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Litigating Climate Change Mitigation and Adaptation in Investment Dispute Resolution

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ABSTRACT

International investment agreements (IIAs) may protect in principle every kind of foreign direct investment (FDI), including "brown" and "green" FDI. This means that potentially polluting multinational enterprises may be protected by IIAs and benefit from the right to sue States for the enactment of measures adopted in furtherance of climate change action through investor-State dispute settlement (ISDS). While this is not preferable under a policy perspective, various legal techniques may provide important "entry points" through which the *lex climatica* – international climate change treaties, such as the United Nations Framework Convention on Climate Change (UNFCCC) of 9 May 1992 and the Paris Agreement of 12 December 2015, and implementing municipal laws – may be successfully integrated in the *lex mercatoria* – IIAs. Such techniques pertain to investment treaty drafting (recognition of the States' right to regulate, general exceptions, express environmental carve-outs and provisions establishing investors' commitments), procedural issues (jurisdictional requirements, admissibility filters and viability of States' counterclaims) and substantive matters (treaty interpretation and applicable laws). Notably, IIAs must be interpreted pursuant to systemic integration as required by Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) pursuant to which "any relevant rules of international law applicable in the relations between the parties" "shall be taken into account". As a result, multilateral treaties addressing climate change do constitute an hermeneutic basis against which adjudicators may asses the breaches of economic treaties under international law. In this respect, the most relevant international instrument appears to be the Paris Agreement with its 196 States membership. The domestic implementation by States of their nationally determined contributions (NDCs) required periodically under Article 4 of the Paris Agreement may provide a parameter of legality of States' climate change inaction, which would then result to be inconsistent with the applicable IIAs. The recent stipulation of multilateral commitments addressing climate change is relevant also under the lens of dispute resolution. In this respect, the "teeth" provided by IIAs and investor-State dispute settlement (ISDS) to implement the investors' rights granted by the Parties may be instrumental also to the enforcement of climate change action commitments (in the absence of an arbitration or submission agreement pursuant to Article 24 of the Paris Agreement and Article 14 of the UNFCCC). In this scenario, ISDS may be resorted to by "green" investors to request an international investment tribunal or court to sanction a possible failure by a State in the implementation of binding climate change action.

Keywords: climate change, mitigation, adaptation, international investment law, international arbitration

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1. Introduction: Climate Change and International Investment Law

The present contribution aims to analyse the relationship and interaction between States' obligations stemming from their participation to the international climate change regime (ICCR) and those arising from international investment law, especially the international investment agreements (IIAs) they are parties thereto (Schill, 2007, 469; Baetens, 2019, 107; Ben Hamida, 2021, 84; Gehring and Hepburn, 2013, 381; Tienhaara, 2019, 292). The compelling character of human-induced climate change, as incontrovertibly established by scientific evidence reported by the Intergovernmental Panel on Climate Change (IPCC), furthers its acknowledgment as first and most urgent contemporary global sustainable issue also in the economic, social and political dimension,[1] consistent with the achievement of Sustainable Development Goal No. 13 ("Take urgent action to combat climate change and its impacts").

The Paris Agreement of 12 December 2015,[2] adopted multilaterally under the aegis of the United Nations Framework Convention on Climate Change (UNFCCC)[3] and featuring 194 Parties, represents one of the most successful achievements of the international climate change regime (ICCR). Given its comprehensive scope, it provides a wide-ranging regulation of the gamut of legal aspects and processes that pertain to climate change, such as mitigation, adaptation, finance, technology, development and transfer, transparency of action, support and capacity building, loss and damage, as well as compliance. The attainment of the ambitious goals[4] envisaged in the Paris

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[1] Bodanski 2021, 80: "Climate change is the mother of all global commons problems".
[2] Paris Agreement, signed at Paris on 12 December 2015, entered into force on 4 November 2016, *UNTS*, vol. 3156.
[3] United Nations Framework Convention on Climate Change, signed at New York on 9 May 1992, entered into force on 21 March 1994, *UNTS*, vol. 1771, p. 107.
[4] Paris Agreement, Art. 3: "(a) Holding 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, recognizing that this would significantly reduce the risks and impacts of climate change; (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development,

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Agreement demands international and national strategies and planning fostering unprecedented figures of "green" investment. Such investments deserve promotion and protection in conditions of stability and sufficient predictability from the viewpoint of foreign investors.

These prospective developments in the field of international investment law ultimately demand rethinking the traditional dichotomy between economic rights and non-economic values (e.g., environment,[5] health, labour standards), especially in the applications to be developed in the arbitral tribunals' practice. Moreover, the protection of foreign investments in the economic sectors of the "green transition" may even be reinforced upon reliance to States' international climate change law obligations, as illustrated in the following paragraphs.

The inescapable tension between States' measures aimed at countering human-induced climate change and their obligations under international investment treaties embodied the background for scholarly investigation about possible effects of "regulatory chill" by international investment law and arbitration on sound domestic climate change related actions and policies.[6] At the same time, there was conventional scepticism in the literature about the potential of the international investment regime to promote climate change action (Baetens, 2019, 107) or acknowledgement of the "invisibility" of the climate question in the context of ISDS (Grosbon, 2019, 389).

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in a manner that does not threaten food production; and (c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development".

[5] It is submitted that the references in IIAs to the environmental protection and concerns, although without expressly mentioning climate change, are nevertheless susceptible of being interpreted extensively as encompassing climate change action based on the application of general principles of treaty interpretation such as good faith and effectiveness (Dörr 2018, 567). Commentators have remarked, for example, that "[c]ertainly climate change is an environmental concern" (Vadi 2015, 1344) and "*plusieurs traités d'investissement ont pris en considération la dimension environnementale. Cette prise en considération permet aux Etats d'agir avec flexibilité pour gouverner le changement climatique*" (Ben Hamida, 2021, 92).

[6] For a doctrinal contrast, cf. Schill, 2009, 477 ("Investment treaties will not prevent state imposition of higher emission standards or product bans as such but restrict their unreasonable or unforeseeable introduction") and Tienhaara, 2018, 232 (outlining "three distinct varieties of regulatory chill: *internalization chill*, *threat chill*, and *cross-border chill*").

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This contribution proposes an inclusive approach about the interaction of international climate change law (*lex climatica*) and investment law (*lex mercatoria*), which should not be considered as competing norms. Notably, it will attempt to explain how the implementation of States' obligations under the Paris Agreement may be realized through resort to international investment law and ISDS. To such an extent, international investment law may provide "teeth" to the ICCR, thus contributing to the fulfilment of its ambitions. More significantly, international investment awards benefit from effective enforcement mechanisms pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 18 March 1965 (ICSID Convention or Washington Convention)[7] and also under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (New York Convention).[8]

Indeed, the marked degree of ultimate enforceability of States' international commitments relating to the protection of foreign investments may be contrasted with the recognized gaps in terms of enforcement and compliance within the ICCR.[9] Most States are bound by the Paris Agreement (194) and the UNFCCC (198), on the one hand, and the ICSID Convention (166 signatories) and the New York Convention (171), on the other. To such an extent, investment awards through which climate change commitments can find implementation may be consequently recognized and enforced in almost all jurisdictions.

[7] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington on 18 March 1965, entered into force on 14 October 1966, *UNTS*, vol. 575, p. 159. In particular, under Article 53.1 "[t]he award shall be binding on the parties" and under Article 54.1 "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State".
[8] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed at New York on 10 June 1958, entered into force on 7 June 1959, *UNTS*, vol. 330, p. 3.
[9] UNFCC, Art. 14; Paris Agreement, Arts. 15 and 24.

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2. The Tension Between Climate Change Action and the States' International Obligations to Protect Foreign Investments

International investment law and its dispute resolution system, in which, in particular, foreign investors have direct recourse to legal redress against States, portrays a *non-mediated* representation of both private and public interests in contentious proceedings. IIAs may in principle protect *ratione materiae* every kind of foreign direct investment (FDI), including high-carbon ("brown") and low-carbon ("green").

Traditionally,[10] investors operating in the sector of fossil fuels (coal, oil and gas) have been frequent claimants in ISDS as they presented at least 192 cases against States for every kind of sovereign conduct affecting their business allegedly in breach of the substantive protections owed under IIAs and investment contracts.[11] However, also "green" arbitrations have more recently arisen amounting to 80 known cases borne out of renewable energy claims, for instance relating to solar photovoltaic energy, wind and hydroelectric power.[12] More generally, investors lodged at least 175 cases to challenge State measures adopted for the protection of the environment.[13]

Interestingly, in the context of such environmental cases, 67 per cent of the claims were directed against States with advanced economies and 95 per cent were filed by investors originating from a home State of an economically developed region.[14] The following sections will explain how the application of substantive standards of protection contained in IIAs may affect climate

[10] For an effective and concise historical reconstruction, cf. Grosbon 2019, 387.
[11] UNCTAD, *Treaty-Based Investor-State Dispute Settlement Cases and Climate Action*, IIA Issues Note, No. 4, September 2022. The overwhelming majority (74 per cent) of these cases were brought against developing countries.
[12] *Ibid*. More than 90 per cent of these cases invoked the Energy Charter Treaty (ECT) as jurisdictional basis. Almost the totality (98 per cent) of such renewable energy ISDS cases were brought by investors from developed regions against developed countries (e.g., *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016).
[13] UNCTAD, *Treaty-Based Investor-State Dispute Settlement Cases and Climate Action*, IIA Issues Note, No. 4, September 2022. Among those 175 cases, 118 were concluded with the following operative outcome: 40 per cent decided in favour of the respondent State and 38 per cent in favour of the claimant investor with an award of damages.
[14] Ibid.

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change policies and, moreover, will also address the central question whether IIAs, instead of curtailing such policies, may contribute to their realization.

The international obligations of States to promote and protect foreign investments pursuant to IIAs and their implementation or failure to implement commitments stemming from the ICCR may interact in manifold respects. National laws and regulations banning or restricting high-carbon industries (for instance, phasing out coal[15]) are as a matter of principle justified either under the application of general exceptions codified in the applicable treaty or based on the general legitimate right to regulate of States (Titi, 2014).

The same would apply to measures incentivizing low-carbon businesses also pertaining to foreign investments performed in the territory of the host State. However, the fact that States operate under the umbrella of a climate change accord, for instance the Paris Agreement, or a multilateral environmental treaty does not, in and of itself, preclude the possibility of incurring international responsibility under IIAs. Notably, the measure at issue shall not be applied in discriminatory, arbitrary or unreasonable manner, which would entail the violation of the various substantive standards of treatment under IIAs, as applicable, both relative (most favoured nation and national treatment) and absolute (fair and equitable treatment and the prohibition of unlawful indirect expropriations).

This mindset is found also in Article 3.5 of the UNFCCC, pursuant to which "[m]easures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade".[16] This anti-protectionist provision borrows its language from the chapeau of Article XX of the GATT 1947, which was conserved in the GATT 1994 and also provides the model for general exceptions clauses in IIAs. Moreover, Article 3.5 of the UNFCCC

[15] See, for instance, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022 (claim eventually dismissed for lack of jurisdiction of the tribunal). See also the earlier case *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (I)*, ICSID Case No. ARB/09/6, Award, 11 March 2011 (award embodying the parties' settlement agreement).
[16] UNFCCC, Art. 3.5.

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posits a general parameter of legality of State measures adopted in furtherance of climate change commitments that affect foreign businesses.

3. The Substantive Scrutiny of State Acts and Omissions Relating to Climate Change Actions Under the Lens of International Investment Law

State measures consisting in prohibitions, bans or, less drastically, restrictions affecting a carbon intensive economic sector are in principle lawful under IIAs (Titi, 2018, 323). In January 2021, the German company RWE AG and its Dutch subsidiary RWE Eemshaven Holding II BV lodged a request for arbitration at ICSID against the Netherlands for its ban of coal-fired power generation by 2030 implemented through the Law on the Prohibition of Using Coal in the Electricity Production (*Wet verbod op kolen bij elektriciteitsproductie*, *Staatsblad* 2019, No. 493), which entered into force on 20 December 2019.[17] The Dutch government adopted this decision to meet its commitments under the Paris Agreement.

However, the claimants have invoked the responsibility of the Netherlands under the Energy Charter Treaty (ECT), including for breach of FET and the prohibition of unlawful indirect expropriation, since practically no compensation was offered by the State, and emphasized that the coal ban targeted a sector in which only foreign investors were operating. A similar claim against the same ban was filed in April 2021 by the German energy company Uniper. However, in this case the investor subsequently agreed in July 2022 to withdraw its request for arbitration as a condition of the deal reached with the German government for its bailout.[18]

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[17] *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4.

[18] *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22. This act by the German government appears to be in line with the position adopted by the European Commission and Member States with regard to intra-EU investment arbitration, especially in light of various judgments of the Court of Justice of the European Union (*Achmea*, *Komstroy*, *PL Holdings*, *Micula*). See

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The legality of an environmental mining ban applied by Colombia formed the object of an arbitration brought by the Canadian corporation Eco Oro. Colombia adopted relevant regulation to protect the high mountain ecosystem of Santurbán Páramo, an environmental conservation zone which fell to cover in part the concession area, a gold and silver deposit, in which the investor operated for decades. The arbitral tribunal, while acknowledging that "neither environmental protection nor investment protection is subservient to the other, they must co-exist in a mutually beneficial manner",[19] found by majority – Professor Philippe Sands dissenting – that the ban violated the minimum standard of treatment of aliens, including FET,[20] pursuant to Article 805 of the Canada-Colombia FTA (2008), notwithstanding the applicability of its general exceptions clause in Article 2201(3).[21] This conclusion appears questionable in so far as it subverts the cardinal tenet upon which a sovereign measure justified by a general environmental exception (or by legitimate right to regulate) and applied evenly and non-discriminatorily by a State shall not

"Declaration of the Representatives of the Governments of the Member States, of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union", in particular at point 4: "Member States which control undertakings that have brought investment arbitration cases against another Member State will take steps under their national laws governing such undertakings, in compliance with Union law, so that those undertakings withdraw pending investment arbitration cases".

[19] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para. 828.

[20] A controversial finding of breach of the minimum standard of treatment, including FET, under Article 1105 of the NAFTA was decided by majority in the *Clayton/Bilcon* case in relation to the environmental assessment decision by Canadian authorities to reject a project to develop and operate a quarry and a marine terminal in Nova Scotia significantly based on "community core values". See *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, paras. 588-604 and 733-741 *Contra*, Id., Dissenting Opinion of Professor Donald McRae, 10 March 2015, especially para. 44 et seq.

[21] This provision applied specifically to the investment chapter of the relevant FTA and preserved the adoption of "measures necessary: a. To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health; b. To ensure compliance with laws and regulations that are not inconsistent with this Agreement; or c. For the conservation of living or non-living exhaustible natural resources". See Canada-Colombia FTA (2008), Art. 2201(3)(a)-(c) and Annex 811(2)(b).

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give rise to a violation of the applicable IIA, including in relation to compensation.[22]

The same conclusion remains applicable to climate change action undertaken by States through domestic legislation. This is confirmed by other arbitral decisions that pondered in a more appropriate manner the competing societal objectives at issue. For instance, in *Chemtura v. Canada*, the tribunal considered that the ban adopted by the Canadian Pest Management Regulatory Agency (PMRA) with regard to the use of toxic agro-chemical lindane on the basis of its health and environmental effects was subject to the provisions of Aarhus Protocol to the Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants (LRTAP Convention)[23] and therefore necessary under the international treaty obligations assumed by the State.[24] Eventually, the tribunal did not find any breach of NAFTA and consequently did not award any damages to the claimant[25].

Also, State measures that provide incentives to "green" investment, for instance in the sector of renewable energies, are in principle legitimate under international investment law (Ben Hamida, 2021, 90). However, such support schemes should not engender a breach of contingent non-discrimination standards under IIAs, namely the obligations of most-favoured-nation (MFN) treatment vis-à-vis investors of third countries and, especially, the national treatment vis-à-vis domestic undertakings.

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[22] For the tribunal's reasoning, cf. *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, paras. 826-837. See also *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, para. 477.
[23] Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants, done at Aarhus on 24 June 1998, *UNTS*, vol. 2230, p. 79.
[24] *Chemtura Corporation v. Government of Canada*, UNCITRAL (formerly *Crompton Corporation v. Government of Canada*), Ad Hoc NAFTA Arbitration under UNCITRAL Rules, Award, 2 August 2010, para. 266.
[25] See also *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, especially Part IV, Chapter D, para. 7 (claim dismissed on the merits in relation to the Californian ban on the use or sale in California of the gasoline additive MTBE).

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In *Nykomb v. Latvia*, a Swedish investor successfully complained about the refusal by Latvia to honour a promise of incentivization, namely a double-tariff, for low-carbon electricity production on the basis of which its investment was made. The tribunal ascertained discriminatory treatment by the State under Article 10(1) of the ECT, since the administrator of the incentive schemes continued to support low-carbon installations operated by domestic investors, while refusing this benefit to foreign investors operating in comparable conditions.[26] This case law entails that national incentive schemes applying *de iure* to and benefitting both foreign as well as domestic investors would not trigger international responsibility of the State under investment treaties.

Hitherto, it has been analysed how positive measures by States imposing bans or restrictions on "brown" investments or providing incentives in favour of "green" investments may withstand the ISDS scrutiny, but for a finding of discriminatory, selective or protectionist application. The necessary achievement of the objectives that are consubstantial to the fight against climate change may provide a sound and viable justification to such measures under both general international law and international investment law. The remaining paragraphs of this section will instead investigate to what extent the inaction of States in implementing climate change measures required under the umbrella of the ICCR may be sanctioned under IIAs for breach of non-contingent standards of treatment, in particular FET.[27] Notably, the

[26] *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, para. 4.3.2.

[27] Concerning the substantive standard of the prohibition of unlawful expropriation measures, especially indirect, the adoption and even-handed implementation by States of climate change legislations and regulations would constitute a legitimate exercise of their police powers, especially if necessitated by multilateral commitments, and would not result in a violation of IIAs. See, for example, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, paras. 272-307, especially 304 (taking into consideration the World Health Organization Framework Convention on Tobacco Control). Moreover, as observed above (see *supra* section 2 of this Chapter) the measures at issue would not be sanctioned as unlawful under the relevant IIA, if the latter contains an express carve-out clause. See CETA, Annex 8-A (*Expropriation*). Instead, it would be markedly speculative to submit that the State's failure to adopt specific climate change action on which the investor legitimately

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analysis focuses on the relevance of climate change mitigation and adaptation measures to which a State committed through the issuance of its nationally determined contributions (NDCs). While the previous analysis assumed a dimension of confrontation between international investment law and climate change law, this scenario posits a relation of reciprocal benefit between the two. In particular, the economic protection of a "green" business investing in the territory of the host State in reliance of the latter's unilateral NDC and in line with the objective to fully realize the climate "ambition cycle" of the Paris Agreement would be placed in alignment rather than opposition.

Pursuant to Article 3 of the Paris Agreement, "[a]s nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of" the Paris Agreement itself.[28] Moreover, it is stated that "[t]he efforts of all Parties will represent a progression over time".[29] Pursuant to Article 4, each Party "shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions".

Each State Party shall communicate every five years its NDCs and every successive edition thereof shall "represent a progression" and "reflect" the "highest possible ambition" of the issuing State.[30] These obligations bind all Contracting Parties of the Paris Agreement, having regard to the "common but differentiated responsibilities and respective capabilities, in the light of

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relied may embody an expropriatory act, notably for lack of the requirement of substantial deprivation of the value of the investment.

[28] Paris Agreement, Art. 3.

[29] *Ibid*.

[30] Id., Arts. 4(3) and 4(9). Rajamani and Guérin (2017, 78) observe that "[s]uffice it to say here that these expectations in relation to progression are of tremendous significance, as they are designed to ensure that, notwithstanding the national determined nature of contributions from parties, the regime as a whole is moving towards ever more ambitious and rigorous actions from parties. This ensures that there is a 'direction of travel' for the regime, as it were." Also, Bodansky, Brunnée and Rajamani (2017, 234) acknowledge that: "The standards of progression and highest possible ambition are arguably objective rather than self-judging".

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different national circumstances" (CBDRRC-NC). This means that, but for a certain degree of flexibility and modularity, the States' commitments that are instrumental to the realization of the goals of the Paris Agreement – first and foremost its temperature goal, the net zero target and the financial pledge – must not be overturned and, moreover, must be progressively strengthened in the course of the "ambition cycle", namely the combination of the expectation of progression (Article 3), the global stocktake (Article 14) and the binding obligation of each Party to present an NDC every five years (Article 4).

Under the Paris Agreement, a Party's substantive commitment pursuant to its NDC embodies an obligation of conduct rather than result (Mayer, 2018, 256-262; Bodanski, 2016, 146; Voigt, 2021, 1016, who characterizes NDC commitments under the Paris Agreement as a "treaty-based expression of due diligence"), which entails that the State is not bound to actually achieve its self-imposed targets, whereas it must proffer its best efforts to this goal within a bottom-up regime (Rajamani, 2016, 500, 511). Instead, the Parties' procedural obligation to prepare, communicate every five years and maintain successive "progressive" NDCs is strictly binding, including the duty to provide mandatory informational requirements to track progress in their implementation and achievement.[31]

It is hereunder investigated whether substantive obligations under IIAs – especially non-contingent standards of treatment – may be applied so as to reinforce qualitatively the binding scope of NDC related obligations under the Paris Agreement in terms of operationalization of prescriptions and enforceability of contents. This analysis chiefly revolves around the protection of the legitimate expectations of foreign investors relying on a State's NDC for or in the making of its investment.[32]

[31] Cf. Paris Agreement, Art. 13(7)(b).
[32] For an effective FET analysis, see *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, para. 360.

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4. The State's Failure to Implement its Nationally Determined Contributions as a Breach of the Fair and Equitable Treatment

The *Antaris v. Czech Republic* tribunal[33] provided an effective FET analysis by isolating its cardinal principles. With regard to the investor's legitimate expectations, it found that "[a] claim based on legitimate expectation must proceed from an identification of the origin of the expectation alleged, so that its scope can be formulated with precision" (para. 360(2)). It also added that "[a] specific representation may make a difference to the assessment of the investor's knowledge and of the reasonableness and legitimacy of its expectation, but is not indispensable to establish a claim based on legitimate expectation which is advanced under the FET standard" (para. 360(5)). The representation may be explicit or implicit (para. 360(3)). Furthermore, consistent arbitral case law and literature establish that the investor's reliance on a legitimate expectation should be crystallized at the time of the investment decision or in the post-establishment phase at the time of the determination whether to channel additional economic resources into an ongoing project or operation (Schreuer and Kriebaum, 2009, 265).[34]

To borrow the language of the *Total v. Argentina* tribunal,[35] NDCs may embody a State's "previous publicly stated position, whether that be in the form of a formal decision or in the form of representation" (para. 129). The substantiation of such a position may depend on the particularization of the content of the individual NDC, which may vary based on the discretion of the communicating Party (for Bodanski, Brunnée and Rajamani, 2017, 202, the

[33] *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, para. 360.
[34] Cf. also *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 190; *National Grid plc v. The Argentine Republic*, UNCITRAL, Award, 3 November 2008, para. 219; *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para. 287: "where investments are made through several steps, spread over a period of time, legitimate expectations must be examined for each stage at which a decisive step is taken towards the creation, expansion, development, or reorganisation of the investment".
[35] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010.

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notion of NDCs "by privileging sovereign autonomy, respecting national circumstances, and permitting self-differentiation, significantly reduced the sovereignty costs of a legally binding instrument": the more specific and clear the declaration to the addressees, the more compelling the case that the foreign investor in question was entitled to rely on it in good faith on the basis of a legitimate expectation. NDCs are not addressed by States only to single investors, but to the generality of stakeholders, *in primis* to the other Parties of the Paris Agreement (Mayer, 2018, 273).

However, the general character of the source of the legitimate expectation does not fatally prevent a successful FET claim. Tribunals have found that general regulatory frameworks and legislation may also give rise to legitimate expectations especially if drafted with sufficient specificity and targeted at foreign investors in order to attract their commitments of resources in the host State.[36] To this extent, domestic laws and regulations on climate change, including those envisaged in NDCs,[37] that provide a defined legal framework for future "green" investment operations – for example, including the provision of support schemes and incentives – may create legitimate expectations based on specific commitments reliable by foreign investors.

NDCs can be considered among the variety of host States' unilateral acts or statements (or assurances, representations or declarations) that may represent a source of obligations with regard to the protection of foreign investments (Reisman and Arsanjani, 2004, 328-343). However, their degree of normativity depends on the clarity and specificity of their contents, which embodies the result of a State's commitment to climate change mitigation and adaptation. This approach is supported by Guiding Principle 7 of the "Guiding

[36] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 133; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 260 (referring to specific "legislative" undertakings); *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, para. 371.
[37] E.g., "Nationally determined contributions under the Paris Agreement. Synthesis report by the secretariat", 26 October 2016, FCCC/PA/CMA/2022/4, para. 104.

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Principles applicable to unilateral declarations of States capable of creating legal obligations" adopted by the International Law Commission in 2006:

> A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligation, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated.[38]

The context and the circumstances in which the NDCs have been communicated by States comprise the applicable international instruments under the aegis of the ICCR, first and foremost the Paris Agreement. In particular, although the mitigation (and adaptation) targets stated in NDCs are not binding as to their result, the "ambition cycle" established by the Paris Agreement generates a reasonable expectation of progression in climate change action, which prevents the self-committing Party to reverse or repeal abruptly its representations and bind the same to take appropriate steps for the attainment of such goals, decisively in view of the presentation of its successive NDC (Rajamani and Bodanski, 2019, 1026).

This force of logic is even more mandatory in relation to countries characterized by an industrialized developed economy having reached the peak of emissions consistent with the CBDRRC-NC caveat. As a consequence, at determined conditions a foreign investor may rely on the State's specific unilateral statements formulated in NDCs and to accrue legitimate expectations that the latter would implement its climate change

[38] International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, Guiding Principle No. 7. The incorporation of the relevance of the context and the circumstances in which the unilateral declaration was formulated is consistent with the case law of the International Court of Justice. See *Case Concerning Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment of 22 December 1986, I.C.J. Reports 1986, 554, at 574, para. 40 and *Case Concerning Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, *I.C.J. Reports 1974*, at 256, para. 34.

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policy and action in effectually incremental direction. Against this background, the investments performed in furtherance of such expectations may fall under the normative scope of IIAs and their substantive protections.

To such an extent, climate change multilateral agreements would constitute "any relevant rules of international law applicable in the relations between the parties" pursuant to Article 31(3)(c) of the VCLT and, therefore, may be systemically integrated in the BIT or IIA that is applicable in an investor-State dispute. The fact that a State is party to the Paris Agreement or other ICCR instrument does not "transform" the substantive standards under the IIAs to which it is also a Party (it is self-explanatory that "IIAs… are not environmental treaties", Boute, 2012, 662). However, the *Allard v. Barbados* tribunal pertinently acknowledged in relation to the Convention on Biological Diversity (CBD)[39] and the Ramsar Convention[40] that "consideration of a host State's international obligations may well be relevant in the application of the standard to particular circumstances".[41]

This entails that ISDS adjudicators may well interpret the applicable IIA, including its external context, and substantiate the reach of the FET obligations contained therein having regard to the relevant climate change obligations binding on the Contracting Parties and the entire variety of aggregate consequences descending therefrom, including reasonable reliance by investors on the practicability of commitments formulated by States in their NDCs. This legal construct appears to be consonant with the consideration of general principles of law recognized by the community of nations such as good faith, estoppel and *venire contra factum proprium* (Bowett, 1957, 176), especially in case host State's organs and

[39] Convention on Biological Diversity (CBD), signed at Rio de Janeiro on 5 June 1992, entered into force on 29 December 1993, *UNTS*, vol. 1760, p. 79.
[40] Convention on Wetlands of International Importance especially as Waterfowl Habitat, signed at Ramsar on 2 February 1971, entered into force on 21 December 1975, *UNTS*, vol. 996, p. 245.
[41] *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award, 27 June 2016, para. 244 (in the context of FPS analysis). In this case, the investor had unsuccessfully argued that the host state's approval of an environmental management plan (EMP) constituted a representation that it would act in a specific way.

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instrumentality willingly induced and attracted foreign "green" businesses by signalling a favourable investment climate. This conclusion would be even more viable if the applicable IIA required the Contracting States to implement the commitments stated in their NDCs.[42]

Finally, since NDCs, as mentioned above, may lack specificity, a foreign investor and the organs (or parastatal entities or State-owned enterprises (SOEs)) of the host State may always incorporate in contractual arrangements a reference to climate change commitments articulated in NDCs or other obligations stemming from the Paris Agreements or other ICCR instruments. In this scenario, the breach of such privy commitments can be scrutinized under IIAs with regard to FET[43] and, if applicable, especially umbrella clauses, i.e. treaty provisions prescribing the observance of contractual commitments entered by States or SOEs with investors (Crawford, 2008, 251). Accordingly, the competent tribunal would be empowered to adjudicate both treaty and contract claims (the latter being governed by the proper law of contract, which usually is the domestic law of the host State) thus rendering enhanced justice to the vindication of climate change related commitments.

This stands as an effective option for States and private businesses furthering the transition to the "green" economy, taking into account that the Paris Agreement's "ambition cycle" is yielding increased target setting activity through Parties' successive NDCs, but the gap between actual implementation and optimal levels of mitigation, adaptation and finance remains considerable (Maljean-Dubois, Ruiz Fabri, and Schill, 2022, 738: "Existing pledges, however, are far from sufficient and remain inconsistent with the temperature target set in the Paris Agreement").

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[42] EU-China Comprehensive Agreement on Investment (CAI), Agreement in Principle (2020), Section IV, Sub-Section 2, Art. 6(a). Article 6(a) of the CAI requires each Contracting Party to "effectively implement the UNFCCC and the Paris Agreement adopted thereunder, including its commitments with regard to its Nationally Determined Contributions".
[43] See *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, Decision on Jurisdiction, 12 February 2010, para. 148 (referring inter alia to the "baseline expectation of contractual compliance").

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5. Concluding Remarks

Consistently with their progressive understanding of climate change as most urgent and pressing global challenge of the present era, States, especially in the developed world, and investors increasingly consider climate change norms as elements of international public policy, on one side, and a source of business opportunities rather than a negative economic externality, on the other side. In this context, unilateral domestic measures (Bilder, 1981, 51) adopted by "pioneer" States in furtherance of climate mitigation, adaptation and finance would be legitimate pursuant to international law, notably under IIAs, if not applied arbitrarily, unpredictably, discriminatorily and as a way to foster protectionism. Moreover, the imperatives of climate change related action, especially as ordered under the Paris Agreement, require massive sustainable investment, including FDI. In the corresponding perspective of "green" investment, climate change action and the protection of economic rights would then stand in synergy, rather than dichotomy.

With regard to investment treaty drafting (recognition of the States' right to regulate, general exceptions, express environmental carve-outs and provisions establishing investors' commitments), procedural issues (jurisdictional requirements, admissibility filters and viability of States' counterclaims) and substantive matters (treaty interpretation and applicable laws), various "entry points" are available for a successful integration of the *lex climatica* – international climate change rules and implementing municipal laws – in the *lex mercatoria* – IIAs. In the framework of ISDS, it has been shown that adjudicators may determine the legality of domestic measures implementing climate change action and, significantly at given conditions, sanction States' omissions in the observance of determined obligations under the ICCR, in particular specific voluntary targets communicated in their NDCs. Having regard to the prong of effectiveness, international investment law and arbitration may importantly give to the ICCR those "teeth" that are lacking under both the Paris Agreement and the

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UNFCCC, thus tempering their admitted compliance and enforcement gaps. Indeed, the prescriptions relating to climate change that are established in investment awards may be successfully recognized and enforced under the ICSID Convention and the New York Convention in accordance with the requirements set forth therein.

From the perspective of deepened and broadened international investment law, the relevance and consideration of climate change related action and concerns, notably under the framework of the Paris Agreement, may function as paradigmatic catalyst of a more sophisticated internalization of non-economic values in the legal dimension of foreign investment. For instance, this forthcoming development would be demonstrated by a conclusive defeat of the sole effects doctrine[44] with regard to the ascertainment of States' breaches of IIAs, notably as to expropriatory acts.

The evolution of international investment law in response to the test of climate change will also depend on the attitude and posture of ISDS adjudicators, in terms of their possible inclusive approach or, conversely, self-restraint, with regard to the application and taking into consideration of norms and legal standards that are "external" (Kurtz 2020, 200) to the applicable commercial treaty. This reflection opens a reference to the question of the requirements and competences of ISDS adjudicators, which inter alia is the object of discussions within the current possible reform of ISDS, especially at UNCITRAL. Certainly, a "demonstrated expertise in public international law"[45] by arbitrators appears to be fundamental for the purposes of appropriate integration of international climate change law in the international protection of foreign investments. This may enhance as a consequence a more adequate balancing in international economic adjudication between economic and non-economic values and concerns, such

[44] E.g., *Compaňia del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case No. ARB 96/1, Award, 17 February 2000, para. 72.
[45] E.g., CETA (2016), Art. 8.27(4).

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as the environmental protection, to the benefit of the populations that are concerned in a democratic-striving perspective (de Búrca, 2007-2008, 221).

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