Climate-Friendly Investment Protection: a Viable Option to Fight Climate Change?

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Abstract: In 2015, 196 States negotiated the Paris Agreement on climate change at the United Nations Climate Change Conference. This development has spurred an assessment of international investment agreements' ability to comport with a renewed push for environmental sustainability. Scholars are divided between those who wish to withdraw from the existing international investment agreements and those who wish to reform the existing framework to combat climate change. On the other hand, other authors argue that the existing IIA framework is not completely incompatible with such efforts. Neither reform approach is perfect and each may face obstacles in its implementation given the time-sensitive nature of climate change.

Keywords: Paris Agreement; Energy Charter Treaty; Climate Change

Protección de Inversiones Favorable al Medio Ambiente: ¿Una Opción Viable para Combatir el Cambio Climático?

Resumen: *En el 2015, 196 Estados negociaron el Acuerdo de Paris para combatir el calentamiento global durante la Conferencia de las Naciones Unidas para el Cambio Climático. Este acontecimiento ha generado debate sobre la habilidad de los acuerdos internacionales de inversión para impulsar un desarrollo ambiental sostenible. El debate académico está dividido entre aquellos que buscan retirarse de los acuerdos internacionales de inversión y aquellos que buscan una reforma al marco vigente para combatir el cambio climático. A la misma vez, hay quienes dicen que el sistema no requiere cambios. Ninguna de las dos posturas de reforma es perfecta y es posible que ambas tengan que lidiar con ciertos obstáculos en su implementación dado el carácter apremiante que conlleva el cambio climático.*

Palabras Clave: *Acuerdo de Paris; Tratado sobre la Carta de Energía; Cambio Climático*

Autores invitados

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SUMMARY:

INTRODUCTION. 1. International investment agreements: a clash with climate mitigation? 2. The Energy Charter Treaty and the Colombian Model BIT as examples of the withdrawal and reform approach. 3. Practical Considerations of Exiting or Reforming the IIA Framework. CONCLUSION. BIBLIOGRAPHY.

INTRODUCTION

The entry into force of the Paris Agreement on November 4, 2016 augmented the existing debate regarding the role that international investment law should have in the efforts to address climate change.

On the one hand, there is hope that new generation international investment agreements (IIAs) will assist in climate change mitigation efforts. Critics argue, however, that IIAs and investor state dispute solution mechanisms (ISDS) may hinder a State's ability to implement environmentally friendly policies.[1]

Echoing those concerns, a recent report prepared by the United Nations Conference on Trade and Development on September 2022 (the UNCTAD Report) highlighted that States could face claims under IIAs as a result of an effort to transit to a low-carbon economy.[2] Similarly, the report urges that a reform to the IIA framework occur in which the risk of States "facing ISDS claims related to climate change policies [...]" is minimized.[3]

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1 Kyla Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement," *Transnational Environmental Law* 7, no. 2 (2018): 229–50, https://doi.org/10.1017/S2047102517000309.

2 United Nations Conference on Trade and Development, *International Investment in Climate Change Mitigation and Adaptation: Trends and Policy Developments | Publications | UNCTAD Investment Policy Hub* (2022), 13,https://investmentpolicy.unctad.org/publications/1273/international-investment-in-climate-change-mitigation-and-adaptation-trends-and-policy-developments.

3 *Ibid.*

The Paris Agreement aims to "hold the increase of the global average temperature to well below 2 °C above pre-industrial levels and pursu[e] efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change."[4]

In this context, the United Nations Framework Convention on Climate Change indicates that in order to meet such limits, greenhouse gas emissions cannot keep increasing past 2025, at the latest, and a 43% decline must occur by 2030.[5] As of this date, the targeted reduction levels have not been met. A recent report by the United Nations Environment Programme has thus indicated that more aggressive measures are needed and that in order to meet the desired levels, a 55% reduction of greenhouse emissions is required by 2030.[6]

It can be inferred that more ambitious targets will be required with each passing year in which the desired emission reduction levels are not met. Eventually, States will be forced to adopt more aggressive policies in order to meet their commitments under the Paris Agreement. It is possible, however, that more aggressive environmental policies may lead to a higher number of ISDS claims by affected investors.

Critics thus argue that the existing investment protection regime may be at odds with the efforts to address climate change concerns as most IIAs are silent on climate change and could hold States liable as a result of measures that may be adopted in violation of investors' rights.[7] Critics state that the existing regime thus reduces the window for the targets laid out by the Paris Agreement as it does not adequately accelerate investment in climate mitigation sectors in comparison to other investments.[8]

With the fear that time may be running out to prevent climate change, analysts have proposed an overhaul of the investment protection regime or even a complete withdrawal from the existing IIAs and ISDS mechanisms.[9]

On the other hand, the Paris Agreement also highlights the fact that developing countries will require greater assistance to meet greenhouse gas emission targets and

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[4] See Paris Agreement, art. 2(a), https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

[5] UNFCCC, "The Paris Agreement" (2022) <https://unfccc.int/process-and-meetings/the-paris-agreement> accessed 20 February 2023.

[6] United Nations Environment Programme, *Emissions Gap Report 2021: The Heat Is On – A World of Climate Promises Not Yet Delivered – Executive Summary* (Nairobi, 2021).

[7] Anja Ipp, *Regime Interaction in Investment Arbitration: Climate Law, International Investment Law and Arbitration* (Kluwer Arbitration Blog, January 12, 2022), 1, https://arbitrationblog.kluwerarbitration.com/2022/01/12/regime-interaction-in-investment-arbitration-climate-law-international-investment-law-and-arbitration/.

[8] Martin Dietrich Brauch, *Climate Action Needs Investment Governance, Not Investment Protection and Arbitration* (Columbia Center on Sustainable Investment [CCSI] Blog), 2-4, https://ccsi.columbia.edu/sites/default/files/content/docs/publications/ccsi-oecd-climate-action-investment-governance-not-protection-isds.pdf.

[9] Kyla Tienhaara et al., "Investor-state disputes threaten the global green energy transition," *Science* 376, no. 6594 (2022): 703, https://doi.org/ 10.1126/science.abo4637.

that securing finance flows to cleaner investments will be essential.[10] In such a context, the OECD notes the role of IIAs and the allocation of finance flows, arguing that IIAs should be aligned in a way consistent with the goals of the Paris Agreement.[11]

In this context, other authors argue that investment protection treaties have the potential to further climate change mitigation strategies.[12] Rather than calling for a withdrawal of the existing investment protection framework or available ISDS mechanisms, some believe that a reform that adopts the provisions of the so called "new generation" IIAs with more nuanced environmental provisions could be a more viable solution.

This article seeks to highlight the different views of how the IIA framework can better serve an environmental policy that addresses climate change. Accordingly, this article will first provide a general overview of the IIA framework along with what some authors consider to be a clash between the existing framework and the measures that countries may adopt to mitigate climate change. Then, Part 2 of this article will discuss both the Energy Charter Treaty and the Colombian Model BIT as examples of the withdrawal and reform approaches suggested by some authors. Part 3 will then analyze the implications of both approaches while underlining some of the issues that certain commentators have identified for these approaches. Finally, Part 4 will offer some concluding remarks.

1. International investment agreements: a clash with climate mitigation?

According to the UNCTAD Report, there are approximately 2,300 IIAs that were concluded between 1959 and 2009, which represent more than 85% of the IIAs ever signed.[13] This report states that the majority of such IIAs do not include provisions acknowledging the State's right to enact regulation for environmental protection. Instead, the UNCTAD Report claims that such IIAs include broadly worded formulations of investor protection standards.[14]

Some commentators argue that old generation treaties centered on providing a stable legal environment for foreign investors.[15] Accordingly, such treaties provide legal

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[10] See Paris Agreement, arts. 2(c), 4(4), and 4(5).

[11] Organisation for Economic Co-operation and Development, *Investment Treaties and Climate Change | The Alignment of finance flows under the Paris Agreement| Background Note |* (May 2022), 4, 13, 17, https://www.oecd.org/investment/investment-policy/oecd-background-investment-treaties-finance-flow-alignment.pdf.

[12] Kate Miles, "Arbitrating Climate Change: Regulatory Regimes and Investor-State Disputes," *Climate Law* 1 (2010): 68, https://doi.org/10.3233/CL-2010-004.

[13] United Nations Conference on Trade and Development, *International Investment in Climate Change Mitigation and Adaptation: Trends and Policy Developments | Publications | UNCTAD Investment Policy Hub* (2022), 15, https://investmentpolicy.unctad.org/publications/1273/international-investment-in-climate-change-mitigation-and-adaptation-trends-and-policy-developments.

[14] *Ibid.*

[15] Jorge Guira and Maria Beatriz Burghetto, *Are Investment Treaties "Zombies," Unfit for Decarbonization Purpose?* (Kluwer Arbitration Blog, August 1, 2022), 2, https://arbitrationblog.kluwerarbitration.com/2022/08/01/are-investment-treaties-zombies-unfit-for-decarbonization-purpose/.

certainty by, among others, affording foreign investors fair and equitable treatment, protection against direct or indirect expropriation, and granting foreign investors treatment similar to the country's nationals.[16]

An objective behind investment agreements is to encourage finance flows and investments in developing countries by creating a stable legal environment. "[A]n important purpose of the ICSID Convention and investment treaties more generally is to encourage and protect international investments. The Report of the Executive Directors proclaims one of the purposes of ICSID is to 'facilitate the settlement of disputes between States and foreign investors' with a view to 'stimulating a larger flow of private international capital into those countries which wish to attract it.'"[17]

Newer IIAs enacted since 2010 include general environmental provisions which seek to recognize the regulatory power of the State in addition to acknowledging the need to foster sustainable development in connection with the environment.[18] Such new IIAs that acknowledge the State's regulatory power while also including specific environmental provisions are commonly referred to as the "new generation" IIAs that supplement the protections to foreign investors with vague references to environmental protection.

Both old and new generation IIAs usually provide foreign investors with substantive and procedural protections. In this context, investors may challenge a measure that a country adopts by submitting a dispute to an arbitral tribunal alleging that the measure constitutes a violation of the treaty.

Among other protections, some authors claim that the fair and equitable treatment standard may be an obstacle to effective climate change mitigation policies.[19] Broadly speaking, these authors contend that investors could challenge an environmental measure alleging that such measure changed the stable legal framework under which the investor made its investment or that such measure affects the investor's legitimate expectations.[20]

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[16] Kate Miles, "Arbitrating Climate Change: Regulatory Regimes and Investor-State Disputes," *Climate Law* 1 (2010): 71, https://doi.org/10.3233/CL-2010-004.

[17] Simon Foote, *The Bona Fide Investor: Corporate Nationality and Treaty Shopping in Investment Treaty Law* (Kluwer Law International, 2021), 114, https://www.kluwerarbitration.com/document/kli-ka-foote-2021-ch08?q=benefits+of+investment+treaties.

[18] United Nations Conference on Trade and Development, *Treaty-based Investor-state Dispute Settlement Cases and Climate Action | IIA Issues Note, Issue 3 | UNCTAD Investment Policy Hub* (September 2022), 4, https://investmentpolicy.unctad.org/publications/1273/international-investment-in-climate-change-mitigation-and-adaptation-trends-and-policy-developments.

[19] Markus Gehring and Marios Tokas, "Synergies and Approaches to Climate Change in International Investment Agreements," *The Journal of World Investment & Trade* 23, 5-6 (2022): 781, https://doi.org/10.1163/22119000-12340270.

[20] *Ibid.*, 782-783; Kate Miles, "Arbitrating Climate Change: Regulatory Regimes and Investor-State Disputes," *Climate Law* 1 (2010): 67, https://doi.org/10.3233/CL-2010-004.

In this context, the UNCTAD Report highlights that a considerable amount of ISDS cases involved "measures or sectors of direct relevance to climate action." The report states that using IIAs as a basis for their claims, there have been 175 ISDS cases brought by claimants in connection with measures purportedly taken for the protection of the environment.[21]

At the same time, other authors have suggested that IIAs do not deter States from regulating or legislating issues at the heart of their mandate.[22] Such authors state "[t]here is no shortage of State action clearly uninformed by the dictates of international law."[23] "While the apprehension of international liability may prompt reflection and careful tailoring of means to ends, it seems less likely to cause the abandonment of legislation at the heart of a government's mandate."[24]

Importantly, another author found that IIAs do not affect governmental decisions as much as is feared. "There does not appear to be a specific impact of IIA ISDS on health, safety and environmental regulatory decision making and therefore that the impact of private actors in the policy making process is perhaps less pronounced than many fear."[25] Using the Canadian experience with NAFTA, this work stated "the empirical evidence found a low level of awareness among HSE regulators [in Canada] regarding NAFTA Chapter 11 and the potential threat of an ISDS challenge to regulation. The research revealed regulators rarely take Canada's trade and investment commitments into consideration when developing regulations … ."[26]

According to the report, the level of knowledge and understanding of the implications of NAFTA vis-à-vis the regulator's measures was still quite vague even in cases in which there had been a NAFTA case that affected a measure implemented by the regulator. The report states that the regulator's "experience would have made them more aware and more likely to flag future regulatory changes for legal advice but this did not impact their decision making."[27]

Notwithstanding the foregoing, there is an ongoing debate about what changes, if any, should be implemented to the IIA regime in light of the objectives of the Paris Agreement. While IIAs entail a series of benefits for investments in general, others

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21 United Nations Conference on Trade and Development, *International Investment in Climate Change Mitigation and Adaptation: Trends and Policy Developments | Publications | UNCTAD Investment Policy Hub* (2022), 13, https://investmentpolicy.unctad.org/publications/1273/international-investment-in-climate-change-mitigation-and-adaptation-trends-and-policy-developments.

22 T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron, May 2005), 599.

23 *Ibid.*

24 *Ibid.*

25 C. Côté, 'A Chilling Effect? The Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment' (PhD thesis, London School of Economics, Feb. 2014), 206, http://etheses.lse.ac.uk/897/8/Cote_A_Chilling_%20Effect.pdf.

26 *Ibid.*, 17.

27 *Ibid.*, 154.

contend that the existing framework should be modernized. In this context, there have been attempts to withdraw from the existing IIA framework or amend it so that the framework is more aligned to the objectives laid out by the Paris Agreement.

2. The Energy Charter Treaty and the Colombian Model BIT as examples of the withdrawal and reform approach

The Energy Charter Treaty (ECT) has been regarded as one of the most invoked treaties for energy related disputes that, directly or indirectly, involve environmental matters. Albeit vaguely phrased, the ECT contains certain provisions which seem to foster policies in favor of the environment.

The preamble of the ECT recognizes the "increasingly urgent need for measures to protect the environment including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes."[28] Similarly, the ECT provides that Contracting Parties "shall strive to minimize in an economically efficient manner harmful Environmental Impacts"[29] while also enshrining the States' regulatory right to adopt or enforce measures necessary to protect human, animal or plant life or health.[30]

On June 24, 2022, the Contracting Parties to the ECT announced an agreement in principle to modernize the ECT. Among others, the proposed text includes a "flexibility mechanism" that allows Contracting Parties to exclude investment protections from certain investments that such parties consider are contrary to their respective energy security and climate goals. [31]

Despite the existing provisions, certain authors have criticized the ECT for not providing meaningful results from an environmental perspective.[32] A recent study analyzed 64 out of 75 known arbitral awards under the ECT and found that they fail to substantively address climate change policies. Specifically, the Climate Change Counsel report stated that none of the awards discussed policy issues dealing with energy transition or climate change.[33]

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[28] Energy Charter Treaty, preamble, para. 15, https://www.energychartertreaty.org/treaty/energy-charter-treaty/.

[29] *Ibid.*, art. 19.

[30] *Ibid.*, art. 24(2).

[31] Energy Charter Secretariat, *Public Communication Explaining the Main Changes Contained in the Agreement in Principle* (24 June 2022), 3 https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf.

[32] *See generally* Center for International Environmental Law, *The New Energy Charter Treaty in Light of the Climate Emergency* (6 July 2022), https://www.ciel.org/the-new-energy-charter-treaty-in-light-of-the-climate-emergency/#The%20ECT%E2%80%99s%20Climate%20Problem.

[33] Anja Ipp, Annette Magnusson & Andrina Kjellgren, *The Energy Charter Treaty, Climate Change and Clean Energy Transition: A Study of the Jurisprudence* (Climate Change Counsel, 2022), 6, https://www.climatechangecounsel.com/_files/ugd/f1e6f3_d184e02bff3d49ee8144328e6c45215f.pdf.

As a result of the ECT's perceived environmental shortcomings, the EU Parliament passed a resolution on November 2022 calling for the withdrawal of the EU Member States from the ECT.[34] Such withdrawal echoes the intentions of the Polish, Spanish, Dutch, French, Slovenian, German and Luxemburg governments to withdraw from the ECT as they believe that the ECT is not aligned with the objectives of the Paris Agreement and will fail to meet the objective to become climate neutral by 2050.[35]

Among other points, the resolution of the EU Parliament restated the Parliament's view that the modernized text of the ECT, currently under discussion, still fails to address the general criticisms of the traditional IIA framework. Namely, the resolution mentions that the proposed revisions to the ECT still maintain protections for investments and other elements that the EU considers may not be aligned with the general objectives of the Paris Agreement, the EU Climate Law, or the objectives of the European Green Deal.[36]

The EU Parliament also expressed its concern that the transition timeframes provided under the modernized text of the ECT run against the energy transition periods required to meet the global warming limits envisioned under the Paris Agreement.[37]

On February 15, 2023, the Secretariat of the Energy Charter Treaty issued a letter in response to the EU Parliament's call to withdraw from the ECT. Among others, the Secretariat argued that the modernized version of the ECT will be aligned with the Paris Agreement and an exit from the ECT would clash with the alleged objective of the EU Parliament.[38]

Specifically, the Secretariat indicated that EU Member States have around 1,500 IIAs that protect high-emission investments and include ISDS provisions. Moreover, the Secretariat also pointed out that the new Comprehensive Economic and Trade Agreement entered between the EU and Canada does not exclude high-emission investments from the protected investments and contains no provision dealing with the Paris Agreement and climate change.[39]

In any event, the concerns of the EU Parliament seem to mirror critics' position that current efforts to reform IIAs are insufficient as State environmental measures could still be challenged under the existing IIA framework. Given the Parliament's perceived limitation of the modernized text of the ECT, it can be inferred that the EU Parliament shares the idea that just like other IIAs, the ECT should be terminated instead of reformed in order to meet the objectives of the Paris Agreement.

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34 European Parliament resolution of 24 November 2022, *Resolution on the outcome of the modernisation of the Energy Charter Treaty (2022/2934(RSP))* (2022), https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2022/2934(RSP).

35 *Ibid.*, 2.

36 *Ibid.*

37 *Ibid.*

38 *Letter from the Secretary General of the International Energy Charter*, SG/23/E0047 (Feb. 13, 2023).

39 *Ibid.*, 2.

In contrast to the EU's intended exit from the ECT, other countries have pushed for the so-called "new generation" treaties which provide more specific provisions dealing with climate protection. For example, the Colombian Model BIT includes a provision requiring a focus on the protection of foreign investments that "favour the prosperity and the sustainable development" of the contracting parties.[40]

The model treaty also enshrines the regulatory right of the State by "[*r*]*eaffirming* the right of each Contracting Party to regulate the investments made in its Territory to protect legitimate public welfare objectives such as human rights, health, public order and safety, labour rights *and environment*."[41] Besides reaffirming this right, the Colombian Model BIT includes a social responsibility clause which affirms this right by providing that "Claimant Investors shall respect the prohibitions established in international instruments, to which any Contracting Party is or becomes a party, pertaining to human rights and the environment."[42]

Similarly, the Colombian Model BIT establishes a "non-detraction from environmental standards" clause. The Colombian Model BIT not only reaffirms the right to implement policies in favor of the environment but also prohibits changes to the country's laws in order to promote foreign investment in a way that detracts from the country's environmental, human rights or labor standards.[43]

The Colombian Model BIT also includes a denial of benefits clause which allows Contracting Parties to deny the benefits under the treaty to an investor that has been found by an international court or a judicial or administrative authority of any State with which Contracting Parties have diplomatic relations to have "caused serious environmental damage in the Territory of the Host Party."[44]

Lastly, the Colombian Model BIT includes a general exceptions clause which states that provided that measures are not applied in a manner that would constitute arbitrary or discriminatory treatment, the treaty shall not preclude the adoption of measures that the State deems necessary for protecting the environment.[45]

Authors have argued that new generation IIAs such as the Colombian Model BIT aim to guarantee the States' right to implement policies that safeguard the environment and prevent climate change.[46] However, critics contend that such IIAs still fall short on

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[40] Republic of Colombia, Model Text for the Colombian Bilateral Investment Treaty (2017), Preamble, Recital 3 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6082/download> accessed 22 February 2022 (Colombian Model BIT).

[41] Colombian Model BIT, Preamble, Recital 4.

[42] Colombian Model BIT, Article on Investors' Social Responsibility.

[43] Colombian Model BIT, Article on Non-detraction from environmental, human rights and labour standards.

[44] Colombian Model BIT, Article on Denial of Benefits.

[45] Colombian Model BIT, Article on General Exceptions.

[46] Madhav Mallya, *India's Race to the Bottom: Bilateral Investment Treaties and the New Draft Environmental Impact Assessment*

the actions required to prevent climate change. Mainly, critics argue that a reformist approach implementing "greener" IIAs would be time-consuming and climate principles are not usually a main focus when reform negotiations tend to occur.[47]

Since both an abolitionist approach and a reformist approach seem to face a series of obstacles in practice as further described in Part 3 infra, the global investment community should assess the implications of both strategies if it considers that one of those approaches are required to align the international investment regime with the efforts to curb climate change.

3. Practical Considerations of Exiting or Reforming the IIA Framework

The response from the Secretariat of the Energy Charter Treaty highlights one of the issues of withdrawing from the existing IIAs as an attempt to address climate change. While parties could denounce a specific treaty, there is still an interconnected framework with other IIAs which contain provisions that could arguably be deemed incompatible with the goals of the Paris Agreement.

An overarching withdrawal would first require analyzing the estimated 3000 IIAs currently in force[48] to then determine which treaties contain provisions considered incompatible with the Paris Agreement. Such a process in itself seems complicated as there is not enough consensus about which treaties, or specific provisions, are incompatible. Moreover, it is likely that such an exit would require a coordinated effort by the whole international community, which would also require an unprecedented level negotiation from governments and investors alike.

Irrespective of whether an overarching withdrawal from IIA treaties is desirable or not, the feasibility of such an option should be assessed against the target dates by which the global community seeks to become carbon neutral. Given the short timeframe and the extended deliberation process that such an exit would entail, one could reasonably question whether such an option is feasible from a practical standpoint. It could well be the case that the deadlines to limit global warming by 1.5 degrees could occur before the time such coordinated withdrawal comes into effect.

Notification (Oct. 9, 2020), https://opiniojuris.org/2020/10/09/indias-race-to-the-bottom-bilateral-investment-treaties-and-the-new-draft-environmental-impact-assessment-notification/.

[47] Kyla Tienhaara et al., "Investor-state disputes threaten the global green energy transition," *Science* 376, no. 6594 (2022): 701, 703, https://doi.org/ 10.1126/science.abo4637; Anja Ipp, *Regime Interaction in Investment Arbitration: Climate Law, International Investment Law and Arbitration* (Kluwer Arbitration Blog, January 12, 2022), 1, https://arbitrationblog.kluwerarbitration.com/2022/01/12/regime-interaction-in-investment-arbitration-climate-law-international-investment-law-and-arbitration/.

[48] United Nations Conference for Trade and Development, *Investment Policy Hub* <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 1 March 2023.

On the other hand, it should be pondered whether the elements of IIAs that some authors consider obstacles to the goals of the Paris Agreement are reason enough to overhaul this framework. As other authors contend, the current investment protection framework is not inherently incompatible with the environment.[49]

A complete withdrawal from the current IIA framework could also affect investments that are not related to the environment but that are essential to a country's economy and overall development. Such a withdrawal would not only deprive such investments from treaty protections but could also hinder the capital flows required to finance investments to address climate change.[50]

As acknowledged by the UNCTAD Report, there is a need for targeted policies that attract foreign direct investment to climate change mitigation sectors.[51] The projects required to address climate change are highly capital intensive and require stable legal environments that could be fostered through investment protections.[52]

The Paris Agreement acknowledges that "developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change" may have specific needs with regard to funding and transfer of technology.[53] It could well be the case that the investments to climate change mitigation sectors identified by the UNCTAD Report and also referred to in the Paris Agreement could be structured in a way that they are benefitted by the existing IIAs that developing countries have in order to provide such countries with the funding and technology required. A complete withdrawal from the existing IIA framework could reduce the access to such funding and technology.

Considering the foregoing, some authors argue that IIAs could be renegotiated to foster measures required to comply with the goals of the Paris Agreement in a way that such measures are not seen as clashing with traditional investor protections.[54] This approach could be seen as a hybrid of the new generation treaties that include policy

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[49] Anja Ipp, *Regime Interaction in Investment Arbitration: Climate Law, International Investment Law and Arbitration* (Kluwer Arbitration Blog, January 12, 2022), 3, https://arbitrationblog.kluwerarbitration.com/2022/01/12/regime-interaction-in-investment-arbitration-climate-law-international-investment-law-and-arbitration/.

[50] Stefan Newton, *New Directions in International Investment Law: Towards Energy Transition* (Kluwer Arbitration Blog, May 24, 2022), 2, https://arbitrationblog.kluwerarbitration.com/2022/05/24/new-directions-in-international-investment-law-towards-energy-transition/.

[51] United Nations Conference on Trade and Development, *International Investment in Climate Change Mitigation and Adaptation: Trends and Policy Developments | Publications | UNCTAD Investment Policy Hub* (2022), 1,https://investmentpolicy.unctad.org/publications/1273/international-investment-in-climate-change-mitigation-and-adaptation-trends-and-policy-developments.

[52] Stefan Newton, *New Directions in International Investment Law: Towards Energy Transition* (Kluwer Arbitration Blog, May 24, 2022), 2, https://arbitrationblog.kluwerarbitration.com/2022/05/24/new-directions-in-international-investment-law-towards-energy-transition/.

[53] See Paris Agreement, Preamble, paras. 5-6, https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

[54] Anja Ipp, *Regime Interaction in Investment Arbitration: Climate Law, International Investment Law and Arbitration* (Kluwer Arbitration Blog, January 12, 2022), 3, https://arbitrationblog.kluwerarbitration.com/2022/01/12/regime-interaction-in-investment-arbitration-climate-law-international-investment-law-and-arbitration/.

exceptions, like the Colombian Model BIT that expressly protects measures adopted to promote environmental policy.

Similar to a complete withdrawal from existing IIAs, implementing such a comprehensive reform exercise would be a lengthy process that may not occur within the desired timeframe as there is also no consensus as to the specific environmental provisions that should be included in the existing IIA framework in order to mitigate climate change. While enacting reform via both bilateral and multilateral treaties could be easier to negotiate than a complete withdrawal, there is not much certainty as to whether such a process could occur on time.

It should be briefly mentioned that, under a reform approach, it is likely that new disputes could occur. It is possible that the more nuanced environmental provisions included under the new generation IIAs will result in more technical disputes involving environmental matters.

Using the Colombian Model BIT as an example, there could be a dispute whether an investor was actually "found by an international court or a judicial or administrative authority of any State to have caused serious environmental damage." Similarly, it is possible that new IIAs that adopt a similar form of the flexibility mechanism envisioned under the modernized ECT could result in disputes on whether certain investments that contracting parties consider are contrary to their respective energy security and climate goals should be excluded or not.

As a preliminary matter, such disputes would center on the interpretation of the nature of such investments and whether they are contrary to the host country's "energy security and climate goals." These disputes would not be very different from those under current IIAs and/or the ICSID Convention regarding what qualifies as an investment in order to gain access to arbitration.

CONCLUSIONS

When considering either the withdrawal from or reform of the existing IIA framework to curb climate change, policymakers should be aware that both options entail a series of issues. The main issue both options share is the narrowing timeframe in which they could be implemented in order to meet the goals of the Paris Agreement.

Both options would be subject to a lengthy negotiation process, which would narrow the window in which they could be effectively implemented. It could be argued that a reform of the existing IIAs could seem a more moderate approach that would face less resistance considering the other non-environmental benefits that IIAs entail.

However, the lack of consensus as to how to reform existing IIAs to align them with the efforts to mitigate climate change could entail a longer execution process when

compared to an overall withdrawal. In other words, it could be argued that a withdrawal process involves delays in its negotiation whereas a reform process involves delays in its execution.

Similarly, such a reform approach would need to carefully tailor the specific climate mitigation provisions to be included under an IIA. Such clauses could vary depending on a country's specific circumstances. It is possible that generic environmental clauses could fail to achieve the desired environmental policies or be used in an arbitrary manner by respondent States.

On the other hand, a complete withdrawal from the IIA framework could also jeopardize the other benefits that such treaties provide. Removing investment protections would affect non-environment related investments along with investments that the Paris Agreement considers necessary to address climate change. The latter could hinder the developing countries' ability to access funding and technologies required to carry out climate change mitigation actions.

Accordingly, it is unclear whether either of these options could limit the increase of greenhouse emissions by 2025 or result in the required rate of decline by 2030 as per the Paris Agreement.

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