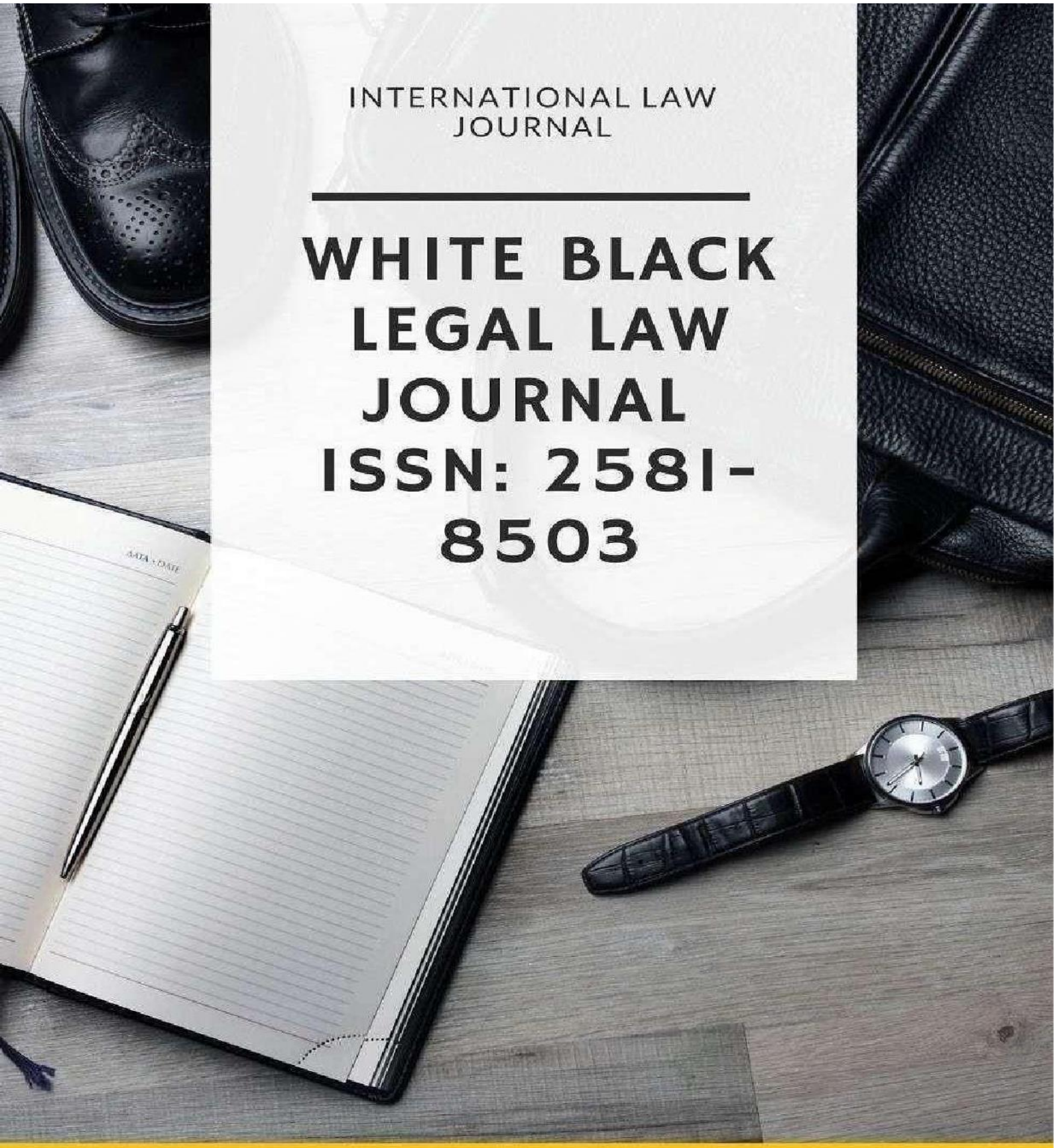


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ESG OBLIGATIONS IN INTERNATIONAL TRADE AND INVESTMENT LAW.

AUTHORED BY - SMITA SANJAY GAIKWAD
Designation: Assistant Professor At DES Shri Navalmal Firodia Law College.

Abstract:

In recent years, environmental, social and governance (ESG) standards have taken on a level of importance that the original designers of the international trade and investment system did not anticipate. Most of the current frameworks were built with the goals of market access and investor protection at the forefront, leaving states with limited clarity on how far they may regulate for sustainability without breaching international commitments. As governments now push forward with climate legislation, mandatory human rights due diligence and broader supply chain oversight, friction with long standing treaty obligations is becoming more visible. This article explores how these tensions emerge and asks whether existing legal structures are capable of adapting to the demands of ESG driven regulation.

By examining WTO case law, recent treaty drafting practices and decisions from investor State disputes, the article finds that the legal system already contains some tools that can support sustainability objectives though they are unevenly applied and often subject to narrow interpretation. Newer treaties show an increasing willingness to incorporate ESG language directly into binding obligations, signalling an ongoing shift from voluntary corporate social responsibility to more enforceable standards. Despite this development, the lack of common approaches across trade and investment regimes creates risks of fragmentation and uneven implementation, especially for developing countries with limited regulatory capacity.

The article argues that without clearer interpretive guidance and more deliberate treaty design, conflicts between economic rules and sustainability goals will continue to arise. It concludes that integrating ESG considerations into international economic law is both necessary and achievable, but it requires reforms that align legal obligations with the broader global movement toward responsible and sustainable economic activity.

Introduction

Environmental, social and governance (ESG) obligations have moved into the mainstream of regulatory policymaking, influencing how governments address climate mitigation, labour protections, corporate conduct, public-sector integrity and the oversight of global supply chains. What began as a set of voluntary criteria promoted by responsible-investment advocates has, over time, taken on a more formal legal character. ESG standards now inform domestic legislation, shape the expectations placed on multinational enterprises and increasingly feature whether explicitly or implicitly in the negotiation and interpretation of international economic agreements. As states adopt more ambitious climate strategies, strengthen their human rights commitments and pursue broader governance reforms, the measures needed to give effect to these priorities frequently intersect with, and occasionally challenge, established rules of international trade and investment law.

International trade law, centred on the World Trade Organization (WTO) agreements and elaborated through a proliferation of bilateral and regional free trade agreements (FTAs), has traditionally emphasised the removal of barriers, the avoidance of discriminatory treatment and the promotion of predictability in global commerce. International investment law, by contrast, has developed around more than 2,500 bilateral investment treaties (BITs) and investment chapters in FTAs, and its core function has long been the protection of foreign investors. Standards such as fair and equitable treatment (FET), national treatment, most favoured nation (MFN) treatment and guarantees against direct and indirect expropriation form the backbone of this regime. Neither system was designed with sustainability in mind, and as governments introduce new rules on carbon emissions, labour conditions or supply chain due diligence, tensions between ESG motivated regulation and trade or investment commitments have become increasingly visible.

This article examines how ESG obligations are being understood and operationalised within these two areas of international economic law. It argues that ESG considerations are gradually reshaping both regimes, although not in a uniform manner. While states have begun to weave sustainability provisions into newer treaties, investor specific ESG duties often remain weak, inconsistent or entirely voluntary. The enduring imbalance between strong, enforceable investor protections and comparatively soft investor obligations continues to limit the regulatory space states require to pursue ESG related objectives

1. Conceptual Foundations of ESG in International Economic Law

1.1 The Emergence of ESG as a Legal Category

ESG originated as a financial tool designed to assess the non-financial risks and performance of corporations in environmental stewardship, social responsibility, and corporate governance. Its international-legal relevance grew as states and international organisations began translating ESG priorities into regulatory requirements. Instruments such as the UN Guiding Principles on Business and Human Rights (UNGPs)[1], the OECD Guidelines for Multinational Enterprises[2], and the Paris Agreement[3] have pushed states toward integrating sustainability into economic governance.

The transition of ESG from voluntary frameworks to enforceable obligations is particularly evident in the European Union, where instruments like the Corporate Sustainability Due Diligence Directive (CSDDD) and the Corporate Sustainability Reporting Directive (CSRD) impose binding duties on companies regarding human rights, environmental protection, and supply-chain transparency. These domestic developments carry transnational implications: for example, the EU's due-diligence regime affects foreign suppliers and raises potential conflicts with WTO rules on non-discrimination.

In the realm of international economic law, ESG does not yet constitute a unified legal doctrine but instead appears across treaties, case law, and soft-law instruments as a set of policy objectives, interpretive principles, or emerging standards of conduct. Understanding ESG as a legal category requires considering its interaction with existing international economic norms.

1.2 ESG and Sustainable Development

Sustainable development has long been recognised as a principle of international law, guiding the balancing of environmental protection and economic growth[4]. It is embedded in WTO preambular language, numerous FTAs, and a large number of investment treaties. ESG can be understood as operationalising the sustainable-development principle: environmental protection aligns with sustainability's ecological dimension; social issues correspond to economic and social development; governance reflects institutional and regulatory integrity.

[1]United Nations. (2011). *Guiding principles on business and human rights: Implementing the United Nations "protect, respect and remedy" framework*. United Nations Human Rights Office of the High Commissioner

[2] Organisation for Economic Co-operation and Development. (2011). *OECD guidelines for multinational enterprises*. OECD Publishing

[3] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, 3156 U.N.T.S. 79 (entered into force Nov. 4, 2016)

[4] Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶ 140 (Sept. 25)

While sustainable development remains a broad normative principle, ESG provides an actionable framework with measurable indicators. When incorporated into treaties, ESG obligations tend to be more specific than general sustainable-development clauses, giving tribunals clearer interpretive guidance. Yet, paradoxically, ESG obligations directed at investors frequently lack enforceability, reducing their legal impact.

1.3 Potential Conflicts Between ESG Regulation and Economic Commitments

International trade and investment agreements require states to respect certain disciplines that may restrict their freedom to impose ESG-related regulations. Several areas generate conflict:

A. Non-Discrimination Principles

Under the General Agreement on Tariffs and Trade (GATT), states must not discriminate between domestic and imported products (national treatment) or between trading partners (MFN). ESG-motivated policies such as deforestation-related import bans or carbon-related border adjustments may violate these principles unless justified under Article XX environmental or public-morals exceptions.

B. Market-Access and Technical Barriers

The WTO Technical Barriers to Trade (TBT) Agreement requires technical regulations to be non-discriminatory and not more trade-restrictive than necessary. Sustainability-related product regulations—such as mandatory sustainability certifications may be challenged as unnecessary obstacles to trade.

C. Investment Protections

Investment treaties impose obligations on states not to expropriate foreign investments, directly or indirectly, and to provide fair and equitable treatment. Investors may argue that ESG-driven measures such as restricting fossil-fuel extraction or enforcing environmental cleanup obligations violate these standards.

1.4 Areas of Convergence and Mutual Reinforcement

Despite possible conflicts, ESG and international economic law can be mutually reinforcing:

- **Legitimacy of Public-Interest Regulation:** Tribunals increasingly recognise that states may regulate in the public interest, including for environmental and social reasons[5].

[5] Philip Morris Brands Sàrl v. Uruguay, ICSID Case No. ARB/10/7, Award, 399–402 (July 8, 2016)

- **Treaty Modernisation:** Recent treaties integrate binding sustainability commitments, encouraging coherence between trade liberalisation and ESG protection.
- **Interpretive Principles:** ESG norms influence treaty interpretation, particularly where treaties include references to environmental protection, human rights, or sustainable development.

The interplay between conflict and convergence forms the core analytical challenge addressed throughout this article.

2. ESG Obligations in International Trade Law

2.1 Introduction

International trade law increasingly intersects with ESG based regulation as states adopt climate, labour, human rights, and sustainability policies affecting international commerce. The WTO framework, along with bilateral and regional FTAs, forms the backbone of the global trading system. Historically, this system sought to discipline discrimination and protectionism, not to promote environmental or social objectives. However, the growing imperative for sustainability especially under the Paris Agreement, the SDGs, and regional climate commitments has compelled states to embed ESG considerations into trade instruments. This section analyses how ESG related obligations emerge in trade law, how they are tested in WTO dispute settlement, and how FTAs incorporate progressively ambitious sustainability chapters.

2.2 WTO Law and ESG-Driven Measures

2.2.1 The Preamble of the WTO Agreement and Sustainable Development

The Marrakesh Agreement establishing the WTO explicitly recognises the objective of sustainable development and environmental protection[6]. Although preambular language is not directly binding, the Appellate Body has treated it as informing the object and purpose of WTO agreements. In *US – Shrimp*, the Appellate Body relied on the sustainable-development reference to support the legitimacy of environmental protection within the WTO framework[7]. This interpretive openness is crucial because many ESG measures—such as carbon taxes, renewable-energy incentives, and due-diligence requirements—are not explicitly accounted for in WTO texts. Nevertheless, through its jurisprudence, the WTO has gradually acknowledged

[6] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (entered into force Jan. 1, 1995)
[7] United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Appellate Body Oct. 12, 1998), ¶¶ 153–155.

that sustainability concerns may justify trade-restrictive measures.

2.2.2 Article XX GATT: The Key Safety Valve for ESG Regulation

Environmental and social regulations that are otherwise inconsistent with fundamental GATT obligations may be justified under Article XX. Two exceptions are particularly relevant:

- **Article XX(b)**: Measures "necessary to protect human, animal or plant life or health".
- **Article XX(g)**: Measures "relating to the conservation of exhaustible natural resources".

These provisions offer the main legal basis for justifying ESG-motivated trade measures. However, the jurisprudence requires states to demonstrate:

1. **A legitimate policy objective**,
2. **A sufficient nexus between the measure and the objective**, and
3. **Compliance with the chapeau of Article XX**, which prohibits arbitrary or unjustifiable discrimination.

Several landmark cases clarify how ESG regulation interacts with these constraints.

2.2.3 Key WTO Cases on ESG Measures

A. US – Shrimp

The United States banned shrimp imports from countries whose fishing methods threatened endangered sea turtles. Although the measure was initially found discriminatory, the Appellate Body held that environmental protection may justify trade restrictions when designed and applied in a non-arbitrary manner[8].

Significance:

This case affirmed that states may adopt process-based (PPM) environmental standards—an essential precedent for ESG measures based on carbon footprints or labour conditions.

B. EC – Seal Products

The EU prohibited trade in seal products on animal-welfare grounds. The Appellate Body accepted that public morals could justify the ban under Article XX(a)[9].

Significance:

This ruling broadened the scope of public-moral exceptions to include ethical concerns about production methods—supporting ESG-based restrictions rooted in ethical supply-chain concerns.

[8] *ibid*

[9] European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R; WT/DS401/AB/R (Appellate Body May 22, 2014), ¶¶ 5.199–5.327

***C.* Brazil Retreaded Tyres**

Brazil banned imports of used tyres due to environmental and health impacts. The Appellate Body upheld the ban as "necessary" under Article XX(b), despite certain inconsistencies in implementation[10].

Significance:

Environmental health measures can withstand scrutiny even if imperfect, so long as the overall regulatory purpose is genuine. These cases collectively demonstrate that WTO panels are increasingly receptive to ESG-based measures, provided they are non-discriminatory and proportionate.

2.3 ESG-Driven Climate Measures and WTO Compatibility

2.3.1 Carbon Border Adjustment Mechanisms (CBAMs)

The EU's Carbon Border Adjustment Mechanism applies carbon pricing to imported goods to prevent carbon leakage. While designed as a climate measure, CBAM must comply with WTO principles such as national treatment, MFN, and non-discrimination.

Potential challenges include whether CBAM:

- Violates Article I (MFN) by differentiating countries with varying climate policies;
- Violates Article III (national treatment) by treating imports less favourably than domestic goods;
- Can be justified under Article XX(b) or (g).

Legal scholars widely agree that a well-designed CBAM could be WTO-compatible if it avoids arbitrary discrimination and reflects genuine climate objectives[11].

2.3.2 Due-Diligence Requirements and Supply-Chain Regulations

States increasingly adopt mandatory due-diligence regimes to prevent deforestation, forced labour, or human-rights abuses in global supply chains. Examples include:

- The EU's Deforestation Regulation;
- US import bans under the Uyghur Forced Labor Prevention Act (UFLPA);
- France's Duty of Vigilance Law.

From a WTO perspective, such rules may:

- Constitute technical regulations under the TBT Agreement;
- Affect market access under GATT;

[10] Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R (Appellate Body Dec. 3, 2007)
[11] Pauwelyn, J. (2013). Carbon leakage measures and the WTO. *Climate Policy*, *6*(3), 261–278

- Raise questions about extraterritoriality.

However, due-diligence requirements may be justified under Article XX if non-discriminatory and proportionate. They also align with global norms, including the UNGPs, making them more defensible in WTO fora.

2.3.3 Renewable-Energy Subsidies and Local-Content Requirements

Renewable-energy policies often interact with the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) or the TRIMs Agreement. WTO jurisprudence has struck down local-content requirements (LCRs) for renewable-energy generation in cases such as *Canada Renewable Energy*[12].

The WTO's strict stance on LCRs presents obstacles for governments pursuing green-industrial strategies, despite climate imperatives. Subsidies that favour domestic green industries may still violate SCM rules unless carefully designed.

2.4 ESG Provisions in Bilateral and Regional FTAs

2.4.1 EU FTAs as Sustainability Leaders

The European Union is the global leader in integrating ESG obligations into FTAs. Modern EU agreements include dedicated Trade and Sustainable Development (TSD) chapters addressing:

- Labour rights (ILO core conventions),
- Environmental protection,
- Climate commitments under the Paris Agreement,
- Corporate responsibility.

Agreements such as the EU Japan EPA[13], EU UK Trade and Cooperation Agreement[14], and EU Canada CETA[15] contain binding or semi-binding sustainability commitments.

However, enforcement mechanisms in TSD chapters remain relatively weak compared to those governing market access. For example, CETA's sustainability commitments are not subject to trade sanctions, but instead rely on consultations and panels of experts[16].

2.4.2 United States FTAs: Labour-Centred ESG Commitments

[12]. Canada – Certain Measures Affecting the Renewable Energy Generation Sector, WT/DS412/AB/R (Appellate Body May 6, 2013)
[13] Agreement between the European Union and Japan for an Economic Partnership, Feb. 1, 2019.
[14] Trade and Cooperation Agreement between the European Union and the United Kingdom, 2021 O.J. (L 149) 10
[15] Comprehensive Economic and Trade Agreement (CETA), Can.-EU, Oct. 30, 2016
[16] Comprehensive Economic and Trade Agreement (CETA), Can.-EU, Oct. 30, 2016, chs. 23–24

While historically less ambitious on environmental issues, US FTAs include robust labour enforcement mechanisms. Under USMCA, for instance, the "Rapid Response Labor Mechanism" allows the US and Canada to challenge labour-rights violations at individual facilities in Mexico[17].

This creates a powerful precedent for enforceable social obligations—arguably the most binding ESG-related mechanism in any FTA.

2.4.3 African Continental Free Trade Area (AfCFTA)

The AfCFTA Protocol on Investment includes explicit ESG obligations related to environmental protection, labour standards, and human rights[18]. These provisions apply not only to states but also to investors, making it one of the first major instruments to impose direct investor ESG duties.

Although still undergoing implementation, the AfCFTA model points toward a future in which ESG obligations could become binding conditions for investment protection and market access.

2.4.4 Asia-Pacific Agreements (CPTPP and RCEP)

The CPTPP contains enforceable environmental and labour chapters, though implementation varies. RCEP, by contrast, provides limited ESG content, reflecting the cautious approach of many Asian states toward sustainability regulation.

However, the region's evolving supply-chain regulation—particularly regarding forced labour and decarbonisation—may influence future treaty negotiations.

2.5 Preliminary Assessment of ESG Integration in Trade Law

Several patterns emerge from the foregoing analysis:

1. **WTO law increasingly tolerates ESG measures**, provided they are non-discriminatory and proportionate.
2. **FTAs are the primary vehicles for integrating ESG obligations**, especially through environmental and labour chapters.
3. **Enforcement remains uneven**: market-access rules remain binding, while ESG chapters often rely on soft mechanisms.
4. **State capacity to regulate for ESG is expanding**, but legal uncertainty persists, especially regarding climate policies and global value-chain requirements.

Overall, international trade law is gradually adapting to ESG imperatives, but reforms are needed to harmonise trade liberalisation with sustainability goals.

[17] Agreement between the United States of America, the United Mexican States, and Canada, USMCA, July 1, 2020, Annex 31-A

[18] African Continental Free Trade Area, Protocol on Investment, 2023, arts. 25 & 29.

3. ESG Obligations in International Investment Law

3.1 Introduction

International investment law, historically designed to protect foreign investors from political risk and arbitrary state conduct, is undergoing significant transformation. Driven by global sustainability imperatives, states increasingly seek to integrate environmental protection, labour rights, climate obligations, and corporate responsibility into bilateral investment treaties (BITs), regional investment chapters, and investment facilitation instruments. While early-generation BITs were narrowly focused on investment protection, particularly expropriation, fair and equitable treatment (FET), and free transfer of funds modern treaties incorporate ESG-related standards and regulatory safeguards. This section examines how ESG obligations arise within investment law, how arbitral tribunals interpret them, and how modern treaties structure sustainability requirements for investors and states.

3.2 The Traditional Architecture of International Investment Law and Its Limitations

Traditional BITs were drafted with a strong asymmetry: they bound host states but imposed virtually no obligations on investors. Their primary objectives were to ensure:

- Protection against unlawful expropriation,
- Non-discrimination,
- Stability of the regulatory environment, and
- Access to investor–state dispute settlement (ISDS).

This structure often raised concerns that ESG regulations such as mining bans, environmental impact requirements, renewable-energy policies, or human-rights safeguards might trigger investor claims alleging indirect expropriation or FET violations. Consequently, states grew reluctant to regulate aggressively for sustainability, fearing treaty-based liability.

Cases such as *Tecmed v Mexico*[19], *Metalclad v Mexico*[20], and *Burlington v Ecuador*[21] illustrate how environmental regulations have historically been contested within the investment-arbitration system. These decisions fuelled debates about whether the system disproportionately protects corporate interests at the expense of public welfare.

[19]Técnicas Medioambientales Tecmed, S.A. v. Mexico, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003)..
[20] Metalclad Corporation v. Mexico, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000)
[21] Burlington Resources Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims (Feb. 7, 2017).

3.3 ESG Considerations within Substantive Investment Protections

3.3.1 Fair and Equitable Treatment (FET)

The FET standard is the most frequently invoked treaty protection. Investors often argue that sudden changes in environmental, social, or energy policy breach legitimate expectations or constitute arbitrary conduct. Tribunals have produced divergent outcomes.

In *Micula v Romania*, regulatory change was deemed unfair due to abrupt repeal of incentives[22]. However, in *Parkerings v Lithuania*, the tribunal emphasised that legitimate expectations must be balanced against the state's inherent right to regulate, especially for public purposes[23].

The trend in recent arbitral jurisprudence supports states' regulatory autonomy, particularly where measures pursue compelling ESG objectives. Modern treaties also clarify that changes to environmental or social regulations do not ordinarily violate FET.

3.3.2 Indirect Expropriation

ESG-based measures—such as bans on polluting activities or revocation of extractive licences—may restrict investments but do not necessarily constitute expropriation if they pursue bona fide public-welfare objectives.

In *Philip Morris v Uruguay*, the tribunal upheld Uruguay's tobacco-control regulations, finding they were bona fide exercises of police powers and did not amount to expropriation[24]. This case is often cited as affirmation that public-health and environmental measures are not compensable expropriations.

Similarly, in *Chemtura v Canada*, environmental restrictions on pesticide use were found to be legitimate regulatory actions[25].

This jurisprudence indicates growing deference to ESG regulation.

3.3.3 Umbrella Clauses and Stabilisation Clauses

Umbrella clauses elevate contractual obligations to treaty obligations; stabilisation clauses freeze the regulatory framework. Both may conflict with evolving ESG norms, particularly where investment contracts in extractive industries limit the state's ability to introduce environmental standards.

Modern treaties increasingly exclude or narrow stabilisation clauses to preserve regulatory space, recognising that sustainability goals require continuous policy evolution.

3.4 ESG Obligations for Investors: A Shift in Treaty Practice

[22] Ioan Micula and Others v. Romania, ICSID Case No. ARB/05/20, Award (Dec. 11, 2013)
[23] Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, ¶ 332 (Sept. 11, 2007).
[24] Philip Morris Brands Sàrl v. Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016)
[25] Chemtura Corporation v. Canada, UNCITRAL, Award (Aug. 2, 2010).

The most transformative development in investment law is the inclusion of **direct obligations for investors**, reversing the historical asymmetry.

3.4.1 Corporate Social Responsibility (CSR) Provisions

Many new treaties include CSR provisions referencing:

- The UN Guiding Principles on Business and Human Rights (UNGPs),
- OECD Guidelines for Multinational Enterprises,
- ILO Tripartite Declaration.

Examples include the Morocco–Nigeria BIT[26], the Pan-African Investment Code[27], and the recent AfCFTA Protocol on Investment[28]. These instruments require investors to adhere to human-rights, labour, and environmental standards.

Although CSR clauses are often framed as non-binding, some treaties impose **binding investor obligations**, allowing host states to counterclaim in arbitration.

3.4.2 Investor Obligations and State Counterclaims

State counterclaims based on environmental or human-rights obligations are increasingly accepted.

In *Urbaser v Argentina*, the tribunal recognised that corporations may bear human-rights responsibilities and allowed a counterclaim concerning the right to water[29].

In *Burlington v Ecuador*, the tribunal awarded Ecuador USD 41 million for environmental damage caused by the investor[30].

These cases demonstrate a shift from purely defensive state positions to proactive enforcement of ESG duties.

3.5 ESG in Modern Investment Treaties

3.5.1 African Instruments: The Vanguard of ESG Integration

Africa has pioneered the integration of investor obligations. The **Morocco–Nigeria BIT (2016)** imposes:

- Binding human-rights and environmental obligations[31],
- Prohibitions on corruption[32],

[26] Morocco–Nigeria BIT (signed 3 December 2016) art 18.
[27] Pan-African Investment Code, 2016, art. 20.
[28] African Continental Free Trade Area, Protocol on Investment, 2023, arts. 25–29..
[29] Urbaser S.A. v. Argentina, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016).
[30] Burlington Resources Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims (Feb. 7, 2017).
[31] Morocco-Nigeria Bilateral Investment Treaty, Morocco-Nigeria, Dec. 3, 2016, art. 14
[32] Morocco-Nigeria Bilateral Investment Treaty, Morocco-Nigeria, Dec. 3, 2016, art. 14

- Requirements for environmental-impact assessments[33],
- Obligations to maintain social- and labour-related protections[34].

The **AfCFTA Protocol on Investment (2023)** similarly mandates:

- Environmental protection,
- Anti-corruption measures,
- Respect for human rights and labour standards.

Unlike most treaties, it also contemplates sanctions for investor non-compliance.

3.5.2 European Treaty Practice

The EU Investment Court System (ICS) and recent EU investment agreements incorporate:

- Explicit references to the Paris Agreement,
- General exceptions for environmental and labour protection,
- Sustainable-development chapters linked to investment obligations.

For example, CETA allows states to pursue environmental and health objectives without violating investor protections[35].

The Energy Charter Treaty (ECT), however, has faced criticism for protecting fossil-fuel investments. Several EU Member States are withdrawing from the ECT due to misalignment with climate goals[36].

3.5.3 Asia-Pacific Instruments

Recent Asia-Pacific treaties strike a balance between investment protection and regulatory flexibility. The **CPTPP** incorporates environmental and labour chapters, though investor obligations remain limited. The **ASEAN Comprehensive Investment Agreement (ACIA)** recognises CSR principles but stops short of binding obligations.

Nonetheless, ESG-related litigation is growing in the region, particularly in disputes involving mining, energy transition, and deforestation.

3.6 ESG and the Emerging "Right to Regulate" Doctrine

Modern treaties increasingly codify the "right to regulate" for public-welfare objectives, particularly in environmental, health, and labour domains.

For example:

- CETA explicitly affirms regulatory autonomy[37],

[33] Morocco-Nigeria Bilateral Investment Treaty, Morocco-Nigeria, Dec. 3, 2016, art. 14
[34] Morocco-Nigeria Bilateral Investment Treaty, Morocco-Nigeria, Dec. 3, 2016, arts. 19 & 20.
[35] Comprehensive Economic and Trade Agreement (CETA), Can.-EU, Oct. 30, 2016, ch. 8
[36] European Commission. (2023). *Energy Charter Treaty withdrawal*. Publications Office of the European Union
[37] Comprehensive Economic and Trade Agreement (CETA), Can.-EU, Oct. 30, 2016, art. 8.9.

- The Morocco–Nigeria BIT grants states authority to regulate for sustainable development[38],
- The SADC Model BIT enshrines an expansive right to regulate[39].

This trend reflects a policy shift: states are no longer required to prioritise investment protection above sustainability objectives. Instead, ESG measures receive presumptive legitimacy.

3.7 ESG and Procedural Reform: ISDS Under Pressure

The inclusion of ESG within ISDS has procedural implications.

3.7.1 Transparency and Public Participation

UNCITRAL Transparency Rules enhance openness in ISDS, allowing amicus curiae submissions by NGOs and affected communities. This supports broader participation in disputes concerning environmental and human-rights issues.

3.7.2 Multilateral Investment Court (MIC)

The EU-led proposal for a Multilateral Investment Court emphasises:

- Judicial independence,
- Consistency of awards,
- Consideration of public-interest factors including ESG obligations.

If established, the MIC may shift investment law closer to public international law, with greater deference to regulatory ESG objectives.

3.8 Preliminary Assessment

The integration of ESG obligations into international investment law reflects four major developments:

1. **Growing acceptance of public-welfare regulation** as compatible with FET and non-expropriation standards;
2. **Direct investor obligations**, including potential liability for environmental and human-rights violations;
3. **Treaty reform**, particularly in the Global South, embedding sustainability into investment governance;
4. **Procedural innovation**, allowing greater transparency and public participation in ESG-related disputes.

[38] Morocco-Nigeria Bilateral Investment Treaty, Morocco-Nigeria, Dec. 3, 2016, art. 23
[39] SADC Model Bilateral Investment Treaty, 2012, art. 20

Investment law is gradually transforming into a more balanced system that recognises sustainable development as a foundational objective rather than a defensive exception.

4 Reconciling Trade and Investment Law with ESG Norms.

4.1 Introduction

Although international trade and investment law originate from different treaty structures and dispute-settlement mechanisms, they increasingly converge around the challenge of integrating ESG norms. Trade agreements seek to liberalise markets while permitting states to pursue environmental and labour goals; investment treaties protect foreign assets while allowing regulatory flexibility. This section analyses how these regimes interact, the points of friction between them, and emerging approaches to achieving systemic coherence.

4.2 Systemic Tensions: Trade Liberalisation, Investment Protection, and ESG Regulation

4.2.1 Regulatory Space vs Market Access and Investor Rights

ESG-driven regulations—such as carbon-pricing regimes, renewable-energy incentives, labour-due-diligence laws, or bans on harmful products—can restrict trade flows or affect investor profitability. Consequently:

- Trade rules may challenge such measures for being discriminatory or overly trade-restrictive.
- Investors may claim that ESG regulations breach FET or amount to indirect expropriation.

This dual exposure creates a **"regulatory chilling effect,"** where states hesitate to introduce ambitious ESG laws due to potential disputes under two separate regimes[40].

4.2.2 Divergent Jurisprudence

WTO panels focus on non-discrimination and necessity tests, while investment tribunals apply standards like FET and police-powers doctrine. Their methodologies differ, leading to inconsistent outcomes.

For example:

- In *US – Shrimp*, the WTO Appellate Body accepted environmental protection as a legitimate objective, provided the measure avoided arbitrary discrimination[41].

[40] Wagner, M. (2014). Regulatory chill in international investment and trade law. *European Journal of International Law*, *24*(2), 615–642..

[41] United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Appellate Body Oct. 12, 1998).

- In *Metalclad*, an investment tribunal found that environmental permit denials violated investor expectations[42].

These differences can create conflicting expectations regarding permissible ESG regulation.

4.3 Convergence Through Shared Principles

Despite differences, trade and investment regimes increasingly share interpretive principles that support ESG objectives.

4.3.1 Sustainable Development as an Interpretive Objective

Both WTO and modern investment treaties refer to sustainable development:

- WTO Agreement Preamble recognises the goal of environmental protection[43].
- Recent BITs, including the Morocco–Nigeria BIT and the AfCFTA Protocol, embed sustainable-development objectives[44].

Tribunals and panels now routinely reference sustainability when interpreting treaty obligations, creating a common normative baseline.

4.3.2 The Right to Regulate

An explicit or implicit right to regulate is now embedded in both systems:

- WTO panels interpret Article XX GATT and TBT rules as preserving state autonomy to pursue legitimate public objectives.
- Investment treaties increasingly codify regulatory autonomy for environmental, health, and social policy.

For instance, CETA affirms that states retain the right to regulate for public-welfare objectives such as environmental protection[45].

This principle reduces the risk that ESG measures will be interpreted as treaty breaches.

4.3.3 Deference to Public-Interest Regulation

Both systems show rising deference to legitimate ESG regulation:

- WTO jurisprudence (e.g., *EC – Seal Products*, *Brazil – Retreaded Tyres*) recognises ethical and environmental concerns as legitimate[46].

[42] Metalclad Corporation v. Mexico, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000)
[43] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (entered into force Jan. 1, 1995)
[44] Morocco-Nigeria Bilateral Investment Treaty, Morocco-Nigeria, Dec. 3, 2016; African Continental Free Trade Area, Protocol on Investment, 2023
[45] Comprehensive Economic and Trade Agreement (CETA), Can.-EU, Oct. 30, 2016, art. 8.9.
[46] European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R; WT/DS401/AB/R (Appellate Body May 22, 2014); Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R (Appellate Body Dec. 3, 2007).

- Investment tribunals have accepted the police-powers doctrine, affirming that bona fide regulations—even if economically harmful—do not constitute expropriation, as in *Philip Morris v Uruguay*[47].

This convergence strengthens the legal defence of ESG measures.

4.4 Emerging Mechanisms for Coherence Between Trade, Investment, and ESG

4.4.1 Cross-Regime References and Incorporation of International Norms

Both trade and investment treaties increasingly refer to international ESG instruments, such as:

- The Paris Agreement,
- ILO Core Conventions,
- Multilateral Environmental Agreements (MEAs),
- UN Guiding Principles on Business and Human Rights.

EU FTAs routinely link trade preferences to ratification of ILO instruments; investment treaties like the Morocco–Nigeria BIT require compliance with human-rights norms[48].

Cross-referencing creates normative bridges between regimes and enhances consistency.

4.4.2 General Exceptions in Investment Treaties

Historically limited to trade law, general exceptions (modelled on GATT Article XX) now appear in investment treaties. Examples:

- The SADC Model BIT includes general exceptions for environmental and social measures[49].
- CETA incorporates exceptions for public-welfare objectives[50].

Such clauses help reconcile investment protection with ESG imperatives by enabling states to justify otherwise restrictive measures.

4.4.3 ESG-Focused Dispute-Resolution Mechanisms

Several treaty innovations support ESG objectives:

- **Sustainability panels** in FTAs, such as those under EU–Korea and CETA, allow environmental and labour issues to be adjudicated by experts rather than trade arbitrators.
- **Counterclaims in ISDS**, increasingly accepted, allow host states to sue investors for ESG violations.

[47] *Philip Morris v Uruguay* (2016) ICSID Case No ARB/10/7.
[48] Morocco–Nigeria BIT (2016) arts 17–20.
[49] SADC Model BIT (2012) art 20.
[50] CETA (n 6) art 8.9.

- **Transparency rules** (UNCITRAL Transparency Rules; Mauritius Convention) permit broader participation by civil society.

These mechanisms realign dispute settlement toward public interest.

4.5 The Role of Non-State Actors in Reconciling ESG with Trade and Investment Law

4.5.1 Corporations

Corporate ESG obligations (through due-diligence laws, supply-chain standards, and CSR provisions) increasingly shape global value chains. Compliance with domestic ESG laws can align corporate behaviour with international norms, reducing conflict with states.

4.5.2 Civil Society and NGOs

Civil society plays a major role through:

- Amicus curiae briefs in ISDS and WTO cases,
- Pressure on states to negotiate stronger ESG clauses,
- Campaigns prompting treaty reform, such as around the ECT.

Their participation influences jurisprudence and treaty drafting.

4.5.3 International Organisations

Bodies such as:

- OECD,
- ILO,
- UNCTAD,
- UNEP,

produce guidelines and model clauses that shape ESG integration across both regimes. UNCTAD's 2015 Investment Policy Framework introduced sustainability as a core element of investment governance[51].

4.6 Reconciling Climate Policy with Trade and Investment Law

Climate regulation presents perhaps the most significant test for reconciling trade, investment, and ESG standards.

4.6.1 Carbon Border Adjustment Mechanisms (CBAMs)

CBAMs may trigger WTO disputes (e.g., MFN, national treatment, TBT rules) and potential investor claims if foreign producers face economic losses. To be compatible:

[51]United Nations Conference on Trade and Development. (2015). *Investment policy framework for sustainable development*. United Nations..

- CBAMs must be non-discriminatory,
- Based on transparent methodologies,
- Justifiable under GATT Article XX exceptions.

Well-designed CBAMs may be defensible under WTO law, particularly Article XX(b) and (g)[52].

4.6.2 Renewable-Energy Policies and Investment Claims

Renewable-energy policies have triggered numerous ISDS claims, particularly in Europe. In *Charanne v Spain* and *Eiser v Spain*, investors challenged retroactive changes to feed-in tariffs[53].

Tribunals emphasised that:

- States may regulate in pursuit of climate objectives,
- But must balance this with investors' legitimate expectations.

Well-designed treaties now explicitly preserve state climate action to avoid such conflicts.

4.6.3 Fossil-Fuel Phase-Out

The Energy Charter Treaty (ECT) has become highly controversial because it protects fossil-fuel investments even as states seek to meet Paris Agreement goals. Tribunals have heard numerous claims challenging climate regulations under the ECT[54].

This conflict has led several EU states to withdraw, signalling an evolution toward sustainability-aligned investment governance.

4.7 Harmonising Global Supply-Chain Regulation

With ESG obligations increasingly applied extraterritorially, states must ensure that supply-chain laws are consistent with trade and investment rules.

4.7.1 Forced Labour and Human-Rights Due-Diligence Measures

The US Uyghur Forced Labor Prevention Act (UFLPA) and EU Corporate Sustainability Due Diligence Directive (CSDDD) may restrict imports and impose compliance obligations on investors. While potentially trade-restrictive, they may be justified under:

- WTO Article XX(a) for public morals,
- Investment treaties' right-to-regulate clauses.

4.7.2 Deforestation Controls

[52] Pauwelyn, J. (2013). Carbon leakage measures and the WTO. *Climate Policy*, *6*(3), 261–278.
[53] Charanne B.V. v. Spain, SCC Case No. 062/2012, Award (Jan. 21, 2016); Eiser Infrastructure Limited v. Spain, ICSID Case No. ARB/13/36, Award (May 4, 2017).
[54] Energy Charter Secretariat. (2021). *ECT and climate change*. Energy Charter Secretariat

The EU Deforestation Regulation imposes strict supply-chain requirements. It may face WTO scrutiny, but environmental integrity and non-discriminatory application strengthen its defence under Article XX(b) and (g).

4.8 Preliminary Assessment

Reconciling trade, investment, and ESG norms requires balancing economic integration with sustainability. The following key developments support this reconciliation:

1. **Shared normative foundations** (sustainable development, right to regulate).
2. **Treaty innovations** (general exceptions, CSR clauses, investor obligations).
3. **Procedural reforms** (transparency, counterclaims, sustainability panels).
4. **Growing deference to climate, environmental, and social regulation** in both WTO and ISDS jurisprudence.
5. **Integration of international ESG instruments** through treaty cross-references.

Despite persistent tensions—particularly involving climate policy, energy transitions, and supply-chain regulation—the two regimes are now more aligned than at any time since their creation.

Conclusion: Aligning International Trade and Investment Law with ESG Imperatives

The accelerating integration of environmental, social and governance (ESG) priorities into global economic regulation signifies a fundamental reorientation of international economic law. Trade and investment regimes, originally constructed to safeguard market access and investor confidence, now operate within a policy landscape shaped by climate emergency, biodiversity loss, rising inequality and escalating human-rights scrutiny. States across all regions are adopting supply-chain due-diligence frameworks, climate-transition legislation, and corporate accountability mandates, while public expectations and financial markets increasingly penalise non-compliance with ESG standards. Yet the legal infrastructure of international economic governance remains structurally misaligned with these new imperatives. WTO rules provide only limited exceptions for sustainability measures under GATT Article XX, while traditional bilateral investment treaties (BITs) impose stringent investor protections with little scope for environmental or social obligations. To remain legitimate and effective, both regimes must evolve towards a coherent framework that recognises sustainability as a core objective rather than an external consideration.

A central insight emerging from contemporary jurisprudence is that **ESG concerns are no longer peripheral to trade and investment law**. WTO panels increasingly acknowledge that environmental protection and public morals—including animal welfare and labour rights—

represent legitimate objectives capable of justifying trade-restrictive measures[55]. Meanwhile, investment tribunals have begun recognising that investors operating in sensitive sectors must anticipate regulatory evolution, including climate-transition legislation or strengthened community-engagement obligations[56]. These developments reflect an embryonic paradigm shift: rather than treating ESG measures as regulatory deviations requiring justification, tribunals are beginning to situate sustainability within the ordinary expectations of modern economic governance.

Nevertheless, doctrinal fragmentation persists. WTO law employs a structured, exception-based model, permitting ESG-related trade restrictions only if they satisfy the substantive and procedural criteria of Article XX.[3] Investment arbitration, by contrast, relies on diffuse treaty language fair and equitable treatment (FET), indirect expropriation, legitimate expectations that tribunals interpret with varying levels of deference to regulatory autonomy. This fragmentation generates the risk of inconsistent outcomes: a climate-related measure upheld under WTO law could, in theory, be struck down by an investment tribunal. Avoiding such contradictions requires structural alignment across regimes.

Future coherence will depend on reforms in four principal areas. First, **explicit treaty language recognising ESG objectives** is essential. WTO Members should issue interpretative declarations—or negotiate future agreements confirming that climate mitigation, biodiversity protection, labour-rights enforcement and human-rights due diligence fall within the scope of legitimate public policy aims under GATT Article XX and related provisions. Regional trade agreements already demonstrate this trend: the EU's recent generation of free trade agreements (FTAs) incorporates enforceable labour and environmental obligations, signalling a move towards balanced reciprocity rather than unilateralism.[4] Strengthening these provisions will ensure that ESG objectives are not perceived as disguised protectionism but as integral to the trade regime's normative framework.

Second, investment treaties must incorporate **explicit ESG obligations for investors**, ensuring symmetry between rights and responsibilities. Modern instruments such as the Netherlands Model BIT (2019) already include duties to conduct environmental and human-rights due diligence and expressly permit counterclaims.[5] This innovation strengthens accountability by allowing States to seek redress for environmental degradation or social harm, as illustrated in *Burlington* and *Perenco*, where tribunals awarded significant damages for investor-caused

[55] European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R (Appellate Body May 22, 2014), ¶¶ 5.199–5.200
[56] Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, ¶ 332 (Sept. 11, 2007).

environmental damage.[6] Future treaties should adopt similar provisions as standard practice, signalling a systemic expectation of responsible investment.

Third, **arbitral tribunals must embrace systemic integration**. Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) requires tribunals to interpret treaty obligations in harmony with relevant rules of international law, including multilateral environmental agreements (MEAs), the Paris Agreement and international human-rights norms.[7] Although tribunals have begun referencing these frameworks, their engagement remains inconsistent. A structured approach to systemic integration would prevent tribunals from interpreting investment protections in isolation from global sustainability commitments and would provide legal certainty for climate-transition measures.

Fourth, **institutional coordination across regimes** must be enhanced. As ESG obligations increasingly intersect with trade disciplines, investment protections, and MEA commitments, cooperation between the WTO, ICSID, UNCITRAL, ILO and environmental treaty bodies becomes indispensable. Joint guidelines or interpretative statements could promote consistency, reduce litigation risks and prevent forum shopping.

Ultimately, the evolution of ESG obligations in international economic law signals the emergence of a new normative equilibrium. Economic liberalisation, once considered the pathway to development, is now recognised as insufficient without parallel commitments to environmental integrity, social justice and responsible corporate conduct. ESG therefore does not represent a transient policy trend but rather a structural transformation in the purpose and design of global economic governance.

The coming decade will determine whether this transformation becomes embedded as a binding legal paradigm. The climate crisis demands rapid decarbonisation, requiring States to implement carbon-pricing mechanisms, fossil-fuel phase-out policies and green-industrial strategies that may restrict or reshape trade and investment flows. Supply-chain accountability legislation will increasingly impose due-diligence obligations on global corporations, requiring adjustments to procurement, sourcing and reporting practices. Investment protection cannot impede these transitions; it must facilitate them.

A coherent ESG-aligned international economic order must therefore rest on three foundational principles. First, **States must retain the sovereign right to regulate** in pursuit of legitimate sustainability objectives without exposing themselves to disproportionate liability. Second, **investors must bear responsibilities proportionate to the protections they enjoy**, including obligations to prevent, mitigate and remedy environmental and social harm. Third, **global**

markets must reward sustainable practices, ensuring that economic activity aligns with planetary boundaries and human dignity.

International trade and investment law, once designed to prioritise efficiency and liberalisation, must now redefine itself around long-term sustainability. ESG is not simply an interpretative consideration or policy preference; it is a normative imperative essential for the legitimacy and functionality of the global economic system. Embedding ESG obligations within both the WTO and investment regimes will foster a more balanced, equitable and sustainable form of globalisation one capable of meeting the profound challenges of the twenty-first century.

Recommendations for Strengthening ESG Integration in Trade and Investment Law

To ensure that ESG obligations become meaningfully integrated into international trade and investment law, several targeted reforms are necessary.

1. Embed Clear ESG Obligations in Treaty Texts

Future trade and investment agreements should include explicit, binding ESG responsibilities for investors, moving beyond aspirational preambular language. Mandatory human rights and environmental due diligence clauses would enhance accountability and provide clearer guidance to both states and investors.

2. Protect Regulatory Space in Investment Arbitration

ISDS mechanisms should be reformed so that tribunals can give proper weight to climate, human rights and environmental objectives. Transparency, greater acceptance of amicus submissions, and treaty-based instructions to balance investment protection with sustainable development would reduce the likelihood that ESG-driven regulations trigger liability.

3. Clarify the Application of WTO Environmental Exceptions

WTO Members should provide interpretive guidance on the use of GATT Article XX in relation to contemporary ESG policies such as carbon border adjustments, supply-chain due diligence requirements and bans linked to forced labour. Clearer standards would help prevent disputes and support coherence in the global trading system.

4. Improve Coherence Through Systemic Integration

Treaty drafters and adjudicators should apply systemic integration under Article 31(3)(c) VCLT to ensure that trade and investment obligations are interpreted consistently with states' ESG commitments, including climate agreements and international human rights instruments.

5. Strengthen Support for Developing Countries

Any ESG-linked reforms must address equity concerns. Technical assistance, climate finance, technology transfer and phased implementation schedules are essential to ensure that

developing countries can meet heightened sustainability expectations without compromising development priorities.

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