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ARTICLE

From Fact to Applicable Law: What Role for the International Climate Change Regime in Investor-State Arbitration?

Entre élément de fait et droit applicable: quel rôle pour le régime international du climat dans l'arbitrage investisseur- État?

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Abstract

While many investor-state dispute settlement (ISDS) proceedings based on international investment agreements have dealt, directly or incidentally, with environmental issues, state measures relating to the mitigation and adaptation to climate change have been subject to a small number of reported cases. This article demonstrates that there is a significant gap between the number of investor-state disputes having a direct relevance with climate change, on the one hand, and the number of such cases that have actually raised climate change as a material legal or factual issue. In addition, arbitral tribunals faced with disputes related to

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measures or sectors that are of direct relevance to climate action have, to date, virtually never engaged in any sort of substantial analysis of international climate change treaties and related instruments, rules, or practices. Against this backdrop, this article will explore ways for arbitrators and parties to ISDS proceedings to better consider the climate regime — in particular, the *Paris Agreement* and instruments arising therefrom — in ISDS proceedings beyond its current limited role as an element of context. While the literature has mostly focused on integrating climate change concerns in ISDS, this article goes further by exploring how states' international climate obligations could play a greater role in the adjudication of investor-state disputes, including by providing states with a justification for implementing more ambitious regulations as well as tribunals with guidance for interpreting substantive obligations in investment treaties.

Keywords: Investor-state dispute settlement; climate change; *Paris Agreement*; systemic integration; applicable law

Résumé

À la différence des questions environnementales, relativement peu de procédures de règlement des différends entre investisseurs et États (RDIE) fondés sur des traités internationaux d'investissement ont porté, directement ou incidemment, sur les mesures prises par les États pour atténuer les changements climatiques et s'adapter à leurs effets néfastes. Cet article démontre qu'il existe un écart important entre le nombre de différends investisseur-État ayant un rapport direct avec le changement climatique, d'une part, et le nombre de procédures qui ont effectivement soulevé les changements climatiques en tant que question matérielle de fait ou de droit, d'autre part. En outre, les tribunaux arbitraux confrontés à des litiges portant sur des mesures ou relatifs à des secteurs ayant un rapport direct avec l'action climatique n'ont, du moins publiquement, jamais procédé à ce jour à une analyse substantielle des traités internationaux sur les changements climatiques ou instruments, règles ou pratiques s'y rapportant. Dans ce contexte, l'article explore les fondements juridiques par lesquels les arbitres et les parties pourraient mieux prendre en compte le régime international du climat, en particulier l'*Accord de Paris* et les mécanismes juridiques qu'il génère, dans les procédures de RDIE, au-delà de son rôle actuel réduit à un élément de contexte. Alors que la littérature s'est surtout concentrée sur l'intégration des préoccupations liées aux changements climatiques dans l'arbitrage d'investissement, la présente contribution va plus loin en explorant comment les obligations internationales des États en matière de changements climatiques pourraient jouer un rôle plus important dans le règlement des différends entre investisseurs et États, notamment en fournissant à ces derniers une justification pour la mise en œuvre de réglementations plus ambitieuses, ainsi qu'aux tribunaux des orientations pour l'interprétation des obligations contenues dans les traités d'investissement.

Mots clefs: Règlement des différends entre investisseurs et États; changement climatique; Accord de Paris; intégration systémique; droit applicable

1. Introduction

Environmental concerns, such as the protection of ecosystems and biodiversity, the treatment of waste and chemicals, or the prevention and remediation of environmental damage, are recurring issues in international investment law. Sustainable development is in fact one of the objectives of many modern international investment

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agreements (IIAs), which increasingly contain provisions or chapters dedicated to sustainable development and/or climate change.[1] A notable share of investor-state dispute settlement (ISDS) proceedings based on IIAs, which can take the form of either bilateral investment treaties (BIT) or investment chapters of free trade agreements (FTA), deal directly or incidentally with environmental policies.[2] They often do so by analyzing whether an environmental measure adopted at the domestic level complies with the standards of protection contained in an applicable IIA[3] or by interpreting environmental clauses contained therein in the context of a particular dispute.[4] Foreign investors have also used ISDS in recent years to challenge amendments to, or rollbacks of, several European Union (EU) member states' frameworks in the renewable energy sector[5] or to deter intended reform efforts, such as the phasing out of coal-fired power plants,[6] the conversion of coal-fired power plants into gas-fired ones,[7] or the freezing of grants for mining licences,[8] which has led to an overall increase since 2016 in the number of investor-state disputes with environmental components.[9]

Several authors have predicted that the next wave of investor-state arbitration claims will likely target host state measures aimed at implementing the mitigation and adaptation goals of the *Paris Agreement*[10] and, more specifically, their nationally determined contributions (NDC).[11] The decision reached during the fifth

[1]See generally Carlo de Stefano, "Giving 'Teeth' to Climate Change Related Obligations through International Investment Law" in Sandrine Maljean-Dubois & Jacqueline Peel, eds, *Climate Change and the Testing of International Law* (Leiden: Brill, 2023) at 256–62. For an overview of the European Union (EU) treaty-making practice in that respect, see also 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" (2022) 23 J World Investment & Trade 778 at 782–89.

[2]Investor-state dispute settlement (ISDS) is defined as the settlement of disputes between a host state and a foreign investor — that is, a national of a state other than the host state of the investment. See Christoph Schreuer, "Investment Disputes" in Anne Peters & Rüdiger Wolfrum, eds, *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008), online: <www.mpepil.com>.

[3]See e.g. *Methanex v United States of America*, NAFTA/UNCITRAL Final Award on Jurisdiction and Merits (3 August 2005); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc v Government of Canada*, NAFTA/UNCITRAL Award (17 March 2015).

[4]See e.g. *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Award (30 November 2017).

[5]See e.g. Matteo Fermeglia, "Cashing-In on the Energy Transition? Assessing Damage Evaluation Practices in Renewable Energy Investment Disputes" (2022) 23 J World Investment & Trade 982.

[6]*Westmoreland Coal Company v Government of Canada*, ICSID Case No UNCT/20/3, Final Award (31 January 2022) [*Westmoreland*].

[7]*Louis Claude Norland Suzor and SBEC Systems Limited v Republic of Senegal*, ICSID Case No ARB/22/1 (registered on 5 January 2022).

[8]See Lisa Bohmer, "Australian Uranium Miner Contemplates Arbitration Claim against Spain," *IA Reporter* (2 February 2021), online: <www.iareporter.com/articles/australian-uranium-miner-contemplates-arbitration-claim-against-spain/>.

[9]Annika Frosch & Wojciech Giemza, "Current Trends in the Investment Environmental Jurisprudence and Predictions for Investment Disputes Involving Climate Change" (2023) 20(1) Transnational Dispute Management 1 at 23 (noting that, since 2016, "the number of environmental investment disputes almost doubled [compared to 117 disputes commenced before October 2015]").

[10]*Paris Agreement*, 22 April 2016, Can TS 2016 No 9 (entered into force 4 November 2016).

[11]See e.g. Arman Sarvarian, "Invoking the Paris Agreement in Investor-State Arbitration" (2023) 38:2 ICSID Rev 422 at 433 ("[a]s States prepare their nationally determined contributions towards the collective

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Conference of the Parties (COP) serving as the Meeting of the Parties to the *Paris Agreement* during the COP28 of the *United Nations Framework Convention on Climate Change* (*UNFCCC*), which calls on parties to "accelerat[e] efforts towards the phase-down of unabated coal power" and to "transition[] away from fossil fuels in energy systems," indicates as much.[12] Others have noted that foreign investors have already sought compensation on the basis of applicable IIAs for the damages caused by state measures and regulations aiming at transitioning from fossil-fuel based economic activities to a greener economy,[13] which could in turn hinder global efforts to combat the adverse effects of climate change and meet the *Paris Agreement* targets.[14]

In this context, the present article seeks to address the following questions: what is the definition of "climate-related ISDS proceedings" and how many cases have been identified so far? How have investor-state tribunals used the climate regime in these cases to date, and is there room for further integration between international climate law and international investment law? Section 1 sets the stage by seeking to reconcile differing definitions of climate-related ISDS proceedings. Based on the work of the Sabin Center for Climate Change Law (Sabin Center)

goal defined by the Paris Agreement, they are likely to increasingly encounter claims by investors affected by regulatory measures intended to mitigate greenhouse gas emissions").

[12]"Outcome of the First Global Stocktake," Doc FCCC/PA/CMA/2023/L.17 (13 December 2023) at para 28 [revised advanced version]; *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107, Can TS 1994 No 7 (entered into force 21 March 1994) [*UNFCCC*].

[13]See Maria Rosaria Mauro, "Investment Disputes and Fight against Climate Change in Light of the Energy Charter Treaty: The Delicate Position of the European Union" (2023) 20:1 Transnational Dispute Management 1 at 4 ("[a]s a matter of fact, up to the present date, fossil fuel companies have frequently utilized investor–State arbitration, especially under the ECT"); Joshua Paine & Elisabeth Sheargold, "A Climate Change Carve-Out for Investment Treaties" (2023) 26:2 J Int' Econ L 285 at 288 ("[t]here are a growing number of ISDS cases that challenge climate-related measures, which have mostly concerned the compensation offered during phase-outs of coal-fired power plants, or decisions to deny or revoke permits for oil and gas exploration and extraction activities"). See also Frosch & Giemza, *supra* note 9 at 2–3; Josephine Dooley, "The Co-Existence of Mitigation and International Investment Law" (2022) 23 J World Investment & Trade 849 at 850.

[14]On 7 July 2023, the European Commission published a formal proposal for the withdrawal of the European Union (EU) from the *Energy Charter Treaty*, alleging that "the current, unmodernised Treaty is not in line with the EU's investment policy and law and with the EU's energy and climate goals" and that "the protection granted to fossil fuels [under the ECT] … does not fit with EU objectives as defined in the European Green Deal, the REPowerEU Plan or the Climate Law – namely: to accelerate the shift away from fossil fuels and towards renewable energy, to achieve a greater energy independence, ensure the EU's energy security, and, not least, deliver on the commitment to cut emissions by at least 55% by 2030 and to reach climate neutrality by 2050." European Commission, "Proposal for a Council Decision on the Withdrawal of the Union from the Energy Charter Treaty," Doc COM(2023) 447 final (2023) at 2–3; *Energy Charter Treaty*, 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998) [*ECT*]. In addition, the climate ministers of Denmark and New Zealand reportedly conceded that the threat of investor-state arbitration proceedings prevented their governments from being more ambitious in their climate policies, including respectively setting an earlier target for ceasing exploration projects and becoming a full member of the Beyond Oil and Gas Alliance and committing to a Paris-aligned phase-out of oil and gas. See Kyla Tienhaara et al, "Investor-state Disputes Threaten the Global Green Energy Transition" (2022) 376:6594 Science 701 at 703, citing Elizabeth Meager, "Cop26 Targets Pushed Back under Threat of Being Sued," *Capital Monitor* (14 January 2022), online: <https://capitalmonitor.ai/institution/government/cop26-ambitions-at-risk-from-energy-charter-treaty-lawsuits/>.

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at Columbia Law School and the United Nations Conference on Trade and Development (UNCTAD), this section argues that there is a significant gap between the number of investor-state disputes having a direct relevance with climate change, on the one hand, and the number of such cases that have actually raised climate change as a material legal or factual issue. Section 2 reviews how investment tribunals have used the climate regime in such cases so far. Based on the comprehensive analysis of the 358 individual cases identified by UNCTAD as "related to measures or sectors that are of direct relevance to climate action,"[15] it argues that, while international investment law and climate change mitigation (and adaptation) "co-exist,"[16] ISDS tribunals have virtually never engaged in any sort of substantial analysis of international climate change treaties, such as the *UNFCCC*,[17] the *Kyoto Protocol*,[18] the *Paris Agreement*, and related instruments, rules, or practices created by United Nations (UN) institutions and bodies (together, the climate regime).[19]

Against this backdrop, section 3 analyzes ways for arbitrators and parties to ISDS proceedings to better consider the climate regime — in particular, the *Paris Agreement* and instruments arising therefrom — in ISDS proceedings beyond its current limited role as an element of context. While the literature has mostly focused on integrating climate change concerns in ISDS, the present article goes further by exploring how states' international climate obligations could play a greater role — for instance, by providing states with a justification for implementing more ambitious regulations or tribunals with guidance for interpreting substantive obligations in investment treaties. Drawing from past case law evidencing limited, but emerging, synergies between international environmental law and international investment law,[20] it explores how parties to ISDS proceedings and tribunals could rely, where relevant, on international treaties and related instruments addressing the climate emergency. It will do so through the assessment of three strategies pursuant to which parties and tribunals could better integrate the climate regime, where appropriate, in resolving investor-state disputes.

[15]United Nations Conference on Trade and Development (UNCTAD), *International Investment in Climate Change Mitigation and Adaptation — Trends and Policy Developments*, Doc UNCTAD/DIAE/INF/2022/2 (2022) at 23 [*UNCTAD Report*]; UNCTAD, "Treaty-based Investor-State Dispute Settlement Cases and Climate Action," IIA Issues Note 4 (2022) at 2, online: <https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf> [*UNCTAD Issues Note*].

[16]Dooley, *supra* note 13 at 849.

[17]*UNFCCC*, *supra* note 12.

[18]*Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005) [*Kyoto Protocol*].

[19]For a similar acceptation, see Margaret A Young, "Climate Change Law and Regime Interaction" (2011) 2 Carbon & Climate L Rev 147 at 148 (defining the *UNFCCC* and "associated instruments" as "the central legal regime to address climate change mitigation").

[20]While many examples or interactions with other legal regimes can be found in the arbitral jurisprudence (for instance, with human rights), this article will focus on the intersection between international environmental law and ISDS since climate change treaties constitute a subcategory of environmental treaties facing similar enforcement hurdles. See generally Sandrine Maljean-Dubois, *La mise en œuvre du droit international de l'environnement* (Paris: Institut du développement durable et des relations internationales, 2003) at 25.

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2. Investor-state arbitration is highly relevant to climate change mitigation and adaptation efforts

The intersection between the climate regime and ISDS has drawn a lot of attention in the last few years from inside[21] and outside[22] the arbitration community. Critics of ISDS as a mechanism to settle disputes between foreign investors and host states involving climate change policy have pointed out the chilling effect of ISDS on mitigation and adaptation efforts.[23] In a 2023 report, David Boyd, the UN special rapporteur on human rights and the environment, condemned the settlement of disputes between host states and foreign investors through arbitration as an "unjust, undemocratic and dysfunctional process."[24] The report stresses that ISDS, by "slowing, weakening and in some cases reversing climate and environmental actions," is likely to have "catastrophic consequences … for climate and environment action and human rights."[25] Others have advanced the thesis that international investment arbitration could be a useful tool to mitigate, and adapt to, the adverse effects of climate change by fostering compliance with climate change policy objectives.[26] An analysis of current practice suggests that ISDS is a double-edged sword: on the one hand, IIAs can be used as tools to promote and protect certain categories of foreign private investment, including those advancing the mitigation and adaptation targets set by parties to the *Paris Agreement* in their NDCs;[27] on the other hand, litigation risks may dissuade states from taking ambitious measures to tackle climate change, including when such efforts seek to implement state commitments under the *Paris Agreement.*[28] This apparent contradiction prompts the following question: what do we mean by "climate change-related ISDS cases," and how many cases are we talking about?

The Sabin Center, through its Global Global Climate Change Litigation Database,[29] provides a first definition. It identifies nineteen ISDS cases as of February

[21]Wendy Miles & Merryl Lawry-White, "Arbitral Institutions and the Enforcement of Climate Change Obligations for the Benefit of All Stakeholders: The Role of ICSID" (2019) 34:1 ICSID Rev 1.

[22]Arthur Neslen, "European Commission Aims to End Secret System Protecting Fossil Fuel Holdings," *The Guardian* (8 October 2022), online: <www.theguardian.com/environment/2022/oct/08/european-commission-aims-to-end-secret-system-protecting-fossil-fuel-holdings>; Lottie Limb, "Inside the 'Secretive' Tribunals Where Fossil Fuel Companies 'Steal' from Developing Countries," *Euronews* (19 November 2022), online: <www.euronews.com/green/2022/11/19/inside-the-secretive-tribunals-where-fossil-fuel-companies-steal-from-developing-countries>.

[23]Kyla Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement" (2018) 7:2 Transnational Environmental L 229 at 233–41.

[24]David R Boyd, *Paying Polluters: The Catastrophic Consequences of Investor-State Dispute Settlement for Climate and Environment Action and Human Rights*, 78th Sess, UNGA Doc A/78/168 (13 July 2023) at 3.

[25]*Ibid.* at 2, 5.

[26]Anatole Boute, "Combating Climate Change through Investment Arbitration" (2012) 35:3 Fordham Intl LJ 613 at 660 (arguing that "[t]he focus on the potential constraining effect of investment arbitration has taken attention away from the potential positive contribution that investment law could make to combat climate change"). See also Gian Maria Farnelli, "Investors as Environmental Guardians? On Climate Change Policy Objectives and Compliance with Investment Agreements" (2023) 23 J World Investment & Trade 887 at 890.

[27]Sabrina Robert-Cuendet, "Repenser le droit des investissements face à l'urgence climatique" in Christel Cournil, ed, *La fabrique d'un droit climatique au service de la trajectoire 1.5* (Paris: Pedone, 2021) 205 at 205. See also de Stefano, *supra* note 1 at 255.

[28]Kyla Tienhaara et al, *supra* note 14 at 703.

[29]Sabin Center for Climate Change Law at Columbia Law School (Sabin Center), "Global Climate Change Litigation Database," online: <https://climatecasechart.com/non-us-climate-change-litigation/>.

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2024,[30] fourteen of which were administered by the International Centre for Settlement of Investment Disputes (ICSID). These nineteen cases fall within the broader category of "climate change litigation," defined as cases that raise "climate change law, policy, or science as a material issue of law or fact in the case."[31] The share of ISDS cases meeting this criterion is very low compared with the overall number of climate change disputes, on the one hand, and with the number of ISDS proceedings, on the other. The Sabin Center identified 2,541 climate change litigation proceedings as of 1 January 2024, and, according to UNCTAD, 1,303 ISDS cases were initiated between 1987 and mid-2023 (see Figure 1).[32]

The small number of ISDS cases construed by the Sabin Center as "climate change litigation" suggests that applying the same criterion to identify traditional (court-based) domestic and international climate change litigation cases, on the one hand, and investment arbitration proceedings, on the other hand, is not satisfactory. There are at least two reasons for this finding. First, this definition, based on the invocation of climate change law, policy, or science as a material

[30]These cases are the following, by date of introduction in chronological order (as of February 2024): *AES Solar and Others (PV Investors) v Spain*, PCA Case No 2012-14, Final Award (28 February 2020); *Isolux v Spain*, SCC Case No V2013/153, Final Award (17 July 2016); *Lone Pine v Government of Canada*, ICSID Case No UNCT/15/2, Award of the Tribunal (21 November 2022) [*Lone Pine*]; *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italian Republic*, ICSID Case No ARB/14/3, Final Award (27 December 2016); *9REN Holding v Spain*, ICSID Case No ARB/15/15, Award (31 May 2019); *Greentech Energy Systems A/S, et al v Italian Republic*, SCC Case No 2015/095, Final Award (23 December 2018); *CEF Energia v Italian Republic*, SCC Case No 158/2015, Award (16 January 2019); *Silver Ridge Power BV v Italian Republic*, ICSID Case No ARB/15/37, Award of the Tribunal (26 February 2021); *Belenergia SA v Italian Republic*, ICSID Case No ARB/15/40, Award (28 August 2019); *Eskosol v Italian Republic*, ICSID Case No ARB/15/50, Award of the Tribunal (4 September 2020); *TransCanada Corporation and TransCanada PipeLines Limited v United States of America*, ICSID Case No ARB/16/21, Order of the Secretary-General Taking Note of the Discontinuance of the Proceeding (24 March 2017); *Eco Oro Minerals Corp v Colombia*, ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021); *SunReserve Luxco Holdings SRL v Italian Republic*, SCC Case No 132/2016, Award (25 March 2020) [*SunReserve*]; *Rockhopper Italia SpA, Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v Italian Republic*, ICSID Case No ARB/17/14, Final Award (23 August 2022) [*Rockhopper*]; *Westmoreland*, *supra* note 6; *Strabag SE, Erste Nordsee-Offshore Holding GmbH and Zweite Nordsee-Offshore Holding GmbH v Federal Republic of Germany*, ICSID Case No ARB/19/29, Procedural Order No 5 (Respondent's Request to Address the Objections to Jurisdiction as a Preliminary Question) (19 April 2021); *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands*, ICSID Case No ARB/21/4, Decision on the Claimant's Request for Provisional Measures (16 August 2022) [*RWE*]; *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV v Kingdom of the Netherlands*, ICSID Case No ARB/21/22, Order Taking Note of the Discontinuance of the Proceeding and Decision on Costs (17 March 2023) [*Uniper*]; *Ascent Resources Plc and Ascent Slovenia Ltd v Republic of Slovenia*, ICSID Case No ARB/22/21, Composition of the Tribunal (7 March 2023).

[31]Joana Setzer & Catherine Higham, "Global Trends in Climate Change Litigation: 2023 Snapshot" (London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2023) at 8, online: <www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf> ("[w]e consider [climate change] litigation to include cases before judicial and quasi-judicial bodies … that involve material issues of climate change science, policy, or law").

[32]Amongst these 1,303 reported cases, 357 are pending, 173 were settled, 124 were discontinued, and the outcome of twenty-two was not made public. See UNCTAD, "Investment Dispute Settlement Navigator" (updated as of 31 July 2023), online: <investmentpolicy.unctad.org/investment-dispute-settlement> ["UNCTAD ISDS Navigator").

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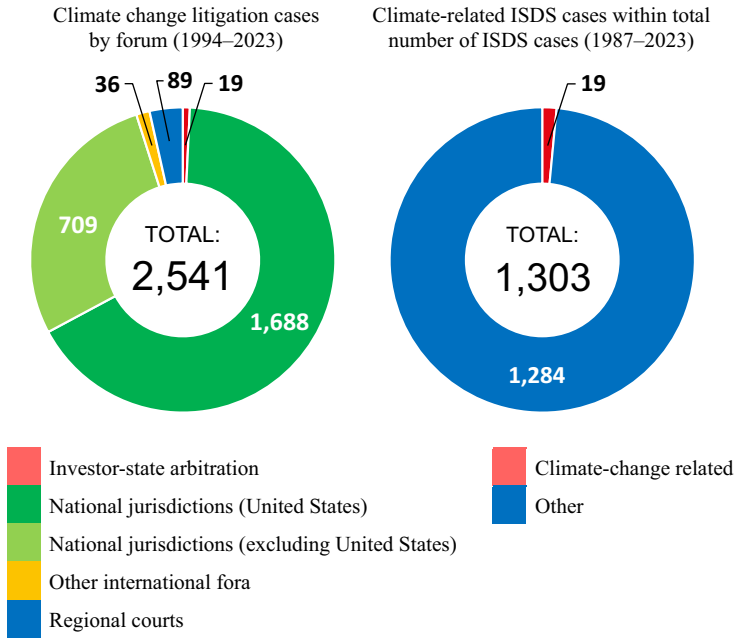

Figure 1. Share of climate-related ISDS proceedings within the total number of climate change litigation proceedings (1994–2023) and ISDS cases (1987–2023).
Source: Created by author, with data from the Sabin Center and the Global Climate Change Litigation Database, online: <climatecasechart.com/> (left) and UNCTAD's Investment Dispute Settlement Database, online: <investment policy.unctad.org/investment-dispute-settlement> (as of 1 February 2024).

issue, seems unduly narrow to properly account for climate-related ISDS proceedings.[33] This is evidenced by the fact that this list of nineteen cases includes only a small fraction of the numerous cases brought against Spain and other EU member states to amend or repeal their support schemes in favour of investors in the renewable energy sector (part of the so-called "renewable energy saga"),[34] even though they involved similar facts and issues in dispute.[35] While climate change policy was not a material factual or legal issue in the

[33]Joana Setzer and Catherine Hingham, who have commented on the cases captured in the Sabin Center's climate litigation databases for the past five years, acknowledge that this definition is "fairly narrow" and that these cases constitute "only a small sample of all climate-relevant ISDS cases, included for reference, which are more comprehensively mapped elsewhere." Setzer & Hingham, *supra* note 31 at 8, 17.

[34]Isabella Reynoso, "Spain's Renewable Energy Saga: Lessons for International Investment Law and Sustainable Development," *Investment Treaty News* (27 June 2019), online: <www.iisd.org/itn/en/2019/06/27/spains-renewable-energy-saga-lessons-for-international-investment-law-and-sustainable-development-isabella-reynoso/>.

[35]To recall, these cases arose out of the withdrawal, by several EU member states, of subsidies and other incentives to the renewable energy sector. Investors in this sector initiated at least eighty cases over the period 2011–21, including forty-eight against Spain alone. See *UNCTAD Issues Note*, *supra* note 15 at 5, 19–21.

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proceedings,[36] these disputes nonetheless related to the states' respective climate change policies — here, their support of domestic and regional energy transition efforts — and should have been counted. This incoherence in the application of the Sabin Center's definition to all renewable energy ISDS proceedings results in an under-estimation of the significant number of ISDS cases in which climate change actions have been in issue, as will be evidenced below. The risks posed by ISDS with respect to state efforts to address climate change may therefore not have been fully captured so far.[37]

Second, the above-mentioned criterion does not adequately consider several biases of the ISDS system, which are inherent to the legal basis of most investors' claims. First, since treaty-based ISDS claims can only be based on a breach by the host state of a substantive investor protection obligation in the applicable IIA, claimants in ISDS proceedings rely almost exclusively on the legal standards contained in the applicable BIT or FTA. This means that the parties to such proceedings are unlikely to rely upon domestic or international climate change as a legal basis for their claims or defences, let alone as a material issue in dispute. Second, investors may frame their claims narrowly so as to give states fewer justifications on the merits.[38] Third, investors rarely seek to bring about broader societal change through their claims, in contrast with most strategic climate litigation cases, which accounts for more than one-third of climate change litigation cases globally.[39] This partly explains why climate change as fact, law, or science has only been discussed in nineteen ISDS proceedings so far, even though the case might otherwise be related to climate change — for instance, because it involves state measures or sectors directly relevant to climate change mitigation and adaptation, such as mining and quarrying or energy supply (see Figure 2).[40]

Against this background, UNCTAD published, in the context of the debate on climate finance that took place at COP-27, a report entitled "International Investment in Climate Change Mitigation and Adaptation: Trends and Policy Developments," which provides for a different methodology for counting cases "related to measures or sectors that are of direct relevance to climate action" commenced between 1987 and 2021.[41] UNCTAD identified three subcategories of cases of direct relevance to climate action. The first category comprises at least

[36]They related for the most part as to whether the roll-back of the states' policies towards renewable energy was contrary to investment treaty standards, including but not limited to the fair and equitable treatment (FET) standard due to a frustration of the investors' legitimate expectations.

[37]See e.g. Kyla Tienhaara et al, *supra* note 14 at 703 (concluding that the "high end of our liability estimate" for the cancellation of all oil and gas projects around the world (authorized or under development) amounts to $340 billion "or even greater if coal mining and midstream fossil fuel infrastructure are considered").

[38]See e.g. the cases *Rockhopper*, *supra* note 30, and *Lone Pine*, *supra* note 30, in which the investors limited their respective claims, *inter alia*, to the alleged wrongly revocation of certain concession rights and permits (as opposed to more general policy orientations of the host states regarding hydrocarbon extraction).

[39]Setzer & Hingham, *supra* note 31 at 22 (who accounted for 382 climate-aligned strategic or semi-strategic (that is, when some but not all of the key factors of a strategic litigation are present) cases before domestic and international courts and tribunals as of May 2023, within a total of 751 cases, the United States excluded).

[40]With respectively 213 and 232 reported cases as of 31 July 2023. See "UNCTAD ISDS Navigator," *supra* note 32.

[41]*UNCTAD Report*, *supra* note 15 at 23. The earliest case was filed in 1994. See *UNCTAD Issues Note*, *supra* note 15, Annex 1.

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Figure 2. Investor-state arbitration proceedings by economic sector (1987–2023).
Source: Created by author, with data from UNCTAD's Investment Dispute Settlement Database, online: https://investment policy.unctad.org/investment-dispute-settlement (last updated 31 July 2023). The sum of the numbers of cases listed by category is higher than the total amount of reported cases as the categories are not mutually exclusive.

175 cases related to "measures taken for the protection of the environment," which UNCTAD deemed relevant to climate action because of the nature or objective of the measure at stake.[42] Such cases are relevant because the climate crisis is interlinked not only with the phase-out of fossil fuels and energy transition efforts but also with biodiversity loss and the protection, conservation, and restoration of nature and ecosystems.[43] According to the report, "[s]ome of the challenged measures involved allegations that the claimants' investment projects were environmentally harmful (causing pollution and degradation of the environment). Several cases, also counted under this category, challenged measures related to regulatory changes for renewable energy production."[44] Because some proceedings

[42]*UNCTAD Report*, *supra* note 15 at 24.

[43]Laura Létourneau Tremblay, "In Need of a Paradigm Shift: Reimagining *Eco Oro v Colombia* in Light of New Treaty Language" (2022) 23 J World Investment & Trade 915 at 918, citing the preamble of the *UNFCCC*, *supra* note 12.

[44]UNCTAD used "[a] wide working definition of the term 'environmental protection' was used to identify environmental ISDS cases. The motives behind the challenged measures can be subject to differing views between the claimant investor and the respondent State." *UNCTAD Report*, *supra* note 15 at 24.

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were kept confidential, UNCTAD noted that the actual number of environmental ISDS disputes was likely higher.[45]

The second category comprises at least 192 cases "related to fossil fuels," which involve "investment activities in the extraction, processing, distribution, supply, transportation, storage and the power generation from coal, oil, gas."[46] Here, UNCTAD focused on the claimant's industry, rather than on the nature or aim of the measure at issue, to determine the relevance of these cases to climate action. UNCTAD admits that "fossil fuel investors challenged measures that were not necessarily related to climate action or the protection of the environment."[47] Yet all ISDS cases involving investors in the fossil fuel industry were deemed relevant because emissions from fossil fuels are the most significant contributor to climate change, and foreign investors in that sector are increasingly affected by new regulations seeking to meet states' emission-reduction obligations.[48] UNCTAD stresses, for example, that "challenged measures included changes in regulatory frameworks applicable to the investment and the denial or revocation of permits on other than environmental grounds."[49] It further noted that "[a]s fossil fuel investors have frequently resorted to ISDS, they can also be expected to use existing ISDS mechanisms to challenge climate action measures aimed at restricting or phasing out fossil fuels."[50]

The third category comprises at least eighty cases involving renewable energy,[51] which UNCTAD identified as a "climate change sector" in an earlier report.[52] Such cases mostly concern the roll-back of support schemes.[53] In total, UNCTAD identified

[45]*Ibid* at 24.

[46]*Ibid* at 26, n 29.

[47]*Ibid.*

[48]Lea Di Salvatore, "Investor–State Disputes in the Fossil Fuel Industry," *International Institute for Sustainable Development* (31 December 2021) at 1, online: <www.iisd.org/publications/report/investor-state-disputes-fossil-fuel-industry>; Anja Ipp, Annette Magnusson & Andrina Kjellgren, "The Energy Charter Treaty, Climate Change and the Clean Energy Transition: A Study of the Jurisprudence," *Climate Change Counsel* (15 March 2022) at 46, online: <www.climatechangecounsel.com/_files/ugd/f1e6f3_d184e02bff3d49ee8144328e6c45215f.pdf>.

[49]*UNCTAD Report*, *supra* note 15 at 26. Examples include *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award (8 December 2008) (claims arising out of the government's modification of its hydrocarbons regulatory framework); *Biedermann International, Inc v Republic of Kazakhstan and the Association for Social and Economic Development of Western Kazakhstan 'Intercaspian'*, SCC Case No 97/1996, Award (2 August 1999) (claims arising out of the government's termination of an oil concession agreement entered into with the claimant for its alleged failure to perform contractual obligations).

[50]*UNCTAD Report*, *supra* note 15 at 26.

[51]Such cases were "brought by investors in the renewable energy sector," many of which "challenged Governments' legislative changes involving reductions in feed-in-tariffs for renewable energy production." *Ibid* at 28.

[52]UNCTAD, "Investment Policy Trends in Climate Change sectors, 2010–2022," Special Issue 9 (2022) at 1, online: <https://unctad.org/system/files/official-document/diaepcbinf2022d8_en.pdf>.

[53]Sudhanshu Swaroop KC & Paul Barker, "The Paris Agreement, Net Zero Energy Transition, and Investor-State Dispute Settlement: Aligning the Investment Treaty System with Climate Change Law & Policy" (2023) 20:1 Transnational Dispute Management 1 at 3. For example, over twenty published awards concern claims that Spain's modification and ultimate cancellation of a feed-in-tariff renewable energy support scheme between 2010 and 2014 breached the *ECT*, leading to over €1 billion in compensation by this country alone. See *ibid* at 9.

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358 ISDS individual pending or concluded ISDS disputes initiated between 1987 and 2021 that are directly relevant to climate change action because of the subject matter of the dispute (either the nature of the investment, its economic sector, or the state policies being challenged and, where applicable, whether such policies or measures were taken in furtherance of international commitments). The categories are not mutually exclusive — in particular, the entire list of renewable energy disputes (eighty cases) is subsumed in the category of environmental cases.[54] These numbers are consistent with another study in 2019 that found that, in the aggregate, 67 percent of the cases filed with ICSID "potentially involve climate change-related issues."[55]

Two different institutions, using their own definition of what constitutes climate-related ISDS proceedings, have thus reached contrasting results. According to the Sabin Center, slightly under 1.5 percent of ISDS proceedings initiated to date are climate related, while, according to UNCTAD, this percentage rises to 29.8 percent over the period from 1987 to 2021. The results obtained by the Sabin Center and UNCTAD show that there is a large gap between the number of investor-state disputes directly relevant to climate change action because of their subject matter, on the one hand, and the handful of cases in which climate change was a material factual or legal issue in the proceedings. As evidenced in the following section, the number of cases in which the tribunal made a significant reference to an applicable element of the climate regime is even lower.

3. When ISDS tribunals consider the climate regime, they almost exclusively refer to it as an element of context

I have reviewed all publicly available decisions and awards on jurisdiction and/or liability originating from the 358 individual cases commenced between 1994 and 2021[56] that have been identified by UNCTAD as "related to measures or sectors of

[54]UNCTAD notes that "some cases are counted as environmental ISDS cases and fossil fuel cases at the same time." *UNCTAD Report*, *supra* note 15 at 23. Ten cases concerned measures taken for the protection of the environment and related to fossil fuels (hereby pertaining to categories 1 and 2), while eighty cases concerned measures taken for the protection of the environment and related to the renewable energy sector (categories 1 and 3). This list is not exhaustive — for instance, UNCTAD did not count *Prairie Mining Limited v Republic of Poland*, UNCITRAL/PCA (2020) under the *ECT*, in which the claimant was seeking damages for the government's alleged actions to block the development of the claimant's coal mines in Poland.

[55]Miles & Lawry-White, *supra* note 21 at 5.

[56]I have used the following method: (1) I identified and gathered the publicly available dispute documents (awards, decisions, and pleadings, where applicable) arising out of the 358 individual ISDS cases related to measures or sectors that are of direct relevance to climate action listed by UNCTAD (see section 2). I used for that purpose the research platforms Italaw, Investor-State Law Guide, and Jus Mundi; (2) I reviewed the contents of the corresponding awards and decisions on jurisdiction and/or liability in order to identify references to (i) international climate treaties (*UNFCCC*, *Kyoto Protocol*, *Paris Agreement*), (ii) other components of the climate regime, and (iii) climate change issues more generally using targeted key words. Where available, I also reviewed party pleadings in order to provide context to the above-mentioned decisions and awards; (4) I divided the cases into four categories: (i) cases in which the tribunal referred to an applicable element of the climate regime as background information or context; (ii) cases in which the tribunal drew legal conclusions or inferences from such element(s) (e.g. in order to interpret the host State's domestic law or the standards of treatment contained in the applicable international investment agreement [IIA]); (iii) cases in which the tribunal did not refer or otherwise discussed any element of the climate regime; and (iv) cases pending, discontinued, or for which the documents of the case were not publicly available. No case was introduced prior to the adoption of the *UNFCCC* in May 1992. Only one case was initiated before the entry into force of the *UNFCCC* in March 1994 — namely, *Saar Papier Vertriebs GmbH v Republic of Poland (I)*, UNCITRAL, Final Award (16 October 1995).

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direct relevance to climate action."[57] Because of the direct link of these disputes with climate action, one would expect the parties to at least consider in their pleadings, if not invoke, the rules and policies governing climate change mitigation and adaptation efforts. This is because, on the one hand, states facing ISDS claims could seek to balance such rules and policies against investment treaty protections in order to obtain more "flexibility for the necessary regulatory experimentation leading to climate adaptation" as well as "the necessary policy space … to take urgent climate action."[58] On the other hand, investors, where relevant, could also rely on the climate regime to hold a government in breach of its investment treaty obligations due to its actions and inactions on climate change.[59] However, my analysis shows that the majority of tribunals have not acknowledged or otherwise referred to any element of the climate regime (that is, international climate change treaties and/or related instruments, rules, or practices) in publicly available decisions and awards, which indicates that they have been seldom invoked by the parties to such disputes (see Figure 3). Virtually, none of the ISDS tribunals have engaged in any sort of substantial analysis of international climate change treaties, and only one tribunal has made a legal finding based on an element of the climate regime[60] — namely, the fourth national communication of the Czech Republic on the *UNFCCC* in 2005, which served as evidence of host state conduct.[61]

Most often, decisions and awards rendered by investor-state tribunals in these cases have referred to sub-components of the climate regime in the section relating to the factual background of the dispute, rather than in the discussion of the applicable rules to assess the merits of the investor's claims as part of the award's statement of reasons.[62] It is not uncommon for arbitral tribunals to construe legal

[57] *UNCTAD Report*, *supra* note 15 at 13; *UNCTAD Issues Note*, *supra* note 15 at 2.

[58] *UNCTAD Issues Note*, *supra* note 15 at 6–7.

[59] See Annette Magnusson, "New Arbitration Frontiers: Climate Change" in Jean Kalicki & Mohamed Abdel Raouf, eds, *Evolution and Adaptation: The Future of International Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2020) 1010 at 1021.

[60] *Antaris Solar GmbH and Dr Michael Göde v Czech Republic*, PCA Case No 2014-01, Award (2 May 2018) at paras 115 and 367 [*Antaris*].

[61] Ministry of the Environment of the Czech Republic and Czech Hydrometeorological Institute, "Fourth National Communication of the Czech Republic on the UN Framework Convention on Climate Change and Demonstrable Progress Report on Implementation of the *Kyoto Protocol*" (2005), online: <https://unfccc.int/resource/docs/natc/czenc4.pdf>.

[62] The decisions and awards referring to elements of the climate regime in the section relating to the factual background of the dispute are (by date of introduction in reverse chronological order): *LSG Building Solutions GmbH and others v Romania*, ICSID Case No ARB/18/19, Decision on Jurisdiction, Liability and Principles of Reparation (11 July 2022) at paras 44–45 [*LSG*]; *FREIF Eurowind Holdings Ltd v Kingdom of Spain*, SCC Case No 2017/060, Award (8 March 2021) at para 156; *Triodos SICAV II v Kingdom of Spain*, SCC Case No 2017/194, Final Award (24 October 2022) at para 118; *Sevilla Beheer BV and Others v Kingdom of Spain*, ICSID Case No ARB/16/27, Decision on Jurisdiction (11 February 2022) at para 169; *ESPF Beteiligungs GmbH, ESPF Nr 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co KG v Italian Republic*, ICSID Case No ARB/16/5, Award (14 September 2020) at para 73; *Eurus Energy Holdings Corporation and Eurus Energy Europe BV v Kingdom of Spain*, ICSID Case No ARB/16/4, Decision on Jurisdiction (17 March 2021) at para 97; *Green Power K/S and SCE Solar Don Benito APS v Kingdom of Spain*, SCC Case No V2016/135, Award (16 June 2022) at para 60; *Infracapital F1 Sàrl and Infracapital Solar BV v Kingdom of Spain*, ICSID Case No ARB/16/18, Decision on Jurisdiction Liability and Quantum (13 September 2021) at para 113; *SunReserve*, *supra* note 30 at paras 99–100, 104; *BayWa re Renewable Energy GmbH and BayWa re Asset Holding GmbH v Kingdom of Spain*, ICSID Case No ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum (2 December 2019) at para 86; *Cavalum SGPS, SA v Kingdom of Spain*, ICSID Case

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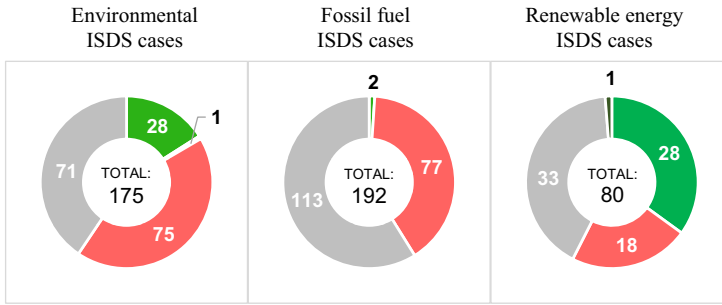

Figure 3a. References to the climate regime in climate-related ISDS cases by category of case (1987–2021).

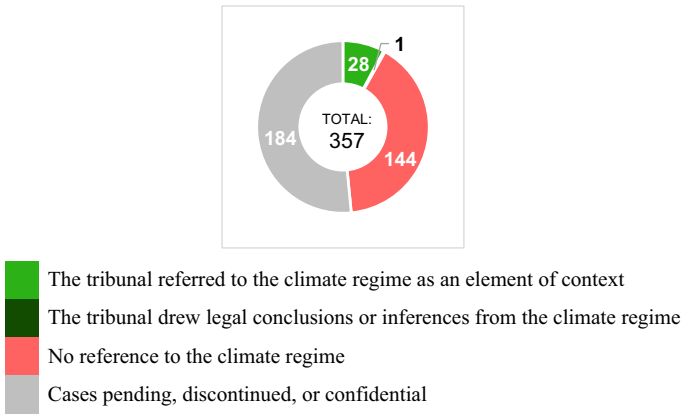

Figure 3b. References to the climate regime in climate-related ISDS cases (total number of individual cases) (1987–2021).
Source: Created by author, with list of cases from UNCTAD, "Treaty-based Investor-state Dispute Settlement Cases and Climate Action," IIA Issues Note 4 (2022), Annex 1, online: https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf.

No ARB/15/34, Decision on Jurisdiction, Liability and Quantum (31 August 2020) at paras 479, 485–86; *Foresight Luxembourg Solar 1 SÀRL, Foresight Luxembourg Solar 2 SÀRL, Greentech Energy Systems A/S, GWM Renewable Energy I SPA, GWM Renewable Energy II SPA v Kingdom of Spain*, SCC Case No 2015/150, Award (14 November 2018) at para 53; *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v Italian Republic*, SCC Case No V 2015/095, Award (23 December 2018) at para 105; *Hydro Energy 1 Sàrl and Hydroxana Sweden AB v Kingdom of Spain*, ICSID Case No ARB/15/42, Decision on Jurisdiction, Liability and Quantum (17 February 2020) at paras 72, 79, 85–86; *Mathias Kruck, Frank Schumm, Joachim Kruck, Jürgen Reiss and others v Kingdom of Spain*, ICSID Case No ARB/15/23, Decision on Jurisdiction and Admissibility (19 April 2021) at para 119; *Mathias Kruck, Frank Schumm, Joachim Kruck, Jürgen Reiss and others v Kingdom of Spain*, Decision on Jurisdiction and Liability and Principles of Quantum (14 September 2022) at para 29; *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v Kingdom of Spain*, ICSID Case No ARB/15/36, Award (6 September 2019) at para 126; Dissenting Opinion on Liability and Quantum by Arbitrator Philippe Sands (6 September 2019) at para 5; *Silver Ridge Power BV v Italian Republic*, ICSID Case No ARB/15/37, Award (26 February 2021) at para 113; *Stadtwerke München GmbH and others v Kingdom of Spain*, ICSID Case No ARB/15/1, Award (2 December 2019) at para 113; *STEAG GmbH v Kingdom of Spain*, ICSID Case No ARB/15/4, Decision on Jurisdiction, Liability and Directions on Quantum (8 October 2020) at para 112; *Watkins Holdings Sàrl and Others v Kingdom of Spain*, ICSID Case No ARB/15/44, Award (21 January 2020) at paras 71–72; *InfraRed Environmental Infrastructure GP Limited and Others v Kingdom of Spain*, ICSID Case No ARB/14/12, Award

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norms as contextual information belonging in the "facts" section of their awards when such norms fall outside of what they consider to be the law applicable to the dispute.[63] The climate regime is no stranger to this phenomenon. In fact, "the potential legal territory where an arbitral tribunal could find itself charged with the task of balancing international investment law … and climate change law, including GHG-curbing ambitions or NDC commitments under the *Paris Agreement*, remains unchartered."[64]

In a number of awards arising out of the decision by several EU countries to withdraw or amend their respective national support schemes to incentivize investments in the renewable energy sector, tribunals referred to elements of the climate regime — at the time, the *UNFCCC* and/or the *Kyoto Protocol* and related instruments — as procedural facts explaining the context of the support schemes' introduction rather than as a legal norm relevant to the interpretation of such domestic legislation or to the adjudication of the claims on the merits more generally.[65] My analysis shows that investor-state tribunals tend to consider the climate regime — most often, the *UNFCCC*, the *Kyoto Protocol*, and the *Paris Agreement* — at best as an element of context, including the very few instances where the climate change emergency was a core driver of the measure in dispute.[66] The climate regime was cited in only two fossil fuel ISDS cases. In the first case, a tribunal also used the

(2 August 2019) at para 3; *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain*, ICSID Case No ARB/14/1, Award (16 May 2018) at paras 103–05; *NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings BV v Kingdom of Spain*, ICSID Case No ARB/14/11, Decision on Jurisdiction, Liability and Principles of Quantum (12 March 2019) at paras 100–01; *RWE Innogy GmbH and RWE Innogy Aersa SAU v Kingdom of Spain*, ICSID Case No ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum (30 December 2019) at para 143; *Infrastructure Services Luxembourg Sàrl and Energia Termosolar BV (formerly Antin Infrastructure Services Luxembourg Sàrl and Antin Energia Termosolar BV) v Kingdom of Spain*, ICSID Case No ARB/13/31, Award (15 June 2018) at para 82; *Natland Investment Group NV, Natland Group Limited, GIHG Limited, and Radiance Energy Holding SARL v Czech Republic*, PCA Case No 2013-35, Partial Award (20 December 2017) at para 99; *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sà rl v Kingdom of Spain*, ICSID Case No ARB/13/30, Decision on Responsibility and on the Principles of Quantum (30 November 2018) at paras 87, 91; *AES Solar and Others (PV Investors) v Kingdom of Spain*, PCA Case No 2012-14, Final Award (22 February 2020) at para 591; *Guaracachi America, Inc and Rurelec PLC v Plurinational State of Bolivia*, PCA Case No 2011-17, Award (31 January 2014) at para 128 [*Guaracachi*].

[63]See e.g. *ESPF Beteiligungs GmbH, ESPF Nr 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co KG v Italian Republic*, ICSID Case No ARB/16/5, Award (14 September 2020) at para 401 ("[t]he Tribunal agrees with the Claimants that Italian law is relevant to this dispute only as a matter of fact or background context, and that it should not influence the legal standards that the Tribunal applies to determine whether the Respondent violated the ECT"). See also *Alps Finance and Trade AG v Slovak Republic*, UNCITRAL, Award (5 March 2011) at para 197.

[64]Magnusson, *supra* note 59 at 1024.

[65]See e.g. *LSG*, *supra* note 62 at 44 ("[t]he *Kyoto Protocol* provides, *inter alia*, that States parties to the Protocol must 'implement and/or further elaborate policies and measures' such as '[r]esearch on, and promotion, development and increased use of, new and renewable forms of energy.' This is because renewable sources of energy … generate much lower levels of greenhouse gas than fossil fuels"). See also *Antaris Solar GmbH and Dr. Michael Göde v Czech Republic*, PCA Case No 2014-01, Award (2 May 2018) at paras 81, 109, 115; *Stadtwerke Munchen GmbH and others v Kingdom of Spain*, ICSID Case No ARB/15/1, Award (2 December 2019) at paras 50–52. See also Magnusson, *supra* note 59 at 1024; Swaroop & Barker, *supra* note 53 at 10.

[66]See e.g. Rockhopper, *supra* note 30 (regarding the decision by the Italian Ministry of Economic Development not to award the claimants a concession to exploit the Ombrina Mare oil and gas, following the government's ban on oil and gas exploration within twelve miles of the Italian coastline). See also

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UNFCCC, along with the *Treaty on the Non-Proliferation of Nuclear Weapons*, as an illustration of treaties in which the parties "consciously and expressly to decide that the burden of right and obligation will fall differently on different treaty parties, or groups of treaty parties."[67] In the second case, the tribunal mentioned that "[t]he purpose of the project — apart from obtaining better economic and financial results — was to enhance the sustainable development of Bolivia through the development of state-of-the-art combined cycle technology, in accordance with the *United Nations Framework Convention on Climate Change*."[68]

The most notable use of an element of the climate regime is found in *Antaris and Göde v Czech Republic*.[69] In this case, which is part of the so-called "renewable energy saga,"[70] a tribunal constituted under the Permanent Court of Arbitration faced claims by German renewable energy investors that the Czech Republic breached the fair and equitable (FET) and full protection and security (FPS) standards under the *Energy Charter Treaty* (*ECT*) and the 1992 *Germany-Czechoslovakia BIT* by "repealing incentive arrangements to attract investors in photovoltaic power generation contrary to its guarantees."[71] In particular, the tribunal was faced with the issue of whether section 6 of *Act 180/2005*, which was intended to promote the use of renewable energy sources, created a promise of regulatory stability and the expectation that the claimants would maintain feed-in tariffs for renewable energy sources at fixed minimum rates for fifteen years (later amended to twenty years) — that is, over the lifetime of the claimants' project.[72] The tribunal rejected the claimants' argument that, under the applicable treaties, "there [was] a free-standing obligation to provide a stable and predictable investment framework" as well as the respondent's contention that "no legitimate expectations as to stability can arise in the absence of a legislative or contractual stabilization arrangement."[73] The tribunal, however, accepted that "promises or representations to investors may be inferred from domestic legislation

Westmoreland, *supra* note 6 (regarding the Alberta government's decision to phase out coal-fired power plants by 2030). The claim was however dismissed on jurisdictional grounds.

[67] *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia*, ICSID Case No ARB/13/32, Award (5 July 2022) at para 448; *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970).

[68] *Guaracachi*, *supra* note 62 at para 128.

[69] *Antaris*, *supra* note 60.

[70] Maximilian Schmidl, "The Renewable Energy Saga from Charanne v Spain to the *PV Investors v Spain*: Trying to See the Wood for the Trees," *Kluwer Arbitration Blog* (1 February 2021), online: <arbitrationblog.kluwerarbitration.com/2021/02/01/the-renewable-energy-saga-from-charanne-v-spain-to-the-pv-investors-v-spain-trying-to-see-the-wood-for-the-trees/>.

[71] *Antaris*, *supra* note 60 at para 10; *ECT*, *supra* note 14; *Agreement between the Federal Republic of Germany and the Czech and Slovak Federal Republic on the Promotion and Reciprocal Protection of Investments*, 2 October 1990, 1909 UNTS 391 (entered into force 2 August 1992); *Act on the Promotion of Electricity Production from Renewable Energy Sources and Amending Certain Acts*, Coll No 180/2005, (31 March 2005).

[72] See *Antaris*, *supra* note 60 at paras 364, 400.

[73] *Ibid* at para 365. For a detailed summary of the tribunal's findings in context, see Joseph Paguio, "The Czech Republic Fends Off Another Claim in Relation to Their Renewable Energy Scheme," *Investment Treaty News* (17 October 2018), online: <www.iisd.org/itn/en/2018/10/17/the-czech-republic-fends-off-another-claim-in-relation-to-their-renewable-energy-scheme-joseph-paguio/>.

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in the context of its background, including official statements," even if such statements do not have legal force.[74]

The tribunal noted, in addition to statements by the Czech Ministry of Industry and Trade, that "the Respondent *in the 2005 UN Report* described the purpose of Section 6(1)(b)(2) as: 'providing guarantees to the investors and owners … that … revenue …will be maintained for a period of 15 years'; and the [Energy Regulatory Office] described the Act on Promotion as 'bringing a guarantee of long-term and stable promotion' … including a 'guarantee of revenues … for a period of 15 years.'"[75] Such statements, even if they were not binding on the State, demonstrate that "both the Respondent and the [Energy Regulatory Office] described the incentive regime in terms of a guarantee or promise of stability, and that the Czech Government actively promoted the new regime at home and abroad, and described its main element in terms of a guarantee."[76] The tribunal thus relied on an element of the climate regime — the 2005 fourth national communication of the Czech Republic on the *UNFCCC* — as evidence of the host state's conduct in order to determine that the Czech incentive regime amounted to a guarantee or promise of stability. According to the majority of the tribunal, such promise did not give rise, however, to a legitimate and reasonable expectation of stability in light of the claimants' own lack of due diligence.[77]

Tribunals have also referred to the climate regime more frequently in decisions and awards rendered in proceedings initiated since 2015 (in 50 percent of publicly available cases), as compared to the period 1994–2014 (in 8 percent of publicly available cases) (see Figure 4). This trend may gain pace in the near future[78] since parties have in recent submissions started to rely on, or challenge, domestic regulations arising out of state commitments under the *Paris Agreement*, including NDCs.[79] In his 2023 report, the UN special rapporteur noted at least seven additional "examples of ISDS claims launched in response to climate actions" between 2021 and

[74]*Antaris*, *supra* note 60 at para 366.

[75]*Ibid* at para 367 [emphasis added]; see also para 115.

[76]*Ibid* at para 366.

[77]See *ibid* at paras 435–45, especially 435 ("[t]he Tribunal considers that Dr Göde's actions were essentially opportunistic, and that the investment protection regime was never intended to promote and safeguard those who, in the words of the Respondent, 'pile in' to take advantage of laws which they must know may be in a state of flux caused essentially by investors of that type") and 445 ("[t]he measures dealt with a pressing problem caused by the late entry of many investors (mainly domestic) seeking to take advantage of an incentive regime which was bound to change"). The public purpose of the regulatory change also played a role in the dismissal of the claims. See *ibid* at para 444 ("[t]he Tribunal accepts that the Respondent had the rational objective of reducing excessive profits and sheltering consumers from excessive electricity price rises, and that its actions were not arbitrary or irrational. There was an appropriate correlation between the Respondent's objectives and the measures it took. There is nothing irrational or unreasonable about the imposition of a charge to regulate what the Respondent reasonably regarded as windfall profits and to reduce the impact on consumers, and the measures … were not disproportionate").

[78]Dooley, *supra* note 13 at 855 ("since mitigation measures will continue to increase in incidence and form as States develop their successive NDCs, it is reasonable to expect that climate change mitigation will be a new arena examined by investor-State tribunals").

[79]Catherine Hingham & Joana Setzer, *"Investor-State Dispute Settlement" as a New Avenue for Climate Change Litigation* (London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 17 June 2021), online: <www.lse.ac.uk/granthaminstitute/news/investor-state-dispute-settlement-as-a-new-avenue-for-climate-change-litigation/> (noting that "[a]t least 13 climate-related ISDS cases filed between

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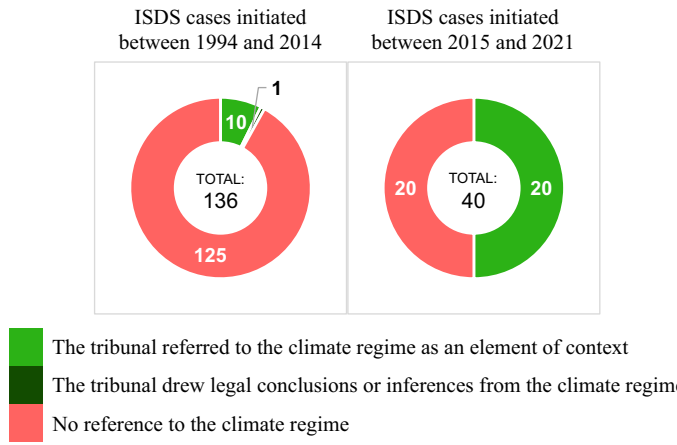

Figure 4. References to the climate regime in publicly available climate-related ISDS decisions and awards over time (1994–2021).
Source: Created by author, with list of cases from UNCTAD, "Treaty-based Investor-state Dispute Settlement Cases and Climate Action," IIA Issues Note 4 (2022), Annex 1, online: <unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf>.

2023.[80] While the *Paris Agreement* has not yet been cited or otherwise referred to in a tribunal's award or decision, it has been used by parties in at least five ISDS cases, one of which is pending and another suspended.[81] No tribunal has yet referred to a state's

2012 and [2021] … relate directly to the introduction, withdrawal or amendment of a policy measure explicitly developed to meet a country's climate goals").

[80]Boyd, *supra* note 24, Annex 2. These cases, not captured by UNCTAD's study, are the following: *Discovery Global LLC v Slovak Republic*, ICSID Case No ARB/21/51, Request for Arbitration (30 September 2021); *TC Energy Corporation and TransCanada Pipelines Limited v United States of America*, ICSID Case No ARB/21/63, Request for Arbitration (22 December 2021); *Clara Petroleum Ltd v Romania*, ICSID Case No ARB/22/10, Request for Arbitration (1 April 2022); *Ruby River Capital LLC v Government of Canada*, ICSID Case No ARB/23/5, Request for Arbitration (17 February 2023) [*Ruby River*]; *Alberta Petroleum Marketing Commission v United States of America*, ICSID Case No UNCT/23/4, Notice of Arbitration (27 April 2023); *Zenith Energy Africa Ltd, Zenith Overseas Assets Ltd and Compagnie du Désert Ltd v Republic of Tunisia*, ICSID Case No ARB/23/18, Request for Arbitration (5 June 2023); *Korea National Oil Corporation, KNOC Nigerian West Oil Company Limited, and KNOC Nigerian East Oil Company Limited v Federal Republic of Nigeria*, ICSID Case No ARB/23/19, Request for Arbitration (8 June 2023).

[81]*Ruby River*, *supra* note 80 at para 52 (pending); *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV v Kingdom of the Netherlands*, ICSID Case No ARB/21/22, Claimant's Memorial (18 December 2021) at paras 82, 238, 365 (discontinued); *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands*, ICSID Case No ARB/21/4, Claimants Memorial (18 December 2021) at paras 287, 490, 591; Respondent's Counter-Memorial (5 September 2022) at paras 178–80, 447–51, 459, 506, 704, 782, 923, 983, 1115–22 (suspended); *Westmoreland Coal Company v Government of Canada*, ICSID Case No UNCT/20/3, Statement of Defense (26 June 2020) at para 22, nn 26–27 (for the proposition that the federal government's notice of intent to amend the 2012 Federal Emissions Regulations as part of a plan to accelerate the transition to cleaner electricity in Canada "related to Canada's commitments under the Paris Agreement") (dismissed on jurisdictional grounds). See also *Michael Ballantine and Lisa Ballantine v Dominican Republic*, PCA Case No 2016-17, Claimants' Reply (25 May 2017), n 476. Other relevant cases include *Vattenfall AB and Others v Federal Republic of Germany*, ICSID Case No ARB/09/6 (2009) (regarding Germany's decision to phase out

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NDC under the *Paris Agreement*; however, a small number of investor claims have sought to challenge state measures seeking to mitigate climate change or adapt to its adverse effects in furtherance of the targets of the *Paris Agreement*.

In particular, two cases under the *ECT* have involved The Netherlands' 2019 decision to phase out coal-fired power by 2030, which was reportedly drafted "in consideration of international and EU law," including the EU's first NDC to reduce GHG emissions by at least 40 percent by 2030, compared to 1990 levels.[82] In another pending case, a Luxembourg investor filed an ICSID claim against Slovenia under the *ECT* arising out of the government's alleged expropriatory and discriminatory treatment of the claimant's investment in a local coal-mining company.[83] The claimants in these cases have challenged measures designed to achieve the host states' respective mitigation goals; however, it is not difficult to imagine a future scenario in which the state's roll-back of its climate mitigation and adaptation policies, contrary the state's commitments reflected in its successive NDCs, could amount to a breach of treaty standards,[84] similar to the claimants' argument in *Antaris v Czech Republic*. To date, none of the awards in the solar energy arbitrations contain any factual conclusions or arguments regarding GHG emissions or any international obligations relating to climate change.[85] Tribunals may however be called upon to interpret and give effect to the international climate obligations arising out of the *Paris Agreement*, and their interplay with investment treaty protections in the near future, as a result of these pending claims.[86] In order to better align with states' obligations stemming from the *Paris Agreement*, as well as the recent wave of withdrawals from the *ECT* (particularly from several EU member states), the modernization process of the *ECT* is likely to have a significant impact on the nature and availability of ISDS to resolve climate change-related investment disputes in the future.[87]

nuclear power plants by 2022; settled); *Koch Industries, Inc and Koch Supply & Trading, LP v Government of Canada*, ICSID Case No ARB/20/52 (2020) (regarding the 2018 cancellation of the cap-and-trade program by the Canadian province of Ontario and its alleged failure to compensate the claimants for the carbon emissions allowances purchased under the same; pending); *Lone Pine*, *supra* note 30 (regarding the Canadian province of Quebec's revocation of permits for oil and natural gas exploration in the Utica shale gas basin; decided in favour of the state); *Rockhopper*, *supra* note 30 (decided in favour of the state).

[82]See *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands*, ICSID Case No ARB/21/4, Respondent's Counter-Memorial (5 September 2022) at paras 178–81, 447–51, especially 447; *Uniper*, *supra* note 30. The former has been suspended by the tribunal since 20 October 2022, and the latter was discontinued in March 2023 following Germany's bailout of Uniper.

[83]*Towra SA-SPF v Republic of Slovenia*, ICSID Case No ARB/22/33 (5 December 2022).

[84]See note 183 below. For the proposition that "the legitimate expectations of investors guaranteed by IIAs should now be evaluated taking into account the necessity of States to adopt measures for the clean energy transition to which they have committed," see Mauro, *supra* note 13 at 29.

[85]Magnusson, *supra* note 59 at 1024.

[86]See Sarvarian, *supra* note 11, at 433; Dooley, *supra* note 13 at 855.

[87]The *ECT* is the most invoked IIA with at least 158 reported ISDS proceedings as of 31 July 2023. See "UNCTAD ISDS Navigator," *supra* note 32. See also Brian Japari, "The Energy Charter Treaty: Reform or Retreat?" *Columbia Journal of Transnational Law Bulletin* (2023); Felix Ekardt et al, "Energy Charter Treaty: Towards a New Interpretation in the Light of Paris Agreement and Human Rights" (2023) 15:6 Sustainability 5006.

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As shown above, only a handful of ISDS proceedings have actually engaged with the climate regime to date, even though they were "directly relevant to climate change policy." There is thus a tension between the overarching nature of climate change as one of the "greatest challenges of our times,"[88] on the one hand, and the apparent lack of consideration by investor-state tribunals of the climate regime when called upon to rule on investor-state disputes, on the other hand. While many potential factors can influence a tribunal's reasoning, including its limited mandate,[89] it is more than ever necessary to question the limited use by investment tribunals of the climate regime so far, considering the "significant effect" that the *Paris Agreement* could have "on a wide range of investment relationships."[90] This necessity has arisen because "climate change mitigation will be a new arena examined by investor-State tribunals,"[91] which will be called upon to assess whether states' domestic climate policies, arising out of their respective NDCs, constitute breaches of applicable treaty protections when they adversely impact foreign investors and their investments. It is also because the protection granted to foreign investors, including ISDS, has the potential to foster compliance by states with their climate mitigation targets under the *Paris Agreement* and to incentivize investment in the renewable energy sector.[92] In fact, nothing prevents ISDS proceedings from becoming a suitable mechanism to adjudicate disputes involving environmental and climate change issues — even if such issues are dealt with accessorily to an investment dispute — subject to the introduction of adequate jurisdictional mechanisms to that effect.[93]

In light of the large number of ongoing and forthcoming ISDS climate-change proceedings, whose combined effect could potentially undermine the international community's efforts to combat climate change or, at the very least, divert a substantial

[88]Sandrine Maljean-Dubois, Hélène Ruiz-Fabri & Stephan W Schill, "International Investment Law and Climate Change: Introduction to the Special Issue" (2022) 23 J World Investment & Trade 737.

[89]Such factors, which are yet to be studied, include (1) the limited mandate of ISDS tribunals, which are called upon to decide investor-state disputes on the basis of specific instrument(s) of consent. Most frequently, treaty-based ISDS claims can only be based on a breach, by the host state, of a standard of protection contained in the applicable investment treaty; (2) the strategies put forward by the parties, including state defences and choices of arbitrators, and (3), arguably, a lack of training and/or knowledge in international environmental law, creative thinking, and innovative legal strategies by arbitration practitioners involved in climate change disputes. This is hinted by Lucy Greenwood, who stated that "to stay relevant as arbitration practitioners … we need to develop expertise in climate change-related disputes" as "we have, as a global dispute resolution community, been somewhat out of touch with regard to climate change and the impact it is having and will have on our practices." Lucy Greenwood, "The Canary Is Dead: Arbitration and Climate Change" (2021) 38:3 J Intl Arb 309 at 324. On the "limited mandate [of arbitral tribunals] and their uneven consideration of environmental concerns in the past," see Valentina Vadi, "Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals" (2015) 48:5 Vand J Transnat'l L 1285 at 1351.

[90]Sarvarian, *supra* note 11 at 429.

[91]Dooley, *supra* note 13 at 855.

[92]See generally Farnelli, *supra* note 26. See also Magnusson, *supra* note 59 at 1020.

[93]Diego Mejía-Lemos, "The Suitability of Investor-State Dispute Settlement and Host State Counterclaims for Implementing Climate Change International Responsibility" (2022) 32:2 RECIEL 334 at 347. The author notes "the role ISDS arbitral proceedings may play as means for implementing international responsibility for breaches of climate change obligations as well as the role of international investment law in substantiating such obligations." *Ibid* at 346.

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amount of funding from climate mitigation and adaptation efforts,[94] this article will now answer the following question: how can ISDS tribunals better integrate climate change concerns in future cases? Based on a review of references found in publicly available pleadings, awards, and decisions published to date, it will do so by identifying precedents in which parties and tribunals have successfully used, or otherwise relied on, international environmental treaties and standards and which may be applied *mutatis mutandis* to the climate regime.

4. Legal pathways to better integrate the climate regime in ISDS

While there is abundant literature offering proposals to reform international investment law, particularly with respect to treaty-making practice,[95] only a handful of authors have explored ways to safeguard states' climate change mitigation and adaptation goals in investor-state disputes brought under existing IIAs,[96] and even fewer have studied the legal basis to do so. In this context, the following section seeks to bridge this existing gap by exploring how tribunals could make more substantial use of the climate regime in investor-state disputes. The previous section demonstrated that a relatively low number of ISDS proceedings (within the total number of climate change disputes) have addressed climate change as a material issue of law or fact, which, in turn, suggests that ISDS parties, counsel, and tribunals have failed to adequately consider the climate regime as a basis for their decisions and arguments.[97] The practice of investor-state tribunals nonetheless shows that an interplay between international investment law and other areas of public policy, including the protection of the environment, is possible.[98]

This section will explore three strategies or legal bases that could be used to better integrate international treaties and related instruments addressing the climate

[94]See Tienhaara et al, *supra* note 14 at 703 (which makes the proposition that upcoming ISDS compensation claims by oil and gas investors for the phase-out of fossil fuel production alone (excluding coal mining and midstream fossil fuel infrastructure) could run as high as US $340 billion, which could result in "the delay of policy action, extension of deadlines for moratoria, or exemptions and payment of far greater compensation to leaseholders than would be available under domestic remedies").

[95]Proponents of a possible reform of ISDS have discussed, *inter alia*, amending existing IIAs to introduce jurisdictional hurdles to carve out high-emission investments or investors from the scope of investment treaties, adopt "greener" standards and dispute settlement mechanisms, or replace the current ISDS model with a new dispute settlement mechanism altogether. See e.g. Martin Dietrich Brauch, "Reforming International Investment Law for Climate Change Goals" in Michael Mehling & Harro van Asselt, eds, *Research Handbook on Climate Finance and Investment Law* (Cheltenham, UK: Edward Elgar, forthcoming); Marc Bungenberg & August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court* (Berlin: Springer, 2020) at 11–12. Other authors have advocated for a behavioural change within the arbitration community. See e.g. Greenwood, *supra* note 89 at 309–26; Mala Sharma, "Integrating, Reconciling, and Prioritising Climate Aspirations in Investor-State Arbitration for a Sustainable Future: The Role of Different Players" (2022) 23 J World Investment & Trade 746 at 775.

[96]See e.g. Dooley, *supra* note 13.

[97]See Sarvarian, *supra* note 11 at 427 (who notes that "[w]hereas it is conceivable for disputing parties to invoke the *Paris Agreement* as 'applicable rules and principles of international law' under article 26(6) of the *ECT* to construe the substantive obligations of States under Part III with respect to liability and quantum, this has yet to occur in an arbitration").

[98]Camille Martini, "Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting" (2017) 50 Intl Lawyer 529 [Martini, "Balancing Investors' Rights"]. See also Gehring & Tokas, *supra* note 1 at 778.

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emergency in ISDS proceedings. The article will argue that the climate regime has the potential to play a more significant role in ISDS proceedings — more than just being used as a "fact" or evoked in passing in the introductory sections of the award. It will do so by analyzing three pathways, each gradually more significant than the other — namely, when the climate regime has been incorporated as part of the domestic laws of the host state and acknowledged as such; when it is construed by the tribunal as part of the legal context of the dispute; and when it is used as applicable law.

A. The climate regime as part of domestic law

A first route to integrate the climate regime in ISDS is to give effect to the domestic norms and regulations aiming at giving effect to the climate regime, including the *Paris Agreement.* The *Paris Agreement* has generated an important volume of domestic law, which will likely grow in the near future, particularly with respect to the measures adopted to implement each state's NDC.[99] Such legislation, adopted in furtherance of global climate change mitigation and adaptation efforts, is likely to adversely impact foreign investors and their investments, who could turn to ISDS as a means to obtain compensation for their economic loss. In fact, this risk has already materialized, as illustrated by the recent decisions in *Uniper v Kingdom of the Netherlands* and in *RWE v Kingdom of the Netherlands* regarding the government's decision to phase out coal-fired power by 2030 in line with its commitments under the *Paris Agreement.*[100]

As previously explained, ISDS tribunals adjudicate investor-state disputes on the basis of specific instrument(s) of consent. In this context, ISDS tribunals virtually never apply domestic law as the law applicable to the dispute. Rather, domestic law is a fact considered by ISDS tribunals as part of their assessment of whether certain state actions have been consistent with the international obligations of the state contained in the applicable IIA. The fact that a state operated under the umbrella of another international agreement, such as the *Paris Agreement*, "does not, in and of itself, preclude the possibility of incurring international responsibility under IIAs."[101] Yet ISDS tribunals would be ill-advised to consider the body of domestic law implementing states' commitments under the *Paris Agreement* as any other domestic measure used by tribunals as evidence of the host state's conduct in relation to its commitments under the applicable IIA.[102]

Instead, ISDS tribunals called upon to control the conformity of such laws and regulations, or their enforcement in regard to the investor and investment, should take stock of their international origin when assessing potential violations of the applicable IIA.[103] They may do so through two avenues. First, ISDS tribunals have

[99]Sarvarian, *supra* note 11 at 433.

[100]*Uniper*, *supra* note 30; *RWE*, *supra* note 30.

[101]De Stefano, *supra* note 1 at 273.

[102]See *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/8, Final Awards on Jurisdiction, Merits or Damages (6 February 2007) at para 78.

[103]Tribunals seldom acknowledge the international origin of domestic laws and regulations. With respect to international legal obligations for the protection of public health, see *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016) at para 302 [*Philip Morris*] ("[i]t should be stressed that the [challenged measures] have been adopted in fulfilment of Uruguay's national and international legal obligations for the protection of public

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developed interpretation techniques in order to balance investors' protection as granted by the applicable treaty standards and public interest concerns, including the protection of the environment.[104] For instance, the tribunal in *Unglaube v Costa Rica* held that a considerable measure of deference to state acts should be accorded when "a valid public policy does exist, and especially where the action or decision taken relates to the State's responsibility for the protection of public health, safety, morals, or welfare."[105] In *Chemtura v Canada*, the tribunal considered that the international commitments of the state — its obligations under the *Aarhus Protocol to the Convention on Long-range Transboundary Air Pollution*[106] — justified the exercise of environmental regulatory powers to restrict the use of lindane, a pesticide deemed dangerous for human health and the environment.[107] The tribunal held that the review process launched by Canada's Pest Management Regulatory Agency was undertaken "in pursuance of its mandate and as a result of Canada's international obligations," thereby excluding any bad faith on the part of Canada.[108]

When assessing the reasonableness or legitimacy of state action, tribunals should therefore consider whether such action was implemented or was consistent with the state's international obligations. Moreover, tribunals should give a greater deference to the state in determining its public policies when they are rooted in international law — for instance, if they mirror rules and principles found in international environmental treaties to which the host state is a party. For instance, when assessing the impact on a protected investment of a domestic measure (such as the phase-out of coal-fired power or the conversion of coal-fired power plants) against the rationale behind it (achieving its GHG emissions reduction targets pursuant to its latest NDC under the *Paris Agreement*), the *Paris Agreement* could be used to interpret the regulatory framework in which the investment took place. Here, the international climate regime could play a critical role in determining whether the state acted *bona fide* or in assessing the rationale behind the state measure.[109] Tribunals could rely on

health"); para 304 ("Articles 8 and 9 of the Law set forth rules in fulfillment of the obligations undertaken by Uruguay under Articles 11 and 13 of the [WHO Framework Convention on Tobacco Control dated 21 May 2003]. It is based on these obligations that the [challenged measures] have been adopted"). ISDS tribunals faced with human rights-related claims have also at times referred to the international origin of human rights protection in the host state's domestic law. See e.g. *SAUR International SA v Republic of Argentina*, ICSID Case No ARB/04/4, Decision on Jurisdiction and Liability (6 June 2012) at paras 328–30 [*Saur*] (regarding the right to water as a fundamental right under Argentina's constitutional law and as a general principle of international law). As noted by Julia Farnelli, "no compelling reasons prevent the reasoning of investment tribunals with regard to [human rights-related] claims and arguments to be applied with regard to environmental ones, in so far as the investment may benefit from a proper implementation of environmental-friendly obligations and policy goals." Farnelli, *supra* note 26 at 890.

[104]Martini, "Balancing Investors' Rights," *supra* note 98 at 534.

[105]*Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica*, ICSID Case No ARB/08/1 and ARB/09/20, Award (16 May 2012) at 246–47.

[106]*Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants*, 24 June 1998, 2230 UNTS 79 (entered into force 23 October 2003).

[107]*Chemtura Corporation v Government of Canada*, UNCITRAL, Award (2 August 2010) at para 133–38.

[108]*Ibid* at 138. See also Martini, "Balancing Investors' Rights," *supra* note 98 at 547.

[109]For an illustration with respect to international human rights law, see e.g. *SAUR*, *supra* note 103 at paras 328–30 (in which the tribunal held, for purposes of interpreting the relevant IIA, that "human rights in general, and the right to water in particular, constitute one of the various sources that the [t]ribunal will have to take into account in resolving the dispute, as these rights are elevated within the Argentine legal system to the rank of constitutional rights, and, moreover, form part of the general principles of international law. …

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the international origin of domestic measures as context or justification — for instance, to assess whether such measures served a public purpose[110] or were necessary, proportionate, and foreseeable by a diligent investor.[111] As reflected in the recent arbitral awards discussed below, international tribunals are in fact regularly called upon to interpret and assess norms and principles of a domestic nature that originate from the international legal framework.

Tribunals may use a second category of entry points in order to consider the consistency of domestic rules arising out of the international climate change law with investor protection obligations — namely, treaty provisions that establish environmental exceptions and obligations to meet international environmental standards. *Eco Oro Minerals Corporation v Republic of Colombia* provides an illustration, with respect to the precautionary principle as embodied in Colombian law,[112] in light of the police powers exception contained in Annex 811(2)(b) of the *Colombia-Canada FTA*.[113] In this case, the tribunal faced, *inter alia*, a claim that Colombia's decision to restrict Eco Oro's mining activities in an environmentally sensitive area known as Páramo, amounted to an unlawful expropriation under Article 811 of the FTA.[114] Colombia disputed that any expropriation had taken place and argued that, even if Eco Oro had been deprived of an acquired right by Colombia, such deprivation would be lawful under the police powers doctrine as reflected by Annex 811, in which the parties to the FTA "confirm[ed] their shared understanding" of the situation addressed by Article 811.[115] The tribunal therefore had to assess whether the measures amounted to a substantial deprivation of Eco Oro's vested rights and, if so, whether they constituted a legitimate exercise of Colombia's police powers. The tribunal found that Eco Oro had vested rights capable of being expropriated[116] and, due to Colombia's decision to restrict the investor's mining activities in spite of a previously acquired permit, that it suffered a "complete deprivation of a potential right to exploit" "capable of being considered to be a substantial deprivation, such as to amount to an indirect

For this reason, in this area, the legal system can and must reserve to the public authority legitimate functions of planning, supervision, policing, sanction, intervention and even termination, in order to protect the general interest" [unofficial translation from the French original]).

[110]See e.g. Hongwei Dang, "The Role of the Precautionary Principle in Investment Arbitration: Did It Manage to Justify the Host States' Cautious Approach on Environmental and Climate Change Issues?" (2023) 20:1 Transnational Dispute Management 1 at 6 (for examples with respect to the precautionary principle).

[111]Frosch & Giemza, *supra* note 9 at 17.

[112]*Eco Oro Minerals Corp v Republic of Colombia*, ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021) [*Eco Oro*]. For a detailed analysis of the actual and potential use of the precautionary principle in ISDS cases, see Dang, *supra* note 110.

[113]*Free Trade Agreement between Canada and the Republic of Colombia*, 21 November 2008, 3243, 3244, 3245, 3246 UNTS, Can TS 2011 No 13 (entered into force 15 August 2011), Annex 811(2)(b) [*Colombia-Canada FTA*] ("[e]xcept in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, for example health, safety and the protection of the environment, do not constitute indirect expropriation").

[114]*Ibid*, art 811.

[115]*Ibid*, Annex 811.

[116]*Eco Oro*, *supra* note 112 at para 440.

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expropriation."[117] The tribunal then turned to consider whether such deprivation constituted an indirect expropriation or a legitimate exercise by Colombia of its police powers precluding any wrongdoing, pursuant to Annex 811(2)(b) of the FTA.[118]

In order to assess whether Colombia's exercise of its police powers was legitimate, the tribunal had to determine that the measures at issue were (1) non-discriminatory and designed and applied to protect the environment and (2) did not comprise a rare circumstance such that they constituted indirect expropriation pursuant to Annex 811(2)(b).[119] The tribunal answered both questions in the affirmative, thereby dismissing Eco Oro's expropriation claim.[120] In doing so, it relied extensively on the precautionary principle, "as enshrined into Colombian Law,"[121] which played a large role in the tribunal's finding that Colombia's measures to protect the environment were "*bona fide*" and "motivated both by a genuine belief in the importance of protecting the páramo ecosystem and pursuant to Colombia's longstanding legal obligation to protect it."[122] It also noted that the "potential applicability of the precautionary principle to the páramo should … have been understood by Eco Oro," meaning that mining activities in the areas overlapping with the Páramo were at risk of no longer be permitted, which eventually happened.[123] As a result, the delimitation of the Páramo by Colombia was "not unreasonable" nor "disproportionate" [*sic*], meaning that it did not amount to a "rare circumstance" constituting indirect expropriation pursuant to Annex 811(2)(a) of the FTA.[124]

In *Eco Oro*, Colombia's successful plea for a lack of unlawful expropriation was therefore bolstered by a finding from the tribunal that the precautionary principle, which had constitutional value under Colombian law, originated from international law (here, Principle 15 of the *Rio Declaration on Environment and Development*).[125] It also shows that ISDS tribunals, facing arguments to that

[117] *Ibid* at para 634.

[118] *Ibid* at para 624.

[119] *Ibid* at para 635.

[120] *Ibid* at paras 642, 698–99.

[121] *Ibid* at paras 460, 630, 644. The tribunal noted that "Article 1.1 of the General Environmental Law referred to the relevance of the Rio principles, Principle 15 of which contained the precautionary principle … which was enshrined into Colombian Law by Article 1.6 and Article 1.4 of the General Environmental Law." *Ibid* at para 644.

[122] *Ibid* at para 698.

[123] *Ibid* at paras 683–86.

[124] *Ibid* at para 655.

[125] Addressing an argument from the claimant that the precautionary principle was not applicable, the tribunal held that the fragility of páramo ecosystems was "precisely the circumstance in which this principle — as for example reflected in the preamble to the 1992 Biodiversity Convention and set out in Principle 15 of the Rio Declaration on Environment and Development— does apply." *Ibid* at para 654. The tribunal's reference to the international origin of the precautionary principle triggered Article 832(1) of the *Colombia--Canada FTA*, which provided that the tribunal "shall decide the issues in dispute in accordance with this Agreement [the FTA] and applicable rules of international law," even though the tribunal did not rely explicitly on this article in its reasoning. This is clarified by Philipp Sands, KC, in his dissenting opinion, who explains that "the precautionary principle has been developed to assist in the taking of decisions in times of uncertainty, and the Tribunal has correctly determined that the application of the precautionary principle — treated as being applicable as a rule of law in accordance with Article 832 of the FTA — to this case has contributed to the conclusion that there has been no actionable violation of Article 811 of the FTA." *Eco Oro*,

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effect, may give effect to the international origin of domestic legislation by granting them a greater deference, either on the basis of explicit treaty language to that effect or through an interpretation of modernized treaty language that better reflects "the social dimension of international investment"[126] when assessing the conformity of the state's actions or inactions with the applicable investment treaty.[127] However, the practice of ISDS tribunals shows that treaty provisions seeking to mitigate the impact of investment protections on their regulatory powers have led to mixed results thus far. In particular, general exception mechanisms, when used at all,[128] have failed to justify conduct aimed at the protection of the environment that would otherwise represent a violation of the treaty.[129] This is illustrated by the *Eco Oro* award,[130] in which the tribunal found that Colombia's actions, aiming at achieving the delimitation of an environmentally sensitive area, were found to be in violation of the minimum standard of treatment, notwithstanding the *Colombia-Canada FTA*'s exception clause modelled on Article XX of the *General Agreement on Tariffs and Trade*.[131] For these reasons, the two following avenues may prove more successful to enhance the interplay between international investment law and climate change law and policy.

B. The climate regime as part of the legal context

Many parties to ISDS proceedings — claimants and respondents alike — have invoked sources of international law external to the applicable IIA in order to advance

supra note 112, Partial Dissent of Professor Philippe Sands KC, 9 September 2021, at para 33.

This finding, however, did not preclude the tribunal's determination that Colombia failed to accord Eco Oro's investment treatment in accordance with the customary international law minimum standard of treatment of aliens, including the obligation to provide fair and equitable treatment (FET), in breach of Article 805 of the free trade agreement (FTA). See *ibid* at para 821; *Rio Declaration on Environment and Development*, 13 June 1992, (1992) 31 ILM 874.

[126]Federico Ortino, "The Social Dimension of International Investment Agreements: Drafting a New BIT/MIT Model?" (2005) 7:4 International Law Forum 243 at 245–46.

[127]The Centre québécois du droit de l'environnement raised a similar argument in its *amicus curiae* submission in *Lone Pine v Canada*, but the tribunal did not reach a finding on the precautionary principle. See *Lone Pine*, *supra* note 30 at paras 471–73, 633.

[128]See *Gold Reserve Inc v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award (22 September 2014) at paras 566–76; *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award (4 April 2016) at paras 530 (in which the two tribunals overlooked the general exception clause contained in Annex 10(b) of the *Canada–Venezuela BIT*). See *Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments*, 1 July 1996, 2221 UNTS 7 (entered into force 28 January 1998). For a more detailed analysis of these two cases, see Wolfgang Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (Oxford: Oxford University Press, 2022) at 190–91.

[129]Camille Martini, "Avoiding the Planned Obsolescence of Modern International Investment Agreements: Can General Exception Mechanisms Be Improved, and How" (2018) 59:8 Boston College L Rev 2877 at 2879 [Martini, "Avoiding the Planned Obsolescence"].

[130]*Eco Oro*, *supra* note 112 at para 837. For an in-depth analysis of the tribunal's reasoning regarding the minimum standard of treatment claim, see Létourneau Tremblay, *supra* note 43.

[131]*General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 194 (provisionally applied 1 January 1948), art 20.

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their interpretation of standards of conduct contained therein.[132] They have done so on the basis of express provisions in the applicable investment treaty or, in the alternative, on the basis of the principle of "systemic coherence" or "systemic integration" in the interpretation of international treaties under customary international law as reflected by Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* (*VCLT*).[133] Article 31(3)(c) provides that, in the process of interpreting a treaty, "[t]here shall be taken into account, together with the context: … (*c*) any relevant rules of international law applicable in the relations between the parties." However, arbitral tribunals have generally been reluctant to uphold such arguments.[134] Parties' attempts at invoking the principle of systemic integration in ISDS proceedings have thus led to limited results so far.[135]

Yet it is submitted here that investor-state tribunals are entitled, where relevant, to apply the principles of systemic integration embodied in Article 31(3)(c) of the *VCLT* to take the climate regime into account in resolving investor-states disputes, even in the absence of treaty language to that effect.[136] The principle of systemic integration seems particularly relevant to interpret broad or "open-textured" treaty standards like unqualified FET treatment clauses,[137] especially when the applicable treaty's entry into force precedes breakthroughs in the climate regime such as the *Paris Agreement*.[138] Given "the large membership" of this agreement, as well as of the *UNFCCC*, it is "highly realistic that Parties to a bilateral or multilateral investment treaty are also bound" by international climate change commitments qualifying as external context for the purposes of Article 31(3)(c) of the *VCLT*.[139]

There is a strong support in the literature for a greater effort by ISDS parties and tribunals to give effect to the systemic integration obligation in Article 31(3)(c) of

[132]See e.g. *Hesham TM Al Warraq v Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014) at para 519; *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania [I]*, ICSID Case No ARB/05/20, Final Award (11 December 2013) at paras 307, 310.

[133]*Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Can TS 1980 No 37 (entered into force 27 January 1980) [*VCLT*].

[134]Against a general trend to the contrary in international judicial practice. See McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54 ICLQ 279 at 280.

[135]While some tribunals accepted that relevant rules of international law applicable between the parties could be considered as part of the context of the treaty being interpreted, they tended to construe narrowly what constituted a "relevant rule" under Article 31(3)(c) of the *VCLT*. They also found that the starting point of the interpretation process was the general rule of Article 31(1), which prioritizes the text of the treaty provision being interpreted over any other elements of treaty interpretation. See *SunReserve*, *supra* note 30 at paras 382–87; *Vattenfall AB and Others v Federal Republic of Germany*, ICSID Case No ARB/12/12, Decision on the Achmea Issue (31 August 2018) at paras 158, 167.

[136]McLachlan, *supra* note 134 at 314.

[137]This is a term used by the International Law Commission (ILC), which was tasked to assess the fragmentation of international law. See ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi*, UN Doc A/CN.4/L.682 (2006) at 15.

[138]As explained by the ILC, "[i]nternational law is a dynamic legal system. A treaty may convey whether in applying Article 31(3)(c) the interpreter should refer only to rules of international law in force at the time of the conclusion of the treaty or may also take into account subsequent changes in the law. Moreover, the meaning of a treaty provision may also be affected by subsequent developments." *Ibid* at 15–16.

[139]De Stefano, *supra* note 1 at 274.

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the *VCLT*.[140] ISDS tribunals generally accept that investment standards should not be considered in isolation of general international law.[141] Yet very few tribunals have actually relied on Article 31(3)(c) of the *VCLT* in practice as a legal basis to consider relevant international environmental or climate change obligations applicable to the relations between the parties to the applicable BIT. Notably, in *David R. Aven et al. v Costa Rica*, a tribunal constituted under the *Dominican Republic-Central America-United States FTA* (*DR-CAFTA*)[142] used Article 31(3)(c) of the *VCLT* in the context of an environmental dispute.[143] The tribunal's reasoning could be applied *mutatis mutandis* to climate change concerns.[144] The tribunal in this case was invited to assess the lawfulness of the state's revocation of an environment viability permit and the termination of the claimants' construction project, after it determined that the project's site included wetlands and forest grounds. The claimants alleged that the state had violated the minimum standard of treatment and unlawfully expropriated their investment. The respondent challenged the right of the investors to bring their claim based on jurisdictional grounds and argued that, under the *DR-CAFTA*, access to investment protection was subordinated to the protection of the environment; that the treaty granted the parties the right to adopt, maintain, and enforce measures to protect their environment; and that the actions of respondent were "entirely supported under applicable local laws."[145] In this case, the treaty contained an applicable law clause pursuant to which the tribunal was to decide the

[140]See e.g. Angelos Dimopoulos, "Climate Change and Investor-State Dispute Settlement: Identifying the Linkages" in Panagiotis Delimatsis, ed, *Research Handbook on Climate Change and Trade Law* (Oxford: Oxford University Press, 2016) 415 at 428 (noting that "the principle of systemic interpretation of international law embedded in Article 31(3)(c) of the *Vienna Convention on Law of Treaties* (*VCLT*) presents an excellent tool available at the disposal of investment tribunals to avoid potential conflicts between investment protection and climate change norms"); Tarcisio Gazzini, *Interpretation of International Investment Treaties* (London: Bloomsbury, 2016) at 211 (affirming that "[r]esorting to other rules of international law may be crucial in interpreting treaty provisions containing references to notions or principles developed in other areas of international law, even more so when the relevant investment treaty does not offer any definition").

[141]See e.g. *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award (17 March 2006) at para 254 (in interpreting a treaty, account has to be taken of "any relevant rules of international law applicable in the relations between the parties" — a requirement that the International Court of Justice has held includes relevant rules of general customary international law); *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania [I]*, ICSID Case No ARB/05/20, Final Award (11 December 2013) at para 526 ("the Tribunal will interpret each of the various applicable treaties having due regard to the other applicable treaties, assuming that the parties entered into each of those treaties in full awareness of their legal obligations under all of them").

[142]*Dominican Republic-Central America-United States Free Trade Agreement*, 5 August 2004 (entered into force 1 March 2006), online: <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>.

[143]*David R Aven, Samuel D Aven, Carolyn J Park, Eric A Park, Jeffrey S Shioleno, Giacomo A Buscemi, David A Janney and Roger Raguso v Republic of Costa Rica*, ICSID Case No UNCT/15/3, Final Award (18 September 2018) at paras 410–11 [*Aven*]; *Dominican Republic-Central America-United States Free Trade Agreement*, 5 August 2004, (2004) 43 ILM 514 (entered into force 1 January 2009) [*DR-CAFTA*].

[144]For another suggested use of the climate regime by way of systemic integration, see Oliver Hailes, "Unjust Enrichment in Investor–State Arbitration: A Principled Limit on Compensation for Future Income from Fossil Fuels" (2022) 32:2 RECIEL 358 at 359.

[145]*Ibid* at paras 6–8, 409; *DR-CAFTA*, *supra* note 143.

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issues in dispute "in accordance with this Agreement and applicable rules of international law."[146]

After finding that the tribunal had jurisdiction to hear the case, the tribunal turned to the determination of the merits. In particular, it noted that the parties did not agree on whether the protections afforded to investors under the investment treaty, including the minimum standard of treatment and the protection against expropriation, were "subordinate to the laws enacted by the Parties to the Treaty seeking the protection of the environment, and under which circumstances a State that is party to *DR-CAFTA* [could] establish laws, policies and/or adopt measures to that end."[147] According to the tribunal, "the rules of treaty interpretation provide[d] the answer."[148] The tribunal applied Article 31(1) of the *VCLT* since the parties were in agreement that "the customary international law rules of treaty interpretation constitute 'applicable rules of international law' under DR-CAFTA Article 10.22(1) [the applicable law clause], and that such rules [were] reflected in the VCLT."[149] It then concluded that Article 31(3)(c) "provides an additional ground for treaty interpreters, such as the Tribunal, to take into account not only other provisions of the *DR-CAFTA*, general principles of law, but also custom, in construing in context the proper meaning of *DR-CAFTA* provisions," such as the FET and expropriation standards.[150]

This finding had two important consequences on the outcome of the dispute. First, it enabled the tribunal to give full effect to Article 10.11 of the *DR-CAFTA*, entitled "Investment and Environment," which provides that "[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."[151] According to the tribunal, interpreting the relevant treaty standards in light of Article 10.11 meant "giving preference to the standards of environmental protection that were stated to be of interest to the Treaty Parties at the time it was signed," so long as the state acted "in line with principles of international law, which require acting in good faith."[152] Second, it allowed the tribunal to "undertake a brief review of the key legislation applicable to the investment" (international instruments for the most part) in order to determine whether the state's enforcement of its own environmental legislation was "proper and lawful."[153] After finding that Costa Rica had adopted international conventions and enacted internal legislation in environmental matters that were "not only consistent with most international conventions, but [] at the forefront of most jurisdictions," the tribunal held, after a thorough analysis of the respondent's enforcement of such laws, that Costa Rica's actions were neither arbitrary nor in breach of the *DR-CAFTA*.[154] As a consequence, the significant environmental

[146] *DR-CAFTA*, *supra* note 143, art 10.22(1); *Aven*, *supra* note 143 at para 19.
[147] *Aven*, *supra* note 143 at para 406.
[148] *Ibid* at para 411.
[149] *Ibid.*
[150] *Ibid.*
[151] *CAFTA-DR*, *supra* note 143, art 10.11.
[152] *Aven*, *supra* note 143 at para 412.
[153] *Ibid* at para 416.
[154] *Ibid* at para 585.

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commitments undertook by Costa Rica under international law, taken as an element of context, justified that it enacted equally ambitious domestic regulations in that respect, whose effective enforcement in regard to the investor was proper and lawful under the investment treaty.

Another notable use of the principle of systemic integration in investment arbitration is found in the *Philip Morris v Uruguay* award.[155] The tribunal, faced with the claim that Uruguay's introduction of a tobacco plain-packaging regulation amounted to unlawful expropriation, used Article 31(3)(c) of the *VCLT* to interpret the applicable treaty standard by reference "to the rules of customary international law as they have evolved."[156] Such rules included the police powers doctrine under customary international law,[157] which the tribunal deemed relevant because "[p]rotecting public health has since long been recognized as an essential manifestation of the State's police power," and the regulations at issue had been adopted "in fulfilment of Uruguay's national and international legal obligations for the protection of public health,"[158] including the World Health Organization's *Framework Convention on Tobacco Control*, dated 21 May 2003.[159] This convention, as "one of the international conventions to which Uruguay is a party guaranteeing the human rights to health," was "of particular relevance in the present case, being specifically concerned to regulate tobacco control."[160] The tribunal concluded that the plain-packaging regulations constituted a "valid exercise by Uruguay of its police powers for the protection of public health," which, as such, could not "constitute an expropriation of the Claimants' investment."[161]

Both cases illustrate that investment tribunals could rely on the existing rules of treaty interpretation under international law to give effect to international obligations arising out of the climate regime, just like any other relevant rules of public international law,[162] subject to the specifics of each independent dispute[163] and the limitations of systemic

[155]*Philip Morris*, *supra* note 103.

[156]*Ibid* at para 290.

[157]According to the police powers doctrine, the state's reasonable *bona fide* exercise of police powers in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic damage to an investor and that the measures taken for that purpose should not be considered as expropriatory. *Ibid* at para 295.

[158]*Ibid* at para 302.

[159]*Framework Convention on Tobacco Control*, 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005).

[160]*Philip Morris*, *supra* note 103 at para 304.

[161]*Ibid* at para 307. The tribunal had also dismissed the claim for lack of substantial deprivation. *Ibid* at paras 272–86.

[162]See *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016) at para 1200 ("[t]he Tribunal further retains that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties. … The BIT cannot be interpreted and applied in a vacuum. The Tribunal must certainly be mindful of the BIT's special purpose as a Treaty promoting foreign investments, but it cannot do so without taking the relevant rules of international law into account. 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").

[163]For instance, in *Aven*, the introduction of environmental clauses in the DR-CAFTA such as Article 10.11 played a large role in the Respondent's successful invocation of systemic integration. The fact that claimant's counsel, at the hearing, stated that "they did not challenge the validity of any law or regulation, but added that the case was one about enforcement of such laws" was also significant, since the tribunal did

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integration.[164] Respondent states, facing claims that a domestic measure was contrary to the applicable treaty standards, can therefore invoke the principle of systemic integration to rely on their international climate change commitments as a defence, even in the absence of explicit treaty language to that effect.[165] However, taking into account relevant rules of international law applicable to the relations between the parties for the purpose of interpreting a treaty standard does not mean that such rules of international law become part of the applicable law.[166] While systemic integration may assist in interpreting an investment treaty standard, it is ill-suited to serve as the sole basis for applying other rules of international law, including climate change treaties, to resolve ISDS disputes.[167]

C. Invoking the climate regime as applicable law

In some instances, the climate regime may play an even more decisive role as part of the law applicable to the resolution of investor-state disputes.[168] This is illustrated by at least one arbitral award in which the tribunal accepted to consider a host state's international environmental obligations in the application of a treaty standard to particular circumstances, without the interplay of Article 31(3)(c) of the *VCLT*. In *Peter A. Allard v Government of Barbados*,[169] the tribunal was called upon to decide whether the state's failure to enforce environmental protections, which allegedly resulted in the destruction of the investor's eco-tourism site located in a protected wetland, amounted to a violation of the FET and FPS standards contained in the *Canada-Barbados BIT*.[170] The investor, in this case, had claimed that the state had breached its obligations under the BIT by failing to enforce its international environmental obligations, including the *Convention on Biological Diversity* and the *Ramsar*

not need to "examine whether the laws enacted by Costa Rica [were] compliant with the Treaty and customary international law." *See Aven*, *supra* note 143 at para 415.

[164]In particular, external rules of international law cannot supersede or displace the treaty being interpreted. See Lauren Nishimura, "Adaptation and Anticipatory Action: Integrating Human Rights Duties into the Climate Change Regime" (2022) 12 Climate L 99 at 108.

[165]Swaroop & Barker, *supra* note 53 at 13.

[166]Gazzini, *supra* note 140 at 221.

[167]This is for at least two reasons: "[o]n the one side, this is due to the character of the investor being a non-State actor to whom extraneous rules of international law cannot properly be applied… The second reason is the fact that most investment tribunals derive their authority from specialised bilateral investment treaties (BITs) with narrow economic object and purpose. This imposes limits with respect to both their jurisdiction to use systemic integration in the application of the treaty and also the criteria of relevance and the assessment as to whether or not the parties to the treaty chose to opt out from other relevant rules of international law." Rumiana Yotova, "Systemic Integration: An Instrument for Reasserting the State's Control in Investment Arbitration?" in Andreas Kulick, ed, *Reassertion of Control over the Investment Treaty Regime* (Cambridge: Cambridge University Press, 2016) 182 at 193–94.

[168]For a comprehensive study of the applicability of the *Paris Agreement* in ISDS disputes, see generally Sarvarian, *supra* note 11.

[169]*Peter A Allard v Government of Barbados*, PCA Case No 2012-06, Award (27 June 2016) [*Allard*].

[170]*Agreement between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investment*, 29 May 1996, Can TS 1997/4 (entered into force 17 January 1997) [*Canada-Barbados BIT*].

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Convention, which allegedly heightened the level of diligence required from the state under the FPS standard.[171] The tribunal held that this standard only required "reasonable action," which the state had undertaken in that case. It also concluded that "[t]he fact that Barbados is a party to the *Convention on Biological Diversity* and the *Ramsar Convention* does not change the standard under the BIT, although consideration of a host State's international obligations may well be relevant in the application of the standard to particular circumstances."[172] The tribunal therefore limited its inquiry as to whether Barbados's actions were "reasonable" in the circumstances, which required an assessment of whether the government's approach in addressing the environmental degradation satisfied the due diligence required pursuant to the FPS standard.

While the tribunal did not evaluate whether Barbados had breached any provisions of the two environmental treaties,[173] it did inquire whether the fact that Barbados was a party to these treaties altered the FPS standard under the BIT (which it did not). To reach this finding, the tribunal did not rely on, nor refer to, the applicable law clause of the *Canada-Barbados BIT* (in contrast with the *Eco Oro v Colombia* tribunal, which did so, even if implicitly).[174] Article XIII(7) of the *Canada-Barbados BIT* provided that "[a] tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and *applicable rules of international law*."[175] The tribunal did not engage either in a detailed analysis of the state's obligations under international environmental law, most likely due to the jurisdictional limitations *ratione materiae* of Article XIII(1) of the *Canada-Barbados BIT*.[176] The tribunal's assessment was thus limited to potential breaches of the BIT, not of other international agreements.

Even though the *Allard v Barbados* tribunal made a limited use of the two environmental treaties, this case is significant insofar as the tribunal held that

[171] *Allard*, *supra* note 169 at para 230; *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993); *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975).

[172] *Allard*, *supra* note 169 at para 243.

[173] The investor did not appear to invoke a breach of the two environmental treaties, even though the state had made claims to the contrary (based on the tribunal's presentation of the parties' arguments, as the pleadings are not publicly available). See *ibid* at para 190.

[174] See note 126 above.

[175] *Canada-Barbados BIT*, *supra* note 170, art XIII(7) [emphasis added]. This is probably because the claimant had sought to use the two conventions as interpretative tools under Article 31(3)(c) of the *VCLT* as part of its claim under the FET standard rather than a set of applicable rules of international law under Article XIII(7) of the bilateral investment treaty (BIT). See *Allard*, *supra* note 169 at para 177 ("[t]he Claimant invokes also Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*. … The Claimant argues that, in "interpreting the scope of the standards of treatment," the tribunal should consider "the obligations with respect to the Sanctuary that Barbados assumed in its environmental treaties").

[176] *Canada-Barbados BIT*, *supra* note 170, art XIII(1) (which provides that a tribunal established under the BIT shall decide "[a]ny dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor *that a measure taken or not taken by the former Contracting Party is in breach of this Agreement*" [emphasis added]). As this clause makes clear, the tribunal's jurisdiction did not extend to breaches of international obligations other than the substantive investor protection obligations contained in the BIT.

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"consideration of a host State's international obligations may well be relevant in the application of the standard to particular circumstances."[177] This reasoning, used here to assess the reasonableness of the government's action, could be applied to other treaty standards, such as FET.[178] It also shows that, subject to adequate applicable law clauses contained in the relevant BIT,[179] tribunals need not rely on the principle of systemic integration to apply or refer to other international treaties, including climate change treaties, in resolving investor-state disputes.[180]

While this has not yet been tested in ISDS proceedings,[181] investors affected by the roll-back of a support scheme in the renewable energy sector could invoke, for instance, the commitment of a respondent state under the *Paris Agreement* to "aim to reach global peaking of greenhouse gas emissions as soon as possible … and to undertake rapid reductions thereafter in accordance with best available science."[182] This could bolster a claim that the host state, through its NDC, had created legitimate expectations of a stable regulatory regime that it subsequently repudiated.[183] Such commitment could also be invoked by the state to escape liability, for instance, where the investor did not conduct appropriate due diligence in light of the host state's strategy as communicated in its NDC[184] or to reduce the amount of damages awarded.[185] Similarity, respondent states could refer to their binding obligation to "pursue domestic mitigation measures, with the aim of achieving the objectives of [their nationally determined] contributions" under Article 4(2) of the *Paris Agreement* in order to justify the enactment of new climate change mitigation measures.[186] Failure by the host state to communicate progressively more ambitious NDCs every five years reflecting its "highest possible ambition" could also ground a claim by the investor that the host state had failed to enforce its obligations under the *Paris Agreement*.[187] However, such a "relation of reciprocal benefit" between international investment law and climate change law remains to be seen.[188]

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[177] *Allard*, *supra* note 169 at para 244.

[178] Farnelli, *supra* note 26 at 908.

[179] *Ibid* at 896. See also Sarvarian, *supra* note 11 at 427.

[180] See Magnusson, *supra* note 59 at 1021 (according to whom "[t]he reasoning of the arbitral tribunal [in *Allard*] has been described as a legal standard which 'may pave the way for future cases that environmentalists could help investors against governments', including a potential argument that a government's actions and inactions on climate change violate the obligation of full protection and security"), citing Simon Lester, "What If ISDS Lawsuits Were Used to Fight Climate Change?" (3 October 2016), online: *Cato Institute* <www.cato.org/commentary/what-isds-lawsuits-were-used-fight-climate-change>.

[181] See Sarvarian, *supra* note 11 at 429–31.

[182] *Paris Agreement*, *supra* note 10, art 4(1).

[183] The tribunal in *Antaris* reached a similar conclusion. See *Antaris*, *supra* note 60. See notes 69–77 above and accompanying text.

[184] This would apply, for instance, to new investments for the exploration and extraction of fossil fuels. See David Hunter, Wenhui Ji & Jenna Ruddock, "The Paris Agreement and Global Climate Litigation after the Trump Withdrawal" (2019) 34:1 Md J Intl L 224 at 246.

[185] Hailes, *supra* note 144 at 358–70 (proposing "a principled limit on compensation for future income from stranded fossil fuel assets" arising out of the prohibition of unjust enrichment and the *Paris Agreement*'s "distributive scheme").

[186] *Ibid*, art 4(2).

[187] *Ibid*, art 4(2)–(3).

[188] De Stefano, *supra* note 1 at 279.

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This is not to say that ISDS tribunals have jurisdiction to consider alleged breaches of climate change treaties in and of themselves, nor can they be entrusted with the enforcement of the climate regime. First, investment treaties usually limit the jurisdiction of investment tribunals to breaches of the standards contained therein,[189] as illustrated by the *Allard* award.[190] Second, applicable IIAs remain the *lex specialis* that shapes the scope of consent within which investment tribunals adjudicate.[191] In addition, the lack of rationale for the *Allard* tribunal's decision to consider the host state's international environmental obligations arguably limits the significance and precedential value of this award. As a consequence, clarification on whether a governing law clause similar to Article XIII(7) of the *Canada-Barbados BIT* could authorize tribunals to consider the international climate regime as applicable law to the dispute will have to await future cases.[192] As pointed out by one author, both provisions on applicable law included in multilateral treaties and several BITs, on the one hand, and Article 42 of the *ICSID Convention* as well as other arbitration rules, on the other hand, "pave the way to the application of international law … assuming the parties have not agreed otherwise."[193]

5. Concluding remarks

The present article has sought to demonstrate that ISDS tribunals and parties should give a greater deference to the climate regime in resolving investor-state disputes in a systemic way. In fact, they have legal pathways to do so, even in the absence of specific treaty language to that effect. Due to constraints of space, I have not explored the wide range of strategies pursuant to which the climate regime could be invoked as a defence by the host state, including at the damage assessment phase.[194] Such arguments can be treaty based, such as jurisdictional

[189]This is illustrated by the *Biloune v Ghana* award, in which the tribunal found that, "while the acts alleged to violate the international human rights of Mr Biloune may be relevant in considering the investment dispute under arbitration, this Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights." *Biloune v Ghana Investment Centre and the Government of Ghana*, UNCITRAL, Decision on Jurisdiction and Liability (27 October 1989) at para 61.

[190]Farnelli, *supra* note 26 at 894.

[191]Miles and Lawry-White, *supra* note 21 at 15.

[192]Such clauses are, in fact, numerous. See e.g. *ECT*, *supra* note 14, art 26(6) ("[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law"); *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments*, 11 December 1990, 1765 UNTS 34 (entered into force 19 February 1993), art 8 [emphasis added] ("[t]he arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and *the applicable principles of international law*").

[193]Gazzini, *supra* note 140 at 221; *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).

[194]See, in that respect, the analysis of Fermeglia, *supra* note 5.

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limitations,[195] general exception mechanisms,[196] and carve-outs;[197] consent based, such as counterclaims;[198] or grounded in general principles of law[199] or customary international law, such as the state of necessity defence.[200]

Investment treaties should not be interpreted and applied in isolation from other branches of international law. The extent to which international climate change law can be relied upon by investor-state tribunals in order to give a greener coloration to investment treaty standards, however, is quite complex.[201] The *Paris Agreement*, as an international treaty, contains provisions that can be used to inform an ISDS tribunal's reasoning, even though their contents tend to be "soft" and "flexible." At the very least, the *Paris Agreement* and the volume of domestic legislation it generates through NDCs should put investors on notice that future regulations aiming at reducing carbon emissions and phasing out emission-heavy industries are to be expected.[202] The key issue going forward is not whether ISDS tribunals will be called upon to rule on climate change disputes — they will — but, rather, what the nature and scope of the obligations arising out of the climate regime will be that they will interpret and apply in adjudicating investor-state disputes. In that context, the UN General Assembly's resolution of 29 March 2023,[203] which, *inter alia*, requested an advisory opinion from the International Court of Justice on the obligations of states under international law with respect to climate change, will hopefully provide parties to ISDS proceedings with more clarity regarding the international obligations arising out of the climate regime

[195]For instance, definition clauses pursuant to which investments must contribute to sustainable development to be within the scope of an investment treaty, or legality clauses pursuant to which investments made in violation of environmental laws and regulations can be denied treaty protection.

[196]See generally Martini, "Avoiding the Planned Obsolescence," *supra* note 129.

[197]See *Agreement between the Belgium-Luxembourg Economic Union, on the One Hand and the Republic of Colombia, on the Other Hand, on the Reciprocal Promotion and Protection of Investments*, 4 February 2009 (not yet in force), online: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/342/download>, pursuant to which the dispute resolution mechanisms of the treaty do "not apply to any obligation undertaken in accordance with [Article VII]" on environmental protection.

[198]In *Metro de Lima v Peru (I)*, ICSID Case No ARB/21/41, Decision on Jurisdiction and Liability (6 July 2021), the respondent brought a counterclaim on the basis of the concession contract, subsequently dismissed, for the alleged socio-economic and environmental damages suffered by Peru due to the delay in the operation of the line.

[199]See de Stefano, *supra* note 1 at 269–70 (who suggests that general principles of international, transnational and domestic law, such as good faith, *nemo auditor*, and the doctrine of unclean hands, or a violation of international public policy, could substantiate a ground for inadmissibility of the claims on the basis of an infringement of domestic climate change laws and regulations).

[200]For instance, in *Impregilo SpA v Argentine Republic (I)*, ICSID Case No ARB/07/17, Award (21 June 2011) at para 346, the tribunal noted that the term "essential interest" in Draft Article 25 of the ILC's "Draft Articles on Responsibility of States for Internationally Wrongful Acts" in *Report of the International Law Commission*, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) could extend to the "preservation of the State's broader social, economic and environmental stability." Even though I have not identified a single case in which the state alleged that the adverse effects of climate change threatened its essential interest(s), we may witness such line of argumentation in the near future.

[201]Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009) at 81.

[202]Hunter, Ji & Ruddock, *supra* note 184 at 246.

[203]UN General Assembly, *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change*, 77th Sess, UN Doc A/77/L.58 (2023) at 3.

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applicable to cross-border investor-state disputes as well as further arguments to uphold domestic policies aiming at bridging the "significant gap" between the aggregate effect of states' current NDCs and their respective emission reduction targets.[204]

[204] *Ibid* at 2.

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