The Treadmill of Production, Sustainable Development Goals and International Investment Law: The Irreducibility of Growth and Environmental Regulation

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ABSTRACT: There exists a concerted effort by international organizations to integrate disparate regimes such as International Investment Law (IIL) with international initiatives such as the Sustainable Development Goals (SDGs). This effort is grounded in the notion that economic and environmental policy goals are compatible and reinforcing. In contrast, this article suggests that it is more likely for a regime like IIL to constrain the aims of an initiative like the SDGs than it is for the SDGs to attenuate the environmental challenges present in the operation of IIL. I make this argument by adopting the framework of the Treadmill of Production (ToP) and introducing it to the analysis of international law. The ToP posits that environmental degradation is intrinsic to capitalism's imperative to expand production. Accordingly, investment policies will inevitably conflict with policies designed to attenuate environmental degradation. More specifically, this framework demonstrates how, as long as sustainable development initiatives rely on foreign private investment, their environmental aims will be forfeit to the primacy of economic growth intrinsic to regimes such as IIL. I analyze the tribunal's decision in the case *Eco Oro v Colombia* to illustrate the incompatibility between investment and environmental policy goals.

Key words: Treadmill of Production; Sustainable Development Goals: International Investment Law; Capitalism; Regulatory Chill; Environmental Degradation

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1 Introduction

In 2011, the Freedom of Investment roundtable hosted by the Organisation for Economic Co-operation and Development (OECD) produced a report in which they claimed, 'Delegates believe that their governments' environmental and investment policy goals are compatible. They also consider that those goals can be made mutually reinforcing and that this mutual supportiveness should be fostered.'[1] One area this position is readily visible is at the nexus of the UN's 2030 Agenda for the Sustainable Development Goals (SDGs)[2] and International Investment Law (IIL). The SDGs encourage sustainable development that is meant to be both environmentally feasible and economically beneficial through 17 goals encompassing a multitude of social, economic and

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[1] JORGE VINUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW 28 (2012); OECD, HARNESSING FREEDOM OF INVESTMENT FOR GREEN GROWTH 3 (2011).

[2] 2030 Agenda for Sustainable Development, G.A. Res. 70/1 (Sep. 15, 2015).

environmental targets.[3] Many proponents of the SDGs encourage their fulfillment through various private investment strategies,[4] which makes the role of the branch of international law designed to promote and protect private foreign investment, IIL,[5] a necessary legal consideration in supporting the advancement of the SDGs.[6] There has been a concerted effort amongst practitioners and scholars of IIL to integrate the principles of sustainable development into the regime, particularly in the last decade, with it featuring in both investment treaty drafting and Investor-State Dispute Settlement (ISDS).[7] However, scholarship shows a documented history of conflict between IIL's investment protections and States' environmental regulatory measures.[8] Such conflict brings into question whether governments' environmental and investment policy goals are as compatible as the OECD might desire. This article contends that they are not. While it is not my aim to provide an overarching assessment of the mutual enforceability of environmental and investment policy goals, I will attempt to demonstrate how the two can be in direct opposition through an examination of the SDGs' reliance on private funding and an example of IIL's tendency to protect foreign investors from environmental regulations.

Comprised mainly of a large body of International Investment Agreements (IIAs)[9] and investor-state arbitration, IIL evolved to protect the international legal relationship between foreign-owned forms of production and commodification and their geographical settings, particularly in land.[10] The regime has gone through extensive changes in the last decade, and it is inaccurate to insist that

[3] *See* BRUNDTLAND COMMISSION, OUR COMMON FUTURE (1987) (for the dominant formulation of the term sustainable development).
[4] *See* UNCTAD, PROMOTING INVESTMENT IN THE SUSTAINABLE DEVELOPMENT GOALS (2019); Sophie Maes, *Bill Gates-Led Fund Pledges to Invest $1 Billion in Startups Fighting Climate Change*, GLOBAL CITIZEN, Sep. 26, 2018; David L. McCollum Et. al, *Energy Investment Needs for Fulfilling the Paris Agreement and Achieving the Sustainable Development Goals*, 3 Nature Energy 589-99 (2018).
[5] RUDOLF DOLZER, URSULA KRIEBAUM & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2nd ed., 2012); MUTHUCUMARASWAMY SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (5th ed., 2021).
[6] Gudrun M. Zagel, *Achieving Sustainable Development Objectives in International Investment Law, in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 9-12 (Julien Chaisse, Leila Choukroune and Sufian Jusoh eds. 2020).
[7] Stefanie Schacherer & Rhea T. Hoffmann, *International Investment Law and Sustainable Development, in* RESEARCH HANDBOOK ON FOREIGN DIRECT INVESTMENT 563, 565 (Markus Krajewski and Rhea T Hoffmann eds., 2019).
[8] Vinuales, *supra* note 1, at 28-38.
[9] *See* for an up-to-date database on the current IIAs in use, https://investmentpolicyhubold.unctad.org/IIA.
[10] *See* Lorenzo Cotula, *The New Enclosures? Polanyi, International Investment Law and the Global Land Rush*, 34 TWQ 1605, 1615–9 (2013).

it is completely opposed to environmental considerations.[11] For instance, there has been the recent effort by UNCITRAL's Working Group III to outline a number of reforms for the international arbitration process of IIL with various states calling for the regime to align more with the SDGs and sustainable development more broadly.[12] Recent Free Trade Agreements (FTAs) and other IIAs show an increased endeavor on the part of IIL's participants to include norms of sustainable development in the regime.[13] This is perhaps most apparent in the (yet not in force) Bilateral Investment Treaty (BIT) between Nigeria and Morocco that explicitly includes a provision concerning corporate social responsibility that '[takes] into account' the SDGs.[14]

However, by introducing the ecolological framework of the Treadmill of Production (ToP) to the legal analysis of the issues above,[15] this article argues that IIL is, nonetheless, more likely to constrain the SDGs' influence on states' environmental regulatory behaviour than the SDGs are to attenuate IILs' more environmentally harmful features. The ToP posits that environmental degradation is intrinsic to capitalist production. The framework focuses on decision-making and how decision-makers (policymakers, tribunals, scholars, etc.) 'get stuck' pursuing economic growth which invariably degrades the environment around them.[16] The ToP explains how regimes such as IIL operate on a level where environmental considerations ultimately tend to lose out to the 'bottom line' of economic growth.[17] The following analysis applies the ToP as a framework to argue against the compatibility between investment and environmental policy goals. I hold up the recent arbitration in *Eco Oro v Colombia* to illustrate how, even when treaties include elements to

[11] *See* Stephan W. Schill & Marc Jacob, *Trends in International Investment Agreements 2010-2011: The Increasing Complexity of International Investment Law* Y.B. Int'l Invt L. Pol'y, 2011-2012 141 (2013).
[12] UNCITRAL W.G. III, Possible reform of investor-State dispute settlement, Submission from the Government of Morocco, U.N. Doc. A/CN.9/WG.III/WP.161 ¶ 4 (Mar. 4, 2019); UNCITRAL W.G. III, Possible reform of investor-State dispute settlement, Submission from the Government of Mali, U.N. Doc. A/CN.9/WG.III/WP.181 ¶ 1 (Sep. 17, 2019); UNCITRAL W.G. III, Possible reform of Investor-State dispute settlement, Submission from the Government of South Africa, U.N. Doc. A/CN.9/WG.III/WP.176 (Jul. 17, 2019).
[13] Maria Chochorelou & Carlos Espaliu Berdud, *Sustainable Development in New Generation FTAs: Could Arbitrators Further the Principle through ISDS?*, 27 RECIEL 176, 180 (2018).
[14] Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, art. 24 (signed Dec. 3, 2016, not in force as of Mar. 5, 2024).
[15] ALLAN SCHNAIBERG, THE ENVIRONMENT: FROM SURPLUS TO SCARCITY (1980).
[16] Dean Curran, *The Treadmill of Production and the Positional Economy of Consumption*, 54 Canadian Review of Sociology 2, 28 (2017).
[17] *See* Bret Clark, Daniel Auerbach & Stefano B Longo, *The Bottom Line: Capital's Production of Social Inequalities and Environmental Degradation*, 8 Journal of Environmental Studies and Sciences 562 (2018).

safeguard environmental action, tribunals can still find host states in breach of economic protections.[18]

The ToP demonstrates most effectively the irreducibility of policies attempting to integrate investment and environmental policy goals and the subsequent necessity for initiatives such as the SDGs to consider different strategies to obtain their goals. Despite the SDGs' attempt at reconciling the antogonisms between states' regulatory efforts and regimes such as IIL's negative environmental features, they in fact help maintain such antagonisms due to their reliance on further economic growth,[19] as can be seen in SDG 8's target to explicitly promote economic growth or the efforts to encourage private funding.[20] This complicity need not be the case. With the timeline for the SDGs at its halfway point, it is imperative that their advocates consider the necessity of alternative approaches towards sustainable development that are not economically growth-oriented.[21] Burgeoning post-growth movements such as degrowth, Ecological Swaraj and Buen Vivir all offer alternative versions of social well-being that are not reliant on economic growth but rather place societies' relationship to the environment as a priority.[22] It is outside of the scope of this article to produce an exhaustive argument for post-growth alternatives, but it is analytically relevant that removing the growth fixation from the SDGs could reorient their targets and make them less reliant on private foreign investment.

This article focuses on two contributions: first, in contrast to the growth agnosticism present in some of the circular economics and doughnut economics literature which is steadily gaining a

[18] I choose to focus on Eco Oro v Colombia instead of other relevant cases because of its high profile, relatively recent proceedings and its relevance to the investment – environment policy nexus – the fact that it involved the decision of an arbitral tribunal to disregard the fair trade agreement's environmental exceptions clause regarding regulatory measures explicitly concerned with protecting a unique ecosystem from mining operations, Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (Sep. 9, 2016) [herein *Eco Oro v Colombia*].
[19] *See* Matheus G. Leichtweis, *"Transforming Our World"? A Historical Materialist Critique of the Sustainable Development Agenda*, Lond. Rev. int. law (2023).
[20] *See* Halliki Kreinin & Ernest Aigner, From *"Decent work and economic growth" to "Sustainable work and economic degrowth": A New Framework for SDG8*, 49 Empirica 281 (2021).
[21] Judith Bueno De Mesquita, *Re-interpreting Human Rights in the Climate Crisis: Moving Beyond Economic Growth and (un)Sustainable Development to a Future with Degrowth*, N.Q.H.R. (2024).
[22] Ashish Kothari, Federico Demaria & Alberto Acosta, *Buen Vivir, Degrowth and Ecological Swaraj: Alternatives to Sustainable Development and the Green Economy*, 57 Development 362 (2014).

broader audience,[23] this article demonstrates why capitalist production – growth – is central to the problems faced in legal questions regarding sustainability and environmental harm. Rather than relying for their fulfillment on private investment strategies, it is imperative initiatives like the SDGs seek out alternatives that do not depend on economic growth. Consequently, I argue against scholarship that advocates for the compatibility of regimes such as IIL and the SDGs[24] and assert that capitalist production and environmental sustainability are irreducible to one another. Secondly, the ToP is explicated as an original and novel way for legal scholars across a variety of disciplines to better understand this irreducibility between environmental and capitalist economic aims and this nexus's impact on law and policy.[25] While there is a steadily growing stream of literature critical of both IIL's environmental impact[26] and its role in maintaining global geo-political and economic heirarchies,[27] scant research exists in IIL literature about the nexus of capitalist exploitation and environmental harm. I believe the ToP fills this gap.

The argument proceeds in two major sections. In section 1, I first explicate the framework of the ToP and demonstrate how both the SDGs and IIL operate in capitalist, growth-oriented paradigms. I argue that this need not be the case as there are viable alternatives to both the internationalization of investment disputes in IIL and the SDGs' reliance on economic growth. In section 2, I illustrate how environmental and investment policy goals can conflict. I examine the recent case of *Eco Oro v Colombia* through the framework of the ToP to demonstrate how international arbitration still fundamentally treats economic considerations as the bottom line of IIL. This suggests that the

[23] KATE RAWORTH, DOUGHNUT ECONOMICS: SEVEN WAYS TO THINK LIKE A 21ST-CENTURY ECONOMIST (2018).
[24] *See* Lise Johnson, Lisa E. Sachs & Nathan Lobel, *Aligning International Investment Agreements with the Sustainable Development Goals* (2019) 58 Colum. J. Transnat'l L. 58; Lise Johnson, *FDI, International Investment Agreements and the Sustainable Development Goals, in* RESEARCH HANDBOOK ON FOREIGN DIRECT INVESTMENT 126 (Markus Krajewski & Rhea Hoffmann eds., 2019).
[25] While the ToP continues to be used in green criminology, I have been unable to locate any legal analyses utilizing the framework. *See* Michael J. Lynch, Paul B. Stretesky & Michael A. Long, *The Treadmill of Production and the Treadmill of Law: Propositions for Analyzing Law, Ecological Disorganization and Crime*, (2018) Capitalism Nature Socialism 1; Michael A. Long, Paul B. Stretesky & Michael J. Lynch, *The Treadmill of Production, Planetary Boundaries and Greem Criminology, in* ENVIRONMENTAL CRIME AND ITS VICTIMS: PERSPECTIVES WITHIN GREEN CRIMINOLOGY 263-275 (Toine Spapens, Rob White & Marieke Kluin eds., 2014).
[26] Olabisi D. Akinkugbe and Adebayo Majekolagbe, *International Investment Law and Climate Justice: The Search for a Just Green Investment Order*, 46 Fordham Int'l L.J. 169, 169-212 (2023); *see also* Kyla Tienhaara Et. al, CLIMATE POLICY, *Investor-State Dispute Settlement: Obstructing a Just Energy Transition* (2022).
[27] *See* DAVID SCHNEIDERMAN, INVESTMENT LAW'S ALIBIS: COLONIALISM, IMPERIALISM, DEBT AND DEVELOPMENT (2022); Ntina Tzouvala, *Full Protection and Security (for Racial Capitalism)*, 25 J. Int'l Econ. L. 224 (2022).

regime is likely to continue to temper the environmental efforts of initiatives such as the SDGs, pointing to the need for viable alternatives.

2 International Investment Law and the Sustainable Development Goals: Their Bases in the Treadmill of Production

The SDG literature often emphasises how the SDGs provide a three-pronged approach to development that accounts for the economic, social and ecologic needs of the world's developing communities while also emphasizing all three elements' interconnectedness.[28] Commentators insist that this multidimensional approach is desirable because the overlapping nature of the environmental issues will require synergy between the three elements.[29] The ToP is relevant because it also recognizes the interconnected relationship between the ecologic, social and economic,[30] but it posits that certain capitalist features make it unlikely for the three elements to successfully integrate.[31] The ToP examines the interconnections between ecologic, social, and economic goals through a framework which accounts for the historicized role capitalist economic relations play in dominating the other two. It adopts a largely neo-Marxian formulation of capitalism, meaning that capitalism is fundamentally based upon a particular set of social relations consisting of, inter alia, private property, wage labour, the division of labour and free markets. These social (often legal)[32] relations ultimately result in a system in which agents' ecological considerations concerning production are constrained by decisions about costs and profits.[33] The framework exposes how legal regimes such as IIL insulate economic interests from the environmental action promoted by initiatives such as the SDGs through constraining decision-makers at both the individual and social level.[34] Because the SDGs do not envision a radical

[28] *See* Jeff Waage Et. al, *Governing Sustainable Development Goals: Interactions, Infrastructures, and Institutions*, *in* THINKING BEYOND SECTORS FOR SUSTAINABLE DEVELOPMENT (Jeff Waage & Christopher Yap eds., 2015); Joyeeta Gupta & Courtney Vegelin, *Sustainable Development Goals and Inclusive Development*, 16 Int'l Environ. Agreements 433 (2016).
[29] Roberto Sanchez Rodriguez, Diana Urge-Vorsatz & Aliyu Salisu Barau, *Sustainable Development Goals and Climate Change Adaptation in Cities*, 8 Nature Climate Change 174, 181 (2018); *see also* Waage Et. al, *supra* note 28).
[30] Kenneth A. Gould, David N. Pellow and Allan Schnaiberg, *Interrogating the Treadmill of Production: Everything You Wanted to Know About the Treadmill but Were Afraid to Ask*, 17 Organization & Environment 296, 299 (2004).
[31] ALLAN SCHNAIBERG & KENNETH GOULD, ENVIRONMENT AND SOCIETY: THE ENDURING CONFLICT 3 (1994).
[32] *See* Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities, A Symposium of Critical Legal Studies*, 34 Am. U. L. Rev. 939 (1984).
[33] Schnaiberg & Gould, *supra* note 31, at 46.
[34] Lynch, Stretesky & Long, *The Treadmill of Production and the Treadmill of Law*, *supra* note 25, at 1.

reorganization of the world's major economic systems, they are more likely to accomodate the negative aspects of IIL rather than exert meaningful reform over such a regime.

The ToP, originally theorised by environmental sociologist Allan Schnaiberg in *From Surplus to Scarcity*,[35] posits that capitalist production's constant need to increase productivity will perpetually require increasing levels of economic expansion and subsequent ecological exploitation.[36] The imperative to expand is due to the cyclic process of capitalism's constant drive to maximise profits,[37] or accumulate capital. As capitalist relations (markets, labour, property, etc) expand, there is a structurally concurrent expansion of production--the physical inputs of capital, labour and natural resources--to meet the needs of a growing labour pool. This expansion increases profits for the capitalist who must then reinvest them to maintain competitiveness.[38] However, as profits get reinvested in cost-cutting technology, this technology further displaces human labour. The loss of human labourers from production results in less overall material consumption. In order to make up for this loss of consumption, production must be further expanded in order to create jobs for more human labourers/consumers.[39] The expansion of production requires further extraction of environmental resources.[40] The 'large, capital intensive' process, consisting of entities with significant scale of production, high usage of modern technology, high profits and bureaucracy',[41] through the extraction of natural resources or industrial production of commodities, creates negative externalities--negative effects on the environment.[42] These externalities can include emissions, waste, and environmental degradation. Despite actors' best efforts to alleviate these externalities, they are unavoidable in the process of production because further natural resources are inevitably required in production's expansion. In sum, as the treadmill expands, it continues to exacerbate overall environmental harm through increasing production/extraction with its concomitant negative externalities. Hence, this cyclic dynamic becomes referred to as a 'treadmill;' production is in constant need of expansion due to the dynamics it itself creates.

[35] *See* Schnaiberg, *supra* note 15.
[36] Gould, Pellow & Schnaiberg, *supra* note 30, at 297.
[37] Schnaiberg, *supra* note 15, at 228–9; *see also* Myron J. Gordon & Jeffrey S. Rosenthal, *Capitalism's Growth Imperative*, 27 Cambridge Journal of Economics 25 (2003).
[38] Schnaiberg, *supra* note 15, at 206.
[39] *Id.* at 228-9
[40] Gould, Pellow & Schnaiberg, *supra* note 30, at 296–7.
[41] Schnaiberg, *supra* note 15, at 221.
[42] Michel Callon, *An Essay on Framing and Overflowing: Economic Externalities Revisited by Sociology*, 46 The Sociological Review 244, 245–6 (1998).

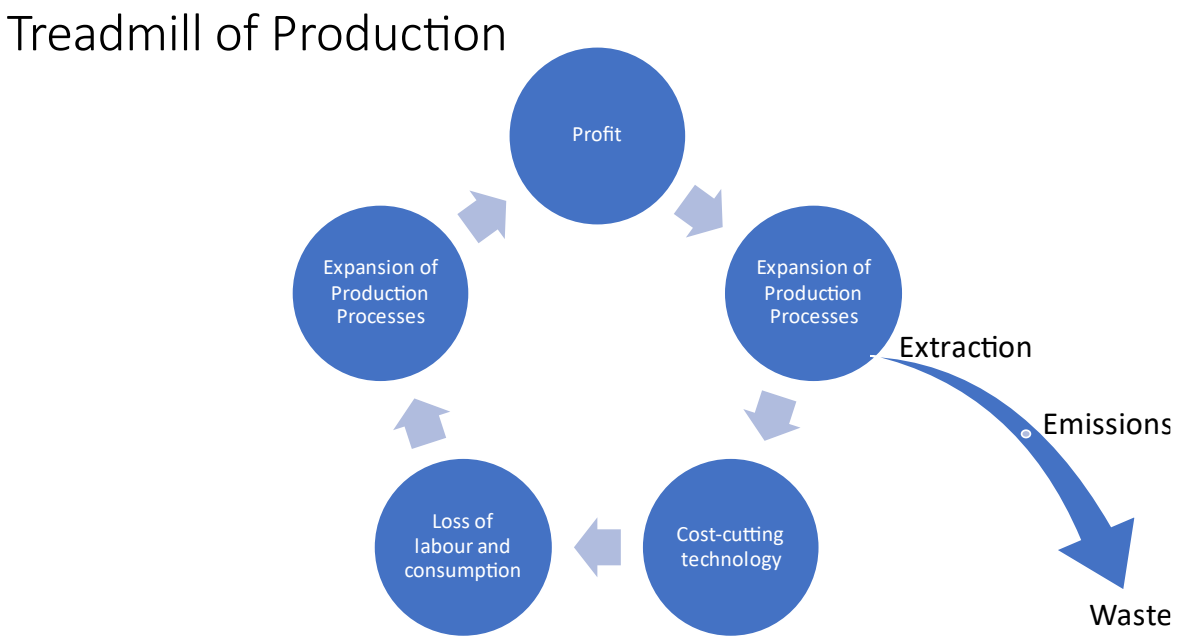

Figure 1

The ToP's strength in framing the harms of production in this way is two-fold. First, it draws attention towards the role of capitalist *production* in the processes of environmental degradation. The previous 70 years have been marked by spectacular growth in capitalist production in both the Global North and South.[43] This expansion coincided with extensive technological advancement and the movement of capital into 'developing' regions such as Southeast Asia, South America and Sub-Saharan Africa.[44] While there has been a shift away from productive industry in the Global North and a trend towards financialization,[45] research suggests that 'domestic profitability of non-financial corporations is fuelled [sic] by foreign operations' in which production plays a significant role.[46]

[43] ROBERT BRENNER, THE ECONOMICS OF GLOBAL TURBULENCE: THE ADVANCED CAPITALIST ECONOMIES FROM LONG BOOM TO LONG DOWNTURN, 1945-2005 (2006).
[44] DAVID HARVEY, SPACES OF CAPITAL: TOWARDS A CRITICAL GEOGRAPHY (2001).
[45] GIOVANNI ARRIGHI, THE LONG TWENTIETH CENTURY: MONEY, POWER AND THE ORIGINS OF OUR TIMES 371-86 (2nd ed., 2009); Greta R Krippner, 'The Financialization of the American Economy' (2005) 3 *Socio-Economic Review* 173.
[46] Cedric Durand & Maxime Gueuder, *The Investment-Profit Nexus in an Era of Financialisation and Globalisation: A Profit-centred Perspective* 15-24 (Post Keynesian Economics Study Group, Working Paper No. 1614, 2016).

Concomitant with this expansion of Northern capital into the Global South has been a corresponding political effort on the part of capital exporting states to instill a belief in the ability of economic growth to benefit the development of low-income states.[47] For instance, efforts such as the policy proposals enshrined in the Washington Consensus of the 1990s expounded on the importance of smaller State involvement, privatisation, deregulation and free markets, all in the name of further economic growth.[48] Following the implementation of these policy prescriptions put forward by international economic institutions such as the World Bank and IMF, the global economy saw a 'boom' in developing states' economic liberalisation and FDI entering the developing world.[49] These policy prescriptions coincided directly with the burgeoning regime of IIL[50] but can also be found in the growth-centric strategies of the SDGs.

The globalised economy has become increasingly implicated in the degradation of global ecosystems,[51] revealing a correlation between an increase in resource depletion and economic growth.[52] This fact has been corroborated by increasing amounts of research that indicates capitalist economic activity has warmed the planet and increased environmental degradation.[53] Notably, the ecological fallout from these developments has been increasingly borne by States in the Global South.[54]

The ToP's second strength as a framework is in how it explains production's effects on decision-making in political and legal realms. It insists that decisions about the 'types of technologies, the use of labor, and volumes of production' are all made at the level of capitalist *production* rather

[47] JASON HICKEL, LESS IS MORE: HOW DEGROWTH WILL SAVE THE WORLD 91-5 (2020).
[48] *See* John Williamson, *The Washington Consensus as Policy Prescription for Development*, World Bank Lecture Series "Practitioners of Development" (2004).
[49] JONATHAN JONES & COLIN WREN, FOREIGN DIRECT INVESTMENT AND THE REGIONAL ECONOMY 12-20 (2006).
[50] *See* Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 Colum. J. Tran'l L. 501 (1998).
[51] *See* Naomi Oreskes, *The Scientific Consensus on Climate Change*, 306 Science 1686 (2004).
[52] *See* Fridolin Krausmann Et. al, *Growth in Global Materials Use, GDP and Population during the 20th Century*, 68 Ecological Economics 2696 (2009).
[53] Ester van der Voet, Lauran van Oers & Igor Nikolic, *Dematerialization: Not Just a Matter of Weight*, 8 Journal of Industrial Ecology 121, 134 (2004); Almut Arneth Et. al, *Summary for Policymakers Climate Change and Land An IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems WG I WG II WG III IPCC Special Report* IPCC 3 (2019); R. Allan Et. al, *Climate Change 2021 The Physical Science Basis: Summary for Policymakers*, IPCC AR6 WGI 5 (2021).
[54] *See* Jason Hickel, *The Anti-colonial Politics of Degrowth*, 88 Political Geography 102404 (2021).

than consumption or financialisation, and that 'it is in the decision to *provide* supply, and the means by which that supply is provided, where social systems and ecosystems first collide.'[55] It is a particularly suitable framework for the current analysis because decisions about production have significant legal implications for policies straddling economic, social and ecologic goals. Specifically, the ToP explains how legal regimes like IIL end up insulating international economic interests by '[opposing] enhancements of environmental regulations that [make] ecologically destructive behaviors of the ToP and its agents [unlawful]'.[56] Moreover, because the ToP focuses on decision-making at various social levels, it effectively navigates the differences inherent to hard and soft legal regimes such as IIL and the SDGs. Therefore, the ToP is uniquely framed to expose the dangers of an initiative like the SDGs relying so heavily on growth-oriented strategies.

The ToP formulates the conflict in decision-making between political-legal systems and ecosystems at both the individual and social level. On the *individual* level, it identifies capitalism's imperative to expand and accumulate profit as the overriding social pressure on individual actors' decision-making.[57] This is particularly visible in the practice of IIL between State agents, foreign investors and arbitrators. The below section discusses foreign investors' interests towards profit and practitioners' interests in maintaining the regime. However, the pressure to insulate economic interests by opposing regulatory enhancement also occurs with local actors, both at the State and business level. This aligns with the work done by Perrone about developing States' 'national elites': the local bureaucrats and corporate actors who do not necessarily share the same interests as their local communities.[58] Perrone argues that, 'while most states actively solicit foreign investment to promote economic growth, foreign investors and national elites sometimes seize most of the benefits.'[59] Such an argument fits well with the ToP; though most local communities may favour tighter state regulations,[60] national elites share the same overriding economic pressure for higher profits as foreign investors and, at the level of governmental action, the decision-makers with close ties to national elites often struggle in maintaining necessary levels of environmental

[55] KENNETH A. GOULD, DAVID N. PELLOW & ALLAN SCHNAIBERG, THE TREADMILL OF PRODUCTION: INJUSTICE & UNSUSTAINABILITY IN THE GLOBAL ECONOMY 19-21 (2008).
[56] Lynch, Stretesky & Long, *The Treadmill of Production and the Treadmill of Law*, *supra* note 25, at 4.
[57] Shnaiberg & Gould, *supra* note 30, at 47-65.
[58] NICOLAS PERRONE, INVESTMENT TREATIES AND THE LEGAL IMAGINATION: HOW FOREIGN INVESTORS PLAY BY THEIR OWN RULES 173 (2021).
[59] *Id*.
[60] *See* David Schneiderman, *Local Resistance: At the Margins of Investment Law* 19 Globalizations 897 (2022).

action.[61] Together, these environmentally adverse individual decisions aggregate to become what IIL scholars have labeled a 'regulatory chill',[62] which will be further investigated in the next section.

At the second, *social* level of decision-making, the ToP formulates a social process whereby societies increasingly rely on the expansion of technological production to meet their economic and social needs. This reliance gets reflected in institutional decision-making oriented towards technological 'economic growth preferences.'[63] The SDGs reflect this social dynamic well. The section below shows how the SDGs exhibit a belief in capitalist innovation and technological progress's ability to deliver communities from poverty and environmental crisis. This is visible in the SDGs' institutional reliance on private foreign investment to meet their stated targets. The section below illustrates how this reliance on technological and financial innovation creates a situation where the SDGs both depend on and promote the capitalist expansionary circumstances that give rise to the ToP. There is, then, contradictory pressures on decision-making between the social and individual levels. The SDGs reflect a social decision to rely on and encourage growth while also advocating for environmental action. While at the individual level, IIL's actors tend to make decisions in line with economic interests that conflict with environmental action.

2.1 International Investment Law

The ToP explains how overriding economic pressures drive individual actors in IIL to take decisions that perpetuate the treadmill at the cost of the environment. IIL scholars have identified this tendency in what they refer to as the 'regulatory chill.' Regulatory chill 'suggests that governments will fail to regulate in the public interest in a timely and effective manner because of concerns about [arbitration]' due to either a fear of capital flight or the extensive costs of

[61] Perrone (n 58) 173-7.
[62] *See* KYLA TIENHAARA, THE EXPROPRIATION OF ENVIRONMENTAL GOVERNANCE: PROTECTING FOREIGN INVESTORS AT THE EXPENSE OF PUBLIC POLICY 25 (2009); Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, 7 T.E.L. 229 (2018); Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 606 (C. Brown and K. Miles eds., 2011).
[63] Shnaiberg & Gould, *supra* note 31, at 69-70.

arbitration.[64] While the concept of regulatory chill does not go uncontested[65] and its causation is difficult to assess,[66] its logic illuminates environmentally harmful decision-making from both the investors and host state agents' perspectives. The ToP contributes to the regulatory chill by grounding its basis in the capitalist imperative to expand.

In political economic terms, IIL provides international legal protections to the globalized sites of production.[67] The progenitors of the regime originally promoted it as a procedural arrangement to ensure the security of foreign investors' sunk costs in risky investment environments.[68] The procedural focus of IIL was ostensibly meant to remove any negative political connotations that might understandably appear in arbitration[69] - arbitration consists of unelected tribunals that determine the lawfulness of sovereign host States' treatment of foreign investors' activities.[70] Notably, investors were traditionally found in wealthy capital exporting states of the global North. In the 1990s and early 2000s, advocates for the regime touted this arrangement as a means for developing states to reap the benefits of foreign investment, particularly in the form of technology spillovers from the Global North.[71] In the last decades, the same arrangement has been reproduced in South-by-South investment relationships.[72] Though, it must be noted that the actual evidence that IIL has any impact either way on the flow of FDI into developing states remains contested.[73]

Where IIL has been of most environmental and social concern is in its disciplining of host states during disputes concerning state regulatory measures. Such a tendency became visible early on,

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[64] Tienhaara, *Regulatory Chill in a Warming World*, *supra* note 62, at 232.
[65] *See* Stephan Schill, *Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?*, 24 J. Int'l Arb. 469 (2007).
[66] Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen & Michael Waibel, *Legitimacy and Governance Challenges*, 10 (The Political Economy of the Investment Treaty Regime, Working Paper, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3003579.
[67] *See* Fiona Macmillan, *Multinational Enterprises, the World Trade Organisation and the Protection of the Environment*, *in* INTERNATIONAL CORPORATE LAW - VOLUME 2 2002 282 (F. Macmillan ed., 2004).
[68] Perrone, *supra* note 58, at 2–14.
[69] *See* Ksenia Polonskaya, *Metanarratives as a Trap: Critique of Investor-State Arbitration Reform*, 23 J. Int'l Econ. L. 957 (2020).
[70] Tzouvala, *supra* note 27, at 232-5.
[71] Jeswald W Salacuse and Nicholas P Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 120 (Karl P. Sauvant & Lisa E. Sachs eds., 2009).
[72] *See* Uche E. Ofodile, *African States, Investor-State Arbitration and the ICSID Dispute Resolution System: Continuities, Changes and Challenges*, 34 ICSID Rev. 296 (2019).
[73] *See* Andrew Kerner, *What Can We Really Know about BITs and FDI?*, 33 ICSID Rev. 1 (2018).

for example, in arbitrations like *Metalclad v Mexico* or *Santa Elena v Costa Rica* where tribunals only considered the effects of States' regulatory measures on investors' economic interests in determining the outcome of instances of expropriation.[74] Such cases instigated a vociferous debate over States' right to regulate because, even if States' environmental measures were done in good faith, compensation was still owed for the effects of the damages. Subsequent cases like *Methanex v USA* or the more recent *Aven v Costa Rica* represented a shift towards states' ability to use their police powers (that states do not owe compensation for bona fide regulatory measures).[75] However, Titi shows how, due to their ambiguity in the caselaw, police powers cannot reasonably be asserted as a general principle of international law.[76]

The ToP helps explain the adverse ecologic decisions within the regime that produce the regulatory chill from both the investors and state actors' point of view. From the investor's perspective, they operate under the presupposition that they must compete for higher profits, otherwise they will fail as a business venture.[77] It is therefore in investors' interests to control their costs of production by what means are available.[78] One such means is to locate their operations in a geographical setting with low regulatory standards such as a State that lacks the capacity to enforce strong environmental or health standards. Doing so keeps their costs of production down by saving on necessary safety or environmental precautions. It is then logical that, when such a State alters its regulatory framework and adversely affects the costs of production for the investor, the investor is less likely to remain in or enter this setting. Indeed, empirical evidence shows that regulatory change does dissuade foreign investors. A 2013 World Bank report on corporate perspectives about political risk indicates that most investors do consider 'adverse regulatory changes' a viable political risk towards investment.[79]

[74] Metalclad Corporation v. Mexico, ICSID Case No. ARB(AF), Award, ¶ 103 (Aug. 30, 2000); Compania del Desarrollo de Santa Elena, S.A. v. Costa Rica, ICSID Case No. ARB/96/1, Final Award, ¶ 72 (Feb. 17, 2000).
[75] Methanex Corporation v. United States of America, UNCITRAL, Final Award, (Aug. 3, 2005); David R. Aven, Samuel D. Aven, Carolyn J. Park, Eric A. Park, Jeffrey S. Shioleno, Giacomo A. Buscemi, David A. Janney and Roger Raguso v. The Republic of Costa Rica, ICSID Case No. UNCT/15/3, Final Award, ¶ 585 (Sep. 18, 2018).
[76] Catharine Titi, *Police Powers Doctrine and International Investment Law*, *in* GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION 339 (Filippo Fontanelli, Andrea Gattini & Attila Tanzi eds., 2018).
[77] Shnaiberg & Gould, *supra* note 31, at 49-54.
[78] *Id.* At 51.
[79] WORLD BANK GROUP, WORLD INVESTMENT AND POLITICAL RISK 21 (2014).

From the perspective of State actors, Tienhaara connects regulatory chill to a Neo-Gramscian form of new constitutionalism.[80] In this formulation, IIL and its protections act as seemingly neutral, depoliticised instruments that lock in and advance the ideologies of a neoliberal political economy (marketisation, deregulation, privatisation; all growth-oriented) by disciplining actors that derogate from such norms.[81] The FET standard for example, which can take the form of legitimate expectations, a stability clause or protection against arbitrariness, often presents particularly difficult circumstances for states trying to avoid discipline due to its 'ever-changing normative content'.[82] Davitti points out how 'thanks to FET, compensation is often attainable even if the higher threshold of [standards such as expropriation or non-discrimination] cannot be reached'.[83] With compensation so easily obtainable for investors, and given the fact that developing States can face claims that sometimes amount to awards in the billions of dollars like that which Venezuela encountered in *ConocoPhillips v Venezuela*,[84] it is logical that developing States may internalize the risk of such sums and shy away from stricter future regulatory policies.[85] This is of significant concern among many of the regime's commentators as over 30 percent of arbitrations comprise of disputes from the fossil fuel and mining sectors.[86] Of these, when the cases make it to the merits stage, 72 percent of fossil fuel investors are successful in their claims against host States.[87]

Nonetheless, it may be countered that, with the current global attitudes concerning environmental action being as they are, States have a stronger impetus to maintain efforts aimed at protecting their ecosystems. However, the ToP emphasises that, 'governments are actually reluctant actors in this struggle, since countries and government agents appear to be more closely tied to economic

[80] Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, n. 61; Kyla Tienhaara, The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy (Sept 2008) (Ph.D. dissertation, VU University).
[81] Tienhaara, Ph.D. Thesis, *supra* note 80, at 109–11.
[82] DARIA DAVITTI, INVESTMENT AND HUMAN RIGHTS IN ARMED CONFLICT: CHARTING AND ELUSIVE INTERSECTION 55 (2019).
[83] *Id*.
[84] ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on the Rectification of the Award, ¶ 64 (Aug. 29, 2019).
[85] Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (n 61) 233–234.
[86] Lea Di Salvatore, IISD, INVESTOR – STATE DISPUTES IN THE FOSSIL FUEL INDUSTRY: IISD REPORT iii (2021).
[87] *Id*. at iv.

expansion'.[88] Indeed, in line with Perrone's argument about national elites, the below discussion about *Eco Oro v Columbia* suggests that government agents appear to be very ambivalent about environmental regulation and economic expansion.

2.2 The Sustainable Development Goals

Recall that the ToP's second level of decision-making occurs at the social level. The SDGs encompass the social level of the ToP by promoting sustainable development that is tethered to productivist economic growth. This is apparent in their institutional commitment to funding schemes which call for the participation of private foreign investors.

At the broader social level, the SDGs cannot escape their growth fixation.[89] This is visible in that their basis is largely grounded in the ideas of ecological modernization theory - that economic impact on the environment will decrease as technological development increases.[90] Consequently, their strategies generally consist of policies and regulations at institutional, State and private levels that direct investment and finance towards promoting 'green' innovation and economic development.[91] This is most readily apparent in how the SDGs make economic growth a central part of their platform. For example, Goal 8's first target is to '… sustain per capita economic growth in accordance with national circumstances'.[92] Goal 8 coincides with various other Goals and Targets about developing countries' health, education and environmental sectors,[93] yet each Goal remains entrenched within a growth-oriented paradigm.[94]

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[88] Shnaiberg & Gould, *supra* note 31, at 55.
[89] Leichtweis, *supra* note 19, at 35-8.
[90] Arthur P.J. Mol, 'Ecological Modernization and the Global Economy' (2002) 2 *Global Environmental Politics* 92; Arthur P.J. Mol, *Ecological Modernization as a Social Theory of Environmental Reform, in* THE INTERNATIONAL HANDBOOK OF ENVIRONMENTAL SOCIOLOGY 63 (Michael R. Redclift & G Woodgate eds., 2010).
[91] UNDESA DIVISION FOR SUSTAINABLE DEVELOPMENT, A GUIDEBOOK TO THE GREEN ECONOMY: ISSUE 3: EXPLORING GREEN ECONOMY POLICIES AND INTERNATIONAL EXPERIENCE WITH NATIONAL STRATEGIES 6 (2012).
[92] GOAL 8 .:. SUSTAINABLE DEVELOPMENT KNOWLEDGE PLATFORM, https://sustainabledevelopment.un.org/sdg8 (last visited Mar. 5, 2024).
[93] SUSTAINABLE DEVELOPMENT GOALS .:. SUSTAINABLE DEVELOPMENT KNOWLEDGE PLATFORM, https://sustainabledevelopment.un.org/?menu=1300 (last visited Mar. 5, 2024).
[94] Claiton Fyock, *What Might Degrowth Mean for International Economic Law? A Necessary Alternative to the (un)Sustainable Development Paradigm,* 12 A. J. I. Law 40, 42-5 (2022).

The SDGs' institutional commitment to growth is visible in policymakers' insistence about privately financing the significant funding required by the SDGs.[95] An UNCTAD report states that the SDGs require an estimated 3.9 Trillion US dollars to meet their targets.[96] The primary funding for the SDGs is meant to be from public official development assistance in the form of inter-governmental grants, loans and technical assistance.[97] However, these methods are unable to accommodate the substantial sum of money needed for this endeavor as can be seen in the 2019 UN Economic and Social Council progress report, which revealed that official development assistance sources are shrinking.[98] These circumstances have only worsened since COVID-19.[99] For this reason, UNCTAD recommends economic tools such as privatization, special economic zones, and investment promotion agencies to address the SDG's targets.[100] The private sector has responded with initiatives such as the Principles for Responsible Investment,[101] a compact signed by over 2,000 investment owners, managers and service providers[102] that promotes itself as a proponent for investment designed to benefit the environmental, social and governance-related factors of global need.[103]

The ToP explains how such a basis in growth is problematic because these processes ultimately result in increasing net environmental extraction and waste.[104] There is, of course, a role to be played by FDI in the innovation and implementation of greener technologies in our contemporary global economy. There will obviously need to be FDI devoted to renewable energy infrastructure, for instance. However, it must be emphasised that green technologies will only make a significant difference if they coincide with a substantial effort to reduce overall material throughput--the net

[95] Vitor Gaspar Et. al, *Fiscal Policy and Development: Human, Social, and Physical Investment for the SDGs*, IMF Staff Discussion Note 19 (2019); *see also* IISD, Contracts for Sustainable Infrastructure: Ensuring the Economic, Social and Environmental Co-Benefits of Infrastructure Investment Projects (2017); *Promoting Investment in the Sustainable Development Goals* (n 4).
[96] UNCTAD, *supra* note 4, at 2.
[97] OECD, Net ODA, https://data.oecd.org/oda/net-oda.htm.
[98] UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, SPECIAL EDITION: PROGRESS TOWARDS THE SUSTAINABLE DEVELOPMENT GOALS 22 (2019).
[99] *See* Wenwu Zhao Et. al, *Achieving the Sustainable Development Goals in the Post-Pandemic Era*, 9 Humanities and Social Sciences Communications 258 (2022).
[100] UNCTAD, *supra* note 4, at 7.
[101] PRINCIPLES FOR RESPONSIBLE INVESTMENT, THE SDG INVESTMENT CASE (2017).
[102] PRINCIPLES FOR RESPONSIBLE INVESTMENT, Signatory Directory | PRI, https://www.unpri.org/signatories/signatory-directory (last visited Mar. 5, 2024).
[103] PETER POSCHEN, DECENT WORK, GREEN JOBS AND THE SUSTAINABLE ECONOMY: SOLUTIONS FOR CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT 2 (2017).
[104] Shnaiberg and Gould (n 31) 69; M Callon (n 42) 245-6..

amounts of resource withdrawal and waste addition.[105] Strategies centered on technological innovation and economic development more commonly rely on the debatable notion that, as States' economies become more sophisticated, they become less reliant on harmful technologies, known as decoupling.[106] Decoupling has increasingly become less tenable with more research.[107] Rather, research indicates, in line with the ToP, that the increase of technological development and expansion results in more overall material throughput.[108] More than encouraging innovation, reducing the overall material throughput must become a priority in the future SDGs.

By disputing the role of the private sector and economic growth in the achievement of the SDGs, this article does not advocate that Global South States should not be afforded the opportunity to 'develop' their economies and supply their citizens with meaningful employment. Of course, Global South States deserve the ability to 'catch up' with their Northern contemporaries in terms of standards of living. However, Schnaiberg and Gould argue that the contemporary global circumstances, in terms of technology, financial systems, etc, are very different now than they were when the treadmill first emerged.[109] It is therefore faulty to assume that the developing States of today should, or even could, 'develop' in the same way States did in previous years.[110] Instead, policymakers should focus their efforts on how global standards of living can be more equal without exacerbating the existential environmental exigencies we currently face. The takeaway from this for the SDGs is that they need not rely on growth-oriented strategies concerning how to best use private foreign investment. There are viable alternatives.

2.3 Viable Alternatives

The criticisms above are predicated on the idea that things could be done differently in both IIL and the SDGs. IIL reflects the ToP because it ultimately protects the bottom line of foreign

[105] DIANA STUART, RYAN GUNDERSON & BRIAN PETERSEN, THE DEGROWTH ALTERNATIVE: A PATH TO ADDRESS OUR ENVIRONMENTAL CRISIS? 14-20 (2020).
[106] Andrew K. Jorgenson & Brett Clark, Are the Economy and the Environment Decoupling? A Comparative International Study, 1960-2005, 118 American Journal of Sociology 1, 28 (2012).
[107] *See* Timothee Parrique Et. al, EUROPEAN ENVIRONMENTAL BUREAU, DECOUPLING DEBUNKED: EVIDENCE AND ARGUMENT AGAINST GREEN GROWTH AS SOLE STRATEGY FOR SUSTAINABILITY (2019).
[108] *See* Blake Alcott, *Jevons' Paradox*, 54 Ecological Economics 9 (2005).
[109] Shnaiberg & Gould, *supra* note 31, at 165.
[110] *Id.*

investors - profit. In doing so, it opposes the necessary enhancements of environmental regulation. The SDGs reflect the ToP because, as a strategy for development, they are 'stuck' within a capitalist, growth-centric paradigm. They do not imagine a way to go beyond the capitalist growth imperative but rather maintain it as a central pillar for development. In neither instance must it be so. The precepts of the capitalist system, as explicated by the ToP, are not determinative social constructs.[111] Actors--States, local communities, businesspeople, tribunals--can act and/or choose differently regarding the different political, economic and legal institutions in which they are involved. For the purposes of space, this article makes this point broadly for both IIL and the SDGs.

First, ISDS does not have to be an international legal practice. Commentators have offered the abandonment of international investment arbitration altogether to bypass the international protections that make the enhancement of environmental regulation so difficult.[112] This is not as unreasonable a suggestion as it might appear. It largely involves bringing judicial decision-making about investors' activities back to the domestic sphere. The internationalisation of ISDS is largely justified on it allegedly improving access to justice for foreign investors and supposedly, more generally, improving the rule of law through a set of international minimum standards.[113] However, Vastardis points out that prioritizing international solutions to investor-State disputes 'reinforces the common perception that domestic institutions, actors, and cultures undermine democracy and human rights, whilst international law promotes them.'[114] Such priorities are patronizing and unnecessary. Developing States, as South Africa has illustrated,[115] are more than capable of reclaiming their domestic sovereignty over the operation of FDI within their borders. A withdrawal from IIL would more generally bring regulatory power back to domestic jurisdictions and could very potentially amount to stronger environmental regulations. This is not to say that domestic judiciaries' decision-making is not susceptible to the pressures of the ToP.

[111] ROBERTO M. UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (1987).
[112] Amandine Van den Berghe & Kyla Tienhaara, CLIENT EARTH, POTENTIAL SOLUTIONS FOR PHASE 3: ALIGNING THE OBJECTIVES OF UNCITRAL WORKING GROUP III WITH STATES' INTERNATIONAL OBLIGATIONS TO COMBAT CLIMATE CHANGE 5-6 (2019).
[113] Anil Yilmaz Vastardis, *Justice Bubbles for the Privileged: A Critique of the Investor-State Dispute Settlement Proposals for the EU's Investment Agreements*, 6 Lond. Rev. int. law 279, 283 (2018).
[114] *Id.* at 284.
[115] Engela Schlemmer, *An Overview of South Africa's Bilateral Investment Treaties and Investment Policy*, 31 ICSID Rev. 167, 185-92 (2016).

Indeed, national judiciaries can be closely connected to national elites.[116] However, national systems have the capability of safeguarding against the pressures of the ToP through politics and more flexibility in enabling innovative environmental action.[117] This last point emphasizes the importance of the following alternative.

Second, the SDGs do not need to rely on growth-oriented strategies to meet their environmental and social targets. Rather, the SDGs should reorient themselves towards encouraging an international economic structure that supports more community-driven lifestyles that bolster genuine self-sufficiency and well-being.[118] The post-growth movement, embodied in movements such as degrowth, Buen Vivir and Ecological Swaraj, is still evolving, but its strength is that it contains genuine proposals for transforming the global political economy.[119] Post-growth identifies the economic growth fixation as the cause of material inequality while prescribing different ways to make substantial environmental and social changes, mainly through reducing the material throughput produced by economic growth.[120] It stresses the importance of moving away from the fixation on national GDPs as an indicator for societal well-being and promotes more community driven forms of organization.

Post-growth advocates ideas such as Green New Deals without growth, shorter work weeks, re-commoning the social sphere and universal basic income as ways in which societies can enjoy decent standards of living without needing the economy to expand and the environment to bear the brunt of this expansion.[121] These proposals would bolster communities' development while eliminating the need for harmful industries to transfer their effects to the Global South. Of course, there will need to be a corresponding political effort for the burden to be distributed across the

[116] Randall D. Eliason, *Why the Supreme Court is Blind to its Own Corruption*, N.Y. TIMES, May 18, 2023.
[117] *See* D. Compagnon, S. Chan & A. Mert, *The Changing Role of the State*, *in* GLOBAL ENVIRONMENTAL GOVERNANCE RECONSIDERED 237 (Frank Biermann and Philipp Pattberg eds., 2012); Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change* (Harvard Project on International Climate Agreements Discussion Paper 2010-33, 2010).
[118] *See* Duncan Crowley Et. al, *Towards a Necessary Regenerative Urban Planning. Insights from Community-Led Initiatives for Ecocity Transformation,* Cidades 83 (2021); J. Xue, *Is Eco-Village/Urban Village the Future of a Degrowth Society? An Urban Planner's Perspective*, 105 Ecological Economics 130 (2014).
[119] GIORGOS KALLIS ET. AL, THE CASE FOR DEGROWTH (Wiley 2020); Hickel, n. 46; Hickel, 'Degrowth: A Theory of Radical Abundance' (2019) *Real-World Economics Review* 54.
[120] *See* Jason Hickel Et. al, *Urgent Need for Post-Growth Climate Mitigation Scenarios*, 6 Nature Energy 766 (2021).
[121] Kallis Et. al, *supra* note 119, at 65.

world's main climate offenders, largely North America and Western Europe, so that the Global South is not left to continue to experience the worst of economic development's features without experiencing its benefits. But rather than rely on neoliberal notions about growth providing a trickle down of wealth to the worse off, post-growth emphasises the importance of wealth redistribution from the wealthy countries to the poor through strategies that reverse the effects of the structural re-adjustments of the last 40 years and the current asymmetries in the trade and investment regimes.[122]

These two broad suggestions would both be better alternatives within the framework of the ToP. First, re-domesticating investor-State disputes would remove a significant hurdle to regulatory enhancements by removing the international protections, like the FET standard, that tend to oppose such enhancements. This would not eliminate the role of FDI in future international economic projects, but it would bring its governance back into the domestic remit. It would afford State decision-makers additional space to experiment with their political economy, regulatory systems and notions of development and well-being without the fear of IIL's regulatory chill.[123] Second and relatedly, post-growth provides the experimental ideas regarding political economics, development and well-being that are currently largely missing in the SDG discourse. It would offer decision-makers (policy makers) an alternative to sustainable development that does not rely on green growth and technological modernization theory.[124] Most importantly, post-growth's emphasis on the importance of a contracted material throughput would attenuate the resource-hungry and waste-heavy processes demanded by capitalism's imperative to expand production.

3 The Irreducibility of Ecologic and Economic Objectives: International Investment Law's New Treaties and the Treadmill of Production

The previous sections framed the bases of both IIL and the SDGs as being grounded in the ToP. The ToP illustrates how agents' decision-making is constrained by the pressures that capitalist economic growth place on actors at both an individual and social/institutional level. This

[122] Jason Hickel, *The Imperative of Redistribution in an Age of Ecological Overshoot: Human Rights and Global Inequality*, 10 Humanity: An International Journal of Human Rights 416, 419-20 (2019).
[123] DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE 8 (2008).
[124] Fyock, *supra* note 94, at 49-52.

framework is necessary in understanding why I argue that the investment and environmental policy goals of States are not as compatible as organisations like the OECD may hope. In recognising the vast need of financial resources for the SDGs to be accomplished, policy makers and commentators persist in their attempt to align investment treaties and ISDS with the principles of sustainable development.[125] The belief is that, if treaties can be re-imagined to reflect the principles of sustainable development,[126] reworked versions of provisions such as the MST or FET standard or effective exception clauses can 'help secure the necessary policy space for States to regulate in the public interest to address climate change and environmental concerns'.[127] What these strategies do not account for however, and the ToP does, is how individual and social decision-making is grounded in capitalism's imperative to expand and accumulate profit. It is this economic imperative to expand that maintains the incompatibility between investment and environmental policy goals despite efforts at better treaty drafting. The following section examines the recent case of *Eco Oro v Colombia* which illustrates such incompatibility at both the individual level with a tribunal's decision-making and at the social level with a State's reliance on growth-oriented strategies for development.

Eco Oro v Columbia exemplifies well how enhanced treaties can fail in keeping tribunals from finding a treaty breach in States' regulatory measures. The case concerned a dispute over Columbia's regulation of Eco Oro's mining concessions in Colombia's Páramo de Santurbán. Páramos are unique high-altitude wetlands that are both very important to Colombia's biodiversity and, with Santurbán specifically, play an essential role in providing fresh water to 2.5 million Colombians.[128] Multiple State bodies vacillated over a number of years concerning Eco Oro's ability to proceed with their operations in what was designated the 'Preservation Zone'. Eco Oro initiated arbitration after Colombia's Constitutional Court struck down the possibility for the company to be granted an exception in using a significant portion of their concession.[129] In an instance reflecting Davitti's comment about the FET standard making investor claims more attainable--the Tribunal found a breach in the FTA's MST and FET clause due to the incertitude

[125] *See* Johnson, Sachs & Lobel, *supra* note 24.
[126] *Id.* at 63.
[127] Laura L. Tremblay, *In Need of a Paradigm Shift: Reimagining Eco Oro v Colombia in Light of New Treaty Language*, 23 JWIT 915, 917 (2022).
[128] Eco Oro v. Colombia, *supra* note 18, at ¶ 86.
[129] *Id.* at ¶ 96-165.

of Colombia's regulatory actions after dismissing claims of indirect expropriation.[130] Ultimately, the Tribunal ensured the FTA's *commercial* commitment to investors' operations by disciplining Colombia's environmental measures. Nonetheless, this result was only made possible due to Colombia's social commitment to commercial growth, which will also be examined below.

The following section does not provide an exhaustive account of *Eco Oro* or the interaction between IIL's operation and the inclusion of SDG-oriented environmental efforts at reform. The purpose is rather to serve as an illustrative example of how investment and environmental policy goals can conflict and embody the dynamics of the ToP. This brief exposition emphasises the importance of considering the viable alternatives to IIL and the SDGs listed above.

3.1 Eco Oro v Colombia through the Lens of the Treadmill of Production

Arriving at an agreement like that of Canada-Colombia's FTA is the result of a concerted effort from both scholars and policymakers over many years to grapple with the difficult relationship between economic activity and environmental/social protection.[131] Schacherer and Hoffmann locate this difficulty in 'the economic fact that investment can be positive or negative for host countries depending upon how it is regulated and directed'.[132] Johnson points out that, concerning the environment, FDI can both disseminate cleaner technologies but also lead to a rise in carbon dioxide emissions.[133] Concerning the economy, she notes that, while FDI can promote knowledge and technology transfer, it can also push out domestic business and increase wealth inequality.[134] Consequently, policymakers focus much attention on the complicated issue of how to best provide environmental policy space in arbitration. Reorienting the operation of IIL is not as straightforward a process as simply including preambular language about the SDGs or including a sustainable development provision. The SDGs, and sustainable development more generally, act as soft law

[130] *Id.* at ¶ 821.
[131] *See* Benjamin Richardson, *Keeping Ethical Investment Ethical: Regulatory Issues for Investing for Sustainability* 87 Journal of Business Ethics 555 (2009); MARIE-CLAIRE CORDONIER SEGGER, MARKUS W. GEHRING AND ANDREW NEWCOMBE, SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW (2011).
[132] Schacherer & Hoffmann, *supra* note 7, at 564.
[133] Johnson, *supra* note 24, at 129; *see also* Luisa Blanco Et. al, *The Impact of FDI on CO2 Emissions in Latin America*, 41 Oxford Development Studies 104 (2013).
[134] Johnson, *supra* note 24, at 128.

that is incorporated into a hard law regime.[135] At most, sustainable development may be considered an interstitial norm which '[pushes or pulls]' States to apply other norms in ways favourable to the tenets of sustainable development, but it has yet to reach any meaningful basis as a customary norm of international law.[136] Hence, policymakers' strategy has been to reorient IIAs towards 'foster[ing], and not constrain[ing], responsible, SDG-advancing governance at the national level'.[137] They have done this mainly by focusing on the inclusion of clearer, more explicit carve-outs for environmental or social regulation in IIAs.

These efforts to include sustainable development and other environmental-friendly provisions in new IIAs have seen tangible results. A recent string of FTAs such as the Trans-Pacific Partnership, Comprehensive Economic and Trade Agreement, EU-Singapore Free Trade Agreement and the EU-Vietnam Free Trade Agreement all contain preambular language exhibiting the parties' commitment to sustainable development, though these statements do not have direct effect on arbitration.[138] While some commentators propose to alter different treaty mainstays such as the FET standard or provisions on expropriation to offer more clarity about their interpretation,[139] the adoption of a WTO-styled general exceptions clause has offered the more popular strategy to engender the 'regulatory autonomy' of host States. By 2016, 40 percent of new IIAs contained a WTO-styled general exceptions clause.[140] The Canada-Colombia FTA exhibits both a preambular environmental qualification and a WTO-style environmental exception clause.[141]

It is at the juncture between economic activity and environmental/social protection that the ToP departs from IIL scholarship and practice. While the authors above acknowledge that FDI and IIL

[135] Rakhyun E. Kim, *The Nexus between International Law and the Sustainable Development Goals*, 25 RECIEL 15, 16 (2016).
[136] MARIE-CLAIRE CORDONIER SEGGER, CRAFTING TRADE AND INVESTMENT ACCORDS FOR SUSTAINABLE DEVELOPMENT: ATHENA'S TREATIES 77-88 (2021).
[137] *Id*.
[138] Chochorelou & Espaliu Berdud, *supra* note 13, at 180.
[139] For example, the recent EU IIAs such as the EU – Viet Nam Investment Protection Agreement (2019) Art. 2.5 provides an exhaustive list of the obligations that fall under the FET standard; Schacherer & Hoffmann, *supra* note 7, at 575; Zagel, *supra* note 6, at 26-41.
[140] Wolfgang Alschner & Kun Hui, *Missing in Action: General Public Policy Exceptions in Investment Treaties*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2018 4 (Lisa Sachs, Jesse Coleman & Lise Johnson eds., Ottawa Faculty of Law Working Paper No. 2018-22, 2018), https://ssrn.com/abstract=3237053.
[141] Free Trade Agreement Between Canada and the Republic of Colombia, Preamble, Art 2201 (3) (signed Nov. 21, 2008, entered into force Aug. 15, 2011) [herein Canada-Colombia FTA].

can play a role in exacerbating both ecological harm and social inequality, they remain 'stuck' in the logic of the treadmill. They cannot accept that economic and environmental policy aims are irreducible. They implicitly accept that FDI is a necessary factor in achieving the SDGs[142] and promote the reimagining of IIAs in ways that 'encourage and channel investments that contribute to sustainable development and withhold benefits from those that do not'.[143] Consequently, their line of reasoning resorts to prescriptions about how to best reorient the operation of IIL ex ante to contribute to sustainable development. However, despite treaty-drafters' best efforts to steer tribunals to interpret clarified treaty language in a way that provides States the ability to enact regulatory actions without fear of compensation, there remains no 'mechanical formula' for tribunals to decide primary obligations such as the FET standard or indirect expropriation in investor-State arbitration.[144] Maximising arbitral certainty ex ante through better treaty provisions[145] may alleviate a certain level of inconsistency in arbitral awards,[146] but it does not and will not do enough to reduce the economic pressures of the ToP, which are the ultimate drivers of the regulatory chill.

This is because both individual tribunals and social institutions like States are beholden to growth-oriented strategies for development that make profit--the 'economical use and enjoyment' of an investment[147]--the bottom line. By revealing the constraint of the treadmill on these two levels, the ToP exposes the irreducibility between environmental and economic policy goals. At an individual level, *Eco Oro* illustrates how tribunals tend to interpret substantive treaty issues ex post in a way that insulates the economic interests of foreign investors. I demonstrate this by focusing on how *Eco Oro's* Tribunal favoured the FTA's preambular commitment to providing a 'predictable

[142] Alschner & Hui, *supra* note 140, at 130; Schacherer & Hoffmann, *supra* note 7, at 564; Johnson, Sachs & Lobel, *supra* note 24, at 61; Cordonier Segger, *supra* note 136, at 267.
[143] Johnson, Sachs & Lobel, *supra* note 24, at 63.
[144] Zachary Douglas & Jan Paulsson, *Indirect Expropriation in Investment Treaty Arbitrations*, *in* ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS 145 (N. Horn & M. Kroll eds., 2004).
[145] Julian Arato, Chester Brown & Federico Ortino, *Parsing and Managing Inconsistency in Investor-State Dispute Settlement*, 21 JWIT 336, 345 (2020).
[146] *See* Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 Ford. L. R. 1521 (2005).
[147] These terms were used by the Tribunal in determining whether there was an indirect expropriation in Técnicas Medioambientales Tecmed, S.A. v United Mexican States (Tecmed v Mexico), ICSID Case No. ARB(AF)/00/2, Award, 115 (May 29, 2003).

commercial framework' over its undertaking to protect the environment.[148] At the social/institutional level, the case also illustrates States' reliance on growth-oriented strategies for economic development, which often entails giving heavy industry as much latitude as possible to receive the presumptive economic spillovers.

3.1.1 Decision-making at the Individual Level of Arbitration

The pressure to insulate economic interests at the individual level is most interestingly visible in the tribunal's favouring of the FTA's preambular commitment to 'ensure a predictable commercial framework for business planning and investment' over the following commitment to doing so 'in a manner that is consistent with environmental protection and conservation'.[149] This is interesting because, while preambles are not binding, their context should be taken into account according to Article 31 of the Vienna Convention on the Law of Treaties.[150] However, there is nothing to indicate any kind of hierarchy in the listed commitments of the FTA. Nonetheless, in both its deliberations over the issues of MST/FET and the general exceptions clause, the Tribunal justified its decision in terms explicitly mentioning both parts of the preamble.[151] Analysing these decisions through the ToP suggests that the Tribunal was constrained by capitalism's imperative to expand and deliberately prioritised the FTA's commitment to a predictable commercial framework over any kind of environmental qualification.

The Tribunal's deliberate prioritisation of a predictable commercial framework is first evinced in their decision on MST. Ultimately, the Tribunal averred that Colombia's actions breached the MST/FET clause because they were arbitrary and essentially sent Eco Oro on a 'regulatory roller-coaster' ride'.[152] To reach this decision, the Tribunal declared their departure from the high threshold of the MST standard as it is set out in *Neer*[153] and instead made its decision based upon a lengthy exposition about the obligations of non-arbitrariness and legitimate expectations in the FET standard.[154] However, the Tribunal accepted that, for regulatory actions to breach the FET

[148] Canada-Colombia FTA, *supra* note 141, at Preamble.
[149] *Id*.
[150] Vienna Convention on the Law of Treaties, Art. 31(2) (adopted May 23, 1969, entered into force Jan. 27, 1980).
[151] Eco Oro v. Colombia, *supra* note 18, ¶ 748, 828.
[152] *Id.* at ¶ 791, 810.
[153] *Id.* at ¶ 744.
[154] *Id.* at ¶ 745-85.

standard, they must be to a degree 'unacceptable from an international perspective whilst set against the high measure of deference that international law extends to States to regulate matters within their own borders'.[155] The Tribunal further accepted that Colombia had not acted in bad faith.[156] It also pointed out that Eco Oro did not provide evidence of its own due diligence, which may have informed upon the company's expectations and the potential investment risks involved within the concession.[157]

With these qualifications, it is difficult to see how the Tribunal came to the decision it did. Is regulatory confusion really enough to satisfy the international threshold set against a high measure of State deference? Professor Sands QC did not think so in his Partial Dissent, stating that Colombia's measures were 'not contrary to the rule of law, and it was not conduct that shocked or offended a sense of judicial propriety'.[158] Viewed from the perspective of the ToP, however, the majority's commitment to a predictable commercial framework makes more sense. Its decision-making was explicitly constrained by the commercial framework it highlighted in the FTA. While the Tribunal claimed that Colombia can 'make difficult and potentially controversial choices' in pursuit of public and environmental protection,[159] it ultimately (again referencing the commitment to a predictable commercial framework)[160] determined that Colombia had failed to 'ensure a predictable business environment'[161] due to the confusion caused by the States' regulatory vacillations. The Tribunal had to oppose the regulatory enhancement put forth by Colombia for it to protect Eco Oro's commercial framework and insulate its economic interests.

The Tribunal's deliberate prioritisation of a predictable commercial framework is secondly evinced in their decision on the environmental exception clause. After first denying Colombia's objection to the Tribunal's jurisdiction,[162] the Tribunal focused on how the exceptions clause should not preclude the claimants from seeking compensation. It stated 'that neither environmental

[155] *Id.* at ¶ 755.
[156] *Id.* at ¶ 806.
[157] *Id.* at ¶ 768-9.
[158] Eco Oro v Colombia, *supra* note 18, Partial Dissent, at ¶ 37; Robert Garden, *Eco Oro v Colombia: The Brave New World of Environmental Exceptions*, ICSID Rev. 1, 4-5 (2022).
[159] Eco Oro v Colombia, *supra* note 18, ¶ 751.
[160] *Id.* at ¶ 770.
[161] *Id.* at ¶ 772.
[162] *Id.* at ¶ 380.

protection nor investment protection is subservient to the other, they must co-exist in a mutually beneficial manner'.[163] Nonetheless, following another mention of the FTA's preambular commitment to a predictable commercial framework,[164] the Tribunal stated that 'whilst a State may adopt or enforce a measure pursuant to [environmental objectives]…this does not prevent an investor claiming…the payment of compensation'.[165] It reached this decision despite both parties to the FTA expressing that if the exception should apply, then there should be no violation of the treaty, no State liability and *no compensation.*[166] The Tribunal dismissed this stance as not comporting with the 'context of the FTA as a whole,'[167] suggesting again that, between a predictable commercial framework and environmental protection, the Tribunal explicitly decided to insulate Eco Oro's economic interests by opposing Colombia's (and Canada's) regulatory enhancements.[168]

The Tribunal's decision to deny the general exceptions clause should give further pause to any certainty that clearer, more explicit carve-outs for environmental or social regulation in IIAs will foster SDG-advancing governance.[169] Alschner and Hui argue that the problem with the general exception clauses' adoption in IIL is that they 'are largely missing in action'.[170] The authors point out that respondent host States 'fail to raise them appropriately and tribunals tend to ignore them or adopt interpretations that lessen their impact'.[171] Tribunals in *Copper Mesa v Ecuador, Bear Creek v Peru* and *Eco Oro v Columbia* have all, in varying ways, disregarded the Canadian FTA General Exception provisions despite such provisions purpose in acting as a 'final safety net' to preserve States' legitimate regulatory objectives.[172] While Alschner and Hui are correct that tribunals do lessen such provision's impact, it is inaccurate after *Eco Oro* to argue that States have not raised such clauses appropriately or that tribunals ignore them. *Eco Oro* was an instance in which both State parties displayed support for the general exception clause and the Tribunal gave

[163] *Id.* at ¶ 828.
[164] *Id.*
[165] *Id.* at ¶ 830-2.
[166] *Id.* at ¶ 374, 378.
[167] *Id.* at ¶ 836.
[168] *Id.* at ¶ 837.
[169] J.B. Heath, Eco Oro and the Twilight of Policy Exceptionalism, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT INVESTMENT TREATY NEWS (December 20, 2021).
[170] Alschner & Hui, *supra* note 140, at 2.
[171] *Id.*
[172] Eco Oro v. Colombia, *supra* note 18, at ¶ 373.

it due consideration. The problem was not the effectiveness of the provision. Rather, the problem is that IIL ultimately tends to insulate economic interests through its decision-makers' opposition to environmental regulatory enhancements in favour of predictable commercial frameworks.

The Intergovernmental Panel on Climate Change articulates well the frustration with such jurisprudence, stating 'while [IIAs] hold potential to increase low-carbon investment in host countries, these agreements have tended to protect investor rights, constraining the latitude of host countries in adopting environmental policies'.[173] However, from the perspective of the ToP, this criticism could be taken further and argued that decisions like *Eco Oro* reveal IIL's tendency to not only constrain host countries' regulatory latitude but also to make foreign investors' profits its bottom-line. The decision in *Eco Oro v Colombia* reflects the pressures that the global system of capitalist production puts on individual decision-makers; they exhibit a tendency to decide in favour of commercial frameworks.

3.1.2 Decision-making at the Level of State Institutions

Eco Oro also exhibits the kind of social pressure the ToP puts on State actors, which is evinced by several of the actions taken and comments made by Colombia. Specifically, the case illustrates how State agents concede to the societal pressure to expand technological production to meet the State's economic and social needs. This is an important aspect of this analysis because it shows that State actions, similar to the SDGs in their pursual of technological and financial advancement, also contribute to the continuation of the ToP.

With drafting the 2001 mining code, the origin of the case's chain of events, Colombia took the initial steps on the treadmill by invoking the concept of sustainable development while also emphasizing the importance of investors' stability, calling the law, 'a modern legislation, which gives legal stability to investors, in accordance with international standards'.[174] Colombia accepted the premise of ecological modernisation that further industrial development, at the behest of multinational corporations, could bolster their economic development while remaining

[173] A Patt Et. al, *International Cooperation*, *in* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC) WORKING GROUP III CONTRIBUTION TO THE SIXTH ASSESSMENT REPORT: CLIMATE CHANGE 2022: MITIGATION OF CLIMATE CHANGE 71–2 (PR Shukla Et. al eds., 2022).
[174] Eco Oro v Colombia (n 18) ¶ 102 (italics removed).

environmentally viable. The State bodies maintained this position even after they rejected plans for an open pit mine in 2010 by maintaining the designation of the concession a 'Project of National Interest,' stating 'This project has a social and economic impact in the regions where the operations are located…which translates into benefits such as the creation of new jobs, royalties and investment in works that will benefit the region'.[175]

However, as was discussed above, the economic benefits from such operations do not often make their way to the local communities. Instead, it is the national elites who reap the economic benefits while the local communities suffer the ecologic and social fallout. In 2010, when Colombia enacted its Law 1382, which gave the government power to prohibit mining operations in paramos,[176] Eco Oro published a news release addressing their concerns about the project's economic feasibility.[177] Eco Oro requested the decision be reconsidered.[178] After which, the corporation later reported internally that 'it had had a "very good meeting with Martinez the Mines Minister*"* who had said the "Governments [sic] definitely wants the project to go ahead"'.[179] These facts suggest the validity of Perrone's framework about the ties between international corporations and 'national elites'. Indeed, local opposition to Eco Oro's operations were visible in the demonstrations that took place against the company in 2011.[180] Nonetheless, the State continued to vacillate concerning its measures toward Eco Oro's concessions, eventually attempting to move forward with underground mine exploration to then finally deciding to protect the Páramos.

While it might be commendable that the State institutions of Colombia finally did side with the local communities and attempt to protect the Páramos, the purpose of pointing out these developments is to demonstrate how the decision-making of Colombia was always constrained by the social pressures of the ToP. Recall that a significant part of the reason developing States participate in IIL is because they have accepted that doing so is an effective strategy in courting further FDI for economic development.[181] Colombia's former Minister of Mines' comment that,

[175] *Id.* at ¶ 122 (italics removed).
[176] *Id.* at ¶ 110.
[177] *Id.* at ¶ 114.
[178] *Id.* at ¶ 115.
[179] *Id.* at ¶ 116 (italics removed).
[180] *Id.* at ¶ 118.
[181] Bonnitcha, Skovgaar Poulsen & Waibel, *supra* note 66, at 46-9.

'mining and energy are going to lead economic growth for the coming decades'[182] exemplifies this acceptance well. However, IIL is not purposed for the development of States, whether that be economic or sustainable development. Rather, it is purposed for the protection of foreign investors' profits. What the instances in *Eco Oro* suggest is that the ToP exerts tremendous pressure on State institutions to support the profit maximisation of international capital, and when these institutions' efforts reverse, there is legal regimes such as IIL in place capable of opposing enhancements towards environmental regulation.

3.1.3 In Summary

In contrast to the view that *Eco Oro* may be an aberration or that what might be needed is still further clarificatory language in IIAs,[183] the case illustrates well the kind of pressure the ToP places on decision-makers at both the individual and social level. Such instances illustrate how regimes like IIL chill the necessary implementation of environmental regulation. This is important because the SDGs' environmental targets are not achievable without environmental action. Nonetheless, both the individual and institutional actors in IIL continue to accept the pressures of the ToP, and the conflict between environmental and economic policies persists. In contrast to the claims of the OECD, even if inroads are made in the form of more arbitral decisions supporting States' police powers, the overall trajectory is more likely to be one with the tendency for IIL to continue to protect economic interests over the environment. The necessary way, then, to break this cycle is to stop promoting the compatibility of investment and environmental policy and to seek out the viable alternatives listed above.

4 Conclusion: A Call to Consider Alternative Approaches

The intended purpose of this article was to illuminate one area in which environmental and investment policy goals are not compatible. Namely, for the OECD to claim that investment and environmental policy goals are compatible, they must overlook the difficulties evident above in instances like *Eco Oro v Colombia.* The importance of this exposition is in attempting to redirect the SDGs towards a more sustainable economic orientation which does not rely on the

[182] Eco Oro v. Colombia, *supra* note 18, at ¶ 787 (italics removed).
[183] Kuo Hou-chih & Jeffrey Lo, *Runaway Tribunal? An Assessment of the Eco Oro Tribunal's Opinion on the General Exceptions,* 15 Contemp. Asia Arbitr. J. 143, 164 (2022).

environmental degradation inherent to the ToP. If the only way forward in the environmental crisis facing the world was through capitalist means, the SDGs' reliance on FDI would certainly remain a vital component of future policies. However, under the current circumstances such a strategy represents an effort to contain the exigencies of the environmental crisis within the ToP. It is irrational to try to fix a crisis with the same methods which caused the crisis in the first place.[184]

Fortunately, there are viable alternatives available for the SDGs that do not necessarily involve IIL. The international community and international lawyers must only be willing to look beyond the current economic and legal means by which the sustainability transformation is to take place and reflect on how these means maintain the treadmill rather than provide its remedy. International arbitration can be brought back within the remit of domestic jurisdictions. States could be provided the sovereign maneuvability they deem necessary in regulating industry within their borders without worrying about international disciplinary measures from international regimes like IIL. Likewise, the SDGs have a multitude of strategies to choose from the post-growth movements that do not rely on growth-oriented approaches to ecologic and economic exigencies. Ultimately, both must first step off the logic of the treadmill.

[184] DIANA STUART, RYAN GUNDERSON AND BRIAN PETERSEN, CLIMATE CHANGE SOLUTIONS: BEYOND THE CAPITAL-CLIMATE CONTRADICTION 11-3 (2020).