ARTICLES

INVESTOR-COMMUNITY CONFLICTS IN INVESTOR-STATE DISPUTE SETTLEMENT: RETHINKING "REASONABLE EXPECTATIONS" AND EXPECTING MORE FROM INVESTORS

GEORGE K. FOSTER[*]

Within the fraught field of investor-state dispute settlement, no cases are more controversial than those in which an investor seeks damages for the cancellation of a project following an outcry by local communities over potential environmental or social impacts. Tribunals have almost always ruled for the investor in these cases, typically reasoning that the cancellation frustrated the investor's "reasonable" or "legitimate" expectations. This Article argues that tribunals have often overlooked or downplayed factors that should limit investors' expectations when undertaking high-impact projects, including specific aspects of domestic environmental law and the host state's international human rights and environmental obligations. The Article also examines factors beyond investor expectations that may be relevant to liability or quantum in such cases, including local remedies and emerging standards of conduct with which investors should be expected to comply. Finally, the Article shows that the

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* Professor of Law, *Lewis & Clark Law School*. I wish to thank the participants at the 2018 annual meeting of the Environmental Law and Sustainability Section of the Academy of Legal Studies in Business at which an early version of this Article was presented, as well as the participants in the Lewis & Clark Law School Faculty Colloquium Series in which a later version was presented. Special thanks to Michael C. Blumm, Lydia Loren, Thomas Schoenbaum, Shalanda Baker, Frédéric Gilles Sourgens, and Timothy Webster for detailed comments and suggestions. I am also grateful to Wendy Hitchcock, Elizabeth Schmitt, Saskia Mooy, Brittaney Bones, Trevor Eisele, Alison Roth, Arpan Banerjee, and John Mayer for their valuable research assistance.

proposed interpretive framework is consistent with the texts of investment treaties and their underlying rationales and could address a number of concerns that threaten these treaties' long-term viability.

TABLE OF CONTENTS

INTRODUCTION

Investment treaties and investor-state dispute settlement (ISDS) have generated tremendous controversy in recent years. Both are regularly denounced as dire threats to national sovereignty and the ability of governments to protect their citizens and the environment from the excesses of multinational enterprises.[1] No cases have drawn

1. Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 694–95, 700 (2014) (describing the rising chorus of criticism against investment treaties and ISDS, including arguments that tribunal awards violate "the sovereignty of the state as well as its legal institutions" and that investment treaties have a "chilling effect on the future development of regulations for public health, safety and the environment," and further "the interests of multinational corporations at the expense of poor states").

more scorn than those in which foreign investors have challenged regulatory measures adopted by host states in the public interest.[2] Within that genre of dispute, a specific strain has emerged that is perhaps most controversial of all: cases in which the investor seeks damages from the host state for having canceled a development project following an outcry by local communities who feared that the project would contaminate their water supplies, destroy their sacred sites, threaten endangered plants or wildlife, or wreak other serious harm.[3] I will refer to these cases herein as "Community Conflict Cases."

The investor invariably contends that state authorities initially authorized or encouraged its project, inducing the investor to commit its capital, before suddenly reversing course in response to community pressure.[4] When arbitral tribunals have reached the merits of these claims, they have almost always ruled in the investor's favor—usually on the reasoning that the host state's reversal frustrated the investor's

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2. Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 VAND. J. TRANSNAT'L L. 355, 382 (2017) ("ISDS allows foreign corporations to interfere with the host government's ability to regulate, constraining the state's capacity to function for the benefit of the public."); Stephan W. Schill, *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review*, 3 J. INT'L DISP. SETTLEMENT 577, 578, 591 (2012) (describing criticisms that "arbitral tribunals use the vague standards of investment protection to intrude into the regulatory space of host states").

3. Detailed summaries of several such cases are provided *infra* Section II.B. Cases fitting this pattern include Abengoa, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/09/2, Award (Apr. 18, 2013); Aven v. Republic of Costa Rica, Case No. UNCT/15/3, Award (Sept. 18, 2018); Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Award (Nov. 30, 2017); Clayton v. Canada, Case No. 2009-04, Award on Jurisdiction and Liability (Perm. Ct. of Arb. 2015); Commerce Group Corp. v. Republic of El Sal., ICSID Case No. ARB/09/17, Award (Mar. 14, 2011); Copper Mesa Mining Corp. v. Republic of Ecuador, Case No. 2012-2, Award (Perm. Ct. of Arb. 2016); Cosigo Res., Ltd. v. Republic of Colombia, UNCITRAL, Notice of Arbitration and Statement of Claim (Feb. 19, 2016); Gabriel Res. Ltd. (Jersey) v. Rom., ICSID Case No. ARB/15/31, Notice of Arbitration (July 21, 2015); Glamis Gold, Ltd. v. United States, UNCITRAL, Award (June 8, 2009); Infinito Gold Ltd. v. Republic of Costa Rica, ICSID Case No. ARB/14/5, Request for Arbitration (Feb. 6, 2014); Lone Pine Res. Inc. v. Gov't of Can., ICSID Case No. UNCT/15/2, Notice of Arbitration (Sept. 6, 2013); Metalclad Corp. v. United Mexican States, ICSID Case No. ARB (AF)/97/1, Award (Aug. 30, 2000); Pac Rim Cayman LLC v. Republic of El Sal., ICSID Case No. ARB/09/12, Decision on Jurisdiction (June 1, 2012); S. Am. Silver Ltd. (Berm.) v. Plurinational State of Bolivia, PCA Case No. 2013-15, Award (Nov. 22, 2018); Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003); TransCanada Corp. v. United States, ICSID Case No. ARB/16/21, Request for Arbitration (June 24, 2016); Windstream Energy LLC v. Canada, Case No. 2013-22, Award (Perm. Ct. of Arb. 2016).

4. *See* case summaries, *infra* Section I.B.

"reasonable" or "legitimate" expectations.[5] These decisions have contributed to the legitimacy crisis facing investment treaties and ISDS and the resulting calls to radically transform them or even scrap them altogether.[6] This Article will contend, however, that a few adjustments to the analytical framework employed by tribunals under *existing* ISDS mechanisms when interpreting *existing* treaties can strike a more effective balance between investor rights, human rights, and environmental protection—all while remaining faithful to treaties' texts and purposes.

The proposed adjustments target the notion of reasonable or legitimate expectations, which tribunals routinely view as central to their analyses when adjudicating some of the most popular treaty claims: expropriation, fair and equitable treatment (FET), and minimum standard of treatment (MST).[7] This Article will argue that tribunals cannot properly evaluate investor expectations without giving due attention to several factors that are frequently overlooked or glossed over. It also identifies issues beyond investor expectations that may be relevant to liability or quantum, but that are likewise often neglected—including conduct that should reasonably be expected *from investors*. Specifically, this Article recommends that tribunals incorporate the following five guidelines into their analyses in Community Conflict Cases.

First, tribunals should identify and give effect to aspects of domestic law that may limit investor expectations. In some cases, tribunals have either ignored potentially relevant domestic law or given it scant attention. Notably, in the case of large-scale projects like those typically at issue in Community Conflict Cases, any approvals sought by an investor will often be contingent upon an environmental impact assessment (EIA) and stakeholder consultations, with decision-makers

5. *See infra* Section I.B.

6. *See, e.g.*, Christopher M. Ryan, *Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law*, 29 U. PA. J. INT'L L. 725, 738–40 (2008) (discussing *Metalclad* and *Tecmed* and noting that these and similar cases have been cited by critics as evidence that tribunals' interpretations of investment treaties "make it difficult for governments to govern"); Schill, *supra* note 2, at 578–79 (describing the legitimacy crisis and actions that some states have already begun to take in response, including withdrawal from or redrafting of treaties, replacing ISDS with dispute settlement in domestic courts, the creation of a standing investment court, or state-to-state arbitration in lieu of ISDS).

7. The nature of these claims, and the relevance of "reasonable expectations" thereto, is discussed *infra* Section I.A.

having discretion to deny the proposal if the results of these processes are not favorable.[8] In addition, domestic law may give decision-makers the power to revoke authorizations if actual impacts exceed those anticipated or if the investor violates applicable regulations.[9] The risk of such a denial or revocation should necessarily inform, and limit, the investor's expectations. Nevertheless, tribunals in some Community Conflict Cases have faulted host states for denying proposals based on concerns that arose in EIAs and stakeholder consultations[10] or have dismissed as irrelevant aspects of domestic law that might have justified revoking a permit.[11]

Second, tribunals should generally accord significant deference to host state authorities when they interpret and apply their own law, as when determining whether or not conditions for any approval were satisfied or grounds existed to revoke an approval.[12] In some Community Conflict Cases, tribunals have purported to show such deference, but were in fact quick to reject determinations by state authorities that were *adverse* to the investor, even as they accepted without scrutiny prior statements or findings that were *favorable*.[13] When faced with conflicting findings on the same subject matter, a rule of thumb that would serve tribunals well is to show greater deference to state authorities when they take action that has the potential to protect against threats to the public or the environment, as compared to when authorities could be concealing or downplaying such threats.[14]

Third, tribunals should consider whether local remedies were reasonably available to the investor that could have corrected any asserted error in the application of domestic law that operated to the investor's detriment. If such remedies were available and the investor failed to pursue them, the claim may be defective on the merits.[15]

Fourth, the tribunal should confirm that the investor's purported expectations were compatible with international law, including the host state's binding obligations under human rights instruments and international environmental law.[16] Tribunals in Community Conflicts

8. *See infra* Section II.A.1.
9. *See infra* Section II.A.2.
10. *See infra* Section II.A.1.
11. *See infra* Section II.A.2.
12. *See infra* Section II.B.1.
13. *See infra* Section II.B.2.
14. *See infra* Section II.B.2.
15. *See infra* Section II.C.
16. *See infra* Section II.D.

Cases usually have declined to examine in any depth the host state's non-investment obligations.[17] Yet if the state violated its international obligations when making commitments to the investor, and the investor knew or should have known of this violation, then the investor arguably cannot reasonably expect to enforce those commitments.[18] While it is relatively rare that commitments to an investor will violate the host state's international obligations, there have been Community Conflict Cases in which the investor claimed a reasonable expectation to engage in activity that may well have implicated such a violation.[19]

Fifth, tribunals should recognize that investors engaged in high-impact activities must be mindful of a risk of community conflict, and expect that, to avoid such conflict, they may need to take any number of steps *whether or not required by law*.[20] Such steps may include reasonable measures to mitigate project impacts, engage with affected communities, and share benefits with them.[21] Any investor who neglects to employ these measures may have only itself to blame for any resulting social conflict or at least be partly at fault—a factor that could warrant a reduction in damages.[22]

If applied consistently going forward, the foregoing guidelines have the potential to alleviate some of the concerns that are driving public opinion against investment treaties and ISDS, while still ensuring investors protection against conduct that can properly be characterized as arbitrary, discriminatory, bad faith, or expropriatory.[23] While this framework would not eliminate altogether the need for further reform in international investment law, it could serve as a useful bridge before treaties are re-drafted or other more elaborate measures are adopted. There is a pressing need for such a ready-made solution because investor-community conflicts arise with regularity and several pending ISDS proceedings have arisen from such conflicts[24]—disputes that present a prime opportunity to apply the proposed framework.

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17. *See infra* Section II.D.
18. *See infra* Section II.D.1.
19. *See infra* Section II.D.1.
20. *See infra* Section II.E.
21. *See infra* Section II.E.
22. *See infra* Section II.E.
23. *See infra* Section III.A (providing examples of how state conduct could violate investment treaties notwithstanding application of the proposed guidelines).
24. Examples include Cosigo Res., Ltd. v. Republic of Colom., UNCITRAL, Notice of Arbitration and Statement of Claim (Feb. 19, 2016); Gabriel Res. Ltd. (Jersey) v. Romania, ICSID Case No. ARB/15/31, Notice of Arbitration (July 21, 2015); Infinito

The discussion will proceed as follows. Part I will explain the potential relevance of investor expectations and how this concept has been applied in a sample of Community Conflict Cases to date. Part II will develop in detail the guidelines described above and show how they could have made a difference in particular cases. Part III will identify circumstances in which respondent states could be found liable, despite the application of the proposed guidelines, and seek to demonstrate that the outcomes contemplated by the proposal would be fully consistent with the rationales underlying investment treaties.

I. THE NOTION OF "REASONABLE EXPECTATIONS" AND ITS APPLICATION IN COMMUNITY CONFLICT CASES

The significance that tribunals routinely assign to investor expectations is sometimes cited as evidence of a pro-investor bias within ISDS: an inherent tendency to uphold investor prerogatives at the expense of state regulatory responsibilities and the public interest.[25] As the discussion below will reveal, however, tribunals have valid reasons for seeking to ascertain what the investor reasonably expected when it made its investment. When tribunals reach questionable results, it is not because they made this basic inquiry, but because they may not have considered everything that should have informed the investor's expectations or focused on investor expectations to the exclusion of other relevant factors.

Section I.A will explain the relevance of investor expectations to some of the most common claims asserted in ISDS: expropriation, FET and MST. Section I.B will then summarize a set of Community Conflict Cases decided on the merits to date, highlighting how the tribunals applied the notion as well as other issues that tribunals ignored or quickly dismissed, but which might have warranted different outcomes.

Gold v. Republic of Costa Rica, ICSID Case No. ARB/14/5, Request for Arbitration (Feb. 6, 2014); Lone Pine Res. Inc. v. Gov't of Can., ICSID Case No. UNCT/15/2, Notice of Arbitration (Sept. 6, 2013).

25. *See, e.g.*, Francesco Costamagna, SERVICES OF GENERAL INTEREST BEYOND THE SINGLE MARKET: EXTERNAL AND INTERNATIONAL LAW DIMENSIONS 98 (Markus Krajewski ed., 2015) (describing the analyses in various treaty awards as biased because "[t]he focus of these decisions was firmly on investors' position and on their expectations, while paying little consideration to the position of the host State and its right to regulate"); Mojtaba Dani & Afshin Akhtar-Khavari, *Rethinking the Use of Deference in Investment Arbitration: New Solutions Against the Perception of Bias*, 22 UCLA J. INT'L L. & FOREIGN AFF. 38, 39–40 (2018) ("The perception of bias is particularly significant when, during the deliberations of investment tribunals, investors' profits and interests seem to outweigh the regulatory autonomy of states.").

A. *The Relevance of Investor Expectations*

Many investment treaties explicitly refer to investor expectations as a factor to be considered when evaluating expropriation claims. For example, the Canada-Peru Free Trade Agreement (FTA), at issue in the *Bear Creek Mining Corp. v. Republic of Peru*[26] case discussed below, provides: "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 . . . *the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations*[.]"[27] The treaty also identifies two other factors as relevant to the analysis: the character of the measure and the measure's economic impact.[28]

These three factors were derived from U.S. takings jurisprudence, and ISDS tribunals often employ them even when the relevant treaty does not expressly refer to them.[29] The rationale behind the reasonable investment-backed expectations criterion is that if someone made an investment in reliance on an established regulatory framework or on governmental assurances, then it may not be fair for the state to change the rules after the fact to the investor's detriment.[30] The second criterion—the character of the measure—examines whether the state was seeking to advance an important public purpose

26. Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Award (Nov. 30, 2017).

27. Canada-Peru Free Trade Agreement, Can.-Peru, art. 812.1, May 29, 2008 [hereinafter Canada-Peru FTA] (emphasis added), https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/background-contexte.aspx?lang=eng [https://perma.cc/9AWM-U4H5].

28. *Id.*

29. Hao Zhu, *Dynamically Interpreting Property in International Regulatory Takings Regimes*, 51 COLUM. J.L. & SOC. PROBS. 129, 152–53 (2017) (summarizing the development of these factors in U.S. takings jurisprudence and their use by ISDS tribunals).

30. *See* Cienega Gardens v. United States, 331 F.3d 1319, 1345–46 (Fed. Cir. 2003) ("The purpose of consideration of plaintiffs' investment-backed expectations is to limit recoveries to property owners who can demonstrate that 'they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.'" (quoting Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994)); Lockaway Storage v. Cty. of Alameda, 216 Cal. App. 4th 161, 168, 185–86 (2013) (holding that landowner's expectation of being able to operate a boat and RV self-storage facility on its property was reasonable because county officials assured the landowner that it could do so before it acquired the land; subsequently-enacted land use restrictions effected a taking).

in restricting the investor's activities, such as preventing a nuisance.[31] The final criterion—economic impact—aims to limit takings claims to property owners who experienced a serious financial loss.[32]

ISDS tribunals frequently also examine the investor's expectations when adjudicating FET or MST claims. To understand why, one must consider the nature of these standards.

Most investment treaties include a provision in which the host state commits to provide FET to covered investors or their investments.[33] In some treaties, the provision refers to FET in isolation, while in others it refers to FET "in accordance with international law," or equates FET with the "minimum standard of treatment" or MST.[34] The MST refers to a basic floor for states' treatment of aliens under customary international law, below which states may not go without incurring international responsibility.[35]

When the treaty does not expressly link FET with international law, FET is often viewed as an autonomous concept. Under this reading, the host state will violate the treaty if it fails to treat the investor fairly and equitably, whether or not that treatment violates the MST.[36] Tribunals employing this interpretation have identified a number of ways the host state can violate the FET standard, including failing to act with due process, discriminating against the investor, operating in a non-transparent manner, or frustrating the investor's "reasonable" or

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31. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491–92 (1987) ("[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."); Walcek v. United States, 49 Fed. Cl. 248, 270 (2001), *aff'd*, 393 F.3d 1349 (Fed. Cir. 2002) (explaining that this criterion "requires the court to consider the purpose and importance of the public interest underlying the regulatory imposition" and "inquire into the degree of harm created by the claimant's prohibited activity").

32. *Cienega Gardens*, 331 F.3d at 1340.

33. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 130 (2d ed. 2012) ("Most bilateral investment treaties (BITs) and other investment treaties provide for fair and equitable treatment (FET) of foreign investments.").

34. *Id.* at 135 (describing variations in the wording of FET provisions).

35. ROLAND KLÄGER, 'FAIR AND EQUITABLE TREATMENT' IN INTERNATIONAL INVESTMENT LAW 48–49 (2011) (describing the MST and its historical development).

36. PATRICK DUMBERRY, FAIR AND EQUITABLE TREATMENT: ITS INTERACTION WITH THE MINIMUM STANDARD AND ITS CUSTOMARY STATUS 32–33 (2018) (observing that most tribunals have interpreted standalone FET clauses as establishing an autonomous standard delinked from customary international law, which provides a higher level of protection than the MST).

"legitimate" expectations.[37] For example, in *Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States*[38]—a Community Conflict Case summarized below—the tribunal asserted that FET precludes the host state from undermining "the basic expectations that were taken into account by the foreign investor to make the investment."[39]

While the content of the MST is unsettled, it is often viewed more restrictively than FET as a stand-alone standard.[40] Several tribunals have asserted that the host state will violate the MST only if its conduct is "egregious and shocking," as where it commits "a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons."[41] Others have characterized the MST as having evolved in recent decades, such that host state conduct no longer needed be outrageous or shocking to violate it; merely being unfair or unreasonable could suffice.[42] There is wide agreement, however, that one way the host state could violate the MST would be to frustrate an investor's reasonable or legitimate expectations.[43] Some tribunals have considered a wide range of state conduct as potentially giving rise to such expectations,[44] while others have restricted the inquiry to specific commitments or assurances that the host state may have offered to induce the

37. *See* DOLZER & SCHREUER, *supra* note 33, at 145–60 (summarizing scenarios that have been deemed contrary to the FET obligation in arbitral jurisprudence).

38. Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003).

39. *Id.* ¶ 154.

40. DUMBERRY, *supra* note 36, at 32–33.

41. *See, e.g.*, Glamis Gold, Ltd. v. United States, UNCITRAL, Award, ¶ 616 (June 8, 2009).

42. *See, e.g.*, Merrill & Ring Forestry L.P. v. Canada, UNCITRAL, ICSID Administered Case, Award, ¶¶ 207–08, 210, 213 (Mar. 31, 2010).

43. *See, e.g.*, Clayton v. Canada, Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 455 (Perm. Ct. of Arb. 2015) ("The reasonable expectations of the investor are a factor to be taken into account in assessing whether the host state breached the [MST]."); *Glamis Gold, Ltd.*, Award, ¶¶ 621–22 (asserting that a host state could violate the MST if its conduct "creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct").

44. *See, e.g.*, *Clayton*, Case No. 2009-04, Award on Jurisdiction and Liability at ¶ 455 (asserting that to ascertain the claimants' reasonable expectations, the tribunal would need to review the claimants' interactions with officials of the host state, the legal and policy framework that existed at the time, and "general and specific encouragements" provided by host state authorities).

investment.[45] Under any of these approaches, however, at least *some* state conduct can give rise to reasonable expectations.

It must be acknowledged that some states have disputed that the MST encompasses a notion of reasonable expectations, asserting an absence of state practice and opinio juris in support of this concept.[46] Nevertheless, even these states have acknowledged that if a host state makes specific assurances to an investor and later abrogates them, the state's conduct could violate the MST—and have at times couched this concept in terms of reasonable expectations.[47]

This Article therefore assumes the potential relevance of investor expectations to expropriation, FET, and MST claims. It proceeds to consider how the concept has been applied in Community Conflict Cases, and how tribunals could enhance their application of the concept—as well as other aspects of their analytical framework—going forward.

B. *Representative Community Conflict Cases*

The following is a summary of five Community Conflict Cases, presented in chronological order. Two can be thought of as companion cases of a sort because they both involve hazardous waste facilities in Mexico: *Tecmed* and *Abengoa*.[48] The other cases involve a proposed gold mine in the United States (*Glamis*),[49] a proposed quarry

45. *See, e.g.*, *Glamis Gold, Ltd.*, Award ¶¶ 621–22, 627 (limiting the inquiry to specific assurances or other conduct by the host state intended to induce the investment).

46. *See, e.g.*, Submission of the United States of America, Windstream Energy LLC v. Canada, Case No. 2013-22, Award, ¶ 16 (Perm. Ct. of Arb. 2016); Gov't of Canada, Reply to 1128 Submissions, Mesa Power v. Canada (June 26, 2015), ¶ 12, https://www.italaw.com/sites/default/files/case-documents/italaw6300_0.pdf [https://perma.cc/C8PA-HS5Y].

47. *See, e.g.*, *Glamis Gold, Ltd.*, Award at ¶ 576 (noting acknowledgement by United States that an MST breach could occur "when express assurances or contractual commitments made to induce foreign investment had been breached"); Gov't of Canada, Counter-Memorial, Windstream Energy LLC v. Canada, (Jan. 20, 2015) ¶ 410, https://www.italaw.com/sites/default/files/case-documents/italaw4288_0.PDF [https://perma.cc/7PBV-3PWT] ("Before the expectations of a foreign investor may even be considered as relevant to the question of whether or not a State has [breached the MST], a claimant must first prove that its expectations . . . were based on a specific assurance or promise by the State made to induce the investment . . . .").

48. Abengoa, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/09/2, Award (Apr. 18, 2013); Tecnicas MedioambientalesTecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 35 (May 29, 2003).

49. *Glamis Gold, Ltd.*, Award ¶ 10.

and marine terminal in Canada (*Clayton*),[50] and a proposed silver mine in Peru (*Bear Creek*).[51] While these arbitrations are by no means the total corpus of Community Conflict Cases, they are particularly relevant because the tribunals reached the merits of the treaty claims and applied a notion of reasonable or legitimate expectations.

1. Tecmed v. United Mexican States

The claimant in this case, Tecmed, was a Spanish company that acquired a hazardous waste landfill in Mexico near the municipality of Hermosillo.[52] Despite the dangerous nature of the materials to be transported through the city on the way to the landfill where it would be stored, there is no indication in the award that Tecmed engaged with the community or sought to ascertain public attitudes toward the project before making the acquisition. According to Tecmed, it relied on the fact that the government issued the necessary permits for the facility and the facility had already been operating for some time.[53] It is notable, however, that once taking over the landfill, Tecmed's local subsidiary, Cytrar, began accepting new types of waste and adopted new practices—including trucking hazardous waste through the city in open bags—which generated instant controversy.[54]

Under pressure from community members, federal authorities inspected Cytrar's operations, found violations of a number of environmental regulations, and imposed fines.[55] Cytrar purported to address the violations, but later inspections found further violations, and authorities imposed new fines.[56] Before long, community opposition to the landfill became "widespread and aggressive."[57] A local NGO filed a complaint against Cytrar for environmental crimes,[58] and protestors marched to the landfill and began a blockade that lasted for months.[59]

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50. Clayton v. Canada, Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 37 (Perm. Ct. of Arb. 2015).
51. Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Award, ¶ 1 (Nov. 30, 2017).
52. *Tecnicas Medioambientales Tecmed*, ARB(AF)/00/2 ¶ 36.
53. *Id.* ¶¶ 35–38.
54. *Id.* ¶¶ 49, 105, 107.
55. *Id.* ¶ 107.
56. *Id.*
57. *Id.* ¶ 108.
58. *Id.*
59. *Id.*

When Cytrar's operating permit was up for review, a federal agency found that Cytrar had committed numerous *additional* legal violations beyond those already sanctioned[60] and declined to renew the permit.[61] Federal authorities considered allowing Cytrar to build a new facility in a different location, but ultimately rejected that possibility.[62]

In response to these events, Tecmed launched an arbitration against Mexico under the 1995 Spain-Mexico Bilateral Investment Treaty (BIT).[63] The tribunal ruled in Tecmed's favor, finding that the withdrawal of Cytrar's permit constituted an expropriation and a denial of FET. The tribunal rested its holding on the notion that, by issuing the necessary permits, federal authorities had given Tecmed the legitimate expectation that Cytrar would be able to operate the landfill indefinitely.[64] The tribunal asserted that Cytrar's violations of environmental regulations did not justify closing the landfill and that the real motivation for the closure had been "community pressure."[65] The tribunal deemed it significant that when federal authorities had previously found Cytrar in violation of environmental regulations, they had merely imposed fines.[66] The tribunal also placed emphasis on prior statements by federal authorities asserting that the landfill did not pose a serious threat.[67]

2. Glamis Gold v. United States

Glamis, a Canadian company, sought to develop a gold mine on federal land in southeastern California.[68] Glamis invested several million dollars to acquire the mining rights, carry out exploratory work, and pursue environmental permits.[69] Glamis would later contend that it was induced to make these investments because the applicable regulatory framework gave it a reasonable expectation that

60. *Id.* ¶ 99 (listing violations); *id.* ¶ 123 ("During its operation of the Landfill, Cytrar breached a number of the conditions under which the Permit was issued . . .").
61. *Id.* ¶¶ 39, 97–99.
62. *Id.* ¶ 112.
63. *Id.* ¶ 4; *see also* Agreement on the Reciprocal Promotion and Protection of Investments, Spain-Mex., June 23, 1995 [hereinafter 1995 Spain-Mexico BIT].
64. *Tecnicas Medioambientales Tecmed*, ARB(AF)/00/2 ¶¶ 149, 154.
65. *Id.* ¶¶ 123–28, 141, 163.
66. *Id.* ¶¶ 124, 137.
67. *Id.* ¶ 124.
68. Glamis Gold, Ltd. v. United States, UNCITRAL, Award, ¶ 10 (June 8, 2009).
69. *Id.* ¶ 98.

it would be able to exploit its mining rights.[70] As in *Tecmed*, however, the claimant's narrative overlooked risks associated with the project, including a trend toward increasing regulation in the mining sector[71] and opposition from a local Native American tribe.[72]

The project was located within the California Desert Conservation Area (CDCA), which Congress had designated for protection because it was environmentally sensitive and featured important cultural and archaeological resources.[73] The federal Bureau of Land Management (BLM) authorized Glamis to undertake exploratory work at the site, and Glamis determined that there was enough gold to make the project profitable.[74] Glamis drafted a plan of operations, which called for excavating three large open pits and constructing associated processing facilities, where Glamis would separate the gold from waste rock through a cyanide heap-leach process.[75] When finished, Glamis would only partially backfill the open pits.[76]

Federal regulations allowed for mining in the CDCA, but only if it could be conducted without "unnecessary or undue degradation" (UUD).[77] Moreover, any operations would have to comply with state and federal laws, including those on air and water quality, wildlife and plant habitat, and cultural resources.[78] In addition, federal legislation required BLM to conduct an EIA prior to approving the proposal[79] and to consider potential effects on items of cultural or religious significance to Native American tribes.[80] Finally, because the project fell within the ancestral lands of the Quechan Tribe, BLM was required to consult the Tribe and take its views into account.[81]

The ensuing impact assessment revealed that the land surrounding the project featured extensive cultural resources, including ancient pictographs, tool deposits, and trails—all of which were sacred to the

70. *Id.* ¶ 633.
71. *Id.* ¶ 639.
72. *Id.* ¶ 676.
73. *Id.* ¶¶ 31, 44.
74. *Id.* ¶¶ 86–87, 115–17.
75. *Id.* ¶ 34.
76. *Id.*
77. *Id.* ¶¶ 54–55.
78. *Id.* ¶ 59.
79. *Id.* ¶ 56.
80. *Id.* ¶¶ 76–78.
81. *Id.* ¶¶ 77–78, 103–05.

Quechan.[82] The trails were part of a larger network known as the Trail of Dreams, which played a vital role in Quechan history and cosmology.[83] BLM determined during the impact assessment process that the mine would destroy fifty-five Native American traditional historic properties that were eligible for listing in the National Register of Historic Places.[84] In addition, there would be significant, unavoidable impact on the ability of the Quechan to travel along the Trail of Dreams and conduct traditional religious activities.[85] BLM determined further that because Glamis did not intend to completely backfill the open pits, the project would result in "unavoidable adverse impacts to visual quality in this substantially undisturbed landscape."[86] In light of these anticipated impacts, the Quechan Tribe expressed strong opposition to the mine during consultations.[87] There is no indication in the award that Glamis engaged with the Tribe before making its investments or that the company offered it any economic benefits to help compensate for the mine's adverse effects.

Based on the results of the impact assessment and input from the Quechan and the general public, BLM determined that Glamis' proposal would cause UUD and rejected Glamis' proposal.[88] Glamis brought a lawsuit challenging that decision, contending that BLM had misapplied the UUD standard.[89] While the case was pending, a new Secretary of the Interior—appointed by President George W. Bush—directed BLM to reconsider its decision.[90] Yet, before BLM could do so, the State of California took action in response to the Quechan Tribe's concerns about the project that effectively precluded approval of Glamis's proposal.[91] Specifically, the state enacted legislation prohibiting the approval of any hardrock surface mining operation in California located near a Native American sacred site, unless the pits would be backfilled and graded to the approximate original contours

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82. *Id.* ¶¶ 89–108.
83. *Id.* ¶¶ 105–08.
84. *Id.* ¶ 99; DEP'T OF INTERIOR, BUREAU OF LAND MGMT., CA 670-41027, RECORD OF DECISION FOR THE IMPERIAL PROJECT (2001), https://www.blm.gov/ca/pdfs/elcentro_pdfs/Glamis_ROD_final_1-01.pdf [https://perma.cc/8WU7-LC2G].
85. *Glamis Gold, Ltd.*, Award ¶ 110.
86. DEP'T OF THE INTERIOR, *supra* note 84, at 3.
87. *Glamis Gold, Ltd.*, Award ¶¶ 102–08, 127.
88. *Id.* ¶¶ 148–55.
89. *Id.* ¶¶ 156, 633–37.
90. *Id.* ¶¶ 157–59.
91. *Id.* ¶¶ 167, 171–77.

of the land.[92] Glamis contended that the new requirements would make the project financially infeasible and abandoned the venture.[93]

Glamis initiated arbitration under the investment chapter of the North American Free Trade Agreement (NAFTA),[94] alleging that the backfilling legislation and failure to approve Glamis's proposal constituted an expropriation and violated the MST.[95] The tribunal rejected both claims, making this a rare Community Conflict Case to go against the investor on liability.

The tribunal denied the expropriation claim on the ground that the actions by state and federal authorities had not deprived Glamis of its mining rights or even rendered the project unprofitable. In the tribunal's view, Glamis could still carry out the project profitably; it would simply have to engage in additional mitigations that would make the project *less* profitable.[96]

On the MST claim, the tribunal accepted that the investor's reasonable expectations could be relevant in determining whether or not a violation occurred. The tribunal contended, however, that the investor's expectations would be relevant only if the host state had created those expectations through conduct designed to induce the investment—as where it offered a specific assurance or commitment to the investor.[97] The tribunal observed that U.S. authorities had made no representations to Glamis about the way in which the relevant legal standard would be interpreted or encouraged Glamis to persist with its efforts.[98] Moreover, the tribunal asserted that if Glamis believed that BLM's interpretation of the UUD standard was incorrect, the proper venue for its challenge was domestic court—not treaty arbitration.[99] As for the state backfilling legislation, the tribunal found that it did not violate any reasonable expectations because mining in California was a highly regulated activity, and state authorities had offered no specific assurance that they would not adopt further regulations.[100]

92. *Id.* ¶ 175.
93. *Id.* ¶ 341.
94. North American Free Trade Agreement, Dec. 17, 1992, Ca.-Mex.-U.S., ch. 11, 32 I.L.M. 605, 639–49 [hereinafter NAFTA].
95. *Glamis Gold, Ltd.*, Award ¶ 11.
96. *Id.* ¶¶ 534–36.
97. *Id.* ¶¶ 621–22, 627.
98. *Id.* ¶ 767.
99. *Id.* ¶ 762.
100. *Id.* ¶¶ 767, 799–807.

3. Abengoa v. United Mexican States

As in *Tecmed*, the claimants in this case were Spanish companies that sought to build a hazardous waste facility in Mexico—this time near the municipality of Zimapán. The investors enjoyed initial governmental support for their project from all levels of government.[101] Once again, however, the investors seem to have ignored clear warning signs about the social viability of the project.

Although the award does not mention it, other sources indicate that there were several communities in close proximity to the proposed hazardous waste plant. These reportedly included multiple villages of indigenous Otomi people,[102] one of which was only 500 meters from the site.[103] It has been alleged that these communities were not consulted about the plant, and that when they learned of it—after its construction was already underway—they were alarmed.[104] Community members were concerned in particular that the hazardous waste would leach into the soil and contaminate local water sources, that toxic clouds could be carried to them on air currents, and that the plant could be vulnerable to earthquakes in light of a nearby geological fault.[105]

It is not clear to what extent governmental authorities took these potential dangers into account when vetting the project; the award does not mention any specific community concerns or even the existence of indigenous villages in the area. In fact, the award says nothing about the impact assessment process, other than to explain that specialists hired by the investors' subsidiary, SDS, "carried out technical studies of the location" and submitted the results to a federal

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101. *Id.* ¶¶ 166–78.

102. *See* Fernando Cabrera Diaz, *Spanish Firms Launch ICSID Dispute Against Mexico over Stalled Toxic Waste Disposal Project*, INV. TREATY NEWS (Jan. 13, 2010), https://www.iisd.org/itn/2010/01/12/spanish-firms-launch-icsid-dispute-against-mexico-over-stalled-toxic-waste-disposal-project [https://perma.cc/U8ZG-468E] (asserting that there were "24 Ñañhus indigenous communities and 20 fresh water springs within a 5 km radius of the waste facility"). The Ñähñu or hñähñu are a subset of the Otomi people. *See About Us*, OTOMI NATION http://otomi.org/about [https://perma.cc/K8TG-ESUS].

103. Ana Lilia Pérez, *Abengoa: El Millonario Juicio Contra México*, CONTRALINEA (Mex.) (Mar. 8, 2011, 12:00 AM), https://www.contralinea.com.mx/archivo-revista/2011/03/08/abengoa-el-millonario-juicio-contra-mexico [https://perma.cc/UN4B-6KR7].

104. *Id.*

105. *See* Katia Fach Gómez, *ICSID Claim by Spanish Companies Against Mexico over the Center for the Integral Management of Industrial Resources*, 8 SPAIN ARB. REV. 1, 7 (June 28, 2010) (referring to local indigenous communities near the plant and summarizing community concerns); Pérez, *supra* note 103 (same).

agency in Mexico,[106] which promptly issued an Environmental Impact Authorization.[107] There is also no indication that SDS engaged with local communities to educate them about the project before settling on the site. The award notes that SDS made presentations to unspecified local residents, but not until after construction was already underway.[108]

When local citizens finally learned about the plant, an opposition movement quickly developed.[109] Concerned citizens established a protest camp in front of Zimapán City Hall, blockaded local roads, and organized other large demonstrations in Zimapán and Mexico City, some of which turned violent.[110] Seeking to diffuse the conflict, federal authorities proposed that an independent body conduct a study to evaluate the project's environmental soundness, and that SDS suspend work in the meantime—which protest leaders endorsed.[111] Yet SDS continued building the plant and no independent study materialized, so protests continued.[112]

Federal authorities eventually sent troops to remove protestors so that the plant could be completed.[113] These authorities also sought to assuage community concerns by stating publicly that the plant complied with applicable regulations and did not threaten the environment or the local population.[114] The municipality eventually issued an operating permit for the plant, which soon began receiving hazardous waste.[115]

The opposition movement continued, and local residents voted leaders of the movement onto the city council.[116] The new councilors again called for an independent impact assessment, but still no such

106. Abengoa, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/09/2, Award, ¶ 180 (Apr. 18, 2013) (author's translation).

107. *Id.* ¶ 182.

108. *See id.* ¶ 192 (noting that Abengoa's subsidiary SDS began to construct the plant in December 1996); ¶ 193 (explaining that in January 1997 SDS "began to make presentations on the Plant in various meetings, and to disseminate information brochures to the population of Zimapán" (author's translation)).

109. *See id.* ¶ 194 (explaining that in January 1997 "a civil association called Unidos por Zimapán (UPZ) was created in Zimapán, which started a campaign against the plant through brochures, meetings and emails" (author's translation)).

110. *Id.* ¶¶ 201–02, 205, 207, 212, 230.

111. *Id.* ¶ 204.

112. *Id.* ¶ 601.

113. *Id.* ¶¶ 237, 239–40.

114. *Id.* ¶¶ 203, 251.

115. *Id.* ¶¶ 218–19, 243–46.

116. *Id.* ¶ 262.

study occurred.[117] The council initiated an administrative proceeding against SDS and ultimately found that there had been irregularities in the EIA and other aspects of the approval process and that SDS had violated environmental regulations while operating the plant. The council revoked the plant's operating permit on those grounds.[118]

The investors initiated arbitration under the 2006 Spain-Mexico BIT,[119] and the tribunal found that Mexico had committed both an expropriation[120] and a denial of FET.[121] The tribunal rested its conclusion for both claims on the notion of legitimate expectations.[122] Specifically, the tribunal reasoned that the investors acquired a legitimate expectation that they would be able to operate the plant indefinitely because governmental authorities had authorized the project, and the federal government "confirmed on repeated occasions its support for the project and its belief that the Plant was being built and operated in a perfectly regular manner."[123] The tribunal dismissed the environmental concerns raised about the plant, asserting that protest leaders had manufactured those concerns to get themselves voted into municipal office.[124] The tribunal suggested that if these leaders' concerns had been genuine, they would have conducted an independent impact assessment after they took office.[125] Nowhere did the tribunal explain how the municipality could have paid for such a study or why SDS did not offer to pay for it given the study's potential to assuage community concerns.

In fact, the tribunal did not acknowledge SDS's failure to fund the proposed independent study even when addressing Mexico's argument that the investors were negligent in handling community relations and therefore bore at least partial responsibility for their own losses.[126] The tribunal rejected that argument out of hand. According to the arbitrators, the conflict had been inevitable given the bad faith of

117. *Id.* ¶¶ 249, 251, 270.
118. *Id.* ¶¶ 279–81.
119. *Id.* ¶¶ 563–71; Agreement for the Promotion and Reciprocal Protection of Investments, Spain-Mex., Oct. 10, 2006 [hereinafter 2006 Spain-Mexico BIT].
120. *Abengoa, S.A.*, ARB(AF)/09/2 ¶ 624.
121. *Id.* ¶¶ 637, 644.
122. *Id.* ¶¶ 614–16 (expropriation claim); *id.* ¶¶ 645–52 (FET claim).
123. *Id.* ¶ 616 (author's translation).
124. *Id.* ¶ 650.
125. *Id.* ¶ 619.
126. *Id.* ¶¶ 660–68.

protest leaders, and Mexico was in no position to fault SDS's community relations efforts when Mexican law did not require SDS to do more.[127]

Another issue the tribunal does not seem to have considered is whether the hazardous waste plant was compatible with Mexico's international human rights and environmental obligations. This omission is conspicuous because while the plant was being constructed, local Otomi communities reportedly asserted that the government's approval of the plant without consulting them violated their international human rights.[128] This contention is one that should be taken seriously because Mexico is a party to multiple binding international agreements that recognize a right on the part of indigenous peoples, like the Otomi, to prior consultation under some circumstances. In particular, an instrument known as ILO Convention No. 169 provides that governments must consult indigenous peoples whenever contemplating administrative measures—like the permitting of a hazardous waste plant—that may affect them directly.[129] In addition, the Inter-American Court of Human Rights (IACHR) has interpreted the American Convention on Human Rights[130] as requiring not only that the state engage in prior consultations with affected indigenous peoples, but that in some contexts it refrain from approving a development project if the affected peoples do not give their free, prior, and informed consent (FPIC).[131] It appears, however, that the tribunal did not

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127. *Id.*

128. *See* Press Release, Todos Somos Zimapán, *Civil Movement Todos Somos Zimapán* (June 26, 2008), http://todossomoszimapan.blogspot.com [https://perma.cc/9SFA-JMGC] (asserting on behalf of the indigenous communities adjoining the hazardous waste plant that they had a right to prior consultation under ILO Convention No. 169 and demanding that their rights be taken into account).

129. International Labour Organization, Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, art. 6, June 27, 1989, 28 I.L.M. 1382 [hereinafter ILO Convention No. 169]. For Mexico's status as a party to this Convention, see International Labour Organization, Ratifications of C169—Indigenous and Tribal Peoples Convention, 1989 (No. 169), https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 [https://perma.cc/UT68-3KUP].

130. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673. For Mexico's status as a party to this Convention, see Inter-American Commission on Human Rights, Basic Documents—Ratification of the Convention, https://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm [https://perma.cc/SL9M-GBDZ] [hereinafter American Convention Ratifications].

131. *See* S.J. Rombouts, *The Evolution of Indigenous Peoples' Consultation Rights Under the ILO and U.N. Regimes*, 53 STAN. J. INT'L. L. 169, 217 (2017) (explaining that the IACHR has repeatedly interpreted the American Convention to provide that "in cases

consider it necessary to inquire into whether Mexican authorities complied with these international obligations when authorizing the plant, or whether those authorities would have committed further violations by allowing the plant to continue operating.

4. Clayton v. Canada

The claimants in this case were a U.S. company, Bilcon, and its owners, the Clayton family, who sought to build an aggregate quarry and marine terminal in Digby Neck, Nova Scotia.[132] The investors contended that they were enticed to pursue this project by promotional material issued by Nova Scotia touting the province's potential for mining and quarries,[133] and by expressions of enthusiasm by provincial officials when they first raised the possibility of carrying out a project in Digby Neck.[134] However, it was undisputed that provincial and federal authorities made clear to the investors early on that any approval would be subject to the outcome of an EIA.[135]

When the claimants applied for approval, these authorities decided to carry out a comprehensive form of impact assessment known as Joint Review Panel or JRP.[136] The authorities charged the JRP—an independent committee of experts—with determining the environmental effects of the project and measures that might mitigate any significant adverse environmental effects.[137] Consistent with applicable law, the agreement establishing the JRP defined "environmental effects" to include not only changes in the physical environment, but also any change that such an effect may have on health and socio-economic conditions; physical and cultural heritage; the current use of lands and resources for traditional purposes by aboriginal persons; or items of historical, archaeological, paleontological, or architectural significance.[138]

The investors contended that they spent millions of dollars conducting studies and engaging with the JRP during the ensuing EIA

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of large scale projects that have a major impact on the community, it is mandatory for the state to obtain consent from the affected communities").

132. Clayton v. Canada, Case No. 2009-04, Award on Jurisdiction and Liability, ¶¶ 5, 9 (Perm. Ct. of Arb. 2015).

133. *Id.* ¶¶ 457–61.

134. *Id.* ¶¶ 462–66.

135. *Id.* ¶¶ 152–57.

136. *Id.* ¶¶ 15, 157.

137. Joint Review Panel, Environmental Assessment of the Whites Point Quarry and Marine Terminal Project 109–12, 114–15 (2007) [hereinafter Whites Point EA].

138. *Id.* at 109.

process.[139] It is striking, however, that the investors do not appear to have made any effort to gauge community attitudes before submitting their proposal and triggering this expensive process. Moreover, even after the process began, it appears that the investors did little to educate the community about the proposal and address its concerns—being described by many residents as "dismissive" of their concerns.[140]

Yet the concerns were substantial. Community members feared the impacts of blasting and marine traffic on whales, salmon, and other aquatic wildlife—all of which were a draw for the area's burgeoning tourism industry.[141] Some worried that the quarry's operations would draw too much water from the local river, adversely affecting fish populations, and that blasting would harm the quality of drinking water.[142] Moreover, Digby Neck was a rural area with no existing industrial operations, and many residents anticipated that establishing such a facility would change the area's character, deter tourists from visiting, and set Digby Neck on a trajectory toward increasing industrialization.[143] In addition, the area and its surrounding waters had long been used by aboriginal groups for traditional purposes, and it was unclear how the project would affect those uses.[144]

These concerns resulted in a flood of letters to provincial and federal authorities urging the rejection of the proposal and similar impassioned entreaties by participants in public hearings.[145] The project also had its supporters,[146] but the JRP perceived the weight of public opinion as substantially against the project.[147]

Ultimately the JRP determined that the project would likely cause significant adverse environmental effects that could not be justified and recommended that the proposal be rejected.[148] The JRP based this conclusion on a number of factors, including its perception that the economic benefits from the project would be relatively modest while the burdens would be significant.[149] In the JRP's view, such burdens would

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139. *Clayton*, 2009-04 ¶¶ 18, 470.
140. Whites Point EA, *supra* note 137, at 71 ("[C]ommunity members described a dismissive, if not openly hostile, response to their concerns from the Proponent.").
141. *Clayton*, 2009-04 ¶ 130.
142. Whites Point EA, *supra* note 137, at 39.
143. *Clayton*, 2009-04 ¶ 130; Whites Point EA, *supra* note 137, at 14, 39, 54–55, 72.
144. Whites Point EA, *supra* note 137, at 67.
145. *Clayton*, 2009-04 ¶ 162; Whites Point EA, *supra* note 137, at 70–72.
146. *Clayton*, 2009-04 ¶ 217.
147. *Id.* ¶¶ 218–19; Whites Point EA, *supra* note 137, at 70–72.
148. *Clayton*, 2009-04 ¶ 188.
149. Whites Point EA, *supra* note 137, at 13.

include adverse effects on the physical environment, including "threats to . . . marine mammals, fish, birds and rare plant species," and the "possible alteration or destruction of a coastal wetland (fen)."[150] The JRP also identified social burdens that could result, including "reduction of groundwater quantity, altered air quality, and lower property values."[151] The JRP went on to assert that "the most striking burden" would be an adverse effect on "community core values," which it defined to include a commitment of the Digby Neck community to "a living connection with traditional lifestyles, harmony with the environment, combined with a strong sense of stewardship as a way of life."[152] According to the JRP, the project would introduce a significant and irreversible change to Digby Neck, which would affect the community's core values.[153] The JRP added that these changes would be so substantial as to constitute "a Significant Adverse Environmental Effect that cannot be mitigated."[154] Provincial and federal authorities thereafter adopted the JRP's recommendation and rejected the proposal.[155]

The claimants initiated arbitration against Canada under NAFTA, contending that the denial of their proposal violated the treaty's MST and anti-discrimination provisions.[156] A majority of the tribunal ruled in the claimants' favor, although one arbitrator, Professor Donald McRae, dissented.

On the MST claim, the majority rested its finding of breach on the notion of reasonable expectations.[157] The majority credited the claimants' assertion that they reasonably expected the impact assessment to have a "scientific and technical focus,"[158] limited to determining the project's "environmental soundness,"[159] whereas the JRP focused on whether the project was consistent with the community's core values.[160] This, the majority asserted, effectively gave the community a veto over the

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150. *Id.*
151. *Id.*
152. *Id.* at 14.
153. *Id.*
154. *Id.*
155. Clayton v. Canada, Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 37 (Perm. Ct. of Arb. 2015).
156. *Id.* ¶¶ 11, 40–41.
157. *Id.* ¶ 455.
158. *Id.* ¶ 201 (referring to "the expected scientific and technical focus of an EIS").
159. *Id.* ¶ 447 ("They expected . . . that their project would be assessed on the merits of its environmental soundness . . . .").
160. *Id.* ¶¶ 451–52, 503.

proposal.[161] In addition, the majority asserted that the JRP failed to consider mitigation measures that could have addressed the adverse environmental effects.[162]

The majority also held that Canadian authorities discriminated against the claimants by subjecting their proposal to more rigorous scrutiny than they applied to other proposed projects.[163] The majority deemed these other projects comparable to the claimants' even though they had not generated significant community opposition.[164]

In his dissent, Professor McRae disputed that the JRP had applied a standard that was manifestly inconsistent with applicable law.[165] He noted that the JRP had grounded its comments about adverse effects on community core values in impacts that were plainly proper for the JRP to consider, including socio-economic impacts such as those on air and water quality, fishing, and quality of life.[166] He also noted that the JRP justified its decision not to recommend mitigation measures on its perception that the effects of the project could not be mitigated.[167] Moreover, Professor McRae faulted the claimants for deficient community engagement, suggesting that if they "had been successful . . . in assuaging the concerns of the community and the JRP about the socioeconomic impact of the Project on the community, perhaps in modifying its proposal, perhaps in providing greater economic benefits, the recommendation might have been different."[168] Finally, he observed that if there were any errors in the standard employed in the review process, the claimants could have challenged the decision before Canadian courts.[169]

5. Bear Creek Mining v. Republic of Peru

The claimant in this case was Bear Creek, a Canadian company that sought to develop a silver mine in the Puno region of Peru near the border

161. *Id.* ¶¶ 23, 523.
162. *Id.* ¶ 583.
163. *Id.* ¶¶ 685–731.
164. *Id.* ¶ 704.
165. Clayton v. Canada, Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, ¶¶ 2, 15–29 (Perm. Ct. Arb. 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4213.pdf [https://perma.cc/YRQ3-RE95].
166. *Id.* ¶¶ 15–16, 19–25.
167. *Id.* ¶ 50.
168. *Id.* ¶ 27.
169. *Id.* ¶ 42.

with Bolivia.[170] As in other Community Conflict Cases, Bear Creek secured initial support for the project from governmental authorities, but its plans were ultimately doomed by a lack of support from local communities.

When Bear Creek first discovered silver, it faced two major threshold obstacles. First, the site was located within the Aymara-Lupaca Reserve Area, which the state had declared off-limits to mining to protect its biodiversity and cultural heritage.[171] The area featured rare flora and fauna and was home to numerous Aymara indigenous communities, who followed a traditional lifestyle centered on subsistence agriculture and herding.[172] Second, Peruvian law provided that a foreign company could not acquire mining rights near the border without a declaration of "public necessity."[173] Bear Creek overcame both of these obstacles when it convinced the state to "resize" the Reserve Area to exclude the mining site[174] and to issue the required decree of public necessity.[175] The state had a financial incentive to take both actions because it stood to derive substantial royalties and tax revenues from the project.[176]

Thereafter, Bear Creek undertook exploratory work at the site with authorization from Peruvian authorities.[177] Encouraged by the results, Bear Creek sought to develop the mine for production.[178] To do so,

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170. Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Award, ¶¶ 1–2, 123 (Nov. 30, 2017).

171. Brief for Non-Disputing Party Written Submission of DHUMA & Dr. Carlos Lopez at 3–4, Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21 (May 9, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7517.pdf [https://perma.cc/ATL2-R9VE] [hereinafter NDP Submission].

172. NDP Submission, *supra* note 171, at 3 (describing Aymara communities around the Santa Ana Project); *see also* Expert Report of Antonio Alfonso Peña Jumpa ¶¶ 9–14, Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21 (Oct. 6, 2015) [hereinafter Peña Expert Report].

173. *Bear Creek Mining Corp.*, ARB/14/21 ¶ 124.

174. NDP Submission, *supra* note 171, at 3–4 (discussing the resizing); *see also Bear Creek Mining Corp.*, ARB/14/21 ¶ 132.

175. *Bear Creek Mining Corp.*, ARB/14/21 ¶ 149.

176. AUSENCO VECTOR ET AL., FEASIBILITY STUDY: SANTA ANA PROJECT, BEAR CREEK MINING CORP. 150 (Oct. 21, 2010) (summarizing anticipated taxes and royalties payable to Peruvian authorities in connection with the Santa Ana Project).

177. Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Witness Statement of Felipe A. Ramírez Delpino, ¶ 15 (Oct. 6, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4472.pdf [https://perma.cc/QS4N-BZRT]; Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Claimant's Memorial on the Merits, ¶ 44 (May 29, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4458.pdf [https://perma.cc/5YV2-ZPGJ].

178. *Bear Creek Mining Corp.*, ARB/14/21, Claimant's Memorial on the Merits ¶¶ 45–48.

however, Bear Creek would have to enter into land-use agreements with the communities and families who owned or occupied the land where the project would occur[179] and would also need further governmental authorizations.[180]

Before Bear Creek could secure those authorizations, Peruvian law required it to conduct an Environmental and Social Impact Assessment (ESIA) and submit the same to Peruvian authorities for review and approval.[181] Bear Creek did so, but the government identified a number of deficiencies in the ESIA and did not approve it.[182] In addition, Peruvian law required mining developers to engage in consultations with all communities likely to be affected.[183] In fact, special consultation rules applied in this instance because the affected communities were indigenous. In such cases, developers had to engage in consultations with a view toward entering into agreements with the affected communities, which should confer a share of benefits and provide for the protection of their cultural heritage.[184] Peru had adopted these requirements to implement ILO Convention No. 169.[185]

Bear Creek would later contend that Peruvian law merely required it to consult with the relevant communities; it did not actually have to secure their consent.[186] Peru disputed this, asserting that community consent was a de facto requirement for any project,[187] but that a legal

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179. *Bear Creek Mining Corp.*, ARB/14/21 ¶ 259 (explaining that a mining company "must reach agreements with all land owners and possessors on the mine sites").

180. *Bear Creek Mining Corp.*, ARB/14/21, Witness Statement of Felipe A. Ramírez Delpino ¶¶ 16, 29.

181. *Id.* ¶¶ 16–17.

182. *Id.* ¶¶ 5, 16–17, 25–26, 29; *Bear Creek Mining Corp.*, ARB/14/21 ¶ 167.

183. *Bear Creek Mining Corp.*, ARB/14/21, Witness Statement of Felipe A. Ramírez Delpino ¶¶ 16, 21.

184. *Bear Creek Mining Corp.*, ARB/14/21 ¶¶ 239, 259 (summarizing consultation obligations and noting that requirements for indigenous communities are set forth in Supreme Decree 028); Aprueban el Reglamento de Participación Ciudadana en el Subsector Minero, Decreto Supremeo No. 028-2008-EM, art. 4, https://www.senace.gob.pe/wp-content/uploads/2016/10/NAS-4-6-05-DS-028-2008-EM.pdf [https://perma.cc/GFV6-64SP] [hereinafter Supreme Decree 028] ("[I]n case of projects or activities to be developed within the lands of indigenous populations . . . the citizen participation procedure is preferably oriented to establish agreements with their representatives, in order to safeguard their traditional rights and customs, and establish the benefits and compensatory measures that correspond to them . . . ." (author's translation)).

185. *Bear Creek Mining Corp.*, ARB/14/21 ¶ 239.

186. *Id.* ¶ 241.

187. *Id.* ¶ 258 ("[T]he State must ensure that companies obtain free and informed consent from the affected communities. . . . [A] company can only proceed with the

requirement existed in this case by virtue of ILO Convention No. 169 because the project would affect indigenous communities.[188] Curiously, Peru failed to make another argument as to why these communities' consent was required: the fact that Peru, like Mexico, is a party to the American Convention.[189] As noted previously, the IACHR has interpreted the American Convention as requiring FPIC when a development project would have a serious adverse effect on an indigenous community's lands, resources, or way of life.[190]

That this may have been such a project was attested to by an amicus brief submitted by a Peruvian NGO and human rights attorney (the "Amici").[191] According to the Amici, local Aymara communities had a spiritual bond with their territory and believed that the earth and local mountains—which they considered deities—would be harmed by the mine.[192] Some were alarmed that the mine would draw excessive water from local sources upon which they, their livestock, and rare wildlife depended.[193] Some also feared that those water sources would be contaminated by hazardous chemicals.[194]

In any event, Bear Creek did engage in some community consultations, but Peru and Amici characterized the company's efforts as grossly inadequate. Bear Creek allegedly excluded key stakeholders, choosing to focus only on communities closest to the mine.[195] Bear Creek also allegedly made highly technical presentations in Spanish, although most locals were Aymara speakers and could not understand the accompanying (poor) translation.[196] Some community members also criticized Bear Creek for not taking their concerns seriously.[197]

Bear Creek managed to secure support from some stakeholders after offering them economic benefits in the form of jobs and payments for

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consent of the communities."); *id.* ¶ 263 ("[W]hen a community or important stakeholders decides that it does not accept a mining project on their land, it cannot be imposed against the will of the people.").

188. *Id.* ¶ 258 (summarizing Peru's argument that, under ILO Convention No. 169, "the State must ensure that companies obtain free and informed consent from the affected communities, [and] the company must do what is necessary to achieve that result").

189. *See* American Convention Ratifications, *supra* note 130.

190. *See supra* notes 130–31 and accompanying text.

191. NDP Submission, *supra* note 171, at 2.

192. *Id.* at 7–8.

193. *Id.*

194. *Id.*

195. Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Award, ¶ 261 (Nov. 30, 2017).

196. *Id.* ¶ 225; NDP Submission, *supra* note 171, at 6–7.

197. *See* NDP Submission, *supra* note 171, at 17.

land use.[198] Yet the company offered few or no such benefits to others within the project's area of impact.[199] Moreover, even some to whom Bear Creek *did* offer benefits declined to support the mine[200]—including landowners who would need to sign land-use agreements for the project to proceed.[201]

In time, a broad-based opposition movement developed against the mine.[202] The movement began with peaceful protests but escalated into strikes, roadblocks, and violent confrontations, which "paralyzed all the southern area of Puno."[203]

According to Bear Creek, Peruvian officials assured the company during this time that its mining rights would be respected and that there were "no legal grounds to rescind legally granted concessions."[204] Nevertheless, Peruvian authorities eventually decided that the only way to diffuse the crisis was to meet protesters' demands.[205] These included revocation of the declaration of public necessity and Bear Creek's associated mining rights and a moratorium on further mining in the area.[206] The state accordingly took these actions.[207]

Bear Creek challenged the state's decision before a Peruvian court, which eventually ruled that it had been unlawful for the state to

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198. *Bear Creek Mining Corp.*, ARB/14/21 ¶ 407.

199. Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Philippe Sands QC, ¶ 21 (Nov. 30, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw10107.pdf [https://perma.cc/U7QW-HJDQ] (detailing unrebutted expert testimony that Bear Creek offered no benefits to several communities that were within the project's area of impact).

200. *Id.* ¶ 22 ("[E]ven amongst those communities that had been given jobs '*there was a lot of opposition*'.").

201. *Bear Creek Mining Corp.*, ARB/14/21 ¶ 263 ("[Claimant was] required to reach agreements with 5 communities who owned the land and the 94 families who were in possession of it—if any of these 99 agreements were to fail (and Claimant had obtained 0 by the date [when its Project was canceled]), it would be fatal to the Project.").

202. Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Witness Statement of Felipe A. Ramírez Delpino, ¶¶ 24, 26, 31 (Oct. 6, 2015).

203. NDP Submission, *supra* note 171, at 8–11; Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Award, ¶¶ 169–74, 178–79, 182, 188 (Nov. 30, 2017); Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Witness Statement of César Zegarra, ¶ 14 (Oct. 6, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4468.pdf [https://perma.cc/AXK2-8HC9].

204. *Bear Creek Mining Corp.*, ARB/14/21 ¶¶ 176, 185.

205. *Bear Creek Mining Corp.*, ARB/14/21, Witness Statement of César Zegarra at ¶¶ 13–25.

206. *Id.* ¶¶ 13, 22, 25.

207. *Id.* ¶ 25.

completely revoke the company's rights.[208] Nevertheless, Bear Creek abandoned domestic proceedings when Peru appealed that ruling,[209] in order to pursue arbitration against Peru under the Canada-Peru FTA before the treaty's limitation period expired.[210]

Bear Creek contended in the ensuing treaty arbitration that the revocation of its mining rights constituted an expropriation and violated the MST.[211] The tribunal ruled in Bear Creek's favor on expropriation, reasoning that Peru gave Bear Creek the "distinct, reasonable expectation" that it would be able to develop the mine by issuing the declaration of public necessity and authorizing the initial exploratory activity.[212] The tribunal declined to reach the MST claim because it would not provide any further relief.[213]

Peru argued that Bear Creek's recovery should be precluded or reduced because ILO Convention No. 169 required community consent for the mine, and the company's outreach efforts had been deficient.[214] The majority rejected these arguments. It asserted that the human rights of indigenous communities were beside the point because "ILO Convention 169 imposes direct obligations only on States."[215] In addition, the majority echoed the tribunal in *Abengoa* in finding that it would be inappropriate to fault Bear Creek's engagement efforts because Peru had not required Bear Creek to take any specific further steps.[216]

One member of the tribunal, Philippe Sands, dissented in part. He asserted that a company like Bear Creek should be mindful of the human rights of communities in places where it invests, even if not directly bound by the relevant human rights instruments.[217] He also

208. *Bear Creek Mining Corp.*, ARB/14/21 at ¶¶ 211, 213.
209. *Id.* ¶ 215.
210. The decree revoking Bear Creek's mining rights was issued in June 2011. *Id.* ¶ 202. The Canada-Peru FTA requires treaty claims to be filed within thirty-nine months from when the alleged treaty breach occurred. Canada-Peru FTA, *supra* note 27, art. 823(1)(c). Bear Creek commenced the arbitration in August 2014—just within the limitations period. *Bear Creek Mining Corp.*, ARB/14/21 ¶¶ 1, 9. The treaty also requires a waiver of the right to continue domestic proceedings with respect to the measure being challenged, once arbitration is sought. Canada-Peru FTA, *supra* note 27, art. 823(1)(e).
211. *Bear Creek Mining Corp.*, ARB/14/21 at ¶¶ 341, 499.
212. *Id.* ¶ 376.
213. *Id.* ¶ 533.
214. *Id.* ¶¶ 560–64.
215. *Id.* ¶ 664.
216. *Id.* ¶ 412.
217. Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Philippe Sands QC, ¶¶ 10–12 (Nov. 30, 2017).

concluded that Bear Creek made inadequate efforts to consult with communities and share benefits with them, as contemplated by ILO Convention No. 169.[218] He would therefore have held that Bear Creek bore partial responsibility for the conflict and reduced its damages by half.[219] Nevertheless, he agreed that the revocation of Bear Creek's mining rights constituted an expropriation.[220] According to Professor Sands, a more appropriate course would have been to suspend the mining rights rather than revoke them outright, leaving room for further consultations.[221]

II. PROPOSED GUIDELINES FOR EVALUATING INVESTOR EXPECTATIONS AND IDENTIFYING WHAT IS REASONABLE TO EXPECT FROM INVESTORS

As Section I.B showed, claimants in Community Conflict Cases typically contend that they invested in reliance on "reasonable" or "legitimate" expectations that they derived either from host state assurances or authorizations or from a regulatory framework that they perceived as favorable to them.[222] As examined below, however, investors' expectations in this regard may not always be objectively reasonable, and for reasons that tribunals do not always consider. Moreover, there may be other relevant factors apart from investor expectations—including investor misconduct or steps the investor needed to take to ripen any potential treaty claim—which could defeat the claim on the merits or warrant a reduction in damages.[223]

The sections that follow propose five guidelines to be employed by tribunals in Community Conflict Cases, each of which is designed to assist in determining whether asserted expectations were reasonable or identifying failings of the investor that may be relevant to liability or quantum.

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218. *Id.* ¶¶ 19–22, 25–36.
219. *Id.* ¶¶ 38–39.
220. *Id.* ¶ 2.
221. *Id.*
222. *Supra* Section I.B.
223. *See, e.g.*, Dani & Akhtar-Khavari, *supra* note 25, at 41, 67 (arguing that under the clean hands doctrine, tribunals should take investors' conduct into account and that serious misconduct should "bar an investor with unclean hands from benefiting from the protection mechanism of investment treaties"); George K. Foster, *Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*, 49 COLUM. J. TRANSNAT'L L. 201, 204–06 (2011) (noting decisions in which tribunals have rejected claims when claimants have not adequately pursued local remedies).

A. *Giving Effect to Aspects of Domestic Law that Limit Investor Expectations*

In all of the cases discussed in Section I.B, the claimants contended that they reasonably expected host state authorities to approve their project or, if already approved, allow them to carry it out indefinitely. And in all of those cases but *Glamis,* the tribunal agreed. Yet arguments of this nature may not be tenable if the approvals on which the asserted expectations were based were not certain to be granted or were subject to potential revocation under domestic law.

It is true that investment treaties establish independent standards and thus a host state may breach a treaty even if its actions were justified under domestic law.[224] Nevertheless, domestic law may be relevant to determining whether or not a treaty breach occurred.[225] Domestic law is relevant in particular to ascertaining the nature and scope of the investor's property rights and any requirements or restrictions on the investor's activities that it should reasonably have anticipated.[226] Notably, for large-scale projects like those typically at issue in Community Conflict Cases, any required approval will often depend on an EIA and stakeholder consultation, so the investor may never secure the property rights it seeks or the permission needed to exercise them if the results of these processes are not favorable.[227] Moreover, any approval may be subject to revocation if actual impacts exceed those anticipated or represented by the investor, or if the investor violates the law while operating the project. Aspects of domestic law like these may thus deserve significant attention in Community Conflicts Cases, although—as will be seen—they do not always receive it.

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224. *See* Int'l Law Comm'n, Rep. on the Works of Its Fifty-Third Session, U.N. Doc. A/56/10, at 36 [hereinafter ILC Draft Articles] ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.").

225. *See id.* at 38 ("Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility.").

226. *See* CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES § 8.65 (2007) ("The property rights that are the subject of protection under the international law of expropriation are created by the host State law."); ANDREW NEWCOMBE & LUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 95 (2009) (explaining that "IIAs and general international law do not . . . regulate the complex problems of proprietary and contractual rights" and "leave these issues to be decided, in principle, by the law of the host state").

227. *See infra* Section II.A.1.

1. Governmental approvals are often contingent on impact assessment or stakeholder consultation, the outcomes of which may be inherently uncertain

In recent decades, more than 100 countries have adopted binding legal requirements for governmental authorities to conduct an EIA prior to approving any projects or other activities that may have a significant environmental impact.[228] The required assessment is generally not limited to impacts on the physical environment; social and cultural impacts must be examined as well, at least if they flow from effects on the physical environment.[229] For example, as previously noted, the Canadian law at issue in *Clayton* called for governmental decision makers to consider potential changes to local health and socio-economic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes by aboriginal persons, or items of historical, archaeological, paleontological, or architectural significance.[230] Federal law in the United States likewise calls for agencies to consider a broad range of social and cultural impacts.[231]

Many EIA regimes also contemplate some form of public participation.[232] This enables local communities to assist in identifying effects they are likely to experience and express their views about the

228. *See* NEIL CRAIK, THE INTERNATIONAL LAW OF ENVIRONMENTAL IMPACT ASSESSMENT: PROCESS, SUBSTANCE AND INTEGRATION 23–33 (2008) (describing the proliferation and content of EIA regimes around the world).

229. *See* 5 DAVID J. MUCHOW & WILLIAM A. MOGEL, ENERGY LAW AND TRANSACTIONS § 120.02 (LexisNexis Matthew Bender, 2019) ("[I]f an EIS is prepared and economic or social effects are 'interrelated' with natural and physical effects, the EIS must discuss 'all of these effects on the human environment.'" (quoting 40 C.F.R. § 1508.14 (2019)); Sari Graben, *Resourceful Impacts: Harm and Valuation of the Sacred*, 64 U. TORONTO L.J. 64, 95 (2014) ("Cultural impacts form part of environmental assessment across the country [in Canada] and are increasingly used around the world."); Lawrence Susskind et al., *The Future of Hydropower in Chile*, 32 J. ENERGY & NAT. RESOURCES L. 425, 456–57 (2014) (discussing EIA regimes in the United States, Europe, and Chile and requirements to assess social impacts).

230. *See* Whites Point EA, *supra* note 137, at 109 (defining "environmental effects" for the purposes of the project's EIA).

231. *See* 40 C.F.R. § 1508.8 (2018) (defining the effects to be evaluated in an impact assessment under U.S. federal law as including "aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative"); *see also* San Juan Citizens All. v. Norton, 586 F. Supp. 2d 1270, 1280–81 (D.N.M. 2008) (summarizing the cultural resource impact assessment required by the National Historic Preservation Act).

232. *See* CRAIK, *supra* note 228, at 31–32 (stating that almost all EIA systems include some form of public participation, and describing it as the "soul" of the EIA process).

proposal.[233] For example, when U.S. federal agencies are preparing an environmental impact statement (EIS), they are required to notify interested parties about the proposal, make a draft EIS available for public comment, hold public hearings, and consider and respond to comments received.[234] In addition, when a project is likely to affect a Native American tribe, agencies must engage in meaningful consultations with the tribe.[235] Similar requirements for public participation exist under Canadian law, which explains the outpouring of local opposition noted by the JRP in *Clayton*.[236]

While EIA regimes merely prescribe procedures that authorities must follow rather than impose any substantive outcome, the results of the EIA process will often influence the project's prospects for approval.[237] When governmental agencies reject proposals to carry out a project, they will often explicitly base the decision on public opposition or on anticipated adverse impacts on local communities or on the physical environment.[238]

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233. *See, e.g.*, Chung-Lin Chen, *Institutional Roles of Political Processes, Expert Governance, and Judicial Review in Environmental Impact Assessment: A Theoretical Framework and a Case Study of Taiwan*, 54 NAT. RESOURCES J. 41, 71 (2014) (explaining that public participation in Taiwan's EIA regime has assisted in "identifying problems, distributing information, and building coalitions against many controversial developmental projects").

234. *See* CRAIK, *supra* note 228, at 31–32 (detailing public participation requirements under the National Environmental Policy Act (NEPA)).

235. *See* George K. Foster, *Community Participation in Development*, 51 VAND. J. TRANSNAT'L L. 31, 72 (2018) (summarizing consultation requirements under federal law).

236. *See generally* DWIGHT G. NEWMAN, REVISITING THE DUTY TO CONSULT ABORIGINAL PEOPLES 113–14 (2014) (explaining the nature of consultations with aboriginal communities required by Canadian law); Shaun Fluker, *The Right to Public Participation in Resources and Environmental Decision-Making in Alberta*, 52 ALTA. L. REV. 567 (2015) (summarizing opportunities for public participation under the 1992 and 2012 versions of the Canadian Environmental Assessment Act and under Alberta law).

237. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (explaining that in the United States "NEPA [the National Environmental Policy Act] itself does not mandate particular results, but simply prescribes the necessary process," and yet "these procedures are almost certain to affect the agency's substantive decision").

238. *See, e.g.*, NEWMAN, *supra* note 236, at 105 ("[E]xperience over the years with the [duty to consult aboriginal communities] does show that it can lead to major modifications to projects or even cancellations of projects that would have unacceptably severe impacts on Aboriginal communities."); Letter from Joseph R. Balash, Assistant Sec'y, Land & Minerals Mgmt., U.S. Dep't of Interior, to Hans-Christian Schulze, Country Manager, Eolus N. Am., Inc. (Nov. 19, 2018), https://basinandrangewatch.org/Crescent%20Peak%20Wind%20Nov%2019%2020 18-Interior.pdf [https://perma.cc/56MR-DXFB] (explaining reasons for denial of application to construct a wind farm, which included potential adverse impacts on wildlife and associated hunting and fishing opportunities, obstruction of scenic vistas, and opposition from local communities and Native American tribes); *Millennium Bulk Terminals*

Indeed, in some cases the results of the impact assessment may legally preclude the government from approving the project. For example, the regulatory framework applicable to the project at issue in *Glamis* prohibited BLM from approving a plan of operations if it would result in UUD.[239] This standard has been interpreted to preclude BLM from approving projects that would violate state or federal laws,[240] would cause impacts not reasonably incident to the proposed activity,[241] or would cause excessive environmental degradation.[242] Hence, if the impact assessment revealed that the project would cause effects within one of these categories, BLM could not validly approve it.[243]

If decisionmakers may deny an approval based on the outcome of an impact assessment or stakeholder consultations, then before these processes play out the investor should be aware that its ambitions may not be realized, and thus it may not have an actionable "expectation."[244] Hypothetically, the host state could guarantee to the investor that it will either issue the necessary approval or compensate the investor for any expenses incurred in connection with these processes. In such an event, the investor may well have a viable claim of reasonable expectations: a

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Longview, WASH. ST. DEP'T ECOLOGY, https://ecology.wa.gov/Regulations-Permits/SEPA/Environmental-review/SEPA-at-Ecology/Millennium [https://perma.cc/4PCZ-J57K] (linking the denial of a water quality permit required to build a coal terminal to adverse impacts to the local environment and communities).

239. Glamis Gold, Ltd. v. United States, UNCITRAL, Award, ¶¶ 54–55 (June 8, 2009).

240. *See* 43 C.F.R. § 3809.5 (2019) (defining UUD to include "conditions, activities, or practices that . . . [f]ail to comply with . . . [f]ederal and state laws related to environmental protection and protection of cultural resources").

241. *See id.* (defining UUD to include "conditions, activities, or practices that . . . [a]re not 'reasonably incident' to prospecting, mining, or processing operations").

242. *See* Mineral Policy Ctr. v. Norton, 292 F. Supp. 2d 30, 42 (D.D.C. 2003) (deciding that BLM has "the authority—and indeed the obligation—to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land").

243. *See* Gregory M. Adams, *Bringing Green Power to the Public Lands: The Bureau of Land Management's Authority and Discretion to Regulate Wind-Energy Developments*, 21 J. ENVTL. L. & LITIG. 445, 469 (2006) ("[T]he UUD standard actually requires prevention of the degradation. Thus, the UUD standard has the potential to either prevent a substantial number of development proposals or require approval to be conditioned on significant mitigation measures.").

244. *See* Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award, ¶¶ 65–71 (Nov. 13, 2000), (finding that the host state did not violate the treaty by applying its EIA regime to the claimant's proposal and rejecting it thereafter because "[t]here can be no doubt that [the] project required an EIA and that [the investor was] aware that this was so," and the EIA was carried out in compliance with domestic law).

possibility recognized by the tribunal in *Glamis*.[245] Yet no such guarantees were alleged in *Bear Creek* or *Clayton* and still the tribunals found that the claimants made their investments in reliance on reasonable expectations acquired *before* impact assessment and stakeholder consultations.

As will be recalled, in *Bear Creek*, the tribunal asserted that the Peruvian government gave Bear Creek the reasonable expectation that it would be able to develop the mine for production by issuing the decree of public necessity and authorizing initial exploratory activity.[246] In reaching this conclusion, the tribunal did not explain how Bear Creek could have had such an expectation even though *separate* governmental approvals were required for the production phase, and any such approvals were subject to both an EIA and mandatory stakeholder consultations.[247] Accordingly, if Peruvian authorities had not guaranteed any particular result, it would seem that Bear Creek should have understood that the outcome was not assured.

In *Clayton*, the majority held that the claimants reasonably expected that the environmental review process would have a "scientific and technical focus"[248] and would be limited to determining the project's "environmental soundness"[249] without an emphasis on "community core values."[250] The majority failed to recognize, however, that the statutory framework gave responsible authorities discretion in evaluating whether or not to approve the project in light of whatever effects the EIA identified—whether biophysical, social, or cultural in nature.[251] Moreover, these authorities were required to take into

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245. *See* Glamis Gold, Ltd. v. United States, UNCITRAL, Award, ¶¶ 621–22, 627 (June 8, 2009) (holding that even though there can be situations where a "Contracting Party's conduct creates reasonable and justifiable expectations," this was not such a case); *id.* ¶ 767 (finding an absence of specific commitments to induce the investment because, inter alia, the host state "did not guarantee Claimant approval of its [mining] claims").

246. *Bear Creek Mining Corp.*, ARB/14/21 ¶ 376.

247. Ramírez Witness Statement, *supra* note 177, ¶¶ 4–5 (explaining the series of governmental approvals that are required for a mining project under Peruvian law at various stages, as well as the need for an EIA); *id.* ¶¶ 16–18 (discussing community consultation requirements that are part of the EIA process).

248. *Clayton*, 2009-04, Award on Jurisdiction and Liability at ¶ 201 (referring to "the expected scientific and technical focus of an EIS").

249. *Id.* ¶ 447 (asserting that the claimants knew that an EIA was required but expected that their project would be assessed "on the merits of its environmental soundness").

250. *Id.* ¶¶ 451–52.

251. Authorities could approve a project only if the EIA showed that it would not have significant adverse environmental effects or that it would have such effects but

account input from the public when making the necessary judgment about whether or not the project's impacts would be justified.[252] Accordingly, unless the authorities had somehow guaranteed a positive result—which was not alleged—the claimants should have known that the outcome was uncertain and that social impacts and stakeholder attitudes could influence the result.

Any claim of reasonable expectations early on in the review process may be even more far-fetched if domestic law precludes the approval of the project absent *consent* by local stakeholders. For example, in the Philippines, certain types of projects may not take place on the lands of an indigenous people unless the people has given its consent.[253] Peru contended in the *Bear Creek* arbitration that a similar consent requirement existed for projects affecting indigenous communities in that country.[254] Oddly, however, the tribunal did not squarely address this argument.[255] Instead, it focused on whether or not the claimant did all it needed to do by way of community "outreach"—that is, the process of *seeking* community consent.[256] The majority asserted in particular that the "[c]laimant could take it for granted to have complied with all legal requirements with regard to its *outreach* to the local communities" because Peru had not required the claimants to take specific further steps in that regard.[257] These comments miss the mark. If a local *consent* requirement existed—rather than merely a

authorities determined that the effects would be "justified in the circumstances." *See* Canadian Environmental Assessment Act, S.C. 1992, c. 37 § 20(1) (repealed 2012). The statute defined "environmental effect" to include a variety of social and cultural impacts. *See id.* § 2(1); *see also* Toby Kruger, *The Canadian Environmental Assessment Act and Global Climate Change: Rethinking Significance*, 47 ALTA. L. REV. 161, 179–80 (2009) (explaining that the Canadian Environmental Assessment Act (CEAA 1992) contemplated a "discretionary decision whereby the decision-maker must balance competing societal values in order to justify project approval").

252. *See* Canadian Environmental Assessment Act § 16(1) (providing that, in making the necessary judgment, decision makers must take into account "comments from the public that are received in accordance with this Act and the regulations," among other factors).

253. *See* JANE A. HOFBAUER, SOVEREIGNTY IN THE EXERCISE OF THE RIGHT TO SELF-DETERMINATION 279 (2016) (discussing FPIC requirements under the IPRA).

254. Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Award, ¶ 258 (Nov. 30, 2017).

255. *Id.*

256. *Id.* ¶¶ 408, 411–12 (asserting that although the Claimant could have taken further steps in outreach to local communities, the "Claimant could take it for granted to have complied with all legal requirements" in regards to community outreach).

257. *Id.* ¶ 412 (emphasis added).

requirement to *seek* consent—and such consent had not been obtained by the time Bear Creek made its investment, then it is not clear how Bear Creek could possibly have had a reasonable expectation that it would be able to develop the mine for production.

Furthermore, if the relevant land or resources are owned by particular individuals or groups, their consent may be required before the project can go forward even if there is no consent requirement for all affected communities.[258] This was another issue raised by Peru in *Bear Creek*, and the claimant did not deny that the landowners' consent was required and that it had failed to obtain it.[259] For the tribunal to find that the claimant nevertheless had a reasonable expectation to carry out the project is curious.

2. Domestic law may contemplate the revocation of rights or authorizations as a result of unanticipated impacts or legal violations

When a government has approved a project and the investor has made expenditures in reliance, the investor may well acquire vested rights under domestic law, such that a subsequent restriction on its activities would require compensation.[260] Yet, under some circumstances, a governmental authorization may be subject to withdrawal or suspension *without* compensation.[261] Notably, domestic law may provide for the revocation or suspension of a permit if the project's impacts turn out to be more severe than was originally anticipated or than was represented by the investor,[262] or if the permit holder violates the terms of the permit or applicable law while carrying out the project.[263] Indeed, a

258. *See, e.g.*, CARLY A. DOKIS, WHERE THE RIVERS MEET PIPELINES, PARTICIPATORY RESOURCE MANAGEMENT, AND ABORIGINAL-STATE RELATIONS IN THE NORTHWEST TERRITORIES 98 (2015) (explaining that developers may require consent from an aboriginal group if it owns the relevant resources).

259. *Bear Creek Mining Corp.*, ARB/14/21 at ¶ 263 (memorializing Peru's argument that Claimant was legally required "to reach agreements with 5 communities who owned the land and the 94 families who were in possession of it" but reached *none* of the required agreements).

260. *See, e.g.*, Coral Springs St. Sys., Inc. v. City of Sunrise, 371 F.3d 1320, 1333–36 (11th Cir. 2004) (discussing the state law doctrines of "vested rights" and "equitable estoppel").

261. *See infra* notes 262, 263 and accompanying text.

262. *See, e.g.*, Mingo Logan Coal Co. v. EPA, 829 F.3d 710, 713 (D.C. Cir. 2016) (affirming EPA's revocation of a permit authorizing a mining company to dispose of waste rock in streams after new data led the EPA to conclude that the project was resulting in unacceptable adverse environmental effects).

263. *See, e.g.*, 30 U.S.C. § 1271(a)(2) (2012) (providing for an order to cease mining activity if "any condition or practices exist, or that any permittee is in violation of any requirement of this chapter or any permit condition required by this chapter,

permit holder in violation of applicable law may be subject to sanction even if state authorities had purported to confirm the lawfulness of its activities. In the United States, for example, the federal government generally cannot be estopped from enforcing the law—or required to pay compensation if it does so—even if its agents have previously represented to the party asserting estoppel that the party was in compliance with the law.[264] Such estoppel will certainly not lie against the government if the party *knew* that its activities were unlawful.[265]

Rith Energy, Inc. v. United States[266] provides an example of a measure that was justified under domestic law and did not require compensation. The plaintiff, Rith, held coal mining leases.[267] To secure a mining permit, Rith had to submit an assessment of the probable hydrologic consequences of mining in the area, supported by soil test results.[268] This was designed to ensure compliance with the Surface Mining Control and Reclamation Act (SMCRA),[269] which seeks to reduce the risk of acid mine drainage (AMD), a phenomenon that can result in toxic materials reaching groundwater.[270] Rith presented results purporting to show that the sampled materials were of low acidity and that the surrounding soils had buffering capabilities, suggesting a low risk of AMD.[271] The relevant agency accordingly issued

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which . . . creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm"); *id.* § 1271(a)(4) (authorizing permit revocation for a pattern of violations that are willful or otherwise unwarranted); Rith Energy, Inc. v. United States, 247 F.3d 1355, 1366 (Fed. Cir. 2001) (holding that the suspension of a mining permit for violations of federal law did not constitute a taking).

264. *See* Robertson-Dewar v. Holder, 646 F.3d 226, 229 (5th Cir. 2011) ("Courts have been exceedingly reluctant to grant equitable estoppel against the government."); *see also* Heckler v. Cmty. Health Servs. of Crawford Cty., Inc., 467 U.S. 51, 60 (1984) (explaining the rationale for this reluctance as follows: "When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined").

265. *See* United States v. Philip Morris Inc., 300 F. Supp. 2d 61, 70–71 (D.D.C. 2004) (holding that any attempt to assert estoppel against the government would necessarily fail if the party cannot establish, inter alia, that the government intended to mislead the party by its conduct and the party was ignorant of the true facts).

266. 247 F.3d 1355, 1366 (Fed. Cir. 2001).

267. *Id.* at 1358.

268. *Id.* at 1359.

269. Surface Mining Control and Reclamation Act (SMCRA) of 1977, 30 U.S.C. §§ 1201–1328 (2012).

270. *See Rith Energy*, 247 F.3d at 1358–59.

271. *Id.*

Rith a permit.[272] Years later, however, the agency received public complaints about the mine and conducted its own tests.[273] These contradicted the results submitted by Rith, so the agency suspended the permit.[274] When Rith challenged this as a taking, the court held that Rith had no reasonable expectation to mine under circumstances that posed a danger to the public and should have known that any authorization was subject to compliance with SMCRA.[275]

The same logic can potentially be applied to treaty claims based on the revocation of a governmental approval. Namely, an investor should reasonably expect that it will have to conduct itself in accordance with domestic law or face the loss of its rights.[276] Indeed, ISDS tribunals have widely recognized that the good faith, non-discriminatory enforcement of domestic regulations does not violate international law—at least if the penalties are proportionate to the offense.[277]

A recent arbitral award in *Aven v. Costa Rica*[278] illustrates how this reasoning can be applied in a Community Conflict Case. In that case, a group of investors sought to develop a hotel and residential complex on the Pacific Coast of Costa Rica.[279] They applied for and obtained the necessary governmental approvals, including environmental viability and construction permits, and began developing the property and marketing it.[280] However, the claimants failed to disclose in their application the possibility that there were protected wetlands on the property.[281] After the claimants began construction work, local

272. *Id.* at 1360.
273. *Id.*
274. *Id.*
275. *Id.* at 1364.
276. *See supra* note 226 and accompanying text.
277. *See, e.g.*, Philip Morris Brands Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, ¶ 305 (July 8, 2016) ("[I]n order for a State's action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the action must be taken *bona fide* for the purpose of protecting the public welfare, must be non-discriminatory and proportionate."); Suez v. Argentine Republic, ICSID Case No. ARB/03/19, and AWG Grp. v. Argentine Republic, UNCITRAL, Decision on Liability, ¶ 139 (July 30, 2010) ("As numerous cases have pointed out, in evaluating a claim of expropriation it is important to recognize a State's legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation.").
278. Aven v. Republic of Costa Rica, Case No. UNCT/15/3, Award (Sept. 18, 2018).
279. *Id.* ¶¶ 6, 94.
280. *Id.* ¶ 6.
281. *Id.* ¶¶ 551–59.

residents complained that wetlands were being destroyed and the government ultimately suspended the permits.[282] The tribunal determined that under Costa Rican law a permit applicant has the burden to disclose the existence of wetlands to the relevant authorities,[283] and that the claimants' failure to do so in this instance justified the suspension of the permits, thereby precluding a finding of treaty breach.[284] The tribunal was unconvinced by the claimants' assertion that they could reasonably rely on the government to identify the wetlands or on the fact that the government had issued the necessary permits.[285]

By contrast, the tribunals in both *Tecmed* and *Abengoa* dismissed out of hand attempts by state authorities to justify permit withdrawals based on asserted violations by the claimants of domestic law.[286] In both cases, the relevant authority concluded that the investor's subsidiary had violated environmental regulations, which constituted grounds under Mexican law for the permit to be withdrawn.[287] Each tribunal determined that the relevant authority's decision was misguided—and constituted a treaty breach—without even inquiring into what remedies Mexican law provided for infractions of the nature alleged. In fact, each tribunal asserted that it was ultimately irrelevant whether the decisions to withdraw approvals had been proper under Mexican law because the investor had reasonably relied on federal authorities' initial inaction as well as on past assertions by these authorities that the facility did not pose a threat to public safety or the environment.[288]

Such a reliance argument may have some merit if the facilities at issue were truly in compliance with applicable law, or the investors had no reason to believe otherwise. But if the investors knew or should have known that the facilities were violating the law, and that withdrawal of their permits was available as a remedy for such a violation, then reliance on prior state assertions may not have been justified. ISDS tribunals should give states considerable leeway to correct their own errors and use

282. *Id.* ¶¶ 122–33, 145–48.

283. *Id.* ¶¶ 542–59

284. *Id.* ¶ 585

285. *Id.* ¶¶ 360, 551–59.

286. *See* Abengoa S.A. v. United Mexican States, ICSID Case No. ARB(AF)/09/2, Award, ¶¶ 256, 281 (Apr. 18, 2013); Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 124 (May 29, 2003).

287. *See Abengoa S.A.*, ARB(AF)/09/2 ¶¶ 256, 281; *Tecnicas Medioambientales Tecmed*, ARB(AF)/00/2 ¶¶ 95, 98, 123–24.

288. *See Abengoa S.A.*, ARB(AF)/09/2 ¶¶ 612–22; *Tecnicas Medioambientales Tecmed*, ARB(AF)/00/2 ¶¶ 124, 149–51.

their police powers to address violations without facing liability when they do so.[289] One way to extend such leeway is to avoid entertaining claims founded in notions of reasonable reliance by investors who knew or should have known that they were violating the law.

B. Showing Deference to Host State Applications of Domestic Law, Particularly When a Decision Protects Against Potential Threats to the Public or the Environment

As the preceding discussion revealed, an investor may not have a credible argument that its reasonable expectations were frustrated by adverse state action if grounds existed under domestic law for the state to take the action in question. However, to apply that principle the tribunal must first accept the state's conclusion that the measure was justified under domestic law. The discussion that follows will contend that tribunals should generally defer to the state in this regard absent evidence of bad faith or manifest error—particularly when the state was acting to prevent threats to public safety or the environment.

1. Tribunals should generally defer to state authorities when interpreting and applying their own law

The proposition that international courts or tribunals should show deference to host state authorities is widely accepted.[290] As the tribunal in *S.D. Meyers*[291] asserted, a "tribunal does not have an open-ended mandate to second-guess government decision-making,"[292] and therefore, the tribunal's "determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[293] It is also often said that tribunals should not purport to act as courts of

289. *See* Feldman v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, ¶ 103 (Dec. 16, 2002), 18 ICSID Rev. 488 (2003) ("[G]overnments must be free to act in the broader public interest through protection of the environment. . . . Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.").

290. *See* Julian Arato, *The Margin of Appreciation in International Investment Law*, 54 VA. J. INT'L L. 545, 555–56 (2014) ("Tribunals have increasingly . . . turned to the idea of deferential standards of review as a tool for balancing the regulatory authority of the state against foreign investors' rights and legitimate expectations under investment treaties.").

291. S.D. Myers, Inc. v. Canada, UNCITRAL, Partial Award (Nov. 13, 2000).

292. *Id.* ¶ 261.

293. *Id.* ¶ 263.

appeals on matters of domestic law[294] and should instead afford states a margin of appreciation in interpreting their own law.[295]

Tribunals vary in how they characterize the appropriate standard of review, but some have said that they would require "convincing and decisive evidence"[296] or "clear and compelling evidence"[297] that host state findings were misguided. Others have indicated that they would respect host state determinations so long as they are plausible, made in good faith, and not manifestly erroneous.[298] Moreover, it is well-settled that states are entitled to a presumption in proceedings before international courts or tribunals that they acted in good faith.[299]

Deference of this sort toward state authorities can be justified on several grounds. To begin, state authorities generally have more familiarity with

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294. *See, e.g.*, RosInvestCo UK Ltd. v. Russ. Fed'n, SCC Arb. V (079/2005), Final Award, ¶ 446 (Arb. Inst. Stockholm Chamber Com. 2010) ("The Tribunal . . . is neither an appeal body for the determination of Russian tax law nor claims that it has expert knowledge of that law."); Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, ¶¶ 129–32 (Apr. 30, 2004) ("[T]he Tribunal . . . is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of *amparo* in respect of the decisions of the federal courts of NAFTA parties.").

295. *See* Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award, ¶ 527 (Nov. 12, 2010) (deciding not to substitute its own judgment for that of Czech courts regarding whether or not an arbitral award was contrary to Czech public policy, and to instead allow it a "margin of appreciation"); Micula v. Rom., ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶¶ 94–95 (Sept. 24, 2008) (asserting that the host state should be accorded a "margin of appreciation" in applying its own law).

296. *See Micula*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility at ¶ 95.

297. *See* Saluka Invs. BV v. Czech Republic, UNCITRAL, Partial Award, ¶ 273 (Perm. Ct. Arb. Mar. 17, 2006).

298. *See, e.g.*, *Frontier Petroleum Servs. Ltd.*, Final Award, ¶ 527 (indicating that the tribunal would defer to Czech courts' interpretation of Czech law so long as their conclusion was "plausible," "reasonably tenable, and made in good faith").

299. *See* Tacna-Arica Question (Chile v. Peru), 2 R.I.A.A. 921, 930 (1925) ("A finding of the existence of bad faith should be supported not by disputable inferences but by clear and convincing evidence which compels a conclusion."); FRÉDÉRIC G. SOURGENS ET AL., EVIDENCE IN INTERNATIONAL INVESTMENT ARBITRATION 134 (2018) (noting the presumption of good faith in ISDS and explaining that it calls for the tribunal to treat the parties "as honest and reasonable unless there is proof to the contrary"); Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L.J. 389, 412 (2002) ("International courts and tribunals have to presume that states act in good faith. To do otherwise would call the honour of states into question, risk introducing political and diplomatic factors into the judicial process, impede international relations, and increase the danger of escalation.").

their own law and are in the best position to interpret it.[300] State authorities are also closer to the underlying facts than an international tribunal and may have greater expertise in any relevant scientific or technical issues.[301] In addition, showing deference is consistent with the dignity due to host states as sovereigns within their own borders and tends to promote the legitimacy of the court or tribunal among states and their publics.[302]

While most tribunals accept the need to show deference in principle, the extent to which they do so in practice is sometimes dubious. Several of the tribunals in Community Conflict Cases discussed above in Section I.B recited some version of the above mantras about deference but proceeded to reject state determinations rather lightly—at least when the determinations were adverse to the claimants. For example, the majority in *Clayton* endorsed the language in *S.D. Meyers*, calling for a "high measure of deference" toward host state authorities when regulating within their own borders[303] and asserted that "mere error in legal or factual analysis" would not warrant a finding of treaty breach.[304] Yet this did not stop the majority from substituting its own judgment for that of the JRP and Canadian authorities regarding how to interpret the legal standard for an EIA under Canadian law. Notably, the majority characterized the JRP's interpretation of the standard as a fundamental departure from Canadian law,[305] despite the evidence discussed above in Section II.A.1 that the interpretation was solidly grounded in the relevant statute.[306]

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300. *See* Kristen E. Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 VA. L. REV. 289, 354 (2016) (noting that a foreign sovereign may be "the best possible expert on its own law").

301. *See* Schill, *supra* note 2, at 602 ("Expertise . . . will often militate for respecting science-based determinations made by domestic agencies . . . . Regularly, arbitral tribunals will lack the specific knowledge to determine or review the substantive soundness of such science-based determinations even with the help of experts.").

302. *See id.* at 600–01 (explaining that the approach of providing deference has contributed to the legitimacy achieved by the World Trade Organization's Appellate Body and the European Court of Human Rights).

303. Clayton v. Canada, Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 440 (Perm. Ct. of Arb. 2015).

304. *Id.* ¶ 594.

305. *Id.* ¶ 594.

306. *See* Clayton v. Canada, Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, ¶¶ 2, 15–29 (Perm. Ct. of Arb. 2015).

2. When deciding which of conflicting host state decisions to credit, tribunals should be mindful of the values at stake and the host state incentives behind each decision

When tribunals have rejected findings by host state authorities, they have sometimes done so in part because those authorities—or other authorities at a different level of government—had previously taken a contrary position. As noted previously, the tribunals in *Tecmed* and *Abengoa* based their conclusions in part on the fact that that federal authorities had previously found that the facilities at issue did not pose serious environmental or safety threats.[307]
These tribunals thus gave priority to certain governmental findings over others. Namely, they credited those that were *favorable* to the investor and rejected those that were *adverse*: an approach that feeds into the perception that ISDS is biased in favor of investors.[308] The tribunals did not explain why they did so, but it is possible they felt that the statements favorable to the investor were more reliable because they were against the state's interest in the arbitration. This reasoning is not always viable, however. State authorities may have good reasons for changing their views, for example if new facts or evidence emerge suggesting that their initial findings were erroneous or incomplete.[309] Further, a different governmental agency may examine the matter and discover that the reality is contrary to what another agency suggested. If the investor knew the true state of affairs, it may not be credible to claim that it was grossly unfair, manifestly arbitrary, or otherwise internationally wrongful for the state to correct itself.

The tribunal in *Abengoa* may also have reasoned that findings or assertions by federal authorities should trump those by municipal authorities. The truth is, however, that findings by municipal authorities may be *more* reliable in some instances because they are closer to the facts on the ground and may be more in tune with impacts on local stakeholders or the environment and less influenced by the financial incentives that can lead higher authorities to overlook impacts.[310]

307. *See supra* note 288 and accompanying text.

308. *See supra* note 25 and accompanying text.

309. *See* CRAIK, *supra* note 228, at 42–43 (asserting that EIAs may be unreliable or fail to comply with applicable legal requirements in part because "developing states often have few experts trained in EIA techniques and related scientific disciplines, environment ministries or other institutions responsible for implementing EIA requirements lack financial resources, and there is often a lack of baseline environmental data").

310. *See* Riccardo Pavoni, *Environmental Rights, Sustainable Development, and Investor-State Case Law: A Critical Appraisal*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW

Accordingly, tribunals faced with conflicting host state findings should not automatically credit one finding over the other simply because of when it was made or which authority made it. In such situations, the tribunal should undertake its own independent examination of the facts and law and reach its own conclusions. While some deference to host state authorities may be warranted, tribunals should modulate the degree of deference they provide to particular decisions depending on the context in which each was made and the values or risks at stake in each decision.

The idea that the degree of deference accorded to governmental measures should vary depending on the context is by no means a novel one. Courts in many legal systems apply an exacting standard of review for measures that target fundamental rights or vulnerable groups, but a deferential one when evaluating measures designed to protect public health, safety, or the environment (which do not place special burdens on vulnerable rights or groups).[311] Similar reasoning would suggest that tribunals in Community Conflict Cases should show considerable deference when reviewing decisions to withhold, revoke, or suspend a governmental approval based on perceived environmental or social threats. Conversely, decisions may warrant little or no deference if

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AND ARBITRATION 525, 553 (Pierre-Marie Dupuy et al. eds., 2009) (arguing that decisions by municipal authorities may warrant more deference than those of federal authorities in light of subsidiarity: the notion that decisions should be made "by the authorities most representative of (and proximate to) citizens' needs and concerns").

311. *See* Kennecott Greens Creek Mining Co. v. Mine Safety & Health Admin., 476 F.3d 946, 954–55 (D.C. Cir. 2007) (explaining that U.S. courts review agency decisions on mine safety regulations under a deferential standard that requires only "reasonableness, not perfection," and that "an extreme degree of deference" is appropriate when the agency is "evaluating scientific data within its technical expertise"); Mingo Logan Coal Co. v. EPA, 70 F. Supp. 3d 151, 170 (D.D.C. 2014), *aff'd*, 829 F.3d 710 (D.C. Cir. 2016) (deferring to EPA's determination as to what constitutes an unacceptable adverse effect on wildlife: so long as it was "reasonable and supported by the record, the Court must defer"); Simona Morettini, *Community Principles Affecting the Exercise of Discretionary Power by National Authorities in the Service Sector*, in GLOBAL AND EUROPEAN CONSTRAINTS UPON NATIONAL RIGHT TO REGULATE: THE SERVICES SECTOR 106, 118 (Stefano Battini & Giulio Vesperini eds., 2008) (noting that the European Court of Justice shows great deference when reviewing state measures adopted for public health and safety); Berta E. Hernández-Truyol, *Querying* Lawrence, 65 OHIO ST. L.J. 1151, 1168 (2004) (explaining that U.S. courts apply heightened scrutiny to classifications that disadvantage a suspect class or infringe on fundamental rights); *id.* at 1210–11 (describing similar standards of review for measures affecting vulnerable groups or fundamental rights in other legal systems); Patricia Popelier & Catherine Van De Heyning, *Procedural Rationality: Giving Teeth to the Proportionality Analysis*, 9 EUR. CONST. L. REV. 230 (2013) ("[T]he ECtHR leaves a wide margin of appreciation in the sphere of environmental protection.").

there is a risk that, by adopting it, the state was ignoring or facilitating such threats or otherwise infringing important rights—such as an indigenous community's right to prior consultation or consent.[312]

Tribunals should be mindful that host states may have strong incentives to downplay risks associated with development projects and that these incentives can continue after a conflict has arisen between the investor and the local community—or even after the treaty arbitration has been filed. After all, if governmental authorities previously approved a project and purported to confirm that it complied with all applicable laws and regulations, it could be very damaging politically to recognize later that their prior findings were erroneous. The authorities would effectively be conceding that they failed in their most fundamental responsibilities and put the public or the environment at risk. For the tribunal to credit assertions by state authorities in such a context, without scrutiny, would be no less of a failure of responsibility—particularly if some other governmental entity has made a different finding.

To be sure, even when significant deference is due to a governmental decision, the tribunal must still exercise independence. Were tribunals too deferential, host states would be free to take whatever action against foreign investments they desired, so long as they cloaked it in the guise of environmental protection or public safety.[313] Tribunals have arguably struck the right balance when holding that they will respect a state determination entitled to deference so long as it was made in good faith and was not manifestly erroneous.[314] It similarly makes sense for tribunals to insist on clear and convincing evidence for any asserted basis to reject such a determination—beyond the fact that state authorities at some point expressed a different view.

C. The Potential Relevance of Local Remedies

Even if the tribunal concludes that a decision by state authorities was erroneous and contrary to the investor's reasonable expectations, it does not automatically follow that a treaty breach has occurred. As I

312. Schill, *supra* note 2, at 25 ("[R]ights can also militate in favor of deference to host state conduct, for example, if that conduct has the objective to protect rights and interests of third parties affected by conduct of foreign investors, above all the host state's population.").

313. Arato, *supra* note 290, at 558 (discussing the risk that deference could be "a means of giving respondent states a free pass to accomplish indirectly what they cannot do directly," as by "engaging in indirect expropriation through dubious environmental measures").

314. *See id.* (deference is only useful when states are acting in good faith).

have argued elsewhere,[315] and as several tribunals have held,[316] if a mechanism exists under domestic law to have that decision reviewed and reversed without undue delay or expense, then the host state's treatment of the investment has not necessarily frustrated reasonable expectations or otherwise fallen below international standards.

Investment treaties can be, and increasingly are, drafted to require the pursuit of local remedies for a specified period of time.[317] Yet even if there is no such requirement as a procedural matter certain claims may properly be viewed as defective on the merits absent a reasonable effort to pursue local remedies.[318] This proposition is most widely accepted for claims challenging judicial decisions because denial of justice has traditionally been viewed as having a substantive exhaustion element.[319] Nevertheless, the same reasoning can apply equally to claims challenging administrative decisions—such as the denial or withdrawal of a permit—provided the decision is readily subject to review and reversal.[320]

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315. *See generally* George K. Foster, *Striking a Balance Between Investor Protections & National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*, 49 COLUM. J. TRANSNAT'L L. 201 (2011).

316. *Id.* at 204–09 (collecting cases); *see also* Cervin Investissements S.A. v. Republic of Costa Rica, ICSID Case No. ARB/13/2, Award, ¶ 504 (Mar. 7, 2017) ("[T]here are situations where, by failing to exercise the remedies allowed by local law against a supposedly unlawful action, the investor prevents the international arbitral tribunal from concluding that the Respondent acted arbitrarily or unfairly, precisely because [the Respondent] was not put in the position of being able to rectify the error committed by an administrative act." (author's translation)).

317. *See* Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361, 404 (2018) (noting that treaties can be drafted to "require the use of local remedies for a significant period of time before international adjudication can be triggered," and citing as an example India's new model BIT, which provides for a five-year period).

318. Foster, *supra* note 315, at 204–07.

319. *See, e.g.*, Christoph Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 L. & PRAC. INT'L CTS. & TRIBUNALS 1, 14 (2005) (noting that a denial of justice by the judiciary "is completed only if the incriminated decision has been appealed unsuccessfully").

320. *See, e.g.*, Generation Ukr., Inc. v. Ukr., ICSID Case No. ARB/00/9, Award, ¶ 20.30 (Sept. 16, 2003) (holding that an expropriation claim based on an administrative decision was defective on the merits in the absence of an effort to secure relief from the decision before national authorities); *Cervin Investissements S.A.*, Award, ¶¶ 504–08 (Mar. 7, 2017) (holding that an administrative decision could not be treated as a treaty breach because the investor could have challenged it in local courts but failed to do so).

In some cases, however, it may not be feasible to pursue local remedies. The prospects for securing redress may be remote, and the investor may be facing financial pressure that makes delay in the filing of treaty arbitration impracticable.[321] In addition, some treaties require the investor to initiate treaty arbitration within a limited period of time and waive local remedies as a condition for proceeding to arbitration. For example, in *Bear Creek*, the investor made an initial effort to pursue local remedies—and even managed to secure a ruling in its favor from the court of first instance—but had to abandon that effort while an appeal was pending in order to commence treaty arbitration within the limitation period.[322] By contrast, in *Clayton*, the investors made no effort to pursue local remedies despite the fact that NAFTA gave the investors three years to pursue local remedies before filing a treaty claim,[323] and Canadian law provided for judicial review of the challenged decision.[324] The dissenting arbitrator found that this failure to seek judicial review rendered the claims fatally defective,[325] but the majority simply ignored the issue of local remedies.

D. Confirming that the Investor's Expectations Were Compatible with the Host State's Non-Investment International Obligations

Even if the host state frustrated expectations of the investor that were reasonable from a domestic law perspective, that does not necessarily mean the investor should prevail on its treaty claims. The tribunal should also confirm that the investor's asserted expectations were reasonable from an *international law* perspective, particularly in light of the host state's human rights and environmental obligations.

It is increasingly recognized that investment treaties should be read in harmony with the host state's non-investment international

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321. *See generally* Loewen Grp., Inc. v. United States, ICSID Case No. ARB(AF)98/3, Award (June 26, 2003) (explaining that the claimant declined to pursue local remedies because it was facing an imminent risk of bankruptcy and the prospects for securing relief were miniscule); Foster, *supra* note 315, at 216–43 (discussing the case and arguing that the claim should not have been treated as defective on the merits under the circumstances).

322. *See supra* Section I.B.5.

323. *See* North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M., arts. 1116(2), 1117(2).

324. Clayton v. Canada, Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, ¶ 42 (Perm. Ct. of Arb. 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4213.pdf [https://perma.cc/YRQ3-RE95].

325. *Id.* ¶¶ 42–43.

obligations.[326] Support for this idea can be found in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT),[327] which calls for treaties to be interpreted in the light of "relevant rules of international law applicable in the relations between the parties,"—which may include human rights or environmental principles.[328]

As discussed in greater detail below, one way tribunals can harmonize the host state's investment and non-investment obligations is to hold that it is not reasonable for the investor to rely on host state conduct that the investor knows, or should know, is contrary to the state's non-investment obligations. Moreover, if the investor purports to secure rights that are inconsistent with the host state's international obligations, the tribunal could treat the act as contrary to international public policy and dismiss the case on that basis.

1. If commitments offered to an investor inherently conflict with the host state's international obligations, the investor cannot reasonably rely on them

Notwithstanding the growing body of jurisprudence and scholarship calling for human rights and environmental principles to inform the interpretation of investment treaty standards, tribunals in most Community Conflict Cases have either made no mention of such obligations or asserted that they are effectively irrelevant for their purposes. For example, in *Bear Creek*, the majority asserted that whatever the content of Peru's human rights obligations, those obligations were for *Peru* to comply with—not the investor—and the investor could rely on the legal framework established by Peru and any rights that Peru conferred on the investor.[329]

Other tribunals have effectively sidestepped arguments about human rights or environmental obligations by asserting that the host state can avoid any conflict with these obligations by compensating the investor for any failure to satisfy commitments previously made to the investor.[330] In other

326. *See, e.g.*, Urbaser S.A. v. Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶ 1200 (Dec. 8, 2016) ("The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.").

327. Vienna Convention on the Law of Treaties art. 31(3), May 23, 1969, 1155 U.N.T.S. 331, 340 [hereinafter VCLT].

328. *Id.*; *see* Urbaser S.A., ARB/07/26 (citing Article 31(3)).

329. Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Award, ¶ 664 (Nov. 30, 2017).

330. *See, e.g.*, Ioana Knoll-Tudor, *The Fair and Equitable Treatment Standard and Human Rights Norms*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 310, 341 (Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann eds., 2009) (endorsing this approach); Nicolette Butler & Shavana Musa,

words, if the host state decided that something it had authorized the investor to do would violate human rights or environmental norms, the state could disallow the activity but pay the investor compensation.[331]

It is not difficult to see the appeal of this approach. After all, it seems to allow the host state to uphold *all* of its obligations and relieves tribunals from having to determine the scope and content of the host state's human rights and environmental obligations—subjects with which many of the business lawyers who sit on ISDS panels are bound to feel uncomfortable.[332] Moreover, in some cases the reasoning is perfectly viable. Take, for example, *Suez v. Argentina*.[333] In that case, the host state promised the operator of a water utility that it could charge certain rates or tariffs to users of the system, with the understanding that the utility may be "directed by the government to provide free or subsidized services to certain classes of consumers," in which case "payment for them was to be made from the National Treasury."[334] Argentina later refused to allow the investor to charge the agreed tariffs, asserting that they were too high for certain consumers and would unduly restrict access to water, thereby infringing the human right to water.[335] The tribunal pointed out that the state could avoid any infringement of human rights by subsidizing the services of low-income consumers as explicitly contemplated in the contract, or otherwise compensating the investor.[336]

Systemizing Human Rights Within Investment Arbitration, 28 AM. REV. INT'L ARB. 433, 438–39 (2017) (collecting cases in which tribunals required compensation for actions taken to fulfill non-investment obligations).

331. Butler & Musa, *supra* note 330, at 440; Knoll-Tudor, *supra* note 330; *see also* S. Am. Silver Ltd. (Berm.) v. Plurinational State of Bolivia, PCA Case No. 2013-15, Award, ¶¶ 560–61, 796, 938 (Nov. 22, 2018) (acknowledging that the human rights of local indigenous communities gave the host state a valid reason to terminate the investor's mining concession, but holding that the host state nevertheless had to pay compensation).

332. Caroline Foster, *A New Stratosphere? Investment Treaty Arbitration as 'Internationalized Public Law'*, 64 INT'L & COMP. L.Q. 461, 481 (2015) ("Many investment treaty arbitrators have little experience in public policy or expertise in the fields of national or international environmental law, [or] human rights . . . ."); Julie A. Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 VA. J. INT'L L. 367, 394, 413 (2014) ("[T]he majority of investment arbitrators come from private law or commercial dispute settlement backgrounds[.]").

333. Suez v. Argentine Republic, ICSID Case No. ARB/03/19, and AWG Grp. Ltd. v. Argentine Republic, UNCITRAL, Decision on Liability, ¶¶ 34, 38, 50, 235 (July 30, 2010).

334. *Id.* ¶¶ 84, 106–11.

335. *Id.* ¶¶ 34, 38, 50, 235.

336. *Id.* ¶¶ 235, 252, 262.

Nevertheless, in some cases a commitment made to the investor would inherently violate human rights, and no financial intervention by the state would avoid or erase the violation. For example, a host state could not authorize an investor to mine or dispose of hazardous waste in a manner that would cause serious contamination of local water supplies without violating its human rights obligations.[337] And no payment of compensation (whether to the investor or to local citizens) could eliminate the inherent incompatibility between what the investor was authorized to do and the state's international obligations.

Moreover, there are strong policy arguments against requiring a state to compensate an investor in such situations. First, the host state—particularly in a developing country—may not have the resources necessary to compensate the investor, and if the state had to do so it may be deterred from taking action to protect human rights or the environment.[338] The state may simply pretend that there is no pollution taking place and suppress any local opposition that arises. Second, for an ISDS tribunal to award compensation would be rightly perceived by many as rewarding the investor for undertaking a project that was inherently incompatible with human rights and further undermine the legitimacy of investment treaties and ISDS.

A preferable approach may be to recognize that the investor could not reasonably have expected to engage in conduct that was contrary to the host state's international obligations and therefore reject the claim on the merits—at least to the extent the claim relied on "reasonable expectations."

The following hypothetical illustrates the point with particular starkness. Imagine that the host state promised the investor that it would exterminate all citizens in the vicinity of a mine or allow the

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337. Jason Rudall, *The Interplay Between the UN Watercourses Convention and International Environmental Law in* THE UN CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES: A COMMENTARY 436–38 (Laurence Boisson de Chazournes et al. eds., 2019) (discussing international environmental agreements and human rights that may be violated if a state allows pollution of a population's water supplies); Lauren Manning, *Mining for Compromise in Pastoral Greenland: Promise, Progress, and Problems in International Laws' Response to Indigenous People*, 32 AM. U. INT'L L. REV. 931, 965–66 (2017) (citing sources that "make it clear that functions associated with extractive mining, like the improper disposal of toxic waste, exposure to harmful chemicals and radiation, and water pollution, all pose threats to well-recognized human rights").

338. Jeff Waincymer, *Balancing Property Rights and Human Rights in Expropriation*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 275, 295 (Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann eds., 2009) (discussing a risk that in developing countries an obligation to pay compensation could lead to regulatory chill).

investor's private security forces to do so, in order to avoid potential resistance to the investor's activities. In such a case, there would be an inherent conflict between what the host state promised and its human rights obligations, and the investor clearly could not reasonably expect the host state to follow through on its promise because such an act would constitute a jus cogens violation.[339] If the investor sought to recover damages in ISDS for the failure to fulfill this promise, one would hope the tribunal would have no hesitation finding the promise unenforceable under international law and award no compensation.[340]

Yet there does not appear to be any good reason to limit this principle to jus cogens norms. If rights conferred by the host state under domestic law were contrary to *any* international obligations of the host state, and the investor knew or should have known that this was so, then the investor arguably could not reasonably have expected to enforce those rights. This should come as no surprise to investors because treaty claims are often premised on the notion that international law trumps domestic law when the two conflict.[341] Just as a host state cannot rely on its own law to avoid its international commitments,[342] so too an investor may not be able to rely on acts of

339. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 257 (2d Cir. 2009) (holding that killings or other inhumane acts as part of a widespread or systematic attack on a civilian population are a crime against humanity); THOMAS WEATHERALL, JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT 219 (2015) (observing that widespread or systematic targeting of civilians is a crime against humanity and a jus cogens violation).

340. *See* Sabine Michalowski & Juan Pablo Bohoslavsky, Jus Cogens*, Transitional Justice and Other Trends of the Debate on Odious Debts: A Response to the World Bank Discussion Paper on Odious Debts*, 48 COLUM. J. TRANSNAT'L L. 59, 68–69 (2009) ("[I]t is increasingly accepted that compliance with jus cogens norms is an international law obligation that not only binds states, but also private individuals and corporations."); Cezary Mik, Jus Cogens *in Contemporary International Law*, 33 POLISH Y.B. INT'L L. 27, 67 (2013) ("No one who acts in the contemporary world (a state concluding contract, a transnational corporation) and who is subject to international law should be permitted to violate those few norms which are considered by the international community as a whole as fundamental.").

341. *See, e.g.*, Amco v. Republic of Indon., ICSID Case No. ARB/81/1, Award, ¶ 40 (May 31, 1990) ("[A]pplicable host state laws . . . must be checked against international laws, which will prevail in case of conflict."); HEGE ELISABETH KJOS, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW 195 (2013) ("When appropriate, arbitral tribunals may in a supervening, or trumping, fashion apply international rules that conflict with the otherwise applicable national norms . . . . [N]ational norms are deliberately disapplied or set aside in favour of international norms.").

342. *See* ILC Draft Articles, *supra* note 224, Commentaries to Article 3, § 3 (collecting decisions by international courts and arbitral tribunals affirming this "well

the host state—or rights conferred under the internal law of the host state—that violate international law.

Moreover, even if there are other theories on which the investor could prevail apart from "reasonable expectations"—such as if the host state discriminated against the investor or formally nationalized certain of the investor's rights—it may be appropriate to take the human rights or environmental implications of the project into account when determining the amount of compensation due.[343] For example, if the investor's mining rights could not be exercised without the consent of affected indigenous communities under human rights law, then those mining rights may not be as valuable as they would be if subject to no such restriction.

To see how the above principles could make a difference in Community Conflict Cases, consider *Abengoa* and *Bear Creek*. In both of those cases, the claimants contended that they reasonably expected to be able to operate their projects on or near lands occupied by indigenous communities, even though those communities had not given their consent.[344] This was despite the fact that both host states were both parties to the American Convention, which the IACHR has interpreted as requiring FPIC when a project could have a serious adverse effect on an indigenous community's lands, resources, or way of life.[345] The awards in *Abengoa* and *Bear Creek* do not examine in detail what impacts the projects at issue could have had on local indigenous communities. But if the potential impacts rose to the level where FPIC was required, then it may have been impossible to square the investors' asserted expectations with the host states' international obligations, and it may have affected the value of whatever rights they did hold.

A similar scenario was at issue in *South American Silver v. Bolivia*, a recently decided case arising from a mining project that the host state

settled" proposition); VCLT, *supra* note 327, at 339 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

343. *See* Tomoko Ishikawa, *The Role of International Environmental Principles in Investment Treaty Arbitration: Precautionary and Polluter Pays Principles and Partial Compensation*, *in* NATURAL RESOURCES GRABBING: AN INTERNATIONAL LAW PERSPECTIVE 245, 271–72 (Francesca Romanin Jacur, Angelica Bonfanti & Francesco Seatzu eds., 2016) (arguing that an investment in an environmentally-sensitive area that is likely to be subject to further regulation should be valued lower than one undertaken elsewhere, all else equal).

344. *See supra* Sections I.B.3 & I.B.5.

345. *See supra* Sections I.B.3 & I.B.5.

canceled due to opposition by local indigenous communities.[346] In contrast to *Abengoa* and *Bear Creek*, the tribunal found that the investor could not reasonably expect to carry out the project at issue in light of the social conflict.[347] Nevertheless, the tribunal upheld the expropriation claim, concluding that the host state could not revoke the investor's mining rights without paying compensation.[348] The tribunal at no point acknowledged that the host state was a party to the American Convention[349] or sought to ascertain whether local communities' FPIC would have been required for the project to go forward: factors which could have been treated as relevant to whether or not the revocation was justified or at least in determining the amount of compensation.

Another example is presented by the pending case of *Infinito Gold v. Costa Rica*.[350] The claimant contends in that case that Costa Rica authorized it to develop a gold mine in a remote region near the San Juan River that forms the border with Nicaragua, but revoked the approval after an outpouring of social opposition.[351] Opponents asserted that the mine presented serious environmental threats and would have violated Costa Rica's international obligations, particularly in light of a risk that toxic chemicals would contaminate the San Juan River and harm endangered species.[352] While these risks may have been exaggerated, if the mine truly could not have been operated profitably

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346. S. Am. Silver Ltd. (Berm.) v. Plurinational State of Bolivia, PCA Case No. 2013-15, Award ¶¶ 121–69 (Nov. 22, 2018) (describing the conflict and revocation of the mining concession).

347. *Id.* ¶¶ 652–57.

348. *Id.* ¶¶ 654, 657, 796, 938.

349. *See* American Convention Ratifications, *supra* note 130.

350. Infinito Gold Ltd. v. Republic of Costa Rica, ICSID Case No. ARB/14/5, Request for Arbitration (Feb. 6, 2014).

351. *Id.* ¶¶ 3–7, 56; Martin Mowforth, *Las Crucitas Mine, Costa Rica*, THE VIOLENCE OF DEVELOPMENT (2019), https://theviolenceofdevelopment.com/las-crucitas-mine-costa-rica [https://perma.cc/NY3P-ZU5F] (describing social opposition to Infinito Gold's mine, which manifested in protests and petitions to the Costa Rican courts).

352. DANIEL KORPELA, A SOCIAL AND ENVIRONMENTAL IMPACT ASSESSMENT OF THE CRUCITAS GOLD MINING PROJECT IN COSTA RICA 27, 53–54 (2014) (discussing arguments by opponents of the mine that contamination of the San Juan River could violate Costa Rica's international obligations and stating, "[i]f [Acid Rock Drainage] is allowed to occur . . . or it is not managed correctly it can cause a huge burden for Costa Rica, contamination can spread into Nicaragua, and then this becomes an international issue"); Mowforth, *supra* note 351 ("There have also been concerns from Nicaraguan environmental groups who believe that the chemicals used in the extraction process will pollute the San Juan River which forms a natural border between Nicaragua and Costa Rica.").

without causing transboundary harm in violation of international environmental law,[353] then arguably, the investor could not reasonably have expected to develop the mine and invested at its own risk.

2. *Securing rights contrary to international law is potentially against international public policy*

If an investor has purported to secure rights that it knows to be contrary to the host state's international obligations, not only should its claim potentially fail on the merits for a lack of "reasonable expectations," but the claim may properly be treated as inadmissible because the investor violated international public policy.

Several tribunals have dismissed claims after concluding that the investors had "unclean hands" because they had committed fraud, corruption, or some other illegality.[354] A number have characterized the misconduct as a violation of international public policy or ordre public, which the arbitrators viewed as depriving them of jurisdiction or rendering the claims inadmissible.[355]

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353. *See, e.g.*, Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (1941) (asserting that one state cannot use its territory to harm another "when the case is of serious consequence and the injury is established by clear and convincing evidence"); *see also* Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 18, 68 (Apr. 20) (same); Gabčíkovo-Nagymaros Project Case (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7, 41 (Sept. 25) (same); Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Rep. 226, 227, 241–42 (Advisory Opinion of July 8) ("[T]he general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.").

354. *See* Dani & Akhtar-Khavari, *supra* note 25, at 67 (citing authority in support of the existence of "a general principle of law and a matter of international public order that [bars] an investor with unclean hands from benefiting from the protection mechanism of investment treaties"); Andrew Newcombe, *Investor Misconduct: Jurisdiction, Admissibility, or Merits?*, *in* EVOLUTION IN INVESTMENT TREATY LAW & ARBITRATION, 187, 190, 196 (Chester Brown & Kate Miles eds., 2011) (summarizing cases).

355. Inceysa Vallisoletana, S.L. v. Republic of El Sal., ICSID Case No. ARB/03/26, Award, ¶¶ 238, 248–52 (Aug. 2, 2006) (dismissing the case because the investor procured its rights through fraud and "[i]t is not possible to recognize the existence of rights arising from illegal acts, because it would violate the respect for the law which . . . is a principle of international public policy"); Plama Consortium Ltd. v. Republic of Bulg., ICSID Case No. ARB/03/24, Award (Aug. 27, 2008), ¶¶ 139–44 (dismissing the claims because the investor's deceptive acts were contrary to international public policy and the principle of good faith, and "the substantive protections of the [treaty] cannot apply to investments that are made contrary to law"); World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶¶ 179–

It may not be a stretch to extend the above reasoning to some situations in which the investor claims to have secured a right to engage in conduct that would violate the host state's human rights or environmental obligations. The act of seeking such rights—potentially while promising a flow of taxes, royalties, or other economic benefits to the state—may be no less repugnant to international public policy than bribing a host state official.

E. Holding the Claimant Accountable for Mismanaging Stakeholder Relations and Other Forms of Contributory Fault

If the tribunal finds, despite applying the foregoing guidelines, that the host state violated its treaty obligations by canceling the investor's project, one further step would still be needed before calculating damages. Namely, the tribunal should consider whether the investor contributed to its losses, as by failing to undertake sufficient due diligence before investing, not engaging adequately with local stakeholders, or committing misconduct while carrying out the project. In that event, a reduction in recovery may be appropriate.

1. The principle of contributory fault

Under international law, as under many domestic legal systems, if a party has contributed to the losses for which it seeks redress, the award may be reduced in proportion to the claimant's contribution.[356] This principle is expressed in Article 39 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles"): "In determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."[357]

Several ISDS tribunals have recognized the principle of contributory fault and have reduced damages on this basis. Some have faulted the investor in particular for undertaking an inadequate risk assessment before investing.[358] Others have reduced from the award any amounts

88 (2006) (dismissing claims on the merits because the claimant secured the contract through bribery in violation of international public policy).

356. Judith Gill & Rishab Gupta, *The Principle of Contributory Fault after Yukos*, 9 DISP. RES. INT'L 93, 93 (2015).

357. ILC Draft Articles, *supra* note 224, at 109.

358. *See, e.g.*, MTD Equity Sdn. Bhd. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, ¶¶ 168–78 (May 25, 2004) (faulting the claimant for not investigating local zoning restrictions before buying real estate and not negotiating contractual provisions that could have protected it if the property were not rezoned); *id.* at 243 (reducing damages by fifty percent).

expended by the investor that were excessive and imprudent in light of risks facing the investment.[359] Still others have reduced damages for misconduct that made the investor vulnerable to adverse host state action—such as tax evasion schemes[360] or acts taken without a required governmental authorization[361]—even if the tribunal did not view the misconduct as justifying the measures that the state took in response.

2. *Application of the principle in Community Conflict Cases*

Similar reasoning could readily be applied to reduce damages in Community Conflict Cases in appropriate circumstances, although several tribunals have declined to do so to date. Notably, the tribunals in *Tecmed* and *Clayton* did not even discuss contributory fault, while the tribunals in *Abengoa*, *Bear Creek*, and *South American Silver* recognized the principle but found that no reduction was warranted.

In language subsequently endorsed by the majority in *Bear Creek*,[362] the tribunal in *Abengoa* articulated the standard for contributory fault as follows:

> For the international responsibility of a State to be excluded or diminished based on the investor's omission or fault, it is necessary not only to prove said omission or fault, but also to establish a causal nexus between the [omission or fault] and the harm suffered. In other words, for the argument to succeed, it would be necessary to have evidence that, if a social communication program had been carried out from [when the Claimants first invested] in a timely manner, there would not have been the events that [later] led to the loss of the Claimants' investment.[363]

359. *See, e.g.*, Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶¶ 426–30 (July 14, 2006); Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz., Award, ICSID Case No. ARB/05/22, ¶¶ 789–97 (July 24, 2008).

360. *See* Yukos Universal Limited (Isle of Man) v. Russian Federation, PCA Case No. AA 227, Award, ¶¶ 484–516, 1614 (July 18, 2014) (reducing damages by twenty-five percent because Yukos' involvement in "tax optimization schemes" attracted scrutiny from Russian authorities, even if it did not justify the seizure and forced liquidation of the company).

361. *See* Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶¶ 679–80, 687 (Oct. 5, 2012) (holding that the a transfer of an interest in the project to another company violated Ecuadorian law and contributed to the termination of the investor's contractual rights, and reducing damages by twenty-five percent). The dissenting arbitrator would have reduced damages by fifty percent. *See* Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Dissenting Opinion of Professor Brigitte Stern, ¶¶ 7–8 (Sept. 20, 2012).

362. Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Award, ¶ 409 (Nov. 30, 2017).

363. Abengoa, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/09/2, Award, ¶¶ 670–71 (Apr. 18, 2013) (author's translation).

Neither of those two tribunals deemed this standard satisfied on the facts before it. The tribunal in *Abengoa* felt that it was inappropriate to fault the claimants for the quality of their community engagement given that Mexican law did not impose any specific obligations on the claimants in that regard.[364] The tribunal added that, in its view, the community conflict was inevitable due to the "aggressive and deceitful campaign" waged by the plant's critics.[365] The majority in *Bear Creek* similarly reasoned that even if the investor had been deficient in community outreach, the state had not required the investor to do more, and so those failings could not justify a reduction in damages.[366]

It is worth considering, however, whether these tribunals' approach to contributory fault was unduly restrictive. One point of concern is that these tribunals seemed to focus exclusively on the quality of the investor's "social communication program," despite the fact that this is only one of many areas in which investor fault may arise. Even if the investor was competent in communicating with the community after making its investment, it may have neglected to conduct adequate due diligence *before* investing, including in ascertaining the community's attitude toward the proposal and how difficult it would be to secure a social license.[367] In addition, the investor may have failed to offer the community a share of benefits that was reasonable under the circumstances. Alternatively, the investor may have engaged in misconduct that undermined its relations with local communities or governmental authorities even if its approach to "communication" was reasonable. For example, if the investor violated environmental regulations or terms of its permit—as in *Tecmed*[368]—this may have fueled criticisms of the project and negated what would otherwise have been adequate engagement efforts. By the same token, the misconduct may have invited scrutiny by state authorities, prompting these authorities to take action that they might not otherwise have taken.

364. *Id.* ¶¶ 664–68.

365. *Id.* ¶ 672 (author's translation).

366. *Bear Creek Mining Corp.*, ARB/14/21 ¶ 412.

367. *See* Muchlinski, *Caveat Investor? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard*, 55 INT'L & COMP. L.Q. 527, 542 (2006) ("[T]he investor is bound to assess the extent of the investment risk before entering the investment . . . . Any losses that subsequently arise out of an inaccurate risk assessment will be borne by the investor.").

368. Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 123 (May 29, 2003) (acknowledging legal violations).

The tribunals in *Abengoa* and *Bear Creek* did not expressly consider these potential forms of contributory fault.

Second, the standard articulated by the tribunals in *Abengoa* and *Bear Creek* seems to require a causal connection between the investor's fault and the *loss of the investment*. Yet the investor's fault may contribute to losses even if it does not trigger the outright cancelation of the project. Notably, the investor may have committed more capital than a prudent investor would have invested after clear warning signs emerged about the project's prospects. In the same vein, missteps by the investor in community relations may have necessitated efforts and expenditures (by way of damage control) that would otherwise not have been required. For example, in *Copper Mesa Petroleum v. Ecuador*,[369] the tribunal found that the claimant responded inappropriately to "provocations" by project opponents, including using mace and other forms of physical force,[370] thereby generating ill-will among the local population and making it more difficult to secure community support.[371] This, the tribunal felt, warranted a thirty percent reduction in damages.[372] By contrast, the tribunals in *Abengoa* and *Bear Creek* at no point considered whether the claimants' fault may have exacerbated their losses, even if that fault was not—in the tribunals' view—what ultimately caused the state to withdraw the permits.[373]

Third, the tribunals in *Abengoa* and *Bear Creek* focused on whether the claimants did all they were *legally required* to do to engage with local communities. This limitation, too, is artificial. Basic business sense calls for investors to do whatever they reasonably can to minimize risk exposure, and the fact that certain steps may not be legally mandated does not diminish their importance. Professor Sands made a similar point in his dissent in *Bear Creek* when advocating for a fifty percent reduction in damages.[374]

Rather than limiting the inquiry to domestic legal requirements, tribunals may find it instructive to consider how the investor's conduct sizes up against relevant *international* standards, such as the OECD

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369. Copper Mesa Mining Corp. v. Republic of Ecuador, Case No. 2012-2, Award (Perm. Ct. of Arb. 2016).
370. *Id.* ¶ 6.99.
371. *Id.* ¶ 6.100.
372. *Id.* ¶ 6.102.
373. *See supra* Sections I.B.3 & I.B.5.
374. Partial Dissenting Opinion of Philippe Sands QC, ¶¶ 10–12, 25–39 (Nov. 30, 2017).

Guidelines for Multinational Enterprises,[375] UN Guiding Principles on Business and Human Rights,[376] and international financial institutions' environmental and social standards.[377] All of these call for companies to conduct pre-investment due diligence and impact assessment, follow prescribed steps to monitor and mitigate impacts, and engage in particular ways with local stakeholders—whether or not required to do so by domestic law.[378] Some financial institution standards go further and establish additional safeguards for indigenous peoples, including an FPIC requirement and an obligation to share economic benefits with affected communities.[379] Compliance with standards like these not only promotes respect for human rights and environmental protection, but also reduces the investor's own risk.[380] Consequently, in some cases a failure to take steps contemplated by international standards could be construed as contributory fault, even if compliance would have been wholly voluntary.

It may also be instructive to compare the investor's conduct to that of other companies who manage to carry out comparable projects *without social conflict*. For example, it is increasingly common for project developers to negotiate agreements with local communities before

375. ORG. FOR ECON. CO-OPERATION & DEV. (OECD), OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 3 (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf [https://perma.cc/FK23-UYA8].

376. UN Office of the High Commissioner of Human Rights, Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf [https://perma.cc/PY4D-QG5U].

377. *See, e.g.*, INT'L. FIN. CORP., GUIDANCE NOTES: PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY ii (Jan. 1, 2012), https://www.ifc.org/wps/wcm/connect/9fc3aaef-14c3-4489-acf1-a1c43d7f86ec/GN_English_2012_Full-Document_updated_June-27-2019.pdf?MOD=AJPERES&CVID=mKqITOj [https://perma.cc/4VVX-UJ4F].

378. *See* Elisa Morgera, *Human Rights Dimensions of Corporate Environmental Accountability*, *in* CORPORATE ACCOUNTABILITY IN INTERNATIONAL ENVIRONMENTAL LAW 321, 511–14 (Pierre-Marie Dupuy & Jorge E. Viñuales eds., 2009) (summarizing these standards and asserting that they collectively represent an emerging consensus that private companies need to meet minimum standards in their business operations beyond domestic legal requirements); *see also* Foster, *supra* note 235, at 79–81 (summarizing relevant aspects of these standards).

379. *See also* Foster, *supra* note 235, at 79–81 (describing safeguards for indigenous peoples under International Finance Corporation standards).

380. *See* Luke Danielson, *Allocation of Resources to Communities From Mining and Oil and Gas Operations*, 2C-1 ROCKY MT. MIN. L. INST. 5 (2009) (citing numerous examples of social conflicts that developed when mining and oil companies failed to meet international standards, resulting in delays or cancelations).

undertaking large-scale projects that will affect them, in order to minimize the risk of conflict and maximize prospects for securing governmental approvals.[381] These agreements typically provide for the developer to mitigate impacts of concern to the community and give the community a share of economic benefits in exchange for its support for the project.[382] The failure to offer terms to local communities that compare favorably to those that have helped avoid conflicts in similar contexts could amount to negligence. Fault may also attach if the investor fails to negotiate such agreements in good faith—with duly representative community leadership—in accordance with procedural safeguards that will promote the agreement's legitimacy in the community.[383]

The tribunal in *South American Silver* also declined to reduce its award on the basis of contributory fault, but on different reasoning.[384] That tribunal found that the investor contributed to the social crisis that led to the cancelation of its project[385] and that Bolivia was within its rights to revoke the investor's mining concession, but also determined that

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381. Foster, *supra* note 235, at 85–86.

382. *Id.*; *see also* William M. Laurin & JoAnn P. Jamieson, *Aligning Energy Development with the Interests of Aboriginal Peoples in Canada*, 53 STET. L. REV. 453, 458 (2015) (noting that in Canada these agreements "typically contain provisions on how the parties will work together and avoid or mitigate the identified impacts" and provide for "various benefits to the affected Aboriginal community to offset the impacts," in exchange for non-opposition).

383. *See generally* George K. Foster, *Combating Bribery of Indigenous Leaders in International Business*, 54 COLUM. J. TRANSNAT'L L. 59, 68–76 (2015) (describing reports of alleged bribery of indigenous community representatives during consultations over development projects); *see id.* at 97–98, 100–02 (outlining procedural safeguards that can protect the integrity of negotiations and ensure that any benefits offered to community leaders are bona fide and not intended to improperly influence their judgment); GINGER GIBSON & CIARAN O'FAIRCHEALLAIGH, GORDON FOUNDATION, IBA COMMUNITY TOOLKIT: NEGOTIATION AND IMPLEMENTATION OF IMPACT AND BENEFIT AGREEMENTS 178 (2015), http://gordonfoundation.ca/app/uploads/2017/03/IBA_toolkit_web_Sept_2015_low_res_0.pdf [https://perma.cc/BYV4-YMZE] (discussing problematic tactics that developers sometimes use during the negotiation of an agreement with an indigenous community, including negotiating with people who lack legitimate authority within the community or otherwise exploiting plural systems for decision-making).

384. *Id.* ¶¶ 874–75 (acknowledging Bolivia's argument that any award should be reduced to reflect the claimant's contributory negligence but declining to do so).

385. S. Am. Silver Ltd. (Berm.) v. Plurinational State of Bolivia, PCA Case No. 2013-15, Award ¶¶ 490, 505 (Nov. 22, 2018) (summarizing the investor's "serious shortcomings in its relationship with the community," which "contributed to increase the divisions among the Indigenous Communities, the radicalization of the opposition groups and the practical impossibility of seeking the consensus that its advisors warned would be necessary in order to operate in the region").

Bolivia breached the treaty by failing to offer compensation.[386] The tribunal rejected Bolivia's argument that the award should be reduced for contributory fault, reasoning that the failure to offer compensation was an act of Bolivia that was in no way attributable to the investor.[387] This conclusion is perplexing, because for purposes of contributory fault the issue is not whether the host state's treaty breach was *attributable* to the investor, but whether—assuming a breach by the host state has been established—the investor's fault contributed materially to its damages.[388] Hence, if the investor negligently failed to take steps that could have minimized conflict with local communities and prevented the resulting revocation of its concession or at least reduced its expenses, arguably the investor should not have recovered as much as it would have if it had been blameless. It is not clear why it would be necessary to show that the investor somehow caused Bolivia's refusal to pay compensation before a reduction in the award could occur.

III. THE PROPOSED GUIDELINES LEAVE AMPLE ROOM FOR STATE LIABILITY AND ARE CONSISTENT WITH THE OBJECT AND PURPOSE OF INVESTMENT TREATIES

Having examined in Part II a series of guidelines that could preclude or reduce recoveries in Community Conflict Cases, it is worth considering how much room would be left for host states to incur liability and whether or not this would be consistent with the goals investment treaties are designed to achieve. As explained below, there are a multitude of scenarios in which such liability could result, and the outcomes contemplated by the guidelines would be fully consistent with the rationales underlying investment treaties.

386. *Id.* at ¶¶ 546–66 (determining that the expropriation was within Bolivia's sovereign powers as recognized by the relevant treaty); *id.* at ¶ 875 (asserting that although the expropriation itself was permissible, "the violation of the Treaty arose from Bolivia's failure to compensate or offer to provide compensation").

387. *Id.*

388. *See* ILC Draft Articles, *supra* note 224, Commentary to Article 39, § 1 ("Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but where the injured State, or the individual victim of the breach, has materially contributed to the damage by some wilful or negligent act or omission.").

A. Scenarios that May Properly Give Rise to State Liability in Community Conflict Cases

Investment treaties vary in the investor protections they articulate, and some include exception provisions or carve-outs that could defeat claims that would otherwise be viable.[389] Nevertheless, it is possible to identify a multitude of scenarios in which host states could incur liability under investment treaties in Community Conflict Cases without running afoul of the guidelines set forth in Part II—subject to a potential reduction in damages for contributory fault in appropriate cases. The examples provided below are intended to be illustrative rather than exhaustive.

One way a host state could be found liable would be if it made a specific commitment to the investor and failed to comply with the same—assuming the commitment was consistent with the state's non-investment international obligations. For example, the host state might promise the investor that if it did not issue a required approval it would compensate the investor for any expenses incurred during the review process. Reneging on such a commitment could violate a variety of treaty provisions,[390] and so long as the investor did not seek to induce a violation of the state's international obligations, nothing should preclude the commitment's enforcement.

Liability could also arise if the host state revoked an approval previously granted to the investor based on purported risks to public safety or the environment, when no such risks actually existed or were greatly exaggerated. As noted above in Section II.B.1, the tribunal should generally defer to host state determinations on matters of domestic law, but it need not do so if the host state's findings were manifestly erroneous or made in bad faith. An example of evidence that might tend to show the state's bad faith in such a situation would be if the host state promptly began operating the project in its own right under similar conditions or allowed another company to do so.[391]

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389. *See generally* Korzun, *supra* note 2 (summarizing drafting innovations contained in some treaties that restrict the scope of treaty standards and the wide variety of exception provisions and carve-outs that treaties may contain).

390. *See, e.g.*, Glamis Gold, Ltd. v. United States, UNCITRAL, Award, ¶¶ 621–22, 627 (June 8, 2009) (asserting that violation of a specific assurance or commitment to an investor could violate the MST); JOSÉ E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 215 (2011) (explaining that violation of a specific assurance could violate FET or a treaty's umbrella clause).

391. Tribunals have found states liable for treaty breaches under such circumstances. *See, e.g.*, Crystallex Int'l Corp. v. Boliviarian Republic of Venez., ICSID

Indeed, host state liability might attach even if the project *did* pose genuine environmental or social threats, but the threats were attributable to actions of the host state or a third party rather than to the investor. Notably, state authorities might be tempted in some cases to blame the investor for their own failings or those of state-owned enterprises which put local communities at risk unnecessarily.[392] Similarly, the state might blame the investor for a failure to deliver promised benefits to a community that the state itself or community leaders misappropriated through no fault of the investor.[393]

Another scenario in which the investor might prevail would be if the host state revoked the investor's rights when there was still a reasonable chance that the investor could demonstrate that the project could be undertaken without undue risks or otherwise secure community support. For example, in *Bear Creek*, Professor Sands faulted Peru for revoking the investor's mining rights rather than suspending them and

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Case No. ARB(AF)/11/2, Award, ¶ 961 (Apr. 4, 2016) (state terminated investor's rights in a mining project based on potential impacts on the environment and indigenous communities, but tribunal viewed these as a pretext for the state's plan to nationalize the project); Khan Resources v. Gov't of Mong., Permanent Court of Arbitration, Case No. 2011-09, Award ¶ 117 (Mar. 2, 2015) (discussing how the state terminated investor's rights in a uranium extraction project based on certain alleged legal violations and potential impacts on a special protected area, but thereafter allowed similar operations by a different company).

392. *See* Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 376 (July 14, 2006) (finding an FET violation based on a state entity's failure to meet its contractual commitment to remediate water treatment facilities, which resulted in water quality problems that officials attempted to blame on the investor).

393. In some countries the state establishes or mandates a fund into which an investor must pay specific amounts for the benefit of local communities, but monies are sometimes misappropriated by state officials or local leaders and the promised benefits never materialize. *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), OECD POLICY TOOLS, CORRUPTION IN THE EXTRACTIVE VALUE CHAIN: TYPOLOGY OF RISKS, MITIGATION MEASURES AND INCENTIVES 109 (2016) [hereinafter OECD POLICY TOOLS] (describing the phenomenon of state-mandated local development funds, which may be prone to "elite capture, embezzlement, misappropriation and misuse of funds for purposes other than those governing the fund"); Kendra E. Dupuy, *Corruption and Elite Capture of Mining Community Development Funds in Ghana and Sierra Leone*, *in* CORRUPTION, NATURAL RESOURCES AND DEVELOPMENT: FROM RESOURCE CURSE TO POLITICAL ECOLOGY 69, 69–72 (Aled Williams & Philippe Le Billon eds., 2017) (explaining how elite capture and rent-seeking behavior by local leaders can prevent developers' contributions to community development funds or trusts from accomplishing their intended purposes).

allowing further impact assessment and community consultation after a cooling off period.[394]

A few other host state liability scenarios warrant mention. In particular, the host state might incur liability if it applied its laws to the claimant's project more strictly than it did to a comparable project operated by host state nationals or third-country nationals;[395] if it subjected the investor to a serious lack of due process or a denial of justice when the investor sought to challenge a denial or revocation of an approval in a domestic forum;[396] or if local citizens who opposed the investor's activities used physical force against the investment and the state was not sufficiently diligent in providing police protection.[397]

B. The Proposed Interpretive Framework Encourages Investment Flows and Good Governance

As the foregoing examples show, there would still be substantial room for a host state to be found liable in a Community Conflict Case under the proposed guidelines. As examined below, there would *have* to be such room in order for the guidelines to be consistent with investment treaties' object and purpose. At the same time, there must be significant limits to host state liability, and I would submit that the proposed guidelines strike an appropriate balance.

As a starting point for this discussion, it should be noted that VCLT Article 31 provides for considering the treaty's object and purpose as a primary means for interpreting its meaning.[398] Tribunals typically seek

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394. Partial Dissenting Opinion of Philippe Sands QC, ¶ 2 (Nov. 30, 2017).

395. *See, e.g.*, Feldman v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, ¶ 181 (Dec. 16, 2000), 7 ICSID Rep. 341 (2005) (holding that Mexico violated NAFTA's national treatment provision by enforcing a tax law more aggressively against a U.S. investor than it did against similarly-situated Mexican-owned companies); JORGE E. VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW 90 (2012) (discussing the possibility that "the uneven enforcement of environmental standards on different foreign and/or domestic investors would fall foul of the MFN or national treatment clauses contained in an investment treaty").

396. DOLZER & SCHREUER, *supra* note 33, at 178–82 (discussing potential liability for denial of justice or other failure to provide adequate access to justice or fair procedure).

397. Christoph Schreuer, *Full Protection and Security*, 1 J. INT'L DISP. SETTLEMENT 1, 2–4 (2010) (summarizing case law involving claims based on violence against the investment by private parties under the full protection and security standard found in many treaties).

398. VCLT, *supra* note 327, at 340 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*." (emphasis added)).

to ascertain the treaty's goals in this regard from the language of the treaty itself, and especially from its preamble.[399]

Countries may enter into investment treaties for any number of reasons, but treaties' preambles typically announce as a key goal the promotion of investment flows between the signatories.[400] Essentially, the hope is that the treaty will encourage companies from one country to invest in the territory of the other because the ISDS mechanism could allow them to recover damages if the host state were to treat them in a manner that was internationally wrongful.[401]

Another rationale often articulated for these treaties is that they promote good governance.[402] The idea is that host states will be encouraged to follow the rule of law, make known in advance the rules that the investor is expected to follow, provide investors with due process, and refrain from discrimination, lest they incur liability.[403] At the same time, investment treaties are not intended to abrogate the basic responsibility of the host state to regulate in the public interest, and good governance means more than acting predictably toward foreign investors. It also means, inter alia, being responsive to those most directly affected by governmental actions and otherwise protecting the public and the environment.[404]

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399. NEWCOMBE & PARADELL, *supra* note 226, at 113–14 ("Many tribunals have sought to interpret IIAs on the basis of their object and purpose, typically by looking at their titles and preambles.").

400. KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION 3 (2010) ("In their preambles, BITs profess that they seek to promote economic prosperity through facilitating foreign investment flows.").

401. Jeswald Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 77 (2005) ("The basic assumptions behind BITs are that a bilateral treaty with clear and enforceable rules to protect and facilitate foreign investment reduces risks that the investor would otherwise face and that such reductions in risks, all things being equal, encourage investment.").

402. VANDEVELDE, *supra* note 400, at 2–3 ("BITs essentially require that investment be treated in a way that is consistent with the rule of law. Promoting the rule of law with respect to foreign investment may be regarded as the primary function of a BIT.").

403. Thomas W. Wälde, *Improving the Mechanisms for Treaty Negotiation and Investment Disputes: Competition and Choice as the Path to Quality and Legitimacy*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2008-2009 505, 574 (Karl P. Sauvant ed., 2009) (explaining that investment treaties create government transparency and accountability, which supports the rule of law, as well as long-term development).

404. *See* U.N. DEP'T. OF ECON. & SOCIAL AFFS., WORLD ECONOMIC AND SOCIAL SURVEY 2014/2015: LEARNING FROM NATIONAL POLICIES SUPPORTING MDG IMPLEMENTATION 142–43 (2016), http://www.un.org/en/development/desa/policy/wess/wess_archive/2015wess_full_en.pdf [https://perma.cc/UG7F-MYKY] (defining good governance to include

The guidelines proposed herein are fully consistent with the twin goals of promoting investment flows and encouraging good governance. They do so by ensuring that investors are protected against conduct that is arbitrary, discriminatory, in bad faith, or expropriatory—as well as ensuring access to a functioning system of justice and reasonable police protection—while still giving the state wide space to protect its population and the environment.

Some might contend that the guidelines would screen out too many cases or result in anemic recoveries, thereby deterring investors from undertaking large-scale projects that may attract controversy. The truth is, however, that investors could readily protect themselves by employing common-sense safeguards. If they did so, they would not need to rely on investment treaties except for the most serious forms of maladministration.

To begin, the investor could undertake pre-investment due diligence. Among other things, the investor should seek to ascertain applicable requirements under domestic law and the scope of the host state's human rights and environmental obligations, including whether or not community consent would be required for the project. The investor could also engage early on with both governmental and community representatives to ascertain their receptivity to the proposal. At this stage, the investor could seek to negotiate contractual terms with the host state providing for the investor to receive compensation for its expenditures during the review process if, at the end of the day, the project did not go forward for no fault of the investor. If the investor decided to proceed, it could carry out a rigorous impact assessment consistent with international standards. It could also consult with affected communities to educate them about the proposal more thoroughly, address any concerns they may have, and offer them a share of benefits commensurate with the impacts they will experience. If successful at achieving community buy-in, the investor could sign contracts with those communities and ensure that they are faithfully implemented. Alternatively, if the state has established other means for delivering benefits to local communities, the investor should seek to ensure, before moving forward, that these arrangements are satisfactory to community stakeholders and likely to

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not only "the rule of law, effective institutions, transparency and accountability," but also "respect for human rights, and the participation of all citizens in the decisions that affect their lives," and having leadership that is "responsive to the needs and aspirations of its citizens").

deliver the promised benefits.[405] If and when the state approved the project, the investor could scrupulously comply with domestic laws and regulations, as well as with any agreements it may have signed, and give the state no reason to act against it. If the investor did all or even much of this it would keep its risk exposure within manageable bounds.

What the investor could *not* do is ignore local communities and engage exclusively with governmental authorities when seeking to operate a hazardous waste facility, mine, or other high-impact project. Nor could the investor presume itself entitled to carry out such a project so long as it goes through the motions of impact assessment and stakeholder consultation. Equally untenable would be the assumption that, so long as it convinces a state authority to sign off on its plans, the project's safety and environmental soundness—and the investor's own diligence—may never subsequently be questioned.

CONCLUSION

The discussion above has shown that Community Conflict Cases decided on the merits to date have largely fed into the prevailing narrative that investment treaties and ISDS are biased in favor of investors, unduly restrain states in the exercise of their regulatory prerogatives, and conflict with host state sovereignty. It has also argued, however, that a few adjustments to the analytical framework employed in these cases could strike a better balance between investor rights, human rights, and environmental protection.

Under the guidelines proposed herein, host states would be encouraged to behave honestly and justly toward investors because they could face significant potential liability if they did not. Companies could rest assured when investing that they would have an avenue for redress should they experience serious mistreatment at the hands of the host state—at least so long as their own hands were clean when they sought it. For just as states would be encouraged to meet an international minimum standard, so too

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405. For example, the state may prescribe certain amounts that the investor must contribute to local communities and even establish a fund to be used for that purpose. *See* OECD POLICY TOOLS, *supra* note 393, at 109 (2016) (explaining that it is common for the state to mandate that extractive companies pay into local development funds, which "may be state-managed, firm-managed, or state-established and community-managed"); Dupuy, *supra* note 393, at 71 (describing the phenomenon whereby states "require mining companies to directly pay affected communities, for instance . . . by paying directly into state-established but community-managed funds"). If it is clear that the amounts to be contributed are not sufficient to achieve community buy-in, or that the funds are prone to mismanagement or corruption, the investor should take this into account in deciding how and whether or not to proceed.

would investors. Investors would be incentivized to conduct due diligence and commonsense risk management whenever embarking on a large-scale venture among a vulnerable population. They would have every reason to respect the human rights of local stakeholders in the places where they operated. It would be incumbent upon them to protect the environment to the extent feasible, and to refrain at all costs from any activities that could cause transboundary harm, threaten endangered species, or otherwise violate the host state's international environmental obligations. And investors would be well-advised to respect host state laws and avoid corruption. In short, investors would need to hold themselves to the same standards of fairness and equity to which they might one day seek to hold the state.