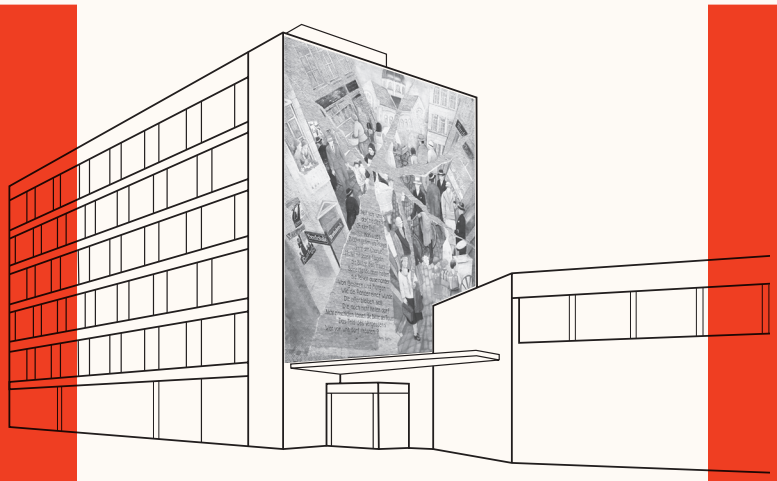

Karsten Nowrot

Transforming International Investment Treaties into Climate Protection Agreements: Current Asian Contributions and Potential Regulatory Ways Ahead

Rechtswissenschaftliche
Beiträge der
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A. Background: Assessing the Policy Implications of International Investment Agreements in the Age of Climate Change*

Ensuring effective climate change mitigation is arguably one of the central global challenges of our time.[1] It could very well be said that we live in the age of climate change. And urgent actions, undertaken by all members of the international community, to address and cope with the challenges arising from this global surface temperature increase appear to be more necessary than ever. The International Court of Justice (ICJ), for example, has stressed in its recently published advisory opinion on the *Obligations of States in Respect of Climate Change* of 23 July 2025 that the phenomenon of global warming, unequivocally caused by human activities, and its severe negative consequences for societies in all parts of the world "concern an existential problem of planetary proportions that imperils all forms of life and the very health of our planet".[2] The Intergovernmental Panel on Climate Change (IPCC), founded in 1988 by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP),[3] emphasizes in its most recent synthesis report "Climate Change 2023", among others, that "[c]limate change is a threat to human well-being and planetary health (very high confidence). There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (very high confidence). […] The choices and actions implemented in this decade will have impacts now and for thousands of years (high confidence)".[4] And the United Nations General Assembly, to mention but one additional example in this regard, reaffirms in its Resolution 79/206, adopted on 19 December 2024 and bearing the title "Protection of Global Climate for Present and Future Generations of Humankind", "that climate change is one of the greatest challenges of our time, expresses profound alarm that the emissions of greenhouse gases continue to rise globally, remains deeply concerned that all countries, particularly developing countries, are vulnerable to the adverse impacts of climate change and are already experiencing an increase in such impacts, including persistent drought and extreme weather events, land degradation, sea level rise, coastal erosion, ocean acidification and changes to the cryosphere, including the melting and retreat of glaciers, such as mountain glaciers, further

* The contribution is based on a presentation given by the author during the first plenary session "Asia's Role in the Development of International Law" at the 10th Biennial Conference of the Asian Society of International Law "Strengthening the Role of International Law in Asia" in Hanoi/Vietnam on 9 October 2025.

1 On this perception see also, e.g., Asia-Pacific Economic Cooperation (APEC) Investment Experts' Group, International Investment Agreements and Climate Change: What is the Role that International Investment Agreements Play in the Transition to a Green Economy?, July 2024, 6 ("It is widely agreed that climate change is the most pressing global challenge."); *Sharma*, Journal of World Investment and Trade 23 (2022), 746 (747) ("Climate change is one of the most serious threats to planet Earth, its flora, fauna and humankind."); *van Aaken*, in: Donath/Heger/Malkmus/Bayrak (eds.), Festschrift für Rainer Hofmann zum 70. Geburtstag, Vol. 2, 781 (782) ("climate change being probably the most fundamental threat to our planet"); *Maljean-Dubois/Ruiz Fabri/Schill*, Journal of World Investment and Trade 23 (2022), 737 ("Climate change is one of the greatest challenges of our time."); *Groß*, JZ 2024, 893 *et seq.*; *Franzius*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 81 (2022), 383 (384); *Cotula*, Journal of World Investment and Trade 23 (2022), 766 (769) ("While debates rage on about the need for ambitious climate action, it is increasingly clear that we are running out of time."); *Magraw/Chennoufi/Cowling et al.*, Journal of International Arbitration 36 (2019), 95 (96); *Markus*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 76 (2016), 715 (717); *Paulus*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 84 (2025), 9 (19 *et seq.*); *Wolff/Hellwege*, in: Hellwege/Wolff (eds.), Klimakrisenrecht, 3 *et seq.*

2 ICJ, *Obligations of States in Respect of Climate Change* (United Nations), Advisory Opinion of 23 July 2025, para. 456.

3 For further details on the IPCC and its activities see the information available on the internet under: <https://www.ipcc.ch/> (accessed 15 August 2025). See also, e.g., *Bolle*, Das Intergovernmental Panel on Climate Change (IPCC), 14 *et seq.*

4 IPCC, Climate Change 2023 – Synthesis Report: Summary for Policymakers, 2023, 24.

threatening food security, water availability and livelihoods, and efforts to eradicate poverty in all its forms and dimensions and achieve sustainable development, recognizes the substantial risks posed by climate change to health, and emphasizes in this regard that mitigation of and adaptation to climate change represent an immediate and urgent global priority".[5]

Although the necessity of adopting ambitious climate change mitigation and adaption policies by states is thus in principle today overwhelmingly recognized, two overarching findings, however, illustrate some of the major difficulties currently faced by the international community on the way to successfully reaching this important goal. First, and if viewed from the perspective of the present regulatory structure and requirements of international climate change law,[6] currently existing so-called "nationally determined contributions" (NDCs) by the contracting parties, envisioned to be the main mechanism under what is often and rightly regarded as the core provision[7] of Article 4 of the Paris Agreement,[8] adopted on 12 December 2015 and entering into force on 4 November 2016 with currently already 195 contracting parties,[9] in order to achieve, on the basis of a "bottom up" governance approach,[10] the long-term temperature goal as stipulated in its Article 2 (1) (a), namely to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels", are almost universally considered to be as far from sufficient and thus still remain inconsistent with the overarching objectives set out in the 2015 Paris Agreement as well as, and perhaps even more important, with the currently predicted safe operating range of our planet in the future.[11]

Already the 21st Conference of the Parties (COP-21) to the 1992 United Nations Framework Convention on Climate Change (UNFCCC)[12] noted on the occasion of the adoption of

5 UN GA Res. 79/206 of 19 December 2024, para. 1; see also already for example UN GA Res. 78/153 of 19 December 2023, para. 1; UN GA Res. 77/165 of 14 December 2022, para. 1; UN GA Res. 76/205 of 17 December 2021, para. 1; UN GA Res. 71/228 of 21 December 2016, para. 1.

6 Generally on the emergence and subsequent development of international climate change law see, e.g., *Bodansky/Brunnée/Rajamani*, International Climate Change Law, 96 *et seq.*; *Boyle/Redgwell*, Birnie, Boyle and Redgwell's International Law and the Environment, 378 *et seq.*; *Nowrot*, Internationales Klimafriedensrecht, 9 *et seq.*; *Stoll/Krüger*, in: Proelß (ed.), Internationales Umweltrecht, 423 (426 *et seq.*); *Mayer*, The International Law on Climate Change, 33 *et seq.*, each with numerous further references.

7 On this perception see also, e.g., *Mayer*, Review of European, Comparative & International Environmental Law 27 (2018), 130; *Boyle/Redgwell*, Birnie, Boyle and Redgwell's International Law and the Environment, 393; *Freudenberger*, Klimaschutz und Verkehr im Völkerrecht, 165; *Rajamani*, International and Comparative Law Quarterly 65 (2016), 493 (497).

8 Decision 1/CP.21, Adoption of the Paris Agreement, reprinted in: FCCC/CP/2015/10/Add.1 of 29 January 2016, p. 2 *et seq*. For the text of the 2015 Paris Agreement see for example the Annex to Decision 1/CP.21, reprinted in: FCCC/CP/2015/10/Add.1 of 29 January 2016, p. 21 *et seq.*

9 See thereto as well as for a current and continuously updated overview of the contracting parties of the 2015 Paris Agreement for example the information available on the internet under: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en> (accessed 15 August 2025).

10 On this "bottom up" governance approach towards combatting climate change as being characteristic for the 2015 Paris Agreement, contrary to the "top down" approach of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted on 11 December 1997 and entering into force on 16 February 2005, see for example *Bodansky*, American Journal of International Law 110 (2016), 288 (300 *et seq.*); *Stoll/Krüger*, in: Proelß (ed.), Internationales Umweltrecht, 423 (472); *Birkner*, in: Ipsen (ed.), Völkerrecht, § 54, paras. 57 and 59; *Frank*, Zeitschrift für Umweltrecht 2016, 352; *Franzius*, in: Markus/Reese/Köck (eds.), Zukunftsfähiges Umweltrecht III, 89 (90); *Schlacke*, Zeitschrift für Umweltrecht 2016, 65 (66); *Will/Manger-Nestler*, Archiv des Völkerrechts 60 (2022), 465 (467); *Saiger*, Nationale Gerichte im Klimaschutzvölkerrecht, 55; *Saurer*, Natur und Recht 2019, 145 (148); *Böhringer*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 76 (2016), 753 (762 *et seq*.).

11 See thereto for example *Maljean-Dubois/Ruiz Fabri/Schill*, Journal of World Investment and Trade 23 (2022), 737 (738); *Proelß*, in: Proelß (ed.), Völkerrecht, 553 (688); *Boyle/Redgwell*, Birnie, Boyle and Redgwell's International Law and the Environment, 402 („This turn in the climate change regime brings with it considerable challenges in implementation, compliance and effectiveness."); *Birkner*, in: Ipsen (ed.), Völkerrecht, § 54, para. 59; *Stoll/Krüger*, in: Proelß (ed.), Internationales Umweltrecht, 423 (471); *Krajewski*, Völkerrecht, § 17, para. 55; as well as generally also, e.g., already *Steffen/Richardson/Rockström et al.*, Science Vol. 347 (13 February 2015), Issue 6223, p. 736 *et seq.*

12 United Nations Framework Convention on Climate Change of 9 May 1992, for example reprinted in: 1771 United

the Paris Agreement in December 2015 that the currently intended NDCs of the future contracting parties would be clearly insufficient to achieve the goal of holding the increase in the global average temperature to below 2°C above pre-industrial levels.[13] Moreover, also more recent developments and findings seem to support this perception.[14] For example, the 5th Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA-5) that took place in Dubai from 30 November until 13 December 2023 stated as one of its overarching conclusions that "Parties are not yet collectively on track towards achieving the purpose of the Paris Agreement and its long-term goals".[15]

Second, and this concerns the other overarching finding worth mentioning in the context of this contribution in order to illustrate some of the major difficulties presently faced by the international community of states on the way to successfully combatting climate change, even as far as countries are concerned that already currently intend to adopt and implement more ambitious climate change prevention and adaption policies, the traditional and also currently still predominant regulatory design of international investment agreements is for a variety of reasons not infrequently perceived – prominently also, among others, by the IPCC itself[16] – as constituting, at least at times and in certain circumstances, something like an obstacle to an effective and in principle probably indispensable domestic re-regulation aimed at combatting climate change.[17]

Nations Treaty Series 107; International Legal Materials 31 (1992), 851.

13 Decision 1/CP.21, Adoption of the Paris Agreement, para. 17, reprinted in: FCCC/CP/2015/10/Add.1 of 29 January 2016, p. 2 *et seq.* ("*also notes* that much greater emission reduction efforts will be required than those associated with the intended nationally determined contributions in order to hold the increase in the global average temperature to below 2 °C above pre-industrial levels") (emphasis in the original).

14 See, e.g., UNEP, Emissions Gap Report 2021 – The Heat is On, 2021, XXIII ("The emissions gap remains large: compared to previous unconditional NDCs, the new pledges for 2030 reduce projected 2030 emissions by only 7.5 per cent, whereas 30 per cent is needed for 2°C and 55 per cent is needed for 1.5°C"); UNEP, Emissions Gap Report 2024 – No More Hot Air … Please!, 2024, XII ("Global greenhouse gas emissions set a new record of 57.1 GtCO2e in 2023, a 1.3 per cent increase from 2022 levels").

15 Decision 1/CMA.5, Outcome of the First Global Stocktake, para. 2, reprinted in: FCCC/PA/CMA/2023/16/Add.1 of 15 March 2024, p. 2 *et seq.*

16 See IPCC, Climate Change 2022, Mitigation of Climate Change, Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, edited by Priyadarshi R. Shukla *et al.*, Chapter 14, p. 1499 ("Investment agreements, which are often integrated in FTAs, seek to encourage the flow of foreign investment through investment protection. While international investment agreements hold potential to increase low-carbon investment in host countries (PAGE 2018), these agreements have tended to protect investor rights, constraining the latitude of host countries in adopting environmental policies (Miles 2019). Moreover, international investment agreements may lead to 'regulatory chill', which may lead to countries refraining from or delaying the adoption of mitigation policies, such as phasing out fossil fuels […]."); and Chapter 14, p. 1505-1506 ("Despite improvements in the international governance of energy, it still appears that a great deal of this is still concerned with promoting further development of fossil fuels. One aspect of this is the development of international legal norms. A large number of bilateral and multilateral agreements, including the 1994 Energy Charter Treaty, include provisions for using a system of investor–state dispute settlement (ISDS) designed to protect the interests of investors in energy projects from national policies that could lead their assets to be stranded. Numerous scholars have pointed to ISDS being able to be used by fossil-fuel companies to block national legislation aimed at phasing out the use of their assets […].").

17 On this perception see also, e.g., already *Tienhaara/Thrasher/Simmons/Gallagher*, Science Vol. 376 (5 May 2022), Issue 6594, p. 701; *Paine/Sheargold*, Journal of International Economic Law 26 (2023), 285 (288 *et seq.*); *Zhu*, Review of European, Comparative & International Environmental Law 33 (2024), 183 (193); *Burgstaller*, in: Hobe/Scheu (eds.), Evolution, Evaluation and Future Developments in International Investment Law, 107 (114) ("However, the risk that existing strong investment protection regimes may also inadvertently exacerbate climate change by simultaneously protecting unsustainable energy projects also needs to be taken into account."); *Mehranvar/Sachs*, in: Ipp/Magnusson (eds.), Investment Arbitration and Climate Change, 263 (264 *et seq.*); *Nwankwo*, Manchester Journal of International Economic Law 17 (2020), 48 (50 *et seq.*); *Islam/Arni*, in: Uddin (ed.), International Law, Climate Change and Bangladesh, 221 *et seq.*; *Martini*, Canadian Yearbook of International Law 61 (2023), 1 (3 *et seq.*); *Dooley*, Journal of World Investment and Trade 23 (2022), 849 (854 *et seq.*); *Marcoux*, Journal of International Dispute Settlement 15 (2024), 351 *et seq.*; *Restrepo Rodríguez*, Investment Treaty Law and Climate Change, 2 *et seq.*; *Akinkugbe/Majekolagbe*, Fordham International Law Journal 46 (2023), 169 (171 *et seq.*); see also UN, Paying Polluters: The Catastrophic Consequences of Investor-State Dispute Settlement for Climate and Environment action and Human Rights, Report of the

And indeed, an in particular more recently notably increasing number of treaty-based investor-state arbitration proceedings have been initiated by foreign investors against various host states aimed at challenging climate change mitigation measures,[18] mostly on the basis of an alleged violation of traditionally quite broadly phrased and thus comparatively vague substantive investment protection standards like fair and equitable treatment and the prohibition of indirect expropriations. Among them are for example the case of *Lone Pine Resources Inc. v. Canada* dealing with a governmental act intended to limit oil and gas exploration activities,[19] the case of *Rockhopper Italia et al. v. Italy* in which a law adopted by the Italian Parliament banning oil and gas exploration within 12 miles of the Italian coastline was at issue,[20] the case of *ExxonMobil Petroleum & Chemical BV v. Netherlands* that concerns the Dutch government decision to shut down the gas production in Groningen,[21] the cases of *TC Energy Corporation and TransCanada Pipelines Limited v. USA* and *Alberta Petroleum Marketing Commission v. USA* dealing with the governmental decision to revoke the permit for the construction and operation of the KXL Pipeline for reasons of climate change mitigation,[22] the case of *Azienda Elettrica Ticinese v. Germany* that concerns the legality of a government decision, taken in 2020, to phase out coal-fired power plants,[23] the case of *Ascent Resources Plc and Ascent Slovenia Ltd v. Republic of Slovenia* dealing, among others, with the legality of the Slovenian 2022 mining law amendment banning the use of hydraulic stimulation for the exploration and exploitation of hydrocarbons in light of applicable international investment treaties,[24] the case of *Zeph Investments Pte Ltd v. Australia* related to a decision by the government not to approve permits for a coal project in connection with a proposed coal-fired power plant,[25] the case of *Westmoreland Mining Holdings v. Canada* that concerned governmental attempts aimed at

Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, David R. Boyd, UN Doc. A/78/168 of 13 July 2023; Asia-Pacific Economic Cooperation (APEC) Investment Experts' Group, International Investment Agreements and Climate Change: What is the Role that International Investment Agreements Play in the Transition to a Green Economy?, July 2024, 9 *et seq.*; as well as also for example UNCTAD, Treaty-Based Investor-State Dispute Settlement Cases and Climate Action, IIA Issue Note, Issue 4, September 2022, 2 *et seq.*; and UNCTAD, World Investment Report 2025: International Investment in the Digital Economy, 2025, 104 ("an aging network of unreformed [investment] treaties that limit regulatory space for key policy areas, including e.g. public health, climate change and digitalization"); for a more cautious view, see, however, for example already *Schill*, Journal of International Arbitration 24 (2007), 469 *et seq.*; *Boute*, Fordham International Law Journal 35 (2012), 613 (659 *et seq.*); *Dimopoulos*, in: Delimatsis (ed.), Research Handbook on Climate Change and Trade Law, 415 (432 *et seq.*). Generally on this issue see also now ICJ, *Obligations of States in Respect of Climate Change* (United Nations), Advisory Opinion of 23 July 2025, Declaration of Judge Cleveland, paras. 21 *et seq.*; as well as Inter-American Court of Human Rights, *Climate Emergency and Human Rights*, Advisory Opinion AO-32/25 of 29 May 2025 requested by the Republic of Chile and the Republic of Columbia, paras. 162 *et seq.* and 351.

18 See in this regard also more recently the observation in UNCTAD, World Investment Report 2025: International Investment in the Digital Economy, 2025, 119 ("some high-profile cases concerned issues that are directly relevant to countries' efforts to combat climate change, for example the phaseout of energy production from coal"); as well as in UNCTAD, Recent Trends in Investor-State Arbitration Cases, IIA Issue Note, Issue 2, September 2025, 6.

19 See thereto *Lone Pine Resources Inc. v. Canada*, UNCITRAL Arbitration Award of 21 November 2022.

20 See in particular *Rockhopper Italia et al. v. Italy*, ICSID Case No. ARB/17/14, Award of 23 August 2022; as well as subsequently *Rockhopper Italia et al. v. Italy*, ICSID Case No. ARB/17/14, Decision on Annulment of 2 June 2025.

21 *ExxonMobil Petroleum & Chemical BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/24/44, Registration of Request for Arbitration of 21 October 2024.

22 See for example *TC Energy Corporation and TransCanada Pipelines Limited v. USA*, ICSID Case No. ARB/21/63, Award of 12 July 2024; as well as, e.g., *Alberta Petroleum Marketing Commission v. USA*, ICSID Case No. UNCT/23/4, Procedural Order No. 5 on Requests for the Production of Documents of 1 April 2025.

23 See thereto, e.g., *Azienda Elettrica Ticinese v. Federal Republic of Germany*, ICSID Case No. ARB/23/47, Procedural Order No. 4 on the Non-Disputing Party Application of 17 April 2025.

24 See, e.g., *Ascent Resources Plc and Ascent Slovenia Ltd v. Republic of Slovenia*, ICSID Case No. ARB/22/21, Order by the Tribunal on Slovenia's Application for Security of Costs of 22 February 2024.

25 See thereto for example *Zeph Investments Pte Ltd v. Commonwealth of Australia*, PCA Case No. 2023-40, Procedural Order No. 6 on Post-Hearing Matters of 23 September 2024.

reducing emissions from coal-fired electricity generation,[26] as well as the cases of *RWE AG and RWE Eemshaven Holding II BV v. Netherlands* and *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Netherlands* in which a law adopted by the Dutch Parliament prohibiting the use of coal for the production of electricity as of 1 January 2030 was challenged by the investors.[27]

While some of these claims were subsequently withdrawn and the respective investor-state dispute settlement proceedings discontinued like in the cases of *RWE AG and RWE Eemshaven Holding II BV v. Netherlands*[28] and *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Netherlands*,[29] while some of the cases were dismissed on jurisdictional grounds like in the proceedings of *Westmoreland Mining Holdings v. Canada*[30] as well as of *TC Energy Corporation and TransCanada Pipelines Limited v. USA*,[31] while one award was rendered in favor of the respondent host state in the case of *Lone Pine Resources Inc. v. Canada*,[32] while some of the proceedings, namely for example the ones in the case of *Alberta Petroleum Marketing Commission v. USA*, in the case of *Ascent Resources Plc and Ascent Slovenia Ltd v. Republic of Slovenia*, in the case of *Zeph Investments Pte Ltd v. Australia*, in the case of *Azienda Elettrica Ticinese v. Germany* and in the case of *ExxonMobil Petroleum & Chemical BV v. Netherlands* are currently still ongoing, and while in the case of *Rockhopper Italia et al. v. Italy* the claimants were initially awarded compensation of some 190 million Euro with the award subsequently being annulled for procedural reasons,[33] there are very likely many more international investor-state arbitration proceedings to come that will concern and legally challenge state actions aimed at effectively combatting climate change.[34]

Moreover, already the mere possibility and likelihood of respective claims being made and proceedings being initiated by certain affected foreign investors and the resulting potential prospect of being required to pay considerable amounts of money as compensation might significantly hamper and actually deter countries from adopting and implementing more far-reaching climate change policies; a phenomenon that is – not only, but increasingly also in the context of climate change measures – not infrequently referred to as "regulatory chill" in

26 *Westmoreland Mining Holdings v. Canada*, UNCITRAL Arbitration Award of 31 January 2022.

27 See thereto for example *RWE AG and RWE Eemshaven Holding II BV v. Netherlands*, ICSID Case No. ARB/21/4, Order of the Tribunal taking note of the discontinuance of the Proceeding and Decision on Costs of 12 January 2024; as well as *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Netherlands*, ICSID Case No. ARB/21/22, Order of the Tribunal taking note of the discontinuance of the Proceeding and Decision on Costs of 17 March 2023.

28 *RWE AG and RWE Eemshaven Holding II BV v. Netherlands*, ICSID Case No. ARB/21/4, Order of the Tribunal taking note of the discontinuance of the Proceeding and Decision on Costs of 12 January 2024, para. 72.

29 *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Netherlands*, ICSID Case No. ARB/21/22, Order of the Tribunal taking note of the discontinuance of the Proceeding and Decision on Costs of 17 March 2023, para. 72.

30 *Westmoreland Mining Holdings v. Canada*, UNCITRAL Arbitration Award of 31 January 2022, para. 252.

31 *TC Energy Corporation and TransCanada Pipelines Limited v. USA*, ICSID Case No. ARB/21/63, Award of 12 July 2024, para. 219.

32 *Lone Pine Resources Inc. v. Canada*, UNCITRAL Arbitration Award of 21 November 2022, para. 653.

33 *Rockhopper Italia et al. v. Italy*, ICSID Case No. ARB/17/14, Decision on Annulment of 2 June 2025, para. 435.

34 For a quite similar perception see also already for example *Paine/Sheargold*, Journal of International Economic Law 26 (2023), 285 (288); *Tienhaara/Thrasher/Simmons/Gallagher*, Science Vol. 376 (5 May 2022), Issue 6594, p. 701 (702); *Sarvarian*, ICSID Review – Foreign Investment Law Journal 38 (2023), 422 (424 *et seq.*); *Zhang/Li*, Sustainability 16 (2024), 1 (6).

scientific contributions[35] and beyond.[36] As suggested in parts of the literature, this – from the perspective of effectively combatting climate change obviously rather undesirable effect – apparently already found more recently its manifestation for example in the case of New Zealand, Denmark, Germany and France.[37]

Nevertheless, there are also, and again if viewed from the perspective of effectively combatting climate change, reasons for a certain hope that international investment agreements can actually be somewhat reconciled with the global need to adopt more meaningful climate change policies. It seems appropriate and useful in this regard to recall the fact that it was in particular since the beginning of the 1990s that the international legal framework on the protection of foreign investments has emerged as one of the most dynamic and practically important areas of international law in general and international economic law in particular.[38] Essentially, this general rise of international investment law, especially in the form of treaty law,[39] can be regarded as the result of a transitional process from what might be labeled as "first generation" bilateral investment treaties concluded since the end of the 1950s to the "second generation" investment agreements entered into mostly in the 1980s, the 1990s as well as the first decade of the new century.

This transition period was overall characterized by an enhancement of the legal protection of foreign investors and their investment activities driven by a broad political consensus recognizing these protective aims as the sole – or at least primary – purpose pursued by international investment agreements. This treaty practice, aimed at establishing and fostering an "international investment protection law" in the true sense of the term, saw the introduction of improved levels of substantive guarantees for investors as well as – and particularly noteworthy – also the stipulation of investor-state dispute settlement provisions that were far from common in older bilateral investment treaties.[40] Hence, this period first and foremost resulted in foreign investors experiencing a notable strengthening of their status and international legal protection, thereby also "marking another step in their transition from objects to subjects of international

35 From the numerous literature on this issue see more generally, e.g., *Van Harten*, The Trouble with Foreign Investor Protection, 99 *et seq.*; as well as specifically related to climate change measures for example *Tienhaara*, Transnational Environmental Law 7 (2018), 229 (232 *et seq.*); *Stegenwallner*, JuWissBlog No. 69/2024 of 15 October 2024; *Paine/Sheargold*, Journal of International Economic Law 26 (2023), 285 (289); *Condon*, Chinese Journal of International Law 14 (2015), 305 (337); *Zhang/Li*, Sustainability 16 (2024), 1 (6); see also, e.g., IPCC, Climate Change 2022, Mitigation of Climate Change, Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, edited by Priyadarshi R. Shukla *et al.*, Chapter 14, p. 1499.

36 See, e.g., now also ICJ, *Obligations of States in Respect of Climate Change* (United Nations), Advisory Opinion of 23 July 2025, Declaration of Judge Cleveland, paras. 21 *et seq.*; as well as Inter-American Court of Human Rights, *Climate Emergency and Human Rights*, Advisory Opinion AO-32/25 of 29 May 2025 requested by the Republic of Chile and the Republic of Columbia, para. 164.

37 See thereto for example *Meager*, Capital Monitor of 14 January 2022; *Paine/Sheargold*, Journal of International Economic Law 26 (2023), 285 (286 *et seq.*); *Liester*, Völkerrechtsblog of 11 September 2024; *van Asselt*, Earth System Governance 9 (2021), 1 (5); *Tienhaara/Thrasher/Simmons/Gallagher*, Science Vol. 376 (5 May 2022), Issue 6594, p. 701 (703).

38 On this perception see for example *Collins*, International Investment Law, 1-2 ("Yet, within a relatively short period of time this area of law witnessed a phenomenal growth to become one of the most dynamic and intensively studied spheres of international law."); *Reinisch*, International Investment Law, 2 ("Other than the rather scarce case law of international courts, investment tribunals offered 'international law in action'.").

39 On the various different sources of international investment law see, e.g., *Dolzer/Kriebaum/Schreuer*, Principles of International Investment Law, 15 *et seq.*; *Reinisch*, in: Tietje/Nowrot (eds.), Internationales Wirtschaftsrecht, 454 (457 *et seq.*); *Salacuse*, The Law of Investment Treaties, 52 *et seq.*

40 On this last-mentioned issue see for example *Radi*, Rules and Practices of International Investment Law, 13 ("It is worth mentioning that the first BITs concluded provided only for an inter-State dispute settlement mechanism."); *Muchlinski*, Multinational Enterprises and the Law, 680 ("Early BITs did not cover disputes between the host state and the investor."); *Tietje/Sipiorski*, in: Bjorklund/Reinisch (eds.), International Investment Law and Soft Law, 192 (193, 205 and 217 *et seq.*); *Tietje/Nowrot/Wackernagel*, Once and Forever? The Legal Effects of a Denunciation of ICSID, 18 *et seq.*

law", particularly on the basis of access to effective international legal remedies.[41]

However, at present, we are again witnessing a major – and potentially even more fundamental – era of reformation or "reconceptualization" in the development of international investment treaty law.[42] In contrast to the previous period, the currently visible transitional phase from the already mentioned "second generation" of investment agreements to the rise of a new "third generation" of investment policies[43] that began to gain considerable momentum in particular ever since the beginning of the 2010s and increasingly finds its manifestation in treaty practice[44] is first and foremost characterized, and indeed largely dominated, by intensified efforts in all parts of the world to progressively develop the international legal basis of investment protection with a view to fostering its contribution to the realization of sustainable development objectives[45] and, albeit closely related, by various efforts of states to regain some

41 *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, para. 141 ("For all these reasons, Article 26 ECT provides to a covered investor an almost unprecedented remedy for its claim against a host state. […] By any standards, Article 26 is a very important feature of the ECT which is itself a very significant treaty for investors, marking another step in their transition from objects to subjects of international law."); concerning the international legal status of foreign investors on the basis of investment agreements see also, e.g., *David Aven et al. v. Costa Rica*, ICSID Case No. UNCT/15/3, Award of 18 September 2018, para. 738 ("Under international law of investments, particularly under DR-CAFTA, the investors enjoy by themselves a number of rights both substantive and procedural, including the right to sue directly the host State when it breaches its international obligations on foreign investment (Section A of Article 10 in DR-CAFTA)."); *BG Group Plc. v. Argentina*, UNCITRAL Arbitration, Award of 24 December 2007, para. 145 ("The proliferation of bilateral investment treaties has effected a profound transformation of international investment law. Most significantly, under these instruments investors are entitled to seek enforcement of their treaty rights by directly bringing action against the State in whose territory they have invested."); *Corn Products International, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility of 15 January 2008, paras. 167 *et seq.* ("In the Tribunal's view, the NAFTA confers upon investors substantive rights separate and distinct from those of the State of which they are nationals. It is now clear that States are not the only entities which can hold rights under international law; individuals and corporations may also possess rights under international law. […] In the case of Chapter XI of the NAFTA, the Tribunal considers that the intention of the Parties was to confer substantive rights directly upon investors. That follows from the language used and is confirmed by the fact that Chapter XI confers procedural rights upon them."); *Tietje*, The Applicability of the Energy Charter Treaty, 13 ("[…], Art. 26 ECT and its consequent substantive investment protection regulations of Part III ECT clearly indicate that investors gain the status of subjects of international law under the ECT."); *Spiermann*, Arbitration International 20 (2004), 179 (185) ("It would take an excessively narrow, albeit not unprecedented standard of interpretation to find that bilateral investment treaties do not vest rights in the investor as a subject of international law."); *Nowrot*, Indiana Journal of Global Legal Studies 18 (2011), 803 (825 *et seq.*); *Douglas*, The International Law of Investment Claims, 10 *et seq.* For a more critical perception see, e.g., *Reinisch*, in: Noortmann/Reinisch/Ryngaert (eds.), Non-State Actors in International Law, 253 (262) ("Ultimately, the question whether investors are partial subjects of international law or not retains an artificial flavor.").

42 On this perception see, e.g., UNCTAD, World Investment Report 2023: Investing in Sustainable Energy for All, 2023, 75 ("Other notable developments continued the trend towards reforming the international investment regime and highlighted the growing need for its adaptation to meet emerging global objectives and challenges. These include greater attention to investment facilitation and climate change."); *Puig/Shaffer*, American Journal of International Law 112 (2018), 361 ("The tide is turning. Ferment is in the air. Reform or even transformation of foreign direct investment governance appears on the way."); *Miles*, in: Lewis/Frankel (eds.), International Economic Law and National Autonomy, 295 *et seq.*; *Mann*, Lewis and Clark Law Review 17 (2013), 521 *et seq*. See also UNCTAD, World Investment Report 2014, Investing in the SDGs: An Action Plan, 2014, 126 ("The IIA regime is undergoing a period of reflection, review and reform.").

43 Generally on this perception see also, e.g., UNCTAD, World Investment Report 2023: Investing in Sustainable Energy for All, 2023, 73 ("new-generation IIAs"); UNCTAD, World Investment Report 2018, Investment and New Industrial Policies, 2018, 95 *et seq.* ("new generation of IIAs"); UNCTAD, Investment Policy Framework for Sustainable Development, 2015 Edition, 12 *et seq.* ("new generation of investment policies"); *Spears*, Journal of International Economic Law 13 (2010), 1037 *et seq*. Specifically on the differences between first, second and third generation investment agreements see also already *Nowrot*, in: Hindelang/Krajewski (eds.), Shifting Paradigms in International Investment Law, 227 (230 *et seq.*).

44 See more recently on the trend towards renegotiating international investment agreements for example *Meyer/Park*, Journal of International Economic Law 21 (2018), 655 (657 *et seq.*).

45 Generally on these developments see for example UNCTAD, World Investment Report 2017, Investment and the Digital Economy, 2017, 119 *et seq.*; UNCTAD, World Investment Report 2016, Investor Nationality: Policy Challenges, 2016, 1 *et seq.*; UNCTAD, World Investment Report 2012, Towards a New Generation of Investment Policies, 2012, 89 *et seq.*; *Kulick*, Global Public Interest in International Investment Law, 11 *et seq.*; *VanDuzer/Simons/Mayeda*,

of their "policy space" vis-à-vis foreign investors.[46]

In light of the sometimes rather negatively perceived effects of the hitherto established international investment protection framework,[47] there is growing recognition among governments of industrialized and developing countries, practitioners and scholars alike, that the central challenge lawmakers and arbitrators are facing today is the need to provide an appropriate and thus acceptable balance between the legally protected economic interests of foreign investors and the domestic and international governance capacity of host states in order to allow the later to pursue the promotion and protection of other (non-economic) public interest concerns like the protection of human rights, the promotion of public health, the enforcement of internationally recognized labor and social standards as well as in particular also the protection of the environment.[48] As a consequence of these developments and in order to avoid an increase in the negative perception of international investment law and a serious "backlash" against the international investment regime as a whole,[49] also a broader discussion on possible

Integrating Sustainable Development into International Investment Agreements, 2012; the contributions in *Cordonier Segger/Gehring/Newcombe* (eds.), Sustainable Development in World Investment Law, 2011; as well as *Dubava*, in: Cremona/Hilpold/Lavranos *et. al.* (eds.), Liber Amicorum for Ernst-Ulrich Petersmann, 389 *et seq.*; and *Nowrot*, Journal of World Investment and Trade 15 (2014), 612 *et seq.*; see in this regard also, e.g., UN GA Res. 74/199, Promoting Investments for Sustainable Development, UN Doc. A/RES/74/199 of 13 January 2020.

46 See, e.g., *Tietje*, ICSID Review – Foreign Investment Law Journal 24 (2009), 457 (461) ("The need for a 'policy space' for governments, i.e. autonomy in national policy-making without constraints by international law and particularly international investment protection law, is one of the most significant consequences of the proliferation of investment law and the fragmentation of international law in general. We are currently witnessing discussions about the necessary policy space in the area of foreign investment, on both the national and international levels."). See also for example *Angin*, ICSID Review – Foreign Investment Law Journal 40 (2025), 11 (15 *et seq.*); *Griebel*, Kölner Schrift zum Wirtschaftsrecht 7 (2016), 106 *et seq.*; *Broude/Haftel/Thompson*, in: Roberts/Stephan/Verdier/Versteeg (eds.), Comparative International Law, 527 *et seq.*; *Artamonova*, New Developments in International Investment Agreements, 36 *et seq.*; *Baltag/Joshi/Duggal*, ICSID Review – Foreign Investment Law Journal 38 (2023), 381 (385 *et seq.*); *Lee*, in: Chaisse/Lin (eds.), International Economic Law and Governance, 131 *et seq.*; *VanDuzer*, in: Delimatsis (ed.), Research Handbook on Climate Change and Trade Law, 434 (454 *et seq.*); *Roberts*, American Journal of International Law 112 (2018), 410 *et seq.*; *Nowrot*, in: Justenhoven/O'Connell (eds.), Peace Through Law, 187 (195 *et seq.*); as well as the quite comprehensive analyses by *Titi*, The Right to Regulate in International Investment Law, 32 *et seq*.; and *Mouyal*, International Investment Law and the Right to Regulate, 8 *et seq.*, each with numerous further references.

47 On the respective perceptions see for example UN Human Rights Council, Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/11/13 of 22 April 2009, para. 30 ("Nevertheless, recent experience suggests that some treaty guarantees and contract provisions may unduly constrain the host Government's ability to achieve its legitimate policy objectives, including its international human rights obligations."); *Van Harten*, Investment Treaty Arbitration and Public Law, 45 *et seq*.; *Wong/Yackee*, Michigan Journal of International Law 46 (2025), 121 (122 *et seq.*); *Butler/Subedi*, Netherlands International Law Review 64 (2017), 43 (46 *et seq.*); *Nowrot*, International Investment Law and the Republic of Ecuador, 18 *et seq.*

48 See thereto also, e.g., UNCTAD, UNCTAD's Reform Package for the International Investment Regime, 2018 Edition, 23 ("Typically, IIAs set out few, if any, responsibilities on the part of investors in return for the protection that they receive. One objective of IIA reform therefore is ensuring responsible investor behavior."); Guiding Principles for the African, Caribbean and Pacific Group of States (ACP) Countries' Investment Policymaking, jointly developed by the ACP Group and the UNCTAD Secretariat, ACP/85/037/17 Rev. 1 of 22 May 2017, 4 ("Principle 4: Balanced Rights and Obligations"), available on the internet under: <http://www.acp.int/content/joint-acp-unctad-guiding-principles-investment-policymaking-approved> (accessed 15 August 2025); as well as for example *McLachlan/Shore/Weiniger*, International Investment Arbitration, 23 *et seq.* ("A balance between the rights of investors and host States"); *Sornarajah*, Resistance and Change in the International Law on Foreign Investment, 348 *et seq.* ("Balanced treaties as the solution"); *Sornarajah*, The International Law on Foreign Investment, 271 *et seq.*; *Tamada*, in: Gal-Or/Ryngaert/Noortmann (eds.), Responsibilities of the Non-State Actor, 203 ("there is a need to adjust the balance of interests between investors and host States"); *Bazrafkan/Herwig*, in: Ambrus/Rayfuse/Werner (eds.), Risk and the Regulation of Uncertainty in International Law, 237 (241 *et seq.*) ("Balancing investment protection and host state's right to regulate").

49 On this perception see, e.g., *Crawford*, Brownlie's Principles of Public International Law, 609 ("generated a backlash against investment treaties"); generally thereto see also for example already *Waibel/Kaushal/Chung/Balchin* (eds.), The Backlash Against Investment Arbitration – Perceptions and Reality, 2010; *Reinisch*, International Investment Law, 3 and 129 *et seq.*; *Kaushal*, Harvard International Law Journal 50 (2009), 491 *et seq.*

"counterweights" to investors' rights[50] is gaining momentum in recent years. Thereby, as for example more recently also highlighted by UNCTAD, these overarching global trends towards reforming the regime of international investment agreements also found their manifestation in "greater attention" now being devoted to the issue of climate change in the investment treaty-making processes.[51]

Against this background and in light of these findings, the present contribution intends to evaluate current as well as some potential future regulatory approaches aimed at redesigning international investment agreements in order to make them more compatible with the global community interest of effective climate change mitigation or even to transform these types of economic treaties into something like climate protection agreements[52] in their own right. Thereby, particular attention will be drawn to the recent policy and treaty practice of Asian countries, thus also highlighting a strengthened role of international law in Asia in the present context. In this regard, the contribution will first and foremost make an attempt to conceptualize the relevant investment treaty practice from a systematic perspective by distinguishing between three different types of international investment agreements and provide respective examples (B.). In addition and subsequently, the analysis also aims at, by adopting primarily a legal policy perspective, identifying and assessing other possible regulatory options that are not yet implemented in current investment treaty-making practice, thereby particularly focusing on the potential future stipulation of investors' obligations in the realm of climate change mitigation (C.).

50 See also for example *Kessedjian*, Journal of World Investment and Trade 22 (2021), 645 ("Rebalancing Investors' Rights and Obligations"); *Tietje/Crow*, in: Griller/Obwexer/Vranes (eds.), Mega-Regional Trade Agreements, 87 (107 *et seq.*) ("Towards a Symmetrical System of International Investment Law"); *Peters*, Beyond Human Rights, 339; *Subedi*, International Investment Law, 281; *Bueno/Vastardis/Djeuga*, Journal of World Investment and Trade 24 (2023), 179 (182) ("efforts to balance rights and obligations in new generation of international investment agreements to ensure more sustainable foreign investments").

51 UNCTAD, World Investment Report 2023: Investing in Sustainable Energy for All, 2023, 75 ("Other notable developments continued the trend towards reforming the international investment regime and highlighted the growing need for its adaptation to meet emerging global objectives and challenges. These include greater attention to investment facilitation and climate change.").

52 Generally on the term and concept of climate protection agreements see, e.g., *Minnerop*, Climate Protection Agreements, paras. 1 *et seq.*, in: Peters (ed.), Max Planck Encyclopedia of Public International Law, available on the internet under: <www.mpepil.com/> (accessed 15 August 2025).

B. Identifying and Systemizing Different Types of Investment and Climate Protection Agreements

The international legal framework on the protection of foreign investments comprises first and foremost of treaty law. The currently more than 2.840 bilateral investment treaties together with roughly 480 other international agreements that provide for investment provisions[53] constitute the public international law "backbone" of this legal regime. In light of this finding, it is hardly surprising that this contractual source of investment law also occupies a prominent position in the current discourses on, and practical approaches to, the issue of how to integrate the public interest concern of climate change mitigation and adaption into the field of international investment law. Thereby, in order to conceptualize the various respective regulatory approaches and their implementation in current investment treaty practice from a more systematic perspective, it is submitted here that it seems possible and helpful to distinguish between three different types of international investment agreements, namely mere "permissive" agreements (I.), more ambitious "encouraging" agreements (II.), as well as "prescriptive" agreements that can be truly regarded as investment and climate protection agreements in a narrower sense (III.).

I. The Currently Most Common: Mere "Permissive" Investment Agreements and their Regulatory Approaches towards Climate Change Measures

The first category of what can be referred to as "permissive" agreements or investment and climate protection treaties in a rather broad sense encompasses international treaties that explicitly allow contracting parties to also pursue more ambitious climate change policies, for example on the basis of more generally phrased provisions emphasizing the right to regulate to achieve and promote environmental protection.

A respective example is provided by Article 9.3 (1) of the investment chapter in the free trade agreement concluded between Israel and Vietnam on 25 July 2023 that entered into force on 1 November 2024: "For the purposes of this Agreement, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity, through the good faith application of their laws and regulations."[54] The subsequent paragraph 2 of this Article adds in the interest of greater certainty that "the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Agreement". Comparable provisions can be found for example in Article 12 of the bilateral investment treaty (BIT) signed by Indonesia and Switzerland on 24 May 2022 and

53 UNCTAD, World Investment Report 2025: International Investment in the Digital Economy, 2025, 104.

54 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/5075/israel---viet-nam-fta-2023-> (accessed 15 August 2025).

entering into force on 1 August 2024,[55] in Article 3 of the India-United Arab Emirates BIT of 13 February 2024 that entered into force on 31 August 2024,[56] in Article 13.4 of the investment chapter in the Comprehensive Economic Partnership Agreement concluded between Canada and Indonesia and signed on 24 September 2025[57] as well as – albeit more generally phrased – in the preamble of the BIT signed by Myanmar and Singapore on 24 September 2019 and entered into force on 9 October 2020,[58] of the Angola-China BIT that was concluded by the contracting parties on 6 December 2023 and entered into force on 29 June 2024,[59] of the Australia-United Arab Emirates BIT of 6 November 2024[60] as well as of the Israel-Philippines BIT that was concluded on 7 June 2022 and entered into force on 12 March 2024.[61]

Another regulatory approach, not confined to but most certainly also of relevance as far as climate change measures are concerned, is the increasingly common specification[62] of traditionally quite broadly phrased substantive protection standards for foreign investors enshrined in international investment agreements.[63] Article 6.5 of the BIT concluded between India and

55 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5012/indonesia---switzerland-bit-2022-> (accessed 15 August 2025).

56 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5119/india---united-arab-emirates-bit-2024> (accessed 15 August 2025).

57 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/5224/canada---indonesia-cepa-2025-> (accessed 30 September 2025).

58 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4907/myanmar---singapore-bit-2019-> (accessed 15 August 2025).

59 For the text of the Agreement between the Government of the People's Republic of China and the Government of the Republic of Angola concerning the Promotion and Reciprocal Protection of Investments see the information on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5103/angola---china-bit-2023-> (accessed 15 August 2025).

60 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bits/5161/australia---united-arab-emirates-bit-2024-> (accessed 15 August 2025).

61 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5010/israel---philippines-bit-2022-> (accessed 15 August 2025).

62 On this regulatory approach see, e.g., *Boor/Nowrot*, Kölner Schrift zum Wirtschaftsrecht 7 (2016), 91 *et seq.*, with numerous further references.

63 See thereto for example *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005, Rn. 273 ("The Treaty, like most bilateral investment treaties, does not define the standard of fair and equitable treatment and to this extent Argentina's concern about it being somewhat vague is not entirely without merit."); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007, para. 296 ("The Tribunal finds the Respondent to be right in arguing that fair and equitable treatment is a standard that is none too clear and precise. This is because international law is itself not too clear or precise as concerns the treatment due to foreign citizens, traders and investors. This is the case because the pertinent standards have gradually evolved over the centuries."); *Rumeli Telecom A.S. et al. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, Rn. 610; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Albania*, ICSID Case No. ARB/11/24, Award of 30 March 2015, paras. 599 *et seq.*; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, para. 611; *Roberts*, American Journal of International Law 107 (2013), 45 (50) ("investment treaties have traditionally been brief and broadly worded, leaving many gaps and ambiguities"); *Roberts*, Harvard International Law Journal 56 (2015), 353 (358); *Alvarez*, New York University Journal of International Law and Politics 42 (2009), 17 (24) ("the typical BIT is a relatively concise (and perhaps somewhat cryptic) document as compared to the voluminous substantive and procedural details contained in the GATT covered agreements"); *Batifort/Larkin*, ICSID Review – Foreign Investment Law Journal 38 (2023), 322; *Oeter*, in: Ipsen (ed.), Völkerrecht, § 51, para. 41; *de Nanteuil*, International Investment Law, 249; *Vadi*, Vanderbilt Journal of Transnational Law 48 (2015), 1285 (1331); *Krajewski*, Wirtschaftsvölkerrecht, para. 641; *Nowrot*, „Long Live Deglobalization" vs. „Free Trade Saves Lives", 14; *Griebel*, Internationales Investitionsrecht, 69; *Schöbener/Herbst/Perkams*, Internationales Wirtschaftsrecht, 271. See thereto in principle already for example *Walker*, Minnesota Law Review 42 (1958), 805 (811 *et seq.*); *Fatouros*, Government Guarantees to Foreign Investors, 138 ("Moreover, since a great number of possible situations has to be covered, the relevant provisions have to be couched in general language. The certainty of absolute standards is thus in fact diminished, since the more general a term is, the more numerous are the ways in which it can be interpreted."); and *ibid.*, 215 ("The generality and

Uzbekistan on 27 September 2024 that entered into force on 15 May 2025 provides a telling example as far as the scope of indirect expropriations[64] – an investment protection standard well-known for being subjected to various conceptual approaches applied in investor-state arbitration to distinguish between cases of indirect expropriation giving rise to claims for compensation by affected foreign investors on the one hand and legitimate regulatory measures in furtherance of general welfare objectives like combatting climate change that do not require compensation by the host state on the other hand[65] – is concerned: "Non-discriminatory regulatory measures by a Party or measures or awards by judicial bodies of a Party that are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment shall not constitute expropriation under this Article."[66] A quite similar provision can be found for example in Article 7 (4) of the China-Venezuela BIT of 15 November 2024 that entered into force on 14 January 2025.[67]

Furthermore, and particularly noteworthy in the present context, some of these investment agreements do not confine themselves to emphasize the right to adopt regulatory measures aimed at protecting the environment more generally but in addition even explicitly highlight the importance of combatting climate change. The preamble[68] of the BIT concluded between Af-

abstraction of these standards, however, remains an important drawback. It is generally difficult to determine whether a certain measure is in accordance with them, that is to say whether, in the usual treaty terms, it is 'just', 'reasonable,' or 'equitable'."); *Mann*, British Yearbook of International Law 52 (1981), 241 (242 *et seq.*); United Nations Centre on Transnational Corporations, Bilateral Investment Treaties, 1988, 41; *Mo*, Journal of World Trade 25 (No. 3, 1991), 43 (52).

64 Generally on the concept of indirect expropriations in international investment law see, e.g., *Kriebaum*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 959 (971 *et seq.*); *Lim/Ho/Paparinskis*, International Investment Law and Arbitration, 412 *et seq.*; *Dolzer/Kriebaum/Schreuer*, Principles of International Investment Law, 153 *et seq.*

65 See, e.g., *Sabahi/Rubins/Wallace*, Investor-State Arbitration, 600 ("The signal problem is defining with precision when an exercise of regulatory or police power crosses the line and becomes compensable, and a vast literature makes clear that the line is neither bright nor clear."); *Bücheler*, Proportionality in Investor-State Arbitration, 125 ("major points of controversy"). Concerning the different approaches applied in investor-state arbitration practice see for example *Telenor v. Hungary*, ICSID Case No. ARB/04/15, Award of 13 September 2006, para. 70; *Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/1, Award of 17 February 2000, para. 72; *Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, para. 116; *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd v. Romania*, ICSID Case No. ARB/15/31, Award of 8 March 2024, para. 931; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011, para. 330; *Saluka v. Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, para. 255; *LG&E Energy Corp. et al. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, para. 195; *Marfin v. Cyprus*, ICSID Case No. ARB/13/27, Award of 26 July 2018, para. 826.

66 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5157/india---uzbekistan-bit-2024-> (accessed 15 August 2025).

67 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5165/china---venezuela-bolivarian-republic-of-bit-2024-> (accessed 15 August 2025).

68 Generally on the functions and importance of preambles from the perspective of treaty interpretation, see for example ICJ, *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia v. Malaysia), Judgment of 17 December 2002, ICJ Reports 2002, 625 (652, para. 51); ICJ, *Asylum Case* (Colombia v. Peru), Judgment of 20 November 1950, ICJ Reports 1950, 266 (282); ICJ, *Case Concerning Rights of Nationals of the United States of America in Morocco* (France v. USA), Judgment of 27 August 1952, ICJ Reports 1952, 176 (196); European Court of Human Rights, *Golder v. United Kingdom*, Application No. 4451/70, Judgment of 25 February 1975, para. 34; *Gardiner*, Treaty Interpretation, 205 *et seq.*; *Dörr*, in: Dörr/Schmalenbach (eds.), Vienna Convention on the Law of Treaties, A Commentary, Article 31, para. 49. Specifically in the context of investor-state dispute settlement see for example *Discovery Global LLC v. Slovak Republic*, ICSID Case No. ARB/21/51, Award of 17 January 2025, paras. 405 *et seq.*; *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Award of 20 August 2007, para. 7.4.4; *de Nanteuil*, International Investment Law, 378-379; *Boknik/Gazzini*, in: Tams/Schill/Hofmann (eds.), International Investment Law and General International Law, 80 (92 *et seq.*); *Dünnwald*, Bilateral and Multilateral Investment Treaties, 102 *et seq.*; *Gazzini*, Interpretation of International Investment Treaties, 157 *et seq.*; as well as, specifically in the present context also, e.g., UNCTAD, The International Investment Treaty Regime and Climate Action, IIA Issue Note, Issue 3, September 2022, 4 ("Well-drafted preambular clauses serve to clarify the application of substantive provisions.").

ghanistan and Azerbaijan on 1 December 2017, for example, specifically stresses the intention of the contracting parties to reciprocally promote and protect foreign investments "consistently with the pursuance of the sustainable development goals, and the combating of climate change".[69] In addition, Article 6 (7) of the Bahrain-Hungary BIT of 4 September 2024 that entered into force on 7 July 2025 emphasizes that "except in the circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures by a Contracting Party that are designed and applied to protect legitimate policy objectives, such as the protection of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity do not constitute indirect expropriations".[70]

Moreover, Annex D of the BIT signed by New Zealand and the United Arab Emirates on 14 January 2025 states in its paragraph E that "[f]or greater certainty, New Zealand reaffirms its right to regulate within its territory to achieve legitimate policy objectives, such as the protection of human, animal or plant life or health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, animal welfare, privacy and data protection, or the promotion and protection of cultural diversity and the promotion and protection of the rights, interests, duties and responsibilities of Māori related to te Tiriti o Waitangi / the Treaty of Waitangi".[71]

II. The Intermediate Category of the More Ambitious: "Encouraging" Investment and Climate Protection Agreements

The second type of treaties relates to an intermediate category of what might be referred to as "encouraging" agreements or investment and climate protection agreements in an already more narrow sense and encompasses treaties that not only permit but also explicitly encourage the contracting parties to specifically engage in processes of optimizing their climate change mitigation efforts by, among others, cooperating with each other in good faith in this policy field.

Art. 36 (1) lit. d of the Framework Agreement on Partnership and Cooperation concluded between the European Union and Malaysia on 14 December 2022, for example, foresees that the contracting parties "shall endeavour to enhance cooperation in the energy sector with a view to: […] enhancing cooperation to address energy-related climate change mitigation and adaptation issues under the United Nations Framework Convention on Climate Change ("UNFCCC"), adopted in Rio de Janeiro on 9 May 1992".[72] Moreover, Article 39 (3) lit. b of this agreement states that the parties shall endeavour to continue to strengthen their cooperation

69 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3877/afghanistan---azerbaijan-bit-2017-> (accessed 15 August 2025).

70 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5169/bahrain---hungary-bit-2024-> (accessed 15 August 2025).

71 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5172/new-zealand---united-arab-emirates-bit-2025-> (accessed 15 August 2025).

72 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/5201/eu---malaysia-partnership-and-cooperation-agreement-2022-> (accessed 15 August 2025).

on the protection of the environment, including in regional programmes, the exchange of best practices, political and regulatory dialogues, conferences and workshops, specifically as regards: […] addressing the challenges of climate change, in particular as regards impacts on eco-systems and natural resources". In addition, Article 11.5 (3) of the Trade and Economic Partnership Agreement concluded between the European Free Trade Association States (EFTA) and India concluded on 10 March 2024 stipulates that the parties "shall endeavour to cooperate bilaterally, and in other fora, as appropriate" with the aim to, as mentioned in Article 11.5 (1), achieve "the objectives and goals of the United Nations Framework Convention on Climate Change, done at New York on 09 May 1992 (hereinafter referred to as "UNFCCC") and the Paris Agreement, done at Paris on 12 December 2015, in order to address the urgent threat of climate change".[73]

The same applies, among others, to the various cooperative efforts foreseen in the Australia-Singapore Green Economy Agreement of 18 October 2022[74] as well as to Article 16.4 (4) of the Agreement between Japan and the United Kingdom of Great Britain and Northern Ireland for a Comprehensive Economic Partnership of 23 October 2020 that entered into force on 1 January 2021 stating that the "Parties commit to working together to take actions to address climate change towards achieving the ultimate objective of the UNFCCC and the purpose of the Paris Agreement".[75] Another regulatory approach that also broadly falls into this category finds its manifestation for example in 16.5 lit. c of this last-mentioned agreement, foreseeing that Japan and the United Kingdom "shall strive to facilitate trade and investment in goods and services of particular relevance to climate change mitigation, such as those related to sustainable renewable energy and energy efficient goods and services, in a manner consistent with this Agreement".

III. The Real Ones: "Prescriptive" Investment and Climate Protection Agreements

The third – and in the present context obviously most interesting – category of what might appropriately be termed as "prescriptive" agreements or investment and climate change agreements in the narrowest and truest sense concerns those treaties that, in principle, even legally oblige the contracting parties to pursue effective and ambitious climate change policies by, among others, committing them to not lowering their environmental standards in order to encourage foreign investments, committing them to promote the contribution of investment to the transition to a low-carbon-economy and to climate-resilient development or committing them to effectively implement their respective obligations and commitments under the 2015 Paris Agreement.

Article 21 of the BIT signed by Japan and Zambia on 6 February 2025, for example,

73 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/5123/efta---india-tepa-2024-> (accessed 15 August 2025).

74 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/5036/australia-singapore-gea-2022-> (accessed 15 August 2025).

75 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/4939/japan---united-kingdom-cepa-2020-> (accessed 15 August 2025).

stipulates in this regard – and in admittedly more general terms not confined to the issue of climate change – that "[e]ach Contracting Party recognises that it is inappropriate to encourage investment by investors of the other Contracting Party and of a non-Contracting Party by relaxing its health, safety or environmental measures, or by lowering its labour standards. To this effect, each Contracting Party should not waive or otherwise derogate from such measures or standards as an encouragement for the establishment, acquisition or expansion of investments in its Territory by investors of the other Contracting Party and of a non-Contracting Party".[76] Quite similar provisions can be found for example in Article 12 of the Hong Kong China SAR-Türkiye BIT that was concluded on 31 October 2023,[77] in Article 24 of the Bahrain-Japan BIT of 23 June 2022 that entered into force on 6 September 2023,[78] in Article 2 (7) of the Hungary-Turkmenistan BIT of 9 June 2023 that entered into force on 5 April 2024[79] as well as in Article 21 of the Angola-Japan BIT signed by the contracting parties on 9 August 2023 and entering into force on 21 July 2024.[80]

A direct reference to the policy field of climate change and a related normative commitment can be found for example in Article 10.8 (2) lit. a of the free trade agreement concluded between the EFTA States and Thailand on 23 January 2025. Under this provision the contracting parties commit themselves to "effectively implement their respective obligations and commitments under the UNFCCC and the Paris Agreement".[81] The same regulatory approach also finds its manifestation, among others, in Article 12.10 (2) lit. a of the free trade agreement signed by the EFTA States and Malaysia on 23 June 2025.[82] Moreover, Article 177 (2) of the Enhanced Partnership and Cooperation Agreement concluded between the European Union and Kyrgyzstan on 25 June 2024 also foresees that "the Parties reaffirm their commitment to effectively implement the multilateral environmental agreements, including the Paris Agreement on Climate Change, that they have ratified respectively".[83]

Another example in the present context is provided by Article 17.12 of the Comprehensive Economic Partnership Agreement concluded between Canada and Indonesia and signed on 24 September 2025.[84] In accordance with paragraph 1 of this provision, the contracting state parties recognize, among others, "that climate change is an urgent threat that requires immediate and enhanced individual and collective action to reduce greenhouse gas (GHG) emissions in

76 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5177/japan---zambia-bit-2025-> (accessed 15 August 2025).

77 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5116/hong-kong-china-sar---t-rkiye-bit-2023-> (accessed 15 August 2025).

78 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5020/bahrain---japan-bit-2022-> (accessed 15 August 2025).

79 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5020/bahrain---japan-bit-2022-> (accessed 15 August 2025).

80 For the text of the Agreement between Japan and the Republic of Angola for the Liberalization, Promotion and Protection of Investment see the information on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5081/angola---japan-bit-2023-> (accessed 15 August 2025).

81 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/5174/efta---thailand-fta-2025-> (accessed 15 August 2025).

82 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/5204/efta---malaysia-epa-2025-> (accessed 15 August 2025).

83 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/5156/eu---kyrgyzstan-epca-2024-> (accessed 15 August 2025).

84 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/5224/canada---indonesia-cepa-2025-> (accessed 30 September 2025).

line with the best available science, and acknowledge efforts by the Parties in meeting their nationally determined contributions (NDC) targets" (lit. a) as well as "the importance of mutually supportive trade, investment, and climate change policies in pursuing the objective of the UNFCCC and the Paris Agreement, including the transition to net-zero emissions and a climate-resilient economy" (lit. c) and "the importance of mitigating and adapting to the effects of climate change through increased investment in nature-based solutions and ecosystembased approaches" (lit. d). In light of these findings, each of the two contracting parties – in accordance with Article 17.12 (2) of the treaty – "shall implement its obligations under the Paris Agreement, noting the importance of NDCs and pursuing climate action measures and policies in order to reduce GHG emissions" (lit. a) and "affirms its commitment to a collective goal of reducing global anthropogenic GHG emissions, and to transition to net zero GHG emissions" (lit. b).

Finally, and despite the fact that its fate currently hangs somewhat in the balance, in this context, attention should also been drawn to the Comprehensive Agreement on Investment on which China and the European Union have reached and announced an agreement in principle on 30 December 2020.[85] Sub-Section 2 ("Investment and Environment") of Section IV on the topic of "Investment and Sustainable Development" prescribes in accordance with Article 6 lit. a that the parties shall "effectively implement the UNFCCC and the Paris Agreement adopted thereunder, including its commitments with regard to its Nationally Determined Contributions". Moreover, Article 6 lit. b stipulates that they shall "promote and facilitate investment of relevance for climate change mitigation and adaptation; including investment concerning climate friendly goods and services, such as renewable energy, low-carbon technologies and energy efficient products and services, and by adopting policy frameworks conducive to deployment of climate-friendly technologies".[86] These provisions are rather similar to, for example, Article 10 (3) of the Bahrain-Hungary BIT of 4 September 2024 that entered into force on 7 July 2025[87] as well as Article 19.6 of the free trade agreement concluded between the European Union and New Zealand on 9 July 2023 that entered into force on 1 May 2024.[88]

85 For this text of the EU-China Investment Agreement following the agreement in principle announced on 30 December 2020 as published by the European Commission on 22 January 2021 on its website see <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237> (accessed 15 August 2025).

86 See thereto also, e.g., *Stoll/Gutt*, in: Scheu/Hofmann/Schill/Tams (eds.), Investment Protection, Human Rights, and International Arbitration in Extraordinary Times, 149 (170); *Gehring/Tokas*, Journal of World Investment and Trade 23 (2022), 778 (785 *et seq.*).

87 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5169/bahrain---hungary-bit-2024-> (accessed 15 August 2025).

88 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/5104/eu---new-zealand-fta-2023-> (accessed 15 August 2025). Specifically on the respective provision see also, e.g., *Carrillo*, Breaking the Mold: An Evaluation of the EU-New Zealand Free Trade Agreement as a New „Gold Standard" for Trade and Sustainable Development Chapters, 16 *et seq.*

C. Some Thoughts on Potential Regulatory Ways Ahead: On the Further Optimization of Investment and Climate Protection Agreements

In addition to the above-mentioned regulatory approaches aimed at addressing the questions how to integrate the public interest concern of climate change mitigation and adaption into the field of international investment law, there are also other possible regulatory options that are not yet implemented in current investment treaty-making practice but are likely to also have the potential to optimize investment treaties in this regard by assisting in transforming them into also becoming something like climate protection agreements. A number of suggestions have been made in this regard in recent years. Among them is for example the proposal to stipulate "carve-outs" for climate protection measures in future and re-negotiated investment treaties, thereby either excluding certain fossil fuel investments from the scope of application – and thus also protection – of respective investment agreements or at least preventing the initiation of investor-state dispute settlement proceedings in relation to specific sectors or measures.[89]

Another regulatory option, so far not more comprehensively explored in the present context, concerns the potential future stipulation of investors' obligations in the realm of climate change mitigation. And indeed, viewed from an overarching perspective, it is noteworthy that in the course of the current efforts aimed at incorporating broader public interest concerns into international investment agreements, the possibility to address the issue of investors' obligations in the respective investment treaty-making processes is in principle clearly gaining recognition and momentum.[90] As the topic of investors' obligations has traditionally not featured a very prominent role in discussions and policy approaches regarding the international treaty regime dealing with the protection of foreign investments, these developments are of a rather innovative character. Overall, international investment law is traditionally – and also as of today – primarily concerned with the protection of foreign investors and their investments.[91] This is already indicated by the fact that most of the currently more than 2.840 bilateral investment treaties[92] are titled "Treaty Concerning the Promotion and Protection of Investments" or in line with some variations thereof. And indeed, in furtherance of these goals, most investment treaties so far still confine themselves to stipulating reciprocal obligations of the contracting state parties and do not impose any direct legal responsibilities on investors under international law.[93]

89 For a more comprehensive assessment of this proposal see, e.g., Center for International Environmental Law, Overcoming International Investment Agreements as a Barrier to Climate Action: A Toolkit to Safeguard Fossil Fuel Measures from Investment Treaty Claims, 2024, 11 *et seq.*; *Paine/Sheargold*, Journal of International Economic Law 26 (2023), 285 *et seq.*, with further references.

90 See also, e.g., *Krajewski*, Business and Human Rights Journal 5 (2020), 105 (113) ("Incorporating investor obligations in international investment treaties constitutes an important element of the reform process of international investment law."); *Low*, Journal of International Economic Law 26 (2023), 66 (76); *Lam/Guo*, Journal of International Economic Law 24 (2021), 321 (324); *Nowrot*, Fostering the Status of Asia's Sovereign Wealth Funds as Responsible Foreign Investors, 15 *et seq.*; *Bueno/Vastardis/Djeuga*, Journal of World Investment and Trade 24 (2023), 179 (182 *et seq.*); as well as the contributions in *Ho/Sattorova* (eds.), Investors' International Law, 2021.

91 On this perception see also for example *Salacuse*, The Law of Investment Treaties, 142 *et seq.*; *Salacuse*, The Three Laws of International Investment, 355 *et seq.*

92 UNCTAD, World Investment Report 2025: International Investment in the Digital Economy, 2025, 104.

93 See also, e.g., *Dolzer/Kriebaum/Schreuer*, Principles of International Investment Law, 33 ("BITs give guarantees to investors but do not normally address obligations of investors, […]."); *Marcoux/Bjorklund*, International and Comparative Law Quarterly 69 (2020), 877 (894) ("the overwhelming majority of international investment agreements do not include direct obligations for foreign investors"); *Low*, Journal of International Economic Law 26 (2023), 66 (76)

This finding does not imply that the inclusion of legal obligations of foreign investors as explicitly stipulated and directly addressed to them in investment agreements[94] is in principle without precedent. Early examples can be found in a number of regional treaties concluded by developing countries since the 1980s. For instance, the Community Investment Code of the Economic Community of the Great Lakes Countries, signed on 31 January 1982, stipulates in its Article 19 that any authorized investor benefiting from the economic, financial and tax advantages under the regime established by this agreement shall agree to, and is thus required to, *inter alia*, "respect and ensure staff rights", "establish and keep to a programme for training local manpower and promoting the advancement of managerial staff who are nationals of the member countries of the Community" as well as "see to the protection of the environment".[95] In addition, the Articles 17 and 19 of the Charter on a Regime of Multinational Industrial Enterprises in the Preferential Trade Area for Eastern and Southern African States of 21 November 1990 list a number of obligations incumbent upon multinational enterprises and their subsidiaries. Among them are the duties to "produce goods of acceptable quality at competitive prices", to supply information concerning the ownership of the shares, to "refrain from entering into restrictive business practices" and to contribute to a "Special Development Tax".[96]

More recently, the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area, adopted on 22/23 May 2007, states in its second part – tellingly titled 'rights and obligations' – the objectives of the agreement "to provide COMESA investors with certain rights in the conduct of their business within an overall balance of rights and obligations between investors and Member States" in Article 11.[97] In this regard, the treaty stipulates in its Article 13 initially merely the largely undisputed obligation of foreign investors to "comply with all applicable domestic measures of the Member State in which their investment is made", a provision which for example is also included in Article 14 of the Ethiopia-Qatar investment agreement signed on 14 November 2017,[98] Article 8 of

("Most BITs at present contain very limited if any provisions in this regard."); *Choudhury*, ICSID Review – Foreign Investment Law Journal 35 (2020), 82 (83) ("These asymmetries arise because the substantive content of IIAs is primarily devoted to outlining the standards of treatment that host States must accord to foreign investors, without imposing corresponding obligations on them."); *Barnes*, Journal of International Dispute Settlement 10 (2019), 328 (348) ("The principal reason why responsible business practices, sustainable development or human rights considerations do not usually form part of the language of BITs is because in BITs the relationship between investors and host States is asymmetrical in nature. That is, BITs usually confer only rights on investors, without necessarily imposing any obligations concerning human rights."); *Peters*, Beyond Human Rights, 340; *Tamada*, in: Gal-Or/Ryngaert/Noortmann (eds.), Responsibilities of the Non-State Actor, 203 ("normally don't impose any obligations upon investors"); *Muchlinski*, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights, 346 (367); *Nowrot*, The Other Side of Rights in the Processes of Constitutionalizing International Investment Law, 7; *Mbengue/Schacherer*, in: Roberts/Stephan/Verdier/Versteeg (eds.), Comparative International Law, 547 (558 *et seq.*); *Yannaca-Small*, University of St. Thomas Law Review 17 (2021), 402 (407); as well as UNCTAD, UNCTAD's Reform Package for the International Investment Regime, 2018 Edition, 65 ("Most IIAs are asymmetrical in that they set out obligations only for States and not for investors.").

94 On this concept of direct obligations of foreign investors and its distinction from indirect obligations of conduct as well as from provisions signaling a commitment to corporate social responsibility by the contracting parties (with the two last-mentioned categories not further dealt with in this contribution) see already, e.g., *Nowrot*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1154 (1160 *et seq.*); *Artamonova*, New Developments in International Investment Agreements, 71 *et seq.*; *Hellwig/Nowrot*, Towards Investors' Responsibilities in International Investment Agreements, 12 *et seq.*; *Abel*, International Investor Obligations, 37 *et seq.*

95 Community Investment Code of the Economic Community of the Great Lakes Countries of 31 January 1982, reprinted for example in: UNCTAD, International Investment Instruments: A Compendium, Vol. II, 1996, 251 *et seq.*

96 Charter on a Regime of Multinational Industrial Enterprises in the Preferential Trade Area for Eastern and Southern African States of 21 November 1990, reprinted for example in: UNCTAD, International Investment Instruments: A Compendium, Vol. II, 1996, 427 *et seq.*

97 Investment Agreement for the COMESA Common Investment Area of 22/23 May 2007, available on the internet under: <http://vi.unctad.org/files/wksp/iiawksp08/docs/wednesday/Exercise%20Materials/invagreecomesa.pdf> (accessed 15 August 2025).

98 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/

Annex 1 of the Southern African Development Community (SADC) Protocol on Finance and Investment as approved by the SADC Summit in Lesotho on 18 August 2006 and amended on 31 August 2016,[99] in Article 11 of the bilateral investment treaty concluded between Argentina and Qatar on 6 November 2016[100] as well as in Article 11 (a) of the Brazil-India investment agreement signed on 25 January 2020.[101]

More noticeable and specific, however, Article 16 of the 2007 COMESA Investment Agreement also stipulates in connection with the issue of movement of labour that, while investors have in principle the right "to hire technically qualified persons from any country", they are required to "accord a priority to workers who possess the same qualifications and are available in the Member State or any other Member State" of COMESA. Furthermore, and again in the geographical context of Africa, the Economic Community of West African States (ECOWAS) Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS that was signed on 19 December 2008 and entered into force one month later on 19 January 2009[102] stipulates in its Chapter III ("Obligations and Duties of Investors and Investments") a quite notable number of direct obligations of conduct. Among them are the requirement of foreign investors "to strive through their management policies and practices, to contribute to the development objectives of the host States and the local levels of government" under Article 11 (3), the duty to conduct environmental and social impact assessments of planned investments (Article 12), the obligation to refrain from involvement in corrupt practices in accordance with Article 13 as well as the normative expectation to establish and maintain "liaison processes" with local communities under Article 15 (3). In addition, Article 14 (2) of the ECOWAS Supplementary Act stipulates that foreign investors "shall uphold human rights in the workplace and the community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investors shall not manage or operate the investments in a manner that circumvents human rights obligations, labour standards as well as regional environmental or social obligations, to which the host State and/or home State are Parties". This provision is supplemented and concretized by Article 14 (3), foreseeing that foreign investors shall not "by complicity with, or in assistance with others, including public authorities, violate human rights in times of peace or during socio-political upheavals", as well as by Article 14 (4), requiring that investors shall act in accordance with the fundamental labour standards as enshrined in the ILO Declaration on Fundamental Principles and Rights at Work as adopted on 18 June 1998 and most recently amended in June 2022[103].

Another quite remarkable example – and obviously inspired by the above-mentioned

international-investment-agreements/treaties/bilateral-investment-treaties/4923/ethiopia---qatar-bit-2017-> (accessed 15 August 2025).

99 Southern African Development Community (SADC), Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment, as signed by the Heads of State or Government of SADC Member States in the Kingdom of Swaziland on 31 August 2016, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3383> (accessed 15 August 2025).

100 Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar of 6 November 2016, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3706> (accessed 15 August 2025).

101 Investment Cooperation and Facilitation Treaty between Brazil and India of 25 January 2020, available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4910/brazil---india-bit-2020-> (accessed 15 August 2025).

102 Economic Community of West African States (ECOWAS) Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS of 19 December 2008, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3547> (accessed 15 August 2025).

103 ILO Declaration on Fundamental Principles and Rights at Work of 18 June 1998 in its current version of 11 June 2022, available on the internet under: <https://www.ilo.org/declaration/lang--en/index.htm> (accessed 15 August 2025).

ECOWAS Supplementary Act – for the presence of direct obligations of conduct in the current investment treaty-making processes is provided by the bilateral investment agreement concluded between Morocco and Nigeria on 3 December 2016.[104] Article 14 of this investment treaty requires foreign investor, in the respective pre-establishment phase, to conduct environmental as well as social impact assessments of their potential investments and, in this regard, to apply the precautionary principle to their environmental assessment screening processes. Further, Article 17 stipulates a prohibition of investors to engage in practices of corruption and Article 19 requires these actors to "meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices" (lit. a) as well as to establish local community liaison processes in accordance with internationally accepted standards (lit. b). Additionally, Article 18 of the agreement states in the realm of post-establishment obligations that investments have to maintain an environmental management system (paragraph 1), that investors "shall uphold human rights in the host state" (paragraph 2), act in accordance with core labour standards (paragraph 3) and do not "manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties" (paragraph 4).

Moreover, and more recently, the African Continental Free Trade Area (AfCFTA) Draft Protocol on Investment, adopted by the African Union at the 36th ordinary session of the Assembly of Heads of State and Government on 19 February 2023, stipulates in its Chapter 5 ("Investor Obligations") a considerable number of in part quite detailed direct obligations of conduct for foreign investors.[105] Article 33 of this protocol requires investors and their investments to "comply with high standards of business ethics, investment-related human rights and labour standards" and, in this regard, to – among others – "support and respect the protection of internationally recognised human rights" (lit. a), to "ensure that they are not complicit in human rights abuses" (lit. b), to "comply with the International Labour Organisation (ILO) standards, including the ILO Declaration on Fundamental Principles and Rights at Work, and domestic labour legislations" (lit. c), as well as to "eliminate discrimination in respect of employment and occupation" (lit. e). Article 34 (1) stipulates that investors and their investments "shall, in carrying out their business activities, respect and protect the environment" and, in order to fulfill this obligation, shall "carry out an environmental impact assessment, in accordance with the best international standards and practices and as required by domestic law" (lit. c) and shall "apply the precautionary principle to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigating or alternative approaches to the investment, or precluding the investment if necessary" (lit. d). Article 34 (2) prescribes that they "shall not exploit or use natural resources to the detriment of the rights and interests of the Host State and local communities". In accordance with Article 35 (1), foreign investors and their investments "shall respect the rights and dignity of indigenous

104 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria of 3 December 2016, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3711> (accessed 15 August 2025). See thereto also, e.g., *Gazzini*, Investment Treaty News, Volume 8, Issue 3, September 2017, 3 *et seq.*; *Santacroce*, ICSID Review – Foreign Investment Law Journal 34 (2019), 136 (145-146); *Zugliani*, International and Comparative Law Quarterly 68 (2019), 761 *et seq.*; *Krajewski*, Business and Human Rights Journal 5 (2020), 105 (113 *et seq.*); as well as more comprehensively *Ejims*, ICSID Review – Foreign Investment Law Journal 34 (2019), 62 (74 *et seq.*).

105 The text of the Draft AfCFTA Protocol on Investment of January 2023 is available on the internet under: <https://au-afcfta.org/2023/05/the-afcfta-investment-protocol-a-potential-game-changer-for-the-african-continent/> (accessed 15 August 2025). See thereto also, e.g., *Ayele/Belete/te Velde*, Overseas Development Institute Policy Brief, April 2023, 5 *et seq.*

peoples and local communities in accordance with relevant domestic laws and regulations, international law, norms and best practices, including the right of indigenous peoples, and local communities where applicable, to free, prior and informed consent and to participate in the benefit of the investment". In addition, Article 36 requires foreign investors and their investments to "refrain from any interference in the internal affairs of State Parties and in their intergovernmental relations, in particular to influence the appointment of persons to public office, finance political parties or undermine the political stability or security of the Host State or to influence public opinion in a manner contrary to this Article". Furthermore, to mention but one additional example, Article 37 (1) and (2) stipulate direct obligations of investors aimed at preventing and combatting corruption.

In addition, Belarus and India signed an investment treaty on 24 September 2018 that stipulates in its Article 11 (ii) the obligation that investors "shall not, either prior to or after the establishment of an investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of a Party as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage nor shall be complicit in inciting, aiding, abetting, or conspiring to commit such acts".[106] Moreover, Article 11 (iv) of the same agreement foresees that foreign investors shall "provide such information as the Parties may require concerning the investment in question and the corporate history and practices of the investor, for purposes of decision making in relation to that investment or solely for statistical purposes". Quite similar obligations of foreign investors are for example also stipulated in Article 12 (b) and (d) of the Brazil-India investment agreement signed on 25 January 2020, in Article 12 of the India-United Arab Emirates BIT of 13 February 2024 that entered into force on 31 August 2024,[107] in Article 12 of the BIT concluded between India and Uzbekistan on 27 September 2024 that entered into force on 15 May 2025[108] as well as in Article 11 (ii) and (iv) of the bilateral investment treaty concluded by India with Kyrgyzstan on 14 June 2019.[109] Furthermore, the bilateral investment treaty concluded by Indonesia and Switzerland on 24 May 2022 stipulates in its Article 14 direct obligations of investors aimed at preventing and combatting corruption.[110]

Although until now apparently no direct obligations of conduct for foreign investors have been stipulated in existing investment agreements that are specifically related to the global challenge of combatting climate change, there are in general no systematic objections to incorporating private entities like foreign investors in the international legal order also as addressees of respective obligations enshrined in investment treaties. In other words, stipulating direct legal obligations of conduct for this category of non-state actors in connection with combatting climate change in respective international agreements is, from the viewpoint of general public international law, undoubtedly a possible and admissible option when discussing potential regulatory techniques aimed at ensuring an appropriate balance between the legal protection

106 Treaty between the Republic of Belarus and the Republic of India on Investments of 24 September 2018, available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3839/belarus---india-bit-2018-> (accessed 15 August 2025).

107 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5119/india---united-arab-emirates-bit-2024> (accessed 15 August 2025).

108 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5157/india---uzbekistan-bit-2024-> (accessed 15 August 2025).

109 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4909/india---kyrgyzstan-bit-2019-> (accessed 15 August 2025).

110 The text of the agreement is available on the internet under: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5012/indonesia---switzerland-bit-2022-> (accessed 15 August 2025).

granted to foreign investors on the one side and their responsibilities towards the societies in which they operate on the other side.

Moreover, such a regulatory approach serves as a further indication that international investment treaties have the potential to also positively contribute to addressing the central global challenge of climate change and thus should be – and as indicated by the treaty practice of Asian countries are currently also on the way to being – transformed into international climate protection agreements.

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