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Reforming International Investment Law for Climate Change Goals

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CHAPTER OVERVIEW

To achieve global climate change mitigation and adaptation goals under the Paris Agreement, international investment law should enable and expedite the transition away from high-emission investment toward low-emission investment. Existing international investment agreements (IIAs) providing for investor–state dispute settlement (ISDS) fail to advance climate goals and can effectively hinder states' climate action. In this chapter, I discuss the implementation of two main policy options for climate-oriented reform of international investment law – termination of climate-unfriendly IIAs and negotiation of climate-friendly ones – at various governance levels, ranging from unilateral to multilateral action. Given the mounting risks and impacts of IIAs and ISDS, as well as the lack of evidence that they encourage foreign investment flows, terminating IIAs or withdrawing from them appears to be the most effective reform option. States seeking to conclude new climate-friendly treaties or to amend existing IIAs must ensure that the treaties legally distinguish between low-emission and high-emission investments. Climate-friendly IIAs must not hinder climate action ('do no harm'), by denying treaty protections to high-emission investments, limiting their establishment and expansion, removing incentives such as fossil fuel subsidies, and requiring investments to be made responsibly. In addition, IIAs should leverage the potential contribution of foreign investment to climate goals ('do good'), by incentivising, promoting, facilitating, and protecting low-emission investments only, and by supporting a just transition to a low-emission world. In line with broader efforts to reform international investment law, climate-aligned IIAs should also exclude or circumscribe controversial provisions (fair and equitable treatment [FET], legitimate expectations, indirect expropriation, and most-favoured-nation [MFN], to name a few), prohibit treaty-based challenges to climate policy measures, and deny substantive rights and access to treaty-based dispute settlement mechanisms to high-emission investments. Climate-unfriendly investors would instead need to rely on substantive rights and procedural avenues based on domestic laws.

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1 INTRODUCTION

States have agreed to climate change mitigation and adaptation goals under the 1992 United Nations (UN) Framework Convention on Climate Change (UNFCCC) and the 2015 Paris Agreement to the UNFCCC. The Paris Agreement's goals enshrine States' commitment to limit global warming to 2°C above pre-industrial levels and their best efforts to limit it to well below 1.5°C,[1] as well as to make 'finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development'.[2]

To achieve these goals, international investment law—the body of international law governing the treatment of foreign direct investment (FDI) by host States—should enable and expedite the transition away from high-emission investment toward low-emission investment. However, international investment law as it stands fails to advance climate goals and can effectively hinder States' climate action. In this chapter, I explore how international investment law could be reformed for alignment with climate change policy goals.[3]

After explaining the need for climate-oriented reform (Part 2), I suggest treaty language and approaches that States may adopt in order to carry it out (Part 3). In Part 4, I discuss the potential implementation of two main policy options—termination of climate-unfriendly IIAs and negotiation of climate-friendly IIAs—at various governance levels, ranging from unilateral to multilateral action. I present conclusions and policy recommendations in Part 5.

2 THE NEED FOR CLIMATE-ORIENTED REFORM OF INTERNATIONAL INVESTMENT LAW

Here I discuss why FDI can contribute to achieving climate goals (Part 2.1), why existing international investment law works against such goals (Part 2.2), and why—for reasons unrelated to climate change—reform of international investment law is already happening (Part 2.3).

[1] Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) (Paris Agreement) art 2(1)(a).

[2] Ibid art 2(1)(c).

[3] Despite the specific climate focus of this work, reform must also take into account the Sustainable Development Goals (SDGs) and other public policy objectives. See United Nations Conference on Trade and Development (UNCTAD), *UNCTAD's Reform Package for the International Investment Regime* (UNCTAD 2018) <https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf> accessed 30 May 2020 (UNCTAD's Reform Package).

2.1 Climate Change Mitigation and Adaptation as an Investment Problem

To achieve global climate objectives, public and private economic actors must change investment flows radically. They need to slash investment in high-emission, climate-unfriendly projects, particularly those that lead to the burning of fossil fuels (coal, oil, and natural gas), which makes up most of humanity's share in causing global warming. In addition, they must ramp up investment in low-emission, climate-friendly projects, such as renewable energy (including wind, solar, geothermal, and hydroelectric power generation) and electricity storage, as well as in climate-resilient infrastructure.[4]

Estimates of the amount of investment needed for the low-carbon transition in energy systems alone lie within the range of USD 1.6 trillion to 3.8 trillion per year from 2016 to 2050; estimates of adaptation investment needed amount to USD 180 billion per year from 2020 to 2030. These needs significantly exceed current levels of climate finance. The annual average of total climate finance in 2017–2018 amounted to USD 579 billion. Furthermore, mitigation finance for renewable energy (at an annual average of USD 336 billion in 2017–2018)—is still dwarfed by investments in fossil fuel generation and infrastructure such as pipelines and ports (at an annual average of USD 930 billion in the same period). Fossil fuel investment continues to grow even though three-quarters of proven coal, oil, and gas reserves need to remain in the ground to limit warming to 2°C.[5] Averaging USD 30 billion in 2017–2018, adaptation finance represents only 5 percent of total climate finance.[6]

Private investment—by companies and financial institutions—already represented most (56 percent) of climate finance in 2017–2018.[7] Private investors need to increase their contribution

[4] Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2014 Synthesis Report, Summary for Policymakers* (IPCC 2014) <https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf> accessed 30 May 2020; IPCC, 'Special Report, Global Warming of 1.5 ºC' <https://www.ipcc.ch/sr15> accessed 30 May 2020.

[5] IPCC, *Climate Change 2014, Synthesis Report* (IPCC 2014) <http://ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_All_Topics.pdf> accessed 30 May 2020, 64, table 2.2. Christophe McGlade and Paul Ekins, 'The geographical distribution of fossil fuels unused when limiting global warming to 2 ºC' (2015) Nature, 187.

[6] Barbara Buchner et al, *Global Landscape of Climate Finance 2019* (Climate Policy Initiative 2020) <https://climatepolicyinitiative.org/publication/global-landscape-of-climate-finance-2019> accessed 30 May 2020. See also

See also REN21, *Renewables 2019 Global Status Report* (REN21 2020) <https://www.ren21.net/gsr-2019/chapters/chapter_05/chapter_05/#fig_47> accessed 30 May 2020, Chapter 5, and International Energy Agency (IEA), *World Energy Investment 2019* (IEA 2020) <https://webstore.iea.org/download/direct/2738?fileName=WEI2019.pdf> accessed 30 May 2020.

[7] Barbara Buchner et al n 6.

further as public funds will not suffice to achieve the ambitious climate change goals.[8] Climate-friendly investment is particularly relevant for the developing world. Countries in Africa, Asia, and Latin America and the Caribbean already struggle with the lack of climate-resilient infrastructure,[9] have limited availability of domestic capital and financing for investment from both the public and private sectors,[10] and are more vulnerable to climate change impacts.[11]

In the context of investment-thirsty developing countries and of the multidirectional nature of globalised investment,[12] FDI flows can play a relevant role in reaching climate goals. Domestic and international law and policy frameworks governing these flows must be designed in a way to ensure that investments lead to climate-friendly, sustainable development.[13] While we must not underestimate the value of national laws and policies,[14] in this chapter I focus on the body of international law governing FDI.

2.2 The Current International Investment Law Regime as a Hindrance to Climate Goals

International investment law consists of a network of international investment agreements (IIAs), including bilateral investment treaties (BITs) and other treaties with investment provisions,

[8] Rosalien Diepeveen, Yulia Levashova and Tineke Lambooy, 'Bridging the Gap between International Investment Law and the Environment' (2014) 30(78) Utrecht Journal of International and European Law 145, <http://dx.doi.org/10.5334/ujiel.cj> accessed 30 May 2020.

[9] Global Infrastructure Hub, *Global Infrastructure Outlook: Forecasting Infrastructure Investment Needs and Gaps* (Global Infrastructure Hub 2020) <https://outlook.gihub.org> accessed 30 May 2020.

[10] Barbara Buchner et al n 6.

[11] Joel B. Smith, Hans-Joachim Schellnhuber and M. Monirul Qader Mirza, *Vulnerability to Climate Change and Reasons for Concern: A Synthesis* (IPCC 2018) <https://www.ipcc.ch/site/assets/uploads/2018/03/wg2TARchap19.pdf> accessed 30 May 2020.

[12] UNCTAD, *World Investment Report 2019* (UNCTAD 2019) <https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2460> accessed 30 May 2020.

[13] Daniel M Firger and Michael B Gerrard, 'Harmonizing Climate Change Policy and International Investment Law: Threats, Challenges and Opportunities' (2010) Yearbook on international investment law and policy 11; Rosalien Diepeveen, Yulia Levashova and Tineke Lambooy n 8; Markus W. Gehring, 'Legal transition to the green economy (2016) 12 McGill International Journal of Sustainable Development Law and Policy, 135.

[14] IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC 2014) <https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf> accessed 30 May 2020; UNCTAD, 'Investment Laws: A Widespread Tool for the Promotion and Regulation of Foreign Investment' (UNCTAD 2016) Investment Policy Monitor: Special Edition <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1388> accessed 30 May 2020.

notably free trade agreements containing investment chapters. There are 3,287 signed IIAs, of which 2,657 are in force.[15]

Under a typical IIA, each State Party (the host State) grants substantive and procedural rights to investors from another State Party (the home State) and to investments they make in the host State's territory. Substantive rights frequently include standards such as national and most-favoured-nation (MFN) treatment and fair and equitable treatment (FET), and obligations such as the prohibition of expropriation. Procedural rights translate in most cases into investor–State dispute settlement (ISDS)—a mechanism allowing foreign investors to resort to international arbitration to seek monetary damages from the host State for violating those substantive rights, typically without prior need to exhaust local remedies.[16]

Although more than three-quarters of the number of IIAs were signed after the conclusion of the 1992 UNFCCC,[17] most do not explicitly embed climate objectives. Most IIAs state the objective of promoting FDI, protecting low-emission and high-emission investments equally, as if they were equally desirable. The fact that international investment law is climate neutral or climate blind is at the heart of why it both fails to advance and also hinders climate action. Mindful of the more optimistic literature supporting possible positive contributions of the existing IIA regime to climate objectives,[18] I elaborate below on some of the substantive and procedural aspects of IIAs that make them work against climate policy goals.

[15] UNCTAD, 'Investment Policy Hub: International Investment Agreements Navigator' <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 30 May 2020 (UNCTAD's IIA Navigator).

[16] Martin Dietrich Brauch, *Exhaustion of Local Remedies in International Investment Law* (International Institute for Sustainable Development [IISD] 2017) <https://www.iisd.org/sites/default/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf> accessed 30 May 2020.

[17] UNCTAD's IIA Navigator n 15.

[18] Anatole Boute, 'The Potential Contribution of International Investment Protection Law to Combat Climate Change' (2009) 27 J Energy & Nat Resources L 333; Nigel Bankes, 'Decarbonising the Economy and International Investment Law' (2012) 30(4) Journal of Energy and Natural Resources Law 498; Markus W. Gehring and Jarrod Hepburn, 'Climate, Trade and Investment Law in the Global Green Economy' in Oliver C. Ruppel, Christian Roschmann amd Katharina Ruppel-Schlichting (eds) *Climate Change: International Law and Global Governance, Volume I: Legal Responses and Global Responsibility* (Nomos 2013); Valentina Vadi, 'Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals' (2015) 48 Vand J Transnat'l L 1285; David W. Rivkin, Sophie J. Lamb and Nicola K. Leslie, 'The Future of Investor-State Dispute Settlement in the Energy Sector: Engaging with Climate Change, Human Rights and the Rule Of Law' (2015) 8(2) Journal of World Energy Law and Business 130.

2.2.1 Substantive Investment Treaty Obligations and Standards

National and MFN treatment, expropriation, and FET and the protection of legitimate expectations are some of the substantive IIA provisions that put climate goals at risk.

National and MFN treatment. Under these clauses, the host State commits to treat foreign investors and investments no less favourably than investors and investments in like circumstances, whether they come from the host State itself (national treatment) or from States that are not parties to the IIA (MFN treatment).[19] When adopting certain climate policy measures, host States may be interpreted to be in violation of those non-discrimination obligations under IIAs. Examples of such climate-friendly measures include the granting of subsidies and other incentives for low-emission investment, such as renewable energy, and the removal of subsidies or other investment incentives for high-emission investment, such as fossil fuels.[20] IIAs does not make it explicit that low-emission and high-emission investments are not 'in like circumstances'. Therefore, whether host State measures discriminating between those investments will be considered to violate the national and MFN treatment standards is uncertain and ultimately depends on arbitral interpretation.[21]

Furthermore, investment arbitration tribunals have interpreted MFN clauses to allow investors to import into the applicable IIA language—even entire provisions—contained in IIAs concluded by the host State with third countries that investors perceive to be more beneficial to them than that of the applicable IIA.[22] As newer-generation IIAs may move in the direction of appropriately discriminating against high-emission investment, climate-unfriendly investors may invoke MFN clauses in order-generation IIAs to sidestep this discrimination.[23] States and commentators have increasingly criticised importation through MFN.[24] However, while MFN clauses subsist in older-generation IIAs that do not expressly prohibit importation attempts, investors may continue to

[19] Organisation for Economic Co-operation and Development (OECD), 'Most-Favoured-Nation Treatment in International Investment Law' (OECD 2004) *OECD Working Papers on International Investment*, 2004/02 <http://dx.doi.org/10.1787/518757021651> accessed 30 May 2020; Suzy H Nikièma, 'The Most-Favoured-Nation Clause in Investment Treaties' (IISD 2017) IISD Best Practices Series <https://www.iisd.org/sites/default/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf> accessed 30 May 2020.

[20] Daniel M Firger and Michael B Gerrard n 13.

[21] Fiona Marshall, *Climate Change and International Investment Agreements: Obstacles or Opportunities?* (IISD 2010) <https://www.iisd.org/sites/default/files/publications/bali_2_copenhagen_iias.pdf> accessed 30 May 2020.

[22] Suzy H Nikièma n 19.

[23] Fiona Marshall n 21.

[24] Simon Batifort and J. Benton Heath, 'The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization' (2018). 111 American Journal of International Law 873 <https://ssrn.com/abstract=3063009> 30 May 2020.

invoke the clause in that manner and to seek sympathetic investment tribunals, and MFN will risk undermining climate-friendly IIA reform.

Expropriation. Most traditional IIAs prohibit both direct expropriation, understood as 'a mandatory legal transfer of the title to the property or its outright physical seizure', and indirect expropriation, which involves regulatory measures leading to a 'total or near-total deprivation of an investment but without a formal transfer of title or outright seizure'.[25] Both direct and indirect expropriation can hurt climate action.[26] For example, should a country decide to nationalise fossil fuel and other carbon-intensive industries to decarbonise its economy by keeping carbon in the ground,[27] aggrieved investors may launch IIA-based challenges against the State, questioning whether the nationalisation was taken for a public purpose, conducted under due process of law and in a non-discriminatory manner, and accompanied by appropriate or fair compensation. Investors in high-emission activities may also invoke expropriation provisions in IIAs to seek compensation from governments implementing increasingly stringent regulatory measures to reduce greenhouse gas emissions—for example, through stricter environmental standards, a carbon tax, or bans on certain fossil fuels—if the investors perceive these measures to substantially deprive them of their investment or affect their profitability.[28]

FET and legitimate expectations. Most IIAs impose on host States a broadly worded obligation to treat foreign investors and investments fairly and equitably, and investors have frequently and successfully invoked FET to obtain monetary compensation from States for a broad array of

[25] UNCTAD, 'Expropriation' (2012) *UNCTAD Series on Issues in International Investment Agreements II* <https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf> accessed 30 May 2020 6–7.

[26] See eg Jacob Werksman, Kevin A. Baumert and Navroz K. Dubash, 'Will International Investment Rules Obstruct Climate Protection Policies? An Examination of the Clean Development Mechanism', (2003) 3 International Environmental Agreements: Politics, Law and Economics 59.

[27] Carla Skandier, 'Nationalize the Fossil Fuel Industry', *In These Times* (17 November 2017) <http://inthesetimes.com/article/20700/nationalize-the-fossil-fuels-industry-carbon> accessed 30 May 2020; Peter Gowan, 'A Plan to Nationalize Fossil-Fuel Companies', *Jacobin* (March 2018) <https://www.jacobinmag.com/2018/03/nationalize-fossil-fuel-companies-climate-change> accessed 30 May 2020; Kate Aronoff, 'Is Nationalization an Answer to Climate Change?', *The Intercept* (8 September 2018) <https://theintercept.com/2018/09/08/jeremy-corbyn-labour-climate-change> accessed 30 May 2020; Carla Santos Skandier, 'Time Has Come to Nationalize the US Fossil Fuel Industry', *Roar* (19 August 2019) < https://roarmag.org/essays/time-has-come-to-nationalize-the-us-fossil-fuel-industry> accessed 30 May 2020; Adele Peters, 'Big Oil is Cheap: Should the Government Take It Over?', *Fast Company* (27 March 2020) <https://www.fastcompany.com/90482315/big-oil-is-cheap-should-the-government-take-it-over> accessed 30 May 2020.

[28] See, for example, Lone Pine Resources Inc. v. Government of Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/lone.aspx?lang=eng> accessed 30 May 2020; Daniel M Firger and Michael B Gerrard n 13.

measures.[29] The risks that FET poses to climate action derive from its generality: '[t]here is a great deal of uncertainty concerning the precise meaning of the concept, because the notions of "fairness" and "equity" do not connote a clear set of legal prescriptions in international investment law and allow for a significant degree of subjective judgment'.[30] It is unclear what types of climate regulations may be considered FET violations and subjected to challenge and compensation claims by foreign investors.

Another related concern is that '[t]he use of FET to protect investors' legitimate expectations can indirectly restrict countries' ability to change investment-related policies or to introduce new policies—including those for the public good—that may have a negative impact on individual foreign investors'. [31] Facing climate policy measures adopted by governments, investors in high-emission activities such as fossil fuel industries could invoke FET to protect their perceived legitimate expectations to profitable investments, in an attempt to obtain monetary compensation from governments for enacting climate policies or to stall climate action.[32]

2.2.2 Investment Dispute Settlement

ISDS mechanisms in IIAs provide foreign investors a procedural avenue to enforce their treaty-based substantive rights against host States. Investors initiated 1,023 known ISDS cases, claiming compensation for alleged breaches of FET, indirect expropriation, and other IIA clauses.[33] A tribunal of three arbitrators appointed by the disputing parties typically decides each case. Different tribunals often widely divergent interpretations of similar provisions. Their decisions are not bound by precedent, and their legal reasoning is not subject to correction and harmonisation through appeals. Decisions are final and binding, and enforceable under the mechanisms of either

[29] OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (OECD 2004), *OECD Working Papers on International Investment*, 2004/03 <http://dx.doi.org/10.1787/675702255435> accessed 30 May 2020; UNCTAD, 'Fair and Equitable Treatment' (2012) *UNCTAD Series on Issues in International Investment Agreements II* <https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf> accessed 30 May 2020.

[30] UNCTAD, *Investment Policy Framework for Sustainable Development* (UNCTAD 2015) <https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf> accessed 30 May 2020 (IPFSD) 83.

[31] ibid 83.

[32] The Creative Disrupters, *Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation: Argumentation Demonstrating How the Model Treaty Meets the Assessment Criteria* (2018) <http://stockholmtreatylab.org/wp-content/uploads/2018/07/The-Creative-Disrupters-Argumentation.pdf> accessed 30 May 2020; Kyla Tienhaara and Christian Downie, 'Risky Business? The Energy Charter Treaty, Renewable Energy, and Investor-State Disputes' (2018) 24.3 Global Governance: A Review of Multilateralism and International Organizations 451.

[33] UNCTAD, 'Investment Policy Hub: Investment Dispute Settlement Navigator' <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 30 May 2020 (UNCTAD's ISDS Navigator).

the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

High-emission investors are among the most frequent ISDS users, including the construction (108 cases initiated), mining (97), and oil and gas (69) sectors.[34] As governments adopt climate policy measures, investors may increasingly rely on ISDS, seeking compensation for regulatory action perceived to negatively affect their business activities—as illustrated by the EUR 1 billion case of German investor Uniper against the Dutch government's coal phase-out.[35] ISDS critics have cautioned that the threat or initiation of ISDS cases challenging regulatory action may dissuade governments from adopting public policy measures.[36] This phenomenon, known as regulatory chill, poses risks to climate action. Many high-emission investors sponsor anti-climate lobby[37] and may credibly threaten or initiate ISDS cases challenging climate regulation.[38]

Tribunals may order host States to pay substantial sums in monetary damages to compensate for negative impacts of climate policy on high-emission investments. Among the 187 ISDS cases for which data on amounts of compensation awarded is available, awards against States exceeded USD 100 million in 50 cases, including 10 exceeding USD 1 billion.[39]

[34] ibid.

[35] Megan Darby, 'Coal Generator Uses Investment Treaty to Fight Netherlands Coal Phaseout' (21 May 2020) *Climate Home News* <https://www.climatechangenews.com/2020/05/21/uniper-uses-investment-treaty-fight-netherlands-coal-phaseout> accessed 30 May 2020.

[36] Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011), 606–627; see also Bradly J. Condon and Tapen Sinha, 'International Investment Agreements' in *The Role of Climate Change in Global Economic Governance* (Oxford University Press 2013).

[37] InfluenceMap, 'Report' <https://influencemap.org/reports/Reports> accessed 30 May 2020; Sandra Laville, 'Top Oil Firms Spending Millions Lobbying to Block Climate Change Policies, Says Report' (21 March 2019) *The Guardian* <https://www.theguardian.com/business/2019/mar/22/top-oil-firms-spending-millions-lobbying-to-block-climate-change-policies-says-report> accessed 30 May 2020; Niall McCarthy, 'Oil And Gas Giants Spend Millions Lobbying To Block Climate Change Policies' (25 March 2019), *Forbes* <https://www.forbes.com/sites/niallmccarthy/2019/03/25/oil-and-gas-giants-spend-millions-lobbying-to-block-climate-change-policies-infographic/#33391eba7c4f> accessed 30 May 2020.

[38] Daniel M Firger and Michael B Gerrard n 13; Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7(2) Transnational Environmental Law 229 <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/C1103F92D8A9386D33679A649FEF7C84/S2047102517000309a.pdf/regulatory_chill_in_a_warming_world_the_threat_to_climate_policy_posed_by_investorstate_dispute_settlement.pdf> accessed 30 May 2020.

[39] UNCTAD's ISDS Navigator n 33.

Finally, even when host States succeed in fending off climate-related claims, legal defence costs can be significant, particularly affecting developing countries. Legal defence costs average USD 8 million and may exceed USD 30 million per case.[40]

2.3 Climate Goals in the Broader Context of International Investment Law Reform

As the number of ISDS cases grew from 1 in 1990 to over 1,000 in 2020,[41] they have evidenced negative impacts of IIA provisions and investment arbitration awards on host States' budgets and their right to regulate in the public interest, in areas including public health, the environment, sustainable development, and climate change. In addition, an increasing number of studies show that there is inconclusive evidence to support that IIAs can perform one of their key expected benefits—encouraging and increasing FDI flows generally, let alone investment that is aligned with host States' development goals.[42] Others criticise IIAs for privileging foreign over domestic investors and investments, and for providing for investor rights only, without corresponding obligations.[43]

In response, many States and other stakeholders have become increasingly critical of fundamental aspects of traditional IIAs and ISDS mechanisms. There are many high-quality studies on options to reform substantive and procedural aspects of international investment law, led by international

[40] United Nations Commission on International Trade Law (UNCITRAL) 'Possible reform of investor-State dispute settlement (ISDS) — cost and duration: Note by the Secretariat' UN Doc A/CN.9/WG.III/WP.153 (31 August 2018). See also Diana Rosert, *The Stakes Are High: A Review of the Financial Costs of Investment Treaty Arbitration* (IISD 2014) <https://www.iisd.org/sites/default/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf> accessed 30 May 2020; Lise Johnson and Lisa Sachs, 'The Outsized Costs of Investor–State Dispute Settlement' (2016) 16(1) Academy of International Business Insights <http://ccsi.columbia.edu/files/2016/02/AIB-Insights-Vol.-16-Issue-1-The-outsized-costs-of-ISDS-Johnson-Sachs-Feb-2016.pdf> accessed 30 May 2020; Lise Johnson, Lisa Sachs, Brooke Güven and Jesse Coleman, *Costs and Benefits of Investment Treaties: Practical Considerations for States* (Columbia Center on Sustainable Investment (CCSI) 2018) <http://ccsi.columbia.edu/files/2018/04/Cost-and-Benefits-of-Investment-Treaties-Practical-Considerations-for-States-ENG-mr.pdf> accessed 30 May 2020.

[41] UNCTAD's ISDS Navigator n 33.

[42] Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen and Michael Waibel, *The political economy of the investment treaty regime* (Oxford University Press 2017); Jonathan Bonnitcha, *Assessing the Impacts of Investment Treaties: Overview of the Evidence* (IISD 2017) <https://www.iisd.org/sites/default/files/publications/assessing-impacts-investment-treaties.pdf> accessed 30 May 2020; Joachim Pohl, 'Societal Benefits and Costs Of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence' (OECD 2018) OECD Working Papers on International Investment, 2018/01 <https://dx.doi.org/10.1787/e5f85c3d-en> accessed 30 May 2020; Lise Johnson, Lisa Sachs, Brooke Güven and Jesse Coleman n 40.

[43] UNCTAD's Reform Package (n 3) 19.

organisations,[44] academics, think tanks, and advocacy organisations.[45] Furthermore, many States are pursuing reform initiatives at unilateral, bilateral, regional, continental, and multilateral levels. Noteworthy initiatives include the following:

- Member States of the UN Commission on International Trade Law (UNCITRAL) mandated the body's Working Group III to work on possible ISDS reform. The working group has identified four categories of concerns regarding ISDS and agreed that multilateral reform was desirable with respect to all four: costs and duration of proceedings; inconsistency, incoherence, unpredictability, and incorrectness of decisions; arbitrators and decision-makers; and third-party funding. The working group is developing solutions to recommend to the commission.[46]

[44] UNCTAD's Reform Package n 3; OECD, 'International Investment Law' <http://www.oecd.org/investment/oecdworkoninternationalinvestmentlaw.htm> accessed 30 May 2020; Partnership for Action on Green Economy (PAGE), 'International Investment Agreements & Sustainable Development: Safeguarding Policy Space & Mobilizing Investment for A Green Economy' (UNEP 2018) <https://www.un-page.org/files/public/international_investment_agreements_sustainable_development_1.pdf> accessed 30 May 2020.

[45] Howard Mann, Konrad von Moltke, Luke Eric Peterson and Aaron Cosbey, *IISD Model International Agreement on Investment for Sustainable Development* (IISD 2005) <https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf> accessed 30 May 2020; Traidcraft, *International Investment Agreements Under Scrutiny: Bilateral Investment Treaties, EU Investment Policy and International Development* (2015) <https://www.tni.org/files/download/iias_report_feb_2015.pdf> accessed 30 May 2020; Frank J. Garcia, Lindita Ciko, Apurv Gaurav, Kirrin Hough, 'Reforming the International Investment Regime: Lessons from International Trade Law' (2015) 18(4) Journal of International Economic Law 861 <https://doi.org/10.1093/jiel/jgv042> accessed 30 May 2020; Karl P. Sauvant, *The Evolving International Investment Law and Policy Regime: Ways Forward* (2016) <https://www.ictsd.org/sites/default/files/research/WEF_Investment_Law_Policy_regime_report_2015_1401.pdf> accessed 30 May 2020; Kavaljit Singh and Burghard Ilge, *Rethinking Bilateral: Investment Treaties Critical Issues and Policy Choices* (Both Ends, Madhyam and SOMO 2016) <https://www.somo.nl/wp-content/uploads/2016/03/Rethinking-bilateral-investment-treaties.pdf> accessed 30 May 2020; Emma Aisbett et al, *Rethinking International Investment Governance: Principles for the 21st Century* (2018) <http://ccsi.columbia.edu/files/2018/09/Rethinking-Investment-Governance-September-2018.pdf> accessed 30 May 2020; Fabio Morosini and Michelle Ratton Sanchez Badin (eds), *Reconceptualizing International Investment Law from the Global South* (Cambridge University Press 2018); Manjiao Chi, Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications (Routledge 2019); International Institute for Environment and Development (IIED), 'Rethinking Investment Treaties and Dispute Settlement in the Light of Sustainable Development' <https://www.iied.org/rethinking-investment-treaties-dispute-settlement-light-sustainable-development> accessed 30 May 2020; IISD, 'Investment Law and Policy Reform' <https://www.iisd.org/topic/investment-law-and-policy-reform> accessed 30 May 2020; CCSI, 'Investment Law and Policy' <http://ccsi.columbia.edu/our-focus/investment-in-law-and-policy> accessed 30 May 2020.

[46] United Nations Commission on International Trade Law (UNCITRAL), 'Working Group III: Investor-State Dispute Settlement Reform' <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 30 May 2020.

- Member States of the Energy Charter Treaty (ECT) are conducting negotiations to 'modernise' it.[47] Negotiation topics include the right to regulate, FET, MFN, and indirect expropriation.[48]

- In preparation to negotiate new-generation IIAs and renegotiate older-generation ones, During the 2010s, States have developed or updated several national or regional IIA models or templates.[49] Noteworthy among the publicly available ones are those prepared by the Southern African Development Community (SADC) (2012),[50] Brazil (2015),[51] India (2015),[52] the Netherlands (2019),[53] and Morocco (2019).[54]

[47] Energy Charter Secretariat, 'Decision of the Energy Charter Conference, Adoption by Correspondence – Modernisation of the Energy Charter Treaty: Mandate, Procedural Issues and Timeline for Negotiations' (6 November 2019) Doc CCDEC 2019 <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201910.pdf> accessed 30 May 2020.

[48] Martin Dietrich Brauch, 'Modernizing the Energy Charter Treaty: A make-or-break moment for sustainable, climate-friendly energy policy' (13 November 2019) *IISD Blog* <https://www.iisd.org/blog/modernizing-energy-charter-treaty-make-or-break-moment-sustainable-climate-friendly-energy> accessed 30 May 2020. See also Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, 'Redesigning the Energy Charter Treaty to Advance the Low-Carbon Transition' (2019) 1 Transnational Dispute Management <https://ssrn.com/abstract=3446723> accessed 30 May 2020.

[49] UNCTAD, 'Investment Policy Hub: Model Agreements' <https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements> accessed 30 May 2020; Sarah Brewin, *Developing and Negotiating Based on a Model Investment Treaty* (IISD 2018) <https://iisd.org/library/developing-and-negotiating-based-model-investment-treaty> accessed 30 May 2020.

[50] Southern African Development Community (SADC), *SADC Model Bilateral Investment Treaty Template with Commentary* (SADC 2012) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2875/download> accessed 30 May 2020.

[51] Federative Republic of Brazil, *Cooperation and Facilitation Investment Agreement* (2015) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download> accessed 30 May 2020 (Brazilian Model CFIA).

[52] Republic of India, *Model Text for the Indian Bilateral Investment Treaty* (2015) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download> accessed 30 May 2020 (Indian Model BIT).

[53] Kingdom of the Netherlands, *Netherlands Model Investment Agreement* (22 March 2019) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download> accessed 30 May 2020 (Dutch Model BIT).

[54] Kingdom of Morocco, *Accord pour la Promotion et la Protection Réciproques des Investissements* (June 2019) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5895/download> accessed 30 May 2020 (Moroccan Model BIT).

- IIAs concluded in the 2010s have increasingly incorporated reform elements, such as a sustainable development orientation, the clarification of the scope and meaning of treaty provisions, the preservation of States' regulatory space, and new dispute settlement approaches. The UN Conference on Trade and Development (UNCTAD) has been tracking progress of IIA reform by analysing newly concluded IIAs from a sustainable development perspective.[55]

- A number of States acknowledging the need for reform have terminated IIAs or withdrawn from the ICSID Convention.[56] Countries that have unilaterally terminated BITs include Bolivia, Ecuador, India, Indonesia, and South Africa.[57] Bolivia, Ecuador, and Venezuela have withdrawn from the ICSID Convention.[58] Italy has withdrawn from the ECT, and Russia has stated its intention no longer to be a signatory to the treaty.[59] Notably, 23 Member States of the European Union (EU) signed an agreement to terminate intra-EU BITs.[60]

Although many studies and initiatives referenced above take sustainable development as a reform imperative, few explicitly and specifically advance climate goals and the transition from high-

[55] UNCTAD, 'International Investment Agreements - Issues Notes' <https://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx> accessed 30 May 2020; see also UNCTAD's World Investment Reports since 2013: UNCTAD, 'World Investment Reports' <https://unctad.org/en/Pages/Publications/WorldInvestmentReports.aspx> 30 May 2020; See also OECD, *Key Issues on International Investment Agreements* (OECD 2017) <https://www.oecd.org/investment/globalforum/2017-GFII-Background-Note-Freedom-of-Investment.pdf> accessed 30 May 2020.

[56] Nathalie Bernasconi-Osterwalder, Sarah Brewin, Martin Dietrich Brauch and Suzy Nikièma, 'Terminating a Bilateral Investment Treaty' (IISD 2020) <https://www.iisd.org/sites/default/files/publications/terminating-treaty-best-practices-en.pdf> accessed 30 May 2020.

[57] Investment Treaty News, 'Ecuador Denounces Its Remaining 16 BITs and Publishes CAITISA Audit Report' (12 June 2017) <https://www.iisd.org/itn/2017/06/12/ecuador-denounces-its-remaining-16-bits-and-publishes-caitisa-audit-report> accessed 30 May 2020. See also Tania Voon and Andrew D. Mitchell, 'Denunciation, Termination and Survival: The Interplay of Treaty Law International Investment Law' (2016) 31(2) ICSID Review - Foreign Investment Law Journal 413 <https://doi.org/10.1093/icsidreview/siw010> accessed 30 May 2020.

[58] Kavaljit Singh and Burghard Ilge n 45.

[59] International Energy Charter, 'Italy' <https://www.energycharter.org/who-we-are/members-observers/countries/italy> accessed 30 May 2020; International Energy Charter, 'Russian Federation' <https://www.energycharter.org/who-we-are/members-observers/countries/russian-federation> accessed 30 May 2020.

[60] European Commission, 'EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties' (5 May 2020) <https://ec.europa.eu/info/files/200505-bilateral-investment-treaties-agreement_en> accessed 30 May 2020.

emission to low-emission economies. In the following parts, I acknowledge the contribution of and build on climate-focused studies and initiatives to reform international investment law.

3 REFORMING INTERNATIONAL INVESTMENT LAW FOR THE CLIMATE GOALS

In this core part, I study substantive and procedural elements to make IIAs climate friendly, leveraging the contribution of international law to achieve climate goals. After tacking the need to distinguish high-emission from low-emission investments, I propose approaches and language for investment international law to 'do no harm' and 'do good' from a climate perspective.

To do so, I build on the model Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation (Model Treaty).[61] I had the honour of leading the drafting team (The Creative Disrupters) of the Model Treaty, which won the 2017–2018 Stockholm Treaty Lab prize, an innovation contest promoted by the Arbitration Institute of the Stockholm Chamber of Commerce and partners. I also bring in input from academic literature, other Stockholm Treaty Lab submissions, stakeholder submissions to the ongoing UNCITRAL Working Group III process on ISDS reform, State practice in recently developed treaties and treaty models, and positions in ongoing ECT modernisation negotiations.

3.1 Legally Distinguishing Between High-Emission and Low-Emission Investments

The climate neutrality or blindness of existing IIAs is at the core of the problem, as I mentioned above. If it is true that IIAs have a potential to encourage FDI flows, climate-blind IIAs can only encourage climate-friendly as well as climate-unfriendly investment indistinctively. To make IIAs into tools to advance climate goals, the starting point must be to create a legal distinction between high-emission and low-emission investments, and then create treaty mechanisms that discourage undesirable, high-emission investment and encourage desirable, low-emission investment.

[61] The following parts of this chapter are based on The Creative Disrupters, *Treaty on sustainable investment for climate change mitigation and adaptation* (2018) <http://stockholmtreatylab.org/wp-content/uploads/2018/07/Treaty-on-Sustainable-Investment-for-Climate-Change-Mitigation-and-Adaptation-1.pdf> accessed 30 May 2020 (Model Treaty); The Creative Disrupters n 32; Martin Dietrich Brauch, 'Tackling Climate Change Through Sustainable Investment: All in a Treaty?' (16 August 2018) *SDG Knowledge Hub* <http://sdg.iisd.org/commentary/guest-articles/tackling-climate-change-through-sustainable-investment-all-in-a-treaty> accessed 30 May 2020; Martin Dietrich Brauch et al., 'Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation: Aligning International Investment Law with the Urgent Need for Climate Change Action' (2019) 36(1) Journal of International Arbitration 7; Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch n 48.

Under the Model Treaty's approach, each State Party establishes the legal distinction between the types of investments that it considers desirable and those that it considers undesirable by listing sectors and sub-sectors in its schedules to different treaty annexes:[62]

> **Sustainable Investment** means, for each Party, an investment in one of the sectors or sub-sectors listed in that Party's Schedule to Annex I.
>
> **Unsustainable Investment** means, for each Party, an investment in one of the sectors or sub-sectors listed in that Party's Schedule to Annex II.

The Model Treaty contains illustrative lists to inspire potential adopters. The Sustainable Investment list features renewable energy and related research and development; other sectors and activities could promote recycling and activities to avoid food waste and deforestation.[63] The Unsustainable Investment list in the Model Treaty includes coal, oil, and gas. By avoiding universally applicable definitions, the Model Treaty provides more flexibility for States and greater political feasibility for negotiations. It acknowledges that definitions of investments that are desirable or undesirable from a climate policy standpoint may vary depending on different and evolving national contexts, levels of climate ambition, and frameworks for climate action.[64] At the same time, the approach ensures predictability in the legal regime, by granting any foreign investor the right to classification of an investment.[65]

Rather than relying on each State to define its climate-friendly and climate-unfriendly investments under an IIA, States could mandate an independent body of climate change experts to develop the definitions in abstract, which would be binding on all State Parties to the IIA, or to classify specific proposed or existing investment projects as climate friendly or unfriendly on a case-by-case basis.[66] Initiatives such as the EU's unified classification system ('taxonomy') on environmentally sustainable economic activities[67] and the indicative list of FDI sustainability characteristics

[62] Model Treaty (n 61) art 1.1.

[63] Christopher Campbell and Ana Coimbra Trigo, 'A Vision for Green Foreign Direct Investment: Proposals for an Investor-State Collaborative Effort' (2019) 36(1) Journal of International Arbitration, 135.

[64] The Creative Disrupters n 32.

[65] Model Treaty (n 61) art 3.19(1).

[66] This idea builds on a suggestion by Ben Beachy, Director of the Sierra Club's Living Economy Program, during a presentation about the Model Treaty at the 13th Annual Columbia International Investment Conference (CIIC): 'Rethinking International Investment Governance: Principles for the 21st Century', in New York, 27–28 September 2018.

[67] European Commission, '*Commission Legislative Proposals on Sustainable Finance'* (24 May 2018) <https://ec.europa.eu/info/publications/180524-proposal-sustainable-finance_en#investment> accessed 30 May 2020. See also the call for a 'brown' taxonomy in addition to the existing 'green' taxonomy in Felicia Jackson, 'The weekend

developed by Karl Sauvant and Howard Mann[68] could serve as inputs into this definition-setting exercise, whether it is conducted by States or delegated to an independent body.

Defining (and discouraging) climate-unfriendly investment is a unique feature of the Model Treaty. Other Stockholm Treaty Lab entries, in defining climate-friendly investment, advance open-ended definitions, broadly defining covered investments as those that contribute to achieving climate goals. Some include illustrative lists of investments that may meet the definition, and others include lists of investments that will be deemed to meet it. These approaches rely on host States and dispute settlement bodies to interpret and apply the definition of climate-friendly investment in accordance with climate science, as well as the UNFCCC, the Paris Agreement, and future instruments of international climate change law.[69] While such definitions ensure a greater degree of flexibility, they also subject host States and foreign investors to uncertainty as to the types of investments that the treaty encourages or discourages, reinforcing the existing uncertainty as to the scope of IIAs that results from broadly varying interpretations by investment tribunals.[70] In this context, definitions that are more narrowly circumscribed and objective are preferable to open-ended ones that depend on subjective interpretation.

3.2 Doing No Harm: Discouraging High-Emission Investments

Before considering how international investment law might encourage cross-border flows of low-emission FDI, it is crucial to ensure that it does not benefit investments that are harmful to the climate. In this part I present ideas on how to do so.

3.2.1 Denying Treaty Protections to High-Emission Investors and Investments

In a climate-reformed international investment law, high-emission investors and investments should not be accorded special treatment vis-à-vis others and therefore should not benefit from the substantive and procedural rights provided by IIAs with ISDS mechanisms. Accordingly, States should remove treaty protections from high-emission investors and investments.

read: Greening finance' (18 April 2020) *PV Magazine* <https://www.pv-magazine.com/2020/04/18/the-weekend-read-greening-finance> accessed 30 May 2020.

[68] Karl Sauvant and Howard Mann, 'Towards an Indicative List of FDI Sustainability Characteristics' (E15 Initiative October 2017) <http://e15initiative.org/publications/towards-an-indicative-list-of-fdi-sustainability-characteristics> accessed 30 May 2020.

[69] See eg the submission by the co-winner of the Stockholm Treaty Lab, Team Innovate: Paula Henin, Jessica Howley, Amelia Keene and Nicola Peart, 'Innovating International Investment Agreements: A Proposed Green Investment Protocol for Climate Change Mitigation and Adaptation'(2019), 36(1) Journal of International Arbitration 37.

[70] Gus Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010' (2018) 29(2) European Journal of International Law 507 <https://doi.org/10.1093/ejil/chy024> accessed 30 May 2020.

One way to do so is to terminate IIAs with ISDS provisions, and negotiate new ones and renegotiate existing ones without them.[71] 'No ISDS' has emerged as one of the approaches to reform investment dispute settlement: 'either ISDS is not covered at all or it is subject to the State's right to give or withhold arbitration consent for each specific dispute, in the form of the so-called "case-by-case consent"'.[72] In 2018, four new IIAs entirely omitted ISDS and two contained bilateral opt-outs: 'the CPTPP [Comprehensive and Progressive Trans-Pacific Partnership] (five bilateral ISDS opt-outs) and the USMCA [United States–Mexico–Canada Agreement] (ISDS opt-out for Canada–Mexico and for Canada–United States)'.[73]

To comply with Stockholm Treaty Lab requirements, the Model Treaty contains a standing court mechanism to settle investor–State disputes, though the drafters note that 'the inclusion of such mechanism does not necessarily result from a sense of conviction by the drafters that all disputes related to sustainable investments *should* have a chance to be elevated to the international level'.[74] The approach of the Model Treaty is to forbid Unsustainable Investors and Investments from accessing treaty-based dispute settlement mechanisms and to subject them to 'the exclusive jurisdiction of the domestic courts of the host State'.[75]

Besides limiting procedural rights, new IIAs could be negotiated and existing ones could be amended so as to grant substantive provisions to climate-friendly investors and investments only, excluding climate-unfriendly ones from among the potential beneficiaries of such treaty-based rights—for example, by expressly stating that the treaty's scope of application shall not cover high-emission investments. The Model Treaty does not provide language to implement this option, as the treaty's approach is indeed to include Unsustainable Investments within its scope in order to create obligations on them. However, it provides language for State Parties to exclude (or to seek negotiations to exclude) Unsustainable Investments from the scope of application of older IIAs:[76]

> 6. The Parties shall seek to renegotiate all their respective bilateral, regional and multilateral treaties that grant substantive or procedural rights to Unsustainable Investors or their investments so as to exclude such Unsustainable Investors and their investments

[71] Kyla Tienhaara n 35.

[72] UNCTAD, 'Taking Stock of IIA Reform: Recent Developments' (2019) 3 IIA Issues Note <https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf> accessed 30 May 2020 3.

[73] ibid.

[74] The Creative Disrupters (n 32) 22.

[75] Model Treaty (n 61) art 9.1(3); Kyla Tienhaara n 38.

[76] Model Treaty (n 61) art 2.5(6)–(7).

> from the scope of application of those treaties or to deny them access to investor–State dispute settlement procedures.
>
> *[If bilateral, and if the Parties that have a bilateral investment treaty in force:]*
>
> [7. The Parties hereby amend their [bilateral investment treaty] so as to exclude Unsustainable Investors and their investments from the scope of application of that treaty and to deny them access to the investor–State dispute settlement procedures under that treaty.]
>
> *[If multilateral:]*
>
> [7. All bilateral, regional and multilateral investment treaties to which Parties to this Treaty are the sole parties are hereby amended so as to exclude Unsustainable Investors and their investments from the scope of application of those treaties and to deny them access to investor–State dispute settlement procedures under those treaties.]

An alternative is to amend existing IIAs or conclude new ones allowing host States to deny treaty benefits to foreign investors when sued in international arbitration with respect to measures to achieve climate goals, carving these out of the scope of ISDS.[77] The CPTPP, allowing a State to deny treaty benefits in the case of claims concerning tobacco control measures, provides inspirational language:[78]

> A Party may elect to deny the benefits of Section B of [this IIA] with respect to claims challenging a tobacco control [or 'climate action'] measure of the Party. Such a claim shall not be submitted to arbitration under [the ISDS provisions] if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under [the ISDS provisions], a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed.

This option does not provide as much certainty as the previous ones presented in this part and depends on case-by-case action by a respondent host State every time a foreign investor initiates an ISDS challenge to its climate measures. One additional disadvantage over the two previous

[77] Kyla Tienhaara n 38; Gus Van Harten, 'An ISDS Carve-out to Support Action on Climate Change' (20 September 2015). Osgoode Legal Studies Research Paper No. 38/2015 <https://ssrn.com/abstract=2663504> accessed 30 May 2020.

[78] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (adopted 8 March 2018, entered into force 30 December 2018) <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3808/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp-2018-> accessed 30 May 2020 (CPTPP) art 29.5.

options is that it requires appropriately defining 'climate action measure'. This definition will be subjective to some extent, and its effectiveness would depend on arbitral interpretation.

3.2.2 Limiting the Establishment and Expansion of High-Emission Investments

Traditionally used to open countries' economies to FDI, IIAs can also serve to limit the establishment and expansion of types of investments that host States wish to discourage, such as high-emission investments. In this regard, the Model Treaty establishes a two-year timeline to phase out the establishment of new Unsustainable Investments.[79] The timeline allows foreign investors to plan and thus eliminate uncertainty. The two-year period suggested in the Model Treaty would be subject to negotiation. It should be neither too long, in view of the urgency of climate action, nor too short as to incentivise a high-emission investment rush.[80]

The Model Treaty also circumscribes foreign investors' rights to expand existing Unsustainable Investments through timelines also subject to negotiation.[81] Depending on their climate ambitions, State Parties could adopt the same solution for the phase-out of new high-emission investments and their acquisitions or expansions, by subjecting them to timelines.

Finally, States may reserve flexibility to speed up, through domestic laws, phase-out timelines for high-emission investments made by domestic or third-country investors, and extend the same treatment to high-emission investors and investments covered by the IIA, as long as they do so in a non-discriminatory manner.[82]

3.2.3 Phasing Out Incentives to High-Emission Investments

Since at least the early 1990s, economic literature has argued that climate policy should 'first and foremost' remove fossil fuel subsidies.[83] In 2009, G20 leaders vowed to phase out 'inefficient fossil fuel subsidies' that 'undermine efforts to deal with the threat of climate change';[84] in 2016,

[79] Model Treaty (n 61) art 2.5(1); see also Peter Newell and Andrew Simms, 'Towards a Fossil Fuel Non-Proliferation Treaty' (2019) Climate Policy <https://doi.org/10.1080/14693062.2019.1636759> accessed 30 May 2020.

[80] Martin Dietrich Brauch et al n 61.

[81] Model Treaty (n 61) art 2.5(2).

[82] Model Treaty (n 61) art 2.5(3).

[83] Bjorn Larsen and Anwar Shah, 'World Fossil Fuel Subsidies and Global Carbon Emission' (World Bank 1992) *Policy Research Working Paper Series* <http://documents.worldbank.org/curated/en/332991468739452719/pdf/multi-page.pdf> accessed 30 May 2020.

[84] G20, 'G20 Leaders Statement: The Pittsburgh Summit' (24–25 September 2009) <http://www.g20.utoronto.ca/2009/2009communique0925.ht3ml> accessed 30 May 2020.

G7 leaders reaffirmed their commitment to eliminate such subsidies and encouraged all countries to do so by 2025.[85]

Despite these pledges, consumer fossil fuel subsidies amounted to more than USD 428 billion in 2018.[86] Subsidies to fossil fuel producers also 'pose formidable financial, institutional and political obstacles' to the low-carbon energy transition,[87] in that they lock in long-term capital investments in fossil fuel infrastructure; artificially reduce the price of carbon; and make coal, oil, and gas appear to be more competitive against renewables than they actually are.[88] Reforming fossil fuel subsidies and redirecting the resulting savings to renewables could help fund the low-carbon energy transition.[89]

Accordingly, climate-reformed IIAs could enshrine in international law States' commitments to phase out investment incentives for high-emission investments, such as fossil fuel subsidies.[90]

3.2.4 Ensuring Responsible, Low-Emission Investment

Climate-reformed IIAs must not only discourage high-emission investments but also ensure that all foreign investments satisfy the highest standards on labour and human rights, public health, energy efficiency, and environmental protection, among others. The Model Treaty, building on newer-generation IIAs and treaty models that endorse sustainable development objectives, advances language in this respect in a number of provisions, notably in Part 4 (Responsible Investment), which creates obligations on foreign investors and investments, such as:

- Compliance with international law, including multilateral environmental agreements, the Paris Agreement, and future treaties on climate change mitigation and adaptation;

[85] G7, 'G7 Ise-Shima Leaders' Declaration: G7 Ise-Shima Summit' (26-27 May 2016) <https://www.mofa.go.jp/files/000160266.pdf> accessed 30 May 2020; see also Vernon J. C. Rive. *Fossil Fuel Subsidy Reform: An International Law Response* (Edward Elgar 2019).

[86] IEA, 'Fossil fuel consumption subsidies bounced back strongly in 2018' (IEA 2019) <https://www.iea.org/commentaries/fossil-fuel-consumption-subsidies-bounced-back-strongly-in-2018> accessed 30 May 2020.

[87] Peter Erickson, Harro van Asselt, Doug Koplow, Michael Lazarus, Peter Newell, Naomi Oreskes and Geoffrey Supran, 'Why Fossil Fuel Producer Subsidies Matter' (5 February 2020) *Nature* <https://www.sei.org/publications/why-fossil-fuel-producer-subsidies-matter> accessed 30 May 2020.

[88] Martin Dietrich Brauch et al n 61.

[89] Richard Bridle, Shruti Sharma, Mostafa Mostafa and Anna Geddes, *Fossil Fuel to Clean Energy Subsidy Swaps: How to Pay for an Energy Revolution* (IISD 2019) <https://www.iisd.org/library/fossil-fuel-clean-energy-subsidy-swap> accessed 30 May 2020.

[90] Model Treaty (n 61) art 2.5(4).

- Compliance with domestic laws of host and home States;
- Anti-corruption;
- Best practices in corporate governance;
- Minimum standards on human rights, labour, and the environment;
- Transparency of contracts, payments, and project information – a provision that could be expanded to mandate foreign investors and their investments to measure and disclose their greenhouse gas emissions, according to methodologies approved by the State Parties;[91]
- Pre-establishment impact assessments;
- Environmental management and improvement; and
- Community engagement and development.

Complementing and reinforcing these investor obligations, the Model Treaty also sets out rights and obligations for home and host States aimed at promoting foreign investment that is in line with responsible, sustainable, and low-emission development pathways. For example, the rights of States outlined in Part 5 encompass the right to regulate in order to achieve legitimate social and economic policy objectives, such as those of the Paris Agreement and other climate change mitigation and adaptation goals. Part 6 include States' obligations 'to provide for high levels of environmental, labour, and human rights protection'[92] and to require under domestic laws high standards for pre-establishment impact assessments covering environmental, social, human rights, and climate change aspects.[93]

Including in IIAs accountability mechanisms such as the one contained in the Model Treaty—encompassing multi-stakeholder mediation and compliance functions—could empower individuals or communities affected or potentially affected by an investment as well as civil society organisations to bring investors and States into compliance with the treaty. In addition, IIAs could also give to aggrieved host States and natural or legal persons of either the home or the host State the right to initiate claims under treaty-based dispute settlement mechanisms, so that they could sue investors for breaches of their treaty obligations.[94]

[91] UNCTAD, *World Investment Report 2010* (UNCTAD 2010) <https://unctad.org/en/Docs/wir2010_en.pdf> accessed 30 May 2020 (UNCTAD's WIR 2010); Lise Johnson, Lisa Sachs and Nathan Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (2019) 58(1) Columbia Journal of Transnational Law 58.

[92] Model Treaty (n 61) art 6.1(1).

[93] Model Treaty (n 61) art 6.2. See also Daniel B. Magraw and Sergio Puig, 'Greening Investor-State Dispute Settlement' (2018) 59 Boston College Law Review 2717.

[94] Model Treaty (n 61) art 9.1.

3.3 Doing Good: Encouraging Low-Emission Investments

In this part I explore how international investment law could be reformed in order to 'do good' in advancing climate goals by encouraging flows of low-emission FDI. These ideas must be taken with a grain of salt in light of the inconclusive evidence that IIAs help host States attract FDI.[95] Even so, leveraging any positive contribution that international investment law may be able to offer to increase these flows must be an essential part of climate-oriented reform efforts.

3.3.1 Providing Incentives to Low-Emission Investments

The granting of investment incentives typically lies within the realm of domestic laws—for incentives provided by national or sub-national governments—or treaties concluded by States within an international integration organisation such as the EU.[96] Harmonising investment incentives between countries or locking them into a BIT may not be in the interest of States, which may want to retain sovereignty to create and modify investment schemes as needed based on public policy reasons. 'Do good' provisions must reaffirm States' policy space to introduce incentives to low-emission investments:[97]

> 1. Each Party may introduce incentives in order to attract Sustainable Investments. Such incentives may include, among others:
>
> > (a) financial incentives in the forms of investment insurance, grants or loans at concessionary rates;
> >
> > (b) fiscal incentives such as tax holidays, pioneer status and reduced tax rates;
> >
> > (c) subsidised infrastructure or services, market preferences;
> >
> > (d) development-oriented incentives, to encourage preferential markets schemes and specific investors within the region;
> >
> > (e) incentives for technical assistance or technology transfer; and
> >
> > (f) investment guarantees.

[95] See n 42.

[96] Lise Johnson and Perrine Toledano, *Background Paper for the Eighth Columbia International Investment Conference on Investment Incentives: The Good, the Bad and the Ugly: Assessing the Costs, Benefits and Options for Policy Reform* (CCSI 2014) <http://ccsi.columbia.edu/files/2014/01/VCC_conference_paper_-_Draft_Nov_12.pdf> accessed 30 May 2020.

[97] Model Treaty (n 61) art 2.4(1).

3.3.2 Promoting and Facilitating Low-Emission Investments

Foreign investors in low-emission activities may be more likely to invest in host States that send out reasonable and credible policy signals of their long-term support to climate-friendly investments.[98] Without the undesirable promise of long-term regulatory stability that characterises so-called stabilisation clauses of old-generation IIAs,[99] the Model Treaty proposes that States signal their support in an instrument of international law. In particular, the Model Treaty creates a framework for international cooperation, under which the States commit to discussing and adopting—through domestic laws or protocols to the treaty—policies and regulations to promote and facilitate climate-friendly investments.[100] Areas of cooperation and facilitation include:

- Targets on renewable energy, energy efficiency, emission reductions, and green finance;
- Facilitated visa procedures;
- Transparent procedures for the issuance of documents, licenses and certificates relating to the establishment and maintenance of climate-friendly investments;
- Timely responses to queries concerning commercial registration, technical requirements, and environmental standards applicable to low-emission investments;
- Technological, technical, scientific, and cultural cooperation for the international exchange of knowledge and experience on low-emission investments;
- Access to and transfer of technology;
- Removal of administrative, fiscal, and other barriers to low-emission investments;
- Professional qualification relevant to low-emission investments;
- Exchanges of information and experiences on and business opportunities;
- Public investment and government procurement channelled to low-emission investments;
- Technical requirements for climate-resilient infrastructure;
- Financing and guarantee facilities for low-emission investment; and
- Reduced interest on loans to, and export finance for, low-emission investment.

The UNCTAD Global Action Menu for Investment Facilitation may inspire other possible international cooperation mechanisms to facilitate low-emission investment that States may wish to embed in climate-aligned IIAs.[101]

[98] Martin Dietrich Brauch et al n 61.

[99] Lorenzo Cotula, *Regulatory Takings, Stabilization Clauses and Sustainable Development* (OECD 2008) <https://www.oecd.org/investment/globalforum/40311122.pdf> accessed 30 May 2020.

[100] Model Treaty (n 61) art 2.3.

[101] UNCTAD, *Global Action Menu for Investment Facilitation* (UNCTAD 2016) <https://investmentpolicy.unctad.org/publications/148/unctad-global-action-menu-for-investment-facilitation> accessed 30 May 2020. See also Martin Dietrich Brauch, Howard Mann and Nathalie Bernasconi-Osterwalder, *SADC–*

3.3.3 Protecting Low-Emission Investments

Older-generation IIAs focused narrowly on protecting foreign investors and investments by granting them treaty-based substantive rights and a procedural avenue to enforce them through international proceedings. Despite the lack of evidence that host States attract more investment by offering those protections, States may wish to continue to offer them in climate-aligned IIAs.

If they wish to do so, however, it is important that they build on the lessons learned of broader sustainable development–oriented reform of international investment law. States should omit 'controversial, widely used, and broadly interpreted' clauses of older-generation treaties[102] and draft investor rights carefully so as to safeguard States' regulatory space.

The Model Treaty guarantees non-discriminatory treatment—encompassing both national and MFN treatment—to foreign investors and investments once they are established in the host State.[103] The treatment promised to foreign investors and investments must be 'no less favourable' than that accorded to investors and investments of the host State itself and of third States who are 'in like circumstances'. The Model Treaty also clarifies that the 'like circumstances' assessment requires an examination of all the circumstances of an investor or investment, including its classification as low-emission or high-emission, its effects on the environment, and its climate change impacts.[104] Climate-friendly and climate-unfriendly investments, therefore, are not 'in like circumstances', and host States may treat them differently.

The Model Treaty's approach is not to include the standards of FET, full protection and security, or legitimate expectations. Instead, building on newer-generation IIAs and models,[105] the Model

IISD Investment Facilitation Workshop: Report of the Meeting Held August 21–23, 2018 in Johannesburg, South Africa (IISD 2019) <https://www.iisd.org/sites/default/files/publications/sadc-iisd-investment-facilitation-workshop.pdf> accessed 30 May 2020.

[102] The Creative Disrupters (n 32) 7.

[103] Model Treaty (n 61) art 3.2.

[104] Model Treaty (n 61) art 3.2(3). See also Meredith Wilensky, 'Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures Under the Trans-Pacific Partnership' (2015) 45 Environmental Law Reporter 10684.

[105] Indian Model BIT n 52; Comprehensive Trade and Economic Agreement between Canada and the European Union (adopted 30 October 2016) <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3546/canada---eu-ceta-2016-> accessed 30 May 2020 (CETA).

Treaty accords foreign investors and investments a standard of treatment protecting them against an exhaustive list of types of egregious State behaviour:[106]

(a) denial of justice in any judicial or administrative proceedings;

(b) a fundamental breach of due process in judicial and administrative proceedings;

(c) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or

(d) manifestly abusive treatment, such as coercion, duress and harassment.

Finally, the Model Treaty protects foreign investors and investments against direct expropriations or nationalisations, which are only allowed if effected for a public purpose, under due process of law, in a non-discriminatory manner, and on payment of compensation.[107] However, the Model Treaty does not allow investors and investments to seek remedy for indirect expropriation.[108]

3.3.4 Ensuring a Just Transition to Low-Emission Economies

The Paris Agreement recalls 'the imperatives of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities'.[109] The International Labour Organisation's (ILO) vision of a just transition is 'a bridge from where we are today to a future where all jobs are green and decent, poverty is eradicated, and communities are thriving and resilient', and includes 'both measures to reduce the impact of job losses and industry phase-out on workers and communities, and measures to produce new, green and decent jobs, sectors and healthy communities'.[110]

Acknowledging that the disruptive shift of investments away from high-emission projects to low-emission ones 'will inevitably affect the livelihoods of workers in sectors that must be discouraged for climate purposes',[111] the challenge of the just transition, absent from IIAs, should be an

[106] Model Treaty (n 61) art 3.3(1).

[107] Model Treaty (n 61) art 3.4.

[108] ibid.

[109] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) preamble.

[110] Just Transition Centre, *Just Transition: A Report for the OECD* (OECD 2017) <www.oecd.org/environment/cc/g20-climate/collapsecontents/Just-Transition-Centre-report-just-transition.pdf> accessed 30 May 2020.

[111] Martin Dietrich Brauch et al n 61.

essential feature in climate-aligned ones. The Model Treaty endorses and incorporates by reference two key international legal instruments relating to the just transition,[112] which lay out illustrative lists of national measures States may take, such as strengthening social safety nets, creating targeted education and training programs, protecting pension funds, and providing additional public funding for a just transition.[113]

Under the Model Treaty, States commit to cooperate in ensuring a just transition, by discussing and adopting policies and regulations, and by sharing knowledge and best practices regarding appropriate macroeconomic and sectoral policies geared toward a just transition.[114]

Furthermore, to ensure that investment-related decision-making processes consider the views of not only governments and investors, but also other stakeholders—including workers, communities, and labour unions—the Model Treaty promotes transparency and public participation. Mechanisms include:

- The Joint Committee to oversee the treaty (Article 10.1);
- The Investment Policy Review Mechanism that periodically assesses the effectiveness of the treaty, including with respect to climate goals (Article 11.2);
- The accountability mechanism with mediation and compliance functions, which is open to complaints by individuals and communities (Article 7); and
- The procedural rights various stakeholders—including affected individuals, communities, and domestic investors—to launch claims against States and investors (Article 9.1).

4 CLIMATE-ORIENTED REFORM AT DIFFERENT GOVERNANCE LEVELS: POLICY OPTIONS, OPPORTUNITIES, AND CHALLENGES

In this part I look into various policy options, opportunities, and challenges to implement the climate-friendly approaches and provisions discussed in Part 3 above. Building on UNCTAD's IIA reform framework,[115] I discuss two broad policy options that I consider most suitable and effective to achieve legally binding climate-oriented reform of international investment law:

[112] Model Treaty (n 61) art 2.6(2), which mentions the Resolution Concerning Sustainable Development, Decent Work and Green Jobs adopted on June 19, 2013 by the General Conference of the International Labour Organization, meeting in Geneva at its 102nd Session; and the Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies for All agreed by the experts gathered at the Tripartite Meeting of Experts convened in Geneva by the International Labour Office from October 5 to 9, 2015.

[113] Martin Dietrich Brauch et al n 61.

[114] Model Treaty (n 61) art 2.7.

[115] UNCTAD, *World Investment Report 2017: Investment and the Digital Economy: Chapter III* (UNCTAD 2017) <http://unctad.org/en/PublicationChapters/wir2017ch3_en.pdf> accessed 30 May 2020. See also UNCTAD 'Reform

1. **Termination of or withdrawal from existing climate-unfriendly IIAs**: This option combines UNCTAD's proposed policy options 9 (terminating existing old treaties), 10 (withdrawing from multilateral mechanisms), and 7 (engaging multilaterally).

2. **Negotiation to amend existing IIAs or conclude new climate-friendly ones**: Here I combine recommendations for new climate-aligned IIAs with UNCTAD's proposed options 2 (amending treaty provisions), 3 (replacing 'outdated' treaties), 4 (consolidating the IIA network), and 7 (engaging multilaterally).

With respect to each of option, I assess the opportunities and challenges of operationalising reform at the appropriate governance levels: unilateral, bilateral, regional, continental, and multilateral.

4.1 Termination of and Withdrawal from Existing Climate-Unfriendly IIAs

At a time when many States already question whether being part of the IIA regime brings them any net development benefits, concerns that IIAs will hinder their policies to achieve climate goals offer an additional reason to exit certain treaties or the regime altogether. Exiting may appear to some as the most radical of reform options but may in fact be appealing as the most prudent one. In the balance of certain risks and possible costs of IIAs, on the one hand, and their uncertain benefits, on the other, States may find confidence to exit the regime in order to clean the slate and only then consider future pathways. After exiting, States may seek to re-enter the regime in different terms or to remain out of it.

Termination—which extinguishes the treaty, releasing the parties from their obligations—can result from the unilateral measure (denunciation) of a party to a bilateral treaty (when the treaty allows it), or from the consent of all parties to terminate a bilateral or multilateral treaty (at any time). Withdrawal may well be done jointly but will typically be unilateral; when a party to a multilateral treaty withdraws from it, the treaty remains in force for non-withdrawing parties.[116]

As mentioned above (Part 2.3), States have terminated many IIAs in the context of broader reform efforts. In 2017—for the first time—the number of IIA terminations taking effect (22) surpassed the number of IIAs signed (18).[117] There are 309 effective terminations of IIAs, among which 113

of the International Investment Agreement Regime: Phase 2' UN Doc TD/B/C.II/MEM.4/14 (31 July 2017) <http://unctad.org/meetings/en/SessionalDocuments/ciimem4d14_en.pdf> accessed 30 May 2020; UNCTAD's Reform Package (n 3).

[116] UN Doc TD/B/C.II/MEM.4/14 (n 115); Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

[117] UNCTAD, *World Investment Report 2018* (UNCTAD 2018) <https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> accessed 30 May 2020.

were replaced by a new treaty. Of the remaining 196 IIAs, 11 had their duration expire, 22 were terminated by consent, and 163 were unilaterally denounced.[118]

A State that chooses to terminate climate-unfriendly BITs unilaterally must consider certain conditions and risks:[119]

> [T]reaty termination through denunciation is not permitted before the IIA has reached a certain 'age', set by the duration provision of the treaty. In addition, denunciation does not immediately liberate contracting parties from their treaty obligations, since IIAs usually contain a 'survival clause', protecting existing investment in the host country for a certain additional period, typically between 10 and 20 years. Finally, treaty denunciation that is undertaken without consulting the other contracting party risks negatively affecting foreign relations.

Before resorting to denunciation, States may first wish to seek their treaty partners to terminate their IIAs by mutual consent. They can operate joint terminations at any time and with immediate effects, by explicitly amending the survival or sunset clause (for example, to reduce its duration) or suppressing it altogether ('neutralisation').[120] While States concerned with protecting outward investors and investments may be unwilling to terminate an IIA by consent, like-minded treaty partners interested in reforming IIAs for climate and other policy goals may agree to the possibility.

Pooling like-minded partners may be easier within regional organisations, as exemplified—in a climate-unrelated context—by the termination of intra-EU BITs. In its 2016 judgment in the *Achmea* case, the European Court of Justice held that investor–state arbitration clauses in intra-EU BITs are contrary to EU law.[121] To comply with 'the obligation of Member States to bring their legal orders in conformity with Union law', and 'sharing the common understanding that [ISDS clauses in intra-EU BITs] cannot serve as legal basis for Arbitration Proceedings', 23 out of the 27 EU Member States signed the 'Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union' on 5 May 2020.[122]

[118] UNCTAD's IIA Navigator n 15.

[119] UNCTAD's Reform Package (n 3) 18. See also Tania Voon and Andrew D. Mitchell n 57; Sarah Brewin, Nathalie Bernasconi, Martin Dietrich Brauch and Suzy Nikièma n 56.

[120] ibid.

[121] Case 284/16 *Slovak Republic v. Achmea*, EU:C:2018:158 <http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0284&lang1=en&type=TXT&ancre> accessed 30 May 2020.

[122] Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (adopted 5 May 2020)

The mechanics of the agreement is relatively straightforward. Article 1 provides that the intra-EU BITs listed by the signatories in Annex A are terminated, and clarifies that sunset clauses in these agreements are also terminated and shall not produce legal effects. Article 2 provides that sunset clauses in intra-EU BITs listed in Annex B—'treaties that have already been terminated and where a sunset clause may be in effect'—are also terminated and shall not produce legal effects. Article 4 determines that termination 'shall take effect, for each such Treaty, as soon as this Agreement enters into force for the relevant Contracting Parties.' Furthermore, the agreement contains transitional provisions governing arbitration proceedings under the terminated BITs.[123]

The intra-EU BIT termination agreement shows how States united around the 'shared common understanding' that IIAs hinder and fail to advance climate goals can act jointly to terminate those IIAs. For like-minded States that acknowledge IIAs' climate-related problems but fail in their attempts to renegotiate or replace existing agreements with climate-friendly ones—the policy option I discuss in Part 4.2 below—termination of the treaties (or withdrawal from them) may be the most sensible way ahead.[124]

Various academics and civil society stakeholders brought into the discussions of UNCITRAL's Working Group III on ISDS reform the policy option of an opt-in multilateral exit agreement to facilitate the termination of IIAs and neutralisation of their survival or sunset clauses,[125] including a textual proposal for such an agreement.[126] Furthermore, responding to a request of the working group, the UNCITRAL Secretariat prepared a note 'presenting the key issues relevant to designing a multilateral instrument on ISDS reform [and] outlining how such an instrument could be

<https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200505-bilateral-investment-treaties-agreement_en.pdf> accessed 30 May 2020; see also European Commission n 60.

[123] ibid.

[124] Martin Dietrich Brauch n 48.

[125] Amandine Van den Berghe and Kyla Tienhaara, *Potential Solutions for Phase 3: Aligning the Objectives of UNCITRAL Working Group III with States' International Obligations to Combat Climate Change* (ClientEarth 2019) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_clientearth.pdf> accessed 30 May 2020; Transport and Environment, Center for International Environmental Law, ClientEarth and SOMO, *Reform Options for ISDS* (2018) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_recs_and_justification_final.pdf> accessed 30 May 2020; Melanie Foley, *Recommendations for UNCITRAL ISDS Discussions* (Public Citizen 2019) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_publiccitizen.pdf> accessed 30 May 2020.

[126] Brooke Güven and Lise Johnson, *Draft Treaty Language: Withdrawal of Consent to Arbitrate and Termination of International Investment Agreements* (CCSI, IIED and IISD 2019) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_withdrawalconsent_0.pdf> accessed 30 May 2020; see also Lise Johnson, Lisa Sachs, Brooke Güven and Jesse Coleman, *Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law* (CCSI 2018) <http://ccsi.columbia.edu/files/2018/04/IIA-CCSI-Policy-Paper-FINAL-April-2018.pdf> accessed 30 May 2020.

structured to incorporate different reform options' that the working group will recommend to UNCITRAL.[127] Along with the language used in the intra-EU BIT termination agreement, these inputs into the Working Group III process provide tools for States that may wish to pursue the option of 'bulk termination' of IIAs that work against climate goals.

4.2 Negotiation to Amend Existing IIAs or Conclude New Climate-Friendly Ones

Whether the starting point is the existing regime or a post-termination clean slate (Part 4.1 above), States committed to effectively aligning international investment law with climate goals must concentrate efforts on negotiations. To conclude climate-friendly IIAs, they will need to engage in negotiations. To fix existing climate-unfriendly IIAs through amendment of provisions, replacement of entire treaties, or consolidation of IIA networks, they will need to engage in (re)negotiations.

In addition, negotiations should ideally lead to legally binding outcomes that unambiguously express States' intention to encourage low-emission investment and their aversion to high-emission investment. Interpretative approaches have been proposed, such as joint declarations 'clarifying that IIAs do not constrain climate change measures enacted in good faith',[128] and hortatory references in treaty provisions and preambles to 'multilaterally recognised standards and instruments' including the UNFCCC and the Paris Agreement.[129] While potentially useful, interpretative approaches do not carry the same weight as treaty language designed to 'create "legal clarity" [and] restrict the interpretive discretion of arbitral tribunals'.[130]

Negotiating climate-friendly treaty amendments at bilateral level—that is, fixing over 2,000 BITs in force, one treaty at a time—would result in higher transactional costs and slower results than by mobilising more like-minded States at regional, continental, or multilateral level. On the positive side, climate champion States could jumpstart climate-oriented reform by seeking bilateral (re)negotiations, leading to faster (albeit more marginal) results.

Recent State practice in BIT negotiations, however, does not evidence climate-oriented reform. None of the 13 BITs concluded in 2019 refers specifically to climate goals.[131] The outlook of future

[127] UNCITRAL, 'Possible reform of investor-State dispute settlement (ISDS): Multilateral instrument on ISDS reform: Note by the Secretariat' UN Doc A/CN.9/WG.III/WP.194 (16 January 2020).

[128] UNCTAD's WIR 2010 (n 91) 138.

[129] IPFSD n 30.

[130] UNCTAD's Reform Package (n 3) 85.

[131] UNCTAD's IIA Navigator n 15.

State practice is not encouraging either. Three of the new national BIT models released in 2019 do refer to climate change but fall short of advancing specific mitigation and adaptation policies:

- The Belgium–Luxembourg Economic Union (BLEU) Model BIT includes a best-efforts obligation to ensure that parties' commitments under multilateral environmental agreements 'are fully recognised and implemented by their domestic legislation'. It also recognises 'the importance of pursuing the objectives of the [UNFCCC] in order to address the threat of climate change'.[132]

- Similarly, under the Dutch Model BIT, 'the Contracting Parties reaffirm their obligations under the multilateral agreements in the field of environmental protection…to which they are party, such as the Paris Agreement…'.[133]

- Covering climate change more strongly than the previous two models—but still depending heavily on interpretation—the Moroccan Model BIT requires investors to 'manage or operate their investments in accordance with international obligations relating to…environmental protection, consistent with the objectives of climate change mitigation and adaptation'.[134]

Regional and continental negotiations could provide fruitful opportunities for like-minded States to build coalitions around climate-oriented reform. Two recently negotiated regional frameworks—the 2017 Cooperation and Facilitation Investment Protocol concluded by Argentina, Brazil, Paraguay, and Uruguay, the four members of the Southern Common Market

[132] Belgium–Luxembourg Economic Union (BLEU), *Proposition de texte modèle pour les accords bilatéraux d'investissement* (2019) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5854/download> accessed 30 May 2020 (BLEU Model BIT) art 17.

[133] Dutch Model BIT n 53 art 6(6).

[134] Moroccan Model BIT n 54 art 20.4. Author's translation of the original in French: 'Les investisseurs devront gérer ou exploiter leurs investissements en conformité avec les obligations internationales en matière…de l'environnement, en accord avec les objectifs d'atténuation et d'adaptation au changement climatique.'

(MERCOSUR);[135] and the investment chapter of the 2018 USMCA[136]—missed opportunities to advance climate-oriented reform.[137]

Africa offers promising opportunities for reform at regional or continental level. The 2016 Draft Pan-African Investment Code encourages investors 'to provide adequate financial resources, including for the transfer of technology, needed for implementing measures to assist the Member States that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to, or mitigation of those adverse effects'.[138] The 2018 Agreement Establishing the African Continental Free Trade Area (AfCFTA), in turn, without referring to climate change specifically, expresses the objective to 'promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties'.[139] African States should seize the opportunity of the ongoing negotiations of the AfCFTA Investment Protocol to design mechanisms to encourage investment that promotes the sustainable, low-emission, and climate-resilient development of the African continent.[140]

Reform of the Energy Charter Treaty (ECT) is of particular importance to achieving climate goals. The 55-party old-generation multilateral IIA on energy investment is undergoing modernisation negotiations formally launched in late 2019.[141] As I argued elsewhere, true modernisation must

[135] Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (adopted 7 April 2017, entered into force 30 July 2019) <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3772/ntra-mercosur-cooperation-and-facilitation-investment-protocol-2017-> accessed 30 May 2020.

[136] Agreement between the United States of America, the United Mexican States, and Canada (adopted 30 November 2018) <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3841/usmca-2018-> accessed 30 May 2020.

[137] Noemie Laurens, Zachary Dove, Jean Frederic Morin and Sikina Jinnah, 'NAFTA 2.0: The Greenest Trade Agreement Ever?' (2019) 18(4) *World Trade Review* 659 <https://doi.org/10.1017/S1474745619000351> accessed 30 May 2020.

[138] African Union (AU) Commission, *Draft Pan-African Investment Code* (AU 2016) <https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf> accessed 30 May 2020 (PAIC) art 30(2).

[139] Agreement Establishing the African Continental Free Trade Area (adopted 21 March 2018, entered into force 30 May 2019) <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area> accessed 30 May 2020 (AfCFTA) art 3(e).

[140] United Nations Economic Commission for Africa (UNECA), AU, African Development Bank and UNCTAD, *Assessing Regional Integration in Africa, ARIA IX: Next Steps for the African Continental Free Trade Area* (UNECA 2019) <https://www.uneca.org/sites/default/files/PublicationFiles/aria9_report_en_4sept_fin.pdf> accessed 30 May 2020.

[141] Energy Charter Secretariat n 47.

‘lead to an overhaul of the ECT rationale and framework, bringing it in line with ECT member states’ international law commitments with respect to climate change’.[142]

The EU’s 27 May 2020 draft text proposal for ECT modernisation[143] includes an article on climate change and the clean energy transition:[144]

> Recognising the urgent need of pursuing the ultimate objective of the [UNFCCC] and the purpose and goals of the Paris Agreement in order to effectively combat climate change and its impacts, and committed to enhancing the contribution of trade and investment to climate change mitigation and adaptation, each Contracting Party shall:
>
> a. effectively implement the UNFCCC and the Paris Agreement adopted thereunder, including its commitments with regard to its Nationally Determined Contribution;
>
> b. promote and enhance the mutual supportiveness of investment and climate policies and measures, thereby accelerating to the transition towards a low emission, clean energy and resource efficient economy, as well as to climate-resilient development;
>
> c. promote and facilitate trade and investment of relevance for climate change mitigation and adaptation, including, inter alia, by removing obstacles to trade and investment concerning low carbon energy technologies and services such as renewable energy production capacity, and by adopting policy frameworks conducive to this objective;
>
> d. cooperate, as appropriate, with the other Contracting Parties on investment-related aspects of climate change policies and measures bilaterally and in international fora, as appropriate.

Similarly to the Model Treaty, the EU’s proposal suggests a new article requiring States to ensure in their domestic laws that environmental impact assessments are carried out prior to authorising

[142] Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch (n 48) 27.

[143] European Commission, ‘EU text proposal for the modernisation of the Energy Charter Treaty’ (27 May 2020) <https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf> accessed 30 May 2020 (EU Proposal for the ECT). See also Council of the European Union, ‘Negotiating Directives for the Modernisation of the Energy Charter Treaty’ (2 July 2019) <https://data.consilium.europa.eu/doc/document/ST-10745-2019-ADD-1/en/pdf> accessed 30 May 2020; European Commission, ‘Commission presents EU proposal for modernising Energy Charter Treaty’ (27 May 2020) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2148&title=Commission-presents-EU-proposal-for-modernising-Energy-Charter-Treaty> accessed 30 May 2020.

[144] EU Proposal for the ECT (n 143) 11.

energy investments. These assessments must identify and assess the effects of the proposed investment on the climate, among other environmental aspects.[145]

The two articles mentioned above would not be subject to ISDS, but only to state–state dispute settlement.[146] These and other climate-related provisions in the EU's proposal represent non-negligible strides to embed climate considerations into the ECT but fall short of the necessary climate-focused overhaul of the treaty.[147] In particular, they fail to deny treaty protection to high-emission investments and to commit States to specific mechanisms to encourage low-emission investments (see Part 3 above).

Global multilateral efforts to carry out climate-oriented reform would be the most impactful but also the most challenging reform pathway.[148] Even though the ongoing process at UNCITRAL focuses on reforming ISDS mechanisms only, States could arguably take advantage of it to negotiate an opt-in agreement or protocol to implement certain elements of climate-oriented reform, such as carving out climate policy measures from the scope of ISDS.[149] States could also launch broader ISDS reform negotiations—covering substantive as well as procedural aspects—whether at UNCITRAL or in other fora. While traditionally not a negotiation forum, UNCTAD has been the leading for specialised intergovernmental policy debate on IIA reform for sustainability goals and would be well positioned to play the same role in climate-oriented reform.

5 CONCLUSIONS AND POLICY RECOMMENDATIONS

The urgency of undertaking climate-oriented reform of international investment law mirrors the urgency of countering the climate emergency. In view of the pressing need to ramp up low-emission investment that advances climate change mitigation and adaptation goals, climate-blind IIAs have become obsolete and unacceptable. International investment law should no longer benefit the types of investment that international climate change law seeks to eliminate.

[145] ibid 22.

[146] ibid 20.

[147] ClientEarth, *The Commission's draft proposal for the modernisation of the Energy Charter Treaty* (ClientEarth 2020) <https://www.documents.clientearth.org/wp-content/uploads/library/2020-04-23-legal-briefing-on-the-commission039s-draft-proposal-for-the-ect-modernisation-ce-en.pdf> accessed 30 May 2020.

[148] UNCTAD's Reform Package (n 3) 88.

[149] See United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 December 2014, entered into force 18 October 2017). See also Paula Henin, Jessica Howley, Amelia Keene and Nicola Peart n 69; UN Doc A/CN.9/WG.III/WP.194 n 127.

Climate-aligned IIAs must distinguish between low-emission and high-emission investments. They must ensure not to hinder climate action ('do no harm'), by denying treaty protections to high-emission investments, limiting their establishment and expansion, removing incentives such as fossil fuel subsidies, and requiring investments to be made responsibly. In addition, they should leverage the potential contribution of foreign investment to climate goals ('do good'), by incentivising, promoting, facilitating, and protecting low-emission investments only, and supporting a just transition to a low-emission world.

Given the mounting risks and impacts of IIAs and ISDS, as well as the lack of evidence that they encourage FDI flows, terminating IIAs or withdrawing from them appears to be the most effective reform option. States may also seek negotiations to conclude new climate-friendly treaties or to amend existing IIAs. In these negotiations, they should exclude or circumscribe controversial provisions (FET, legitimate expectations, indirect expropriation, and MFN, to name a few), prohibit treaty-based challenges to climate policy measures, and deny substantive rights and access to treaty-based dispute settlement mechanisms to high-emission investments. Climate-unfriendly investors would instead need to rely on substantive rights and procedural avenues based on domestic laws.

This chapter has shown that there is no shortage of policy options for climate-oriented IIA reform. The main outstanding challenge is mobilising political will for States to carry it out. Here several stakeholders have relevant roles to play. Academia, development-focused think tanks, and international organisations such as OECD and UNCTAD should continue to conduct research on climate-smart international investment law reform. Advocacy is also important: civil society and the low-emission private sector should urge governments to prioritise climate action and to rebalance IIAs accordingly.

Reform will ultimately depend on inter-State negotiations. Global multilateral action—whether to fix the regime or to exit it—is the most effective reform option but also the most difficult to operationalise given States' diverging interests. But the challenge to mobilise multilateral action is no excuse not to act. Developing States, in isolation or within regional and continental organisations such as the AU, should continue to consider abandoning the regime and to develop treaty-based mechanisms to better serve to their sustainable development and climate goals. Developed States professing climate leadership should initiate and sponsor negotiations to fix their treaty networks or move toward termination. EU Member States, for example, have a golden opportunity to prove their climate leadership, by either transforming the ECT from an *any-type* energy treaty into a *renewable* energy treaty or withdrawing from it. Climate champion States should also take the lead in convincing recalcitrant States and building broader reform coalitions.