to any claims or investigations by the environmental regulators.

In the course of the proceedings, it was found that GDE were in persistent breach of the trade effluent discharge limits detailed in their permits and that GDE had provided its regulators with false information prior to the SPA. Judge Keyser QC concluded that the environmental warranties given in the SPA as well as general legal compliance warranties had been breached and that untrue representations had been made regarding GDE's communications with the regulator.

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41 For e.g., the European cases *Lliuya v RWE* (Case No. 2 O 285/15 Essen Regional Court) and *Asmania et al v Holcim* (2022) concerning liability for historic GHG emissions; the decision of the Hague District Court in *Milieudefensie v. Royal Dutch Shell plc* (CLI:NL:RBDHA:2021:5339), obliging Shell to reduce emissions by 45% by 2030 compared to 2019 levels; the UK Supreme Court decisions, *Vedanta v Lungowe* ([2019] UKSC 20), concerning pollution caused by a copper mining operation in Zambia, and *Okpabi v Royal Dutch Shell* ([2021] UKSC 3), concerning pollution caused by oil exploration in Nigeria; the French court proceedings commenced in January 2023 by ClientEarth, Surfrider Foundation Europe and Zero Waste France against France-headquartered Danone concerning its contribution to global plastic pollution.

42 *MDW Holdings Limited v. Norvill*, [2021] EWHC 1135 (Ch); [2022] EWCA Civ 883.

In assessing the amount of damages, the measure for damages was considered to be the *"...difference between (a) the value of GDE on the basis that the warranties were true ("Warranty True") and (b) the actual value of GDE given that the warranties were false ("Warranty False")"* as at the date of the SPA. Judge Keyser QC held that the Warranty False amount should reflect the *"additional costs that would have been incurred in the lawful operation of the leachate processing operations at the site and, correspondingly, the reduced profits"* as well as *the "reputational damage... that the breaches were liable to cause to the company and jeopardy that they occasioned to the future of the business"* and eventually awarded damages of GBP 382,600. On appeal, Lord Justice Newey confirmed Judge Keyser QC's decision to assess GDE's Warranty False value as he did.

A similar issue concerning an environmental warranty in an SPA arose before an International Chamber of Commerce ("**ICC**") Tribunal presided by Dr. Wolfgang Peter in *Solvay Specialty Polymers Italy v. Edison.*[43] Solvay entered into an SPA for the purchase of shares in Agora S.p.A. ("**Agora**"), a subsidiary of Edison, from the legal predecessors of Edison. Agora owned various subsidiaries operating industrial sites at Bussi, Spinetta and Porto Marghera in Italy. In the SPA, Edison explicitly warranted that itself and its subsidiaries are in "substantial compliance" with the applicable environmental laws.

In instituting arbitral proceedings against Edison, Solvay asserted that Edison and its subsidiaries contaminated and polluted the surrounding areas of the Bussi and Spinetta sites as well as the groundwater through the discharge of hazardous material and concealed its ongoing breach of environmental warranties (dating back to the 1950s) when it entered into the SPA with Solvay. Solvey further alleged that the relevant notifications to public authorities were not made despite the availability of audits and reports that evidenced the contamination and that none of these reports were made available to Solvay before the closing date of the transaction. Edison argued that, in 1981, due to a corporate restructuring, its chemical business was transferred to a wholly owned subsidiary, and that it did not bear any responsibility from thereon since its subsidiaries acted autonomously.

The arbitral tribunal held that Edison breached the SPA's environmental warranty as it was not in substantial compliance with the applicable environmental laws. It also found that the contractual provision obligated Edison to report, accurately and exhaustively, all environmental issues at both sites, to the authorities. However, large amounts of information regarding the pollution and contamination of the soil and groundwater in and around the industrial sites were omitted from the documentation submitted to authorities and disclosed to Solvay. Moreover, the acts and omissions of its subsidiary were attributable to Edison as members of Edison's management were involved in concealing the actual situation of the sites. Accordingly, the arbitral tribunal awarded damages amounting to EUR 91,493,936.

The decisions in *MDW Holdings Limited v. Norvill* and *Solvay Specialty Polymers Italy v. Edison S.p.A* make it clear that, successful ESG claims are possible where clear breaches of environmental warranties are found or when companies fail to adhere to ESG reporting obligations.

43 *Solvay Specialty Polymers Italy v. Edison S.p.A.*, ICC Case No. 18666/FM/MHM/GFG, Partial Award, 22 June 2021.

As companies face increasing scrutiny over their ESG credentials, particularly for companies operating in industries subject to stringent environmental regulation, an increase in litigation of contractual ESG clauses is likely. However, companies may face hurdles in doing so, including when it comes to potential difficulties in determining the scope for quantification of losses for breach of ESG obligations.

Apart from these typical methods of dispute resolution, ESG claims can also arise before institutional mechanisms such as the Compliance Advisor Ombudsman of the IFC, due to the stringent ESG undertakings associated with World Bank Group funded projects, as discussed in Section II above. While not all such cases are in the public domain, the few that trickle down to domestic courts demonstrate how a loan agreement can form the basis of an ESG related contractual claim.

In *Jam et al. v. IFC*,[44] which is heralded as a landmark case, the Supreme Court of the United States issued a decision that squarely rejected the defense of absolute immunity invoked by the IFC through the United States' International Organizations Immunities Act of 1945, with respect to a damages suit for negligence, nuisance, trespass, and breach of contract filed in 2015 before the United States District Court for the District of Columbia, by a group of farmers and fishermen in India, with assistance from the NGO EarthRights. Their claim concerned a USD 450 million loan provided by IFC in the 2000s to construct a coal-fired power plant in the coastal state of Gujarat in India. As part of the lending agreement, which included the IFC's Performance Standards on Environmental and Social Sustainability, the IFC required loan recipients, including the power plant, to adhere to stringent human rights safeguards and environmental protections. The agreement allowed the IFC to revoke financial support for the plant if the plant fails to adhere to these requirements.

The plant opened in 2012 and caused severe pollution in local waterways and farmland, damaging the environment and creating hardship for local fishermen. The IFC's own internal audit through its Compliance Advisor Ombudsman found that the IFC did not adequately supervise the environmental and social action plan contained in the loan agreement for the project.

A claim of this nature is not a regular occurrence, but it is a telling development.

IV. Survey results: prevalence of ESG clauses, impact on business and human rights, and best practice

The responses to the Survey on ESG clauses corroborate the prior assessment in this chapter that corporations (regardless of sector) undertake ESG due diligence as a part of their usual investment process. ESG due diligence also forms a part of pre-deal compliance checks and the assessment of client financing and relationships with suppliers.

4.1 Due diligence

Accordingly, ESG due diligence has become an important part of investment decisions, corporate finance and business strategies in a short period of time. While the responses to the Survey indicate that the practice of conducting ESG specific due diligence is still not notably common, its influence in the business processes of many companies is becoming increasingly clear, especially with

44 *Jam et al. v. International Finance Corporation*, Supreme Court of the United States, No. 17 – 1011, 27 February 2019.

developments in domestic and international laws and regulations and the growing relevance of ESG for the supply chains of companies. In fact, 27.5% of respondents to the Survey agreed that their companies refrained from entering into a contract with a counterparty based on its ESG track record and 28.9% of respondents noted that their organisations have entered into contracts which include specific clauses requiring the implementation of ESG due diligence processes.

In addition, clauses that come in the form of due diligence questionnaires related to climate change, health and safety assessments, sanctions checks, and ESG compliance checks will become a decisive feature of corporate due diligence processes, especially for organisations that seek to mitigate ESG risks now or in the future.

4.2 Warranties

In contrast, the responses to the Survey noted a significant use of ESG warranties across organisations in different sectors. This holds true for organisations engaging in both public and private sector M&A where there has been a growing interest in ESG matters. Moreover, ESG factors such as anti-bribery and anti-money laundering, environmental and safety matters have traditionally been a part of a standard set of comprehensive warranties in SPAs. 40.6% of respondents to the Survey confirmed that they have entered into contracts requiring compliance with anti-bribery and corruption laws. Compliance with environmental laws and regulations and human rights or labour rights laws and regulations followed closely behind with 34.8% of responses each. The cascading of ESG warranties through the extension of their cover to activities of sub-contractors and sub-suppliers were used to varying degrees, with mixed responses from 30.4% of respondents who noted that their warranties do cascade in that manner and 24.6% of respondents who reported that they do not.

4.3 Compliance and performance metrics

The clauses discussed in this chapter that provide for compliance, development and implementation of ESG policies and procedures and the provision of performance metrics are still not frequently used in commercial contracts. However, they appear in the limited context of shareholder agreements that incorporate ESG and impact metrics from portfolio companies. There is also a momentum, particularly among larger corporates, to impose detailed climate change or other ESG-specific requirements on suppliers due to the expectations of external stakeholders, such as investors, who seek to identify ESG risks and issues within businesses, especially across its supply chain. Hence, compliance and performance metrics clauses are found in supply contracts. This trend is further propelled by increasing pressure to disclose and report on Scope 3 emissions. With the rising urgency to meet international carbon budgets, companies will have to document their carbon footprint throughout the entire value chain and take more responsibility for indirect emissions in the coming years.

4.4 Consequences of breach and remediation

The responses to the Survey further indicate a mixed usage of contractual clauses that provide for the consequences of breach, such as termination, indemnification and remediation. Among the organisations responding to the survey, indemnity clauses were less prevalent with 37.7% of

respondents stating that their contracts do not have such indemnities and 17.4% of respondents stating that they do. Likewise, while 33.3% of respondents stated that their organisations have entered into contracts which include clauses giving termination rights as a result of a breach of an ESG-related obligation, only 21.7% of respondents confirmed that they do.

However, standard forms of contract widely use ESG specific indemnification clauses including in the loan market where standard indemnities within LMA loan documentation are triggered when ESG obligations are breached. Further, with the increased promulgation of ESG-related regulation, it is likely that contracting parties will increasingly seek to adopt clauses that trigger termination rights for breach of regulation.

While remediation clauses for breach of ESG obligations are in use in supply chains, such clauses were less common among the respondents with only 18.8% of respondents stating that they have entered into contracts with remediation clauses and 36.2% of respondents noting that they have not. Similarly, third party intervention in raising ESG related grievances or claims was not commonly in use among the respondents.

C. ESG OBLIGATIONS IN INVESTMENT TREATIES

By Merryl Lawry-White

ESG-related clauses increasingly feature specifically in investment and trade treaties which govern relationships between States and frequently confer investment protection on non-State investors—both bilateral and multilateral.

While investment treaties as we know them today have been around since 1959, the inclusion of references to ESG standards is a much more recent phenomenon. Frequently included in a "new generation" of investment treaties, the inclusion of such standard is not "novel". Certain Model BITs from the 2000s envisaged, for example, obligations on investors that they comply with what were more commonly known as "corporate social responsibility or CSR" (or equivalent) standards. For example, the Ghana Model BIT 2008 requires that investors comply with laws and regulations of the host State, including those in relation to labour, health and the environment, and that they "shall behave in accordance with relevant guidelines and other internationally accepted standards applicable to foreign investors". However, in recent years there have been significant development and acceptance of ESG standards, as reflected in some of the newer treaties, though some of the most advanced treaties have not yet come into force as noted elsewhere in this chapter.

Annex B to this report contains examples of ESG-related clauses contained in investment treaties. Here we focus on the following four types of ESG related clauses that are more likely to apply more directly to investors: *(i)* preambular; *(ii)* jurisdictional; *(iii)* substantive obligations; and *(iv)* institutional—specifying that an institution or body must, or may, take certain ESG standards into account, or giving it power to interpret ESG standards.

I. Preambular

The Preamble to a treaty usually describes the purpose, motives and considerations underlying the conclusion of the treaty. It does not contain the operative provisions of the treaty but plays an important role in the interpretation of a treaty. The examples contained in the Annex show the increasing focus of States on investment as a means to further "sustainable" development. The existence of these provisions in the 2015 Norway Draft Model Bilateral Investment Treaty, for example, represents its:

> "Desir[e] to strengthen their economic and investment relations in accordance with the objective of sustainable development in its economic, social and environmental dimensions, and to promote investment in a manner aiming at high levels of environmental, health, safety and labour protection in accordance with relevant internationally recognized standards and agreements in these fields to which they are parties;"

In spite of the concerns of some commentators over the use of the term "sustainable development", the concept is firmly rooted in the international discourse, and forms the basis of the "17 Sustainable Development Goals" ("SDGs"), adopted by all UN Member States in 2015 as part of the 2030 Agenda for Sustainable Development. It is essentially the conceptual lens through which to understand

States' concerns with ESG in investment treaties—investment and economic growth and development are no longer the only concern; States are seeking investment that furthers the E, S and G elements of their sustainability agenda.

This concept of "sustainable development" was explained by the International Court of Justice in the 1997 Judgment in Gabčíkovo–Nagymaros Project as follows:

> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind . . . new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when states contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

In the rare cases where investment tribunals have interpreted "sustainable development", they have tended to do so with reference to the national law in question (on issues where the national law applies) or a specific definition contained in the relevant treaty. As UNESCO explains:

> "Sustainable development is the overarching paradigm of the United Nations. The concept of sustainable development was described by the 1987 Bruntland Commission Report as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs.""

Certain SDGs and ESG concerns are closely linked with States' human rights, labour, environmental and governance obligations adopted under other treaties. As the quote from the Preamble of the Norway Draft Model BIT shows, States are concerned about aligning their investment agendas with other international obligations, such as those under their business and human rights agenda, and more recently those under the Paris Agreement. This concern is also seen in the substantive obligations contained in certain of the investment treaties set out in the Annex. Additionally, the Preamble to the Norway Draft Model BIT lists other specific concerns within its agenda, including labour rights, human rights, democracy, rule of law, fundamental freedoms and transparency and accountability. By making these points clear in their Model BITs, States signal the type of "development" and "investment" they will protect under international law, and the basis on which they will contract with other States.

II. Jurisdictional clauses

It is not common for jurisdictional clauses to directly address ESG issues, but they frequently do so on an implicit basis. The most common "jurisdictional" clause that relates to ESG is that an investment must be made "in accordance with law". These clauses have acted to bar investment protection to investments made outside of the law; for example pursuant to fraud, bribery or corruption. The Morocco Model BIT expressly denies a right to investors and investments to commence dispute settlement under its terms, where the investor or investment has not complied

with anti-money laundering, bribery, corruption and anti-terrorist standards set out in Article 19 of the Model BIT. Tribunals have also applied this criteria to investments, even where an equivalent clause is absent from the treaty. For example, in Inceysa v El Salvador,[45] the Tribunal concluded that recognising rights arising from illegal acts would violate an international public policy not to sanction illegality and to respect the law. It is possible to foresee that provisions such as Article 14 of the Nigeria-Morocco BIT (not in force), which requires certain actions prior to investment (i.e, to conduct a social impact assessment and an environmental impact assessment of the potential investment in accordance with applicable national laws or agreed standards), might also be pleaded as a bar to investment protection for investors or investments that do not comply with the express language of the relevant treaty.

III. Substantive ESG-related standards

These vary, as shown in the Annex, from suggesting "voluntary" action to requiring specific action. For example, the India Model BIT puts the onus on investors to "endeavour to **voluntarily incorporate** internationally recognized standards of **corporate social responsibility** in their practices and internal policies". Many other BITs put this obligation on the States' parties to encourage investors to voluntarily incorporate CSR or internationally recognised standards into their operations, such as the Singapore-Nigeria BIT (not in force), and the Canada and Netherlands Model BITs. The latter two treaties make specific reference to the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights. On the other hand, there is nothing voluntary about the operating systems required under the Nigeria-Morocco BIT (not in force), which states that investments are to:

- "maintain an environmental management system",
- "uphold human rights in the host state",
- "act in accordance with core labour standards",
- if "in areas of resource exploitation and high-risk industrial enterprises", companies "shall maintain a current certification to ISO 14001 or an equivalent environmental management standard", and
- in a nod to States complying with their due diligence obligations through the treaty language itself, investors and investments "shall not manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties".

In addition, there is a trend in more recent treaties to include provisions that preserve the right of the States to regulate on certain issues, including ESG matters. These provisions tend to take the form of an express "right to regulate" or a "general exception", but they, in essence carve out certain State measures from triggering investment protection obligations of the State under the treaty. Such exceptions tend to contain qualifying statements, for example that the State measure be "necessary" to protect a sovereign function related to health, the environment, etc., and that the measures must

45 *Inceysa Vallisoletana S.L. v Republic El Salvador,* ICSID Case No. ARB/03/26, Award dated 2 August 2006 at para 249

not be arbitrary, or in the case of the Indian Model BIT, the measure must be taken in "good faith, on a non-discriminatory basis, and (be) of general application". The "Right to Regulate" in the Norway Draft Model BIT, on the other hand, confers broader discretion on the State; i.e. measures that the State "*considers appropriate* to ensure that investment activity is undertaken in a manner sensitive to health, safety, human rights, labour rights, resource management or environmental concerns". Whereas others treaties, such as the Morocco Model BIT there is no obligation to pay compensation for listed State measures provided such measure are taken in "good faith, on a non-discriminatory basis, and of general application". Recent tribunals have termed such clauses "safeguard clauses", preserving the prerogative of the State to take certain measures, rather than laying down obligations for investors.

Even without the provisions found in "new generation" BITs/MITs, States have also invoked the police powers doctrine as justifying environmental or public health measures in the context of expropriation claims, though with limited success. In the *Rockhopper Exploration v Italy* decision issued last year, for example, the tribunal acknowledged that the claimants' right to protection from expropriation was "not absolute", since the state could avoid the consequences of an unlawful expropriation by complying with the requirements listed in the treaty—i.e., non-discriminatory measures taken in the public interest, pursuant to due process, and subject to the payment of prompt, adequate and effective compensation. However, in this case, the State had not done so.[46] Also last year, in the context of the customary international law minimum standard of treatment, the tribunal in *Lone Pine v. Canada* emphasised that "a high measure of deference must be given to the right of the host State to make regulatory changes in light of the public interest", in this case to protect the fluvial environment of the St. Lawrence river.[47]

IV. Institutional

Various bodies are granted powers (or duties) to interpret, discuss, monitor or directly take into account in their decision making certain ESG standards or behaviours. For example, the Norway Draft Model BIT envisages a joint committee composed of representatives of the two States that have the power to discuss certain issues, including related to CSR standards, environmental protection and human rights. CETA envisages a Committee on Trade and Sustainable Development that will, amongst other things, oversee a review of the impact of CETA on sustainable development and "address in an integrated manner any matter of common interest to the Parties in relation to the interface between economic development, social development and environmental protection". Other treaties require that tribunals take into account an investor's failure to comply with certain ESG standards in awarding compensation for the States' breach of investment protection—in effect, creating a financial incentive to comply. For example, the Morocco-Nigeria BIT instructs tribunals to take into account an investor's failure to "manage or operate their investments in compliance with international obligations regarding human and labour rights, responsible business conduct, health and environmental protection, and consistent with climate change mitigation and adaptation objectives" in awarding compensation.[48] That also means that evidence of the investors' failings will

46 *Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v Italian Republic*, ICSID Case No. ARB/17/14, Award dated 23 August 2022 at para 197.

47 *Lone Pine Resources Inc. v The Government of Canada*, ICSID Case No. UNCT/15/2, pars 623-4

48 Morocco-Nigeria BIT, Art 18(4)

be relevant to the scope of the proceedings (which may also be subject to transparency obligations). The Netherlands Model BIT provides that "in deciding on the amount of compensation, is expected to take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises".[49]

V. Dispute resolution clauses

Finally, although this guide addresses specific ESG clauses, we note that the wording of the dispute resolution clause and applicable law clauses in investment treaties may provide an avenue to consider ESG standards that are not specified in the treaty. For example, in December 2016, the *Urbaser* tribunal became the first investment arbitration tribunal to consider a counterclaim on the basis of an investor's human rights obligations.[50] The tribunal examined the United Nations Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the ILO's Tripartite Declaration of Principles and the UNGPs and determined that "international law accepts corporate social responsibility as a *standard of crucial importance* for companies operating in the field of international commerce". Referring to the UNGPs, the tribunal noted that these standards include respect for human rights—a departure from the view that corporations "were immune from being" subjects of international law. While the decision has been criticised, it is an indication of the manner in which the applicable law clause might bring ESG standards into play. In *Bear Creek v Peru*, Professor Sands (dissenting on quantum) relied upon ILO Convention No 169, noting that while it "may not impose obligations directly on a private foreign investor as such *does not, however, mean that it is without significance or legal effects for them*". He referred to the *Urbaser* tribunal's finding that certain human rights "are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights". Sands found that the claimant did not take sufficient steps "to engage the trust of all potentially affected communities" (including through a lack of transparency).[51]

The increasing concern with ESG in the context of investment treaties and investment treaty claims—as regards both State and investor behaviour—reflects a broader trend in international policy and treaty making. For example, the Paris Agreement on Climate Change contains an explicit goal "to make finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development", and the increasingly ambitious nationally determined contributions, as well as public commitments made at the conferences of States Parties, will require that States regulate accordingly. This will, in turn, affect the rights and obligations afforded to domestic and foreign investors in their territories. Recent efforts to modernise the Energy Charter Treaty (ECT)—as well as the announcement by several EU States that they will withdraw from the ECT—reflect a concern that certain investment protections may undermine efforts to combat climate change. This trend is not limited to environmental challenges: it also concerns human and labour rights, and other governance concerns. The increasing focus on respecting human rights through investor supply

49 Netherlands Model BIT, Art 23.

50 *Urbaser S.A., Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award dated 8 December 2016, para 1195

51 *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Philippe Sands QC dated 12 September 2017, paras 10 and 19

chains is reflected in national legislation, such as the UK Modern Slavery Act, the EU's 2021 guidance to help EU companies to address the risk of forced labour in their operations and supply chains, the EU's Conflict Minerals Regulation and the EU's proposal for a Directive on corporate sustainability due diligence. How these proposals and commitments interact with the investment treaty regime is a key "topic to watch" over the next decade.

D. RESOLUTION OF ESG DISPUTES

By Julianne Hughes-Jennett, Quinn Emmanuel LLP

Due to the breadth of subject matter encompassed by ESG, the range of disputes that can arise is expansive: this can encompass conduct arising out of, for instance, a corporate governance dispute, to a labour matter involving the breach of a worker's human rights, to a mass tort claim arising out of an environmental disaster, and so on. In many cases, ESG disputes often implicate Governments or public entities[52]; however, we focus in this chapter particularly on ESG disputes between private parties or in business-to-business relationships, and in particular we consider clauses in dispute resolution provisions that incorporate or accommodate an ESG element.

I. ESG dispute resolution through domestic courts

ESG disputes are replete in domestic courts around the world;[53] whether arising out of statute, the civil code, or legislation, pursuant to the constitution or human rights instruments; as a matter of common law or customary law, or out of contract. In the case of the latter, ESG disputes may be brought under the ordinary dispute resolution clauses which are now included as standard clauses in most modern contracts. In many cases the contract will provide that the courts of a particular State shall have jurisdiction to govern disputes arising out of or in connection to the contract and include a choice of law clause which identifies the applicable substantive law. We do not include examples of such clauses in this report as these are commonplace and often in template form depending on the industry or nature of the parties' relationship, although parties should be conscious of the implication of choosing a State's law and courts in such clauses. This designation will have both a procedural and substantive impact on the treatment of the ESG claim because the chosen State's rules of matters such as contractual interpretation, available remedies, interim relief, jurisdiction, conflict of laws, and public policy will govern.

II. Alternative dispute resolution: mediation and arbitration

Parties may also opt to incorporate alternative means of dispute resolution in their contracts, whether as an alternative or a supplement to traditional court proceedings. Of the various forms of ADR, the two most common are mediation and arbitration.

Mediation, which refers to a process whereby an appointed neutral third party (the mediator) assists the parties in resolving the dispute, has the potential of resolving ESG disputes at an early stage. New initiatives, such as the CEDR Business and Human Rights Mediation Initiative[54], are being actively explored to expressly incorporate elements of an ESG framework in mediation. Although this framework is still only in the early consultation phase, such a framework could assist parties

52 For instance, human rights claims, which are sometimes also categorised as a form of ESG dispute, are regularly brought against States both in national fora and before international tribunals such as the Interamerican Court of Human Rights, the European Court of Human Rights, among others.

53 *See*, among others, *Urgenda Foundation v State of the Netherlands* (ECLI:NL:HR:2019:2007), 20 December 2019; *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20; *Jesner v Arab Bank, PLC*, 584 U.S. ___ (2018).

54 CEDR, Mediation for Business and Human Rights, accessed at https://www.cedr.com/foundation/currentprojects/mediation-for-business-and-human-rights/

in referring disputes to a mediation facility which is closely attuned to the requirements under the UN Guiding Principles on Business and Human Rights and engages effectively with affected stakeholders.

Arbitration is typically used as an alternative to proceedings in national courts, whereby the parties agree to instead have their dispute resolved by a sole or panel of appointed arbitrators who issue a decision binding on the parties.

States may be subject to arbitration proceedings pursuant to existing investment treaties (and in relation to which, see further **Chapter C** on ESG Clauses in Investment Treaties). However, individuals and businesses can also submit their disputes to arbitration pursuant to arbitration clauses in the parties' agreements or agreed subsequently. Strictly speaking an arbitration clause does not necessarily have to have an overt 'ESG' element to it at all, and, as long as they fall within the scope of the clause and are not carved out by law,disputes in relation to ESG matters can be referred to arbitration pursuant to standard arbitration clauses (sometimes referred to as arbitration agreements). This is the mechanism by which most ESG clauses are likely to arrive at arbitration, through general dispute resolution clauses referring to arbitration in contracts that incorporate ESG obligations. Such clauses differ across party contracts, although at a minimum, they are typically drafted to addresses the core requirements of a valid and enforcement agreement to arbitrate under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the 'New York Convention'), as well any specific local requirements to ensure the validity of such agreement.

Perhaps the most prominent example of arbitration in an ESG context were the arbitrations which arose as a result of the Rana Plaza building collapse in Bangladesh. Following the disaster, a number of global brands and trade unions entered into the 2013 Accord on Fire and Building Safety in Bangladesh (sometimes referred to as the Bangladesh Accord), which agreement referred disputes to arbitration:

> *5. Dispute resolution. Any dispute between the parties to, and arising under, the terms of this Agreement shall first be presented to and decided by the SC* [Steering Committee], *which shall decide the dispute by majority vote of the SC within a maximum of 21 days of a petition being filed by one of the parties. Upon request of either party, the decision of the SC may be appealed to a final and binding arbitration process. Any arbitration award shall be enforceable in a court of law of the domicile of the signatory against whom enforcement is sought and shall be subject to The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), where applicable. The process for binding arbitration, including, but not limited to, the allocation of costs relating to any arbitration and the process for selection of the Arbitrator, shall be governed by the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006).*[55]

Two arbitrations, brought by IndustriALL Global Union and UNI Global Union, were commenced pursuant to this arbitration clause, with the parties choosing to have the arbitration administered by the Permanent Court of Arbitration based in the Hague.[56] The parties in both cases reached a settlement and the claims were thereafter terminated.

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55 The Accord on Fire and Building Safety in Bangladesh, 13 May 2013, accessed at https://bangladesh.wpengine.com/wp-content/uploads/2018/08/2013-Accord.pdf

56 See Permanent Court of Arbitration, Bangladesh Accord Arbitrations, accessed at https://pca-cpa.org/en/cases/152/

On the back of the Bangladesh Accord arbitrations, an initiative culminated in the introduction of the Hague Rules on Business and Human Rights Arbitration (the 'Hague Rules'). The Hague Rules, modelled after the 2013 UNCITRAL Arbitration Rules which are familiar to most arbitration practitioners, have been designed to accommodate the specific context in which business and human rights disputes arise and are litigated. There are model clauses included in the Hague Rules which can be incorporated into commercial contracts, addressing different common party scenarios. One such clause is the model arbitration clause for pre-dispute submission to arbitration, i.e. which parties can incorporate in their contracts agreeing to submit their disputes to arbitration and governed in accordance with the Hague Rules:

> Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Hague Rules on Business and Human Rights Arbitration.
>
> (a) The number of arbitrators shall be . . . [one or three];
>
> (b) The place of arbitration shall be . . . [town and country];
>
> (c) The language(s) to be used in the arbitral proceedings shall be . . . [select one or more languages].
>
> (d) The [Permanent Court of Arbitration] shall provide secretariat services and serve as registry in the arbitration.[57]

Arbitration remains a popular means of dispute resolution: it is a private process and awards are not typically made public (with the general exception of investment treaty cases); however, this inherent confidentiality integrated in the arbitral process also makes it difficult to ascertain how it is being used in the resolution of ESG disputes.

III. Complaint and grievance mechanisms

Another recurring feature in some dispute resolution clauses that cover ESG (and particularly business and human rights) issues is the requirement to submit disputes to an established grievance mechanism, developed in the specific context of the parties' relationship and/or the wider industry. These have developed particularly since the introduction of the notion of 'operational-level grievance mechanisms' in the context of the right to an effective remedy in the UN Guiding Principles on Business and Human Rights. Such mechanisms are particularly common in the supply chain context (although not exclusive to it): some examples include the Adidas Third Party Complaints Procedure[58] and the London Organising Committee of the Olympic Games and Paralympic Games (LOCOG) Complaints and Dispute Resolution Mechanism.[59]

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57 https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf

58 Adidas Group, 'Third Party Complaint Process for Breaches to the adidas Group Workplace Standards or Violations of International Human Rights Norms', accessed at https://www.adidas-group.com/media/filer_public/3a/a8/3aa87bcf-9af9-477b-a2a5-100530e46b19/adidas_group_complaint_process_october_2014.pdf

59 *See* Stuart Bell, Phil Cumming and Steve Gibbons, 'Complaint and dispute resolution process to deal with breaches of the Sustainable Sourcing Code', December 2012, accessed at https://webarchive.nationalarchives.gov.uk/ukgwa/20130403014434/http://learninglegacy.independent.gov.uk/publications/complaint-and-dispute-resolution-process-to-deal-with-br.php

IV. Integration of dispute resolution clauses

Dispute resolution provisions can range from relatively simple clauses to more extensive provisions. In many cases, dispute resolution provisions may be structured in a 'tiered' or 'escalating' manner, whereby the parties are required to use more than one form of dispute resolution. For example, a clause may be drafted such that it is effectively a condition for a prospective claimant to first submit a dispute to a specific grievance mechanism, failing which the dispute is subject to formal mediation. If mediation fails, the dispute may thereafter be submitted to either arbitration or to litigation in the specified State's courts.

V. Environmental aspects of dispute resolution

Finally, ESG clauses may be included in dispute resolution provisions which do not address the mode of dispute resolution, but rather the way it is conducted. In particular, there are growing efforts to address the environmental aspects of dispute resolution. For example, the Chancery Lane Project provides examples of four different kinds of litigation and arbitration clauses: in relation to (i) green litigation and arbitration protocols[60]; (ii) low carbon arbitration hearings[61]; and (iii) choice of green governing law clause[62]; and a clause in relation to avoiding excessive paperwork in dispute resolution.[63] This is consistent with wider initiatives elsewhere, such as the Campaign for Greener Arbitrations' "Green Pledge", whereby arbitration practitioners voluntarily commit to taking various steps to minimise the environmental impact of their practice.[64] While not strictly speaking contractual clauses, the Campaign for Greener Arbitration has also produced a number of different supplementary documents, such as a "Green Protocol for Arbitral Proceedings"[65] and "Model Green Procedural Order"[66], which can be incorporated in arbitration proceedings.

With the growing recognisance of ESG across a wide range of sectors, parties should consider carefully how disputes under contracts will be resolved and seek advice on the different forms of dispute resolution, particularly given the recent and on-going developments in this space.

As the users of arbitration and the other actors involved in arbitration (counsel, institutions, etc.) are from corporations increasingly making their own ESG commitments, we can expect a greater focus on ESG in the manner in which arbitrations are run.

60 Chancery Lane Project, 'Green Litigation and Arbitration Protocols', last updated 24 September 2021, accessed at https://chancerylaneproject.org/climate-clauses/green-litigation-and-arbitration-protocols/

61 Chancery Lane Project, 'Low Carbon Arbitration Hearings', last updated 27 September 2021, accessed at https://chancerylaneproject.org/climate-clauses/low-carbon-arbitration-hearings/

62 Chancery Lane Project, 'Choice of Green Governing Law Clause', last updated 24 September 2021, accessed at https://chancerylaneproject.org/climate-clauses/choice-of-green-governing-law-clause/

63 Chancery Lane Project, 'Avoiding Excessive Paperwork in Dispute Resolution', last updated 29 September 2021, accessed at https://chancerylaneproject.org/climate-clauses/avoidance-of-excessive-paperwork-in-dispute-resolution/

64 Campaign For Greener Arbitrations, 'The Green Pledge', accessed at https://www.greenerarbitrations.com/greenpledge

65 Campaign for Greener Arbitrations, 'Green Protocol for Arbitral Proceedings', accessed at https://www.greenerarbitrations.com/green-protocols/arbitral-proceedings

66 Campaign for Greener Arbitrations, 'Model Green Procedural Order', accessed at https://www.greenerarbitrations.com/green-protocols/arbitral-proceedings

VI. Survey results: Expectation and experience of dispute resolution mechanisms for ESG disputes

Given that the field of ESG obligations is still emerging, it is perhaps surprising that those responding to the IBA Survey had a reasonable amount of experience of resolving ESG related disputes. 42% of respondents that responded to questions on dispute resolution said that they had experience of resolving contractual ESG disputes through contractual mechanisms. While 37% of respondents had experience of external grievance mechanisms, such as NCPs and development bank grievance mechanisms.

Of particular interest was the ranking in importance of the factors which would lead the respondents to the Survey to choose a mechanism for dispute resolution. Respondents were asked to rank 13 factors in order of importance for the ideal dispute resolution mechanism to resolve: (i) business-to-business disputes, arising out of an ESG-related contractual provision; and (ii) third-party claims against the respondents' organisation for ESG-related issues.

Confidentiality was the most important factor for both types of disputes. Interestingly, however, showing an opposite trend, transparency ranked second for business-to-business disputes. These results were tacitly supported during the roundtables, in which some respondents agreed that although litigation would be the usual mechanism adopted for contractual disputes, they would not want ESG disputes to be resolved by litigation. Ability to select decision-makers ranked third and second, respectively.

Intersection with national courts ranked second to last, and last, respectively, for each type of dispute. Congruent with this ranking, for business-to-business disputes, enforceability was the least important factor in any dispute resolution mechanism, which is perhaps a reflection of the nature of the obligations at play and would suggest that (especially when combined with a wish for confidentiality) non-binding forms of dispute resolution would be most commonly used. "Ability to protect vulnerable individuals/populations", ranked third and second last for both types of disputes.

Costs of the process ranked lowly, suggesting reputational costs are given more weight than financial costs by the respondents.

Respondents were asked if they would change their rankings if non-ESG disputes were at issue. 74% said that they would not change their answers, while 26% said that they would. Those who indicated that they would change explained that that the issue and risk, particularly citing reputational risk, are similar with regard to ESG and non-ESG issues, both ESG and non-ESG matters contribute to value creation within the organisation and that the respondent organisation applies the same treatment and processes for contractual disputes or third-party claims regardless of the dispute's subject matter. Those that responded that they would change their answer stated that in non-ESG disputes the interface with other affected parties and the courts is not as important.

With respect to whether the respondent organisations had an Operational Grievance Mechanism or systems set up by organisations at their operational sites to handle complaints from workers, community members and other stakeholders, 58% of respondents said they had a standing grievance mechanism to deal with complaints from stakeholders, whether employees, community members or others. One respondent described creation of a whistleblowing policy, handled by the respondent

organisation's compliance officer, to encourage employees and staff to report misconduct, another mentioned a whistleblower hotline and another described its complaints pathway which is triggered by reporting by phone or email to a manager or director, followed by a timely and transparent investigation/decision process escalated to a senior member of the relevant organisation, usually a board member. The most relevant factor to the respondent organisations in considering a standing grievance mechanism for third parties was reputational impact (87.5% of respondents), closely followed by whether the standing grievance mechanism is imposed by law or the counterparty (81.25% respondents).

Reflecting a pattern throughout the survey responses, the comments highlighted the importance of reputational impact and the legal status of ESG obligations as two key factors in considering how ESG disputes should be resolved. Respondents noted they expected ESG obligations to be increasingly "enforceable" in the short-term.

Traditionally, arbitration may not have been seen as the dispute resolution mechanism of choice for ESG disputes. For this reason, when establishing arbitration rules for business and human rights disputes, the drafters of the Hague Rules were careful to anticipate that a key objection for the use of arbitration to resolve these types of disputes was the fact that the process is traditionally confidential. Thus, the Hague Rules provide for transparency and public access to the arbitration proceedings bucking the traditional assumption that arbitration proceedings are confidential. However, the Survey results suggest that confidentiality is the most important factor for corporates when deciding whether to adopt rules. This, together with cost not ranking highly as a factor, and the importance attached to 'ability to select decision makers', tends to emphasise that business regards ESG disputes as having a high degree of reputational risk. It also tends to suggest that arbitration, as opposed to public court litigation, may well be a dispute resolution of choice for ESG disputes in the future. This would also not be surprising in the context of disputes arising out of ESG clauses because such clauses may well feature in business-to-business contracts which, given that they will cover a commercial subject matter and range of other contractual obligations, would in any event include arbitration as their agreed dispute resolution mechanism provision. Respondents at the roundtables emphasised that dispute resolution clauses in contracts are rarely crafted with the ESG obligations specifically in mind—they are general to the contract. Finally, while there may well be a public interest in greater public scrutiny of ESG disputes, the fact that business can resolve any such disputes confidentially may make them more inclined to assume ESG obligations in the first place. The 2013 Accord on Fire and Building Safety in Bangladesh remains a prime example of this.

As there is an increasing focus on ESG as a specific outcome of certain businesses (such as impact investors) and inherent to the way in way many businesses operate—a trend reflected and supported by increasing legislation and regulation—ESG contractual obligations and disputes become increasingly likely. The Survey responses and roundtables demonstrate that respondents are increasingly seeing and focusing on such disputes, and ways to prevent such disputes. ESG disputes will come in all different shapes and sizes, and different dispute resolution mechanisms will be more suited to certain disputes than others, but, for the reasons explained, arbitration will increasingly be implicated as the number of disputes escalates. In this context, and as some initiatives have already started to do, we will need to consider if and how to best tailor arbitration to ESG disputes.

ANNEX A – Survey questions

I. Introduction

Quantitative and qualitative data was collected from (i) a survey sent to in-house counsel and compliance personnel in a wide variety of companies;[67] (ii) a series of roundtables in different regions of the world with in-house counsel, compliance personnel and experts from think tanks, NGOs, law firms, academia and international organisations.

The survey was completed by 70 respondents; however, they did not all respond to each question.[68] The statistics (in percentages) analysed in this guide refers to the percentage of respondents that answered each question. While the survey was structured as multiple choice or yes/no; agree/disagree answers, respondents also entered comments, which has helped interpret the statistical responses.

It is a relevant to note that ESG is broadly defined and as a consequence, answers may have focused on one specific aspect of ESG, rather than all aspects. Nevertheless, the comments and responses suggested that ESG contractual clauses were more commonly related to legal and regulatory requirements (such as anti-bribery and corruption) or requirements and standards imposed by investors, rather than a broader culture of using contracts to ensure respect for ESG.

Overview of the respondents

Respondents covered a broad range of types of companies, industries and regions of the world:

Size: 37% of respondents worked in companies with more than 1000 employees; 31% in companies with less 100 employees or less. 24% of respondent companies had a turnover of more than 1bn USD; 26% had a turnover of 10m USD or less. The majority of respondents had less than 100 companies in their supply chains.

Industries: The largest number of respondents classified their company's industry as financial services, oil & gas, renewables or electricity. However, "other" accounted for 44% of responses, suggested a far greater range of industries implicated in the survey.[69]

Geography: almost all of the respondents were headquartered in the UK, Western Europe or the US & Canada. However, even if headquartered in these jurisdictions, the geographical scope of their business was much broader: 41% operate in Latin America; 37% in MENA; 36% in Asia and 34% in China and/or Sub-Saharan Africa.

67 The survey was open for responses between 5 May and 30 July 2021 and the roundtables were conducted during the second half of 2021 and the first half of 2022.

68 The pattern of responses suggests that some respondents did not complete the survey due to (i) time restrictions; (ii) relevance/sufficient knowledge or practice in the business to respondents.

69 Other sectors identified by respondents included Water; Forestry; Agriculture; Financial Services; Food and Beverage; Heavy Manufacturing; Garment/clothing; IT, Electronics & Telecommunications; Transportation; Pharmaceuticals & Chemicals; Retail & Consumer Goods; and Legal industries.

The importance placed by the respondents on ESG

In response to a series of threshold questions to understand the importance placed on ESG by the respondent organisations (and therefore the relevance of ESG contractual provisions to the respondents—for the purposes of understanding the survey results and to understand the importance of this issue in general):

- 88% agreed with the statement: "My organisation values ESG"
- 79% agreed with the statement: "My organisation considers that its environmental and social impact is important and takes steps to prevent or mitigate adverse impacts"
- 40% agreed with the statement: "Your company has refrained from entering into a contract with a counterparty because of its ESG record".
- Most respondents' organisations had a committee, task-force or other ESG in-house function.[70]
- Crucially, 54% of respondents said their companies undertakes some form of ESG due diligence, i.e., have set up internal processes to ensure that ESG is respected. Contractual provisions could form a part of this.[71]

In a theme that runs through the survey data, the comments in response to this question show that due diligence is often tied to legal or regulatory responsibilities; requirements imposed by investors (or, for investors, as part of the investment screening process); or due diligence of public reporting to ensure it is accurate (and therefore to mitigate a potentially key legal and reputational risk).

Though it is possible that there is an element of self-selection in terms of those respondents choosing to answer the survey questions, the available data does suggest a sufficient commitment to ESG, including refraining from entering contracts based on ESG concerns, that ESG clauses could be of assistance/importance to respondents' businesses.

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70 15 respondents reported that the responsibility for ESG Policy and Practice lay with a Board-level investment committee or task-force; and 15 respondents had a sustainability or ESG in-house function. Others reported that external or in-house counsel had ESG responsibilities (12 respondents), and six respondents reported a more bespoke option (such as a senior executive with ESG responsibilities that reported to the CEO). The extra information offered by respondents about the taskforces covered:
- Their responsibilities, including ESG policies, data analytics, ESG regulatory changes, ESG research, safe running of investee companies, ESG due-diligence at pre-investment stage, monitoring ESG performance on ownership, driving improvements in ESG performance and data collection, implementing decarbonisation plans, internal audits, disclosure, and covering regulatory/legal ESG-related reporting.
- The themes covered, including modern slavery, climate change, health and safety, racial equity, reputation risk, customer and communications, energy, water, human rights, worker retention, forced labour, bribery, sanctions, tax strategy, transparency, permitting, community management.

71 The ESG due diligence undertaken took various forms including, sustainability maturity assessments, soil tests, surveys linked to ESG criteria, compensation reports, health and safety checks, climate change exposure assessments, audited finances and GHG reports, assessments tailored to risk based on the Equator Principles/IFC Performance Standards and UN Guiding Principles on Business and Human Rights, self-assessment based on key areas of environment, social, business ethics and health and safety, measures aimed at directly reducing carbon footprint, measures aimed at ensuring diverse Board and Committee representation, convening panels on ESG issues including climate change, compliance checks regarding Politically Exposed Persons (PEP) and sanctions checks, corporate checks, online references to modern slavery, bribery, corruption, and environmental issues.

II. Survey questions

PART 1: Initial screening questions

1.1 Could you provide a rough estimate of:

Number of employees of your company?

- ☐ *0-100*
- ☐ *101 to 500*
- ☐ *500-1000*
- ☐ *1001 or more*

Annual sales/income/revenue of your company?

- ☐ *0-10 million USD*
- ☐ *10 million to 1 billion USD*
- ☐ *Over 1 billion USD*

Number of suppliers in your supply chain?

- ☐ *Less than 100*
- ☐ *100-1000*
- ☐ *1000-2000*
- ☐ *Over 2000*

1.2 In which sectors does your organisation operate?

- ☐ *Oil and Gas*
- ☐ *Electricity*
- ☐ *Water*
- ☐ *Renewable Energy*
- ☐ *Forestry*
- ☐ *Agriculture*
- ☐ *Financial Services*
- ☐ *Food and Beverage*
- ☐ *Heavy Manufacturing*
- ☐ *Garment/clothing industry*
- ☐ *IT, Electronics & Telecommunications*
- ☐ *Transportation*
- ☐ *Pharmaceuticals & Chemicals*
- ☐ *Retail & Consumer Goods*
- ☐ *Other (please describe)*

1.3 In which region is your organisation headquartered? For example, where the CEO is based or the Board regularly meets, or where company-wide decisions are made. (Please select more than one if relevant)

- ☐ *UK*
- ☐ *Western Europe (excluding UK)*
- ☐ *Eastern Europe (including Russia)*
- ☐ *China*
- ☐ *India*
- ☐ *Asia (excluding India and China)*
- ☐ *Australia, New Zealand and Pacific*
- ☐ *Middle East & North Africa*
- ☐ *Sub-Saharan Africa*
- ☐ *Latin America (including Mexico)*
- ☐ *US & Canada*
- ☐ *Other (please specify)*

1.4 In which region(s) does your organisation operate (please select more than one if relevant)?

- ☐ *UK*
- ☐ *Western Europe (excluding UK)*
- ☐ *Eastern Europe (including Russia)*
- ☐ *China*
- ☐ *India*
- ☐ *Asia (excluding India and China)*
- ☐ *Australia, New Zealand and Pacific*
- ☐ *Middle East & North Africa*
- ☐ *Sub-Saharan Africa*
- ☐ *Latin America (including Mexico)*
- ☐ *US & Canada*
- ☐ *Other (please specify)*

1.5 Would you be willing to participate in a round table discussion to discuss your experience and comment on the survey results and themes emerging from the research? (Please choose one: yes or no)

☐ *Yes* ☐ *No*

(Continue in either case; If "yes", please indicate your contact details here:)

PART 2: ESG screening questions

Examples of ESG factors:[72]

Environmental	Social	Governance
Climate change: greenhouse gas emissions and adaptation to climate change impacts	Human rights	Executive pay
Energy efficiency	Working conditions, including slavery and child labour	Bribery and corruption
Resource depletion, including water	Local and indigenous communities	Money laundering
Hazardous waste	Community Conflict	Sanctions
Air and water pollution	Health and safety	Political lobbying and donations
Deforestation	Employee relations and diversity	Board independence, diversity and structure
Biodiversity and conservation	Sustainable livelihoods	Tax strategy
		Transparency
		Shareholder rights

2.1 Which Corporate Department has Primary Responsibility for ESG Policy and Practice? [Where is the main locus of responsibility for ESG? (Please choose one)]

- ☐ *Board level Investment committee or task-force*
- ☐ *In-house legal counsel*
- ☐ *External legal counsel*
- ☐ *Sustainability or ESG In-house Function*
- ☐ *External ESG advisors*
- ☐ *Other, please specify*

2.2 Does your organisation have any dedicated ESG teams/taskforces?

☐ *Yes* ☐ *No*

2.3 Does your organisation undertake ESG due diligence?

☐ *Yes* ☐ *No*

2.4 Do you have any responsibility for your organisation's ESG decisions?

☐ *Yes* ☐ *No*

72 Source: UNRPI: What is responsible investment?

2.5 To what extent would you agree with the following statements? (Agree / Disagree / Do not know)

- ☐ *My organisation values ESG*
- ☐ *My organisation considers that its environmental and social impact is important and takes steps to prevent or mitigate adverse impacts*
- ☐ *Your company has refrained from entering into a contract with a counterparty because of its ESG record.*

PART 3: ESG Contract Questions

3.1 Has your organisation entered into contracts which include warranties for any of the following matters? (Tick those which are applicable)

- ☐ *Compliance with environmental laws or regulations,*
- ☐ *Compliance with human rights or labour rights laws, regulations and standards*
- ☐ *Compliance with anti-bribery and corruption laws or regulations*
- ☐ *Compliance with security protocols and best practice*
- ☐ *Compliance with reporting regimes (such as gender pay gap or modern slavery reporting)*
- ☐ *Maintenance of financial risk policies and procedures*
- ☐ *Compliance with voluntary standards for ESG issues (e.g. the UN Guiding Principles on Business and Human Rights, Equator Principles)*
- ☐ *Accuracy of ESG-related due diligence questionnaires.*

3.2 If you have identified any relevant warranties under clause 3.1, are these warranties typically extended to cover the activities of sub-contractors/supply chains?

☐ *Yes* ☐ *No*

3.3 Do you/your organisation require a counter-party to secure similar warranties from its suppliers/sub-contractors?

☐ *Yes* ☐ *No*

3.4 Has your organisation entered into contracts which require the counter-party to comply with any of the following matters? (Tick those which are applicable)

- ☐ *Environmental laws or regulations*
- ☐ *Human and labour rights laws, regulations and standards*
- ☐ *Anti-bribery and corruption laws or regulations*
- ☐ *Reporting regimes (such as gender pay gap or modern slavery reporting)*
- ☐ *Compliance with voluntary standards for ESG issues (e.g. the UN Guiding Principles on Business and Human Rights, Equator Principles)*
- ☐ *Accuracy of ESG-related disclosures, and provision of underlying data, made in accordance with transparency regulations*

3.5 Has your organisation entered into contracts which include clauses requiring a party to comply with, develop and implement ESG-related policies and procedures (for example a general ESG sustainability policy, a Human Rights policy or policies related to anti-bribery or modern slavery)?

☐ *Yes* ☐ *No*

3.6 Has your organisation entered into contracts which include clauses requiring a party to remediate potential or adverse impacts of ESG-related harm?

☐ *Yes* ☐ *No*

3.7 Has your organisation entered into contracts which include clauses requiring a party to implement due diligence procedures?

☐ *Yes* ☐ *No*

3.8 Has your organisation entered into contracts which include clauses requiring a party to maintain records so as to permit an audit of supply chains?

☐ *Yes* ☐ *No*

3.9 Has your organisation entered into contracts which include clauses requiring the provision of ESG performance metrics?

☐ *Yes* ☐ *No*

3.10 Has your organisation entered into contracts which include clauses requiring a party to indemnify the other in relation to ESG-related obligations?

☐ *Yes* ☐ *No*

3.11 Has your organisation entered into contracts which include clauses giving termination rights as a result of a breach of any ESG-related obligations?

☐ *Yes* ☐ *No*

3.12 Does your organisation identify existing or potential disputes through due diligence? For example, identifying complaints through operational level complaint mechanisms.

☐ *Yes* ☐ *No*

3.13 Has your organisation entered into contracts which permit third parties to raise a grievance or bring claims against it in relation to any ESG-related obligations, or which envisage a division of liability should third parties bring a claim?

☐ *Yes* ☐ *No*

3.14 If you have answered yes in relation to any of the above questions, please upload any examples of the above clauses; or, if this is not possible, please describe these clauses.

PART 4: Dispute Resolution Provisions

4.1 Have you had any experience to date resolving contractual ESG disputes through contractual mechanisms, such as arbitration or mediation?

☐ *Yes* ☐ *No*

4.2 If the answer to 4.1 is no, why do you think this is?

4.3 Have you had any experience of engagement with external grievance mechanisms; such as National Contact Points, development bank mechanisms and judicial mechanisms?

☐ *Yes* ☐ *No*

4.4 If the answer to 4.1 or 4.3 is yes, would you and/or a colleague be willing to participate in a further call to discuss your experience, including mechanisms used, how they were designed, challenges faced and solutions found?

☐ *Yes* [If yes, please provide name and contact details.]

☐ *No*

4.5 Please list, in order of preference, five of the features of a dispute resolution process which (if any) you consider to be desirable to resolve business-to-business disputes arising out of an ESG-related contractual provision:

☐ *Confidentiality*

☐ *Transparency*

☐ *Ability to select decision-makers*

☐ *Expertise of decision-makers in ESG related matters*

☐ *Finality of decision (i.e. exclusion of rights of appeal)*

☐ *Option to refer the dispute to mediation*

☐ *Ability to expedite proceedings*

☐ *Lower costs*

☐ *Prior-mediation, consultation/negotiation or settlement of the dispute*

☐ *Potential to accommodate multiple interests and parties or potential for collective redress*

☐ *Ability to protect vulnerable individuals/populations*

☐ *Interface with national courts*

☐ *Enforceability*

☐ *Other (please specify)*

4.6 Please list, in order of preference, those features of a dispute resolution process which (if any) you consider to be desirable in the event that third parties were to bring a claim against your organisation for ESG-related issues:

- ☐ *Confidentiality*
- ☐ *Ability to select decision- makers*
- ☐ *Expertise of decision-makers in ESG related matters*
- ☐ *Finality of decision (i.e. exclusion of rights of appeal)*
- ☐ *Option to refer the dispute to mediation*
- ☐ *Ability to expedite proceedings*
- ☐ *Lower costs*
- ☐ *Prior-mediation, consultation/negotiation or settlement of the dispute*
- ☐ *Potential to accommodate multiple interests and parties or potential for collective redress*
- ☐ *Ability to protect vulnerable individuals/populations*
- ☐ *Interface with national courts*
- ☐ *Other (please specify)*

4.7 Would you give a different answer to Questions 4.5 and 4.6 if they were asked in relation to a dispute resolution process for non-ESG disputes?

- ☐ *Yes, I would give a different answer.*
- ☐ *No, I would not give a different answer.*
- ☐ *Please explain your answer:*

4.8 Do you have a standing OGM; i.e. Operational Grievance Mechanism or systems set up by organisations at their operational sites to handle complaints from workers, community members and other stakeholders?

☐ *Yes* ☐ *No*

If yes, and you be willing to share this us, please upload here or describe such a mechanism or provide contact details of someone who can discuss.

4.9 Please select any factors that may be relevant to you/your organisation in considering whether to implement a standing grievance mechanism for third parties? For example, an OGM or a standing offer to arbitrate disputes through a streamlined procedure.

☐ *Value of claim(s)*

☐ *Reputational impact (risk or reward)*

☐ *Demonstrating compliance of your organisation with ESG obligations or fulfilling existing commitments (please specify)*

☐ *Necessary to a project or investment being realised for commercial reasons*

☐ *Imposed by law or the counterparty.*

☐ *Industry expectations*

☐ *Other (please specify)*

ANNEX B – Annex to Investment Treaty Chapter

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
Ghana Model BIT Adopted 2008	"Recognizing that the encouragement and reciprocal protection of investment under this agreement will be conducive to the stimulation of individual business initiative and will **contribute to increasing long term sustainable economic growth and development** in both States,"	**Article 7** **Expropriation** 1. Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party, except for a public purpose and in a non discriminatory manner. […] 6. Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect **legitimate public welfare objectives, such as national security, public health, safety, and the environment, do not constitute indirect expropriations**. **Article 12** **Responsibilities of Nationals and Companies of a Contracting Party in the Territory of the other Contracting Party** 1. **Nationals and companies** of one Contracting Party in the territory of the other Contracting Party **shall be bound by the laws and regulations in force in the host State, including its laws and regulations on labour, health and the environment.** 2. Nationals and companies of one Contracting Party in the territory of the other Contracting Party shall to the extent possible, **encourage human capital formation, local capacity building through close cooperation with the local community**, create employment opportunities and facilitate training opportunities for employees, and the transfer of technology. 3. Nationals and companies of one Contracting Party in the territory of the other Contracting Party shall **behave in accordance with relevant guidelines and other internationally accepted standards applicable to foreign investors**.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
Canada-Benin BIT Signed 09/01/2013 In force 12/05/2014	N/A.	**Article 15** **Health, Safety and Environmental Measures** The Parties recognize that it is **inappropriate to encourage investment by relaxing domestic health, safety or environmental measures**. Accordingly, a Contracting Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, those measures to encourage the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Contracting Party considers that the other Contracting Party has offered such an encouragement, it may request consultations with the other Contracting Party and the two Contracting Parties shall consult with a view to avoiding the encouragement. **Article 16** **Corporate Social Responsibility** Each Contracting Party should encourage enterprises operating within its territory or subject to its jurisdiction to **voluntarily incorporate internationally recognized standards of corporate social responsibility** in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Contracting Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. **Article 20** **General Exceptions** 1. For the purpose of this Agreement: (a) a Contracting Party may adopt or enforce a measure necessary: **(i) to protect human, animal or plant life or health**, (ii) to ensure compliance with domestic law that is not inconsistent with this Agreement, or **(iii) for the conservation of living or non-living exhaustible natural resources**; (b) provided that the measure referred to in subparagraph (a) is not: (i) applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or (ii) a disguised restriction on international trade or investment. […]	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		Annex I **Expropriation** The Contracting Parties confirm their shared understanding that: (a) indirect expropriation results from a measure or a series of measures of a Contracting Party that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure; (b) the determination of whether a measure or a series of measures of a Contracting Party constitutes an indirect expropriation requires a case by case, fact based inquiry that considers, among other factors: (i) the economic impact of the measure or the series of measures, although the sole fact that a measure or a series of measures of a Contracting Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred, (ii) the extent to which the measure or the series of measures interferes with distinct, reasonable investment-backed expectations, and (iii) the character of the measure or the series of measures; (c) except in rare circumstances, such as when a measure or a series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, a non-discriminatory measure of a Contracting Party that is designed and **applied to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation.**	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
Austria-Nigeria BIT **Signed 08/04/2013** **Not in force**	"REFERING to the international obligations and commitments concerning respect for **human rights**"; "COMMITTED to achieving these objectives in a manner consistent with the protection of health, safety, and the **environment, and the promotion of internationally recognised labour standards**"; "EMPHASISING the necessity for all governments and civil actors alike to adhere to UN anti corruption efforts, most notably the UN Convention against Corruption (2003)"; "ACKNOWLEDGING that investment agreements and multilateral agreements on the **protection of environment, human rights or labour rights** are meant to foster global sustainable development and that any possible inconsistencies there should be resolved without relaxation of standards of protection";	Article 4 **Investment and Environment** The Contracting Parties recognise that it is **inappropriate to encourage an investment by weakening domestic environmental laws**. **Article 5** **Investment and Labour** (1) The Contracting Parties recognise that it is inappropriate to encourage an investment by **weakening domestic labour laws**. (2) For the purposes of this Article "labour laws" means each Contracting Party's statutes or regulations, that are directly related to the following internationally recognised labour rights: (a) the right of association; (b) the right to organise and to bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labour; (d) labour protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour; (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. (f) elimination of discrimination in employment and occupation. **Article 6** **Transparency** (1) Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures, as well as international agreements which may affect the operation of the Agreement. (2) Each Contracting Party shall promptly respond to specific questions and provide, upon request, information to the other Contracting Party on any measures and matters referred to in paragraph (1). (3) No Contracting Party shall be required to furnish or allow access to information concerning particular investors or investments the disclosure of which would impede law enforcement or would be contrary to its laws and regulations protecting confidentiality.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		Article 7 **Expropriation and Compensation** […] (4) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.	
Georgia-Switzerland BIT **Signed 03/06/2014** **In force 17/04/2015**	"Recognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity and **sustainable development** of both States," "Convinced that these objectives can be achieved without relaxing **health, safety, labour and environmental standards of general application**," "Affirming the mutual supportiveness **of investment, environment and labour policies in this respect**," Reaffirming their **commitment to democracy, the rule of law, human rights** and fundamental freedoms in accordance with their obligations under international law, "Determined to encourage investors to **respect internationally recognized corporate social responsibility standards and principles**," "Confirming their commitment to prevent and **combat corruption in international investment**,"	Article 3 Promotion, Admission […] (3) The Contracting Parties recognize that it is inappropriate to weaken or reduce the levels of protection provided by its laws, regulations and standards for health, safety, **labour and environment** for the sole purpose of encouraging investments. Therefore, a contracting party or otherwise does not derogate from or offer to waive or otherwise derogate from such laws, regulations and standards in order to encourage investment of an investor of the other contracting party. **Article 5** **Free Transfer** […] (2) In order to remove any ambiguity, it is confirmed that a Contracting Party may delay or prevent a transfer through the equitable and non-discriminatory and in good faith measures related to tax any obligation to the protection of the rights of creditors or compliance with judicial or administrative decisions. […] Article 9 Right to Regulate (1) Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining or enforcing any measure that is consistent with this Agreement in the public interest, such as measures **relating to health, safety, environmental or labour or reasonable prudential measures.** […]	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
Canada-Senegal BIT Signed 27/11/2014 In force 05/08/2016	N/A.	**Article 15** **Health, Safety and Environmental Measures** The Parties recognize that it is inappropriate to encourage investment by relaxing **domestic health, safety or environmental measures**. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, those measures to encourage the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding the encouragement. **Article 16** **Corporate Social Responsibility** Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily **incorporate internationally recognized standards of corporate social responsibility** in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. Such enterprises are encouraged to make investments whose impacts contribute to the resolution of social problems and preserve the environment. **Article 18** **General Exceptions** 1. For the purpose of this Agreement: (a) a Party may adopt or enforce a measure necessary: (i) to protect **human, animal or plant life** or health, (ii) to ensure compliance with domestic law that is not inconsistent with this Agreement, or (iii) for the conservation of living or non-living exhaustible natural resources; (b) provided that the measure referred to in subparagraph (a) is not: (i) applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or (ii) a disguised restriction on international trade or investment. […]	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		Annex B.10 **Expropriation** The Parties confirm their shared understanding that: (a) indirect expropriation results from a measure or a series of measures of a Party that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure; (b) the determination of whether a measure or a series of measures of a Party constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the measure or the series of measures, although the sole fact that a measure or a series of measures of a Party have an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred, (ii) the extent to which the measure or the series of measures interferes with distinct, reasonable investment-backed expectations, and (iii) the character of the measure or the series of measures; (c) except in rare circumstances, such as when a measure or a series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, a non-discriminatory measure of a Party that is **designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation.**	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
Norway Draft Model BIT **Adopted 13/05/2015**	"*Desiring* to strengthen their economic and investment relations **in accordance with the objective of sustainable development in its economic, social and environmental dimensions**, and to promote investment in a manner aiming at **high levels of environmental, health, safety and labour protection** in accordance with relevant internationally recognized standards and agreements in these fields to which they are parties"; "*Desiring* to contribute to a stable framework for investment in order to maximize effective and sustainable utilization of economic resources and **improve living standards**"; "*Emphasising* the importance of **corporate social responsibility**"; "*Recognising* that the development of economic and business ties can promote **respect for internationally Recognised labour rights**"; "*Reaffirming* their **commitment to democracy, the rule of law, human rights and fundamental freedoms** in accordance with their obligations under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Rights"; "*Determined* to **prevent and combat corruption, including bribery**, in international trade and investment"; "*Recognising* the **basic principles of transparency, accountability and legitimacy** for all participants in foreign investment processes";	**Article 6** **Expropriation** […] 8. […] However, paragraphs 1 to 6 of this Article do not in any circumstances apply to a measure or a series of measures, other than nationalizing or expropriating, by a Party that are **designed and applied to safeguard public interests, such as measures to meet health, human rights, resource management, safety or environmental concerns**. […] **Article 11** **Not Lowering Standards** 1. The Parties recognize that it is **inappropriate to encourage investment** by **relaxing domestic health, human rights, safety or environmental measures or labour standards**. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention of an investment of an investor. 2. If a Party considers that the other Party has offered such an encouragement, it may request consultations under Article [Joint Committee]. **Article 12** **Right to Regulate** Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate **to ensure that investment activity is undertaken in a manner sensitive to health, safety, human rights, labour rights, resource management or environmental concerns**. **Article 24** **General Exceptions** Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international [trade or] investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary: i. to protect public morals or to maintain public order;	**Article 23** **The Joint Committee** 1. The Parties hereby establish a Joint Committee composed of representatives of the Parties. 2. The Joint Committee shall meet whenever necessary. Each Party may request at any time, through a notice in writing to the other Party, that a meeting of the Joint Committee be held. The request shall provide sufficient information to understand the basis for the request, including, where relevant, identification of issues in dispute. Such a meeting shall take place within 60 days of receipt of the request, unless the Parties agree otherwise. 3. The Joint Committee shall: i. supervise the implementation of this Agreement; ii. in accordance with Article [Disputes between the Parties], endeavour to resolve disputes that may arise regarding the interpretation or application of this Agreement; iii. review the possibility of further removal of barriers to investment; iv. where relevant, suggest to the Parties ways to enhance and promote investment action; v. review investments covered by this Agreement; vi. review case-law of investment arbitration tribunals relevant to the implementation of this Agreement; vii. oversee the further elaboration of this Agreement;

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		ii. to **protect human, animal or plant life or health**; iii. to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; iv. for the protection of national treasures of artistic, historic or archaeological value; or v. for the **protection of the environment.** **Article 31** **Corporate Social Responsibility** The Parties agree to **encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights and to participate in the United Nations Global Compact**.	viii. where relevant, **discuss issues related to corporate social responsibility, the preservation of the environment, public health and safety, the goal of sustainable development, anticorruption, employment and human rights;** and ix. consider any other matter that may affect the operation of this Agreement.
India Model BIT **Adopted 28/12/2015**	"Recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of **sustainable development**";	**CHAPTER II** **OBLIGATIONS OF PARTIES** **Article 3** **Treatment of Investments** 3.1 No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law through: (i) Denial of justice in any judicial or administrative proceedings; or (ii) fundamental breach of due process; or (iii) **targeted discrimination** on manifestly unjustified grounds, such as **gender, race or religious belief**; or (iv) manifestly abusive treatment, such as coercion, duress and harassment." **CHAPTER III** **INVESTOR OBLIGATIONS** **Article 12** **Corporate Social Responsibility** Investors and their enterprises operating within its territory of each Party shall endeavour to **voluntarily incorporate** internationally recognized standards of **corporate social responsibility** in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as **labour, the environment, human rights, community relations and anti-corruption**.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		Article 26 **Award** […] 26.3 A tribunal can only award monetary compensation for a breach of the obligations under Chapter II of the Treaty. Monetary damages shall not be greater than the loss suffered by the investor or, as applicable, the locally established enterprise, reduced by any prior damages or compensation already provided by a Party. For the calculation of monetary damages, the Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure, or other mitigating factors. **CHAPTER VI:** **EXCEPTIONS** **Article 32** **General Exceptions** 32.1 Nothing in this Treaty shall be construed to prevent the adoption or enforcement by a Party of measures of general applicability applied on a non-discriminatory basis that are necessary to: (i) protect **public morals** or maintaining public order; (ii) **protect human, animal or plant life** or health; (iii) ensure compliance with law and regulations that are not inconsistent with the provisions of this Agreement; (iv) **protect and conserve the environment**, including all living and non-living natural resources; (v) protect national treasures or monuments of artistic, cultural, historic or archaeological value."	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
Nigeria-Singapore BIT Signed 04/11/2016 Not in force	N/A.	Article 10 **Health, Safety and Environmental Measures** The Parties recognise that it is **inappropriate to encourage investment by relaxing domestic health, safety or environmental measures**. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from those measures to encourage the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultation with the other Party and the Parties shall consult with a view to avoiding the encouragement. **Article 11** **Corporate Social Responsibility** 1. Singapore reaffirms the importance of encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of **corporate social responsibility** that have been endorsed or are supported by Singapore. 2. Nigeria is to encourage enterprises operating within its territory or subject to its jurisdiction to **voluntarily incorporate internationally recognised standards of corporate social responsibility** in their practices and internal policies such as statements of principles that have been endorsed or are supported by Nigeria. These principles address issues such as labour, the environment, public health, human rights, community relations and anti-corruption. **Article 28** **General Exceptions** Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party or its investors where like conditions prevail, or a disguised restriction on investments of investors of the other Party in the territory of a Party, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures: (a) necessary to protect public morals or to maintain public order; (b) necessary to **protect human, animal or plant life** or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on a contract; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or (iii) safety; (d) imposed for the protection of national treasures of artistic, historic or archaeological value; or (e) relating to the **conservation of exhaustible natural resources** if such measures are made effective in conjunction with restrictions on domestic production or consumption.	
Canada-Peru BIT Signed 14/11/2006 In force 20/07/2007	N/A.	**Article 10** **General Exceptions** 1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary: (a) to **protect human, animal or plant life or health**; (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or (c) for the conservation of living or non-living exhaustible natural resources. […] **Article 11** **Health, Safety and Environmental Measures** The Parties recognize **that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures**. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		Annex B.13(1) Expropriation The Parties confirm their shared understanding that: (a) Indirect expropriation results from a measure or series of measures of a Party that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure; (b) The determination of whether a measure or series of measures of a Party constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; (ii) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the measure or series of measures; (c) Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and **applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation**.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
Netherlands Model BIT **Adopted 22/03/2019**	"Reaffirming their **commitment to sustainable development** and to enhancing the contribution of international trade and investment to sustainable development"; "Recognizing the **importance of equality between men and women** when formulating, implementing and reviewing measures within the field of international trade and investment";	**Article 2** **Scope and Application** […] 2. The provisions of this Agreement shall not affect the right of the Contracting Parties to regulate within their territories necessary to achieve legitimate policy objectives such as the **protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection** or for prudential financial reasons. The mere fact that a Contracting Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectation of profits, is not a breach of an obligation under this Agreement. **Article 5** **Rule of law** […] 3. As part of their duty to protect against **business-related human rights abuse**, the Contracting Parties must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. These mechanisms should be fair, impartial, independent, transparent and based on the rule of law. **Article 6** **Sustainable Development** 1. The Contracting Parties are committed to promote the development of international investment in such a way as to contribute to the objective of sustainable development. 2. Each Contracting Party shall ensure that its investment laws and policies provide for and **encourage high levels of environmental and labor protection** and shall strive to continue to improve those laws and policies and their underlying levels of protection. 3. The Contracting Parties emphasize the **important contribution by women** to economic growth through their participation in economic activity, including in international investment. They acknowledge the importance of incorporating a gender perspective into the promotion of inclusive economic growth. This includes removing barriers to women's participation in the economy and the key role that gender-responsive policies play in achieving sustainable development. The Contracting Parties commit to promote equal opportunities and participation for women and men in the economy. Where beneficial, the Contracting Parties shall carry out cooperation activities to improve the participation of women in the economy, including in international investment.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		4. The Contracting Parties recognize that it is inappropriate to lower the levels of protection afforded by **domestic environmental or labor laws in order to encourage investment**. 6. Within the scope and application of this Agreement, the Contracting Parties reaffirm their obligations under the multilateral agreements in the field of **environmental protection, labor standards and the protection of human rights to which they are party, such as the Paris Agreement, the fundamental ILO Conventions and the Universal Declaration of Human Rights. Furthermore, each Contracting Party shall continue to make sustained efforts towards ratifying the fundamental ILO Conventions that it has not yet ratified**. **Article 7** **Corporate Social Responsibility** 1. Investors and their investments shall comply with domestic laws and regulations of the host state, including **laws and regulations on human rights, environmental protection and labor laws**. 2. The Contracting Parties reaffirm the importance of each Contracting Party to encourage investors operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally **recognized standards, guidelines and principles of corporate social responsibility** that have been endorsed or are supported by that Party, such as the **OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, and the Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and business**. 3. The Contracting Parties reaffirm the importance of investors conducting a due diligence process to identify, prevent, **mitigate and account for the environmental and social risks and impacts of its investment**. 4. Investors shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state. 5. The Contracting Parties express their **commitment to the international framework on Business and Human Rights, such as the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, and commit to strengthen this framework**	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		Article 23 **Behavior of the Investor** Without prejudice to national administrative or criminal law procedures, a Tribunal [constituted in accordance with Articles 19 "Submission of a claim" and 20 "Constitution and functioning of the Tribunal"], in deciding on the amount of compensation, is expected to take into account non-compliance by the investor with its commitments under the **UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises**.	
Morocco-Nigeria BIT **Signed 03/12/2016** **Not in force**	"**UNDERSTANDING** that sustainable development requires the fulfillment of the **economic, social and environmental** pillars that are embedded within the concept";	**Article 13** **Investment and Environment** 1) The Parties recognize that their respective environmental laws policies and multilateral environmental agreements to which they are both party, **play an important role in protecting the environment.** 2) The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. 3) The Parties recognize that each Parry undertakes to respect and observe the social responsibility owed to the other Party. 4) Nothing in this Agreement shall be constructed to prevent a Party from adopting maintaining, or enforcing, in a non-discriminatory manner, any measure otherwise consistent with this Agreement that **it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental and social concerns**. **Article 14** **Impact Assessment** 1) Investors or the investment shall comply with **environmental assessment screening and assessment processes** applicable to their proposed investments prior to their establishment, as required by the laws of the host state for such an investment or the laws of the home state for such an investment, whichever is more rigorous in relation to the investment in question. 2) Investors or the investment shall conduct a **social impact assessment** of the potential investment. The Parties shall adopt standards for this purpose at the meeting of the Joint Committee.	**Article 4** **Institutional Governance** 1) For the purpose of this agreement, the Parties hereby establish a Joint Committee [with responsibilities pursuant to Articles 14 and 19] for the administration of this Agreement (hereinafter referred to as "Joint Committee"). 2) The Joint Committee shall be composed of representatives as designated by both Parties. […] 4) The joint Committee shall have the following responsibilities: a) Monitor the implementation and execution of this Agreement; b) Debate and share opportunities for the expansion of mutual Investment; c) Request and welcome the participation of the private sector and civil society, when applicable, on specific issues related to the work of the Joint Committee; and d) Seek to resolve any issues or disputes concerning Parties' investment in an amicable manner.

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		3) Investors, their investment and host state authorities shall apply the precautionary principle to their **environmental impact assessment** and to decisions taken in relation to a proposed investment, including any necessary mitigation or alternative approaches of the precautionary principle by investors and investments shall be described in the environmental impact assessment they undertake. **Article 15** **Investment, Labour and Human Rights Protection** 1) The Parties reaffirm their respective obligations as members of the International Labour Organization (ILO) and their commitments under **the ILO Declaration on Fundamental Principles and Rights at Work** and its Follow-up. 2) The parties recognize that it is **inappropriate to encourage investment by weakening or reducing the protection accorded in domestic labour laws**. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labour laws where the waiver or derogation would be inconsistent with the labour rights conferred by domestic laws and international labour instruments in which both are parties are signatories, or fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction. 3) The Parties recognize that it is inappropriate to encourage investment by relaxing domestic labour, public health or safety. They shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in their territories, of an investment. 5) Each Party shall ensure that its laws and regulations provide **for high levels of labour and human rights protection** appropriate to its economic and social situation, and shall arrive to continue to improve these law and regulations. 6) All parties shall ensure that their laws, policies and actions are **consistent with the international human rights agreements** to which they are a Party. **Article 18** **Post-Establishment Obligations** 1) Investments shall, in keeping with good practice requirements relating to the size and nature of the investment, maintain an environmental management system. Companies in areas of resource exploitation and high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		2) Investors and investments shall **uphold human rights** in the host state. 3) Investors and investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998. 4) Investors and investments shall not manage or operate the investments in a manner that circumvents **international environmental, labour and human rights obligations** to which the host state and/or home state are Parties. **Article 19** **Corporate Governance and Practices** 1) In accordance with the size and nature of an investment, a) Investments shall meet or exceed national and internationally accepted standards of **corporate governance** for the sector involved, in particular for transparency and accounting practices. b) Investments shall establish and maintain, where appropriate, local community liaison processes, in accordance with internationally accepted standards when available. c) Where relevant internationally accepted standards of the type described in this Article are not available or have been developed without the participation of developing countries, the Joint Committees may establish such standards. **Article 24** **Corporate Social Responsibility** 1) In addition to the obligation to comply with all applicable laws and regulations of the Host State and the obligations in this Agreement, and in accordance with the size, capacities and nature of an investments, and taking into account the development plans and priorities of the Host State and the Sustainable Development Goals of the United Nations, investors and their investments should **strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through high levels of socially responsible practices.** 2) Investors should apply the ILO Tripartite Declaration on Multinational Investments and Social Policy as well as specific or sectorial standards of responsible practice where these exist. 3) Where standards of corporate social responsibility increase, investors should strive to apply and achieve the higher level standards.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
Morocco Model BIT **Adopted 01/06/2019**	"Desiring to strengthen their economic and investment relations, in accordance with the objective of **sustainable development in its economic, social and environmental dimensions** and without compromising the right of the Parties to adopt general measures relating, inter alia, to the protection of public health, the environment, safety and workers' rights, in accordance with the standards provided for in the international agreements to which both Parties have acceded"; "Recognizing the essential role of **investment in promoting sustainable development**, economic growth, technology transfer, poverty reduction, job creation, and human development"; "Emphasizing the importance of **responsible business conduct,** the promotion of transparency principles and the fight against corruption";	**SECTION II** **OBLIGATIONS OF THE PARTIES** **Article 6** **General Treatment and Protection of Investments** 6.1 Investments made by investors of one Party in the territory of the other Party in accordance with its laws and regulations shall, in accordance with the provisions of this Article, be accorded fair and equitable treatment by the latter Party and full protection and security that should not be less than that accorded to its own investors and their investments or to investors of a third State and their investments. It is understood that : a) A party violates the obligation to provide fair and equitable treatment under paragraph 1 when a measure or series of measures, constituting : (i) a denial of justice in criminal, civil or administrative proceedings; or ii) a fundamental violation of the rights of the defence; or iii) **targeted discrimination on patently unjustified grounds, such as gender, race or religious belief; or** iv) grossly abusive treatment, such as harassment, coercion and pressure. (Note: For greater certainty, the fact that an investor or investment does not achieve its desired results does not constitute a denial of justice.) (b) the full protection and security set out in paragraph 1 refers only to the Party's obligations with respect to the physical security of investors and their investments in its territory and not to any other obligations. 6.2 For greater certainty, a change in the law of a Party does not in itself constitute a violation of section 6.1. 6.3 Nothing in this Article shall be construed to prevent a Party from taking any measure **considered necessary to protect public order, public health or the environment,** provided that such measures are not applied in a discriminatory, abusive or unjustified manner. **Article 17** **Maintaining Public Health, Labor, Environmental and Safety Standards** 17.1 The Parties recognize that it is **not appropriate to relax domestic public health, labor, environmental or safety measures** to encourage investment. Accordingly, no Party should waive or otherwise derogate from, or offer flexibilities to waive or otherwise derogate from, such measures to encourage the establishment, acquisition, expansion or retention in its territory of an investment by an investor.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		17.2 The Parties shall cooperate on matters relating to **the protection of public health and the environment** and shall hold expert consultations on these matters. **SECTION III** **OBLIGATIONS AND RESPONSIBILITIES OF INVESTORS AND INVESTMENTS** **Article 19** **Fight Against Corruption, Money Laundering and Terrorist Financing** 19.1 Prior to or after the establishment of an investment in the territory of the Host Party, investors and their investments shall not offer, promise or give any undue pecuniary or other advantage, directly or through intermediaries, to a public official of the Host Party or to a member of his family, any of its associates or any other person closely related to it, for its benefit or for the benefit of a third party, to act or refrain from acting in the performance of its official duties, with a view to obtaining any preference with respect to a proposed investment or to licenses, permits, contracts or any other rights related to an investment. 19.2 Within the framework of their activities, investors and their investments admitted to the territory of the Host Party **shall apply the principles recognized by the international community with regard to the fight against money laundering and the financing of terrorism.** 19.3 A violation of paragraphs 19.1 and 19.2 of this Article by an investor or investment shall constitute a violation of the domestic law of the Host Party relating to the establishment and operation of an investment. 19.4 **Where an investor or its investment has violated this Article, neither the investor nor the investment shall have the right to initiate a dispute settlement process under any provision of this Agreement**. The Host Party may raise this issue as an objection to jurisdiction in any dispute arising under this Agreement or in any proceeding under Section VI relating to dispute settlement between an investor and the Host Party. **Article 20** **Social and Environmental Responsibility** 20.1 Investors and their investments will **strive to contribute to the sustainable development** of the Host Party and the local community through responsible practices. 20.2 Investors of a Party in the territory of the other Party shall endeavor to **contribute to human capital formation, job creation and technology transfer**.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		20.3 Investors of a Party in the territory of the other Party shall endeavor to apply the International Labor Organization's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises, as well as specific or sectoral standards of responsible conduct promoted by the Parties. 20.4 Investors will be expected to **manage or operate their investments in compliance with international obligations regarding human and labor rights, responsible business conduct, health and environmental protection, and consistent with climate change mitigation and adaptation objectives**. 20.5 A [Arbitral] tribunal established under Section VI ["Dispute resolution between an investor and the host party" Articles 32-43] of this Agreement shall, in determining the amount of compensation, take into account the failure of the Investor to comply with its commitments referred to in paragraph 20.4 of this section. **SECTION IV** **EXCEPTIONS** **Article 21** **General Exceptions** Nothing in this Agreement shall be construed to require a Party to pay compensation as a result of taking action in good faith, on a non-discriminatory basis and of general application to: a) face a situation whose effects result from a force majeure or an unforeseen external event; b) protect public morals or public order; **c) to protect human or animal life and to preserve plants;** **d) ensure the provision of essential social services, such as health, education or water supply;** **e) protect and conserve the environment, including exhaustible natural resources, both biological and non-biological**; e) protect monuments of national artistic, cultural, historical or archaeological value; and f) ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		SECTION VI **DISPUTE RESOLUTION BETWEEN AN INVESTOR AND THE HOST PARTY** **Article 32** **Prerequisites for Submitting a Dispute to Arbitration** 32.1 An investor may not submit a dispute to arbitration under this Section if it is found that his or her investment was made through bribery, money laundering or misrepresentation. […]	
Canada Model BIT Adopted 05/2021	"Reaffirming the importance of encouraging investment promotion activities and to make these activities more accessible to underrepresented groups, including by **encouraging investments by women, Indigenous peoples, and micro, small, or medium-sized enterprises,** Reaffirming the **importance of promoting responsible business conduct, cultural identity and diversity, environmental protection and conservation, gender equality, the rights of Indigenous peoples, labour rights, inclusive trade, sustainable development and traditional knowledge**, as well as the importance of preserving the Party's right to regulate in the public interest";	**Article 3** **Right to Regulate** The Parties reaffirm the right of each Party to regulate within its territory to achieve legitimate policy objectives, such as **with respect to the protection of the environment and addressing climate change; social or consumer protection; or the promotion and protection of health, safety, rights of Indigenous peoples, gender equality, and cultural diversity**. **Article 4** **Non-Derogation** The Parties recognize that it is not appropriate to encourage investment by relaxing domestic **measures relating to health, safety, the environment, other regulatory objectives, or the rights of Indigenous peoples**. Accordingly, no Party shall relax, waive or otherwise derogate from, or offer to relax, waive or otherwise derogate from, such measures in order to encourage the establishment, acquisition, expansion or management of the investment of an investor in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding the encouragement. **Article 16** **Responsible Business Conduct** 1. The Parties reaffirm that investors and their investments shall comply with domestic laws and regulations of the host State, including laws and regulations on **human rights, the rights of Indigenous peoples, gender equality, environmental protection and labour**.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		2. Each Party reaffirms the **importance of internationally recognized standards, guidelines and principles of responsible business conduct** that have been endorsed or are supported by that Party, including the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights, and shall encourage investors and enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate these standards, guidelines and principles into their business practices and internal policies. These standards, guidelines and principles address areas such as labour, environment, gender equality, human rights, community relations and anti-corruption. 3. Each Party should encourage investors or enterprises operating within its territory to undertake and maintain meaningful engagement and dialogue, in accordance with international responsible business conduct standards, guidelines and principles that have been endorsed or are supported by that Party, with Indigenous peoples and local communities. 4. **The Parties shall cooperate on and facilitate joint initiatives to promote responsible business conduct**.	
Comprehensive Economic and Trade Agreement (CETA) Canada and the European Union Signed 30/10/2016 In force: Some sections are provisionally in force as of 21/09/2017	"**REAFFIRMING** their strong attachment to **democracy and to fundamental rights** as laid down in the Universal Declaration of Human Rights, done at Paris on 10 December 1948, and sharing the view that the proliferation of weapons of mass destruction poses a major threat to international security"; "**RECOGNISING** the importance of international security, **democracy, human rights** and the rule of law for the development of international trade and economic cooperation";	**CHAPTER ONE** **GENERAL DEFINITIONS AND INITIAL PROVISIONS** **Article 1.9** **Rights and Obligations Relating to Water** 1. The Parties recognise that water in its natural state, including water in lakes, rivers, reservoirs, aquifers and water basins, is not a good or a product. Therefore, only Chapters Twenty-Two (Trade and Sustainable Development) and Twenty-Four (Trade and Environment) apply to such water. 2. **Each Party has the right to protect and preserve its natural water resources**. Nothing in this Agreement obliges a Party to permit the commercial use of water for any purpose, including its withdrawal, extraction or diversion for export in bulk. […]	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
	"**AFFIRMING** their commitments as parties to the ***UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions***, done at Paris on 20 October 2005, and recognising that states have the right to preserve, develop and implement their cultural policies, to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and to preserve their cultural identity, including through the use of regulatory measures and financial support"; "**REAFFIRMING** their commitment to **promote sustainable development** and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions"; "**ENCOURAGING** enterprises operating within their territory or subject to their jurisdiction to respect internationally recognised guidelines and principles of **corporate social responsibility**, including the OECD Guidelines for Multinational Enterprises, and to pursue best practices of responsible business conduct"; "**IMPLEMENTING** this Agreement in a manner consistent with the enforcement of their respective **labour and environmental laws** and that enhances their levels of labour and environmental protection, and building upon their international commitments on labour and environmental matters";	**CHAPTER EIGHT** **INVESTMENT** **Article 8.9** **Investment and Regulatory Measures** 1. For the purpose of this Chapter, the Parties reaffirm their **right to regulate within their territories** to achieve legitimate policy objectives, such as the protection of public health, **safety, the environment or public morals, social** or consumer protection or the promotion and protection of cultural diversity. […] **CHAPTER TWENTY-ONE** **REGULATORY PROVISIONS** **Article 21.2** **Principles** 1. The Parties reaffirm their rights and obligations with respect to regulatory measures under the TBT Agreement, the SPS Agreement, the GATT 1994 and the GATS. 2. The Parties are committed to ensure **high levels of protection** for **human, animal and plant life** or health, and the environment in accordance with the TBT Agreement, the SPS Agreement, the GATT 1994, the GATS, and this Agreement. […] **Article 21.3** **Objectives of regulatory cooperation** The objectives of regulatory cooperation include to: (a) contribute to the **protection of human life, health or safety, animal or plant life or health and the environment** […] **CHAPTER TWENTY-TWO** **TRADE AND SUSTAINABLE DEVELOPMENT** **Article 22.1** **Context and objectives**	**Article 22.4** **Institutional Mechanisms** 1. The **Committee on Trade and Sustainable Development**, established under Article 26.2.1(g) (Specialised committees), shall be comprised of high level representatives of the Parties responsible **for matters covered by this Chapter and Chapters Twenty-Three (Trade and Labour) and Twenty-Four (Trade and Environment).** The Committee on Trade and Sustainable Development shall oversee the implementation of those Chapters, including cooperative activities and the review of the impact of this Agreement on sustainable development, and address in an integrated manner any matter of common interest to the Parties in relation to the interface between economic development, social development and environmental protection. With regard to Chapters Twenty-Three (Trade and Labour) and Twenty-Four (Trade and Environment), the Committee on Trade and Sustainable Development can also carry out its duties through dedicated sessions comprising participants responsible for any matter covered, respectively, under these Chapters.

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		1. The Parties recall the **Rio Declaration on Environment and Development of 1992**, **the Agenda 21 on Environment and Development of 1992, the Johannesburg Declaration on Sustainable Development of 2002 and the Plan of Implementation of the World Summit on Sustainable Development of 2002, the Ministerial Declaration of the United Nations Economic and Social Council on Creating an environment at the national and international levels conducive to generating full and productive employment and decent work for all, and its impact on sustainable development of 2006, and the ILO Declaration on Social Justice for a Fair Globalisation of 2008**. The Parties recognise that **economic development, social development and environmental protection are interdependent and mutually reinforcing components** of sustainable development, and reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development, for the welfare of present and future generations. 2. The Parties underline the benefit of considering **trade-related labour and environmental issues** as part of a global approach to trade and sustainable development. […] 3. In this regard, through the implementation of Chapters Twenty-Three (Trade and Labour) and Twenty-Four (Trade and Environment), the Parties aim to: (a) promote sustainable development through the enhanced coordination and integration of their respective **labour, environmental and trade policies and measures**; […]; (c) enhance enforcement of their respective **labour and environmental law and respect for labour and environmental international agreements**; […] **Article 22.3** **Cooperation and Promotion of Trade Supporting Sustainable Development** 1. The Parties recognise the value of international cooperation to achieve **the goal of sustainable development and the integration at the international level of economic, social and environmental development** and protection initiatives, actions and measures. Therefore, the Parties agree to dialogue and consult with each other with regard to trade-related sustainable development issues of common interest. […]	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		CHAPTER TWENTY-THREE **TRADE AND LABOUR** **Article 23.1** **Context and Objectives** […] 2. Affirming the value of greater policy coherence in decent work, encompassing core labour standards, and **high levels of labour protection**, coupled with their effective enforcement, the Parties recognise the beneficial role that those areas can have on economic efficiency, innovation and productivity, including export performance. […] **Article 23.3** **Multilateral Labour Standards and Agreements** 1. Each Party shall ensure that its labour law and practices embody and provide protection for the fundamental principles and rights at work which are listed below. **The Parties affirm their commitment to respect, promote and realise those principles and rights in accordance with the obligations of the members of the International Labour Organization (the "ILO")** and the commitments under the **ILO Declaration on Fundamental Principles and Rights at Work** and its Follow-up of 1998 adopted by the International Labour Conference at its 86th Session […] **Article 23.4** **Upholding Levels of Protection** 1. The Parties recognise that it is **inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their labour law and standards.** […] **CHAPTER TWENTY-FOUR** **TRADE AND ENVIRONMENT** **Article 24.1** **Definition** For the purposes of this Chapter: **environmental law** means a law, including a statutory or regulatory provision, or other legally binding measure of a Party, the purpose of which is the protection of the environment, including the prevention of a danger to human life or health from environmental impacts […]	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		Article 24.2 **Context and Objectives** The Parties recognise that the **environment is a fundamental pillar of sustainable development** and recognise the contribution that trade could make to sustainable development. The Parties stress that enhanced cooperation to protect and conserve the environment brings benefits that will: (a) promote sustainable development; (b) strengthen the environmental governance of the Parties; (c) build upon international environmental agreements to which they are party; and (d) complement the objectives of this Agreement. **Article 24.3** **Right to Regulate and Levels of Protection** The Parties recognise the right of each Party to **set its environmental priorities**, to establish its **levels of environmental protection**, and to adopt or modify its laws and policies accordingly and in a manner consistent with the multilateral environmental agreements to which it is party and with this Agreement. Each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve such laws and policies and their underlying levels of protection. **Article 24.4** **Multilateral Environmental Agreements** 1. The Parties recognise the value of **international environmental governance** and agreements as a response of the international community to global or regional environmental problems and stress the need to enhance the mutual supportiveness between trade and environment policies, rules, and measures. […] **Article 24.9** **Trade Favouring Environmental Protection** 1. The Parties are resolved to make efforts to **facilitate and promote trade and investment in environmental goods and services**, including through addressing the reduction of non-tariff barriers related to these goods and services. […] **Article 24.12** **Cooperation on Environment Issues** 1. The Parties recognise that enhanced cooperation is an important element to advance the objectives of this Chapter, and **commit to cooperate on trade-related environmental issues** of common interest […]	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
US-Mexico – Canada Agreement (USMCA) **Signed 30/11/2018** **In force 01/07/2020**	"RECOGNIZE their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, and protect legitimate public welfare objectives, such as health, safety, **environmental protection, conservation of living or non-living exhaustible natural resources**, integrity and stability of the financial system, and public morals, in accordance with the rights and obligations provided in this Agreement"; "**PROTECT human, animal, or plant life** or health in the territories of the Parties and advance science-based decision making while facilitating trade between them"; "**PROMOTE high levels of environmental protection,** including through effective enforcement by each Party of its environmental laws, as well as through enhanced environmental cooperation, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices; PROMOTE the protection and enforcement of labor rights, the improvement of working conditions, the strengthening of cooperation and the Parties' capacity on labor issues"; "RECOGNIZE the importance of increased **engagement by indigenous peoples** in trade and investment"; "SEEK to **facilitate women's and men's equal access** to and ability to benefit from the opportunities created by this Agreement and to support the conditions for women's full participation in domestic, regional, and international trade and investment";	**CHAPTER 14** **INVESTMENT** **Article 14.16** **Investment and Environmental, Health, Safety, and other Regulatory Objectives** 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, health, safety, or other regulatory objectives**. **Article 14.17** **Corporate Social Responsibility** The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those **internationally recognized standards, guidelines, and principles of corporate social responsibility** that have been endorsed or are supported by that Party, which may include the OECD Guidelines for Multinational Enterprises. These **standards, guidelines, and principles may address areas such as labor, environment, gender equality, human rights, indigenous and aboriginal peoples' rights, and corruption.** **CHAPTER 23** **LABOR** **Article 23.2** **Statement of Shared Commitments** 1. The Parties affirm their obligations as members of the ILO, including those stated in the **ILO Declaration on Rights at Work and the ILO *Declaration on Social Justice for a Fair Globalization (2008).*** […] **Article 23.3** **Labor Rights** 1. Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the **ILO Declaration on Rights at Work:** […] **Article 23.4** **Non-Derogation** The Parties recognize that it **is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party's labor laws**. Accordingly, no Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, […]	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		Article 23.5 **Enforcement of Labor Laws** 1. No Party shall fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties after the date of entry into force of this Agreement. […] **Article 23.6** **Forced or Compulsory Labor** 1. The Parties recognize the goal **of eliminating all forms of forced or compulsory labor, including forced or compulsory child labor**. Accordingly, each Party shall prohibit the importation of goods into its territory from other sources produced in whole or in part by forced or compulsory labor, including forced or compulsory child labor. […] **Article 23.12** **Cooperation** 1. The Parties recognize the importance of cooperation as a mechanism for effective implementation of this Chapter, to **enhance opportunities to improve labor standards,** and to further advance common commitments regarding labor matters, including the principles and rights stated in the **ILO Declaration on Rights at Work**. […] **CHAPTER 24** **ENVIRONMENT** **Article 24.2** **Scope and Objectives** 1. The Parties recognize that a healthy environment is an integral element of sustainable development and **recognize the contribution that trade makes to sustainable development**. 2. The objectives of this Chapter are to promote mutually supportive trade and **environmental policies and practices**; **promote high levels of environmental protection and effective enforcement of environmental laws**; and enhance the capacities of the Parties to address trade-related environmental issues, including through cooperation, in the furtherance of sustainable development. […]	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		Article 24.3 **Levels of Protection** 1. The Parties recognize the sovereign right of each Party to establish its own levels of **domestic environmental protection** and its own environmental priorities, and to establish, adopt, or modify its environmental laws and policies accordingly. […] **Article 24.4** **Enforcement of Environmental Laws** 1. No Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inactionin a manner affecting trade or investment between the Parties after the date of entry into force of this Agreement. […] 3. Without prejudice to Article 24.3.1 (Levels of Protection), **the Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws.** Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties. […] **Article 24.5** **Public Information and Participation** 1. Each Party shall **promote public awareness of its environmental laws** and policies, including enforcement and compliance procedures, by ensuring that relevant information is available to the public. […] **Article 24.7** **Environmental Impact Assessment** 1. Each Party shall **maintain appropriate procedures for assessing the environmental impacts of proposed projects** that are subject to an action by that Party's central level of government that may cause significant effects on the environment with a view to avoiding, minimizing, or mitigating adverse effects. 2. Each Party shall ensure that such procedures provide for the disclosure of information to the public and, in accordance with its law, allow for public participation.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		Article 24.8 **Multilateral Environmental Agreements** 1. The Parties recognize the **important role that multilateral environmental agreements can play in protecting the environment and as a response of the international community to global or regional environmental problems**. 2. Each Party affirms its **commitment to implement** the multilateral environmental agreements to which it is a party. […]. **Article 24.9** **Protection of the Ozone Layer** 1. The Parties recognize that emissions of certain substances can **significantly deplete and otherwise modify the ozone layer** in a manner that is likely to result in adverse effects on human health and the environment. Accordingly, each Party shall take measures to control the production and consumption of, and trade in, substances controlled by the Montreal Protocol. […] **Article 24.11** **Air Quality** 1. The Parties recognize that air pollution is a serious threat to public health, ecosystem integrity, and sustainable development and contributes to other environmental problems; **and note that reducing certain air pollutants can provide multiple benefits.** […] **Article 24.13** **Corporate Social Responsibility and Responsible Business Conduct** 1. The Parties recognize the **importance of promoting corporate social responsibility and responsible business conduct**. 2. Each Party shall **encourage enterprises organized or constituted under its laws, or operating in its territory, to adopt and implement voluntary best practices of corporate social responsibility** that are related to the environment, such as those in internationally recognized standards and guidelines that have been endorsed or are supported by that Party, to strengthen coherence between economic and environmental objectives.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		Article 24.23 **Sustainable Forest Management and Trade** 1. The Parties acknowledge their role as major consumers, producers, and traders of forest products and the **importance of a healthy forest sector to provide livelihoods and job opportunities, including for indigenous peoples**. […] **Article 24.25** **Environmental Cooperation** 1. The Parties recognize the **importance of cooperation as a mechanism to implement this Chapter**, to enhance its benefits, and to strengthen the Parties' joint and individual capacities to **protect the environment**, and to promote sustainable development as they strengthen their trade and investment relations. […]	
EU-UK Trade Cooperation Agreement **Signed 30/12/2020** **In force 21/05/2021**	"1. REAFFIRMING their commitment to democratic principles, **to the rule of law, to human rights**, to countering proliferation of weapons of mass destruction and to the fight against climate change, which constitute essential elements of this and supplementing agreements;" "7. RECOGNISING the Parties' respective autonomy and rights to regulate within their territories in order to achieve legitimate public policy objectives such as the protection and **promotion of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, animal welfare, privacy and data protection and the promotion and protection of cultural diversity**, while striving to improve their respective high levels of protection";	PART TWO TRADE, TRANSPORT, FISHERIES AND OTHER ARRANGEMENTS HEADING ONE **TITLE II** **SERVICES AND INVESTMENT** **CHAPTER 1** **GENERAL PROVISIONS** **Article 123** **Objective and Scope** […] 2. The Parties reaffirm the **right to regulate within their territories** to achieve **legitimate policy objectives**, such as: the protection of public health; social services; public education; safety; **the environment, including climate change**; public morals; social or consumer protection; privacy and data protection or the promotion and protection of cultural diversity. […] TITLE VIII ENERGY CHAPTER 3 **SAFE AND SUSTAINABLE ENERGY**	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
	"9. RECOGNISING the need for an ambitious, wide-ranging and balanced economic partnership to be underpinned by a level playing field for open and fair competition and sustainable development, through effective and robust frameworks for subsidies and competition and a commitment to **uphold their respective high levels of protection in the areas of labour and social standards, environment, the fight against climate change, and taxation**";	**Article 323** **Cooperation on Standards** […] the Parties **shall promote cooperation** between the regulators and standardisation bodies located within their respective territories to facilitate the development of international standards with respect to **energy efficiency and renewable energy**, with a view to contributing to **sustainable energy and climate policy**. TITLE XI LEVEL PLAYING FIELD FOR OPEN AND FAIR COMPETITION AND SUSTAINABLE DEVELOPMENT CHAPTER 1 **GENERAL PROVISIONS** **Article 355** **Principles and Objectives** […] 3. Each Party reaffirms its ambition of achieving **economy-wide climate neutrality by 2050.** […] **Article 356** **Right to Regulate, Precautionary Approach and Scientific and Technical Information** […] 2. The Parties acknowledge that, in accordance with the precautionary approach, where there are reasonable grounds for concern that there are **potential threats of serious or irreversible damage to the environment or human health**, the lack of full scientific certainty shall not be used as a reason for preventing a Party from adopting appropriate measures to prevent such damage. […] **CHAPTER 5** **TAXATION** **Article 383** **Good Governance** The Parties recognise and commit to implementing the **principles of good governance** in the area of taxation […]	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		CHAPTER 6 **LABOUR AND SOCIAL STANDARDS** **Article 387** **Non-regression from Levels of Protection** 1. The Parties affirm the right of each Party to set its policies and priorities in the areas covered by this Chapter, to **determine the labour and social levels of protection** it deems appropriate and to adopt or modify its law and policies in a manner consistent with each Party's international commitments, including those under this Chapter. 2. **A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its labour and social levels of protection** below the levels in place at the end of the transition period, including by failing to effectively enforce its law and standards. […] CHAPTER 7 ENVIRONMENT AND CLIMATE **Article 391** **Non-regression from Levels of Protection** 1. The Parties affirm the right of each Party to set its policies and priorities in the areas covered by this Chapter, to **determine the environmental levels of protection and climate level of protection** it deems appropriate and to adopt or modify its law and policies in a manner consistent with each Party's international commitments, including those under this Chapter. 2. A **Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection** or its climate level of protection below the levels that are in place at the end of the transition period, including by failing to effectively enforce its environmental law or climate level of protection. […] 5. The Parties shall continue to strive to **increase their respective environmental levels of protection** or their respective climate level of protection referred to in this Chapter. **Article 392** **Carbon Pricing** 1. Each Party shall have in place an **effective system of carbon pricing** as of 1 January 2021.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		2. Each system **shall cover greenhouse gas emissions** from electricity generation, heat generation, industry and aviation. […] **Article 393** **Environmental and Climate Principles** 1. Taking into account the fact that the Union and the United Kingdom share a common biosphere in respect of cross-border pollution, **each Party commits to respecting the internationally recognised environmental principles** to which it has committed, **such as in the Rio Declaration** on Environment and Development, adopted at Rio de Janeiro on 14 June 1992 (the "1992 Rio Declaration on Environment and Development") and in multilateral environmental agreements, including in **the United Nations Framework Convention on Climate Change**, done at New York on 9 May 1992 ("UNFCCC") and the Convention on Biological Diversity, done at Rio de Janeiro on 5 June 1992 (the "Convention on Biological Diversity") […] **Article 394** **Enforcement** 1. For the purposes of enforcement as referred to in Article 391, each Party shall, in accordance with its law, ensure that: (a) domestic authorities competent to enforce the relevant law with regard to environment and climate give due consideration to alleged violations of such law that come to their attention; those authorities shall have adequate and effective remedies available to them, including injunctive relief as well as proportionate and dissuasive sanctions, if appropriate; and […] **CHAPTER 8** **OTHER INSTRUMENTS FOR TRADE AND SUSTAINABLE DEVELOPMENT** **Article 399** **Multilateral Labour Standards and Agreements** 1. The Parties affirm their commitment to **promoting the development of international trade in a way that is conducive to decent work** for all, as expressed in the **2008 ILO Declaration on Social Justice for a Fair Globalization**.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		2. In accordance with the ILO Constitution and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted at Geneva on 18 June 1998 by the International Labour Conference at its 86th Session, each Party commits to respecting, promoting and effectively implementing the internationally recognised core labour standards, as defined in the fundamental ILO Conventions…: […] ." **Article 400** **Multilateral Environmental Agreements** 1. The Parties recognise the importance of the UN Environment Assembly (UNEA), of the UN Environment Programme (UNEP) and of multilateral environmental governance and agreements as a response of the international community to global or regional environmental challenges and stress the need to enhance the mutual supportiveness between trade and environment policies, rules and measures. […] **Article 401** **Trade and Climate Change** 1. The Parties recognise the importance of **taking urgent action to combat climate change** and its impacts, and the role of trade and investment in pursuing that objective, **in line with the UNFCCC**, with the purpose and goals of **the Paris Agreement** adopted at Paris on 12 December 2015 by the Conference of the Parties to the United Nations Framework Convention on Climate Change at its 21st session (the "Paris Agreement"), and with other multilateral environmental agreements and multilateral instruments in the area of climate change. […] **Article 402** **Trade and Biological Diversity** 1. **The Parties recognise the importance of conserving and sustainably using biological diversity** and the role of trade in pursuing these objectives, including by promoting sustainable trade or controlling or restricting trade in endangered species, in line with the relevant multilateral environmental agreements to which they are party, and the decisions adopted thereunder, notably **the Convention on Biological Diversity and its protocols**, and the **Convention on International Trade in Endangered Species** of Wild Fauna and Flora, done at Washington D.C. on 3 March 1973 ("CITES"). […]	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		Article 405 **Trade and Investment Favouring Sustainable Development** 1. The Parties confirm their **commitment to enhancing the contribution of trade and investment to the goal of sustainable development** in its economic, social and environmental dimensions. […]. **Article 406** **Trade and Responsible Supply Chain Management** 1. The Parties recognise the importance of **responsible management of supply chains through responsible business conduct and corporate social responsibility** practices and the role of trade in pursuing this objective. […] 3. The Parties recognise the utility of international sector-specific guidelines in **the area of corporate social responsibility and responsible business conduct** and shall encourage joint work in this regard. In respect of the OECD Due Diligence Guidance for responsible supply chains of minerals from conflict-affected and high-risk areas and its supplements, the Parties shall also implement measures to promote the uptake of that Guidance. […] PART SIX DISPUTE SETTLEMENT AND HORIZONTAL PROVISIONS TITLE II BASIS FOR COOPERATION **Article 763** **Democracy, Rule of Law and Human Rights** 1. The Parties shall continue to **uphold the shared values and principles of democracy, the rule of law, and respect for human rights**, which underpin their domestic and international policies. In that regard, the Parties reaffirm their respect for the Universal Declaration of Human Rights and the international human rights treaties to which they are parties. […]	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		Article 764 **Fight Against Climate Change** 1. The Parties consider that **climate change represents an existential threat** to humanity and reiterate their commitment to strengthening the global response to this threat. **The fight against human-caused climate change as elaborated in the United Nations Framework Convention on Climate Change ("UNFCCC")** process, and in particular in the Paris Agreement adopted by the Conference of the Parties to the United Nations Framework Convention on Climate Change at its 21st session (the "Paris Agreement"), inspires the domestic and external policies of the Union and the United Kingdom. Accordingly, each Party shall respect the Paris Agreement and the process set up by the UNFCCC and refrain from acts or omissions that would materially defeat the object and purpose of the Paris Agreement. 2. The Parties shall advocate the fight against climate change in international forums, including by engaging with other countries and regions to **increase their level of ambition in the reduction of greenhouse emissions.**	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
Colombia-Spain BIT Signed 16 September 2021	"Convencidos de que la Inversión tiene el potencial de contribuir al **desarrollo sostenible** y a aumentar la prosperidad en ambos países." "Reafirmando el derecho de cada Parte Contratante a regular las Inversiones hechas en su Territorio para cumplir objetivos legítimos de bienestar público, que se **pueden lograr sin disminuir los estándares de salud, orden público y seguridad, derechos humanos y de medio ambiente** de aplicación general." "Reconociendo la importancia de la seguridad internacional, la democracia, los **derechos humanos** y el Estado de Derecho para el desarrollo del comercio internacional y la cooperación económica."	II. ESTÁNDARES DE TRATO **Artículo 11** **Expropiación** 1. Las Inversiones no deberán ser sujetas a nacionalizaciones o expropiaciones, tanto indirecta como indirectamente, a través de medidas de efecto equivalente a una nacionalización o expropiación (en adelante "expropiación"), salvo cuando dicha expropiación sea: a. adoptada por razones de utilidad pública o interés general; b. realizada de conformidad con el debido proceso legal; c. realizada de forma no discriminatoria; y d. mediante el pago de una indemnización oportuna, adecuada, pronta y efectiva, conforme a este Acuerdo. […] 5. Para mayor certeza, salvo en la circunstancia excepcional de que el impacto de una Medida o conjunto de Medidas sea tan grave en relación con su finalidad que resulte manifiestamente excesivo, las Medidas no discriminatorias adoptadas por una Parte Contratante que se conciban y se apliquen para proteger objetivos legítimos de bienestar público, como la **salud pública, la seguridad, la competencia y el medio ambiente**, no constituyen una expropiación indirecta. […] **III. DERECHO A REGULAR Y DENEGACIÓN DE BENEFICIOS** **Artículo 14** **Derecho a Regular** 1. Las Partes Contratantes reconocen mutuamente su **derecho a regular** dentro de sus Territorios **mediante medidas razonables para alcanzar objetivos legítimos de política pública, tales como la seguridad, el desarrollo sostenible, la seguridad social, la privacidad, la protección de datos, la promoción o la protección de la diversidad cultural, los derechos humanos, la salud, la educación, los servicios sociales, los consumidores, los recursos naturales o el medio ambiente**. 2. El solo hecho de que la adopción, modificación o ejecución de una Medida afecte negativamente a una Inversión o interfiera con las expectativas del Inversionista, incluyendo su expectativa de ganancia, no constituye por sí mismo un incumplimiento de ninguna obligación bajo este Acuerdo.	IV. RESOLUCIÓN DE DISPUTAS **Artículo 37** **Consejo Bilateral de Inversión** 1. Las Partes Contratantes crearán un Consejo Bilateral de Inversión (el "Consejo") para la administración de este Acuerdo. 2. El Consejo estará compuesto de representantes estatales de cada una de las Partes Contratantes. 3. El Consejo se reunirá al menos una (1) vez cada tres (3) años en las oportunidades, lugares y a través de los medios que las Partes Contratantes acuerden. 4. El Consejo tendrá las siguientes funciones y responsabilidades: a. supervisar la aplicación y cumplimiento de este Acuerdo; b. adoptar interpretaciones vinculantes sobre este Acuerdo.

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		Artículo 16 **No Disminución de Estándares Laborales, Ambientales y de Derechos Humanos** 1. Las Partes Contratantes reconocen que **no es adecuado fomentar la inversión debilitando o reduciendo las medidas de protección que proporciona su legislación medioambiental, laboral o de derechos humanos**. 2. **Ninguna de las Partes Contratantes podrá**, a través de una acción sostenida, repetida o por inacción**, dejar de aplicar de manera efectiva su legislación medioambiental, laboral o sobre derechos humanos como estímulo al establecimiento, la adquisición, la expansión o la retención de una Inversión** en su Territorio. 3. **Ninguna de las Partes Contratantes podrá aplicar su legislación medioambiental, laboral o de derechos humanos de forma que constituya una restricción encubierta a la Inversión o una discriminación injustificada** entre las Partes Contratantes. **Artículo 17** **Responsabilidad Social de los Inversionistas** Cada Parte Contratante **fomentara la aplicación de las Líneas Directrices para Empresas Multinacionales de la Organización para la Cooperación y el Desarrollo Económicos** – OCDE.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
Jersey-UAE BIT Signed 09/11/2021 Entered into force 09/02/2023	"Recognising that the protection of investments is conductive to enhancing international investments and to **sustainable economic development**;" "Aware that these objectives can be realised in a way that is consistent with the **right to regulate** of the Governments of the Contracting Parties and considerations of **public health, safety, the environment, and labour protections**;"	**Article 3** **Expropriation** 1. Investments of investors of a Contracting Party in the territory of the other Contracting Party shall not be subject to nationalisation, or any other form of direct or indirect expropriation, including any measure having similar effects, except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) in accordance with due process of law; and (d) accompanied by prompt, adequate and effective compensation. 2. The determination of whether a measure or series of measures constitutes an expropriation shall be made following a fact-based inquiry with reference to the character and economic impact of the measure or measures. **Good faith regulation for legitimate public purposes which is carried out in a non-discriminatory and proportionate manner will not ordinarily constitute an expropriation.** […] **Article 10** **Right to Regulate** 1. Each Contracting Party reaffirms its **right to regulate in the public interest within its territory in order to realise legitimate policy objectives in areas relating to public health, safety, the environment, and labour protections**, and in a manner that is non-discriminatory and non-arbitrary. 2. Non-discriminatory and proportionate regulatory measures by a Contracting Party will not ordinarily constitute a breach of standards in this Agreement.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
Quirinal Treaty (France - Italy) Signed 26 November 2021	« Rappelant que leur communauté de destin est fondée sur les principes fondamentaux et objectifs inscrits dans la Charte des Nations Unies et dans le Traité sur l'Union européenne, et que cette communauté repose sur les valeurs de paix et de sécurité**, de respect de la dignité humaine, des droits de l'homme et des libertés fondamentales**, de la démocratie, de l'égalité et de l'État de droit; » « Réaffirmant avec force que ces valeurs marquent leur attachement à **une société caractérisée par le pluralisme, la non-discrimination, la tolérance, la justice, la solidarité et l'égalité de genre** ; rappelant leur attachement au multilatéralisme, à un ordre et à des relations internationales fondés sur le droit et sur l'Organisation des Nations Unies; » « **Déterminées à combattre le dérèglement climatique et à préserver la biodiversité ; convaincues que les progrès** économique**, social et environnemental sont indissociables ; et conscientes que la sécurité et la prospérité de nos sociétés requièrent une action urgente pour sauvegarder notre planète, qui est notre maison commune**; » « Convaincues que l'Arc alpin, **particulièrement touché par le réchauffement climatique**, mérite une étroite coopération et une implication forte des deux pays; »	**Article 1** **Affaires Étrangères** 1. Compte-tenu de leur objectif conjoint de contribuer au maintien de la paix et de la sécurité internationales, **de protéger et promouvoir les droits de l'homme**, **d'œuvrer à la préservation des biens publics mondiaux, y compris la santé**, **ainsi qu'à la réalisation de l'Agenda 2030 des Nations Unies pour le développement durable**, les Parties s'engagent à développer leur coordination et à favoriser les synergies entre leurs actions respectives au niveau international. Elles se consultent régulièrement en vue d'établir des positions communes et d'agir conjointement sur toute décision touchant leurs intérêts communs, y compris, lorsque cela est possible, dans les formats plurilatéraux auxquels participe l'une des deux Parties. […] 3. Reconnaissant que la Méditerranée est leur creuset commun, les Parties développent des synergies et renforcent leur coordination sur les questions relatives à la sécurité, au développement socio-économique, à l'intégration, à la paix et **la protection des droits de l'Homme dans la région, et à la lutte contre l'exploitation de la migration irrégulière. Elles promeuvent une utilisation juste et durable des ressources** énergétiques. Elles s'engagent également à favoriser une approche européenne commune dans les politiques de voisinage au Sud et à l'Est de l'Union européenne. 4. Les Parties adoptent des initiatives communes visant à promouvoir la démocratie, **le développement durable**, la stabilité et la sécurité sur le continent africain. Ensemble, elles s'engagent à renforcer les relations de l'Union européenne et de ses États membres avec ce continent, avec une attention particulière à l'Afrique du Nord, au Sahel et à la corne de l'Afrique. A cet effet, les Parties développent leurs consultations bilatérales, **notamment sur les politiques pour le développement durable et sur la manière d'assurer une protection et une promotion efficace des droits de l'Homme, de l'État de droit et de la bonne gouvernance, en ligne avec la recherche d'une meilleure synergie entre l'aide humanitaire, le développement et la paix**. […]	**Article 11** **Organisation** […] 4. Un Comité stratégique paritaire chargé de la mise en œuvre du présent Traité et de la feuille de route est institué au niveau des Secrétaires généraux des ministères des Affaires étrangères. Il précise, en liaison avec l'ensemble des ministères concernés, les stratégies et actions communes et formule des recommandations sur la mise en place des engagements pris dans le cadre du présent Traité, dont il surveille et évalue l'application. Le Comité stratégique paritaire se réunit une fois par an en amont du Sommet intergouvememental. […]

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		6. En matière commerciale, elles collaborent pour que la politique de l'Union européenne concoure à leur objectif partagé de rendre les échanges internationaux plus équitables et **plus durables**, contribuant ensemble à renforcer la politique industrielle et à construire l'autonomie stratégique européenne. Elles soutiennent le rôle moteur de l'Union européenne dans le renforcement du multilatéralisme commercial. **Elles promeuvent le renforcement de l'articulation entre la politique commerciale de l'Union européenne et les objectifs européens de développement durable**. **Article 3** **Affaires Européennes** 1. Les Parties œuvrent ensemble pour une Europe démocratique, unie et souveraine et pour le développement de l'autonomie stratégique européenne. Elles s'engagent à renforcer les institutions et défendre les valeurs fondatrices du projet européen et l'État de droit. **Elles favorisent une transition de l'Union européenne vers un modèle de développement résilient, inclusif et durable**, dans le cadre d'une économie ouverte et dynamique, exploitant pleinement le potentiel d'un Marché unique source de résilience. […] 3. Les Parties renforcent leur coordination dans les principaux domaines de la politique économique européenne, tels que la stratégie économique et budgétaire, l'industrie, l'énergie, les transports, la concurrence et les aides d'État, le travail, la lutte contre les inégalités**, la transition écologique** et numérique et la programmation financière de l'Union européenne. Elles agissent de concert en faveur de l'intégration économique et financière de l'Union européenne, de l'achèvement de l'Union économique et monétaire et du renforcement de la monnaie unique, facteur d'autonomie stratégique pour l'Union européenne. Elles promeuvent également des mécanismes de convergence fiscale afin de lutter contre la concurrence agressive, tout en soutenant une évolution des règles de la fiscalité internationale destinée à répondre aux défis de la numérisation des économies. […]	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		Article 5 **Coopération économique, industrielle et numérique** 1. Les Parties encouragent les échanges entre leurs acteurs économiques en veillant à promouvoir une croissance équitable, **durable** et inclusive. Elles s'engagent à faciliter les investissements réciproques et portent, dans un contexte d'équilibre de leurs intérêts respectifs, des projets conjoints pour développer les entreprises innovantes, les petites et moyennes entreprises et les grandes entreprises des deux pays, en favorisant leurs relations réciproques et la définition de stratégies communes sur les marchés internationaux, dans le cadre d'une Europe sociale. 2. Les Parties favorisent, notamment par des consultations régulières, la mise en œuvre d'une politique industrielle européenne ambitieuse, visant à renforcer la compétitivité de leurs entreprises au niveau mondial et à faciliter l'accomplissement de la double transition numérique et écologique de l'économie européenne. Elles œuvrent à la réalisation de l'objectif d'autonomie stratégique de l'Union européenne, à partir des secteurs des transitions énergétique et numérique, des nouvelles technologies, de la santé, de la défense et des transports, notamment en promouvant des projets soutenant les emplois et les acteurs économiques locaux. Elles reconnaissent la nécessité de préserver l'intégrité du Marché unique, en soutenant une concurrence loyale à la fois entre les entreprises européennes et avec celles des pays tiers**, tout en favorisant l'augmentation des standards sociaux et environnementaux**. Les Parties s'engagent à renforcer leurs collaborations industrielles bilatérales, ainsi qu'à promouvoir des initiatives conjointes contribuant au renforcement des chaînes de valeur stratégiques européennes. Elles facilitent la participation des petites et moyennes entreprises à ces projets et leur financement par le biais de fonds et de programmes européens. […]	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		Article 6 **Développement social, durable et inclusif** 1. Les Parties rappellent leur attachement au renforcement de la dimension sociale de l'Union européenne et à la mise en œuvre du Plan d'action du socle européen des droits sociaux, dans le prolongement des engagements pris lors du Sommet de Porto le 8 mai 2021. Elles soulignent **l'importance d'assurer des conditions de travail et de rémunération décentes à tous les travailleurs**, y compris pour les travailleurs des plateformes, de garantir des salaires minimaux adéquats, de développer le dialogue social, de lutter contre le chômage des jeunes, et de promouvoir un droit individuel à la formation pour favoriser le développement des compétences. Elles s'engagent à soutenir les **politiques favorisant une pleine parité entre les hommes et les femmes**, en particulier en soutenant l'autonomisation des femmes et en promouvant le talent et l'avancement des femmes à des postes à responsabilité. Elles s'engagent à **lutter contre toutes les discriminations, à combattre le moins-disant social, à lutter contre la pauvreté et l'exclusion sociale et à renforcer la protection des personnes vulnérables**. Elles entendent agir ensemble face aux mutations du marché du travail et aux changements démographiques. Elles s'engagent à organiser une consultation annuelle en vue d'échanger les bonnes pratiques et de préparer des projets et des positions communes dans le cadre européen. 2. **Les Parties s'emploient à soutenir et mettre en** œuvre **les instruments multilatéraux relatifs au développement durable**, en premier lieu le Programme de développement durable à l'horizon 2030 des Nations Unies, **et à la protection de l'environnement et du climat**, notamment l'Accord de Paris. A cette fin, elles œuvrent ensemble pour des résultats ambitieux en matière climatique, notamment dans le cadre des négociations européennes et internationales, et s'engagent à contribuer à l'atteinte de la neutralité climatique d'ici 2050 et à la mise en œuvre de l'ambition de l'Union européenne visant à renforcer la résilience de nos sociétés. Elles mènent également des **actions communes en faveur de la préservation, la restauration, le renforcement et la valorisation de la biodiversité**, tant dans les instances européennes qu'internationales. Elles se consultent régulièrement sur les dossiers multilatéraux d'intérêt commun majeur en matière environnementale et climatique, et agissent en coordination étroite pour mettre en place des outils permettant une **transition** écologique **efficace,** équitable **et socialement** équilibrée.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		3. **Les Parties** œuvrent **à l'intégration de la protection du climat dans toutes les politiques** et valorisent la mobilisation des jeunes dans ce domaine, ainsi que celle des acteurs privés, à travers les coalitions multi-acteurs. Elles travaillent également conjointement à accélérer l'action en faveur de l'adaptation au changement climatique. 4. **Les Parties** œuvrent **à la décarbonation dans tous les secteurs appropriés**, notamment en développant les énergies renouvelables et en promouvant l'efficacité énergétique. 5. Reconnaissant le rôle significatif de la mobilité et des infrastructures dans la poursuite des objectifs de développement durable, du Pacte vert européen et de la lutte contre le changement climatique, **les Parties coopèrent au niveau bilatéral et au sein de l'Union européenne pour réduire les** émissions **dues aux transports et pour développer des modèles de mobilité et d'infrastructures propres et durables en soutien d'une transition ambitieuse**, **solidaire et juste**. A cet effet, un Dialogue stratégique sur les transports au niveau des ministres chargés des infrastructures et de la mobilité durable se tient alternativement en France et en Italie. 6. **Les Parties défendent au niveau international une vision partagée concernant la biodiversité, la protection des** écosystèmes **naturels et ruraux, l'assainissement et la protection des eaux et des sols.** Elles travaillent ensemble pour garantir l'atteinte d'objectifs mondiaux pour la biodiversité ambitieux et robustes, en mettant en œuvre les engagements souscrits dans la Convention sur la diversité biologique et dans la Convention des Nations Unies pour combattre la désertification. 7. **Les Parties soutiennent** également **l'objectif de faire de la Méditerranée une mer propre et** écologiquement **durable**. Elles s'emploient à renforcer sa protection, notamment en soutenant le projet visant à désigner une zone maritime particulièrement vulnérable dans la Méditerranée nord occidentale. Elles favorisent le développement de l'économie bleue durable en Méditerranée.	

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		8. **Les Parties agissent de concert au niveau européen afin de favoriser la résilience, la durabilité et la transition du système agricole et agroalimentaire tout en garantissant la souveraineté alimentaire de l'Union européenne**. A cet égard, elles soutiennent les mesures en faveur de la lutte contre le gaspillage alimentaire et de la gestion des risques ainsi que les projets de développement durable dans les filières agro-alimentaires et l'agriculture biologique, afin de contribuer à la sauvegarde de la fertilité et de la biodiversité des sols. Elles s'engagent également à soutenir des projets de lutte contre la déforestation notamment au sein du Partenariat des déclarations d'Amsterdam. Les Parties s'engagent à soutenir, protéger et promouvoir, tant au sein de l'Union européenne qu'auprès des pays tiers, aux niveaux bilatéraux, plurilatéraux et multilatéraux, les appellations d'origine et les indications géographiques enregistrées dans l'Union européenne. 9. **Les Parties s'engagent à promouvoir et soutenir la coopération entre leurs aires protégées et entre leurs parcs terrestres ou marins, y compris dans le cadre des accords régionaux et mondiaux sur la préservation de la biodiversité**. 10. Les ministères compétents engagent des consultations régulières afin de mettre en œuvre l'ensemble des dispositions du présent article. **Article 8** **Enseignement, formation, recherche et innovation** […] 3. Les Parties s'emploient à rapprocher leurs systèmes éducatifs, dans le but notamment de contribuer à la construction de l'Espace européen de l'éducation. Elles encouragent la mobilité des jeunes, en particulier pour l'enseignement et la formation professionnels dans une perspective d'apprentissage continu, avec pour objectif de constituer des centres d'excellence professionnelle franco-italiens et européens et de favoriser la reconnaissance de tels parcours. Elles développent les filières permettant la double délivrance du baccalauréat français et de l'Esame di Stato italien (ESABAC) et encouragent les partenariats systématiques entre établissements français et italiens les proposant, tout comme la mobilité des élèves et de leurs professeurs. **Elles s'engagent** également **à coopérer pour une** éducation **au développement durable** et à la citoyenneté mondiale, à travers des programmes de collaboration dédiés. […]	

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UK-Australia FTA Signed 17/12/2021	"RECOGNISING the Parties' respective autonomy and rights to regulate within their territories in order to achieve legitimate public policy objectives such as the protection and promotion of public health, education, labour standards, social services, safety, the environment including climate change, and animal welfare;" "SEEKING to encourage women's full access to and ability to benefit from this Agreement and support equitable participation in international trade and investment;"	**CHAPTER 9** **FINANCIAL SERVICES** **Article 9.19** **Sustainable Finance** 1. The Parties recognise the importance of international cooperation to **facilitate the inclusion of environmental, social, and governance considerations in investment decision-making and other business activities**, in order, thereby, to **increase investment in sustainable activities**. 2. The inclusion of environmental considerations in investment decision-making and other business activities involves, inter alia, the **assessment and pricing of climate-related risks and opportunities, and the exploration of environmental and sustainable projects and infrastructure**. 3. The Parties acknowledge the importance of encouraging financial service suppliers to develop an approach to managing climate-related financial risks. Specifically, the Parties recognise the importance of encouraging the uptake of climate-related financial disclosures for financial service suppliers with material exposure to climate change, including forward-looking information, informed by initiatives in international fora, such as the Task Force on Climate-Related Financial Disclosures. 4. The Parties shall cooperate in relevant international fora, and where agreeable, in the development and adoption of internationally recognised standards for the **inclusion of environmental, social, and governance considerations in investment decision-making and other business activities**. **CHAPTER 13** **INVESTMENT** **Article 13.17** **Investment and Environmental, Health, and other Regulatory Objectives** 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, health, or other regulatory objectives**.	**CHAPTER 2** **TRADE IN GOODS** **Article 2.16** **Committee on Trade in Goods** […] 2. The Goods Committee's functions shall include: […] (f) facilitating trade in remanufactured goods, including considering amendments or modifications to the provisions of this Agreement relating to the treatment of remanufactured goods, with a view to broadening the types of goods that may be considered remanufactured goods, having regard to factors including technological developments and the **Parties' shared environmental objectives.** **CHAPTER 22** **ENVIRONMENT** **Article 22.21** **Environment Working Group** 1. The Parties hereby establish an Environment Working Group ("the Working Group") composed of official level representatives, as designated by each Party. 2. The Working Group shall meet within one year of the date of entry into force of this Agreement. Thereafter, the Working Group shall meet at least every two years, unless the Parties decide otherwise.

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		Article 13.18 **Investment and the Environment** 1. The Parties recall the provisions of this Agreement that are applicable to **promoting mutually supportive investment and environmental outcomes and that are consistent with the sovereign right of each Party to set its levels of environmental protection**, including as set out in the relevant provisions, exceptions, and exclusions of this Chapter, of Annex I (Schedules of Non-Conforming Measures for Services and Investment) and Annex II (Schedules of Non-Conforming Measures for Services and Investment), of Chapter 31 (General Provisions and Exceptions), and of Chapter 22 (Environment). 2. The Parties further recall that such provisions, exceptions, and exclusions include those applicable to: (a) maintaining and effectively enforcing domestic environmental law and policies; (b) recognising that it is inappropriate to waive or derogate from environmental law to encourage investment; (c) affirming commitments under multilateral environmental agreements; (d) supporting the transition to low carbon and climate resilient economies; and (e) encouraging investment in environmental goods and services. **Article 13.19** **Corporate Social Responsibility** Each Party reaffirms the importance of encouraging investors operating within its territory or subject to its jurisdiction voluntarily to incorporate into their internal policies those internationally recognised **standards, guidelines, and principles of corporate social responsibility** that have been endorsed or are supported by that Party, such as the *OECD Guidelines for Multinational Enterprises* done at Paris on 21 June 1976 and the *United Nations Guiding Principles on Business and Human Rights done at Geneva on 16 June 2011*.	3. The purpose of the Working Group is to oversee the implementation of this Chapter and its functions shall be to: (a) review and monitor the implementation and operation of the provisions of this Chapter; (b) provide a forum to seek solutions to resolve differences between the Parties as to the interpretation or application of this Chapter; (d) coordinate with other committees, working groups, and any other subsidiary bodies established under this Agreement as appropriate; (e) perform any other functions as the Parties may decide. 4. The Working Group shall be jointly chaired and shall produce an agreed record of its meetings, including decisions and next steps and, as appropriate, report to the Joint Committee. **Article 22.22** **Environment Contact Points** Each Party shall designate and notify a contact point from its relevant authorities within 90 days of the date of entry into force of this Agreement in order to facilitate communication between the Parties in the implementation of this Chapter. Each Party shall promptly notify the other Party in the event of any change to its contact point. **Article 22.23** **Environment Consultations** 1. The Parties shall at all times endeavour to agree on the interpretation and application of this Chapter, and shall make every effort through dialogue, consultation, exchange of information and, if appropriate, cooperation to address any matter that might affect the operation of this Chapter.

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		CHAPTER 16 **GOVERNMENT PROCUREMENT** **Article 16.3** **General Exceptions** 1. Subject to the requirement that the measure is not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where the same conditions prevail, or a disguised restriction on international trade between the Parties, nothing in this Chapter shall be construed to prevent a Party, including its procuring entities, from adopting or maintaining a measure: (a) necessary to protect public morals, order or safety; (b) **necessary to protect human, animal or plant life or health**; (c) necessary to protect intellectual property; or (d) relating to the good or service of a person with disabilities, of philanthropic institutions or of prison labour. 2. The Parties understand that **subparagraph 1(b) includes environmental measures necessary to protect human, animal or plant life or health.** **Article 16.7** **Environmental, Social and Labour Considerations** A Party, including its procuring entities, may: (a) take into account environmental**, social and labour considerations** throughout the procurement procedure, provided they are: (i) based on objectively verifiable criteria; (ii) non-discriminatory; and (iii) indicated in the notice of intended procurement or tender documentation; and (b) take appropriate measures to **ensure compliance with its obligations in the fields of environmental, social and labour law**, provided they are non-discriminatory. **Article 16.22** **Cooperation** […] 2. The Parties shall endeavour to cooperate in matters such as: […] (b) exchanging experiences and information, such as regulatory frameworks and best practices, including on the use and adoption of measures to **promote environmental, social and labour considerations in government procurement**; […]	2. A Party (the requesting Party) may request consultations with the other Party (the responding Party) regarding any matter arising under this Chapter by delivering a written request to the responding Party's contact point. The requesting Party shall include information that is specific and sufficient to enable the responding Party to respond, including identification of the matter at issue and an indication of the legal basis for the request. 3. Before a Party requests consultations under this Article for a matter arising under paragraph 4 or paragraph 6 of Article 22.3 (General Commitments), that Party shall consider whether it maintains environmental laws that are substantially equivalent in scope to the environmental laws that would be the subject of the dispute and shall identify and notify those laws to the responding Party. The Parties shall take this issue into account during the consultations. 4. Unless the Parties agree otherwise, they shall enter into consultations promptly, and no later than 30 days after the date of receipt by the responding Party of the request. 5. The Parties shall make every effort to arrive at a mutually agreed solution to the matter, which may include appropriate cooperative activities. The Parties may seek advice or assistance from any person or body they deem appropriate in order to examine the matter. 6. Consultations pursuant to this Article, Article 22.24 (Joint Committee Consultations) and Article 22.25 (Ministerial Consultations) may be held in person or by any technological means available as agreed by the Parties.

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		(f) encouraging **greater participation by women** in government procurement to the extent possible; […] **CHAPTER 22** **ENVIRONMENT** **Article 22.1** **Definitions** For the purposes of this Chapter: "environmental law" means a law or regulation of a Party, or provision thereof, including any that implements the Party's obligations under a multilateral environmental agreement, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through: (a) the prevention, abatement or control of: the release, discharge or emission of pollutants or environmental contaminants including greenhouse gases; (b) the control of environmentally hazardous or toxic chemicals, substances, materials or wastes, and the dissemination of information related thereto; or (c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas, but does not include a law or regulation, or provision thereof, directly related to worker safety or health, nor any law or regulation, or provision thereof, the primary purpose of which is managing the subsistence or aboriginal harvesting of natural resources; […] **Article 22.2** **Objectives** 1. The objectives of this Chapter are **to promote mutually supportive trade and environmental policies; promote high levels of environmental protection and effective enforcement of environmental laws; and enhance the capacities of the Parties to address trade-related environmental issues**, including through cooperation. 2. Taking account of their respective domestic priorities and circumstances, the Parties recognise that **enhanced cooperation to protect and conserve the environment and sustainably manage their natural resources brings benefits that can contribute to sustainable development, strengthen their environmental governance**, and complement the objectives of this Agreement.	7. Consultations pursuant to this Article, Article 22.24 (Joint Committee Consultations) and Article 22.25 (Ministerial Consultations), and in particular, positions taken by the Parties during consultations, shall be confidential and without prejudice to the rights of either Party in any further or other proceedings. **Article 22.24** **Joint Committee Consultations** 1. If the Parties have failed to resolve the matter under Article 22.23 (Environment Consultations), either Party may request that the Joint Committee convene to consider the matter by delivering a written request to the contact point of the other Party. 2. The Joint Committee shall promptly convene following the delivery of the request, and shall seek to resolve the matter including, if appropriate, by gathering relevant scientific and technical information from governmental or non-governmental experts. **Article 22.25** **Ministerial Consultations** If the Parties have failed to resolve the matter under Article 22.24 (Joint Committee Consultations), either Party may refer the matter to the relevant Ministers of the Parties by delivering a written request to the contact point of the other Party. The relevant Ministers shall seek to resolve the matter.

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		3. The Parties further recognise that it is inappropriate to establish or use their environmental laws or other environmental measures in a manner which would constitute a disguised restriction on trade or investment between the Parties. **Article 22.3** **General Commitments** 1. The Parties recognise the **importance of mutually supportive trade and environmental policies and practices to improve environmental protection in the furtherance of sustainable development**. 2. The Parties recognise **the sovereign right of each Party to establish its own levels of domestic environmental protection** and its own priorities relating to the environment, including climate change, and to establish, adopt or modify its environmental laws and policies accordingly. 3. Each Party shall strive to ensure that its environmental laws and policies provide for, and encourage, **high levels of environmental protection** and to continue to improve its respective levels of environmental protection. 4. Neither Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties after the date of entry into force of this Agreement. 5. The Parties recognise that each Party retains the right to exercise discretion and to make decisions regarding: (a) investigatory, prosecutorial, regulatory, and compliance matters; and (b) the allocation of environmental enforcement resources with respect to other environmental laws determined to have a higher priority. Accordingly, the Parties understand that with respect to the enforcement of environmental laws, a Party is in compliance with paragraph 4 if a course of action or inaction reflects a reasonable exercise of that discretion, or results from a bona fide decision regarding the allocation of those resources in accordance with priorities for enforcement of its environmental laws. 6. Without prejudice to paragraph 2, the Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws. Accordingly, **a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws** in order to encourage trade or investment between the Parties.	**Article 22.26** **Dispute Resolution** 1. If the Parties have failed to resolve the matter under Article 22.23 (Environment Consultations), Article 22.24 (Joint Committee Consultations) and Article 22.25 (Ministerial Consultations), within 120 days after the date of receipt of a request under Article 22.23 (Environment Consultations), or any other period as the Parties may agree, the requesting Party may request consultations under Article 30.7 (Consultations – Dispute Settlement) or request the establishment of a panel under Article 30.8 (Request for Establishment of a Panel – Dispute Settlement). 2. In addition to the requirements set out in subparagraph 1(a) of Article 30.10 (Qualification of Panellists), for a dispute arising under this Chapter panellists other than the chair shall have sufficient expertise or experience in environmental law or practice. **CHAPTER 27** **Cooperation** **Article 27.4** **Committee on Cooperation** 1. The Parties hereby establish a Committee on Cooperation, composed of government representatives of each Party. 2. The Committee shall: (a) review and monitor the implementation and operation of cooperation provisions in other Chapters of this Agreement related to areas of cooperation listed in Article 27.2 (Areas of Cooperation); (b) facilitate the exchange of information between the Parties including on experiences and lessons learned through cooperation activities undertaken between the Parties;

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		7. Where a Party has defined environmental law under Article 22.1 (Definitions) to include only laws and regulations at the central level of government (first Party) and where the other Party (second Party) considers that an environmental law at the sub-central level of government of the first Party is not being effectively enforced by the relevant sub-central level of government through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties, the second Party may request a dialogue with the first Party. The request shall contain information that is specific and sufficient to enable the first Party to evaluate the matter at issue, and an indication of how the matter is negatively affecting trade or investment of the second Party. 8. Nothing in this Chapter shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of the other Party. **Article 22.4** **Multilateral Environmental Agreements** 1. The Parties recognise that multilateral environmental agreements to which they are party play an important role, globally and domestically, in protecting the environment, and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. Accordingly, each Party affirms its commitment to implement the multilateral environmental agreements to which it is a party. 2. The Parties emphasise the need to enhance the mutual supportiveness between trade and environmental law and policies, through dialogue between the Parties on trade and environmental issues of mutual interest, particularly with respect to the negotiation and implementation of relevant multilateral environmental agreements and trade agreements. **Article 22.5** **Climate Change** 1. Each Party affirms its **commitment to address climate change**, including under the *United Nations Framework Convention on Climate Change* done at New York on 9 May 1992 and the *Paris Agreement* done at Paris on 12 December 2015 ("Paris Agreement"), to which both Parties are party, and recognises the importance of achieving their goals. 2. The Parties emphasise that efforts to address climate change require collective and urgent action, and acknowledge the role of global trade and investment in these efforts.	(c) discuss and consider issues or proposals for future cooperation activities including, as appropriate, on analytical topics relating to monitoring, measurement, information gathering, and interpretation and analysis of information relevant to cooperation activities under this Agreement; (d) invite, as appropriate, private sector entities, non-governmental organisations, civil society, relevant experts, stakeholders or other relevant institutions, to assist in the development and implementation of cooperation activities; (e) consider any matter, or matters raised by any standing working group or other subsidiary body including dialogues, related to areas of cooperation pursuant to Article 27.2 (Areas of Cooperation); (f) coordinate with other committees, working groups and any other subsidiary body, including dialogues, established under this Agreement as appropriate, in support of the development and implementation of cooperation activities; (g) consider any matter related to cooperation and support any cooperation activities referred to it under any Chapter of this Agreement; (h) supervise the work of any committees, working groups or other subsidiary bodies including dialogues established under this Agreement, where the Agreement so provides; and (i) seek to resolve differences that may arise concerning the interpretation or application of this Agreement in relation to areas of cooperation pursuant to Article 27.2 (Areas of Cooperation).

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		3. The Parties recognise the important role that cooperation can play in addressing climate change. Consistent with Article 22.20 (Cooperation Frameworks), the Parties shall cooperate to address matters of mutual interest which may include: (a) emission reduction opportunities across all sectors and greenhouse gases; (b) exchange on policies, laws, and measures that can contribute to a reduction in greenhouse gas emissions; (c) development and acceleration of cost-effective, low, and zero emissions technologies; (d) clean and renewable energy sources and supporting infrastructure and enabling technologies; (e) energy efficiency; (f) sustainable transport and sustainable urban infrastructure development; (g) addressing deforestation and forest degradation; (h) emissions measurement, reporting, and verification; (i) climate change adaptation and resilience; (j) nature-based solutions to mitigate and adapt to the impacts of climate change; and (k) capacity building and development assistance for climate vulnerable countries. **Article 22.6** **Environmental Goods and Services** 1. The Parties recognise the **importance of trade and investment in environmental goods and services as a means of improving environmental and economic performance, contributing to clean growth, and addressing global environmental challenges**. 2. Accordingly, each Party shall facilitate and promote, as appropriate, trade and investment in environmental goods and services, including environmental and low emissions technologies, clean and renewable energy and enabling infrastructure, and energy efficient goods and services. 3. The Environment Working Group shall consider issues identified by a Party or the Parties related to trade in environmental goods and services, including issues identified as potential non-tariff barriers to that trade. The Parties shall endeavour to address any potential barrier to trade in environmental goods and services that may be identified by a Party, including by working through the Environment Working Group and in conjunction with other relevant committees established under this Agreement, as appropriate.	3. The Committee may: (a) make recommendations, or refer matters, to the Joint Committee; (b) facilitate public-private partnerships in cooperation activities; (c) establish ad hoc working groups, as appropriate, which may include government representatives, non-government representatives or both; (d) refer matters to any ad hoc or standing working group or any other subsidiary body including dialogues related to areas of cooperation pursuant to Article 27.2 (Areas of Cooperation); and (e) engage in other activities as the Parties may decide. 4. The Committee shall meet within one year of the date of entry into force of this Agreement, and thereafter as agreed by the Parties. 5. The Committee shall produce an agreed record of its meetings, including decisions and next steps and, as appropriate, report to the Joint Committee.

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		4. The Parties shall cooperate bilaterally and in international fora, as appropriate, on ways to enhance trade and investment in environmental goods and services. **Article 22.7** **Circular Economy** 1. The Parties **recognise the importance of a transition towards a circular economy and the role that waste avoidance and greater resource efficiency can play in reducing pressure on the natural environment**, improving resource security, and reducing other associated negative environmental effects arising from the use of materials throughout their lifecycle. The Parties further recognise the role that trade can play in achieving these goals through trade in second-hand goods, end-of-life products, secondary materials, processed waste, as well as trade in related services. 2. The Parties recognise the importance of avoiding the generation of waste and encouraging the reuse of products and resource efficient product design, including the designing of products to be easier to reuse, dismantle, or recycle at end of life. The Parties also recognise the importance of encouraging environmental labelling, including eco-labelling, to make it easier for consumers to make more sustainable choices. 3. Consistent with Article 22.20 (Cooperation Frameworks), the Parties shall cooperate to address matters of mutual interest related to the transition towards a circular economy. Areas of cooperation may include: (a) barriers to trade in relation to the circular economy; (b) environmental labelling, including eco-labelling; (c) sustainable supply chain management, including enhanced reverse logistics; (d) investment in, and financing of, circular economy projects; (e) reuse, repair, remanufacture, and recycling; (f) resource efficient product design that makes products more durable and easier to repair, recycle, and reuse; (g) extended producer responsibility; (h) technological innovation related to the circular economy including innovative approaches to recycling and litter reduction, processing waste, waste tracking mechanisms, data collection, sustainable plastic packaging, and alternative materials;	

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		(i) best practice in resource efficiency in key fields such as industrial symbiosis, sustainable use of chemicals and plastics, and new business models such as product service systems; (j) approaches to reducing the amount of waste sent to landfill and accelerating the movement of waste further up the waste hierarchy; and (k) best practice on sustainable management of hazardous wastes. **Article 22.8** **Ozone Depleting Substances and Hydrofluorocarbons** 1. The Parties recognise that emissions of certain substances can significantly deplete and otherwise modify the ozone layer in a manner that is likely to result in adverse effects on human health and the environment, and that the reduction of certain substances can address global environmental challenges, including climate change. Accordingly, **each Party shall take measures to control the production and consumption of, and trade in, substances controlled by the Montreal Protocol**. 2. The Parties also recognise the importance of public participation and consultation, in accordance with their respective law or policy, in the development and implementation of measures concerning the protection of the ozone layer. Each Party shall make publicly available appropriate information about its programmes and activities, including cooperative programmes, that are related to ozone depleting substances and hydrofluorocarbons. 3. Consistent with 22.20 (Cooperation Frameworks), the Parties shall cooperate to address matters of mutual interest related to ozone-depleting substances and hydrofluorocarbons. Cooperation may include exchanging information and experiences in areas related to: (a) environmentally friendly alternatives to ozone-depleting substances and hydrofluorocarbons, as well as emerging technologies for sustainable cooling and refrigeration; (b) refrigerant management practices, policies, and programmes including lifecycle management of coolants and refrigerants; (c) methodologies for stratospheric ozone measurements; (d) combating illegal trade in ozone-depleting substances and hydrofluorocarbons; and (e) barriers to trade in, and uptake of, sustainable cooling and refrigeration technologies.	

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		Article 22.9 **Air Quality** 1. The Parties acknowledge that trade involving production, consumption, and transportation of goods across air, sea and land can cause air pollution and that air pollution can travel long distances and recognise **the importance of reducing domestic and transboundary air pollution**, and that cooperation can be beneficial in achieving these objectives. 2. The Parties recognise the importance of public participation and consultation in accordance with their respective law or policy in the development and implementation of measures to reduce domestic and transboundary air pollution and in ensuring access to air quality data. 3. Consistent with Article 22.20 (Cooperation Frameworks) the Parties shall cooperate to address matters of mutual interest with respect to air quality, which may include: (a) ambient air quality planning; (b) modelling and monitoring, including spatial distribution of main sources and their emissions; (c) measurement and inventory methodologies for air quality and emissions measurements; and (d) reduction, control, and prevention technologies and practices. **Article 22.10** **Protection of the Marine Environment from Ship Pollution** 1. The Parties recognise **the importance of protecting and preserving the marine environment**. To that end, each Party shall take measures to prevent the pollution of the marine environment from ships. 2. The Parties also recognise the importance of public participation and consultation, in accordance with their respective law or policy, in the development and implementation of measures to prevent the pollution of the marine environment from ships. Each Party shall make publicly available appropriate information about its programmes and activities, including cooperative programmes, that are related to the prevention of pollution of the marine environment from ships. 3. Consistent with Article 22.20 (Cooperation Frameworks), the Parties shall cooperate to address matters of mutual interest with respect to pollution of the marine environment from ships. Areas of cooperation may include: (a) accidental pollution from ships; (b) pollution from routine operations of ships;	

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		(c) deliberate pollution from ships; (d) development of technologies to minimise ship-generated waste; (e) emissions from ships; (f) adequacy of port waste reception facilities; (g) increased protection in special geographic areas; and (h) enforcement measures including notifications to flag States and, as appropriate, by port States. **Article 22.11** **Marine Litter** 1. The Parties acknowledge that trade is a source of marine litter and the **importance of taking action to prevent and reduce marine litter,** including plastics and microplastics, in order to preserve marine and coastal ecosystems, prevent the loss of biodiversity, and mitigate marine litter's costs and impacts. 2. Recognising the global nature of the challenge of marine litter, the Parties acknowledge the **importance of maintaining measures under their environmental laws and policies to prevent and reduce marine litter and taking action to address marine litter in other fora.** 3. Accordingly, the Parties shall cooperate to address matters of mutual interest with respect to combatting marine litter, which may include: (a) addressing land and sea based pollution; (b) promoting waste management infrastructure; (c) advancing efforts related to abandoned, lost, or otherwise discarded fishing gear; and (d) circular economy and waste management hierarchy measures relevant to addressing marine litter. **Article 22.12** **Marine Wild Capture Fisheries** 1. The Parties acknowledge their role as major consumers, producers and traders of fisheries products, and the importance of the marine fisheries sector to their development and to the livelihoods of their fishing communities, including artisanal or small-scale fisheries. The Parties also acknowledge that the fate of marine capture fisheries is an urgent resource problem facing the international community. Accordingly, the Parties recognise the **importance of taking measures aimed at the conservation and the sustainable management of fisheries.**	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		2. In this regard, the Parties acknowledge that inadequate fisheries management, fisheries subsidies that contribute to overfishing and overcapacity, and illegal, unreported, and unregulated ("IUU") fishing can have significant negative impacts on trade, development and the environment, and recognise the need for individual and collective action to address the problems of overfishing and unsustainable utilisation of fisheries resources, with appropriate consideration of the rights of coastal States to fisheries resources and the obligations of coastal States, flag States and port States in managing fishing activity. 3. Accordingly, each Party shall operate a fisheries management system that regulates marine wild capture fishing and that is designed to: (a) prevent overfishing and overcapacity; (b) reduce bycatch of non-target species and juveniles, including through the regulation of fishing gear that results in bycatch and the regulation of fishing in areas where bycatch is likely to occur; and (c) promote the recovery of overfished stocks for all marine fisheries in which that Party's persons conduct fishing activities. Such a management system shall be based on the best scientific evidence available and on internationally recognised best practices for fisheries management and conservation as reflected in the relevant provisions of international instruments aimed at ensuring the sustainable use and conservation of marine species.11 4. Each Party shall promote the long-term conservation of sharks, marine turtles, seabirds, and marine mammals, through the implementation and effective enforcement of conservation and management measures. Those measures should include, as appropriate: (a) for sharks, the collection of species-specific data, fisheries bycatch mitigation measures, catch limits, and finning prohibitions; and (b) for marine turtles, seabirds, and marine mammals: fisheries bycatch mitigation measures, conservation and relevant management measures, prohibitions, and other measures in accordance with relevant international agreements to which the Party is party.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		5. The Parties recognise that the implementation of a fisheries management system that is designed to prevent overfishing and overcapacity and to promote the recovery of overfished stocks must include the control, reduction, and eventual elimination of all subsidies that contribute to overfishing and overcapacity. To that end, neither Party shall grant or maintain any of the following subsidies12within the meaning of Article 1.1 of the SCM Agreement that are specific within the meaning of Article 2 of the SCM Agreement: (a) subsidies for fishing13that negatively affect14fish stocks that are in an overfished15condition; and (b) subsidies provided to any fishing vessel16 while listed by the flag State or a relevant Regional Fisheries Management Organisation or Arrangement for IUU fishing in accordance with the rules and procedures of that organisation or arrangement and in conformity with international law. 6. Subsidy programmes that are established by a Party before the date of entry into force of this Agreement for that Party and which are inconsistent with paragraph 5(a) shall be brought into conformity with that paragraph as soon as possible and no later than three years of the date of entry into force of this Agreement for that Party. 7. In relation to subsidies that are not prohibited by paragraph 5(a) or 5(b), and taking into consideration a Party's social and developmental priorities, including food security concerns, each Party shall make best efforts to refrain from introducing new, or extending, or enhancing existing subsidies within the meaning of Article 1.1 of the SCM Agreement, to the extent they are specific within the meaning of Article 2 of the SCM Agreement, that contribute to overfishing or overcapacity. 8. With a view to achieving the objective of eliminating subsidies that contribute to overfishing and overcapacity, the Parties shall review the disciplines in paragraph 5 through existing channels, as appropriate. 9. Each Party shall also provide, to the extent possible, information in relation to other fisheries subsidies that the Party grants or maintains that are not covered by paragraph 5, in particular fuel subsidies. 10. A Party may request information from the other Party regarding fisheries subsidies notifications provided in accordance with WTO data reporting requirements. The notifying Party shall respond to that request as quickly as possible and in a comprehensive manner.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		11. The Parties recognise the importance of concerted international action to address IUU fishing as reflected in regional and international instruments17and shall endeavour to improve cooperation internationally in this regard, including with and through competent international organisations. 12. In support of efforts to combat IUU fishing practices and to help deter trade in products from species harvested from those practices, each Party shall: (a) cooperate with the other Party to identify needs and to build capacity to support the implementation of this Article; (b) support monitoring, control, surveillance, compliance, and enforcement systems, including by adopting, reviewing, or revising, as appropriate, measures to: (i) deter vessels that are flying its flag18 and its nationals from engaging in IUU fishing activities; and (ii) address the transhipment at sea of fish or fish products caught through IUU fishing activities; and (c) implement port State measures, including through actions consistent with the Port State Measures Agreement;19 (d) strive to act consistently with relevant conservation and management measures adopted by Regional Fisheries Management Organisations of which it is not a member so as not to undermine those measures; and (e) endeavour not to undermine catch or trade documentation schemes operated by Regional Fisheries Management Organisations or Arrangements or an intergovernmental organisation whose scope includes the management of shared fisheries resources, including straddling and highly migratory species, where that Party is not a member of those organisations or arrangements. 13. Consistent with Article 28.2 (Publication – Transparency and Anti-Corruption), a Party shall, to the extent possible, provide the other Party with the opportunity to comment on proposed measures that are designed to prevent trade in fisheries products that result from IUU fishing.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		Article 22.13 **Sustainable Forest Management and Trade** 1. The Parties recognise the **importance of conservation and sustainable forest management, including in relation to addressing climate change and reducing biodiversity loss, and the role of trade in pursuing this objective**. The Parties acknowledge their role as major consumers, producers, and traders of forest products and the importance of the forest sector to the development and livelihood of communities and indigenous peoples. 2. The Parties recognise the importance of: (a) **the sustainable management of forests for providing environmental, economic, and social benefits for present and future generations**; (b) halting deforestation and forest degradation, including with respect to trade in commodities related to those activities; (c) trade in forest products harvested from sustainably managed forests and in accordance with the law of the country of harvest; and (d) taking measures that contribute to combatting illegal logging and related trade and to promoting trade in legally harvested forest products. 3. Accordingly, each Party shall take measures to combat illegal logging and related trade. 4. The Parties recognise that some forest products, when sourced from sustainably managed forests and used appropriately, can store carbon and avoid greenhouse gas emissions in other sectors and thus contribute toward achieving global environmental objectives. 5. Each Party shall: (a) cooperate and exchange information, as appropriate, on the implementation of measures that contribute to combatting illegal logging and related trade, including with respect to third countries; and (b) cooperate bilaterally and in multilateral fora, as appropriate, on opportunities to halt deforestation and forest degradation, and the trade in commodities related to those activities, to reduce biodiversity loss, and to address other sustainable forest management and trade matters.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		Article 22.14 **Trade and Biodiversity** 1. The Parties recognise **the importance of conservation and sustainable use of biodiversity, including marine biodiversity, and their key role in achieving sustainable development.** 2. Accordingly, each Party shall promote and encourage the conservation and sustainable use of biological diversity, in accordance with its law and policy. 3. The Parties recognise the importance of respecting, preserving, and maintaining knowledge and practices of indigenous and local communities embodying traditional lifestyles that contribute to the conservation and sustainable use of biological diversity. 4. The Parties recognise the importance of facilitating access to genetic resources within their respective domestic jurisdictions, consistent with each Party's international obligations. The Parties further recognise that each Party may require, through domestic measures, prior informed consent to access those genetic resources in accordance with domestic measures and, where such access is granted, the establishment of mutually agreed terms, including with respect to sharing of benefits from the use of those genetic resources, between users and providers. 5. The Parties also recognise the importance of public participation and consultation, in accordance with their respective law and policy, in the development and implementation of measures concerning the conservation and sustainable use of biological diversity. Each Party shall make publicly available information, about its programmes and activities, including cooperative programmes, related to the conservation and sustainable use of biological diversity. 6. Consistent with Article 22.20 (Cooperation Frameworks), the Parties shall cooperate on matters of mutual interest. Cooperation may include exchanging information and experiences in areas related to: (a) the conservation and sustainable use of biodiversity; (b) the protection and maintenance of ecosystems and ecosystem services, including marine ecosystems; (c) access to genetic resources and the sharing of benefits arising from their utilisation; (d) embedding biodiversity considerations into policies, strategies, and practices of public and private actors in relevant sectors; and	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		(e) safeguarding wild and managed pollinators, and promoting the sustainable use of pollination services. **Article 22.15** **Invasive Alien Species** 1. The Parties recognise that the movement of terrestrial and aquatic invasive alien species across borders through trade-related pathways can adversely affect the environment, economic activities and development, and plant, animal, and human health. The Parties also recognise that the prevention, surveillance, detection, control, and, when possible, eradication, of invasive alien species are critical strategies for managing those adverse impacts. 2. Accordingly, the Parties shall identify cooperative opportunities to share information and management experiences on the movement, prevention, detection, control, and eradication of invasive alien species, with a view to enhancing efforts to assess and address the risks and adverse impacts of invasive alien species. **Article 22.16** **Conservation and Illegal Wildlife Trade** 1. The Parties affirm the **importance of combating the illegal take of, and illegal trade in, wild fauna and flora, and acknowledge that this trade undermines efforts to conserve and sustainably manage those natural resources, has social consequences, distorts legal trade in wild fauna and flora, and reduces the economic and environmental value of these natural resources.** 2. Accordingly, the Parties affirm their commitment to implement the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* done at Washington D.C. on 3 March 1973 ("CITES"). 3. The Parties commit to promote conservation and to combat the illegal take of, and illegal trade in, wild fauna and flora. To that end, the Parties shall: (a) exchange information and experiences on issues of mutual interest related to combating the illegal take of, and illegal trade in, wild fauna and flora, including combating illegal logging and associated illegal trade, and promoting the legal trade in associated products; (b) undertake, as appropriate, joint activities on conservation issues of mutual interest, including through relevant regional and international fora; and (c) endeavour to implement, as appropriate, CITES resolutions that aim to protect and conserve species whose survival is threatened by international trade.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		4. Each Party further commits to: (a) take appropriate measures to protect and conserve wild fauna and flora that it has identified to be at risk within its territory, including measures to conserve the ecological integrity of specially protected natural areas, for example wetlands; (b) maintain or strengthen government capacity and institutional frameworks to promote sustainable forest management and wild fauna and flora conservation, and endeavour to enhance public participation and transparency in these institutional frameworks; and (c) endeavour to develop and strengthen cooperation and consultation with interested non-governmental entities in order to enhance implementation of measures to combat the illegal take of, and illegal trade in, wild fauna and flora. 5. In a further effort to address the illegal take of, and illegal trade in, wild fauna and flora, including parts and products thereof, each Party shall take measures to combat, and cooperate to prevent, the trade of wild fauna and flora that, based on credible evidence22, were taken or traded in violation of that Party's laws and regulations, the primary purpose of which is to conserve, protect, or manage wild fauna or flora. Such measures shall include sanctions, penalties, or other effective measures, including administrative measures, that can act as a deterrent to such trade. In addition, each Party shall endeavour to take measures to combat the trade of wild fauna and flora transhipped through its territory that, based on credible evidence, were illegally taken or traded. 6. The Parties recognise that each Party retains the right to exercise administrative, investigatory, and enforcement discretion in its implementation of paragraph 5, including by taking into account in relation to each situation the strength of the available evidence and the seriousness of the suspected violation. In addition, the Parties recognise that in implementing paragraph 5, each Party retains the right to make decisions regarding the allocation of administrative, investigatory, and enforcement resources. 7. In order to promote the widest measure of law enforcement cooperation and information sharing between the Parties to combat the illegal take of, and illegal trade in, wild fauna and flora, the Parties shall endeavour to identify opportunities, consistent with their respective laws and regulations, and in accordance with applicable international agreements, to enhance law enforcement cooperation and information sharing, for example by creating and participating in law enforcement networks.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		8. The Parties recognise the importance of continuing efforts to combat the illegal trade in wildlife, including ivory, and the importance of appropriate regulation of domestic wildlife markets worldwide, including markets for ivory and goods containing ivory, that are contributing to poaching or illegal trade. Accordingly, the Parties shall cooperate as appropriate to support non-party efforts to introduce and implement domestic controls on the take and trade in wildlife, and on markets for ivory and goods containing ivory, that are contributing to poaching or illegal trade. **Article 22.17** **Corporate Social Responsibility** Each Party should **encourage enterprises operating within its territory or jurisdiction, to adopt voluntarily, into their policies and practices, principles of corporate social responsibility that are related to the environment**, consistent with internationally recognised standards and guidelines that have been endorsed or are supported by that Party. **Article 22.18** **Opportunities for Public Participation** 1. Each Party shall seek to accommodate requests for information regarding the Party's implementation of this Chapter. 2. Each Party shall make use of existing, or establish new, consultative mechanisms, for example domestic advisory committees, to seek views on matters related to the implementation of this Chapter. These mechanisms may include persons with relevant experience, as appropriate, including experience in business, natural resource conservation and management, or other environmental matters. **Article 22.20** **Cooperation Frameworks** 1. The Parties recognise the importance of cooperation as a mechanism to implement this Chapter, to enhance its benefits and to strengthen the Parties' joint and individual capacities to protect the environment and to promote sustainable development and clean growth as they strengthen their trade and investment relations. 2. Accordingly, the Parties shall cooperate as appropriate on the matters identified in this Chapter. Such cooperation may take place bilaterally and in international fora. 3. Each Party may: (a) share its priorities for cooperation with the other Party, including the objectives of that cooperation;	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		implementation of this Chapter; and (c) develop and participate in cooperation activities and programmes as agreed by the Parties. 4. Cooperation may be undertaken through various means including: dialogue, workshops, seminars, conferences, collaborative programmes, and projects; technical assistance to promote and facilitate cooperation and training, the sharing of information, data, and evidence based practices on policies and procedures; and the exchange of experts. 5. Each Party may promote public participation in the development and implementation of cooperative activities, as appropriate. 6. All cooperative activities under this Chapter are subject to the availability of funds and of human and other resources, and to the applicable laws and regulations of the Parties. The Parties shall decide, on a case-by-case basis, the funding of cooperative activities. **CHAPTER 24** **TRADE AND GENDER EQUALITY** **Article 24.1** **Objectives** 1. The Parties acknowledge the **importance of advancing gender equality for inclusive economic growth** and that gender-responsive policies are important for ensuring equitable participation in domestic, regional and global economies. 2. Accordingly, the Parties recognise the importance of advancing gender equality and women's economic empowerment across this Agreement and agree to incorporate gender perspectives in their trade and investment relationship. 3. The Parties affirm their commitment to the *WTO Joint Ministerial Declaration on Trade and Women's Economic Empowerment* made at the 11th WTO Ministerial Conference in Buenos Aires in December 2017 and acknowledge the work of other multilateral fora, such as the Organisation for Economic Co-operation and Development, in advancing the evidence base on women's economic empowerment and trade. 4. The Parties acknowledge that, in addition to the provisions in this Chapter, there are provisions in other Chapters of this Agreement that seek to advance gender equality and women's economic empowerment in the context of trade and investment including in relation to services, SMEs, financial services, procurement, labour, and digital trade.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		(b) propose cooperation activities related to the 5. The Parties recognise the importance of evidence-based interventions and measures that facilitate women's full access to and ability to benefit from this Agreement. 6. The Parties further recognise the benefits of sharing their experiences in designing, implementing, resourcing and strengthening policies, programmes and other initiatives to advance gender equality and address the systemic and other barriers which prevent women, including as workers, business owners and entrepreneurs, from participating equitably in all aspects of trade. **Article 24.2** **Trade and Gender Equality Cooperation Activities** 1. The Parties shall undertake cooperation activities, as appropriate, that support women workers, business owners and entrepreneurs to access the full benefits and opportunities created by this Agreement. 2. The Parties recognise the importance of carrying out the cooperation activities with the inclusive participation of women. 3. Cooperation activities that may be undertaken by the Parties include, but are not limited to, exchanging information, experiences and evidence relating to: (a) programmes and initiatives aimed at improving the access of women to markets, technology and financing; (b) promoting equal opportunities for women in the workplace, including workplace flexibility; (c) the development and strengthening of women's leadership and business networks; (d) improving the access of women and girls to leadership opportunities and education, including in fields in which they are under-represented, such as science, technology, engineering, and mathematics, insofar as those activities are related to trade; (e) trade missions for businesswomen and women entrepreneurs; (f) collaborating, including with developing countries and in multilateral fora, to promote equitable participation of women in supply chains; and (g) enabling women's access to online business tools and opportunities to strengthen digital skills, and identifying and addressing barriers to women accessing digital trade.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		4. To support achievement of the objectives of this Chapter, the Parties shall cooperate and exchange information on the integration of gender in approaches to data collection, analysis and monitoring, as agreed by the Parties, which may include: (a) methods and procedures for the collection of sex-disaggregated data, the use of indicators, monitoring and evaluation methodologies, and the analysis of gender statistics related to trade; (b) conducting gender analyses of trade policies, incorporating both quantitative and qualitative data and information, and for the monitoring of their effects on women as workers, entrepreneurs and business-owners; or (c) undertaking research on trade and gender equality where appropriate. **Article 24.3** **Dialogue on Trade and Gender Equality** 1. The Parties agree to establish a Dialogue on Trade and Gender Equality (the Dialogue) composed of government representatives from each Party. Meetings of the Dialogue shall take place by agreement of the Parties. 2. The Dialogue may consider any matter that the Parties consider appropriate to advance gender equality and women's economic empowerment in the Parties' trade and investment relationship. The Committee on Cooperation shall consider any matter under this Chapter related to cooperation and support any cooperation activities. 3. The Dialogue may engage and facilitate communication with relevant stakeholders which may include women workers, business owners and entrepreneurs, in its consideration of matters relevant to this Chapter. 4. The Dialogue shall report on the progress of its work to the Committee on Cooperation established under paragraph 1 of Article 27.4 (Committee on Cooperation – Cooperation), while seeking to avoid duplication of its work. 5. The Dialogue may work with other bodies and subsidiary bodies established under this Agreement to advance the objectives of this Chapter and support the delivery of the cooperative activities described in Article 24.2 (Trade and Gender Equality Cooperation Activities), which may include providing advice or recommendations to the Joint Committee as appropriate.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		CHAPTER 25 **ANIMAL WELFARE AND ANTIMICROBIAL RESISTANCE** **Article 25.1** **Animal Welfare** 1. The Parties recognise that animals are sentient beings. They also recognise the connection between improved welfare of farmed animals and sustainable food production systems. 2. The Parties affirm the right of each Party to establish its own policies and priorities for the protection of animal welfare and to adopt or modify its laws, regulations and policies in this area. 3. Each Party recognises that it is inappropriate to encourage bilateral trade or investment by weakening or reducing its levels of protection for animal welfare. Accordingly, each Party shall endeavour to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its laws, regulations and policies in a manner that weakens or reduces its level of animal welfare protection as an encouragement for trade or investment between the Parties. 4. Each Party shall endeavour to ensure that its laws, regulations and policies provide for and encourage high levels of animal welfare protection and shall endeavour to continue to improve their respective levels of animal welfare protection, including through their laws, regulations and policies. 5. The Parties shall exchange information, expertise and experiences in areas of mutual interest in the field of animal welfare, with the aim of improving understanding of each other's approaches and regulatory systems and improving animal welfare standards. 6. The Parties shall continue to strengthen and build on their existing cooperation in the field of animal welfare, including on issues relating to the treatment of farmed animals, including by: (a) encouraging cooperation on research in the field of animal welfare; and (b) working together in relevant international fora on areas of mutual interest, including to promote the development of the best possible animal welfare standards and practices for animals farmed for food production. 7. The Parties encourage non-governmental bodies and persons of the Parties to exchange views, experiences and information as part of wider collaboration in the field of animal welfare.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		8. The Parties hereby establish a Joint Working Group on Animal Welfare drawn from government representatives of the Parties responsible for animal welfare matters. 9. The Joint Working Group will, among other things, provide a forum for: (a) cooperation on initiatives of mutual interest; (b) reviewing developments in animal welfare; (c) promoting high animal welfare practices; and (d) information sharing, under this Chapter. 10. The Joint Working Group shall have its first meeting within one year of the entry into force of this Agreement, and thereafter at regular intervals as agreed by the Parties. **Article 25.2** **Antimicrobial Resistance** 1. The Parties recognise that antimicrobial resistance (AMR) is a serious global threat to human and animal health. 2. The Parties recognise that the nature of the threat requires a transnational and One Health approach, in line with the Global Action Plan, acknowledging the interdependencies between animal health, human health, and the environment, and the implications for food safety and food security. 3. Each Party shall explore initiatives to promote the reduced need for and appropriate use of antimicrobial agents in animal production and health, and in crop production, including promoting guidance on the prudent and responsible use of antimicrobial agents in good husbandry and veterinary practices, and biosecurity. 4. The Parties shall cooperate, on areas of mutual interest in relevant international organisations, including the World Organisation for Animal Health, the United Nations Food and Agriculture Organization, and the Codex Alimentarius Commission, on the further development of international codes, guidelines, standards, recommendations and other international initiatives aiming to promote the prudent and responsible use of antimicrobial agents, including those which are critically important for human medicine. Each Party shall support the implementation of such agreed international codes, guidelines, standards, recommendations and international initiatives. 5. The Parties recognise and support efforts made towards global harmonisation of surveillance and data collection. Each Party shall promote strengthened AMR surveillance and monitoring of antimicrobial use under a One Health approach and may exchange its experience in doing so with the other Party.	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		6. The Parties shall facilitate the exchange of information, expertise, and experiences in the field of combatting antimicrobial resistance, and identify common views, interests, priorities, and policies in this area. 7. The Committee on Cooperation established under Article 27.4 (Committee on Cooperation - Cooperation) shall consider any matter under this Article related to cooperation and support any cooperation activities. **CHAPTER 27** **COOPERATION** **Article 27.2** 1. The Parties shall, consistent with this Agreement, undertake and strengthen cooperation activities to assist in: (a) implementing this Agreement; (b) enhancing each Party's ability to take advantage of the economic opportunities created by this Agreement; and (c) promoting and facilitating trade and investment between the Parties. 2. Cooperation activities may include the following areas: (a) **environment**; (b) **trade and gender equality**; (c) development; (d) **labour**; (e) anti-corruption; and (f) **antimicrobial resistance**. 3. The Parties may undertake cooperation activities through, *inter alia:* (a) dialogue, workshops, seminars, conferences, collaborative programs and projects; (b) the sharing of best practices on policies and procedures; and (c) the exchange of experts and information. **CHAPTER 31** **GENERAL PROVISIONS AND EXCEPTIONS** **Article 31.1** **General Exceptions** […]	

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		2. The Parties understand that the measures referred to in paragraph (b) of Article XX of GATT 1994 **include environmental measures necessary to protect human, animal or plant life or health**, and that paragraph (g) of Article XX of GATT 1994 applies to **measures relating to the conservation of living and non-living exhaustible natural resources**. 3. For the purposes of Chapter 8 (Cross-Border Trade in Services), Chapter 9 (Financial Services), Chapter 10 (Professional Services and Recognition of Professional Qualifications), Chapter 11 (Temporary Entry for Business Persons), Chapter 12 (Telecommunications), Chapter 13 (Investment), Chapter 14 (Digital Trade), and Chapter 18 (State-Owned Enterprises and Designated Monopolies), paragraphs (a), (b) and (c) of Article XIV of GATS are incorporated into and made part of this Agreement, *mutatis mutandis*.2 The Parties understand that the measures referred to in paragraph (b) of Article XIV of GATS include **environmental measures necessary to protect human, animal or plant life or health**. […]	
India-UAE CEPA Signed 18 February 2022 Entered into force 01/05/2022	"RECOGNISING their right to regulate and to preserve the flexibility of the Parties to set legislative and regulatory priorities; "RECOGNISING FURTHER the need to protect legitimate public welfare objectives, such as health, safety, environmental protection, conservation of living or non-living exhaustible natural resources, integrity and stability of the financial system, and public morals, in accordance with the rights and obligations provided in this Agreement;"	**CHAPTER 14** **ECONOMIC COOPERATION** **Article 14.1** **Objectives** […] 2. Economic cooperation under this Chapter shall be built upon a common understanding between the Parties to support the implementation of this Agreement, with the objective of maximising its benefits, supporting pathways to trade and investment facilitation, and further improving market access and openness to contribute to **the sustainable inclusive economic growth** and prosperity of the Parties. **Article 14.5** **Environmental Cooperation** 1. The Parties recognise the importance of mutually supportive trade and environmental policies and practices to **improve environmental protection in the furtherance of sustainable development**. 2. The Parties recognise the sovereign right of each Party to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt or modify its environmental laws and policies accordingly.	CHAPTER 14 **ECONOMIC COOPERATION** 1. For the purposes of the effective implementation and operation of this Chapter, the Parties shall establish a Committee on Economic Cooperation (CEC). 2. The CEC shall undertake the following functions: (a) monitor and assess the implementation of this Chapter; (b) identify new opportunities and agree on new ideas for prospective cooperation or capacity building activities; (c) formulate and develop Annual Work Program proposals and their implementation mechanisms; (d) coordinate, monitor and review progress of the Annual Work Program to assess its overall effectiveness and contribution to the implementation and operation to this Chapter;

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
		3. Each Party shall strive to ensure that its environmental laws and policies provide for, and encourage, **high levels of environmental protection** and to continue to improve its respective levels of environmental protection. 4. Each Party shall endeavour to effectively enforce its environmental laws. 5. The Parties recognise that each Party retains the right to exercise discretion and to make decisions regarding: (a) investigatory, prosecutorial, regulatory and compliance matters; and (b) the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities. Accordingly, the Parties understand that with respect to the enforcement of environmental laws a Party is in compliance with paragraph 4 if a course of action or inaction reflects a reasonable exercise of that discretion, or results from a bona fide decision regarding the allocation of those resources in accordance with priorities for enforcement of its environmental laws. 6. The Parties recognise that multilateral environmental agreements to which they are party play an important role, globally and domestically, in protecting the environment and that the respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. Accordingly, each Party affirms its commitment to implement the multilateral environmental agreements to which it is a party. 7. Nothing in this Section shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of the other Party.	(e) suggest amendments to the Annual Work Program to the Joint Committee through periodic evaluations; (f) cooperate with other Committees and/or subsidiary bodies established under this Agreement to perform stocktaking, monitoring and benchmarking on any issues related to the implementation of this Agreement, as well as to provide feedback and assistance in the implementation and operation of this Chapter; and (g) report to and, if deemed necessary, consult with the Joint Committee in relation to the implementation and operation of this Chapter.

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
India-Australia ECTA Signed 02/04/2022 Entered into force 29/12/2022	"RESOLVING to strengthen their economic relations, further liberalise and expand trade and investment, enhance economic growth, create opportunities for workers and business, improving living standards, and **promote sustainable growth**"; "RECOGNISING their **right to regulate** in order to meet national policy objectives, and determining to preserve their flexibility in setting legislative and regulatory priorities to **protect legitimate public welfare objectives**"	CHAPTER 6 **SANITARY AND PHYTOSANITARY MEASURES** **Article 6.2** **Objectives** The objectives of this Chapter are to: […] (b) provide a framework to facilitate bilateral trade between the Parties, while **protecting human, animal or plant life or health**;	CHAPTER 12 **ADMINISTRATIVE AND INSTITUTIONAL PROVISIONS** **Article 12.1** **Establishment of the Joint Committee** The Parties hereby establish a Joint Committee, which shall be composed of government representatives of the Parties at the level of senior officials or, when agreed by the Parties, at the level of Ministers. **Article 12.4** **Functions of the Joint Committee** 1. The Joint Committee shall: (a) assess, review and monitor the implementation and operation of this Agreement; (b) consider any matter relating to the implementation or operation of this Agreement; (c) consider ways to further trade and investment between the Parties, including improving market access; (d) consider and recommend to the Parties any proposal to amend this Agreement; (e) supervise and coordinate the work of all subcommittees, subsidiary bodies and working groups established under this Agreement; (f) during its first meeting, adopt the Rules of Procedure and Code of Conduct referred to in Article 13.11 (Rules of Procedure and Code of Conduct – Dispute Settlement); and (g) consider any other matter that may affect the operation of this Agreement. […]

Examples of ESG Clauses in Bilateral and Multilateral Investment Treaties			
BIT	**Preamble**	**Substantive Clauses**	**Institutional Provisions**
Colombia-Venezuela BIT Signed 03/02/2023	"CONVENCIDAS de que estos objetivos pueden alcanzarse sin comprometer las medidas de salud, seguridad y medioambiente, de aplicación general, así como los derechos laborales internacionalmente reconocidos"	**Artículo 1** Objeto El presente Acuerdo tiene por objeto establecer, mantener y consolidar un marco jurídico que facilite y promueva las inversiones directas transfronterizas realizadas por inversionistas de una Parte, en el territorio de la otra Parte, con la finalidad de promover el desarrollo armonioso, productivo y **sostenible** de ambos pueblos, en respeto a la soberanía y autodeterminación de cada una de las partes, de su ordenamiento jurídico nacional y del derecho internacional. **Artículo 5** **No Discriminación** a. Nada en este Acuerdo se interpretará para impedir que una Parte adopte, mantenga o aplique medidas jurídicas no discriminatorias: i. Diseñadas y aplicadas para la **protección de la vida humana, animal o vegetal o el medio ambiente**; ii. Garantizar el cumplimiento de las leyes y reglamentos que no sean incompatibles con las disposiciones del presente Acuerdo; o iii. Relacionados con la **conservación de los recursos naturales agotables vivos o no vivos**. […] **Artículo 7** **Expropiación y Nacionalización** a. Las inversiones realizadas por inversionistas de la Parte Emisora podrán ser expropiadas o nacionalizadas por la Parte Receptora, por necesidad, por razones de interés público, o por razones de utilidad pública o interés general, de conformidad con el ordenamiento jurídico nacional de cada Parte y conforme al debido proceso y contra una justa compensación o indemnización, siempre que tales medidas no sean tomadas de manera discriminatoria, de conformidad con el ordenamiento jurídico nacional de la Parte Receptora. b. El monto de la compensación o indemnización deberá ser equivalente al precio del valor mercado de la inversión, inmediatamente antes que las medidas de nacionalización o expropiación se hagan del conocimiento público. c. **Las medidas jurídicas no discriminatorias diseñadas y aplicadas para proteger objetivos legítimos de bienestar público, como la salud, la seguridad y el medio ambiente, no constituyen una expropiación.**	**Artículo 15** **Comité Conjunto** a. Las Partes establecen por medio del presente documento un Comité Conjunto, compuesto por los representantes de Colombia y Venezuela. b. La primera reunión del Comité Conjunto tendrá lugar durante el año siguiente a la entrada en vigor de este Acuerdo. Posteriormente, el Comité Conjunto se reunirá cada dos (2) años en Caracas y Bogotá, alternadamente, a no ser que las Partes convengan lo contrario. c. El Comité Conjunto estará copresidido por el Ministro del Poder Popular con competencia en Comercio Exterior de Venezuela y el Ministro de Comercio, Industria y Turismo de Colombia, o a quienes respectivamente designen. d. El Comité Conjunto acordara su cronograma de reuniones y establecerá su orden del día. e. El Comité Conjunto podrá: i. Establecer o disolver subcomités, grupos de trabajo y otras instancias, 0 asignarles responsabilidades; ii. Comunicarse con todas las partes interesadas, incluyendo el sector privado y organizaciones sociales; por intermedio del gobierno de la Parte que corresponda; iii. Hacer recomendaciones según lo previsto en este Acuerdo. iv. Adoptar su propio reglamento interno. f. El Comité Conjunto deberá: i. Asegurar que este Acuerdo funcione adecuadamente. ii. Supervisar y facilitar la ejecución y aplicación del presente Acuerdo, y promover sus objetivos generales.

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		d. Los inversionistas afectados tendrán derecho a acceder, conforme el ordenamiento jurídico nacional de la Parte que haga la expropiación, a la autoridad judicial de dicha Parte, a fin de revisar el monto de la compensación y la legalidad de dichas expropiaciones o medidas comparables. **Artículo 14** **Medidas Ambientales y Laborales** a. Nada de los [sic] dispuesto en este Acuerdo se entenderá en el sentido de prevenir a una Parte de adoptar, mantener, o hacer cumplir cualquier medida que considere apropiada para asegurar que una actividad de Inversión en su territorio sea asumida de acuerdo con sus leyes y regulaciones ambientales, así como con sus leyes y regulaciones laborales, siempre que tales medidas sean proporcionales a los objetivos buscados. b. Las Partes reconocen que no es apropiado fomentar la Inversión disminuyendo los estándares de sus medidas laborales y ambientales. En consecuencia, una Parte no deberá dejar de exigir o derogar, u ofrecer, tales medidas, como una forma de fomentar el establecimiento, adquisición, expansión o retención de una Inversión o de un Inversionista en su territorio.	iii. Supervisar el trabajo de todos los sub-comités, grupos de trabajo y otros organismos establecidos conforme al presente Acuerdo; iv. Considerar maneras de seguir mejorando las relaciones comerciales entre las Partes; v. Explorar formas de cooperación para fortalecer la productividad e integración entre las Partes; vi. Cualquier otro asunto de interés relacionado con el área amparada por este Acuerdo.

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