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GREENING INVESTOR-STATE DISPUTE SETTLEMENT

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Abstract: Climate change poses serious threats to human society. Climate change is already affecting our environment and thus, many aspects of human and economic activity. Among the challenges ahead, governments will need to more actively adopt regulatory policies given the international obligations in this area, such as the Paris Agreement, as well as promote green private investment as a means toward unlocking sustainable growth. How can international investment law be adapted and modernized to respond to these challenges? In this Essay, we summarize a comprehensive set of innovations that could be included in International Investment Agreements to address international obligations regarding climate change. Our discussion, based on a Green Treaty Model, first stresses the role of balanced obligations for investors and host countries, and then focuses on dispute settlement. We conclude by explaining how the current process of reform under the auspices of the United Nations Commission on International Trade Law can be used for a more ambitious transformation of international investment; a transformation in which investment treaties can act as catalysts for green foreign direct investment necessary to reverse the momentum for climate change already built into the atmosphere.

INTRODUCTION

Global climate is already changing our environment. Glaciers have shrunk, ice on rivers and lakes is melting earlier, plant and animal ranges have shifted, and trees are flowering sooner. Wildfires are more frequent, hurricanes more intense, and periods of drought and heat waves more prolonged. These trends harm crops in the fields as changes in daily and seasonal weather disruptions increase, which may affect growing patterns and increase the need for irrigation and other water management techniques. Climate change will affect growing patterns and increase the need for irrigation and other water management techniques. This will affect our food supply and will impact our daily life in unpredictable ways. Adaptation will be required; and efforts

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to mitigate climate change will also affect our lives, as “virtually every human activity directly or indirectly emits [greenhouse gases]”¹ In short, “[t]he planet’s atmosphere is a public good, and climate change constitutes a public bad.”²

To minimize the impacts of these effects, it is necessary to implement climate-friendly investment laws and policies to incentivize green investments—both domestic, and perhaps more importantly, foreign. And yet, most treaties addressing transnational fluxes of foreign direct investment (FDI) make little to no effort to reflect this necessity, let alone highlight the potential of FDI for improving these disheartening prospects. It is widely recognized that optimally regulated FDI has the potential to mitigate this public bad and generate substantial economic and environmental enhancements through the establishment of more efficient supply chains and the dissemination of good practices.³ These are indirect benefits for combatting climate change. But, in addition to failing to provide the space to deal with climate change-induced regulatory needs, perhaps the main blind spot of international investment agreements (IIAs) is neglecting the fact that FDI can also generate direct benefits, including with respect to combatting climate change through technology transfer and innovation to emerging market economies.⁴

¹ Jonathan B. Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 692 (1999); see NAT’L RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS 10–11 (2001) [hereinafter CLIMATE CHANGE SCIENCE]; Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354, 44,402–03 (proposed July 30, 2008) (to be codified at 40 C.F.R. ch. 1) (describing greenhouse gases attributable to diverse human activities such as electricity, heating, cooking, transportation, landfills, mining, industry, soil management, land use change, and raising domesticated animals).

² Rachel Brewster, *Stepping Stone or Stumbling Block: Incrementalism and National Climate Change Legislation*, 28 YALE L. & POL’Y REV. 245, 268 (2010); see Jody Freeman & Andrew Guzman, *Climate Change and U.S. Interests*, 109 COLUM. L. REV. 1531, 1596 (2009) (discussing the implications of economic interests relating to climate change).

³ See JOSEPH FRANCOIS ET AL., CTR. FOR ECON. POLICY RESEARCH, REDUCING TRANSATLANTIC BARRIERS TO TRADE AND INVESTMENT: AN ECONOMIC ASSESSMENT 1–3 (2013), http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf [<https://perma.cc/FA6U-MZV9>] (arguing that “domestic rules and regulations . . . can place a cost on trade and investment” but that “the costs involved may . . . be mitigated or reduced through partial regulatory convergence and cross-recognition of standards”). See generally Peter John Wood, *Climate Change and Game Theory: A Mathematical Survey* (Austl. Nat’l Univ. Crawford Sch. Econ. & Gov’t, Working Paper No. 2.10, 2010), <http://ageconsearch.umn.edu/bitstream/249379/2/CCEP-2-10.pdf> [<https://perma.cc/556S-4JUC>] (discussing game theoretic solutions to climate change); CLIMATE CHANGE SCIENCE, *supra* note 1.

⁴ See, e.g., HOWARD MANN & KONRAD VON MOLTKE, INT’L INST. FOR SUSTAINABLE DEV., NAFTA’S CHAPTER 11 AND THE ENVIRONMENT: ADDRESSING THE IMPACTS OF THE INVESTOR-STATE PROCESS ON THE ENVIRONMENT 3–4 (1999), <http://www.iisd.org/pdf/nafta.pdf> [<https://perma.cc/MYU5-G4ZZ>]; Thomas Waelde & Abba Kolo, *Environmental Regulation, Investment Protection and ‘Regulatory Taking’ in International Law*, 50 INT’L & COMP. L.Q. 811, 814, 822

To reap the full potential of environmental benefits from these FDI inflows, adequate host country legal, technical, and regulatory capacities and appropriate IIAs will be needed. What is perplexing then is the failure of IIAs to take climate change into account. Climate change presents unique uncertainties and other challenges to investors and to governments, particularly for long-term investments. The effects of climate change can be highly disruptive to economic and other human activity, in part because those effects are unpredictable at the local level, and in part because the international community and host countries need to continually readjust climate change-related policies. Thus, investors and governments should work together more actively to enhance regulatory policies with international obligations in this area.⁵ Public-private partnerships are particularly fundamental to increasing energy efficiency for providing both new financial opportunities and enhanced environmental security. Green private investment is further acknowledged as being a means toward unlocking sustainable growth.⁶

How can IIAs incentivize FDI and host countries to deal with climate change? In this Essay, we discuss some innovations that could be included in future IIAs, to make these agreements more responsive to the challenges presented by climate change. The Essay is based on the work of a constitutive group of experts who participated in designing a ‘Green Investment Treaty Model’ (“Green Treaty” or “Treaty”) as part of a challenge created by the Stockholm Treaty Lab.⁷ This Essay highlights some of the team’s main suggestions in the spirit of expanding the audience for this issue and engaging the community of international investment law scholars who may not be aware of the relevant intersection between FDI and climate change.⁸

(2001) (discussing tensions between international environmental and international investment law); Alan Morrison, *Is the Trans-Pacific Partnership Unconstitutional?*, THE ATLANTIC (Jun. 23, 2015), <http://www.theatlantic.com/politics/archive/2015/06/tpp-isds-constitution/396389/> [https://perma.cc/RGL3-C3FS] (discussing the tension between international investment arbitration and the demands of the United States Constitution).

⁵ For an example of an international agreement with climate change-related obligations, see Environment Agreement Under the United Nations Framework Convention on Climate Change, Apr. 22, 2016, T.I.A.S. No. 16-1104 [hereinafter *The Paris Agreement*].

⁶ GREEN GROWTH ACTION ALL., THE GREEN INVESTMENT REPORT 6 (2013), http://www3.weforum.org/docs/WEF_GreenInvestment_Report_2013.pdf [https://perma.cc/6AV8-FL9N].

⁷ See generally *The Inspiration*, STOCKHOLM TREATY LAB, <http://stockholmtreatylab.org/the-treaty-lab/> [https://perma.cc/G49P-KHX7] (discussing the Stockholm Treaty Lab Prize and its challenge to draft a model investment treaty for climate change mitigation).

⁸ Daniel B. Magraw et al., *Model Green Investment Treaty: Team Planet Submission* (2018), <http://stockholmtreatylab.org/wp-content/uploads/2018/10/Team-13-Model-Treaty.pdf> [https://perma.cc/2DTB-Q8HH] [hereinafter *Green Treaty: Team Planet*]. The team was composed of the following experts: Krycia Cowling, Charles Di Leva, Jonathan Drimmer, Chiara Giorgetti, Hana Heineken, Mette Hoej, Young-Hee Lee, Leila Chennoufi, Jan Low, Daniel Magraw, Kendra Magraw, Steve McCaffrey, Grace Menck Figueroa, Sergio Puig, Annabella Rosemberg, and Niranjali

Before continuing, a clarification is in order: because space precludes addressing all the investment-related topics implicated in climate change, we focus on dispute settlement provisions. Not only does the symposium organized by Boston College have a narrower focus on investment dispute settlement, but the current process of reform undertaken under the auspices of the United Nations Commission on International Trade Law (UNCITRAL) centers primarily on how to improve or transform investor-State dispute settlement (ISDS), the controversial yet dominant process of enforcing international investment commitments.⁹ Hence, this Essay briefly notes some of the proposals to make IIAs more consistent and compatible with climate change's challenges, and addresses the main changes that could be implemented with respect to dispute settlement.¹⁰

The Essay is organized as follows: Part I addresses the main substantive proposals, discussing some of the criteria used in the design of the Green Treaty.¹¹ Part II explains the relevance of investment dispute settlement for the effective implementation of the Green Treaty as well as the necessary adaptation to the dominant paradigm of investment dispute settlement—ISDS.¹² Finally, we briefly conclude.

Amerasinghe. We must add that other teams participated in the Stockholm Treaty Lab's competition and that our proposal was not judged to be the winner. *See The Outcome*, STOCKHOLM TREATY LAB, <http://stockholmtreatylab.org/the-outcome/> [<https://perma.cc/925D-YFRX>].

⁹ Mattias Kumm, *An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege*, 4 ESIL REFLECTION 3 (2015). *See generally* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007) (discussing the implications of investment treaty arbitration as a public law system and the unique power of private arbitrators within the system). For controversial ISDS cases, see Philip Morris Asia Ltd. v. Commonwealth of Austl., PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Jan. 7, 2015) http://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf [<https://perma.cc/7GPT-AJYH>], and Vattenfall AB v. Fed. Republic of Ger., ICSID Case No. ARB/09/6, Claimant's Request for Arbitration (Mar. 30, 2009), http://italaw.com/documents/Vattenfall_Request_for_Arbitration_001.pdf [<https://perma.cc/QW72-LLLR>].

¹⁰ By doing so, we do not ignore the realities that climate change affects virtually all aspects of society and that some countries and segments of society are more likely to be involved in other important ways. We, however, want to link the important work on greening FDI to the current and historical process of ISDS reform that is being advanced within UNCITRAL, without dismissing important substantive innovations proposed by this group of experts. *See, e.g.*, Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AM. J. INT'L L. 410 (2018) (providing an overview of different reform proposals) [hereinafter Roberts, *Reform of Investor-State Arbitration*].

¹¹ *See infra* notes 13–35, and accompanying text.

¹² *See infra* notes 36–68, and accompanying text.

I. TOWARDS A GREEN INVESTMENT TREATY

Given the nature and significance of challenges posed by climate change, governments should adapt their IIAs in a nuanced way to address what are likely to be the most important areas, activities and issues for regulating FDI. In this section, we briefly highlight some of the more substantive aspects of how IIAs can become more responsive to the challenges presented by climate change.

A. Incentivizing Green FDI

As is evident from the Green Treaty—a model agreement that we hope will inspire governments across the globe—we believe policymakers should design IIAs to fill the currently existing vacuum by integrating investment and climate change laws and policies within the framework of sustainable development.¹³ For that purpose, the structure of our proposal for a Green Treaty retains the form of a traditional IIA, i.e., an international treaty, addressing investment-related disciplines with a preamble, operative provisions, final clauses, and annexes.¹⁴ Substantively, States should re-conceptualize fundamental aspects of investment law to take account of the specific challenges posed by climate change to investors, society, and governments in general and to capitalize on the experience gained with traditional IIAs, including at least two decades of intense dispute settlement practice. This practice has given rise to important doctrinal issues as well as ample interpretive guidance by ISDS tribunals.

On that basis, and with the benefit of years of experience in different relevant fields of law and policy, the team proposed a treaty text with embedded flexibilities for IIAs that could be adopted by different nations. Many of the Treaty's provisions are more-or-less standard and draw on lan-

¹³ Many changes and new model treaties have emerged from ISDS criticism. For example, South Africa suspended negotiations of investment treaties. *See, e.g.*, Republic of South Africa, Bilateral Investment Treaty Policy Framework Review: Government Position Paper 12, 12 (2009), <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/090626trade-bi-lateralpolicy.pdf> [<https://perma.cc/H8WM-SUYD>]; Luke Eric Peterson, *South Africa Pushes Phase-Out of Early Bilateral Investment Treaties After at Least Two Separate Brushes with Investor-State Arbitration*, INVESTMENT ARB. REP. (Sept. 23, 2012), http://www.iareporter.com/articles/20120924_1. Other countries have imposed new restrictions in their draft investment-related treaties. *See* Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area art. 27(2), Feb. 27, 2009, 2672 U.N.T.S. 47529; Damon Vis-Dunbar, *Norway Shelves Its Draft Model Bilateral Investment Treaty*, INT'L INST. FOR SUSTAINABLE DEV.: INV. TREATY NEWS (June 8, 2009), <https://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/> [<https://perma.cc/U2QE-89TM>]. Nevertheless, to our knowledge this is the first exercise to reform an entire IIA with the aim of confronting climate change.

¹⁴ *See generally Green Treaty: Team Planet*, *supra* note 8.

guage from already existing investment agreements such as the Canada-European Union Trade Agreement and the Trans-Pacific Partnership, in part to avoid unnecessary questions of interpretation.¹⁵ The team concluded that nations should embody innovations at several levels to support the Paris Agreement on Climate Change¹⁶ and sustainable development by including legal provisions aimed at:

- approaching the critical need to protect the parties' right to regulate not only with general statements but also with express attention to *sectoral areas* of particular relevance to climate change, such as incentives, water, agriculture, land use, energy, public health, labor, human rights, indigenous people's rights, and finance;¹⁷
- providing balance in obligations by including disputable investor obligations, including with respect to planning, implementation, and reporting;¹⁸
- crafting obligations to fit the context of climate change by including all the usual IIA disciplines except the prohibition on performance requirements because addressing climate change may require the latter, particularly with respect to agriculture or energy use;¹⁹
- emphasizing the importance of sound planning by investors, which includes requiring environmental impact assessments to take into account climate risks; setting up compliance programs to ensure proper governance; and, developing an environmental management program to ensure investments do not stray from a climate-friendly path;²⁰
- focusing on the full lifetime of investments to ensure planning and implementation that support the host country's efforts to address climate change, with enforceability being an indispensable part of a multipronged approach designed to achieve effective implementation;²¹
- specifying and integrating investment reporting and party reporting requirements under the Paris Agreement, such as providing for a transparent and participatory process involving foreign investments

¹⁵ See Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, Jan. 14, 2017, 2017 O.J. (L 11) 3 [hereinafter Joint Interpretive Instrument]; *Green Treaty: Team Planet*, *supra* note 8.

¹⁶ See The Paris Agreement, *supra* note 5; *Green Treaty: Team Planet*, *supra* note 8, art. 5.

¹⁷ *Green Treaty: Team Planet*, *supra* note 8, arts. 8–17.

¹⁸ *Id.* art. 35.

¹⁹ *Id.* arts. 35–36.

²⁰ *Id.* art. 35.

²¹ See generally *id.*

for the Paris Agreement's five-year cycle of adjusting Nationally Determined Contributions;²²

- emphasizing the importance of education, capacity building, technology transfer and finance, including means of monitoring and reporting on climate change-related educational efforts;²³
- requiring transparency with respect to promulgating and publishing climate-related measures, including subsidies and other incentives or disincentives, and about international dispute settlement;²⁴
- specifying a balanced treatment of allegations of corruption that embodies proper incentives to both investors and parties;²⁵
- encouraging cooperation between parties and between parties and foreign investors in the event of natural disasters, which will be exacerbated by climate change;²⁶ and
- providing flexibility regarding dispute settlement, as well as strengthening and adding credibility to climate change-related dispute settlement.²⁷

Some of the proposed text for each of the obligations that implement these innovations might be seen as favoring investors and investments, while others may be seen as favoring State parties to the agreement. We believe, however, that the entire package of provisions comprises an integrated and balanced approach. The main goals of this proposed Treaty include balancing the right to regulate with the need to encourage sound foreign investment in the context of combating climate change and achieving sustainable development. Such balancing can be difficult in practice, especially when deciding fact-intensive questions. Hence, we recognize the fundamental role of dispute settlement provisions that can empower different types of adjudicators to contextualize what are often perceived as broad legal standards.²⁸

²² *Id.* art. 26.

²³ *Id.* pmb.

²⁴ *Id.* art. 30.

²⁵ *Id.* art. 16.

²⁶ *Id.* arts. 5, 23.

²⁷ Daniel B. Magraw et al., *Model Investment Green Treaty: Executive Summary* (2018) (on file with author) [hereinafter *Green Treaty: Executive Summary*]. See generally *Green Treaty: Team Planet*, *supra* note 8.

²⁸ Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037, 1071 (2010) (arguing that tribunals are increasingly engaged in a "balancing process" and are "called upon to make value judgments"). Treaties have not failed to recognize this trend. See, e.g., U.S. Dep't of State, 2012 U.S. Model Bilateral Investment Treaty arts. 24(3), 37, <https://www.state.gov/documents/organization/188371.pdf> [<https://perma.cc/Y6L4-HHHP>].

B. Maximizing Intersectionality and Feasibility

To correctly contextualize investment provisions within climate change challenges, IIAs should maximize intersectionality among all relevant legal fields, including environmental, investment promotion and protection, water, and indigenous rights. In addition, drafters should ensure that the treaty provisions are meaningful and relevant for regulatory and investment decisions alike. The Green Treaty accomplishes this by containing a set of parallel obligations and carving out the necessary policy space for regulators. This approach minimizes the demands placed on adjudicators by providing guidance to them.²⁹ The balancing of values and priorities is best addressed by democratic processes or by authorities with better information and contact with relevant actors.³⁰ In this spirit, and in accordance with the criteria announced for the competition, we proposed an integrated, comprehensive approach with the following characteristics:

- *Compatibility*: The team's approach is compatible with other areas of law. Importantly, the sectoral approach to ensuring the parties' right to regulate takes express account of activities and areas of particular relevance to climate change, such as agriculture, water and finance.³¹
- *Efficiency*: The team's design aims to attract investment in general, with special consideration for green investment. The requirement that parties be transparent with respect to the promulgation and enactment of subsidies, incentives and disincentives and regarding other investment-related measures allows investors and investments to better understand what is happening, and may lead to more rational decision-making.³²
- *Viability*: The team proposes strong, precise protection of the right to regulate, including through the sectoral approach and the preclusion of the prohibition on performance requirements,

²⁹ See, e.g., Meredith Wilensky, *Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures Under the Trans-Pacific Partnership*, 45 ENVTL. L. REP. 10,683, 10,689 (2015) (discussing the broad application of the Fair and Equitable Treatment standard and innovations in the TPP to reduce misapplications in the context of climate change policy).

³⁰ See Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 606, 606 (Chester Brown & Kate Miles eds., 2011) (arguing that regulatory chill may be an important problem "inadequately addressed and often prematurely dismissed by legal scholars").

³¹ *Green Treaty: Executive Summary*, *supra* note 27, at 3. See generally *Green Treaty: Team Planet*, *supra* note 8.

³² *Green Treaty: Executive Summary*, *supra* note 27, at 4. See generally *Green Treaty: Team Planet*, *supra* note 8.

to serve States' needs but at the same time remain attractive to investors. The chosen sectors, such as agriculture and water, are likely to be critically important to many States as climate change affects, for example, the availability and quality of water.³³

- *Universality*: A defining characteristic of the proposal is the overall balance of the Treaty, which is achieved by a blend of the elements summarized above. This allows countries with varying views on that subject to effectively engage with the framework. States can deal with perhaps the most contentious issues, including regulating fossil fuels or mining, in the way that best suits them.³⁴
- *Enforceability*: As we further explain below, by providing different alternative modes of dispute settlement, countries may select a method that best meets their needs; which can lead to better implementation and ultimately enforcement, if the need for it arises.³⁵

It suffices to say here that most of the proposals to improve IIAs include provisions dovetailing with each other to attain comprehensiveness and balance. Massive capital flows, carefully planned and implemented projects, and international cooperation and coordination are needed to address climate change. In this sense, the greening of IIAs is a necessary step for building a more prosperous tomorrow for present and future generations.

II. THE ROLE OF DISPUTE SETTLEMENT

A key part of transforming IIAs is to provide flexibility regarding dispute settlement to countries with different views regarding who should decide investment disputes, as well as adequate safeguards if ISDS is elected. The proposal thus contains three alternative methods of dispute settlement: domestic courts of the host country, traditional ISDS, and a standing tribunal. It allows prospective signatories to an IIA to choose among those different op-

³³ *Green Treaty: Executive Summary*, *supra* note 27, at 5. See generally *Green Treaty: Team Planet*, *supra* note 8.

³⁴ *Green Treaty: Executive Summary*, *supra* note 27, at 6. See generally *Green Treaty: Team Planet*, *supra* note 8.

³⁵ *Green Treaty: Executive Summary*, *supra* note 27, at 7. See generally Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361 (2018) (discussing ways to assess alternatives in investment law); *Green Treaty: Team Planet*, *supra* note 8.

tions. This approach is consistent with that of the United Nations Convention on the Law of the Sea in connection with disputes brought under it.³⁶

Flexibility alone is not sufficient. Greener IIAs must be complemented by strengthening and adding credibility to climate change-related dispute settlements. The Green Treaty contains five provisions addressing this issue. First, it requires that cases be decided expeditiously and with due process if the Parties choose to settle investor-initiated disputes in domestic courts of the host country.³⁷ Second, the Green Treaty requires that arbitrators have a basic familiarity with climate change law and sustainable development law and policy, requirements that do not exist in any IIA and are essential to reaching just results, if the parties choose either of the international dispute settlement mechanisms.³⁸ Third, the Treaty contains a mandatory Code of Conduct appropriate for international disputes brought under the IIA.³⁹ Fourth, the Treaty requires that dispute settlement be transparent and provide meaningful opportunity for public participation, and more specifically, that dispute settlement under either of the international mechanisms be conducted in accord with the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration.⁴⁰ And fifth, parties are implicitly required to report publicly on compliance with treaty-based decisions or awards.⁴¹

We briefly describe below the three alternatives and the reason for our position. We also explain some other innovations that can be added to investment dispute settlement, in particular ISDS, to bring enforcement more in line with the goals of the Green Treaty.

A. *The Need for Alternatives*

Many analysts have addressed whether ISDS, a permanent court, or domestic courts are preferable as alternatives for handling claims regarding unfair, discriminatory, or expropriatory treatment of foreign investments.⁴² The analysis, however, should also include non-adjudicatory mechanisms such as private contracting, and political risk insurance as well as political mechanisms, such as international diplomacy. A country's decision should be made by the country itself based on its own conditions.

³⁶ United Nations Convention on the Law of the Sea art. 287, Dec. 10, 1982, 1833 U.N.T.S. 397.

³⁷ *Green Treaty: Team Planet*, *supra* note 8, art. 38-A-1.

³⁸ *Id.* art. 39.

³⁹ *Id.* annex 38-B-1/38-C-1.

⁴⁰ *Id.* art. 38.

⁴¹ *Id.* art. 28.

⁴² *Id.*

Institutional choice is always contextual and thus all institutional options are imperfect and subject to trade-offs.⁴³ Market options may not be available in many situations, especially for small- and medium-sized investors. Domestic courts may not be independent or impartial, lacking basic rule-of-law protections. Some may be more prone to biases against foreigners. Diplomacy tends to favor powerful States, as well as the influential firms that lobby them. Interstate dispute settlement can politicize disputes and still be tilted in favor of powerful actors, whether they be States or large corporations with privileged access to State officials.

To decide which institutional option is preferable, one should not simply aggregate how an institutional option performs across goals.⁴⁴ But if States aim at enhancing climate change regulation within the domestic rule of law, then States may want to put emphasis on domestic courts and institutions. Complementarity between domestic and international dispute settlement is an important goal of international law, an attribute the current ISDS system does not yet prioritize. From this perspective, national courts should be the first in line for resolving disputes and mechanisms that provide incentives for domestic rule-of-law enhancement.⁴⁵

But some countries may not need to emphasize domestic rule of law or prioritize other considerations and hence may choose an international investment dispute settlement mechanism. The most frequently used mechanism for investment adjudication—ISDS—has many deficiencies that commentators have identified for decades.⁴⁶ For example, ISDS creates structural incentives for arbitrators to favor those who appoint them. There is no appeals mechanism to provide for consistency across cases, raising basic rule-of-law concerns. Inconsistent decisions made by *ad hoc* panels limit the law's expressive value, and therefore, the law's influence on behavior outside the threat of

⁴³ See generally NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994) (arguing that all legal and policy questions need consideration of the comparative capabilities of different institutions and providing comparative institutional analysis framework).

⁴⁴ See generally Puig & Shaffer, *supra* note 35.

⁴⁵ CTR. FOR INT'L ENVTL. LAW, POSITION PAPER: EU PROPOSAL FOR A MULTILATERAL REFORM OF INVESTMENT DISPUTE RESOLUTION 5 (2017) (criticizing the ICS proposal for "allowing investors to side step" domestic courts).

⁴⁶ See generally THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel et al. eds., 2010) (presenting some of the systemic concerns with investment arbitration, such as limitations on domestic policy space, a lack of democratic accountability, a systemic pro-investor bias, and the inability of treaties to respond to changes in economic circumstances).

sanctions. Hence, as we explain below, if this option is chosen, IIAs may add safeguards to offset the general shortcomings of ISDS.⁴⁷

A third option involves an international court system (ICS). The idea of a single court was advanced as a more legitimate alternative than ISDS by the European Commission.⁴⁸ At its core, this proposal would create a tribunal of first instance and an appellate body, with the judges having fixed terms, paid a regular salary, and selected on a random basis from a roster designated by States. These judges would be restricted from acting as counsel in other cases (which in our judgment occurs too often under current IIAs). The European Commission, representing the twenty-eight member States of the European Union (E.U.), has endorsed this option, and even included it in several agreements. The E.U. plans to promote ICS prospectively in all its treaty negotiations involving investment protection, including with the United States under the proposed Transatlantic Trade and Investment Partnership (TTIP).⁴⁹ As the world's largest sender and receiver of

⁴⁷ Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 91–92 (2013) (discussing criticism of ISDS and proposing a new theoretical framework to explain the investment treaty system) [hereinafter Roberts, *Clash of Paradigms*].

⁴⁸ LAURA PUCCIO & RODERICK HARTE, EUROPEAN PARLIAMENTARY RESEARCH SERV., FROM ARBITRATION TO THE INVESTMENT COURT SYSTEM (ICS) 13–15 (2017), [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607251/EPRS_IDA\(2017\)607251_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607251/EPRS_IDA(2017)607251_EN.pdf) [<https://perma.cc/93F4-Z44Y>]; see U.N. Comm'n on Int'l Trade L., Working Group III (Investor-State Dispute Settlement Reform), Submission from the European Union for the 35th Sess., Possible Reform of Investor-State Dispute Settlement (ISDS), at 2–3, U.N. Doc. A/CN.9/WG.III/WP.145 (Dec. 12, 2017), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/088/32/pdf/V1708832.pdf?OpenElement> [<https://perma.cc/J4RR-4S5N>] (providing critiques of ISDS by the E.U.).

⁴⁹ Memorandum from Gen. Secretariat of the Council of the European Union to Delegations 12981/17 ADD 1 DCL 1, Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes (Mar. 1, 2018), <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf> [<https://perma.cc/S2PR-Y24F>]; see Joint Interpretative Instrument, *supra* note 15, at 3–5 (documenting an economic and trade agreement between Canada and the E.U. that includes investment protection and dispute resolution); *European Union Proposal for Investment Protection and Resolution of Investment Disputes: Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-Commerce: Chapter II-Investment* § 3 (Nov. 12, 2015), http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf [<https://perma.cc/44ZB-P6GG>]; Colin M. Brown, *A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches*, 32 ICSID REV. 673, 682 (2017) (noting that the E.U. is currently engaging in talks on trade and investment protection agreements with countries including United States, Vietnam, Singapore, Japan, China and Mexico). See generally *EU and Mexico Reach New Agreement on Trade*, EUR. COMM'N: NEWS ARCHIVE (Apr. 21, 2018), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1830> [<https://perma.cc/5WCV-DWPK>] (discussing a new trade agreement between Mexico and the E.U. that includes the EU's new ICS); *The EU and Vietnam Finalise Landmark Trade Deal*, EUR. COMM'N: NEWS ARCHIVE (Dec. 2, 2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1409> [<https://perma.cc/FM9H-ESDM>] (discussing final talks between Vietnam and the E.U. on a free trade agreement that will include an updated investment dispute resolution system).

FDI, and given that around half of the existing BITs involve E.U. member States, the E.U. exercises considerable leverage in challenging the status quo.⁵⁰ Its support enhances the political possibility for a multilateral ICS.

Although an investment court may seem better, there are reasons why States may not agree to this option. It may be remote from domestic stakeholders and its decisions could be resisted on sovereignty grounds. Its decision-makers also could be beholden to powerful States given those States' greater importance for the system's sustainability. If those powerful States dislike the judges' decisions, they could block their replacement and suspend the court, as has happened in other venues such as the World Trade Organization. There may also be other reasons, including the cost of establishing and maintaining a permanent tribunal.

The main point is that contexts differ across States, and choices should depend on those contexts and how States want to promote climate change conscious and sustainable FDI. Where basic rule-of-law norms are protected, the costs of an additional international system of review may not be worthwhile. Rather, reliance may be better placed on national courts. In contrast to a State that lacks independent, impartial courts, an international mechanism that provides for investor standing to bring claims is of much greater importance. In some contexts, States may prefer not to include a system of exhaustion of local remedies to streamline the process. A State can then provide greater assurance to investors that they will be treated fairly, and thus reduce the State's cost of capital. In this context, an ICS with an appellate mechanism appears to be a superior model to ISDS because it would more likely be attentive to a State's public policy interests, including the interests of other stakeholders in the investment process.

Our Treaty does not dictate which institutional option is best across all contexts or through time. The goal of the Green Treaty in this respect is to present different options with sufficient safeguards. These options will be a function of context and will depend on particular factors, including a State's market size and FDI dependence, per capita wealth, capital endowment, historical background, institutional development, and government ideology, et cetera. But looking forward, we believe that an international investment regime that is consistent with provisions to address climate change challenges likely cannot simply rely on ISDS. Flexibility will likely be the trend since it will allow States facing distinct challenges to select from a menu of imperfect international alternatives.

⁵⁰ European Commission State of the Union 2017: Factsheet on Future Negotiations for a Multilateral Investment Court, http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf [<https://perma.cc/EP22-ZJPN>] [hereinafter European Commission Factsheet].

B. Transparency and the Enhancement of International Dispute Settlement

The three proposed alternatives could be strengthened to increase enforceability. The alternative of using domestic courts, for instance, can be affected by long delays not uncommon in domestic legal proceedings.⁵¹ Hence, the Green Treaty proposes strengthening the alternatives by a requirement that any such case be decided in an expeditious manner that provides due process.⁵² Other alternatives exist to improve domestic enforcement, including relying on a system of preliminary reference whereby domestic adjudicators can refer questions of interpretation to international tribunals. The advantage of the preliminary reference alternative is its focus on enhancing the rule of law within States, as opposed to bypassing them. If effective, the international court's reach is extended in an efficient and legitimate manner. The disadvantage, from the perspective of investors, is that they have no direct access to an international body, but rather depend on the good faith of national courts, which act as gatekeepers. The international body can only respond to questions as framed by the national courts. The system thus depends on whether national courts have incentives to refer matters to the international body. To the extent that they lack such incentives, as they do in many domestic contexts, this alternative would likely be ineffective. It could, however, be complemented by other mechanisms, such as an interstate dispute settlement.

The investor-State and standing tribunal alternatives can be strengthened in three major ways as proposed by the Green Treaty. First, by providing an enhanced Code of Conduct, which should lead to more just decisions, reduce post-award complaints, and increase the credibility of the process.⁵³ Second, the Treaty requires the application of the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, which has many advantages, including increasing credibility, allowing public input that may be helpful, and informing the public about what countries must do to comply with awards.⁵⁴ And third, the Green Treaty implicitly requires

⁵¹ See JONATHAN BONNITCHA ET AL., *THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME* 90 (2017) (noting that the 3.6 year timeframe for an ICSID arbitration is "more than twice the duration for litigation in domestic courts in selected developed countries"); Anthony Sinclair, *ICSID Arbitration: How Long Does It Take?*, 4 GLOBAL ARB. REV. 5, 19 (2009) (reporting that the average length of an ICSID arbitration is 3.6 years).

⁵² *Green Treaty: Team Planet*, *supra* note 8, art. 39.

⁵³ *Id.* annex 38-B-1/38-C-1.

⁵⁴ *Id.* art. 39; see U.N. Convention on Transparency in Treaty-Based Investor-State Arbitration, art. 2, *opened for signature* Mar. 17, 2015, 54 I.L.M 4 (entered into force Oct. 18, 2017) (providing for the implementation of the UNCITRAL Rules on Transparency); Rep. of the U.N. Comm'n on Int'l Trade Law on the Work of Its Forty-Sixth Session, at 81–86, U.N. Doc. A/68/17

countries to report on compliance with awards and settlements as part of their analysis of the impacts of FDI on climate change.⁵⁵ We conclude this section with an elaboration of such provisions.

- *Enhanced Expertise of Arbitrators*: The Green Treaty proposes that members of international tribunals (the second and third dispute settlement options) have a basic knowledge not only of investment law but also of climate change law and of sustainable development law and policy. Few international arbitrators now possess such expertise, which is essential to adjudicating issues relating to climate change and which can be gained without undue effort. If this provision becomes effective, it is predictable that major academic institutions interested in arbitration will hold short courses to provide such training, probably partly or wholly online.⁵⁶ Relatedly, the Green Treaty expressly authorizes international tribunals to engage experts to provide expertise that may be needed in a particular case, such as the sufficiency of a party's environmental management program. As described below, the Treaty specifies that the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitrations apply to ensure that the public is informed of disputes, including relating to climate change, and to increase the credibility of dispute settlement.⁵⁷
- *Code of Conduct*: The Green Treaty includes a Code of Conduct for Arbitrators that applies to all international dispute resolution mechanisms, including mediation. The Code is significantly more detailed than the few existing codes, and it is mandatory. In addition to general duties of the arbitrators, the

(2013) (supplying the UNCITRAL Rules on Transparency) [hereinafter U.N. Comm'n Int'l Trade Law 46th].

⁵⁵ *Green Treaty: Team Planet*, *supra* note 8, art. 28.

⁵⁶ For a larger discussion and an explanation of different forms of bias in ISDS, see Sergio Puig, *Blinding International Justice*, 56 VA. J. INT'L L. 647, 661–62, 672–5 (2016) and Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 U. PA. J. INT'L L. 431, 436–37 (2013) (discussing the criticisms for lack of diversity in arbitrator selection).

⁵⁷ U.N. Comm'n Int'l Trade Law 46th, *supra* note 54, at 81–86 (supplying the UNCITRAL Rules on Transparency); *Green Treaty: Team Planet*, *supra* note 8, art. 39; see Malcolm Langford et al., *The Revolving Door in International Investment Arbitration*, 20 J. INT'L ECON. L. 301, 324–27 (2017) (providing empirical evidence of a significant group of individuals who sequentially or simultaneously perform different roles in international investment arbitration cases, creating credibility issues for their resulting decisions); Nassib G. Ziadé, *How Many Hats Can a Player Wear: Arbitrator, Counsel and Expert?*, 24 ICSID REV. 49, 50–58 (2009) (discussing conflict scenarios when an international investment dispute arbitrator has another relationship to the subject matter of the dispute, such as acting as counsel on a prior case with similar issues).

Code uniquely provides for specific duties and obligations in all the phases of the arbitral proceedings. Duties are owed to both parties and other arbitrators. Significantly, the Code also details specific issues to be disclosed, which include past and pending appointments and work as counsel as well as conflict of interest.⁵⁸

- *Transparency*: The Green Treaty requires that the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitrations be used in all international dispute resolution mechanisms identified in the Treaty. These rules were recently negotiated in UNCITRAL and represent a balanced and workable set of rules that recognizes the important functions served by transparency in this context. Considering both the transparency requirements and the Code of Conduct, we believe the Treaty is responsive to recent criticisms of ISDS to the effect that the arbitral process lacks transparency and clear rules of procedure.⁵⁹

C. UNCITRAL and the Opportunity for Substantive Reform⁶⁰

There is an unprecedented process of reform of international investment law underway. This process has largely been in response to the critiques of ISDS. States and commentators have proposed a range of institutional reforms that are being discussed in a UNCITRAL working group.⁶¹ Prominently, the E.U. has promoted a multilateral investment court system where private investors retain standing to file claims directly against

⁵⁸ *Green Treaty: Team Planet*, *supra* note 8, annex 38-B-1/38-C-1; Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 422 (2002) (proposing "articulated, enforceable ethical norms" in ISDS).

⁵⁹ U.N. Comm'n Int'l Trade Law 46th, *supra* note 54, at 81–86; *Green Treaty: Team Planet*, *supra* note 8, art. 39. See generally U.N. Comm'n on Int'l Trade L., Working Group II (Arbitration and Conciliation), Settlement of Commercial Disputes: Preparation of a Legal Standard on Transparency in Treaty-Based Investor-State Arbitration, Note by the Secretariat, U.N. Doc. A/CN.9/WG.II/WP.172 (Aug. 2, 2012) (constructing the UNCITRAL Rules on Transparency); U.N. Comm'n on Int'l Trade L., Working Group II (Arbitration and Conciliation), Settlement of Commercial Disputes: Preparation of a Legal Standard on Transparency in Treaty-Based Investor-State Arbitration, Note by the Secretariat, U.N. Doc. A/CN.9/WG.II/WP.169 (Dec. 13, 2011) (constructing the UNCITRAL Rules on Transparency).

⁶⁰ For a more in-depth analysis, see Professor Puig's previous scholarship published in the *American Journal of International Law*. See generally Puig & Shaffer, *supra* note 35.

⁶¹ U.N. Comm'n on Int'l Trade Law: Working Grp. II (Dispute Resolution), Annotated Provisional Agenda of the Sixty-Eighth Session, at 2–3, U.N. Doc. A/CN.9/WG.II/WP.204 (Nov. 22, 2017). See generally Roberts, *Clash of Paradigms*, *supra* note 47.

States.⁶² The E.U. has already concluded agreements containing such a system—designed for bilateral relations, but including flexibilities for multilateralization—with Canada, Singapore, Vietnam and Mexico, and indications are that more agreements with these features will follow.⁶³ As noted above, the E.U. exercises considerable leverage in this reform process due to its role as a leading sender and receiver of FDI and the multitude of existing IIAs that involve E.U. members.⁶⁴

In parallel, India adopted a new model BIT incorporating ISDS, but conditioned its use on the initial pursuit of remedies before domestic courts for at least five years.⁶⁵ India and China also have signaled interest in an appellate process, similar to that included in the E.U.'s proposal.⁶⁶ Although the United States has previously defended ISDS, in October 2017, Robert Lighthizer, the United States Trade Representative (USTR), signaled a potential shift in the United States' position regarding ISDS, suggesting that investors should rely on market mechanisms, such as political risk insurance.⁶⁷ In this context, the ICSID Secretariat also has advanced consideration of an 'incremental' updating of the ICSID Regulations and Rules.⁶⁸

So far, the UNCITRAL process has focused on international dispute settlement provisions. To some extent, this focus is understandable given the attention that ISDS attracts among international law practitioners, legal

⁶² See, e.g., European Commission Factsheet, *supra* note 50.

⁶³ See *supra* note 49 and accompanying text (discussing the EU's promotion of ICS in recent investment protections and trade treaty negotiations).

⁶⁴ European Commission Factsheet, *supra* note 50; see Anthea Roberts, *A Turning of the Tide Against ISDS?*, EJIL TALK! (May 19, 2017), <https://www.ejiltalk.org/a-turning-of-the-tide-against-isds/> [<https://perma.cc/73HW-3EG7>] (listing examples of proposed reforms); see also U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE 4, 7, 111, http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf [<https://perma.cc/N7RR-FYGR>] (providing a global overview of FDI and evolving IIAs).

⁶⁵ Model Text for the Indian Bilateral Investment Treaty art. 15.2 (Gov't of the Republic of India 2015), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560> [<https://perma.cc/LST3-USYW>].

⁶⁶ See Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the U.S. at the WTO*, U. ILL. L. REV. 115, 157 n.321 (2018) ("[S]ome Chinese trade specialists believe that China could look favorably on an appellate process for investor-state dispute settlement."); Roberts, *Reform of Investor-State Arbitration*, *supra* note 10, at 33 ("China could well become a semi-systemic reformer, seeking to retain investment treaty arbitration . . . but subject to an appellate body.").

⁶⁷ Shawn Donnan, *Bitter Differences over NAFTA Break into the Open*, FIN. TIMES (Oct. 18, 2017), <https://www.ft.com/content/058aa538-b387-11e7-a398-73d59db9e399> ("Mr. Lighthizer . . . said the [ISDS] system amounted to an unfair subsidy for businesses to invest overseas. 'Why is it [Mr. Lighthizer's] job to encourage people to invest in Mexico?'").

⁶⁸ Other proposals exist. See Roberts, *Reform of Investor-State Arbitration*, *supra* note 10, at 10–11; see also *Invitation to File Suggestions for Rule Amendments*, News Release, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, (Jan. 25, 2017), <https://icsid.worldbank.org/en/Pages/News.aspx?CID=213> [<https://perma.cc/NM8K-3DCC>].

scholars, and civil society organizations. But the problems with the international investment regime are deeper and should respond to bigger, more relevant issues such as climate change. This is necessary in part (or because of) its neocolonial roots that focus on FDI protection in resource-intensive sectors that require large upfront capital, especially in the petroleum extraction sector. Hence, the reform process presents a unique opportunity to create a real transformation to produce an investment law regime more consistent with the main challenges now facing human society.

CONCLUSION

The Paris Agreement on climate change reached in December 2015 was a historic achievement in international diplomacy. Climate change, like widespread poverty and inequality, nuclear proliferation, and the threats of a global pandemic, poses tremendous threats to individuals and human society—threats that are being experienced now around the world while international efforts to address climate change continue to remain inadequate. Massive amounts of capital, carefully planned and effectively implemented projects, and international cooperation and coordination involving all stakeholders are needed to combat climate change. The current process of international investment law reform can be used to scale-up this ambition by greening IIAs. Changes required to existing models include requiring all arbitrators to be familiar with climate change and sustainable development law and policy, instituting a mandatory Code of Conduct, and increasing transparency and the opportunity for public participation. The Green Treaty discussed in this Essay presents a dynamic path to achieving these goals, and to building a better tomorrow for present and future generations by improving the provisions and the dispute settlement process currently dominant in most investment treaties.