**Integrating, Reconciling and Prioritising Climate Aspirations in Investor-State Arbitration for a Sustainable Future: The Role of Different Players**

**Abstract**

There is a pervasive sense of tension between Investor-State Arbitration and International Climate Change Law. Both fields use different rationalities and evolved through completely different treaty systems. The tensions between the regimes are evident in the practice of ISA tribunals that hardly engage in analyses of States’ climate obligations. To mitigate this, this article proposes that climate aspirations must be integrated at various levels of the ISA regime by different players and at various stages. While States can contribute to this by drafting investment treaties better; arbitrators can reconcile the tensions by using pro-climate interpretative mechanisms; arbitration institutes can formulate procedural rules embedding third party participation and allowing counterclaims in ISA. Counsels and disputing parties can adopt best practices in managing arbitrations in a sustainable way, use climate and net zero aligned clauses and empower the arbitration tribunal to interpret and modify applicable law to align it to climate objectives.

**Keywords**

Bilateral Investment Agreements, Climate Change, ICSID, Investor-State Arbitration, ISDS, Multilateral Investment Court, UNCITRAL

1. Introduction

Climate change is one of the most serious threats to planet Earth, its flora, fauna and humankind. There is a growing international consensus that concerted efforts must be made to address climate change. The United Nations Climate Action Summit in 2019 highlighted that States can no longer remain passive, and reactive but pursue proactive, progressive measures to deal with the problem. The COP26 Summit brought stakeholders together to make more concerted efforts towards the goals of the Paris Agreement and the United Nations Framework Convention on Climate Change (UNFCCC). Efforts on this front can however be seriously undermined by Investor-State Arbitration (ISA). In the recent past, some countries have had to re-think their domestic environmental measures in the face of ISA/threats of ISA. The nature of ISA discourages transparency, third party participation, and submissions of counterclaims. The broad discretionary powers, use of forward-looking valuation methods adopted by ISA tribunals have led to extremely large amounts of damages being awarded to foreign investors.[[1]](#footnote-1) Requiring States to pay compensation to affected investors will escalate costs of the energy transition, lead to regulatory chill[[2]](#footnote-2) and delay emission-reduction policies.[[3]](#footnote-3) ISA can escalate costs of energy transition even if States win the relevant arbitration. The costs of participating in an ISA can itself run into millions of dollars, all of which are not recoverable even if the respondent State wins the arbitration.[[4]](#footnote-4) An important question, against this backdrop is how can the tensions between ISA and International Climate Change Law (ICCL) be resolved.

This article argues that despite the current regime of ISA not being aligned with climate mitigation, given that climate change is an all-encompassing threat, addressing climate change is a joint responsibility of States, arbitrators, arbitration institutes, counsels, and disputing parties. This article proposes that climate aspirations must be integrated at various levels of the ISA regime by different players and at various stages of ISA proceedings. Amongst all other players, arbitrators are in the best position to integrate climate goals with ISA by adopting pro-climate interpretative techniques and by deferring to regulatory autonomy of States. But arbitrators can only do what they have been mandated to do, so treaties drafted by States, procedural rules formulated by arbitration institutes and powers conferred by disputing parties have a big role to play in integrating and reconciling climate aspirations and ISA. By way of conclusion, this article also evaluates if the proposed Multilateral Investment Court (MIC) can be a better forum for resolving investment disputes involving climate measures instead of ISA. In doing so, this article makes three contributions. Firstly, it provides suggestions on how tensions between ISA and ICCL can be resolved and role that can be played by different players in integrating them. Secondly, it provides a conceptual taxonomy to study the different ways in which climate arguments can appear in ISA. Thirdly, it provides considerations that needs to be taken into account in instituting the MIC in a way that it is able to integrate climate goals.

This article is divided into four parts. The next part explores the distinct evolution of ISA and ICCL and the resultant tensions between the two regimes. The third part discusses the role of different players in the ISA regime and how each of them can contribute to integrating climate aspirations in ISA. Particularly, the role of States, arbitrators, arbitration institutes such as the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), counsels and disputing parties are discussed. This part discusses how arbitrators can better integrate climate aspirations within ISA and provides a conceptual taxonomy for studying the various ways in which climate-related arguments can be made in an ISA. This taxonomy is organised under four broad themes namely, climate arguments used by investors; climate change regulations as defences and counterclaims by States; climate change-related arguments or presentations in amicus submissions; and environment/climate change used in reasoning by tribunals. This part also discusses some of the recent reforms at ICSID and UNCITRAL that can have an impact on achievement on climate goals including discussion on the proposed MIC. The last concludes.

1. ISA and ICCL: Tensions and their Reasons

International Investment Law (IIL) and ISA on one hand and ICCL on the other belong to separate fields of international law. While IIL developed through a fragmented bilateral investment treaty (BIT) system based on reciprocity, ICCL developed through multilateralism based on universal values and accountability. Like many other ‘laws’, they are united in their philosophies, i.e., both are fundamental to the process of regulating behaviour, enforcing rule of law and protection of rights.[[5]](#footnote-5) Some themes such as ‘corporate social responsibility’ of investors (for example in Article 7 of Netherlands Model BIT) and ‘international public policy’ are common to both regimes. But except in these limited ways, there is otherwise, hardly any relationship between the two. Both regimes evolved distinctly from one another, prioritise different objectives, operate in separate areas of international law and as a result, interactions between the regimes lead to some complex tensions.

Following the Second World War and the consequent changed political scenario, ISA was conceived as a foreign investment dispute resolution mechanism by World Bank officials.[[6]](#footnote-6) It was formalised in 1965 through the ICSID Convention which enabled foreign investors to bring a direct claim against the host State without interference from its home State. The founders of the ICSID Convention primarily envisaged ICSID as fulfilling one primary objective, namely the promotion of foreign investment. The report of the Executive Directors on the Convention emphasises this in several paragraphs[[7]](#footnote-7) and states that the main goal of the ICSID system is to promote international investment by providing a neutral forum of dispute resolution to investors wary of biased decisions by local courts.[[8]](#footnote-8) ICSID’s officials took active steps to persuade governments to use ICSID clauses which led to their incorporation in numerous BITs. Different States competed and coordinated their negotiating positions[[9]](#footnote-9) which led to the proliferation of bilateral investment agreements. In 1966, the General Assembly of the United Nations established the UNCITRAL and in 1976, the UNCITRAL Arbitration Rules[[10]](#footnote-10) came into force which facilitated ad-hoc arbitration claims. The ICSID and the UNCITRAL Rules are some of the most commonly used rules for ISAs today.

While IIL and ISA grew bilaterally, ICCL evolved through multilateralism in the 1980s. When ISA was formally conceptualised in the 1960s, ICCL was yet to become a specific area of law on its own. Older generation investment treaties hardly referred to climate change. The threat of climate change became a policy consideration only towards the end of the 1980s.[[11]](#footnote-11) An international scientific effort to study climate change was taken up in 1988 under the auspices of the World Meteorological Organisation (WMO) and the UN Environment Programme (UNEP). The UN General Assembly Resolution endorsed the action of the WMO and UNEP to jointly establish an Intergovernmental Panel on Climate Change (IPCC) and requested them to ‘initiate action leading, as soon as possible, to a comprehensive review and recommendation with respect to … [t]he identification and possible strengthening of relevant existing international legal instruments having a bearing on climate [and] [e]lements for inclusion in a possible future international convention on climate’.[[12]](#footnote-12) The first report of the IPCC and the Second World Climate Conference in November 1990 at Geneva provided the necessary impetus and in December 1990, the UN established the Intergovernmental Negotiating Committee to negotiate the Convention on Climate Change.[[13]](#footnote-13) As a result, the 1992 UNFCCC took form.[[14]](#footnote-14) The main aim of the Convention is to stabilise ‘greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’.[[15]](#footnote-15) The Convention fits ‘somewhere between a framework and a substantive convention, establishing more comprehensive obligations than the bare-bones form of a treaty … yet falling short of the detailed commitments’.[[16]](#footnote-16) The 1997 Kyoto Protocol builds on the UNFCCC to limit or reduce greenhouse gas emissions. The Paris Agreement adopted at the COP21 in 2015 enhanced the implementation of the UNFCCC by ‘[h]olding 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’.[[17]](#footnote-17) While arbitrators have played a vital role in multilateralizing[[18]](#footnote-18) ISA, the ICCL framework is certainly more multilateral than the IIL framework.

The dissimilarities between both regimes are not just confined to their origins but also extend to their respective content and objectives they set out to achieve. ICCL is concerned with the voluntary commitments of States to achieve a certain threshold and climate objectives unconnected with individual rights. ICCL focuses mainly on mitigation of and adaptation to climate change, organising financial and other means of support for mitigation and adaptation, and international oversight to promote implementation, compliance, and effectiveness.[[19]](#footnote-19) The focus of IIL on the other hand is the promotion of foreign investment. IIL and ISA are concerned with direct/indirect expropriation of foreign investors’ investment and provision of a remedy in case investment protection standards prescribed under a relevant treaty are violated by a State measure. The protection of investor rights under IIL depends on interstate relations, whereas climate commitments are in some respect independent and have an objective character as they do not depend on reciprocity between States at least in terms of their nationally determined contributions (NDCs) under the Paris Agreement.

Despite both regimes seeking to achieve different objectives, fossil fuels energy system is deeply embedded in the global investment economy. There have been at least 192 ISA claims and 80 known cases initiated by investors in the fossil fuel and renewable energy sector respectively.[[20]](#footnote-20) Intersections between ISA and climate mitigation inevitably create tensions be it in the form of arbitration threats from foreign investors against environmental protection,[[21]](#footnote-21) climate mitigation policies of governments,[[22]](#footnote-22) arbitration claims and awards causing regulatory chills[[23]](#footnote-23) or because of ISA arbitrators being reluctant to address climate-related arguments.. As a result ISA can complicate dealing with raising costs of adopting greener climate policies, restrict the scope of what governments can do to adopt robust climate policy and in the process undermine public trust and confidence.[[24]](#footnote-24) These tensions translates into difficult practical questions such as how international investment dispute settlement can integrate, reconcile (or prioritise) ICCL obligations under multilateral frameworks with investment protection obligations under bilateral frameworks. Given the structural and substantive differences, bringing together ISA and ICCL under one multilateral set-up seems difficult. Suggestions have been made for States to agree on a carve-out for existing investment treaties by way of a multilateral climate change agreement[[25]](#footnote-25) but this solution is difficult to operationalise, particularly because multilateral consensus in the field of international investment is often very difficult to achieve. Even if consensus is achieved for such a treaty, it may not be the optimal solution. This is because firstly, treaty ratification could actually be just an ‘expressive role’ externally demonstrating that a country is committed to something while deflecting internal or external pressure for real change (at least by ‘insincere ratifiers’).[[26]](#footnote-26) Secondly, enforcement mechanism for such a treaty is likely to be very weak. Thirdly there is no guarantee that bodies entrusted with its interpretation will actually interpret the carve-out in the intended way. Lastly,, there is no guarantee that all States will have an equal voice in the process. One possible way of resolving this quandary is by different actors of the ISA regime (States, arbitrators, arbitration institutes, UNCITRAL, arbitration practitioners) embedding climate goals at various stages to produce climate friendly outcomes.

Towards a Climate Friendly ISA Regime

Given the difficulties in achieving a multilateral consensus on reconciling IIL, ISA and ICCL, a workable solution is for each actor within the ISA system to adopt climate friendly practices so that overall, the system becomes more climate friendly. The ISA regime is made up of multiple actors and players such as States, arbitrators, arbitration institutes, UNCITRAL, arbitration practitioners, who exercise influence over how the system operates and the outcomes it produces.[[27]](#footnote-27) That is not to say that all players exert equal influence, some are of course more powerful, influential than the others, but all have some capacity to make a difference. This obviously is a different approach to governance through a multilateral treaty, but it provides an innovative way to resolve the multilateral impasse. States are arguably, the most important players within the ISA regime that can tangibly integrate ICCL and ISA. The following sections first explore the role of States, followed by the role of arbitrators, arbitration institutions, UNCITRAL, practitioners and counsels in reconciling ISA and ICCL.

* 1. ***Role of States in reconciling ISA and ICCL: Better Treaty Drafting***

States hold a unique position within the ISA regime. As treaty parties they are the lawmakers, that can negotiate and enter into investment treaties with stronger climate-related provisions. As one of the disputing parties, they can empower the tribunal to exercise its discretion in favour of safeguarding regulatory capacity of States when challenged measures relate to climate obligations particularly. Older generation investment agreements do not embed the right to regulate in pursuit of environmental or climate aspirations and the preambles of most agreements place greater emphasis on investment protection and promotion.[[28]](#footnote-28) In some treaties, the right to regulate is safeguarded by way of qualifications, carve-outs and exceptions. Elsewhere, regulatory capacity is indirectly preserved by imposing stricter conditions for bringing a claim such as requiring exhaustion of local remedies or by imposing preconditions that make it difficult for the investor to bring a claim.

As more and more States are finding themselves responding to ISA claims, there appears to be a conscious movement in how States deal with ISA by way of a ‘sovereignty reassertion’.[[29]](#footnote-29) In newer investment treaties, States are increasingly paying more attention to securing their regulatory capacity for environmental and climate purposes.[[30]](#footnote-30) New generation treaties are incorporating more comprehensive provisions,[[31]](#footnote-31) preambles[[32]](#footnote-32) and expressly safeguarding the right to regulate in some areas by way of carve-outs. For example, the 2004 Model Dutch BIT acknowledges that investment protection ‘can be achieved without compromising health, safety and environmental measures of general application’.[[33]](#footnote-33) Several other trade and investment agreements contain similar preambular words.[[34]](#footnote-34) The Comprehensive and Economic Trade Agreement (CETA) in Article 8.9 expressly reaffirms the right to regulate to achieve public health, safety, environmental, social, cultural and consumer protection goals. Some States are drafting investment treaties with greater precision, particularly on indirect expropriation, fair and equitable treatment, national treatment and exceptions as these are the main areas of conflict between regulatory autonomy and investment protection.[[35]](#footnote-35) Newer treaties such as the CETA and the EU-Singapore Trade Agreement attempt to define and deal with the indirect expropriation provision more clearly. This is helpful as unlike treaties which provide little guidance on indirect expropriation by using phrases like ‘equivalent to’ or ‘tantamount to’, such detailed provisions help tribunals identify the factors to be taken into account in adjudicating indirect expropriation claims.[[36]](#footnote-36)

To check ISA’s adverse impact on States’ ability to pursue climate measures, it has been suggested that States can agree on a carve-out for existing investment treaties in a multilateral climate change agreement that should take precedence over existing treaties.[[37]](#footnote-37) It has also been suggested that future ISA treaties should have sufficiently specific carve-outs prioritising this climate change agreement.[[38]](#footnote-38) But this may not be easy. Negotiation of a new multilateral treaty has its challenges. At least if past experiences are considered, the failure of the Multilateral Agreement on Investment[[39]](#footnote-39) stands testimony to the hurdles of reaching a multilateral consensus on international investment. The ICSID itself was also agreed as a ‘lowest common denominator’ in the field of investment protection because the World Bank officials were sceptical if anything more than that could be achieved internationally on this front.[[40]](#footnote-40) Similarly, suggestions that existing investment treaties can be renegotiated to safeguard climate aspirations are also difficult to implement. Renegotiation of treaties is often fraught with diplomatic, legal and logistical difficulties. Even if this route is adopted, and even if all countries start renegotiating their investment treaties, it could take up to twenty years to replace the existing treaties[[41]](#footnote-41) to include new clauses including climate protection measures. In any event, there are other political costs associated with such renegotiation that States may not be willing to incur. Moreover, adding words in treaties need not necessarily lead to better outcomes in favour of the environment and climate mitigation. Drafting more precise treaties does not necessarily mean they would be interpreted in the anticipated way by all prospective tribunals and the prospect of having to pay damages remains. Recently, in *Eco Oro*[[42]](#footnote-42), the tribunal did not preclude Colombia’s right to enact certain measures but implied an obligation to compensate the investor under the Canada-Colombia BIT which contained a GATT-style environmental exception.[[43]](#footnote-43) Better treaty drafting with more pronounced climate provisions, therefore does not guarantee achievement of anticipated results.

***Role of Arbitrators in Reconciling ISA and ICCL***

Since investment treaties are interpreted by arbitrators, they are in a very good position to exercise their interpretative discretion in favour of climate. Frequent interactions of ISA with environmental laws and measures mitigating climate change demonstrate the tensions and difficulty in reconciling ISA with climate goals.[[44]](#footnote-44) While it is difficult to quantify how many climate regulations have been affected by a threat of an arbitration, ISA claims have been made for compensation for the value reduction of existing investment due to climate policy,[[45]](#footnote-45) roll-back of climate measure[[46]](#footnote-46) and environmental permits,[[47]](#footnote-47) challenging environmental measures phasing out nuclear power,[[48]](#footnote-48) restricting coal-fired power plant, and banning offshore oil drilling[[49]](#footnote-49) among others. In recent years a record number of cases have been filed in the renewable energy sector.[[50]](#footnote-50) At the same time, non-renewable energy investments also continue to remain a prominent source of ISAs. While the Energy Charter Treaty (ECT) is being modernised by its signatories and some States have signalled their preference for ‘greening’ the ECT, others ‘[believe] that it is not necessary to amend the current ECT provisions’.[[51]](#footnote-51) In November 2021, in the Eighth Negotiation Round on the modernisation of the ECT, the Modernisation Group advanced on several aspects including sustainable development, CSR and ‘built on previous discussions on a draft article on the relation between the Energy Charter Treaty and the Paris Agreement’.[[52]](#footnote-52)

With current reforms of ISA and the modernisation of ECT in the pipeline, the number of cases in which these two areas are interacting is increasing. Arbitrators are very well placed to integrate and reconcile the tensions between ISA and ICCL. To analyse how arbitrators can help reconcile the tensions between ISA and ICCL, one needs a taxonomy to study how climate-related arguments can appear in ISA. The interplay between ISA and ICCL can be studied under the following taxonomy: climate law arguments made by investors, climate arguments presented as defences and counterclaims by States; climate arguments raised by a third-party including amicus curiae, and climate arguments used by tribunals to reason their awards.

* + 1. Climate Arguments by Investors

An investor can strategically use climate arguments to substantiate their claims in addition to using investment rights/protection arguments. In *Allard v Barbados*,[[53]](#footnote-53) the Claimant, a Canadian investor brought proceedings against Barbados under the Canada - Barbados BIT claiming that his eco-tourism investment project of US$35 million suffered because of the host State’s failure to fulfil its environmental obligations. More specifically the claimant claimed that Barbados, ‘failed to take reasonable and necessary environmental protection measures and, through its organs and agents, has directly contributed to the contamination of the Claimant’s eco-tourism site, thereby destroying the value of his investment’.[[54]](#footnote-54)

Some commentators have argued that this case is reflective of a possibility of using ISA to make States more accountable, to compel them to do more to meet their international environmental obligations.[[55]](#footnote-55) But some caution is necessary when taking such a line of argumentation. In this case, the Claimant raised environmental protection arguments because the host States’ actions and omissions violated its international obligations to Canadian investors. It was a claim for enforcing the investor’s rights not for protecting the environment. A decision in favour of the investor would not have obliged the State to do anything more to protect the environment. Moreover, a threat or actual initiation of arbitration will not necessarily compel States to do more in the right direction and instead can increase the costs of energy transition. ISA can increase the costs of energy transition mainly in two ways. Firstly, a mere threat of ISA can put investors in a better negotiating power with the State. This can lead to better outcomes for investors even if matters do not proceed to a full-fledged arbitration.[[56]](#footnote-56) Secondly, if matters proceed to arbitration, forward-looking valuation methods, broad discretion exercised by arbitral tribunal may enable investors to be compensated to a more generous standard. In both these cases, more public funds may be spent on compensating investors than would otherwise be paid to the investor. Moreover, as discussed below allowing foreign investors to bring claims on the ground that the State failed to fulfil its environmental/climate obligations and awarding exorbitant damages can cause regulatory chill. In considering climate-related arguments made by investors, arbitrators need to balance investors rights with that of increasing costs of energy transition for States.

* + 1. Climate Arguments as Defences and Counterclaims by States

States may be able to rely on climate arguments in their defences, to justify measures adversely affecting investment and argue that the challenged measure(s) were necessary to further international climate obligations. States can raise climate defences[[57]](#footnote-57) in a number of ways depending on the specific facts of the case, the wording of the relevant treaty, the underlying contract(s), and the procedural rules. In a typical scenario where the investor challenges a particular measure undertaken to mitigate climate change because it violates legitimate expectations and property rights of the investor, the host/respondent State can argue that it should not be held liable for breach of the underlying investment treaty on the basis that it is acting in accordance with the UNFCCC, Kyoto Protocol[[58]](#footnote-58) or the Paris Agreement. Within the EU, it may even be possible to defend the adoption of climate mitigation measures by relying on Article 37 of the EU Charter of Fundamental Rights as applicable law.[[59]](#footnote-59) Elsewhere it may be possible to argue that the measures challenged by investors were mandated by the respondent State’s environmental protection obligations based on constitutional law. It is unclear how an ISA tribunal would receive and respond to such arguments.[[60]](#footnote-60) Some tribunals have expressly recognised the need to safeguard regulatory space[[61]](#footnote-61) while others have found that it makes no difference that an expropriatory measure is environmental and have held that compensation must be paid.[[62]](#footnote-62) It is also difficult to predict how future tribunals will deal with this issue because of the multiplicity of investment treaties and tribunals. Different investment treaties are worded differently, and some tribunals follow[[63]](#footnote-63) ‘informal precedents’ while others disregard[[64]](#footnote-64) such an approach. While there is little within the existing system to reconcile different interpretations, approaches, the growing awareness around climate change alludes to the possibility that tribunals in the time to come may be more receptive and open to such arguments.

States may also be able to bring climate counterclaims in ISA. The question of raising counterclaims depends on whether the tribunal has jurisdiction to entertain counterclaims and on how closely they are related to the claim. Therefore, whether counterclaims can be made has to be determined on a case-to-case basis. In *Roussalis v Romania*,[[65]](#footnote-65) the Tribunal relying on Article 9 of the Greece-Romania BIT found that ‘the BIT imposes no obligations on investors, only on contracting States. Therefore … counterclaims fall outside the tribunal’s jurisdiction’.[[66]](#footnote-66) Under Article 25(1) of the ICSID Convention, the Tribunal has jurisdiction over ‘any legal dispute arising directly out of an investment’. Article 46 of the ICSID Convention states that subject to parties’ agreement, ‘the Tribunal shall, if requested by a party, determine any … counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre’. Rule 40(1) of the ICSID Arbitration Rules 2006 operationalise the same. But these provisions in themselves are insufficient to indicate ‘consent’ to the respondent’s counterclaims. Generally, an ISA tribunal would be empowered to deal with counterclaims if the relevant BIT deals with the resolution of ‘all disputes’ between the parties by the arbitral tribunal.[[67]](#footnote-67)

Some recent counterclaims[[68]](#footnote-68) for the adverse environmental impact of investment have received positive treatment[[69]](#footnote-69) from ISA tribunals. In *Perenco v Ecuador*[[70]](#footnote-70) the respondent State brought a counterclaim alleging that the oil extraction activities of the investors caused environmental damage and breached environmental laws. The claimant was ordered to pay under the counterclaim. In *David Aven et al. v Costa Rica* the tribunal reasoned that the Dominican Republic–Central America FTA (DR-CAFTA) provisions ‘implicitly, [imposed] some obligations to investors, especially with respect to the environmental laws of the host State’.[[71]](#footnote-71) Drawing on the *Urbaser v Argentina*[[72]](#footnote-72) tribunal’s treatment on this issue, the tribunal went to state that ‘environmental law is integrated in many ways to international law, including DR-CAFTA. It is true that the enforcement of environmental law is primarily to the States, but it cannot be admitted that a foreign investor could not be subject to international law obligations in this field … There are no substantive reasons to exempt foreign investor of the scope of claims for breaching obligations … particularly in the field of environmental law’.[[73]](#footnote-73) But the David Aven Tribunal finally concluded that the counterclaim filed by the Respondent did not meet the requirements of the procedural rules and was therefore dismissed.

* + 1. Climate Arguments in Amicus Submissions

Another way climate arguments can appear before ISA tribunals is by way of amicus curiae submissions. Tribunals may be more willing to consider them particularly in light of changes made to third party participation in ISA following the UNCITRAL Transparency Rules which became effective from 1 April 2014 and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) which came into force in 2017. Climate arguments in amicus submissions can arise in two ways: firstly, when the amici rely on the right to a hearing to represent climate concerns and secondly when the amici make submissions as to the substantive content of a right of third parties (possibly as a human rights argument) who can potentially be affected by any award that a tribunal is likely to render. These amicus submissions could be made along with climate arguments presented by host states.

While several climate-related arbitrations are pending and the extent of amicus intervention in these are unknown, a review of ISA tribunals’ practice in dealing with amicus submission in environmental cases is disappointing. ISA tribunals have often failed to consider environmental arguments made by the amici even in cases where relevant investment agreement covered environmental concerns.[[74]](#footnote-74)

* + 1. Climate - Law Reasoning of Tribunals

Finally, tribunals may show a willingness to rely on the international climate obligations of host States as authority for their decisions or they could use their discretion contrary to parties’ expectations.[[75]](#footnote-75) Despite the increasing number of renewable energy cases, ISA tribunals hardly make any reference to the respondent State’s obligation under the Paris Agreement.[[76]](#footnote-76) Nevertheless, in the long run, as climate change becomes a more pressing issue, tribunals could ‘evolve’ to consider climate arguments favourably. This is possible as new arbitrators (possibly with training and expertise in environmental laws[[77]](#footnote-77)) enter the arbitration market and newer treaties continue to make express reference to environmental and climate concerns.

* + 1. Challenges and Opportunities in Arbitrators Reconciling ISA and ICCL

Climate arguments may appear in ISA in different ways. However, ISA tribunals may not always prefer or be able to reconcile environmental/ICCL objectives with investors rights. This is mainly because of three reasons. Firstly, ISA tribunals may be reluctant to engage with ICCL arguments. If arbitrators view themselves exclusively as a part of the ISA regime solely concerned with the rights of foreign investors, they are likely to not fully engage with ICCL arguments. It is possible that arbitrators may view ICCL as a potential cause of political disturbances, intruding in ISA’s purely legal, autonomous field. In such a case, ISA tribunals may be inclined to take a more restrained approach when climate defences are raised by States. Though not in the context of climate change, tribunals have reasoned, for example in the context of following precedents that ‘[t]he Arbitral Tribunal’s mission is more mundane […] to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal’s analysis might have on future disputes in general’.[[78]](#footnote-78) If an ISA is viewed by arbitrators as an atomistic, one-off dispute resolution instance solely concerned with protection of investment rights, they may not be inclined to engage with climate-related arguments thereby dampening prospects of effective integration. Secondly, arbitrators may be inclined to reject climate arguments because most ISA arbitrators are trained in commercial law with relatively narrow expertise in public international law or international environmental law. Despite the general belief that arbitrators apply the law without regard to personal background, an arbitrator’s professional experience shapes their mindset and how they decide disputes. Arbitrators undoubtedly ‘bring policy preferences, their education, career background and their life experience to these arbitrations’.[[79]](#footnote-79) Arguably, unfamiliar territories make arbitrators wary of the journey ahead and there may be ‘inherent dangers in experts from a particular field of international law-making judgments about the applicability of another field of international law, about which they have very little knowledge and probably little sympathy’.[[80]](#footnote-80) Thirdly, only those matters which parties have agreed/consented to submit to arbitration are arbitrable. A typical jurisdictional clause contains consent for claims arising ‘related to’ or ‘concerning’ or ‘with regard to’ investments purportedly exclude ICCL issues unless the dispute itself relates to some climate measure directly. Tribunals going over and above their remitted jurisdiction risk their awards being refused recognition and enforcement or in case of an ICSID arbitration risk being annulled. Therefore, the tribunal’s competence to admit and decide on climate-related measures would depend on whether the jurisdiction clause is wide or narrow.[[81]](#footnote-81)

With increasing decarbonisation and investments made in renewable energy, it is likely that climate-related arguments by investors will appear more frequently in ISA. As a result, arbitrators will need to find ways to reconcile tensions between these two regimes. The ad hoc nature of ISA, the broad discretionary powers of arbitrators and the lack of a central body to reconcile conflicting decisions can impede the development of a consistent approach towards ICCL issues in ISA. Arbitrators as the primary decision-makers in the ISA framework, must reimagine their roles and work not just as agents of the disputing parties but as actors responsible for harmonising and prioritising climate goals. This can be done in three ways. Firstly, ISA tribunals can adopt interpretative techniques to reconcile climate obligations with investment protection obligations.[[82]](#footnote-82) Tribunals should adopt strategies to harmonise and/or even prioritise climate law in some cases. ISA tribunals can adopt interpretative techniques to consider norms from the international climate context by relying on Article 31(3) (c) of the Vienna Convention on the Law of Treaties (VCLT) that requires treaty provisions to be interpreted by taking into account relevant rules of international law including customary international law.[[83]](#footnote-83) Adopting interpretative tools to reconcile climate obligations and investment protection is also effective considering the strong presumption against normative conflict in international law[[84]](#footnote-84) and avoiding fragmentation. In any event, most domestic courts dealing with environmental policies are committed to protecting them and if ISA lifts off these disputes from domestic courts, it is a legitimate expectation that ISA tribunals interpret them in the same spirit. The inclusion of environmental law and human rights could help minimise the structural bias of the investment regime. Secondly, arbitrators can safeguard the regulatory capacity of States by showing deference to regulatory autonomy. Currently, arbitrators employ the doctrines of ‘police powers’ and ‘necessity’ to safeguard State’s right to regulate. But even if a State’s right to regulate is preserved, ISA tribunals have consistently upheld investors’ right to be compensated when State measures have adversely affected investment protection standards. While reasonable compensation meets the ends of justice, as discussed below income-based compensation can have chilling effect on adoption of climate friendly measures and increase costs of energy transition. Thirdly, arbitrators as far as possible, should exercise their discretion in favour of climate obligations. Tribunals could also adopt the *Urbaser v Argentina*[[85]](#footnote-85) tribunal’s approach to allowing counterclaims on climate issues wherever this is possible.

***Role of Arbitration Institutions and their Rules in Reconciling ISA and ICCL***

Arbitration institutes can play a vital role in integrating ISA and ICCL. Arbitration institutes can formulate specialised rules to deal with ISA involving climate measures and adopt climate-friendly arbitration practice. The Permanent Court of Arbitration has developed rules specific to environmental litigation such as the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment which has been referenced in instruments arising out of multilateral frameworks such as the Green Climate Fund. The IBA Climate Change Justice and Human Rights Task Force ‘recommends the PCA as a preferred forum for environmental and climate change-related disputes’[[86]](#footnote-86) and ‘encourages all arbitral institutions to take appropriate steps to develop rules and/or expertise specific to the resolution of environmental disputes, including procedures to assist consideration of community perspectives’.[[87]](#footnote-87) The ICC Commission on Arbitration and ADR with the support of the ICC Commission on Environment and Energy created an ‘Arbitration of Climate Change Related Disputes’ Task force ‘[t]o ascertain what, if any, specific features are required for a dispute resolution mechanism to effectively resolve climate change related disputes’.[[88]](#footnote-88) The Report contains some suggestions of draft provisions to enhance transparency, participation but leaves most of it to the parties’ agreement. Other initiatives such as the Stockholm Treaty Labs by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) are positive developments on this front.[[89]](#footnote-89)

ICSID has recently amended its Arbitration Rules, some of which can have a positive impact on how ICCL issues are dealt with. The proposals around improving transparency and participation of third parties, counterclaims can have a positive impact on integrating ISA and ICCL, but they are not enough.

* + 1. Improving Transparency, Participation under ICSID Rules

Generally, ISA tribunals approach questions of transparency and participation in different ways. Some have been liberal in allowing access to information, hearings, documents and allowing participation of amicus curiae, whilst other tribunals have been restrictive in their approach and kept the proceedings closed. Again, tribunals have taken different approaches depending on which aspects of the proceedings are requested to be made transparent and at what stage of the proceeding. The different approaches taken by tribunals is a result of the interplay of the various agreement and instruments that apply in a given ISA which includes the provisions of the investment treaty signed between the host and home State of the investor, any ancillary agreement between the disputing parties, application of arbitral rules, any domestic legislation that may apply and discretionary powers exercised by tribunals. Moreover, the lack of a central overarching body makes it difficult to reconcile the varied approaches adopted by different ISA tribunals.

To enhance transparency, in 2014, the UNCITRAL Transparency Rules and the Mauritius Convention were adopted. The Transparency Rules and Convention have made some progress in making the ISA regime more transparent.[[90]](#footnote-90) The UNCITRAL Arbitration Rules 2013 which incorporates a reference to the new Transparency Rules carries a presumption of transparency rather than confidentiality in ISA. Moreover, disputing parties cannot withhold consent to make the hearing public. But it is debatable as to whether they are sufficient and if there is a need to develop further guidance on how to apply the requirements for third-party submissions and ensure that such submissions are actually considered by ISA tribunals when rendering decisions.[[91]](#footnote-91) Within the reforms process both at UNCITRAL and ICSID, it is generally accepted that the participation of interested non-disputing parties (NDPs) would enable better representation of interests, support environmental and climate protection.

The current ICSID reforms also attempt to bring it in line with the UNCITRAL regime. The current ICSID Arbitration Rules 2022 make changes to Additional Rule (AR) 32 and AR 37 of the previous rules. Rule 65 makes changes to AR 32 and broadens NDPs access to hearings. Under the current rules , Tribunals are required to allow NDPs unless either of the disputing parties objects. AR 67 makes changes to the previous AR 37(2). The new Rules retain the existing two-step process under which a third party must first apply for permission to make a submission and then, if permitted, make the submission as per the requirements set out by the tribunal. The new Rules also deal with participation on a non-disputing State party (NDSP) and allow NDSPs to make submissions on the application/interpretation of a treaty at issue. These provisions may have a positive impact on ISA related to climate measures provided members of the tribunal actually consider such submissions and use them to inform their reasoning of awards. Overall, the new Rules that primarily makes some changes to rules around third party participation and amicus submission are not enough to mitigate the tensions between ICCL and ISA. Both the new ICSID Arbitration Rules like the new UNCITRAL Transparency Rules does not provide NDPs with any independent right to participate in ISA. The latest ICSID Working Paper clarified that disputing parties still retain control over the process and that the Tribunal shall provide NDP and NDSPs with relevant documents unless either disputing parties objects.[[92]](#footnote-92) Moreover, Rule 66 defines confidential and protected information expansively and parties can agree to keep documents filed in the proceedings completely confidential. Awards may still not be published without parties’ consent. Rule 62 merely enables parties to agree to consent to publication and creates a legal fiction that if parties do not object, the award will be published. If parties object ICSID shall publish excerpts of the legal reasoning. In practice this hardly changes anything. Parties can refuse to consent to publication of awards and ICSID can continue publishing excerpts as it currently does. Rule 64 also retains party’s control over publication of documents filed in the proceedings. It merely creates an avenue for parties to litigate their position on redactions without really adding much in terms of making proceedings transparent. Given the pervasive use of ICSID Rules in ISA, and the standing of ICSID as a premier arbitral institution which will increasingly contribute to the development of environmental and climate norms,[[93]](#footnote-93) something more needs to be done.

Enabling the participation of NDPs and NDSP’s can have a positive impact on ISA involving ICCL issues. Amicus submissions can bring in new perspectives in climate-related ISA, represent the broader public interest in climate protection, provide specialist expertise on climate science, all of which can improve the quality of arbitral decision-making. Allowing participation of third parties can enhance the representation of relevant interests which is particularly crucial in ISA involving climate change measures. Achieving climate objectives involve important questions of public policy that affect monetary and social policies and have social justice[[94]](#footnote-94) implications. In some cases, these directly implicate the interest of third parties and the future generation. Not allowing NDP participation, disregarding their submission and/or failure to engage with their submissions can make ISA look ‘profoundly undemocratic’ and be an ‘extreme example of excessive power granted to corporations’[[95]](#footnote-95) particularly because investment treaties generally do not impose any responsibilities on investors.[[96]](#footnote-96)

* + 1. Counterclaims under ICSID Rules

As mentioned above, allowing States to bring counterclaims can help make ISA a level playing field and they can be particularly useful in disputes involving climate-related measures. The recent ICSID Rules only make superficial changes to the current rules[[97]](#footnote-97) governing counterclaims (‘ancillary claims’). Subject to parties’ agreement to the contrary, as far as counterclaims arise directly out of the subject-matter of the dispute and fall within the scope of parties’ consent and the jurisdiction of the Centre, the respondent State may file a counterclaim. Unless ISA tribunals adopt broad interpretative techniques the current amendments add very little in terms of allowing States to bring counterclaims. ICSID as the leading arbitration institute administering ISAs should have taken the lead to make more effective changes to allow States to bring counterclaims. It would have contributed to a more effective integration of ICCL and ISA

***Role of UNCITRAL in reconciling ISA and ICCL***

The UNCITRAL Arbitration Rules are widely used in ISAs. The current Rules do not contain any special provisions specifically applicable to disputes involving ICCL issues. The UNCITRAL Working Group III is currently in the process of reforming ISA. Some of these reforms proposals have the potential to have a positive impact on integrating ISA and ICCL. For example, the Code of Conduct for Adjudicators[[98]](#footnote-98) formulated by ICSID and UNCITRAL can make it mandatory for arbitrators to consider systemic effects of their awards and respect States’ right to regulate at least in some of the key areas including climate change. The preamble of the Code could contain a general requirement of showing a degree of deference to States’ regulatory powers by requiring arbitrators to adopt approaches that do not adversely affect a State’s right to regulate in key areas such as human rights, environment and climate mitigation. This will enable better integration and reconciliation of ISA and climate goals. Moreover, the reforms proposals focussing on generating consistent awards, allowing counterclaims, reformulating rules around calculation of damages can help in reconciling the tensions between the two regimes.

Consistency of ISA Awards

Within the UNCITRAL reforms there are discussions to enhance consistency by way of introducing an appellate mechanism in three different ways: firstly, in investment treaties as an ad-hoc or stand-alone mechanism which could review awards of ISA tribunals; secondly, within an institutionally managed multilateral existing set-up such as under the auspices of OECD, UNCITRAL; thirdly, the establishment of a multilateral investment court. Irrespective of how this proposal is operationalised, consistency of decisions promotes a sense of fairness, predictability and stability. Consistency in climate cases will enable States to better plan their measures and bring coherence as a matter of practice, but how far ‘pro-climate’ stances would be upheld can only be speculated.

Counterclaims in the UNCITRAL reforms process

As discussed above, States’ ability to present counterclaims is limited by procedural rules and ‘consent’ which raise questions on the admissibility of counterclaims. States often raise claims about ‘bad conduct’ of claimant investors but in accordance with the existing framework of BITs that primarily seeks to protect the interests of investors, States generally do not make an affirmative counterclaim in the proceedings.[[99]](#footnote-99) Within the current UNCITRAL Reforms process ‘the general understanding [is] that any work by the Working Group would not foreclose consideration of the possibility that claims might be brought against an investor where there was a legal basis for doing so’.[[100]](#footnote-100) But only time will tell how this will be operationalised. As mentioned above, the ISA system should allow States to make counterclaims to enforce investors’ environmental obligations. This can be achieved by expressly authorising counterclaims by host States in the procedural rules, even if the relevant treaty is silent on the issue.[[101]](#footnote-101) This can pave the way for greater balance between disputing parties, address the asymmetry that currently exists[[102]](#footnote-102) and may have a positive impact on the achievement of climate goals.

Damages

Another important area on which UNCITRAL can effectively contribute is on the issues of damages. Damages in ISA should be fundamentally reconceptualised to exclude exorbitant compensation for investors affected by States measures particularly in ISAs involving climate measures. The issue of damages in an ISA is considered to be a matter of substantive law that should be agreed by the parties. If a method of valuation is not agreed by the parties, tribunals may exercise their discretion to adopt an appropriate method. ISA tribunals have a range of valuation methods available to them, but most tribunals use income-based discounted cash flows (DCF) method to determine the adverse effect of a State’s measure on the value of investment.[[103]](#footnote-103) The DCF method involves estimating the value of the investment as equal to the current value of the income, the investment is expected to generate in the future. It differs from asset or cost-based methods under which the value of the investment is calculated based on the amount of investment made.[[104]](#footnote-104) As a result of using income-based methods, tribunals can award speculative losses to be paid. In Tethyan Copper Company v Pakistan,[[105]](#footnote-105) for instance arbitrators awarded around $6 billion for estimated returns of exploiting the mines based on DCF even though the investor never actually exploited the mines.[[106]](#footnote-106) If such broad valuation methods are adopted even in climate-related ISAs, they will further lead to increasing costs of energy transition for States. Moreover, awarding exorbitant compensation can have a chilling effect[[107]](#footnote-107) on adopting climate mitigation measures and increase the cost of the energy transition.[[108]](#footnote-108)

UNCITRAL can provide some guidance for arbitrators on how reasonable damages should be calculated taking into account fairness, public interests, costs of energy transition, the economic capacity/burden on the respondent State, the benefit the State got from the investment, or the amount actually invested by the investor.[[109]](#footnote-109) The remit of the current ICSID and UNCITRAL reforms process is fairly narrow.[[110]](#footnote-110) Working Group III at UNCITRAL is focussing on reforming procedural aspects alone which makes it difficult to reconcile ISA with other important areas such as environment and climate change. Both reform processes are working on the least disagreeable areas for reform and miss the opportunity to engage with problems stemming from a lack of clarity of substantive standards of investor protection and reconciling the tensions between ISA and the other areas.  The issue of calculation of damages is central to the debate of ISA’s legitimacy. The DCF method is not unassailable and better methods are available. UNCITRAL as one of the key actors capable of influencing the ISA system should seriously consider this in its current reforms process.

Multilateral Investment Court

Another reform option presented in the UNCITRAL reforms process is EU’s proposal for a MIC. The MIC can be structured in a way that can reconcile ICCL and investment dispute resolution. Despite States’ efforts in drafting more clearly worded treaties and the ongoing reforms process enhancing the prospect of increased participation of NDPs and NDSP, achieving more consistent decision making, facilitating presentation of counterclaims, such incremental reforms have their limitations. Incorporating the right to regulate in investment agreements does not mean tribunals will necessarily interpret them in the intended way. Submissions by NDPs does not mean they will always be taken into account by ISA tribunals. Consistency in arbitral decision-making need not necessarily lead to ‘better’ or ‘climate-friendly’ awards. These incremental reforms may not be enough to make ISA sustainable for resolving/litigating climate disputes. Instead, the incremental reforms under UNCITRAL and ICSID can also be effectively embedded in the EU’s MIC proposal.

If the MIC is conceptualised and created to embed third-party participation, enhanced transparency, filing of counterclaims, it could be a better forum than ISA to litigate/resolve climate-related investment disputes. The MIC will need to recognise the dual roles States play in international investment law first as treaty parties and then as respondents and afford States the flexibility to implement climate measures. The MIC can be conceptualised in a way that judges show a margin of appreciation for States to achieve legitimate policy objectives. Judges of the MIC can exercise their discretion to give States more regulatory space in relation to climate measures. Moreover, the MIC can be structured to give a right to third parties to participate/access documents irrespective of disputing parties’ positions on such submissions (with adequate safeguards for confidential/protected information). By providing adequate opportunity to NDPs, environmental organisations to participate in the proceedings, it can enable better consideration of climate arguments. It can be structured to enhance participation without the judges being concerned about their jurisdictional contours (unlike terms of reference of arbitrators*).* The MIC’s procedural rules can authorise the presentation of counterclaims by the respondent State. In the long run, it can generate a consistent body of law around ICCL related investment disputes which will enable States to streamline their policy approach. Under the current proposals, judges of the MIC are likely to have public international law background which arguably can lead to better integration of climate change law in investment protection. This is because cognitive biases, backgrounds of decision makers play a role in how they arrive at a particular decision. Within the ISA system, arbitrators use mental shortcuts, methods of reasoning that may have ‘emerged from their professional experiences’.[[111]](#footnote-111) Judges with public international law background are therefore more likely to be mindful of the systemic impact and precedential value of their judgement and strive to integrate climate change law and international investment.[[112]](#footnote-112)

Reconciling the State’s regulatory power and investment dispute resolution by showing a degree of deference is critical to the legitimacy of the system. Both normative and sociological legitimacy of an investment dispute resolution forum depends on its ability to reconcile its tensions with States’ regulatory power. In the sociological sense, States drive international investment law and its dispute resolution system. Foreign investors will not be able to bring claims if States do not agree to be bound by such provisions in investment treaties. The departure of some Latin American countries from the ICSID system in the last decade serves as a reminder of the fact that States can abandon the ISA system if it unduly restricts its regulatory freedom.[[113]](#footnote-113) Moreover, ISA tribunals circumscribing a State’s regulatory autonomy to implement measures in the areas of environment and climate change can erode its legitimacy in the eyes of the public. In the normative sense, a State must be able to function in a way that is compatible with its own domestic constitutional law obligations. Environment protection and climate mitigation are not mere general aspirations for a modern democratic State. They are legal, constitutional obligations. If ISA awards impose unreasonable and excessive limits on State’s regulatory capacity, it can create serious tensions between domestic and international law. Failing to reconcile these tensions would therefore raise serious questions of the normative legitimacy of IIL.[[114]](#footnote-114)

While the MIC is a better alternative to incremental reforms, there are some challenges in implementing this proposal. Firstly, this proposal[[115]](#footnote-115) of the EU does not enjoy multilateral support. EU’s major trading partners including USA and Japan are reluctant to join the MIC. Only a handful of countries have shown their support to this initiative. Moreover, the MIC may not be preferred by countries that are exploring avenues of fostering their regional initiatives. Some countries are also backing calls to go back to using local courts instead of ISA and it is unlikely that these countries will be willing to join a new international forum. Secondly, there is no clarity on how the permanent investment court system set up within individual treaties such as that of CETA or under other mega-regional agreements will be integrated with the MIC.

***Role of Arbitration Practitioners and Counsel in Reconciling ISA and ICCL***

In addition to the above, arbitration practitioners should continue adopting climate-friendly practices. Arbitration practitioners have been promoting measures such as the Campaign for Greener Arbitrations that ‘seeks to raise awareness of the significant carbon footprint of the arbitration community’ and promotes ‘best practice in managing arbitrations in a sustainable way’[[116]](#footnote-116) and, the Chancery Lane project which encourages using climate and net-zero aligned clauses. The draft climate clauses for dispute resolution and arbitration highlight parties’ ability to empower the arbitration tribunal to interpret and modify applicable law to align it to climate objectives.[[117]](#footnote-117) These initiatives are moves in the right direction but obviously, their success largely depends on voluntary participation

Conclusion

Substantial and sustained investment in greener energy is required to meet climate goals. The protections afforded to foreign investors through ISA may be attractive to investors, but it also poses a significant risk in terms of the escalating cost of energy transition and causing regulatory chill. There is therefore a need to balance the private rights of the investors and public interest in climate mitigation measures. While this may be achieved by better drafting of investment treaties, that alone is not enough. States, arbitrators, arbitration institutes, UNCITRAL, counsel and disputing parties can all contribute to calibrating their approaches to achieve climate goals in different ways. While States can negotiate, draft, and align climate aspirations in investment treaties, precise treaty drafting can only be useful if arbitrators interpret them in the intended way. It is therefore necessary that ISA arbitrators reimagine their roles as decision-makers in charge of reconciling (if not prioritising) public interest in climate mitigation and investment rights. They have the requisite tools to do this in the form of interpretative techniques under the VCLT. Arbitration institutes can help in better integration of climate aspirations in investment dispute resolution by providing for more effective procedural rules enabling submission of counterclaims, submission by third parties, improving transparency, providing guidance on damage calculation. ICSID in its most recent round of amendments have taken some positive steps in relation to enhancing transparency and participation of third parties but a lot more remains to be done. But again, arbitrators have an important role to play in this regard. Arbitrators must seek to integrate climate aspirations and actually consider submissions of third parties constructively. The UNCITRAL is also currently working on reforming the ISA system and some of the reforms proposals can help integrate climate aspirations and investment dispute resolution. The proposed Code of Conduct can cement this by providing that arbitrators consider systemic effects of their awards and protect States’ right to regulate in environmental and climate-related ISA. The MIC proposed by the EU is particularly noteworthy. The MIC could be a better route because as a permanent body with standing judges with a public international law background, it could easily integrate rules on third party participation, transparency, counterclaims within its constitution and reconcile, prioritise climate protection through consistent development of climate and investment jurisprudence.

1. Kyla Tienhaara and Lorenzo Cotula, ‘Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets’ (IIED Land, Investment and Rights Series, 2020) <<https://pubs.iied.org/sites/default/files/pdfs/migrate/17660IIED.pdf> > accessed 29 May 2022. [↑](#footnote-ref-1)
2. Kyla Tienhaara, ‘Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement’ (2018) 7 Transnational Environmental Law 229. [↑](#footnote-ref-2)
3. ClientEarth, ‘Potential Solutions for Phase 3: Aligning the Objectives of UNCITRAL Working Group III with States’ International Obligations To Combat Climate Change’ <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_clientearth.pdf>> accessed 29 May 2022. [↑](#footnote-ref-3)
4. For example, in *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Australia was awarded only part of their legal costs despite the investor abusing the process and Australia ‘winning’ the arbitration. [↑](#footnote-ref-4)
5. One could argue that while the ISA regime is concerned with protection of rights of the investors, the climate regime is concerned with protecting State’s right to emit greenhouse, green gases. This may be an unconventional way to look at the Paris Agreement, but the Paris Agreement is not about prohibiting GHG but about controlling such emissions which is based on the premise that States are allowed to emit these gases. [↑](#footnote-ref-5)
6. Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (OUP 2018). [↑](#footnote-ref-6)
7. ICSID, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (18 March 1965) Paras 9- 13

   <http://icsidfiles.worldbank.org/ICSID/ICSID/StaticFiles/basicdoc/partB-section03.htm> accessed 29 May 2022. [↑](#footnote-ref-7)
8. Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (2nd edn, Wolters Kluwer 2011) 4-5. [↑](#footnote-ref-8)
9. Jeswald W. Salacuse, ‘BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries’ (1990) 24 (3) The International Lawyer 655-675. [↑](#footnote-ref-9)
10. UNCITRAL Arbitration Rules, UN Doc A/31/98, 31st Session Supp No 17.

    <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf> accessed 29 May 2022. [↑](#footnote-ref-10)
11. Friedrich Soltau, *Fairness in International Climate Change Law and Policy* (CUP 2009). [↑](#footnote-ref-11)
12. UNGA Res 43/53 (6 December 1988) <https://undocs.org/en/A/RES/43/53> accessed 29 May 2022. [↑](#footnote-ref-12)
13. Soltau (n 11). [↑](#footnote-ref-13)
14. # Daniel Bodansky, Jutta Brunnée, Lavanya Rajamani, *International Climate Change Law* (OUP 2017).

    [↑](#footnote-ref-14)
15. United Nations Framework Convention on Climate Change, UNTS Registration No 30822 (adopted 9 May 1992, in force 21 March 1994) (UNFCCC) art 2. [↑](#footnote-ref-15)
16. Soltau (n 11). [↑](#footnote-ref-16)
17. U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015). [↑](#footnote-ref-17)
18. Stephan W. Schill, *The Multilateralization of International Investment Law* (CUP 2010). [↑](#footnote-ref-18)
19. # Bodansky et al. (n 14).

    [↑](#footnote-ref-19)
20. IIA Issues Note ‘Treaty-Based Investor-State Dispute Settlement Cases and Climate Action’ Issue 4 (September 2022) <<https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf>> accessed 6 September 2022. [↑](#footnote-ref-20)
21. Tienhaara (n 2). [↑](#footnote-ref-21)
22. Corporate Europe Observatory, the Transnational Institute and Friends of the Earth Europe/International, ‘Blocking Climate Change Laws with ISDS Threats: Vermilion vs France’ (June 2019) <<https://10isdsstories.org/cases/case5/>> accessed 6 September 2022; Lauge N. Skovgaard Poulsen and Geoffrey Gertz, ‘Reforming the Investment Treaty Regime: A ‘backward-looking approach’, (March 2021) <<https://www.brookings.edu/research/reforming-the-investment-treaty-regime/>> accessed 6 September 2022. [↑](#footnote-ref-22)
23. Tarald Laudal Berge, Axel Berger, ‘Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity’, [2021] 12 (1) Journal of International Dispute Settlement 1–41; Stephan W. Schill, ‘Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?”, [2007] 24 Journal of International Arbitration 469. [↑](#footnote-ref-23)
24. Instances such as Nicolas Hulot's resignation over the inability to achieve environmental and climate objectives in France, Denmark and New Zealand admitting the threat of investor-state lawsuits has hindered their climate policy ambitions are some of the examples where tensions between the regimes are clearly highlighted. See written evidence submission from War on Want responding to “To what extent might the inclusion of Investor-State Dispute Settlement clauses in free trade agreements affect the UK’s climate change policies?” <https://committees.parliament.uk/writtenevidence/106709/html/> accessed 5 September 2022; Elizabeth Meager, ‘Cop26 targets pushed back under threat of being sued’ (*Capital Monitor*, 14 January 2022) <<https://capitalmonitor.ai/institution/government/cop26-ambitions-at-risk-from-energy-charter-treaty-lawsuits/#:~:text=Countries%20party%20to%20the%20Energy,hindered%20their%20climate%20policy%20ambitions>.> accessed 5 September 2022. [↑](#footnote-ref-24)
25. Gus Van Harten, ‘An ISDS Carve-Out to Support Action on Climate Change’ (2015) Osgoode Legal Studies Research Paper Series113. [↑](#footnote-ref-25)
26. Oona A. Hathaway, ‘Do Human Rights Treaties Make a Difference?’ [2002] 111(8) The Yale Law Journal 1935-2042; E. Neumayer, ‘Do international human rights treaties improve respect for human rights?’ [2005] 49 J. Conflict Resolut. 925–953. [↑](#footnote-ref-26)
27. Emmanuel Gaillard, ‘Sociology of international arbitration’ [2015] 31 *Arbitration International* 1–17 <<https://cdn.arbitration-icca.org/s3fs-public/document/media_document/emmanuel-gaillard--sociology-of-international-arbitration-042715-ia.pdf>> accessed 27 May 2022. [↑](#footnote-ref-27)
28. Suzanne A. Spears, ‘The Quest for Policy Space in a New Generation of International Investment Agreements’ [2010] 13(4) Journal of International Economic Law 1037–1075 <<https://doi.org/10.1093/jiel/jgq048>> accessed 29 May 2022. [↑](#footnote-ref-28)
29. Ibid. [↑](#footnote-ref-29)
30. For different examples of how precise drafting can be operationalised see IISD, Climate change and International Investment Agreements: Obstacles and Opportunities (March 2010) <https://www.fao.org/fileadmin/user\_upload/rome2007/docs/Climate%20Change%20and%20International%20Investment%20Agreements.pdf> accessed 29 May 2022. [↑](#footnote-ref-30)
31. For example, Article 10.10 of the Oman–US FTA provides that ‘[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns’. [↑](#footnote-ref-31)
32. Christian Tietje et al, ‘The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership’ (Study prepared for Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, 2014).

    <https://www.eumonitor.eu/9353000/1/j4nvgs5kjg27kof\_j9vvik7m1c3gyxp/vjn8exgvufya/f=/blg378683.pdf>. [↑](#footnote-ref-32)
33. Ibid. [↑](#footnote-ref-33)
34. See Japan–Korea BIT (2002); Canadian Model BIT (2004), Jordan–Singapore BIT (2004), Canada–Peru BIT (2007), COMESA CCIA (2007), China–New Zealand FTA (2008), ASEAN– Australia–New Zealand FTA (2009), and India–Korea FTA (2009). [↑](#footnote-ref-34)
35. Caroline Henckels, ‘Protecting regulatory autonomy through greater precision in investment treaties: the TPP, CETA, and TTIP’ [2016] 19 Journal of International Economic Law 27 – 50; For a range of different approaches adopted by States in treaty drafting also see IIA Issues Note ‘The International Investment Treaty Regime and Climate Action (September 2022) <‘<https://unctad.org/system/files/official-document/diaepcbinf2022d6_en.pdf>> accessed 6 September 2022. [↑](#footnote-ref-35)
36. Sukma Dwi Andrina, ‘Towards a Future Investment Treaty: Lessons from Indirect Expropriation Cases due to Measures to Protect the Environmental and Public Health’ (2017) 28(2) European Business Law Review pp. 245–269. [↑](#footnote-ref-36)
37. Van Harten (n 25). [↑](#footnote-ref-37)
38. Ibid. [↑](#footnote-ref-38)
39. OECD, Multilateral Agreement on Investment <https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> accessed 27 May 2022. [↑](#footnote-ref-39)
40. St John (n 6). [↑](#footnote-ref-40)
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42. *Eco Oro Minerals Corp. v Republic of Colombia*, ICSID Case No. ARB/16/41. [↑](#footnote-ref-42)
43. IISD, ‘Implications of the Eco Oro Decision for Investment Treaty Negotiations and Reforms’, A roundtable discussion on the Eco Oro investment arbitration award (28 October 2021) <<https://www.iisd.org/events/implications-eco-oro-decision-investment-treaty-negotiations-and-reforms>> accessed 29 May 2022. [↑](#footnote-ref-43)
44. See Tienhaara et al. (n 1) for a list of ISAs involving fossil fuel companies related to climate/environmental policy. [↑](#footnote-ref-44)
45. *RWE v Kingdom of the Netherlands*, ICSID Case No. ARB/21/4; *Uniper v Netherlands*, ICSID Case No. ARB/21/22. [↑](#footnote-ref-45)
46. *The PV Investors v Spain*, PCA Case No. 2012-14; *Eskosol v Italy*, ICSID Case No. ARB/15/50. [↑](#footnote-ref-46)
47. *Rockhopper v Italy*, ICSID Case No. ARB/17/14. [↑](#footnote-ref-47)
48. *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No. ARB/12/12. [↑](#footnote-ref-48)
49. *Rockhopper* (n 47). [↑](#footnote-ref-49)
50. UNCTAD, ‘Investor–State Dispute Settlement: Developments in 2015’ (June 2016, No 2). [↑](#footnote-ref-50)
51. Energy Charter Secretariat, Decision of the Energy Charter Conference (October 2019) <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201908.pdf> accessed 29 May 2022. [↑](#footnote-ref-51)
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53. *Peter A. Allard v The Government of Barbados*, PCA Case No. 2012-06. [↑](#footnote-ref-53)
54. Peter Allard (n 53), Award on Jurisdiction (13 June 2014) <https://pcacases.com/web/sendAttach/1954> accessed 29 May 2022. [↑](#footnote-ref-54)
55. Nikos Lavranos, ‘Using the Paris Agreement in arbitrations’ (*Practical Law Arbitration Blog*, 31 March 2020) <http://arbitrationblog.practicallaw.com/using-the-paris-agreement-in-arbitrations/> accessed 29 May 2022. [↑](#footnote-ref-55)
56. Tienhaara et al (n 1). [↑](#footnote-ref-56)
57. For a list of defence arguments, some of which can also apply to ISA involving climate measures see ‘Defence Arguments in Investment Arbitration’ (2020) 18 ICSID Reports <https://www.cambridge.org/core/journals/icsid-reports/article/defence-arguments-in-investment-arbitration/42BC4A0912FEE83BEEFDD2D129E5EFDF> accessed 29 May 2022. [↑](#footnote-ref-57)
58. Chester Brown, ‘International, Mixed, and Private Disputes Arising Under the Kyoto Protocol’, Journal of (2010) 1 (2) International Dispute Settlement 447 – 473. [↑](#footnote-ref-58)
59. Florence Humblet and Kabir Duggal, ‘If You Are Not Part of the Solution, You Are the Problem: Article 37 of the EU Charter as a Defence for Climate Change and Environmental Measures in Investor-State Arbitrations’ [2020] 5(1) European Investment Law and Arbitration Review Online 265-295 <https://doi.org/10.1163/24689017\_011> accessed 29 May 2021. [↑](#footnote-ref-59)
60. Amanda Lee et al, ‘Suitability of ISDS for Societal Challenges’ [2022] Global Arbitration Review < <https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/suitability-of-isds-societal-challenges>> accessed 17 May 2022. [↑](#footnote-ref-60)
61. *Philip Morris* (n 4); *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; Also see *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No. ARB(AF)/99/1 para 103 which states ‘[G]overnmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, […] At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this’. [↑](#footnote-ref-61)
62. *Compañia del Desarrollo de Santa Elena S.A. v Republic of Costa Rica*, ICSID Case No. ARB/96/1 in which the tribunal found that the purpose of the taking is immaterial and at para 71 stated ‘[w]hile an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference’. [↑](#footnote-ref-62)
63. In *Saipem S.p.A. v The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, the Tribunal opined that it ‘considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law’. [↑](#footnote-ref-63)
64. *Romak S.A. (Switzerland) v Republic of Uzbekistan*, PCA Case No. AA280. [↑](#footnote-ref-64)
65. *Spyridon Roussalis v Romania*, ICSID Case No. ARB/06/1 <https://www.italaw.com/sites/default/files/case-documents/ita0723.pdf> accessed 29 May 2022. [↑](#footnote-ref-65)
66. Ibid. [↑](#footnote-ref-66)
67. In *Saluka Investments BV v The Czech Republic*, PCA Case No. 2001-04*,* the tribunal found that the provision for arbitrating ‘all disputes … concerning an investment’ could include consideration of counterclaims made by the respondent. [↑](#footnote-ref-67)
68. *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Ecuador’s Counterclaims (7 February 2017). [↑](#footnote-ref-68)
69. See *Perenco Ecuador Ltd. v The Republic of Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August, 2015) where the Tribunal agreed ‘that if a legal relationship between an investor and the State permits the filing of a claim by the State for environmental damage caused by the investor’s activities and such a claim is substantiated, the State is entitled to full reparation in accordance with the requirements of the applicable law’. [↑](#footnote-ref-69)
70. Ibid. [↑](#footnote-ref-70)
71. *David R. Aven and Others v Republic of Costa Rica*, ICSID Case No. UNCT/15/3 <https://www.italaw.com/sites/default/files/case-documents/italaw9955\_0.pdf> accessed 29 May 2022. [↑](#footnote-ref-71)
72. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No. ARB/07/26* <https://www.italaw.com/sites/default/files/case-documents/italaw8136\_1.pdf> accessed 30 May 2022. [↑](#footnote-ref-72)
73. *David R. Aven* (n 71). [↑](#footnote-ref-73)
74. *Methanex Corporation v United States*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits ((3 August 2005); *Glamis Gold, Ltd. v United States*, UNCITRAL, Award (8 June 2009); Wei-Chung Lin, ‘Safeguarding the Environment? The Effectiveness of Amicus Curiae Submissions in Investor-State Arbitration’ (2017) International Community Law Review 270-301. [↑](#footnote-ref-74)
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    <http://arbitrationblog.kluwerarbitration.com/2019/05/22/environmental-considerations-in-investment-arbitration-a-report-of-a-topical-issues-in-isds-seminar/> accessed 29 May 2022. [↑](#footnote-ref-76)
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81. Filip Balcerzak, ‘Jurisdiction of Tribunals in Investor–State Arbitration and the Issue of Human Rights’, [2014] 29(1) ICSID Review - Foreign Investment Law Journal216–230. [↑](#footnote-ref-81)
82. ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification Expansion of International Law’, Report on the Study Group of the International Law Commission (A/CN.4/L.682 prepared by Martti Koskenniemi). [↑](#footnote-ref-82)
83. In *Philip Morris v Oriental Republic of Uruguay* (n 61) the tribunal found that Article 5 of the Switzerland-Uruguay BIT must be interpreted in accordance with Article 31(3)(c) of the VCLT. Recognising State’s police power as a part of general international law and protection of public health as an essential manifestation of the police powers, the tribunal found that the challenged measures were taken by Uruguay with a view to protect public health and did not constitute expropriation. [↑](#footnote-ref-83)
84. ILC Report (n 82). [↑](#footnote-ref-84)
85. Urbaser (n 72). [↑](#footnote-ref-85)
86. IBA ‘Achieving Justice and Human Rights in an Era of Climate Disruption International Bar Association Climate Change Justice and Human Rights Task Force Report’ (2014) <https://www.ibanet.org/MediaHandler?id=0f8cee12-ee56-4452-bf43-cfcab196cc04> accessed 29 May 2022. [↑](#footnote-ref-86)
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91. UNCITRAL Secretariat, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019) <<https://undocs.org/en/A/CN.9/970>> accessed 29 May 2022. [↑](#footnote-ref-91)
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100. UNCITRAL Secretariat, Report of Working Group III (n 91). [↑](#footnote-ref-100)
101. ClientEarth (n 3). [↑](#footnote-ref-101)
102. Y Kryvoi, ‘Counterclaims in investor-state arbitration’, (2012)21(2) Minnesota Journal of International Law 216–252. [↑](#footnote-ref-102)
103. Toni Marzal, ‘Against DCF valuation in ISDS: on the inflation of awards and the need to rethink the calculation of compensation for the loss of future profits’ (*EJIL: Talk!*, 26 January 2021).

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     defined the DCF method as ‘the cash receipts realistically expected from the enterprise in each future year of its economic life as reasonably projected nminus [sic] that year's expected cash expenditure, after discounting this net cash flow for each year by a factor which reflects the time value of Money, expected iinflation [sic], and the risk associated with such cash flow under realistic circumstances. Such discount rate may be measured by examining the rate of return available in the same market on alternative investments of comparable risk on the basis of their present value’ available at <<https://documents1.worldbank.org/curated/en/955221468766167766/text/multi-page.txt>> accessed 27 May 2022. [↑](#footnote-ref-104)
105. *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1. [↑](#footnote-ref-105)
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107. This chilling effect can manifest as an internalised chill (where policymakers prioritise avoidance of disputes over adoption of climate friendly policies) or a threat chill (where adoption of specific climate related measure is stalled because of a threat of an ISA) or a cross-border chill (when fossil fuel companies launch an ISA claim in one jurisdiction to delay/stall adoption of similar measure in another jurisdiction). Kyla Tienhaara, ‘Regulatory Chill and the Threat of Arbitration: A View from Political Science’ in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011); Tienhaara (n 2).   
     Gus Van Harten and D. N. Scott, ‘Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada (Part 2)’ in Lisa Sachs and Lise Johnson (eds), *Yearbook on International Investment Law and Policy 2015-2016* (OUP 2018). [↑](#footnote-ref-107)
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111. [Pichrotanak Bunthan](http://arbitrationblog.kluwerarbitration.com/author/pichrotanakbunthan/), ‘Arbitrators as Flamingos of Many Colors’ (9 February 2021) <<http://arbitrationblog.kluwerarbitration.com/2021/02/09/arbitrators-as-flamingos-of-many-colors/>> accessed 27 May 2022. [↑](#footnote-ref-111)
112. Marc Bungenberg and August Reinisch ‘From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court Options Regarding the Institutionalization of Investor-State Dispute Settlement’ pp 125 footnote 38 citing Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists, Annex No. 1, 695 (1920) ‘[i]n the Court of Arbitration, there is no permanent tie between the sitting judges, and consequently, no esprit de corps nor progressive continuity in jurisprudence; on the other hand, the Court of International Justice, being composed of judges, permanently associated with each other in the same work, and, except in rare cases, retaining their seats from one case to another, can develop a continuous tradition, and assure the harmonious and logical development of International Law.’ <https://link.springer.com/book/10.1007/978-3-662-59732-3> accessed 19 May 2022. [↑](#footnote-ref-112)
113. Classic examples are South Africa’s changed approach to ISA after the Pierro Foresti case, Australia’s and New Zealand’s approach after the Phillip Morris case. [↑](#footnote-ref-113)
114. Mattias Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’ [2004] 15 (5) The European Journal of International Law 907–931. [↑](#footnote-ref-114)
115. ‘Legislative Train Schedule, A Balanced and Progressive Trade Policy to Harness Globalisation’ (*European Parliament*, 20 March 2021) <<https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-multilateral-investment-court-(mic)>> accessed 29 May 2022. [↑](#footnote-ref-115)
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117. The Chancery Lane Project ‘Choice of Green Governing Law Clause’ <https://chancerylaneproject.org/climate-clauses/choice-of-green-governing-law-clause/> accessed 29 May 2022. [↑](#footnote-ref-117)