Articles

THE APPLICATION OF INTERNATIONAL CLIMATE CHANGE LAW IN INTERNATIONAL INVESTMENT ARBITRATION: ADDRESSING THE DEFICIENCIES

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ABSTRACT

In the context of global climate governance, the Investor-State Dispute Settlement (hereinafter "ISDS") mechanism has become a pivotal platform for dealing with climate change issues. There is an increasing practice for international climate change law (hereinafter "ICCL") to be incorporated into international investment arbitrations. It may be invoked by host states, non-disputing parties and foreign investors in order to advance the legitimacy of states' measures, to interpret investment treaty standards, or to evaluate the impact of climate change on investments. However, as a result of both internal and external deficiencies in the ISDS mechanism,

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uncertainty surrounds the application of ICCL to investment arbitration. To address the deficiencies, this article proposes to align ISDS with climate objectives, based on four aspects. They include incorporating climate change provisions into international investment treaties, broadening the application of sustainable development provisions, applying ICCL through systematic interpretation, and adhering to the principle of mutual supportiveness.

KEYWORDS: *climate change, sustainable development provisions, systematic interpretation, mutual supportiveness*

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I. INTRODUCTION

In 1992, the United Nations Framework Convention on Climate Change (hereinafter "UNFCCC") suggested "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system", which laid the legal foundation for international cooperation on climate change.[1] The 2015 Paris Agreement is a collective effort to bolster worldwide responses to the looming threat of climate change. It sets the ambitious goal of curbing the global average temperature rise this century to well below 2°C above pre-industrial levels.[2] Additionally, it advocates for intensified endeavors to limit the temperature increase to a more stringent target of 1.5°C above pre-industrial levels. The Paris Agreement marks the beginning of a new process for international governance of climate change, which indicates that global green and low-carbon transitions have become the norm. Adapting to and mitigating climate change will require hundreds

[1] United Nations Framework Convention on Climate Change art. 2, May 9, 1992, 1771 U.N.T.S. 107.
[2] Paris Agreement to the United Nations Framework Convention on Climate Change art. 2(a), Dec. 12, 2015, 3156 U.N.T.S. 79.

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of billions of dollars in investment, primarily from foreign sources.[3] Especially, public and private economic parties should restructure their economic sectors and facilitate climate-friendly investment projects to accelerate the transition from high to low emission cross-border investments. However, the current regime of international investment law does not meet the needs of "decarbonization". This is mainly due to the potential for foreign investors in carbon-intensive industries to challenge the climate regulatory policies of host states through the Investor-State Dispute Settlement (hereinafter "ISDS") by relying on investment protection provisions in International Investment Agreements (hereinafter "IIAs"), such as the prohibition of illegal expropriation, National Treatment, and Fair and Equitable Treatment (hereinafter "FET") provisions.[4] Based on statistical data, a significant number of previous ISDS cases have pertained to measures or sectors directly linked to climate action.[5] Through international investment arbitration, foreign investors regularly request large amounts of compensation against the climate measures, which transfers the risk of investment transition to the host states. It is estimated that these investment arbitration claims related to climate change may already be worth as much as $340 billion.[6] In the face of the threats of ISDS, some countries have had to soften their domestic emission-reduction policies,[7] which leads to "regulatory chill" on climate change regulation in host countries.[8] These cases not only highlight the growing friction

[3] According to the International Finance Corporation, between 2016 and 2030, an estimated $23 trillion in climate-smart investment opportunities exist in emerging markets. *See Climate Investment Opportunities in Emerging Markets: An IFC Analysis*, INT'L FIN. CORP. (2016), https://www.ifc.org/content/dam/ifc/doc/mgrt/3503-ifc-climate-investment-opportunity-report-dec-final.pdf.

[4] Martin Dietrich Brauch, *Reforming International Investment Law for Climate Change Goals*, *in* RESEARCH HANDBOOK OF CLIMATE FINANCE AND INVESTMENT 1, 1 (Michael Mehling & Harro van Asselt eds., 2023).

[5] *Treaty-Based Investor-State Dispute Settlement Cases and Climate Action*, UNITED NATIONS CONFERENCE ON TRADE & DEV. [hereinafter "UNCTAD"] (2022), https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf. For example, in Westmoreland v. Canada (II), the Alberta government decided that coal-fired power plants would be phased out by 2030. However, foreign investors claimed the compensation program excluded them, violating Article 1102 (National Treatment) and Article 1105 (International Minimum Treatment standard) of the North American Free Trade Agreement (NAFTA). *See* Westmoreland Coal Company v. Government of Canada (II), ICSID Case No. UNCT/20/3, Award, ¶¶ 90-93 (Jan. 31, 2022), https://www.italaw.com/sites/default/files/case-documents/italaw16469.pdf.

[6] Kyla Tienhaara et al., *Investor-State Disputes Threaten the Global Green Energy Transition*, 6594(376) SCIENCE 701, 701-03 (2022); Humberto J. Rocha, *Governments' Climate Laws Could Spur $340B in ISDS Claims*, LAW360 (May 2022), https://www.law360.com/compliance/articles/1490759/governments-climate-laws-could-spur-340b-in-isds-claims.

[7] For instance, the French government backed away from a proposed law to end all fossil fuel exploration on French territory by 2040, after oil company Vermilion threatened to sue. *See* Harro van Asselt, *Governing Fossil Fuel Production in the Age of Climate Disruption: Towards an International Law of 'Leaving It in the Ground'*, 9(100118) EARTH SYS. GOVERNANCE 1, 5 (2021).

[8] Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by*

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between the investment regime and climate change mitigation, but also underscore the complexities at the intersection of international climate change law (hereinafter "ICCL") and the international investment treaty regime.[9] Against this background, this article first examines the various actors who may invoke ICCL in international investment arbitration, and goes further to highlight the internal and external deficiencies the current international investment arbitration regime faces in the wake of climate change. Subsequently, it proposes a four-fold legal foundation for the tribunals' application of ICCL[10] to align ISDS with climate objectives, aiming to provide insights into fostering a positive synergy between international investment arbitration and climate change.

II. INVOKING ICCL IN INVESTMENT ARBITRATION: DIFFERENT ACTORS

Parties to international investment arbitration may invoke ICCL, for a variety of reasons and objectives.[11] These include using international climate law to advance the legitimacy of states' measures in light of their climate change obligations, to interpret investment treaty standards, or to evaluate the impact of climate change on investments.

A. Host States

1. Climate Change Objections and obligations under the ICCL — Host states may use climate change objectives and obligations under ICCL as a defense against alleged violations of an investment treaty. International investment law is not a self-contained regime,[12] and the interpretation of international investment law must also take into account other international law norms, including the ICCL. The interrelationship between ICCL and investment law has been acknowledged by the European Union (hereinafter "EU") and Canada in the interpretation of the joint committee on investment of the Comprehensive Economic and Trade Agreement (hereinafter "CETA").[13] It specifies that, in terms of climate change, the

Investor-State Dispute Settlement, 7(2) TRANSNAT'L ENV'T. L. 229, 232 (2018).

[9] Julien Chaisse, *Realigning Investment Treaties for Climate Resilience*, FDI INTEL., (Apr. 13, 2023), https://www.fdiintelligence.com/content/opinion/realigning-investment-treaties-for-climate-resilience-82310.

[10] DANIEL BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW 12 (2017).

[11] Mala Sharma, *Integrating, Reconciling, and Prioritising Climate Aspirations in Investor-State Arbitration for a Sustainable Future: The Role of Different Players*, 23 J. WORLD INV. & TRADE 746, 756 (2022).

[12] Sheng Zhang, *Human Rights and International Investment Agreements: How to Bridge the Gap?*, 7(3) CHINESE J. COMPAR. L. 457, 458 (2019).

[13] Council Decision 2024/435, on the Position to Be Adopted on Behalf of the European Union Within the CETA Joint Committee Established Under the Comprehensive Economic and Trade

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interpretation of the investment provisions in the CETA, the tribunal shall give due consideration to the commitments of the Parties under multilateral environmental agreements, including the Paris Agreement.[14]

2. The Legality of Foreign Investment — Some bilateral investment treaties (hereinafter "BIT") contain legality provisions that require investments to be made in accordance with the host state's domestic law to qualify for treaty protections.[15] It has been held by numerous tribunals that legality requirements refer to the making of investments. Once an investment has been made, the standard of legality does not apply to the conduct and management of that investment.[16] An illegality in the making of the investment indicates that it does not qualify as an investment for purposes of the BIT, and consequently, there is no consent to arbitrate.[17] The phrase of "in accordance with the laws" pertains not only to the laws on admission and establishment but also to other rules of the domestic legal order.[18] The Organisation for Economic Cooperation and Development reported that 185 jurisdictions adopted climate action policies following the Paris Agreement.[19] Climate change legislation, as part of the domestic law, may affect the legality of foreign investments at the time they are made and compliance of foreign investments with their host states' domestic legal requirement.

In some circumstances, the requirement for an investment to comply with domestic law is not included in the definition of "investment" but is specified elsewhere in the BIT.[20] A growing trend in BIT emphasizes environmental considerations for foreign investors. For example, Article 14 of the Morocco–Nigeria BIT mandates that investments undergo environmental impact assessments before establishment, complying with domestic regulations. This agreement even further requires that after the

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Agreement (CETA) Between Canada, of the One Part, and the European Union and Its Member States, of the Other Part, as Regards the Adoption of an Interpretation of Article 8.10, Annex 8-A, Article 8.9, and Article 8.39 Thereof in Accordance With Its Article 26.1.5(e), 2024 O.J. (L 1) 1.

[14] *Id.*

[15] Agreement Between the Belgium-Luxembourg Economic Union and the Republic of Indonesia for the Promotion and Protection of Investments, Belg.-Indon., art. 9(a), Jan. 15, 1972, 2136 U.N.T.S. 121. It provides that, "The protection accorded to investors by the provisions of the present Agreement shall apply, (a) in the territory of the Republic of Indonesia only to investments which have been approved by the Government of the Republic of Indonesia pursuant to the stipulations contained in the Foreign Investment law No. 1 of 1967 or other relevant laws and regulations of the Republic of Indonesia."

[16] URSULA KRIEBAUM ET AL., PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 110 (3d ed. 2022).

[17] *Id.* at 108.

[18] *Id.*

[19] David Gaukrodger, *The Future of Investment Treaties-Possible Directions* 16 (Organisation for Economic Co-operation and Development [hereinafter OECD], Working Papers on international investment 2021/03, 2021).

[20] KRIEBAUM ET AL., *supra* note 16, at 109.

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establishment of the investment, investors must maintain an environmental management system. Specifically, companies in areas of resource exploitation and high-risk industrial enterprises are required to maintain current certification to ISO 14001 or an equivalent environmental management standard.[21] Should an investor's actions diverge from such requirements of the host state in the making of the investment, the host state may oppose the tribunal's jurisdiction or the admissibility of claims. Tribunals may be less likely to entertain claims from foreign investors whose investments do not comply with the pertinent national climate change laws.[22] In a recent investment arbitration Award, in Cortec Mining v. Kenya, the Tribunal ruled that, although the United Kingdom–Kenya BIT does not explicitly require compliance with domestic law, it lacked jurisdiction over a claim brought by a trio of mining companies on the basis that the mining licenses at issue had not been obtained lawfully due to the Claimants' failure to secure the required environmental impact assessments at the initiation of the investment.[23] The Tribunal applied the principle of proportionality, acknowledging that minor breaches or unintentional mistakes would not automatically disqualify a foreign investor from BIT protection. However, in this specific case, the Tribunal deemed the failure to conduct environmental impact assessments a "serious matter." This significant breach of Kenyan law justified their decision to decline jurisdiction.[24]

3. Article 31(3)(c) of the Vienna Convention on the Law of Treaties — It is also possible for a host state to justify its actions against foreign investors within the framework of climate change legislation. According to Article 31(3)(c) of the Vienna Convention on the Law of Treaties (hereinafter "VCLT"), a host state may, for example, assert that the investment treaty provisions should be interpreted in accordance with ICCL obligations, since the ICCL is part of the relevant international law rules that apply to BIT Contracting Parties. Consequently, in a scenario where an investor challenges a measure taken to mitigate climate change based on an alleged violation of their legitimate expectations and property rights, the host state can assert that the restrictions on high-carbon industries or the implementation of stringent climate change regulations are in line with the

[21] Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments, Morocco-Nigeria, art. 18, Dec. 3, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download.

[22] *Investment Treaties and Climate Change: Compilation of Submissions*, OECD (Apr. 13, 2022), https://www.oecd.org/investment/investment-policy/OECD-investment-treaties-climate-change-consultation-responses.pdf.

[23] Cortec Mining Kenya Ltd., Cortec (Pty) Ltd. & Stirling Cap. Ltd. v. Republic of Kenya, ICSID Case No. ARB/15/29, Award, ¶ 405 (Oct. 22, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw10051.pdf.

[24] *Id.* ¶ 348.

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initiative to fulfill international emission reduction obligations outlined in the Paris Agreement.

4. Counterclaims — The host states may also be able to bring counterclaims based on ICCL in ISDS. Although there has not yet been a case of host state counterclaim in investment arbitration involving climate change, there have been instances of the arbitral tribunals supporting host state counterclaims in the fields of environmental protection and human rights. For example, in Burlington v. Ecuador and Perenco v. Ecuador, the Tribunals in both cases concluded that environmental protection is a matter of public interest and should choose the interpretation most conducive to environmental protection when interpreting disputes over environmental regulation regime.[25] The Tribunals therefore arrived at the conclusion that Ecuador has the right to enforce environmental regulations and investors are obliged to comply with Ecuador's revised regulatory regime.[26] Similarly, in Urbaser v. Argentina, the Tribunal upheld a counterclaim brought by the host state in a human rights argument in international investment disputes. The Tribunal found that, when the investor relied on forced or child labour or business practices that are conducive to a threat to human life or health, the Tribunal has jurisdiction over counterclaims brought by the host state.[27]

It should be pointed out that private investors are not directly responsible for reducing emissions, nor are they actively obligated to implement emissions reductions under international law. The ICCL only imposes the responsibilities of international emission reductions on states. It, nevertheless, does have horizontal effects, as host governments are responsible for ensuring that businesses within their territories comply with domestic law. Consequently, counterclaims will be justified if high-emission investors violate the host state's climate regulation by emitting greenhouse gases beyond permitted limits, thereby threatening the host state's public interest, or negatively impacting the realization of emission reduction targets. The "polluter pays" principle[28] can be achieved through climate change counterclaims, shifting the external costs of climate change from society to the entity responsible for the damage.

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[25] Perenco Ecuador Ltd. v. Republic of Ecuador & Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, ¶ 322 (Aug. 11, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw6315.pdf.

[26] Burlington Res. Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration & Award, ¶¶ 262, 216, 233 (Feb. 7, 2017); *Id*.

[27] Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶¶ 1209-10 (Dec. 8, 2016).

[28] J. Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29(3) GOLDEN GATE U.L. REV. 465, 470 (1999).

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B. Non-Disputing Parties

Amicus curiae arguments or non-disputing contracting party's submissions touching on ICCL can add material value to investment disputes, especially when climate change has clear public interest dimensions.[29] The growing significance of *amicus curia*e is underscored by the fact that modern investment treaties and arbitral rules explicitly permit their submission.[30] A notable example is Rule 67 of the recently revised International Centre for Settlement of Investment Disputes (hereinafter "ICSID") Arbitration Rules (2022), eliminating the requirement for tribunals to seek permission from disputing parties before considering amicus submissions. With this evolution and the rising imperative for BIT to align with the principles of the Paris Agreement, the attempt to introduce *amicus curiae* briefs is likely to persist and potentially intensify.[31]

In recent practice, *amicus curiae* prepared by Non-Governmental Organizations (hereinafter "NGOs") appeared frequently in the ISDS and achieved some success.[32] *Amicus curiae* submissions are the legal route for public interest issues to enter the scope of investment arbitration. For example, the case of Methanex Corporation v. USA is the first case to allow non-disputing parties to participate in investment arbitration as *amicus curiae*. In this case, NGOs submitted *amicus curiae* of human rights and argued that the California government's prohibition of additives was to protect the water rights and health of local residents. The Tribunal determined that it has the right to accept every written opinion submitted by an *amicus curiae*.[33] In addition to *amicus curiae*, a non-disputing contracting party may clarify their positions on climate related issues. For instance, in Eco Oro Minerals Corp. v. Colombia, Canada expressed its view on the environmental exception of the Canada–Colombia Free Trade Agreement (hereinafter "FTA") through its non-disputing party

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[29] Risteard de Paor, *Climate Change and Arbitration: Annex Time Before There Won't Be a Next Time*, 8(1) J. INT'L DISP. SETTLEMENT 179, 205 (2017).

[30] Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, Can.-EU, art. 8.38, Oct. 30, 2016, 2017 O.J. (L11) 23, 39 [hereinafter CETA].

[31] Human Rights Council, Expert Mechanism on the Right to Development, Seventh Session, Right to Development in International Investment Law, ¶ 64, U.N. Doc. A/HRC/EMRTD/7/CRP.2 (Mar. 9, 2023).

[32] Chen Yu, *Amicus Curiae Participation in ISDS: A Caution Against Political Intervention in Treaty Interpretation*, 35(1-2) ICSID REV.-FOREIGN INV. L.J. 1 (2020).

[33] Methanex Corp. v. U.S., ICSID case, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", ¶ 47 (Jan. 15, 2001), https://www.italaw.com/sites/default t/files/case-documents/ita0517_0.pdf.

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submission.[34] In Canada's view, the general exceptions provide a final "safety net" for the State to exercise its regulatory powers as a means of achieving specific legitimate objectives. As a final note, Canada explained that the Contracting Parties to the FTA "did not consider their investment obligations incompatible with their obligations to protect the environment and society."[35]

As climate change investment disputes increase, it is likely that the arbitral tribunals will have to deal with both NGOs and communities' group. As well as clarifying the basic case, *amicus curiae* submissions or submissions by non-disputing contracting party can provide scientific evidence of climate damage's causality or justification of climate measures. Furthermore, they can enhance the Tribunal's focus on climate change issues and better balance investor protection with public concerns.

C. Foreign Investors

As far as foreign investors are concerned, they may take action against host states due to their inaction on climate change. Foreign investments are at risk due to adverse climate events, which the host state fails to address. As an example, investors who have been affected by climate change-related weather conditions such as hurricanes or flooding may claim that the host state breached the FET and "full protection and security" (FPS) obligation under IIAs. In the case of Allard v. Barbados, the investor from Canada claimed that Barbados breached the standard of FET in failing to undertake the international environmental obligations. Although the Tribunal did not uphold this claim, the lack of precedent in international investment arbitration indicates that climate change cases are likely to continue as governments are under increasing pressure to do more in climate action. As of today, some IIAs have incorporated the Paris Agreement into their implementation. For example, the new version of the Netherlands Model BIT, which was released in March 2019, includes provisions explicitly recognizing state obligations under the Paris Agreement as well as other multilateral environmental agreements. Further, ICCL is also referred to in the Agreement in Principle of the Modernisation of the Energy Charter Treaty that was reached in June 2022. It states that the contracting parties are required to "effectively implement the UNFCCC and the Paris Agreement adopted thereunder, including its obligations with respect to its Nationally Determined Contributions", and it includes the obligation to "promote and enhance the mutual support of climate policy and investment

[34] Eco Oro Minerals Corp. v. Republic of Colom., ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 373 (Sept. 9, 2021), https://www.italaw.com/sites/default/files/case-documents/italaw16212.pdf.
[35] *Id.* ¶ 376.

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measures."[36] Under these circumstances, foreign investors may be able to use these obligations as further legal grounds for bringing a claim regarding a state's failure to comply with its obligations under the Paris Agreement.

III. INTERNAL AND EXTERNAL DEFICIENCIES OF THE IIAS REGIME TO ADDRESS THE TENSIONS

ISDS practice recognizes that international law obligations overlap between protecting foreign investment and safeguarding the environment and other social values, so it has begun to take into account multilateral international conventions in its decision-making process. Tribunals in the cases of Chemtura v. Canada,[37] Philip Morris v. Uruguay,[38] and Suez and Vivendi v. Argentina[39] have begun to interpret the investment treatment standard in IIAs in light of the compatibility between multilateral treaties to which a host state is a party and IIAs, which provides references for arbitral tribunals to invoke the ICCL when hearing investment disputes involving climate change issues. Additionally, as climate change becomes a more pressing issue and more treaties mention the issue explicitly, the Tribunal may choose to give more weight to climate change arguments.[40] It is also pointed out that the flexibility and hybridity of ISDS arbitral proceedings and the greater enforceability of ISDS arbitral awards also underscore the potential of ISDS for addressing climate change aspects of investment disputes.[41] Nevertheless, the internal and external deficiencies of the ISDS mechanism make it difficult for the tribunals to mitigate tensions between the BIT and the ICCL. This has led to an increased level of conflict between the two, and has ultimately resulted in a lack of clarity and consistency in the decisions of international arbitral tribunals.

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[36] *Finalisation of the Negotiations on the Modernisation of the Energy Charter Treaty*, ENERGY CHARTER SECRETARIAT (June 24, 2022), https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf.

[37] Chemtura Corp. v. Gov't of Can., PCA Case No. 2008-01, Award, ¶¶ 137-41 (Aug. 2, 2010).

[38] Philip Morris Brands Sàrl, Philip Morris Prods. S.A. & Abal Hermanos S.A. v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, ¶¶ 302, 304, 401 (July 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf.

[39] Suez, Sociedad Gen. de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 262 (July 30, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf.

[40] Sharma, *supra* note 11, at 754.

[41] Diego Mejía-Lemos, *The Suitability of Investor-State Dispute Settlement and Host State Counterclaims for Implementing Climate Change International Responsibility*, 32 REV. EUR. COMPAR. & INT'L ENV'T. L. 334, 336 (2022).

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A. Internal Deficiencies: The Asymmetrical Structure of IIAs and ISDS

According to the statistics of the United Nations Conference on Trade and Development (UNCTAD), there is a total of 3,291 IIAs all over the world, with a majority of them concluded between the 1990s and 2010s.[42] These "old-generation" IIAs were concluded before the widespread climate action and they are "climate neutral or climate blind".[43] They fall short on the following aspects in terms of addressing climate change:

1. The Lack of Climate Considerations in "Old-Generation" IIAs — The "old-generation" IIAs are relatively short with no more than twelve to fourteen articles,[44] and they are intended to promote foreign investment through the development of legal schemes that protect foreign investment from certain government actions.[45] "Old-generation" IIAs lack the ability to address how host states can regulate climate change, which may impede climate change action implementation.[46] Additionally, most IIAs have a long lifecycle, lasting more than ten years. Many key treaty protections remain intact through "sunset clauses" in the IIAs, which aim to protect investments made before termination under an outdated legal regime.[47]

Second, "old-generation" IIAs usually only allow host states to defend claims brought against them,[48] which makes it difficult for the host states to make counterclaims. This creates a power imbalance in international

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[42] U.N. CONF. ON TRADE & DEV. [hereinafter UNCTAD], WORLD INVESTMENT REPORT 2024: INVESTMENT FACILITATION AND DIGITAL GOVERNMENT, 65 (2024), https://unctad.org/system/files/official-document/wir2024_en.pdf.

[43] Martin Dietrich Brauch, *Reforming International Investment Law for Climate Change Goals*, *in* RESEARCH HANDBOOK ON CLIMATE FINANCE AND INVESTMENT LAW 5 (Michael Mehling & Harro van Asselt eds., 2023); A survey conducted by OECD in 2011 revealed that climate change had not made its way into treaty language. *See* Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey* (OECD Working Papers on International Investment, 2011).

[44] KRIEBAUM, *supra* note 16, at 16.

[45] Meredith Wilensky, *Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures Under the Trans-Pacific Partnership*, 45 ENV'T L. REP. 10683, 10683 (2015).

[46] The International Investment Treaty Regime and Climate Action, UNCTAD (Sept. 2022), https://unctad.org/system/files/official-document/diaepc binf2022d6_en.pdf.

[47] For example, the "modernization" reforms of the ECT show that the urgency of linking the ECT to the energy transition and climate protection goals has been recognized, but the process is being accompanied by harsh critique. There are increased calls for a coordinated EU withdrawal from the ECT. Withdrawal is possible under Article 47, but this would trigger the "sunset clause" under which existing investments would remain protected for another twenty years after withdrawal. *See* Arthur Lauvaux, *Towards a Bumpy Ride into the Sunset: On the Mutual Termination of IIAs and Their Sunset Clauses*, 38(3) ARB. INT'L 203, 205 (2022); Bart-Jaap Verbeek, *The Modernization of the Energy Charter Treaty: Fulfilled or Broken Promises*, 8(1) BUS. HUM. RTS. J. 94, 101 (2023); Rafael Leal-Arcas et al., *The Contribution of Free Trade Agreements and Bilateral Investment Treaties to a Sustainable Future*, 23(1) ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 3, 49-50 (2020).

[48] Maxi Scherer et al., *Environmental Counterclaims in Investment Treaty Arbitration*, 36(2) ICSID REV. -FOREIGN INV. L.J. 413, 413 (2021).

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investment arbitration, as the host state is unable to hold foreign investors accountable for any violations of international law. The counterclaim mechanism been called "30 years of failure", on the grounds that there are only a handful of successful counterclaims by host states in investment arbitration practice.[49] In Rusoro Mining v. Venezuela, for instance, the Tribunal pointed out that the Article 12 of the Canada–Venezuela BIT restricts the scope of disputes that can be submitted to arbitration, and the BIT only affords foreign investors standing to file arbitrations against host States; and the purpose of the arbitrations is for arbitrators to adjudicate disputes relating to claims by investors that the host state's actions or inactions are in violation of the investment treaty through the application of international law and the investment treaty.[50] To address the imbalance, some recent IIAs have begun integrating counterclaim provisions. For instance, Article 9.19(2) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) allows the respondent to assert a counterclaim based on the factual and legal foundations of the original claim or to utilize a claim as a setoff against the claimant. Despite the fact that counterclaims are available to a defendant state, the current framework of international law does not provide a mechanism to ensure that the state would use counterclaims to fulfill its duty of protection against actions by foreign investors.[51]

Third, IIAs give guarantees to foreign investors, but they do not address obligations of foreign investors.[52] The majority of IIAs do not mention corporate social responsibility (hereinafter "CSR"). Even in treaties that do, CSR clauses are still in the embryonic stage,[53] and these clauses have largely been voluntary in nature.[54] Since the "old-generation" of IIAs did not include language on CSR, arbitral decisions raising investor responsibility are relatively rare. In most cases, investor-state tribunals have been unwilling to accommodate the application of non-investment

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[49] Ana Vohryzek-Griest, *State Counterclaims in Investor State Dispute: A History of 30 Years of Failure*, 15 INT'L L. REVISTA COLOMBIANA DE DERECHO INTERNACIONAL 83, 83 (2009).

[50] Rusoro Mining Limited v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF) /12/5, Award, ¶¶ 621-27 (Aug. 22, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7507.pdf.

[51] Tomoko Ishikawa, *Counterclaims and the Rule of Law in Investment Arbitration*, 113 AM. J. INT'L L. UNBOUND 33, 36 (2019).

[52] Kriebaum, *supra* note 16, at 33.

[53] Rafael Peels et al., *CSR in International Trade and Investment Agreements: Implications for States, Business and Workers*, INT'L LAB. OFF., 14 (2016), https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.ilo.org/media/428981/download&ved=2ahUKEwilkuWp3KmIAxVpgK8BHcb1DDgQFnoECB4QAQ&usg=AOvVaw1oUiMsZBB5LD8ZYF9S1cnz.

[54] Claire Cutler & David Lark, *Incorporating Corporate Social Responsibility Within Investment Treaty Law and Arbitral Practice: Progress or Fantasy Remedy?*, IISD (Dec. 19, 2020), https://www.iisd.org/itn/en/2020/12/19/incorporating-corporate-social-responsibility-within-investment-treaty-law-and-arbitral-practice-progress-or-fantasy-remedy-claire-cutler-david-lark/.

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obligations and other treaties.[55] The lack of obligations on foreign investors also limits the possibility of respondent States bringing counterclaims against the investor claimant for breach of its obligations under the treaty.[56] In the case of Urbaser v. Argentina, the Tribunal rejected the counterclaim on the grounds that the investor lacks the obligation under international law. The Tribunal found that the respondent's argument conflated the concessionaire's provision of water and sewerage services with the obligation to fulfil the human right to water.[57] The human right to water entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on the part of any company providing the contractually required service. In such a case, the investor's obligation to perform has as its source domestic law; it does not find its legal ground in general international law.[58] Given that the respondent had not identified an independent obligation in international law that was binding on the claimant, the counterclaim could not succeed. The same situation happened in Aven v. Costa Rica, as the Tribunal concluded that "the language of Articles 10.9.3.c and 10.11 of the Dominican Republic–Central America Free Trade Agreement seeks to ensure that States retain a significant margin of appreciation in respect of environmental measures in their respective jurisdictions", but they do not impose any affirmative obligation upon investors.[59]

2. The Asymmetrical Structure of ISDS — "One-sided" IIAs result in an asymmetrical structure of international investment arbitration, which gives greater weight to foreign investment protection when deciding cases dealing with environmental measures or climate action adopted by the host states. For example, in Rockhopper v. Italy, the claimants submitted a claim against Italy pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter "ICSID Convention") for breach of various provisions of the ECT. As part of its climate change mitigation efforts, Italy banned offshore oil and gas exploration and production within 12 nautical miles of the coast. In the end, the Tribunal found that Italy had committed an unlawful expropriation and awarded the claimants EUR 184 million in damages.[60] A similar result was

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[55] Katia Yannaca-Small, *Corporate Social Responsibility and the International Investment Law Regime: Not Business as Usual*, 17(2) U. SAINT THOMAS L.J. 402, 410 (2021).
[56] UNCITRAL, *Possible Reform of Investor-State Dispute Settlement: Multiple Proceedings and Counterclaims*, at 8, U.N. Doc. A/CN.9/WG.III/WP.193 (Jan. 20, 2020).
[57] Urbaser v. Argentine, *supra* note 27, ¶¶ 1206-07.
[58] *Id.* ¶ 1209.
[59] David Aven et al. v. The Republic of Costa Rica ICSID Case No. UNCT/15/3, Final Award, ¶ 743 (Sept. 18, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9955_0.pdf.
[60] Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic ICSID Case No. ARB/17/14, Final Award, ¶¶ 103, 266-68. (Aug. 23, 2022), https://jusmundi.com/en/document/decision/en-rockhopper-exploration-plc-rockhopper-italia-s-p-a-and-rockhopper-mediterranean-ltd-v-italian-republic-final-award-wednesday-24th-august-2022.

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found in Eco Oro Minerals Corp. v. Colombia, in which the Canadian investor claimed that successive environmental bans in Colombia had cost it over 50% of its mining rights. The Tribunal found Colombia's bans violated the Colombia–Canada FTA's minimum standard of treatment, resulting in damage to Eco Oro without any apparent legitimate purpose.[61] The Tribunal also held that a general environmental exception did not preclude compensation under the FTA.[62] Cases such as these demonstrate that environmental protection measures can be challenged and deemed violations of IIAs, and that explicit safeguards and exceptions to protect state climate policies are inadequate.[63]

Meanwhile, under the "old-generation" IIAs, arbitrators are typically confined to assessing whether the host state violated its obligations to safeguard foreign investors, as they often view themselves as agents for the parties who seek to settle their particular investment dispute.[64] For instance, the Tribunal in Biloune v. Ghana held that it had no jurisdiction over claims for violations of human rights.[65] While some recent BIT explicitly address climate change and environmental protection,[66] considering such public law issues may be beyond the capacity of arbitrators, since most come from the commercial arbitration background and lack the necessary expertise.[67] It is for these reasons that investment arbitration has been criticized due to its potential to negatively impact human rights as enshrined in legally binding instruments, whether civil, cultural, economic, political, or social.[68] The 2022 report of Intergovernmental Panel on Climate Change also highlighted that the ISDS

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[61] Eco Oro v. Colombia, *supra* note 34, ¶ 821.

[62] *Id.* ¶ 829.

[63] UNCTAD, *Treaty-Based Investor-State Dispute Settlement Cases and Climate Action*, 2022(4) IIA ISSUE NOTE 1, 2 (2022), https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf.

[64] Tom Ginsburg, *The Arbitrator as Agent: Why Deferential Review Is Not Always Pro-Arbitration*, 77 U. CHI. L. REV. 1013, 1018 (2010).

[65] Antoine Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana, Award on Jurisdiction and Liability, ¶ 60 (Oct. 27, 1989), https://jusmundi.com/en/document/decision/en-biloune-and-marine-drive-complex-ltd-v-ghana-investments-centre-and-the-government-of-ghana-award-on-jurisdiction-and-liability-friday-27th-october-1989.

[66] According to recent treaty practice, States have been introducing express climate provisions in their IIAs to align the IIAs regime with climate commitments. A survey conducted by UNCTAD shows that climate-related provisions are mainly distributed in preamble, market access provisions, investment facilitation provisions, right to regulate provisions, exception provisions, dispute settlement provisions. UNCTAD, *supra* note 46, at 16.

[67] Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104(2) AM. J. INT'L L. 179 (2010).

[68] *UN Experts Voice Concern over Adverse Impact of Free Trade and Investment Agreements on Human Rights*, U.N. (June 2, 2015), https://www.ohchr.org/en/press-releases/2015/06/un-experts-voice-concern-over-adverse-impact-free-trade-and-investment#:~:text=There%20is%20a%20legitimate%20concern,and%20other%20persons%20leaving%20in.

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mechanism could be a serious impediment to governments taking the climate measures.[69]

Additionally, the existing arbitral practice, in particular that of the calculation of compensation, is not well suited for the cases involving states' climate action. "Old-generation" IIAs do not specify compensation standards in cases of treaty obligations violation. Arbitration practice has established a host state's obligation to make full reparation by determining compensation based on income-based valuation methods that quantify the cash flows that assets would have generated if the State had not violated the investment treaty. This method, named the discounted cash flow (DCF) method, creates privileges for fossil fuel asset owners, allowing them to receive massive compensation.[70] The average award in a fossil fuel case is over USD 600 million, almost five times as much as in non-fossil fuel cases.[71] As states phase out the use of fossil fuels in energy production in accordance with the Paris Agreement, investor-State arbitration may be an option for claimants to recover lost value. The use of DCF methods may even lead to an increase of arbitration cases in fossil fuel production.[72]

3. The Insufficient Role of "New-Generation" IIAs — Although some recent treaties have begun to include language about health, environment and the climate change, they still lag behind in addressing urgent climate issues.[73] The majority of "new-generation" IIAs merely reaffirm their commitments to combating climate change or encourage the removal of obstacles to trade or investment in goods and services relevant to climate change mitigation. These provisions seem to limit their role primarily to recommendations and political commitments, rather than imposing binding obligations. Unlike the investment protection provisions, which have a "hard law" character, these declaratory provisions are considered "soft law" due to their non-binding language and the absence of proactive provisions intended to support climate action effectively.[74] Meanwhile, despite the ostensibly "greened" provisions on non-discriminatory treatment, expropriation, and FET in the "new-generation" IIAs, the interpretation of

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[69] UNCTAD, *supra* note 46, at 2.

[70] Oliver Hailes, *Unjust Enrichment in Investor-State Arbitration: A Principled Limit on Compensation for Future Income from Fossil Fuels*, 32(2) REV. EUR., COMPAR. & INT'L ENV'T L. 358, 361 (2022).

[71] *Investor-State Disputes in the Fossil Fuel Industry*, IISD (Dec. 2021), https://www.iisd.org/system/files/2022-01/investor–state-disputes-fossil-fuel-industry.pdf.

[72] Yawen Zheng, *Rethinking the 'Full Reparation' Standard in Energy Investment Arbitration: How to Take Climate Change into Account*, 27(3) J. INT'L ECON. L. 500, 504 (2024).

[73] Crina Baltag Fciarb et al., *Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?*, 38(2) ICSID REV.-FOREIGN INV. L.J. 381, 409 (2023).

[74] *Investment Treaty Regime Needs Reforms to Support Climate Action*, UNCTAD (Sept. 6, 2022), https://unctad.org/news/investment-treaty-regime-needs-reforms-support-climate-action#:~:text=The%20reforms%20should%20minimize%20states,used%20to%20challenge%20climate%20policies.

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these new agreements appears to remain rooted in the understanding of "old-generation" IIAs.[75]

B. External Deficiencies: Unresolved Conflicts Between ICCL and IIAs

It is observed that the jurisprudence of the investment tribunal has not developed complex or consistent strategies to resolve norm-conflicts between international investment law and other areas of international law.[76] Principles to resolve conflict of norms include *jus cogens*, *lex posterior*, or *lex specialis*. These rules or principles, however, do not effectively address the conflict between rules of investment protection and climate obligations.

In the first place, norms which embody *jus cogens* are considered as being hierarchically superior to other norms. These norms are binding on all states and can be enforced by the international community. They include the prohibition of genocide, slavery, and torture, as well as other core principles of international law.[77] In this respect, Article 53 of the VCLT provides that: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law";[78] Article 103 of the United Nations Charter also provides that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".[79] As mentioned by the Tribunal in EDF v. Argentina, it is common ground that the tribunal should be sensitive to international *jus cogens* norms, including basic principles of human rights.[80] Meanwhile, in Phoenix v. Czech Republic, the Tribunal argued that "nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs".[81] Although global climate change action is suggested to be

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[75] WOLFGANG ALSCHNER, INVESTMENT ARBITRATION AND STATE-DRIVEN REFORM: NEW TREATIES, OLD OUTCOMES 45 (2022).

[76] Jörg Kammerhofer, *The Theory of Norm Conflict Solutions in International Investment Law*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 81, 87 (Marie-Claire Cordonier Segger et al. eds., 2010).

[77] JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 94 (2003).

[78] Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

[79] U.N. Charter art. 103.

[80] EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Award, ¶ 909 (June 11, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1069.pdf.

[81] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 78 (Apr. 15, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0668.pdf; Sabine Schlemmer-

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a *jus cogens* norm,[82] there is little evidence that the international community accepts and recognizes that environmental norms have become *jus cogens* norms.[83] It is also because most of the ICCL adheres to an "encouragement and promotion" policy. Since they do not fall under the scope of *jus cogens*, they cannot be granted a higher place in a hierarchy than IIAs in treaty application.

Furthermore, as stated in Article 30 of the VCLT, the principle of *"lex posterior"* means, whenever all parties to a treaty are also parties to an earlier treaty on the same subject, and the earlier treaty has not been suspended or terminated, then the earlier treaty applies only to the extent its provisions are compatible with the later one.[84] This is primarily due to the assumption that the more recent norm will have a better chance of reflecting the current legal and social conditions. However, as pointed out by the International Law Commission, the applicability of the principle of *"lex posterior"* is limited.[85] Further, considering that environmental law differs from international investment law in terms of law-making techniques, particularly the framework-protocol approach and the use of "administrative law" secreted by environmental treaty bodies, determining which obligation is prior/posterior will be difficult.[86] On the other hand, as mentioned by the International Law Commission, in case of conflicts or overlaps between treaties in different regimes, the question of which of them is later in time would not necessarily express any presumption of priority between them. States bound by treaties should instead try to implement the obligations as much as possible in compliance with harmonization principles and mutual accommodation.[87] This would require that investment tribunals shall interpret norms of ICCL and IIAs, which have different objectives and scopes, in a harmonious approach.

The *lex specialis* principle suggests that when two or more norms deal with the same subject matter, the more specific norm should be given priority.[88] It was accepted by some investment arbitral tribunals that *lex specialis* requires identity between the parties and the issues concerned to

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Schulte, *Fragmentation of International Law: The Case of International Finance & Investment Law Versus Human Rights Law*, 25(1) GLOB. BUS. & DEV. L.J. 409, 420 (2012).

[82] Miguel Ángel Marmolejo Cervantes et al., *Global Climate Change Action as a Jus Cogens Norm: Some Legal Reflections on the Emerging Evidence*, 52(5-6) ENV'T POL'Y & L. 359, 363 (2022).

[83] Int'l L. Comm'n, Fourth Rep. on Peremptory Norms of General International Law (*Jus Cogens*) by Dire Tladi, Special Rapporteur, UN. Doc. A/CN.4/727 (2019).

[84] Int'l L. Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN. Doc. A/CN.4/L.702 (2006) [hereinafter Fragmentation of International Law].

[85] *Id.*

[86] PAUWELYN, *supra* note 77, at 31-36 (2003).

[87] Fragmentation of International Law, *supra* note 84.

[88] *Id.* at 8.

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give rise to a situation where different sets of rules might be opposed or contradictory.[89] More often, the principle of *lex specialis* is invoked by investment tribunals to hold that the IIA, as a specialized legal instrument, prevails over customary international law and general principles of international law.[90] However, it is argued that this reasoning could be that investment law falls under international economic law and is implemented primarily by commercial lawyers, who may not consider or be unwilling to consider public interest or the broader perspective of public international law.[91] In actual fact, as noted by the International Law Commission, a special law on a particular subject matter cannot be separated from the nature and purpose of the general law it deviates from.[92] This means that IIAs cannot be read in isolation and shall operate within the framework of international human rights law or climate change law. It was also noted by the Tribunal in National Grid v. Argentina Award, though the BIT is *lex specialis*, it is not a self-contained, stand-alone legal framework, but rather an international bilateral treaty which must be "integrated" with underlying principles of international law in order to fill its gaps.[93]

In general, a growing number of IIAs include provisions addressing the environment, human rights, labor, and climate change, which are used to pursue various non-investment objectives or values. Such an approach increases the likelihood of conflicts between the rules of international investment law and other rules of international law. If the ICCL applies directly to the substance of investment disputes, conflicts between climate change norms and investment law norms are unavoidable. However, the traditional conflict principles of *lex superior*, *lex posterior* and *lex specialis* are inadequate for resolving these normative conflicts.

IV. RECONCILIATION OF ISDS AND CLIMATE ACTION

Reforming IIAs would be the best way to address both internal and external deficiencies and help states fulfill their climate change

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[89] PAO Tatneft (formerly OAO Tatneft) v. Ukraine, PCA Case No. 2008-8, Partial Award on Jurisdiction, ¶ 91 (Sept. 28, 2010).

[90] For instance, Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States ICSID Case No. ARB(AF)/04/5, Award, ¶ 117 (Nov. 21, 2007); Corn Products International Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, ¶ 76 (Jan. 15, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0037_0.pdf.

[91] Anja Ipp, *Regime Interaction in Investment Arbitration: Climate Law, International Investment Law and Arbitration*, KLUWER ARB. BLOG (Jan. 16, 2022), https://arbitrationblog.kluwerarbitration.com/2022/01/12/regime-interaction-in-investment-arbitration-climate-law-international-investment-law-and-arbitration/.

[92] Fragmentation of International Law, *supra* note 84.

[93] National Grid P.L.C. v. Arg. Republic, Award, ¶ 87 (Nov. 3, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0555.pdf.

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commitments, but negotiating new IIAs would be onerous and time-consuming. For instance, although the modernization process encompasses broader reform efforts and attempts to balance foreign investment protection with the preservation of state sovereignty, a number of concerns remain regarding the protection of fossil fuel investments and the lack of prospects for change within the ECT. Consequently, several countries have announced their intention to withdraw unilaterally.[94] Despite existing arduous challenges, recent practice in investment arbitration shows that the arbitral Tribunal could adopt a broad interpretation approach to reconcile the tension between IIAs and ICCL to accommodate climate goals.

A. Incorporating Climate Change Provisions into IIAs

The most straightforward approach to address the deficiencies in part 3 will be to reform and update the old-generation IIAs. At present, some IIAs have begun to introduce specific provisions related to climate change to address the increasingly serious global warming problems.[95] The climate change provisions are mainly embodied in the provisions of preambles,[96] market access,[97] investment promotion and facilitation,[98] counterclaims, [99] and corporate social responsibility,[100] which indicate that climate change is

[94] Bart-Jaap Verbeek, *The Modernization of the Energy Charter Treaty: Fulfilled or Broken Promises?* 8(1) BUS. & HUMAN RTS. J. 98 (2023); Martin Dietrich Brauch, *The Agreement in Principle on ECT "Modernization": A Botched Reform Attempt that Undermines Climate Action*, COLUM. CTR. SUSTAINABLE INV. (Oct. 17, 2022), https://ccsi.columbia.edu/news/agreement-principle-ect-modernization-botched-reform-attempt-undermines-climate-action; Maria José Alarcon, *ECT Modernisation Perspectives: Revamping International Investment Law: A Comparative Look at Substantive ISDS Reform in the ECT and Beyond*, KLUWER ARB. BLOG (May 10, 2023), https://arbitrationblog.kluwerarbitration.com/2023/05/10/ect-modernisation-perspectives-revamping-international-investment-law-a-comparative-look-at-substantive-isds-reform-in-the-ect-and-beyond/.

[95] The EU is a pioneer in introducing climate change clauses in IIAs, it purports to introduce ambitious climate neutrality provisions and conformity with international conventions on climate change, such as the Paris Agreement, as an essential part of its future trade and investment agreements. *See y* Markus Gehring & Marios Tokas, *Synergies and Approaches to Climate Change in International Investment Agreements: Comparative Analysis of Investment Liberalization and Investment Protection Provisions in European Union Agreements*, 23 J. WORLD INV. & TRADE 778 (2022).

[96] *See, e.g.*, *China-EU Comprehensive Investment Agreement*, EDIT, Preamble, https://edit.wti.org/document/show/29817b74-3d47-46e2-8dbf-dd9dc6aa15a9 [hereinafter CHINA-EU CAI].

[97] *See, e.g.*, CETA, *supra* note 30, art. 24.9.

[98] *See, e.g.*, Agreement between the European Union and Japan for an Economic Partnership, EU-Japan, art. 16.5(c), 2018, 3396 U.N.T.S.

[99] *See, e.g.*, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, arts. 14.11.2, 9.19.2, Mar. 8, 2018, 3346 U.N.T.S.

[100] *See, e.g.*, Agreement Between the Government of the Republic of Turkey and the Government of the Republic of Serbia Concerning the Reciprocal Promotion and Protection of Investments Serb.-Turk., art. 11, June 11, 2022, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6130/download.

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going to play an important role in future investment arbitrations and also provide the legitimacy basis for the application of ICCL by arbitral tribunals. IIAs can go further to specify compensation standards in the event of climate action in the future. When a tribunal determines the appropriate method of valuation for stranded fossil fuel assets, it is suggested that the Paris Agreement's distribution scheme may impose a principled limit on compensation for future income from these assets, thereby ensuring that investor-state arbitration does not increase claimants' wealth at the expense of the capacity of the host state to take climate action measures.[101]

Climate change provisions can be directly applicable to the legal basis for settling investment disputes. For example, the 2021 Canada Model Foreign Investment Promotion and Protection Agreement of Canada reaffirms the Contracting Parties' right "to regulate within its territory to achieve legitimate policy objectives, such as with respect to the protection of the environment and addressing climate change".[102] These provisions will justify government actions to deal with climate change and better fulfill the government's obligation to reduce emissions. In addition, some IIAs specify that foreign investors must comply with domestic laws when making investment decisions and conducting environmental impacts assessments.[103] In the event that foreign investors breach the climate regulatory norms adopted by the host state to implement the Paris Agreement norms, the investment tribunal will have jurisdiction to hear the host state's counterclaim. There are also IIAs that use language such as "reaffirming their commitment to the fight against climate change" or "resolving to strengthen economic, trade, and investment relations in line with climate change objectives" in the preamble. For instance, the preamble of the EU–UK Trade and Cooperation Agreement stipulates that "parties [are] reaffirming their commitment to democracy principles, to the rule of law, to human rights, and to the fight against climate change".[104] It is likely that the parties used such language to restate their commitment to respecting certain climate change norms, and the parties indicated that they would incorporate any relevant international climate change norms into their investment treaties so that they might be directly applicable to the disputes.

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[101] Hailes, *supra* note 70, at 7.

[102] *Canada Model Foreign Investment Promotion and Protection Agreement*, GOV. OF CAN., art. 3 (2021), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng. In addition, the EU–UK BIT and EU–Japan BIT specify the regulatory rights of host countries in addressing climate change.

[103] UNCTAD, *supra* note 46.

[104] Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, preamble, ¶ 1, 2021, O.J. (L 149) 10.

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Meanwhile, the climate change provisions in IIAs can provide interpretation tools for the application of ICCL by the investment tribunal. Article 31(1) of the VCLT states that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", which provides evidence for climate-friendly interpretation by the arbitral tribunals. For instance, if the preamble to an investment treaty refers to the parties' commitment under the ICCL, a contextual interpretation would require that the terms of the investment treaty be construed in light of climate goals. In addition, if the substantive provisions of the IIAs include the host state's right to regulate climate change provisions, or provide for promoting the transformation of investment to low-carbon and sustainable direction, it implies that the host state will focus on developing a low-carbon economy in the future, which has reference value for the arbitral tribunals to interpret and understand the IIAs provisions. For example, Article 16.5(c) of the EU–Japan Economic Partnership Agreement not only reaffirms the Parties' joint action to combat climate change to achieve the ultimate objectives of the UNFCCC and the Paris Agreement, but also requires that both parties should strive to promote trade and investment in goods and services related to mitigation of climate change.[105] Although the wording of the agreement is soft law in nature, it demonstrates the concern of the EU and Japan on climate change and sustainable development issues.[106] In light of the above, these climate change provisions reflect the positive signal that IIAs Contracting Parties will strengthen their efforts to address climate change. They serve as important reference points for the arbitral tribunals when determining whether a state has the right to regulate its climate, whether investors are entitled to reasonable expectations, and whether indirect expropriating is occurring.[107]

In circumstances where climate change provisions are not directly incorporated into the IIAs, the Contracting Parties can adopt binding interpretations of the treaty provisions to include reference to climate change. For instance, the "Draft Decision of the CETA Joint Committee" developed by the European Commission and Germany clarified that the provisions of FET and indirect expropriation shall be interpreted by the arbitral tribunals in light of "the Parties" commitments "under the Paris

[105] Such provisions are designed to promote and facilitate investments that contribute to the fight against climate change, particularly in low-carbon and renewable energy sources, and to limit high-emission investments.

[106] Celine Bak said that "They have signaled that future trade agreements will include Paris as part of the rules." Ivana Kottasová, *Why Trump May Hate This New Free Trade Deal?*, CNN (July 2017), https://money.cnn.com/2017/07/06/news/economy/japan-eu-trade-deal-trump/index.html.

[107] Arman Sarvarian, *Invoking the Paris Agreement in Investor-State Arbitration*, 38(2) ICSID REV. - FOREIGN INV. L.J. 422 (2023).

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Agreement and their respective climate neutrality objectives and in a way that allows the Parties to pursue their respective climate change mitigation and adaptation policies".[108]

B. Broadening the Application of the Sustainable Development Provisions

Sustainable development provisions have gained increasing attention in IIAs in recent years. At the domestic, bilateral, regional, and multilateral levels, this trend can be observed, which not only introduces the goal requirement of sustainable development explicitly in the preamble and chapter on sustainable development, but enriches sustainable development by including environmental and human rights provisions.[109] These options include provisions designed to strengthen the sustainable development dimension of IIAs, resolve problems arising from the regime's growing complexity and to adjust the balance between the protection of foreign investors and the host state's right to regulate. The principle of sustainable development sets the tone for the interpretation, application and development of law, both as an interpretative tool for modernizing "old treaties" in accordance with contemporary environmental standards as well as a balancing technique to equitably reconcile competing interests based on the facts of each case. In the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), the International Court of Justice (hereinafter "ICJ") pointed out that "this need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development". [110] Provisions for sustainable development assist in determining the overall objectives of IIAs, as well as interpreting specific provisions in a manner consistent with environmental protection and climate mitigation.

In the event that climate change provisions are not included explicitly in investment agreements, provisions related to sustainable development can be used to fill this gap. Stronger sustainable development provisions within IIAs, through the definition of investment, general exceptions provisions, carve-outs,[111] and CSR, can serve as a powerful tool to

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[108] Joshua Paine & Elizabeth Sheargold, *2022 in Review: Climate Change as a Mainstream Issue for Investment Treaty Policymakers*, KLUWER ARB. BLOG (Jan. 27, 2023), https://arbitrationblog.kluwerarbitration.com/2023/01/27/2022-in-review-climate-change-as-a-mainstream-issue-for-investment-treaty-policymakers/.

[109] According to a 2014 statistic by the OECD, more than 75% of IIAs include the term of sustainable development. Kathryn Gordon et al., *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey* 1, 10 (OECD Working Papers on International Investment, 2014).

[110] INTERNATIONAL COURT OF JUSTICE, CASE CONCERNING THE GABČÍKOVO-NAGYMAROS PROJECT (HUNGARY/SLOVAKIA), 74 (1997).

[111] Joshua Paine & Elizabeth Sheargold, *A Climate Change Carve-Out for Investment Treaties*,

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safeguard the environment and mitigate climate change.[112] This alignment with the 2030 Sustainable Development Agenda ensures that IIAs promote responsible investment practices and advance the sustainable development goals.[113] These provisions can ensure that investments are made in a way that is consistent with applicable environmental standards, and safeguard the state's right to regulate. Meanwhile, they can be used to require investors to comply with existing environmental regulations. The United Nations Independent Expert on promoting a democratic and equitable international order further urges States to consider including specific provisions in BIT and free trade agreements to address the legal responsibility of transnational corporations and investors for reparations arising from environmental, health, and other damages caused by their activities.[114] This could also empower host states to file counterclaims against investors for their actions, strengthening mechanisms for accountability.[115]

Additionally, sustainable development can serve as a nexus between the ICCL and international investment law. Although ICCL and international investment law have developed on different tracks, both are related to sustainable development. Climate action forms part of sustainable development. [116] Meanwhile, as reaffirmed by the China-EU Comprehensive Agreement on Investment (CAI), economic development, social development and environmental protection are interdependent and mutually reinforcing dimensions of sustainable development.[117] In the New Delhi Declaration on the Principles of International Law Related to Sustainable Development, the International Law Association (hereinafter "ILA") highlights that sustainable development should be "integrated into all relevant fields of policy in order to realize the goals of environmental protection, development and respect for human rights".[118] The integration principle, which is one of seven ILA principles for pursuing substantive

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26(2) J. INT'L ECON. L. 285 (2023).

[112] Claudia Salgado Levy, *Drafting and Interpreting International Investment Agreements from a Sustainable Development Perspective*, 3(1) GRONINGEN J. INT'L L. 59 (2015).

[113] Lise Johnson et al., *Aligning International Investment Agreements with the Sustainable Development Goals*, 58(1) COLUM. J. TRANSNAT'L L. 58 (2019); *see generally* Lise Johnson, *FDI, International Investment Agreements and the Sustainable Development Goals*, *in* RESEARCH HANDBOOK ON FOREIGN DIRECT INVESTMENT 126 (Markus Krajewski & Rhea T. Hoffmann eds., 2019).

[114] Rep. of the Independent Expert on the Promotion of a Democratic and Equitable International Order, U.N. Doc. A/HRC/30/44 (2015).

[115] J Anthony VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries*, COMMONWEALTH SECRETARIAT (Aug. 2012), https://www.iisd.org/system/files/meterial/6th_annua l_forum_commonwealth_guide.pdf.

[116] *See generally* Paine, *supra* note 111.

[117] CHINA-EU CAI, *supra* note 96, art. 1(2), Sub-sec. I, Sec. IV.

[118] *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, 2(2) INT'L ENV'T AGREEMENTS: POL., L. & ECON. 209 (2002).

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development effectively, reflects the interdependence between international law principles and rules related to sustainable development from the perspective of social, economic, financial, environmental, and human rights. By implementing the integration principle, sustainable development will help mitigate tensions between investment law and ICCL, as well as improve their interrelationships.

C. Applying the ICCL Through Systematic Interpretation

IIAs generally include provisions of applicable law that extend beyond investment treaties to cover other sources of international law.[119] For example, Article 26(6) of ECT states that "A tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law." Likewise, Article 42(1) of the ICSID Convention provides that "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".[120] These choice-of-law provisions open the door for investment tribunals to integrate climate change considerations into their decision-making through applying general international law.[121] In Urbaser v Argentina, the Tribunal found that an international human rights law obligation deriving from another treaty between the investor's home State and the host state would be applicable in investment disputes, because the international human rights law would be part of the international legal framework.[122] Hence, through application of relevant international law rules, investment tribunals could not only provide the respondent states with greater sovereign autonomy to regulate climate change, but also achieve a balance between the commitments of Paris Agreement and flexibility of IIAs.

Meanwhile, tribunals are critical for the process of treaty interpretation, and the relevance that arbitrators attach to the VCLT is key in this process.[123] ICCL can be introduced through the systematic interpretation,

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[119] D. Mejía-Lemos, *General International Law and International Investment Law: A Systematic Analysis of Interactions in Arbitral Practice*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY (Julien Chaisse et al. eds., 2020).

[120] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 42(1), Mar. 18, 1965, 575 U.N.T.S. 159.

[121] Raymond Yang Gao, *The Role of Public International Law in Integrating Human Rights Considerations in Investment Treaty Arbitration*, 16(2) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 275, 287 (2021).

[122] Urbaser v. Argentine, *supra* note 27, ¶ 1207.

[123] Julien Chaisse & Arjun Solanki, *Advancing Climate-Change Goals: From Reactive to Proactive Systemic Integration*, COLUM. CTR. SUSTAINABLE INV., (Nov. 14, 2022), https://www.econstor.eu/bitstream/10419/266571/1/1824434677.pdf.

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which is enshrined in Article 31(3)(c) of VCLT.[124] The systemic integration principle enables the application of general international law rules for interpreting substantive obligations of IIAs without defining a hierarchy and establishing a concurrent approach.[125] This principle is increasingly being used by the ICJ, the European Court of Human Rights and the Appellate Body of the World Trade Organization. International investment tribunals have also begun to consider host states' international obligations under other multilateral agreements when interpreting IIAs. For instance, in Micula v. Romania, the Tribunal considered that each of the various applicable treaties will be interpreted by it having regard to the other applicable treaties, assuming that the parties entered into each treaty fully aware of the legal obligations they would be subject to under all of them.[126] Similarly, in Urbaser SA v. Argentina, the Tribunal further states that "the BIT cannot be interpreted and applied in a vacuum, the BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights".[127] These cases suggests that arbitral tribunals may consider violations of non-investment treaties when interpreting investment protection standards.

By integrating climate change norms into an investment dispute, it provides a reasonable basis on which the arbitral tribunal may apply ICCL when deciding investment arbitration cases, and broadens the scope of the applicable laws in investment disputes.[128]

D. Following the Principle of Mutual Supportiveness

The principle of mutual supportiveness, which is regarded as an interpretative pillar of the principle of sustainable development, functions as a key legal tool to address tensions between competing regimes.[129] Accordingly, to promote coordination and complementarity rather than conflict, the rules of international law should be understood and applied as mutually reinforcing, as part of the same legal system. While the principle

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[124] Vassilis P. Tzevelekos, *The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology-Between Evolution and Systemic Integration,* 31(3) MICH. J. INT'L L. 621, 633 (2009).

[125] Chaisse & Solanki, *supra* note 123.

[126] Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20, Final Award, ¶ 326 (Dec. 11, 2013), https://italaw.com/sites/default/files/case-documents/italaw3036.pdf.

[127] Urbaser v. Argentine, *supra* note 27, ¶ 1200.

[128] David W. Rivkin et al., *The Future of Investor-State Dispute Settlement in the Energy Sector: Engaging with Climate Change, Human Rights and the Rule of Law*, 8(2) J. WORLD ENERGY L. & BUS. 130, 143 (2015).

[129] Riccardo Pavoni, *Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes Debate?'* 21(3) EUR. J. INT'L L. 649, 650 (2010).

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of mutual supportiveness is regarded as an interpretative pillar of the principle of sustainable development, it is more intuitively apt to operate at the hermeneutic level.[130] Recent IIAs have begun to introduce other topics of fundamental interest to the international community through the principle of mutual supportiveness, such as environment, human rights and climate change. For example, Article 83 of the UK–Moldova Trade and Cooperation Agreement stipulated that "cooperation shall be conducted considering the interests of the Parties on the basis of equality and mutual benefit and taking into account the interdependence existing between bilateral and multilateral commitments in this field".[131]

The concept of mutual supportiveness provides a normative solution to the integration of competing investment protection and climate change regimes by arbitral tribunals. In the Iron Rhine Arbitration (Belgium v. Netherlands) case, the Tribunal stressed the importance of a "dynamic and evolutionary" interpretation of treaties, considering modern standards and developments in international environmental law. Additionally, the Tribunal clarified the interplay between economic development and environmental protection. It underscored that environmental law and the law on development are not opposing choices; instead, they are complementary and mutually reinforcing concepts. As such, when development activities carry the potential to cause substantial harm to the environment, there exists a duty to prevent or at the very least, mitigate such harm.[132] The Tribunal in S.D. Myers v. Canada considered that that the principle of mutual supportiveness was chief among the principles governing the interface of trade, investment, and environmental obligations and held that "environmental protection and economic development can and should be mutually supportive".[133] These cases provide valuable references for the Tribunal to consider the international obligations of host countries under other conventions when applying and interpreting IIAs. Furthermore, the UNFCCC and the Paris Agreement are also being invoked in domestic proceedings to illustrate the practice of mutual supportiveness between environment and development.[134] A landmark judgement was rendered by the District Court in The Hague on 26 May 2021 in the case Milieudefensie

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[130] *Id*. at 662.

[131] Strategic Partnership, Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Moldova, U.K.-Mold., art. 83, Dec. 24, 2020, https://mfa.gov.md/sites/default/files/b02604-en.pdf.

[132] Award in the Arbitration Regarding the Iron Rhine Railway (Belg. v. Neth.), Decision, ¶¶ 59, 84 (May 24, 2005); Wendy Miles & Merryl Lawry-White, *Arbitral Institutions and the Enforcement of Climate Change Obligations for the Benefit of all Stakeholders: The Role of ICSID*, 34(1) ICSID REV.-FOREIGN INV. L.J. 1, 8 (2019).

[133] S.D. Myers, Inc. v. Government of Canada, ICSID case, Partial Award, ¶¶ 220, 247 (Nov. 13, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0747.pdf.

[134] Anna-Julia Saiger, *Domestic Courts and the Paris Agreement's Climate Goals: The Need for a Comparative Approach*, 9(1) TRANSNAT'L ENV'T L. 37, 48 (2020).

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et al. In v. Royal Dutch Shell, the Paris Agreement is used to demonstrate that the carbon dioxide emitted by Shell poses a serious threat to Dutch residents and has a serious intergenerational impact. Therefore, the enterprise must be responsible for reducing emissions.[135] In light of the above, it can be seen that the introduction of other multilateral agreements through the mutual supportiveness has become an established fact in the field of trade and investment, whether in international arbitration or domestic litigation. For the climate submission in international investment disputes, the arbitral tribunals can apply the mutual supportiveness to update "old-generation" IIAs, seeking to balance investment protection and international obligations in relation to climate change.

V. CONCLUSION

Investment treaties and climate mitigation efforts have been debated for about 15 years, but only recently has climate change been mainstreamed into investment treaty policy, primarily by aligning it with international commitments to climate change, including the Paris Agreement.[136] As the climate change issue moves from the margins to the centre of concern, it is likely that there will be an increasing number of climate-related submissions in investment arbitration, from foreign investors, host states and non-disputing parties. However, most IIAs were signed before the 2000s and are mainly aimed at promoting and protecting investments. "One-sided" IIAs tend to produce a skewed structure in international investment arbitration, resulting in a higher emphasis on foreign investment protection when deciding cases in which measures to protect the environment or climate change have been implemented by the host state. Meanwhile, arbitration for international investment is derived from commercial arbitration.[137] In most cases, the arbitral tribunals settle investment disputes in accordance with the IIAs, and many of them only focus on protecting foreign investment, not engaging with social and public arguments involved in investment disputes.[138] Considering the overriding narrative of global warming as a common concern of humanity, it is imperative to reform IIAs in order to align them with climate policies and make them more climate friendly. To ensure that the IIA regime and ISDS mechanism do not impede the Paris Agreement' s objectives, this article

[135] Rb. Den Haag 26 kunnen 2021, ECLI:NL:RBDHA:2021:5337 m.nt., ¶ 4.3.5. (Milieudefensie et al./Royal Dutch Shell plc.) (Neth.).
[136] Paine & Sheargold, *supra* note 108.
[137] Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104(2) AM. J. INT'L L. 179, 207 (2010).
[138] Gian Maria Farnelli, *Investors as Environmental Guardians? On Climate Change Policy Objectives and Compliance with Investment Agreements*, 23(5-6) J. WORLD INV. & TRADE 887, 892 (2022).

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argues that the most straightforward way to do so would be to update investment agreements so that they begin to reflect more of a climate focus within their content. As green investments gain popularity, sustainable development provisions such as those regarding the environment, human rights, labor, and climate change have been incorporated into IIAs. In addition to protecting investments, these "green" investment treaties require arbitral tribunals to consider their compatibility with other aspects of international law. Moreover, this study demonstrates that there are other, more practical ways of applying the principle of mutual supportiveness and the principle of systematic interpretation to allow arbitral tribunals to interpret agreements in a way that balance investment protection with climate policies in the host states.

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