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The inherent incompatibility of international investment law with a just green transition

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Draft

I. Introduction

The longstanding tensions between states' international investment law (IIL) obligations and their obligations under international human rights and environmental laws are becoming increasingly prominent in the context of climate action and just transition policies.[2] The acceleration of domestic mitigation and adaptation measures adopted by governments around the world to tackle the climate emergency have given rise to investment treaty claims by investors adversely impacted by such measures, primarily in the energy sector.[3] As acknowledged in the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement,[4] decarbonization is essential to mitigating the climate emergency and achieving a just green transition. It is well established by science that the greatest anthropogenic

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[2] See on the relationship between IIL and public interest regulation, Lorenzo Cotula, 'Do Investment Treaties Unduly Constrain Regulatory Space?' (2014) Questions of International Law, Zoom-in 9, 19-31; Bueno, N., Yilmaz Vastardis, A., & Djeuga, I. N. (2023). Investor human rights and environmental obligations: The need to redesign corporate social responsibility clauses. *Journal of World Investment & Trade, 24*(2), 179–216; Alessandra Arcuri and Federica Violi, 'Human Rights and Investor-State Dispute Settlement: Changing (Almost) Everything, so that Everything Stays the Same' (2019) 3 Diritti umani e diritto internazionale 579–96; A Yilmaz Vastardis, 'From Risk to Rights: Reorienting the Paradigms at the Heart of Corporate Legal Form and Investment Treaty Standards in Foreign Investment Governance' in Jean Ho and Mavluda Sattorova (eds), *Investors' International Law* (Hart 2021) 132–77; Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (UNWG on Business and Human Rights), 'International Investment Agreements (IIA s) and Human Rights: Report on Human Rights-Compatible International Investment Agreements' (27 July 2021) A/76/238; Barnali Choudhury, 'Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements' (2017) 38 U Pa J Intl L 425.

[3] Westmoreland Coal Company v Canada ICSID Case no. UNTC/20/3; *Glencore International A.G. v. Republic of Colombia*, ICSID, Case No. ARB/21/30; TransCanada v USA (2016); TC Energy v USA; Uniper v Netherlands; RWE v Netherlands; Discovery Global LLC v Slovak Republic; Alberta PMC v USA; Ruby River Capital LLC v Canada;

[4] United Nations Framework Convention on Climate Change (signed 4–14 June 1992, entered into force 21 March 1994); Paris Agreement to the UNFCCC Dec. 12, 2015. U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015)

contributors to global warming are the burning of fossil fuels and biomass, deforestation, and industrial agriculture.[5]

Climate action requires major transformations of economies and societies. Both its implementation and its delay pose grave dangers to the most vulnerable segments of society, climate policies raise complex distributive questions at local and international levels.[6] Energy transition is a fundamental pillar of climate action. With oil, gas and mining sectors being amongst the most powerful and litigious industries in the face of public policy reforms,[7] and IIL providing a layer of protection above and beyond domestic laws from policy shifts detrimental to profit margins,[8] it is inevitable that international investment law will be a battlefield where arbitrators will settle some important distributional consequences of climate policies.[9] This is a concern especially because "[b]y selectively providing rights and remedies for foreign investors, the investment treaty regime can compound social inequalities in the face of climate change."[10]

Scholars critical of IIL have argued that protections the system affords to fossil fuel investments cause delays in climate action and raise its costs.[11] Others have argued that, despite its potential adverse impacts on fossil fuel phase-out, IIL can still support climate action by facilitating investments in green economies and help achieve decarbonization targets.[12] Yet,

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[5] Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment to the UN General Assembly in its 74th session 15 July 2019, A/74/161. Para 12.

[6] L Cotula, 'International Investment Law and Climate Change: Reframing the ISDS Reform Agenda' (2023) 24 (4-5) Journal of World Investment and Trade 766-791, 771.

[7] Lea Di Salvatore, 'Investor-State Disputes in the Fossil Fuel Industry' International Institute for Sustainable Development Report December 2021 < https://www.iisd.org/system/files/2022-01/investor%E2%80%93state-disputes-fossil-fuel-industry.pdf>.

[8] Anil Yilmaz Vastardis, 'Investment Treaty Arbitration: A Justice Bubble for the Privileged' in Thomas Schultz and Federico Ortino (eds) *Oxford Handbook of International Arbitration* (OUP 2020), p.617; Juan Carlos Boué, 'The Investor-State Dispute Settlement Damages Playbook: To Infinity and Beyond (2023) 24 (3) Journal of World Investment and Trade 372-397.

[9] See L Cotula, 'International Investment Law and Climate Change: Reframing the ISDS Reform Agenda', 770-71.

[10] L Cotula, 'International Investment Law and Climate Change: Reframing the ISDS Reform Agenda' 788.

[11] Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Change Policy Posed by Investor-State Dispute Settlement' (2018) 7(2) TEL 229, Kate Miles, 'International Investment Law and Climate Change: Issues in the Transition to a Low Carbon World' p.27-34; Alessandra Arcuri, Kyla Tienhaara and Lorenzo Pellegrini, 'Investment law v supply side climate policies: insights from Rockhopper v Italy and Lone Pine v Canada' (2024) 24 International Environmental Agreements: Politics, Law and Economics 193-216.

[12] M Gehring and M 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 (5-6) Journal of World Investment and Trade 778-812, 782; G M Farnelli. 'Investors as Environmental Guardians? On Climate Policy Objectives and Compliance with Investment

research also has shown that reliance on IIL by renewable energy investors in a wave of recent investment disputes arising from roll-back of various renewable energy subsidies and the methods of valuation of damages applied by a number of tribunals have led to over-compensating these investors and this "bears a chilling effect on host States' climate policies."[13]

The flurry of policy making, policy U-turns and adjustments to tackle the climate crisis, including possible shifts in response to instances of irresponsible investor conduct, in sectors critical to climate action make fertile ground for investment disputes,[14] both in relation to the phasing out of fossil fuels and in relation to promoting investments crucial to decarbonization goals. In the academic literature, thus far, most attention has been rightly dedicated to the implications of investment treaty protections on supply side climate policies focusing on fossil fuels, and on reforms needed to make treaties consistent with climate goals.[15] As far as climate friendly investments[16] are concerned, with a few exceptions,[17] the analysis has largely focused on the role of investment treaties in facilitating and scaling up such investments[18] In this chapter, I review the role of investment treaties in the context of climate action, both their

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Agreements' (2022) 23 (5-6) Journal of World Investment and Trade 887-914; Daniel M Firger and Michael Gerrard, 'Harmonizing Climate Change Policy and International Investment Law: Threats, Challenges and Opportunities' Yearbook On International Investment Law & Policy 2010-2011, Karl P. Sauvant, Ed., OUP 2011; A Boute, 'Combatting Climate Change through Investment Arbitration' (2012) Fordham International Law Journal 613-664: A Boute, 'Regulatory Stability and Renewable Energy Investment: the Case of Kazakhstan' (2020) 121 Renewable and Sustainable Energy Reviews, 109673; see also the World Bank Group and the Energy Charter Secretariat, 'Enabling Foreign Direct Investment in the Renewable Energy Sector: Reducing Regulatory Risks and Preventing Investor-State Conflicts' 2023; K Miles, 'International Investment Law and Climate Change: Issues in the Transition to a Low Carbon World', (July 2, 2008). Society of International Economic Law (SIEL) Inaugural Conference 2008, <https://ssrn.com/abstract=1154588.

[13] M Fermeglia, "Cashing-In on the Energy Transition? Assessing Damage Evaluation Practices in Renewable Energy Disputes" (2022) 23 (5-4) Journal of World Investment and Trade 982-1019, 987.

[14] Zoe Phillips Williams, *The Political Economy of Investment Arbitration* (OUP 2022) 16-20.

[15] J Paine and E Sheargold, 'A Climate Change Carve-Out for Investment Treaties' (2023) 26(2) Journal of International Economic Law 285-304; G Van Harten, An ISDS Carve-Out to Support Action on Climate Change, Osgoode Legal Studies Research Paper Series (2015); Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation.

[16] The term 'climate friendly' investments is used here to refer to investments that aim to contribute to mitigation and adaptation activities to combat climate change, such as investments in clean energy, mining of transition minerals, financial instruments geared towards addressing climate change. It is important to bear in mind that 'climate friendly' investments may not always achieve intended climate goals and may cause environmental degradation and human rights harms.

[17] See e.g. L Cotula, 'Critical Minerals': International Economic Law in a Global Resource Rush, (2023-2024) 15(2) Trade, Law and Development; O Hailes, 'Lithium in International Law: Trade, Investment and the Pursuit of Supply Chain Justice' (2022) 25 Journal of International Economic Law 148; L Mehranvar and S Sasmal, The Role of Investment Treaties and Investor–State Dispute Settlement (ISDS) in Renewable Energy Investments, (2022). <https://scholarship.law.columbia.edu/sustainable_investment/5>

[18] Supra note 12.

potential to hinder phasing out fossil fuels and their potential as a catalyst for climate friendly investments to assess whether, as currently configured, investment treaties are compatible with just transition objectives. This review finds that besides hindering the regulation of fossil fuels in line with climate goals, the risks investment treaties pose to the implementation of a just and equitable transition outweigh the potential benefits of relying on investment treaties to attract climate friendly investments. I conclude that investment treaties would stifle a just and equitable transition by unconditionally protecting and over-compensating climate-friendly investments during a complex period of major transformation in society.

The chapter proceeds as follows. In Part II, I provide a brief overview of how international investment law can act as an obstacle to climate action, specifically focusing on issues around the protection of fossil fuel investments. I provide this brief overview to locate the main focus of the debate around the impact of investment treaties on supply side climate policies.[19] In Part III, I delve into the role of investment treaties as enablers of climate action. Here, I discuss need for scaling up climate-friendly investment and finance to achieve decarbonization goals and the legal principles that shape the conditions and outcomes of investment flows. My focus here is on whether relying on investment treaties can support a just and equitable transition that distributes the risks and benefits of the transition equitably at local and international levels. In Part IV, I conclude and provide reflections on the way forward.

II. International investment law as an obstacle to climate action

It is estimated that approximately 60% of oil and gas, and 90% of coal must remain unextracted to keep within a 1.5 °C carbon budget.[20] In further recognition of this urgent reality, in the Glasgow Climate Pact in COP26, the state parties agreed to accelerate efforts to phase out unabated coal power and phase-out inefficient fossil fuel subsidies.[21] With oil and gas stranded assets estimated to cost over US$1 trillion to investors,[22] a rise in investment disputes in this area is to be expected. The UN Intergovernmental Panel on Climate Change has expressed concern that despite IIL's potential role to encourage climate friendly investments, the threat

[19] See on this Alessandra Arcuri, Kyla Tienhaara and Lorenzo Pellegrini, 'Investment law v supply side climate policies: insights from Rockhopper v Italy and Lone Pine v Canada'.
[20] D Welsby, J Price, S Pye, P Elkins 'Unextractable fossil fuels in a 1.5 C world', (2021) 597 Nature 230-234.
[21] Glasgow Climate Pact para 36.
[22] D Welsby, J Price, S Pye, P Elkins 'Unextractable fossil fuels in a 1.5 C world', (2021) 597 Nature 230-234.

of investment claims looms large over the progress of climate action and energy transition.[23] Scholars have argued that the availability of investment treaty protections and investment arbitration delay or make more costly state efforts to decarbonise their economies and societies.[24] Most recently, a report by the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd, to the UN General Assembly highlighted investment treaties and arbitration as a major obstacle to climate action due to the size of arbitral awards secured by the fossil fuel industry and the impact of investment treaty protections on policy space.[25]

There is a growing consensus among a spectrum of international investment law scholars that the threat of investment treaty claims can slow down climate action, specifically the fossil fuel phase out element, and render moving away from fossil fuels more costly.[26] David R Boyd's 2023 report identifies 20 publicly known investment arbitration claims and threatened claims that are linked to policies aimed at preventing and alleviating harmful impacts of fossil fuel projects.[27] Some of these claims are directly linked to supply side climate policies and others arise from limitations or prohibitions of fossil fuel projects in ecologically sensitive areas.[28] While many of the listed claims or threats have not yet led to arbitral awards in favour of the investor, except for *Rockhopper v Italy*, the list reveals that some of the threatened claims were

[23] IPCC 6th Assessment Report Chapters 14 and 15, 2022 (Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the IPCC)

[24] K Tienhaara and L Cotula, "Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets" 2020 IIED Land, Investment and Rights Series; G Van Harten, 'Foreign Investment Protection and Climate Action: A New Price Tag for Urgent Policies' 2016 12(5) Osgoode Legal Studies Research Paper Series 21/2016; N Lobel and M Fermeglia. 'Investment protection and unburnable carbon: competing commitments in international investment and climate governance' (2018) 4 Diritto del Commercio Internazionale 945-976; J Paine and E Sheargold, 'A Climate Change Carve-Out for Investment Treaties' 2023 26(2) Journal of International Economic Law 285-304; K Miles, "Arbitrating climate change: Regulatory regimes and investor-state disputes," 1 Climate Law 63 (2010), pp. 86-91; L Johnson, 'International Investment Agreements and Climate Change: The Potential for Investor-State Conflicts and Possible Strategies for Minimizing It' (2009) 39 Envtl L Rep News & Analysis 11147.

[25] Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights, A/78/168, 13 July 2023.

[26] Arcuri, Tienhara, Pellegrini "Investment law v supply side climate policies"; Tienhaara and Cotula "Raising the cost of climate action?"; Van Harten, "'Foreign Investment Protection and Climate Action".

[27] *TRUenergy v Australia* (Threatened claim but never brought); Vattenfall v Germany I; Lone Pine v Canada; TransCanada v USA; Rockhopper v Italy; Vermilion v France (threatened); Westmoreland v Canada (I and II); Lama v Canada; Ascent Resources v Slovenia; Uniper v Netherlands; RWE v Netherlands; Discovery Global LLC v Slovak Republic; TC Energy v USA; Glencore International v Colombia (III); Alberta PMC v USA; Clara Petroleum v Romania; Ruby River Capital LLC v Canada; Korea National Oil Corporation and Others v Nigeria; Zenith Energy v Tunisia.

[28] Arcuri, Tienhaara, Pellegrini, "Investment law v supply side climate policies" p. 3.

averted due to policy reversals,[29] and others were settled or discontinued after compensation was offered externally to the arbitral proceedings after the claim was filed.[30] A number of claims are currently still pending an outcome before tribunals.[31] Majority of these claims involve developed states as respondents as relatively early movers in supply side climate policies. As supply side policies become taken up by developing countries, many heavily reliant on coal power or oil and gas extraction, pursuant to their UNFCCC and Paris Agreement commitments, there is likely to be a sharp rise in investment arbitration claims in response to transition policies.[32]

As noted by Arcuri et al, fossil fuel phase-out poses important multi-layered distributional questions as to who should bear the cost of "forgoing extraction possibilities?"[33] IIL protections play a significant role in determining some of the distributional outcomes of climate action, by shielding investors from the financial losses that may arise from policy evolution.[34] They do so through large compensation awards to fossil fuel or mining investors, which often go beyond usual market rates,[35] paid out from the public purse. Such awards may be a result of projects that were not allowed to carry on beyond the exploration phase or those that were at operational stage but terminated before the end of their expected life cycle.[36]

Some scholars and policy-makers remain convinced that the new generation investment treaties that recognise state's right to regulate, contain exceptions on environmental protection or include revised provisions on substantive standards, such as on the meaning of the fair and

[29] TRUenergy v Australia; Vermilion v France.
[30] E.g. RWE AG and RWE Eemshaven Holding II BV v The Kingdom of the Netherlands; Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands (ICSID Case No. ARB/21/22).
[31] See eg Zeph Investments Pte. Ltd. v. The Commonwealth of Australia (II)(PCA Case No. 2023-67); Westmoreland Coal Company v. Canada (III)(ICSID Case No. UNCT/23/2); Ascent Resources Plc and Ascent Slovenia Ltd v. Republic of Slovenia(ICSID Case No. ARB/22/21); Discovery Global LLC v. Slovak Republic(ICSID Case No. ARB/21/51).
[32] K Tienhaara, R Thrasher, B A Simmons and K P Gallagher "Investor-state dispute settlement: obstructing a just energy transition" 23(9) Climate Policy 2023, pp 1197-1212.
[33] Arcuri, Tienhaara, Pellegrini "Investment law v supply side climate policies" p.1.
[34] A Yilmaz Vastardis, "From Risk to Rights" 90-91.
[35] J C Boué, 'The Investor-State Dispute Settlement Damages Playbook: To Infinity and Beyond' (2023) 24(3) JWIT 372–97; see also, P R Gilbert, 'Expropriating the Future: Turning Ore Deposits and Legitimate Expectations into Assets' in K Birch and F Muniesa (eds) *Assetization: Turning Things into Assets in Technoscientific Capitalism* (MIT Press 2020), 173-201 .
[36] Juan Carlos Boué, 'The Investor-State Dispute Settlement Damages Playbook'; Toni Marzal, "Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS" (2021) 22(2) JWIT 249-312.

equitable treatment standard, can overcome the investment treaty threat to climate action.[37] However, arbitral awards such as *Eco Oro v Colombia*[38] and *Bear Creek v Peru*[39] demonstrate that such mechanisms may not suffice to limit the extent of investment treaty protections in order to integrate protection of human rights and the environment into international investment governance.[40] Both disputes relate to mining investments in ecologically sensitive areas which were to operate within a complex socio-economic locality,[41] involving opposition to mining from local and indigenous communities,[42] as well as involving inconsistent political decision-making and evolving policies around environmental governance. In the *Bear Creek* award, neither the environmental exception,[43] nor the corporate social responsibility clause contained in the Peru-Canada FTA allowed Peru to escape liability.[44] On the issue of investor's conduct and its social responsibility, the *Bear Creek* tribunal found no causal link between the investor's potentially irresponsible conduct and the government measure that terminated Bear Creek's right to operate the mining concessions.[45] When the respondent invoked the FTA exception found in Article 2201.1 relating to measures necessary to protect human life or health,[46] the tribunal found that the measures taken by the government were not covered by the exception, without offering a thorough reasoning on this finding.[47] While revolving around a different investment, but a sufficiently similar set of facts, the *Eco Oro* award bears similarities to *Bear*

[37] See eg. Stephan Schill and Vladislav Djanic, "Wherefore art thou? Towards a public-interest based justification of international investment law" (2018) 33(1) ICSID Review- Foreign Investment Law Journal 29-55; S Zhang and N Li, 'Addressing Climate Change through International Investment Agreements: Obstacles and Reform Options' *Sustainability* 2024, 16, 1471: J Dooley, 'The Co-Existence of Mitigation and International Investment Law: A Practical Assessment of Climate Change Action Under Less 'Green-Friendly' Investment Agreements' (2022) 23 Journal of World Investment and Trade 849-886; M Sharma, 'Integrating, Reconciling, and Prioritising Climate Aspirations in Investor-State Arbitration for a Sustainable Future: The Role of Different Players' (2022) 23 Journal of World Investment and Trade, 746-777; Communication COM(2015) 497 final from the Commission of 14 October 2015 on Trade for All - Towards a More Responsible Trade and Investment Policy, 14-17.

[38] *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41.

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

[40] See Lorenzo Cotula and Nicolas M Perrone, 'Seeing Santurban Through ISDS: A sociolegal case study of Eco Oro v Colombia' (2024) Leiden Journal of International Law; Gunes Unuvar, Benton Heath

[41] Lorenzo Cotula and Nicolas M Perrone, 'Seeing Santurban Through ISDS'

[42] *Bear Creek Mining v Peru*, paras 152–216.

[43] Canada-Peru Free Trade Agreement, Article 2201 (3).

[44] Bear Creek Mining Corporation v. Republic of Peru (ICSID Case No. ARB/14/21), paras 411-414; Bueno, N., Yilmaz Vastardis, A., & Djeuga, I. N. (2023). Investor human rights and environmental obligations: The need to redesign corporate social responsibility clauses. *Journal of World Investment & Trade, 24*(2), 179–216, pp 208-210.

[45] *Bear Creek Mining v Peru* para 411.

[46] *Bear Creek Mining v Peru* para 462.

[47] *Bear Creek Mining v Peru* Paras 473-478.

Creek in its assessment of social and environmental factors and provisions within the applicable treaty.[48]

It is important to note that there are cases with similar circumstances in which the respondent state has not been found to have breached investment treaty standards.[49] But these awards do not offer adequate openings for safeguarding policy space and local community rights in the context of climate action. For instance, the recent *Red Eagle v Colombia* award concerning a mining investment adjacent to the Eco Oro mining titles in the Santurban Paramo in Colombia found no breach of the FET or expropriation provisions of the same Colombia-Canada FTA applied in the *Eco Oro* dispute, and therefore did not consider whether the environmental exception was applicable in the case.[50] While the Red Eagle award absolves Colombia from liability, the success of the respondent is due to the very specific circumstances that are present in the case, namely that when the investor acquired the mining titles, there were already regulations in place banning mining in the paramos.[51] If we contrast the factual matrix of Red Eagle with that of *Eco Oro*, we find that in Eco Oro the mining titles were acquired some time before the ban was introduced, but the environmental and social concerns were known to the investor from the outset and the regulators as well as the judiciary had begun taking steps to protect the paramos.[52] And this distinction in the timing of the acquisition of the mining titles seem to have made the biggest difference on the findings of the respective tribunals. The difference in outcome was not due to differential environmental or social impacts of the projects, as the projects would have similarly devastating impacts on the ecosystem. If we are to consider the application of the same or similar set of investment treaty standards in the context of a dispute arising from climate action, little hope can be discerned from the existing suite of arbitral awards that the newer generation of treaties that contain CSR and right to regulate clauses or environmental or social exceptions would allow states to defend their actions on purely public interest grounds for imperfectly implemented policy measures.

[48] G Unuvar, 'A tale of policy carve-outs and general exceptions: *Eco Oro v Colombia* as a case study' (2023) 14 Journal of International Dispute Settlement 517-533; L Cotula and N M Perrone 'Seeing Santurban through ISDS: A Sociolegal case study of Eco Oro v Colombia' (2024) 37(2) Leiden Journal of International Law 440-461.
[49] Red Eagle Exploration Limited v. Republic of Colombia (ICSID Case No. ARB/18/12); Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania (ICSID Case No. ARB/15/31)
[50] Red Eagle v Colombia
[51] Red Eagle v Colombia paras 63-64, 297
[52] Lorenzo Cotula and Nicolas M Perrone, 'Seeing Santurban Through ISDS' pp3-5.

Arguments have also been advanced that the principle of systemic integration can support preservation of policy space of host states and allow integration of states' environmental and human rights obligations under international law into the interpretation of IIA standards.[53] Fahner and Happold have argued that a review of arbitral awards involving a potential clash between a state's IHRL obligations and its IIA obligations "sheds doubt on the utility of the notion of systemic integration as a tool for solving norm conflicts in international law."[54] Moreover, as noted by Cotula systemic integration "leaves considerable room for discretion – for instance on which rules are relevant and how to take them into account."[55] Fahner and Happold find, in the same vein, that the arbitrators retain discretion on how to achieve harmonization and often the systemic integration exercise ends up interpreting investment treaties to restrict the scope of human rights obligations of states.[56]

Another layer of concern arises from Arcuri's critique of the *Rockhopper v Italy* award which forewarns us about the potential effects of investor reliance on investment treaties to counter climate policy making supported by ecological democratic forces.[57] This is especially concerning when many arbitral awards have penalised states for taking imperfect policy decisions in response to democratic contestation and protest, viewing such actions as an outcome of 'political whim' or 'political pressure'[58] that justifies finding of a treaty violation.[59] As climate change is described as a wicked problem[60] and an issue that concerns the very survival of life on our planet, climate action and policy-making inevitably involves and will

[53] See e.g. J E Vinuales, and P M Dupuy, 'Human Rights and Investment Disciplines: Integration in Progress' in M. Bungenberg, J. Griebel, S. Hobe, A., Reinisch (eds), International Investment Law (Baden Baden: Nomos) (2012) (Forthcoming), Available at SSRN: https://ssrn.com/abstract=2125205; U Kriebaum, 'Human Rights and International Investment Arbitration' T Schultz and F Ortino (eds) *The Oxford Handbook of International Arbitration* (OUP 2020), 153-155; L Wandahl Mouyal, *International Investment Law and the Right to Regulate* (Routledge 2016) 228-233.

[54] J H Fahner and M Happold, "The Human Rights Defence in International Investment Arbitration: Exploring the Limits of Systemic Integration" ICLQ vol 68, July 2019 pp 741–759, 744.

[55] L Cotula, '(Dis)integration in Global Resource Governance: Extractivism, Human Rights, and Investment Treaties' (2020) 23 Journal of International Economic Law 431-454, 448.

[56] J H Fahner and M Happold, "The Human Rights Defence in International Investment Arbitration" p.758.

[57] A Arcuri, 'On how the ECT fuels the fossil fuel economy: *Rockhopper v Italy* as a case study' [2023] 7(1): 3. *Europe and the World: A law review* [20]

[58] Bear Creek v Peru para 401

[59] See also Rockhopper v Italy, para 198; Tecmed paras 164-166; Z Phillips Williams, *The Political Economy of Investment Arbitration* 149-150.

[60] Charlotte Villiers, 'New Directions in the European Union's Regulatory Framework for Corporate Reporting, Due Diligence and Accountability: the Challenge of Complexity" (2022) European Journal of Risk Regulation 1-19, at pp.1-2 (Climate change and the pursuit of sustainability and sustainable business might be regarded as among the world's "wicked problems" because, conceptually, we might not fully know what we are looking for, with competing definitions, constantly evolving scientific evidence and data and dynamic interconnections combining "networks uncertainty, nonlinearity, thresholds, feedback, and resilience")

involve contestation, protest and imperfect policy choices and reversals. This combination of factors makes climate action a fertile ground for investment treaty disputes.

III. International investment law as an enabler of climate action

Given the urgency, size, and volume of foreign investments and financing needed to achieve just green transition and tackle the climate crisis,[61] international investment governance plays a crucial role in shaping the conditions of the transition. According to UNCTAD, 'Climate protection requires a massive new wave of investment, reinventing energy and carbon-emitting sectors."[62] The Paris Agreement, in Article 2(1)(c) requires state parties to make "finance flows consistent with a pathway towards low green-house gas emissions and climate-resilient development." Pursuant to Article 9 of the Paris Agreement and the principles of equity and common but differentiated responsibilities and respective capabilities codified in the UNFCCC, there is an obligation on developed countries to provide financial resources to assist developing countries in implementing mitigation and adaptation measures. It is also well established that delayed or inadequate climate action threatens human rights and environmental protection in the context of the climate emergency.[63] While international agreements on climate change chart these general obligations on developed states, question remains as to the forms of financing and the legal terms governing the flow of finance and investments to support a green transition. According to UNCTAD, the necessary investment push to scale up climate friendly investments require "governments to use all policy instruments at their disposal, including fiscal policies, industrial policies, credit provision, fiscal regulation and welfare policies, as well as international trade and investment policies."[64]

Modes of financing and the regulatory framework applicable to transition investments will shape the conditions of green transition, as well as the distribution of benefits and risks of these

[61] A 2021 analysis by the UNFCCC Standing Committee on Finance estimates the financing needed is between USD 5.9 trillion to 11.5 trillion until 2030, see UNFCCC Standing Committee on Finance: First report on the determination of the needs of developing country Parties related to implementing the Convention and the Paris Agreement, 2021, p.7.
[62] UNCTAD (2019), Trade and Development Report 2019: Financing a Global Green New Deal, UN Conference on Trade and Development (UNCTAD): New York and Geneva, p.5
[63] IACHR and REDESCA Resolution 3/2021, Climate Emergency: Scope of Inter-American Human Rights Obligations
[64] UNCTAD (2019), Trade and Development Report 2019, p vi.

investments.[65] Whether green transition frameworks and policies support a 'just transition' is and will be influenced, among other factors, by the content of the legal standards governing finance and investments. The IPCC Synthesis report published in 2023 warned that "there is a rapidly closing window of opportunity to secure a liveable and sustainable future for all." But, how decarbonization is achieved matters too. While climate change poses serious threats to nature and wellbeing of societies, the scale of transformation required to decarbonise comes with costs, losses and damage, resulting from losses of jobs, livelihoods, food, land and energy insecurity, public and private revenues from fossil fuels and industrial agriculture.[66] There is already growing evidence of human rights and environmental harms resulting from investments in renewable energy and transition minerals sectors.[67] To address such risks associated with decarbonisation, there is a growing consensus that climate policies should integrate equity and fairness to ensure a just transition. The UN IPPC 6th assessment report states that the just transition approach entails:

> "a set of principles, processes and practices aimed at ensuring that no people, workers, places, sectors, countries or regions are left behind in the move from a high-carbon to a low-carbon economy. It includes respect and dignity for vulnerable groups; creation of decent jobs; social protection; employment rights; fairness in energy access and use and social dialogue and democratic consultation with relevant stakeholders."[68]

As states use all policy options at their disposal to scale up climate friendly investments, what role might international investment law play in shaping equity and fairness in investments geared towards decarbonisation?

Thus far, the attention in investment law scholarship on green investments has focused primarily on the protection of renewable energy investments,[69] with lesser focus on transition

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[65] Celine Tan, Anil Yilmaz Vastardis, Gamze Erdem Turkelli, "UK-African Partnerships and Just Energy Transitions: Finance and Investment Implications" Climate Finance for Equitable Transitions submission to the UK All Party Parliamentary Group for Africa 21 August 2023, accessible at https://warwick.ac.uk/fac/soc/law/research/projects/nefdef/climatefinance/policy-advocacy/ukap/

[66] Sangji Lee and Lisa Baumgartner, How Just Transition Can Help Deliver the Paris Agreement? UNDP 2022, p 7.

[67] Business and Human Rights Resource Centre Transition Minerals Tracker, <https://www.business-humanrights.org/en/from-us/transition-minerals-tracker/>.

[68] WG III Contribution to the IPCC Sixth Assessment Report (Climate Change 2022: Mitigation of Climate Change) page 75.

[69] M Fermeglia, "Cashing-In on the Energy Transition?',

minerals such as lithium.[70] The dominant view among international economic law scholars and policy-makers is that investment treaties can act as an enabler of climate action by facilitating investments in green economies and help achieve Paris Agreement's net zero targets.[71] The public data available on the UNCTAD Investment Dispute Settlement database shows 117 arbitration claims have been filed by renewable energy investors up to 2023, with a significant majority of claims filed after 2012..[72] As debates around the role of IIL in facilitating green transition grow, and reform proposals are put on the table to reserve protection for climate friendly investments,[73] it is important to bear in mind that climate friendly investments can still cause environmental and human rights harm.

Disproportionate protections offered to investors under IIL may deter government action responding to such harms or render them more costly. For instance, mining of some transition minerals, such as cobalt and copper, have a long history of environmental and human rights harm.[74] The growing demand for these minerals to support green energy and technologies has exacerbated concerns of labour exploitation, human rights harms, and environmental degradation.[75] A recent report on a carbon credit project in Sierra Leone has exposed that the project is "raising significant concerns over land rights, lack of community consent, and potential social repercussions", potentially threatening the livelihoods of local communities.[76]

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[70] O Hailes, 'Lithium in International Law'.

[71] Gehring and Tokas 2022; Farnelli 2022; A Boute 'The potential contribution of international investment protection law to combat climate change' 27(3) Journal of Energy and Natural Resources Law 2009 333-376; Communication of the Secretary General on the Modernisation of the Energy Charter Treaty (1 Jul 2022) International Energy Charter https://www.energycharter.org/media/news/article/communication-of-the-secretary-general-on-the-modernisation-of-the-energy-charter-treaty/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=72821feec70fab2743d97ad51eafb987; World Economic Forum, Guidebook on Facilitating Climate FDI, White Paper July 2023, https://www3.weforum.org/docs/WEF_Guidebook_on_Facilitating_Climate_FDI_2023.pdf

[72] The World Bank Group and the Energy Charter Secretariat 2023 Report p.23 reports 119 disputes being filed up to 119; The overall number of such disputes filed with an IIL tribunal is possibly higher when accounting for disputes that remain confidential and hidden from public view.

[73] See, J Paine and E Sheargold, 'A Climate Change Carve-Out for Investment Treaties'.

[74] AfreWatch and Amnesty International, "This is what we die for" Human Rights Abuses in the Democratic Republic of the Congo Power the Global Trade in Cobalt, 2016 https://www.amnesty.org/en/documents/afr62/3183/2016/en/; Global Witness, 'Copper Bottomed? Bolstering the Aynak Contract: Afghanistan's First Major Mining Deal' 2012 <https://www.globalwitness.org/en/campaigns/afghanistan/copper-bottomed/>

[75] Amnesty International and Initiative pour la Bonne Gouvernance et les Droits Humains, *Powering Change of Business as Usual: Forced Evictions at Industrial Cobalt and Copper Mines in the Democratic Republic of Congo* 2023 accessible at https://www.amnesty.org/en/documents/AFR62/7009/2023/en/

[76] SILNORF and HEKS EPER, Carbon done wrong: Controversial carbon credit project in Sierra Leone threatens people's land rights (May 2024) accessible at https://www.farmlandgrab.org/post/32191-controversial-carbon-offset-project-spells-hardship-for-local-communities

Similarly, some large scale renewable energy projects have been involved in allegations of human rights harms due to displacement of communities, attacks and threats to human rights defenders, labour exploitation and violations of rights of indigenous peoples.[77] Most prominently, in 2020, a Mexican indigenous community Unión Hidalgo filed a lawsuit against Electricité de France (EDF) under the French Law on Corporate Duty of Vigilance in connection with the construction of a wind park on the Union Hidalgo territory. Union Hidalgo and its co-plaintiffs claim that EDF did not comply with its vigilance obligations under the law due to its failure to seek free, prior and informed consent from the affected communities, leading to division and conflict within the community, as well as threats and intimidation of indigenous rights defenders. EDF has said that they have complied with Mexican laws in planning and constructing the wind farm and recognise the right of indigenous peoples to free prior and informed consent and have collaborated with the Mexican authorities who are leading the consultations.[78] The case illustrates that green investments are not immune to harming human rights of local communities or cause environmental degradation, much like fossil fuel investments.

Community resistance to the development or implementation of green investments with human rights and environmental impacts could give rise to policy shifts or adaptations by the host government, potentially giving rise to investment treaty claims if such shifts in policy harm profit margins of the investor. A leading study by Zoe Phillips Williams on the political economy of investment arbitration has illustrated that democratic contestation is an important contributor to the emergence of investor-state disputes.[79] According to Williams, the tensions between a state's IIL commitments to a stable business environment and its duty to regulate in the public interest manifest themselves most dramatically in "states' ability to respond to democratic contestation regarding investment-related issues".[80] While there are plenty of examples of democratic contestation and community resistance influencing policy decisions culminating in arbitration claims in mining and fossil fuel industries,[81] such disputes arising

[77] See e.g., Unión Hidalgo v EDF, a lawsuit filed in France under the French Law on Corporate Duty of Vigilance alleging EDF's breach of its vigilance duty for failing to respect indigenous peoples' rights when planning the construction of a wind park in Mexico; Business and Human Rights Resource Centre, Renewable Energy and Human Rights Benchmark: Key Findings from the Wind and Solar Sectors, 2021.
[78] https://www.bloomberg.com/news/features/2021-07-09/mexico-wind-farms-divide-communities?embedded-checkout=true
[79] Zoe Phillips Williams, *The Political Economy of Investment Arbitration*, p.3-4, 18.
[80] Zoe Phillips Williams, *The Political Economy of Investment Arbitration* p.4, 18
[81] Rockhopper v Italy; Eco Oro v Colombia; Bear Creek v Peru; Bilcon and Clayton v Canada.

from "green-investments", such as EDF's wind farm investments in Mexico, also remain full within the realm of possibilities.

While states need to facilitate climate friendly investments and international cooperation and financing is key to achieving the much-needed green transition, I argue that international investment law, as it is currently configured, is not an appropriate legal framework to facilitate a just and equitable transition. Protections offered by IIL *might* support incentivising climate friendly investments and help mobilise financing, due to legal protections offering stability and predictability for investors, particularly for investments that involve high upfront costs and long waits to generate profits.[82] But the empirical evidence does not support the idea that investment treaties play a role in incentivising these investments.[83] A 2022 study carried out by the Columbia Center for Sustainable Investment assesses the importance of investment treaty protections in investor decision making based on the findings of a survey targeting investors and industry experts in the renewable energy sector.[84] The findings of their survey indicate that "when investing in new foreign markets … investment treaties are not decisive in investment decision-making."[85] Similarly, Tienhaara and Downie's study on whether the Energy Charter Treaty's investment protection provisions facilitate FDI into clean energy technologies found no evidence supporting that hypothesis.[86] Even if investment treaties did, in some instances, incentivise climate friendly investments, the risks they pose in privileging investor protection over environmental and human rights protection and their exclusion of local community claims[87] raise significant concerns on supporting an investment governance for a just and equitable transition. A minority of awards where environmental, human rights and local community concerns were duly considered in arbitral decision-making do not provide

[82] The World Bank Group and the Energy Charter Secretariat 2023 Report "Renewable investment projects are generally characterized by relatively high upfront investment costs and lower operating costs over time. That is, even though their overall costs have significantly decreased over time…" P.15.
[83] Josef C Brada, Zdenek Drabek and Ichiro Iwasaki, Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis *Journal of Economic Surveys* (2021) Vol. 35, No. 1, pp. 34–70, p 58 finding that IIL's impact on FDI is "so small as to be considered as negligible or zero".
[84] Ladan Mehranvar & Sunayana Sasmal, The Role of Investment Treaties and Investor–State Dispute Settlement (ISDS) in Renewable Energy Investments, (2022). Available at: https://scholarship.law.columbia.edu/sustainable_investment/5
[85] Mehranvar and Sasmal, p.7
[86] Kyla Tienhaara and Christian Downie, "Risky Business? The Energy Charter Treaty, Renewable Energy, and Investor-State Disputes" (2018) 24 Global Governance 451-471.
[87] N M Perrone, 'The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime' AJIL Unbound. 2019; 113:16-21. doi:10.1017/aju.2018.92; Stephanie Triefus, 'International Investment Law from Below: Taking local community rights seriously', Erasmus University Rotterdam (unpublished PhD thesis).

much relief,[88] when the system lacks precedent and certainty. Overall, the benefits offered by investment treaties to host states in scaling up climate-friendly investments are questionable; but there is a large body of arbitral case law evidencing that investment treaties do not take environmental and human rights considerations seriously.

IV. Way forward and Conclusion

There is a wide recognition that investment treaty protections raise the cost of climate action, particularly when policies take action to phase out and reduce reliance on fossil fuels. One option to tackle this problem is to introduce a sectoral focussed fossil fuel carve out, such as the one advanced by the ECT modernisation proposal.[89] While this would be a welcome progress to tackle one of the most pressing issues in climate-investment relationship, it would fail to capture the complexity of climate action measures needed to work towards a just transition. A climate carve-out, as advanced by Van Harten, and more recently by Paine and Sheargold may provide a more effective solution to tackling the possible detrimental impact of investment treaty protections on regulating fossil fuel investments, while also capturing broader measures that focus on mitigation.[90] A carve out, depending on its design, could leave fossil fuel and emissions reduction focused policy disputes wholly outside the scope of the investment treaty and therefore prevent initiation of investment treaty claims in these sectors.

There is greater disagreement when it comes to the role of investment treaties in promoting investments crucial to decarbonizing economies and societies. The necessity of rapidly scaling up climate-friendly investments, especially in the developing world, is unquestionable.[91] But this necessity cannot be viewed in isolation from the broader socio-economic context in which these investments operate.[92] A just and equitable transition requires an inclusive and integrated investment governance framework that does not insularly protect and privilege investor rights

[88] See e.g. Gabrielle Resources v Romania; Urbaser v Argentina.
[89] See for an analysis of the proposal, L Schaugg and S Brewin, Uncertain Climate Impact and Several Open Questions: An analysis of the proposed reform of the Energy Charter Treaty, International Institute for Sustainable Development, October 2022.
[90] Gus Van Harten, An ISDS Carve-Out to Support Action on Climate Change, Osgoode Legal Studies Research Paper Series (2015), No 38, Vol.11, Issue 8; J Paine and E Sheargold, 'A Climate Change Carve-Out for Investment Treaties'.
[91] Mithatcan Aydos et. al., "Scaling investment in renewable energy generation to achieve Sustainable Development Goals 7 (Affordable and Clean Energy) and 13 (Climate Action) and the Paris Agreement: Roadblocks and Drivers" CCSI (December 2022), p.8.
[92] UNDP Just Transition report p.17.

at the expense of the rights and wellbeing of other segments of society. It also requires an investment protection framework that allows sufficient flexibility for governments to implement reasonable, proportionate and non-discriminatory adaptation of policies in light of evolving local and global realities,[93] including for 'climate friendly' investments.

A recent study on drivers of renewable energy investments analyses four key elements of such a framework in the context of renewable energy investments, which are relevant to all climate friendly investments: "fairness, flexibility, transparency and predictability, and effective dispute settlement mechanisms and rule of law".[94] While investment treaties profess to offer these guarantees to investors through substantive treaty standards and international dispute settlement, their narrow and investor oriented focus, as interpreted by arbitral tribunals, have resulted in a skewed understanding of what a robust regulatory framework is. IIL has no qualms with a weak regulatory framework, presence of corrupt practices or lack of rule of law in the host state, as long as the bottom line of the investor is not impacted. For instance, IIL understands the concepts of 'fairness' 'transparency' and 'predictability' only in relation to the interests of the investor through its fair and equitable treatment standard ('FET'). The FET standard has been developed in arbitral case law largely to safeguard the 'legitimate expectations' of the investor, interpreted as a guarantee that an investor will operate its business throughout its expected life cycle at a certain level of profit, no matter what changes occur in the external political, economic, and social circumstances.[95] Thus, flexibility is largely absent from IIL's lexicon, except when host states are found liable to pay damages for having adapted policies to changing needs and priorities. Moreover, ISDS practice under investment treaties suffers from a major rule of law deficiency, due to inconsistent arbitral awards applying the same legal principles to highly similar set of circumstances, absence of a system to challenge or appeal awards, lack of transparency, exclusion of third parties with direct interest in the proceedings, and the list goes on.[96]

[93] Mithatcan Aydos et. al., p.5.
[94] Mithatcan Aydos et. al., 44.
[95] J Ostřanský, 'Fair and Equitable Treatment' in D Schneiderman and G Van Harten (eds) *Rethinking Investment Law: Perspectives and Prospects* (OUP 2023) at p. 128, 151.
[96] I Damjanovic, 'The Reform of International Investment Law: Whose Rule of Law?' (2024) European Journal of Risk Regulation 1-17, 5-8; J Arato, K Claussen and M Langford, 'Investors-State Dispute Settlement Reform Process: Design, Dilemmas and Discontents' (2023) 14(2) Journal of International Dispute Settlement 127-133.

Instead of the skewed regulatory framework offered by investment treaties, a just and equitable transition would be better served by an investment governance framework that defines the key concepts of fairness, predictability, flexibility, transparency and rule of law in an inclusive manner. For instance, it has been proposed that a fair regulatory framework is one that facilitates "mutual benefits of investors and the state."[97] When the framework becomes unbalanced in terms of producing mutual benefits, there should be room for flexibility and adjustments to ensure rebalancing of distributional impacts and maintaining sustainability.[98] Beyond investors and the state, the regulatory framework should allow local communities and rightsholders to have an independent voice and the ability to shape investment governance to ensure protection of their rights and interests.[99] Fairness and equity require that no one is left behind in the transition process. To achieve this, investment governance frameworks should integrate safeguards for securing the rights and interests of individuals and groups who are impacted by implementation of investment and financing decisions.

[97] Mithatcan Aydos et. al P.44 - 45
[98] Mithatcan Aydos et. al P.45
[99] See on this, Perrone, and J Ostřansky and J Bonnitcha, Rethinking Investment Treaties: A Roadmap IISD Report May 2024, pp 35-36.