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Climate Change Clauses in International Investment Agreements: An Analytical Survey

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Abstract—This article investigates how States have reflected the urgent need for climate action in their international investment agreements. It reviews the wording of 109 international investment agreements that contain specific climate change language. The practice is slowly gaining momentum across States and grouping of States, but concerns at present chiefly the EU, Chile, the UK, New Zealand and Australia. The review indicates that the overwhelming majority of States did not consider that the urgent need to implement climate actions required them to update their international investment agreements. The few States that did so merely shoehorned climate change considerations into their traditional environmental clauses, although new practices are emerging in this area. In addition, the few investment treaty parties that engaged with climate change did not seek to make climate-friendly investments markedly more attractive than climate-neutral or climate-hostile ones. The main obligations that they created in respect of climate change mirror largely those existing under the climate change regime and relate to cooperation, facilitation and promotion activities. The normative content of these obligations is even more diluted when they are worded—as is often the case—as obligations to make efforts to cooperate, to promote or to facilitate. States also sought to shield the parties' ability to adopt climate change measures through clauses protecting their regulatory powers, borrowing often from the wording of the so-called second generation of investment treaties. Recent practice in the context of the Energy Charter Treaty allows individual parties to reduce the investment treaty protection they grant with respect to existing or future fossil fuel investments. Although much more is required for investment treaties to reflect the urgent need for climate action fully, including more significant participation of non-Annex I countries in the practice, the wide breadth of the clauses surveyed suggests that all the key elements of a multilateral agreement on investment, trade and climate change are on the table.

I. INTRODUCTION

Climate change is 'an unprecedented challenge of civilizational proportions and . . . the well-being of present and future generations of humankind depends on our immediate and urgent response to it'.[2] The United Nations General Assembly

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[2] UNGA, Request of an Advisory Opinion of the International Court of Justice on the obligations of States in respect of Climate Change (A/RES77/276) (29 March 2023) Preamble, para 1.

(UNGA), in its resolution requesting an advisory opinion from the International Court of Justice on the obligations of States with respect to climate change:

> *not[ed] with profound alarm* that the emissions of greenhouse gases continue to rise despite the fact that all countries, in particular developing countries, are vulnerable to the adverse effects of climate change and that those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints, such as the least developed countries and small island developing States, are already experiencing an increase in such effects, including persistent drought and extreme weather events, land loss and degradation, sea level rise, coastal erosion, ocean acidification and the retreat of mountain glaciers, leading to displacement of affected persons and further threatening food security, water availability and livelihoods, as well as efforts to eradicate poverty in all its forms and dimensions and achieve sustainable development.[3]

The international community sought to address climate change and its adverse impacts through several legal instruments, including the United Nations Framework Convention on Climate Change (UNFCCC),[4] the Kyoto Protocol[5] and the Paris Agreement.[6] On 13 December 2023, the Conference of the Parties to the Paris Agreement issued, pursuant to its Article 14, the 'Outcome of the First Global Stocktake', which reviewed the implementation of the Paris Agreement to assess collective progress towards achieving its purpose and long-term goals. The Conference of the Parties to the Paris Agreement recognized that:

> limiting global warming to 1.5 °C with no or limited overshoot requires deep, rapid and sustained reductions in global greenhouse gas emissions of 43 percent by 2030 and 60 percent by 2035 relative to the 2019 level and reaching net zero carbon dioxide emissions by 2050.[7]

In addition to mitigation measures, the 'Outcome of the First Global Stocktake' emphasized that:

> the magnitude and rate of climate change and associated risks depend strongly on near-term mitigation and adaptation actions, that long-term planning for and accelerated implementation of adaptation, particularly in this decade, are critical to closing adaptation gaps and create many opportunities, and that accelerated financial support for developing countries from developed countries and other sources is a critical enabler.[8]

The existential threat that climate change poses to humanity requires, therefore, '[r]apid and far-reaching transitions across all sectors and systems' that 'are necessary to achieve deep and sustained emissions reductions and secure a liveable and sustainable future for all'.[9] The Intergovernmental Panel on Climate Change (IPCC) explained, with a high degree of confidence, that the systems transitions called for by climate change include:

[3] ibid para 8 (emphasis as in source).

[4] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) (UNFCCC) 1771 UNTS 107.

[5] Kyoto Protocol to the UNFCCC (adopted 11 December 1997, entered into force 16 February 2005) UNTS, vol 2303, 162.

[6] Paris Agreement (adopted 12 December 12015, entered into force 4 November 2016) UNTS, vol 3156, 79.

[7] Conference of the Parties to the Paris Agreement, 'Outcome of the First Global Stocktake' (adopted 13 December 2023) (FCCC/PA/CMA/2023/L.17) para 27.

[8] ibid para 53.

> deployment of low- or zero-emission technologies; reducing and changing demand through infrastructure design and access, socio-cultural and behavioural changes, and increased technological efficiency and adoption; social protection, climate services or other services; and protecting and restoring ecosystems.[10]

The IPCC stressed, equally with a high degree of confidence, that '[f]easible, effective, and low-cost options for mitigation and adaptation are already available', but noted, with a very high degree of confidence, that '[t]he availability, feasibility and potential of mitigation and adaptation options in the near term differs across systems and regions'.[11]

The systems transitions dictated by climate change require significant regulatory and economic support.[12] The IPCC observed that '[f]inance, technology and international cooperation are critical enablers for accelerated climate action. If climate goals are to be achieved, both adaptation and mitigation financing would need to increase many-fold.'[13] The IPCC pre-empted questions about the availability of the global capital and liquidity necessary to fund the systemic change required to mitigate and adapt to climate change. It explained, with a high degree of confidence, that:

> There is sufficient global capital and liquidity to close global investment gaps, given the size of the global financial system, but there are barriers to redirect capital to climate action both within and outside the global financial sector and in the context of economic vulnerabilities and indebtedness facing developing countries. Reducing financing barriers for scaling up financial flows would require clear signalling and support by governments, including a stronger alignment of public finances in order to lower real and perceived regulatory, cost and market barriers and risks and improving the risk–return profile of investments. At the same time, depending on national contexts, financial actors, including investors, financial intermediaries, central banks and financial regulators can shift the systemic underpricing of climate related risks, and reduce sectoral and regional mismatches between available capital and investment needs.[14]

Scholars have shown great interest in the relations between climate change and investment law, especially the possible contribution of international investment law to the global effort to fight climate change and its adverse impacts. The interest was prompted by the increasing number of investment cases concerning climate-related measures,[15] as well as the existing and somewhat disappointingly high

[9] Intergovernmental Panel on Climate Change, 'Summary for Policymakers' in Climate Change 2023: Synthesis Report, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (Geneva 2023) (IPCC) C.3.

[10] ibid C.3.1.

[11] ibid.

[12] ibid C.6.4.

[13] ibid C.7.

[14] ibid C.7.3 (italics in the original).

[15] See, cases relating (i) to the phasing out of nuclear power (*Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12); (ii) to restrictions on coal or oil drilling activities (*Rockhopper Italia SpA, Rockhopper Mediterranean Ltd, and Rockhopper Exploration PLC v Italian Republic*, ICSID Case No ARB/17/14, Final Award (23 August 2022); *Westmoreland Coal Company v. Canada (I)*; *Zeph Investments Pte Ltd v Commonwealth of Australia*, PCA Case No 2023–40; *Lone Pine Resources Inc v Government of Canada*, ICSID Case No UNCT/15/2; *TC Energy Corporation and TransCanada Pipelines Limited v United States of America (II)*, ICSID Case No ARB/21/63; *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands*, ICSID Case No ARB/21/4 ; *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV v Kingdom of the Netherlands*, ICSID Case No ARB/21/22); (iii) the rolling back of climate subsidies and incentives (*AES Solar and others (PV Investors) v Kingdom of Spain*, PCA Case No 2012–14, Final Award (28 February 2020); *Eskosol SpA in liquidazione v Italian Republic*, ICSID Case No ARB/15/50, Award (4 September 2020)). See also Special Rapporteur on the human right to a clean, healthy and sustainable environment, 'Examples of ISDS Claims Launched in Response to Climate Actions', annex to G.A. Res. A/78/168 in 'Paying Polluters: The Catastrophic Consequences of Investor-State Dispute Settlement for Climate and Environment Action and Human Rights' (13 July

number of environmental measures that failed the scrutiny of investment arbitral tribunals.[16] The overwhelming majority of the literature on the relationship between climate change and investment law focused on States' regulatory space to adopt climate mitigation and adaptation measures without breaching their investment treaty obligations. Scholars discussed, in light of the investment tribunals' case law, the constraints that investment protection standards, primarily the prohibition on indirect expropriation and the obligation to provide fair and equitable treatment to foreign investors, may pose to States' ability to implement climate action.[17] The general sense in this literature is that the substantive and procedural guarantees afforded by investment treaties are an obstacle to the transition towards a greener economy and the adoption of climate measures.[18] A few scholars proposed wording to enable investment treaties to be in harmony with the need to adopt climate change

2023) Annex 2 (available here); UNCTAD, 'International Investment in Climate Change Mitigation and Adaptation: Trends and Policy Developments' (2022) UNCTAD/DIAE/INF/2022/2, 13.

[16] See among others, *Eco Oro Minerals Corp v Republic of Colombia*, ICSID Case No ARB/16/41, *Peter A Allard v Government of Barbados*, PCA Case No 2012–06, Award on Jurisdiction (13 June 2014); *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6, Award (27 September 2019); *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, Award (8 December 2016); *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Award (14 December 2012); *Methanex Corporation v United States of America*, UNCITRAL (3 August 2005); *Técnicas Medioambientales Tecmed, SA v United Mexican States*, ICSID Case No ARB (AF)/00/2, Award (29 May 2003); *Metalclad Corporation v United Mexican States*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000); *Compañia del Desarrollo de Santa Elena SA v Republic of Costa Rica*, ICSID Case No ARB/96/1, Award (17 February 2000).

[17] See eg Camille Martini, 'From Fact to Applicable Law: What Role for the International ClimateChange Regime in Investor–State Arbitration?' (2024) 61 Can YB Intl L 1-36; Lorenzo Cotula, 'International Investment Law and Climate Change: Reframing the ISDS Reform Agenda' (2023) 24 JWIT 766–91; Joshua Paine and Elizabeth Sheargold, 'A Climate Change Carve-Out for Investment Treaties' (2023) 26 J Intl Econ L 285–304; Zachary Pavlik, 'Leveraging Foreign Investments to Support Climate Change Adaptation in the Global South' (2023) 53(2) Env L 203–37; Arman Sarvarian, 'Invoking the Paris Agreement in Investor–State Arbitration' (2023) 38(2) ICSID Rev—FILJ 422–40; Kyla Tienhaara and Rachel Thrasher, 'Investor–State Dispute Settlement: Obstructing a Just Energy Transition' (2023) 9 Climate Policy 1197–221; Manish Aggarwal and Ridhi Kabra, 'Regulating for Climate Change without Breaching Investment Treaties' in Annette Magnusson and Anja Ipp (eds), *Investment Arbitration and Climate Change* (Kluwer Law International 2023) 165–78; Ladan Merhanvar and Lisa E Sachs, 'The Role and Relevance of Investment Treaties in Promoting Renewable Energy Investment' ibid 263–88; Gian Maria Farnelli, 'Investors as Environmental Guardians? On Climate Change Policy Objectives and Compliance with Investment Agreements' (2022) 23 JWIT 887–914; Joséphine Dooley, 'The Co-existence of Mitigation and International Investment Law: A Practical Assessment of Climate Change Action under Less "Green-Friendly" Investment Agreements' (2022) 23 JWIT 849–86; Laura Létourneau Tremblay, 'In Need of a Paradigm Shift: Reimagining *Eco Oro v Colombia* in Light of New Treaty Language' (2022) 23 JWIT 915–46; Mala Sharma, 'Integrating, Reconciling, and Prioritising Climate Aspirations in Investor–State Arbitration for a Sustainable Future: The Role of Different Players' (2022) 23 JWIT 746–77; Elena Cima, 'Retooling the Energy Charter Treaty for Climate Change Mitigation: Lessons from Investment Law and Arbitration' (2021) 14 Journal of World Energy Law and Business 75–87; Sarah Z Vasani and Nathalie Allen, 'No Green without More Green: The Importance of Protecting FDI through International Investment Law to Meet the Climate Change Challenge' (2020) 5(1) European Investment Law and Arbitration 1–39; Wendy Miles and Merryl Lawry-White, 'Arbitral Institutions and the Enforcement of Climate Change Obligations for the Benefit of all Stakeholders: The Role of ICSID' (2019) 34(1) ICSID Rev—FILJ 1–31; Freya Baetens, 'Combating Climate Change through the Promotion of Green Investment: From Kyoto Paris without Regime-Specific Dispute Settlement' in Kate Miles (ed), *Research Handbook on Environment and Investment Law* (Elgar 2019) 107–30; Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy by Investor–State Dispute Settlement' (2018) 7(2) TEL 228–50; Julien Chaisse, 'Renewables Re-energized? The Internationalization of Green Energy Investment Rules and Disputes' (2016) 9 Journal of World Energy Law and Business 269–81; Bradly J Condon, 'Climate Change and International Investment Agreements' (2015) 14 Chinese JIL 305–39; Stephan W Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?' (2007) 24(5) J Intl Arb 469–77; Jacob Werksman, Kevin A Baumert and Navroz K Dubash, 'Will International Investment Rules Obstruct Climate Protection Policies? An Examination of the Clean Development Mechanism' (2003) 3 International Environmental Agreements: Politics, Law and Economics 59–86.

[18] See also Intergovernmental Panel on Climate Change, 'Climate Change 2022: Mitigation of Climate Change, Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate' (2022) (IPCC) chpt 14, 1505-06 and chpt 15, 1593-94.

mitigation and adaptation measures.[19] However, very few studies sought to review existing investment treaties to determine how they reflect States' perceptions of the urgent need to adopt climate measures and implement them.[20]

The purpose of this article is to provide a structured overview of investment treaty climate change clauses by mapping them to provide a sense of the international practice in this area. For this purpose, the article reviews the wording of climate change clauses in international investment agreements to determine how they reflect the parties' engagement with the urgent need for climate action.[21] It pays attention both to the binding character of the obligations under the clauses and the normative strength of their content, that is to say the exact conduct that is required from the parties.[22] This article does not purport to analyse the actual operation of the clauses in practice, including arbitral practice, nor does it seek to measure their actual impact on climate efforts.

Here, the term 'climate change clauses' refers, first, to investment treaty clauses which expressly mention climate change. The notion of 'climate change clauses' also encompasses treaty clauses which address mitigation and adaptation to climate change, even when they do not refer expressly to it.[23] However, this article excludes from its scope investment treaty clauses that deal with the environment or sustainable development, in general, without a specific reference to climate change.[24] General environmental and sustainable development clauses are certainly relevant for climate change. Some treaty clauses clarify that their use of the term 'environmental laws' or 'environmental measures' includes climate change laws and measures.[25] Nevertheless, general environmental and sustainable development clauses leave somewhat

[19] See among the most interesting proposals, Paula F Henin and others, 'Innovating International Investment Agreements: A Proposed Green Investment Protocol for Climate Change Mitigation and Adaptation' (2019) 36(1) J Intl Arb 37–70; Daniel B Magraw and others, 'Model Green Investment Treaty: International Investment and Climate Change' (2019) 36(1) J Intl Arb 95–134; Silke Noa Elrifai and others, 'A Model Multilateral Treaty for the Encouragement of Investment in Climate Change Mitigation and Adaptation' (2019) 36(1) J Intl Arb 71–94.

[20] See, however, Markus Gehring and Marios Tokas, 'Synergies and Approaches to Climate Change in International Investment Agreements: Comparative Analysis of Investment Liberalization and Investment Protection Provisions in European Union Agreements' (2022) 23 JWIT 778–812; Kathryn Gordon and Joachim Pohl, 'Environmental Concerns in International Investment Agreements: A Survey' (2011) 1 OECD Working Papers on International Environment 1–32.

[21] The purpose of this article is therefore not to interpret fully, pursuant to the customary rules on treaty interpretation, specific clauses. Space constraints would not allow such a task. Rather, the article relies on the literal meaning of the clauses to map them. The focus on the literal meaning of the clauses is sufficient for this purpose, especially when, according to the International Court of Justice, the interpretative process should stop when the literal meaning of treaty clauses makes sense in their context. See, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* Judgment [1994] ICJ Rep 6, 21–22, para 41.

[22] This study therefore brings the debate about soft law at the level of the obligations themselves. For an understanding of this debate that provides this methodological framework, see Georges Abi-Saab, 'Cours général de droit international public' (1987) 207 VII Recueil des Cours de l'Académie de droit international 15.

[23] See eg Partnership agreement between the EU and its Member States, of the one part, and the Members of the Organisation of African, Caribbean and Pacific States, of the other part (signed 11 November 2023, not yet in force) (the Samoa Agreement) art 43, para 2 (available here) (holding that: 'The Parties shall promote the transition to a low-emission and resource-efficient economy. They shall support sustainable consumption and production approaches, environmentally sound waste- and chemicals-management and measures reducing all forms of pollution'). See also Agreement between the United States of America, the United Mexican States, and Canada (signed 30 November 2018, entered into force 1 July 2020) art 24.24 (available here) (referring to 'environmental goods and services to address current and future global environmental challenges'). ECOWAS Common Investment Code (ECOWIC) (signed 22 December 2019, entered into force 22 December 2019) (available here) (which does not mention climate change, although it defines environmental legislation as a 'legislation related to the: (i) prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants'. In general, climate change appears here under the guise of sustainable development).

[24] For recent treaties that deal with sustainable development in general, without mentioning climate change, see Economic Partnership Agreement between the Southern African Customs Union Member States and Mozambique, of the one part, and the United Kingdom, of the other part (signed 9 October 2019, entered into force 1 January 2021) (available here); Agreement establishing an Economic Partnership Agreement between the Eastern and Southern Africa States and the United Kingdom (signed 31 January 2019, entered into force 1 January 2021) (available here); WTO, Investment Facilitation for Development (published 29 February 2024, not yet in force) (available here).

unclear the views and approaches of the parties on the urgent need for climate action specifically. Investment treaties with general environmental clauses have been characterized as the second generation of international investment agreements. Following a similar taxonomy, those with clauses dealing specifically with climate change may be considered as part of the 'third generation' of international investment agreements, on which this article focuses.

Concretely, this study examined 109 international investment agreements, defined broadly as any treaty containing clauses governing foreign investments and investors, which were concluded between 16 November 1991 and 10 February 2025, the text of which is available on the UNCTAD or the World Trade Institute databases.[26] The first international investment agreement mentioning climate change was concluded on 16 November 1991,[27] that is to say a year after the adoption of the IPCC's first report on climate change.[28] This is also a year before the Rio Conference that led to the adoption of the Rio Declaration on the Environment and Development and several environmental conventions, including the UNFCCC.[29] The decision to conclude investment treaties implements a State's economic policy and qualifies, therefore, as economic action. Consequently, it should reflect 'to the extent possible' 'climate change considerations', pursuant to Article 4, paragraph 1(f), of the UNFCCC.[30]

The remainder of this article is structured as follows. Section II makes some general observations on climate change clauses in investment treaties to provide a general overview of the key elements of the practice. The following sections discuss the clauses themselves and distinguish investment treaty climate change clauses according to whether they seek to support the climate change regime, as a whole (Section III) or to mobilize the contribution of investments and investment law in the fight against climate change (Section IV and Section V).

II. GENERAL OBSERVATIONS

This study reveals that the inclusion of climate change clauses in investment treaties is widespread (A), increasingly common (B), but still often appears to be an afterthought (C).

A. *A Widespread Practice*

The practice of including climate change clauses in investment treaties is widespread across regions. This study identified 121 different parties, including States, separate customs territories, regional economic communities and other grouping of States that have included in their investment treaties climate change clauses.[31] The list

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25 FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom (signed 8 July 2021, entered into force 1 September 2022) art 13.2, para 2 (available here).

26 Annex I: List of investment treaties with climate change clauses.

27 EC–Hungary Association Agreement (concluded 16 November 1991, entered into force 1 February 1994) art 79 (environment) (available here).

28 See JT Houghton, GJ Jenkins and JJ Ephraums, *Climate Change: The IPCC Scientific Assessment* (CUP 1990) <www.ipcc.ch/site/assets/uploads/2018/03/ipcc_far_wg_I_full_report.pdf> (accessed 2 June 2024).

29 *Report of the United Nations Conference on Environment and Development* (Rio de Janeiro, 3–14 June 1992) (A/CONF.151/26/Rev1).

30 UNFCCC, art 4, para 1(f) (n 4) (available here) (providing that: '1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall . . . (f) Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change').

contains both developed and developing States, Annex I (within the meaning of Article 4, paragraph 2, of the UNFCCC) and non-Annex I countries,[32] as well as States transitioning towards a liberal economy. Nevertheless, there are some clearly identifiable front runners. Of the 109 treaties surveyed in this research, 51, that is to say 46.78 per cent of the treaties, are concluded by the European Union. Even if one excludes the European association agreements with other countries (16 treaties, as further detailed below), the European Union would still remain the leader of the practice of including climate change clauses in investment treaties. The survey indicates that the top 15 parties that include climate change clauses in their treaties are, in addition to the EU, Chile (14 treaties), the UK (13 treaties), New Zealand (10 treaties), Australia (9 treaties), Korea (8 treaties), Japan (7 treaties), the EFTA States (Iceland, Liechtenstein, Norway and Switzerland) (6 treaties), Vietnam (6 treaties), China (5 treaties), Malaysia (5 treaties), Moldova (5 treaties), Peru (5 treaties) and Ukraine (5 treaties).[33]

Sixty-five out of the 121 participants (or 53.71 per cent of the total) have concluded only one investment treaty with climate change clauses; 26 participants (21.48 per cent) have concluded only two treaties with climate change clauses; 10 participants (8.26 per cent) have concluded only three such treaties; and six participants (4.95 per cent) have concluded only four treaties. Only 11.46 per cent have concluded five or more investment treaties with climate change clauses. It may be reasonable to assume that States and grouping States with the highest number of treaties containing climate change clauses have adopted a deliberate policy of including such provisions, while the opposite can be said of the States with very few such clauses in their treaties.

The EU's practice of including climate change clauses in its investment treaties does not come as a surprise. The EU is currently updating and modernizing its investment treaties and expanding its preferential trade agreements. As a result, it has concluded, since 2010, more investment treaties than any other State, separate customs territory or grouping of States. The European Union had, therefore, more opportunities to incorporate climate change clauses in its new treaties than States that did not update their investment treaties.[34] In addition, EU law mandates that the EU take into account climate change considerations when concluding investment treaties.[35] According to Opinion 2/15 of the Court of Justice of the European Union, the 'sustainable development linked to preservation and improvement of the quality of the environment and the sustainable management of global natural resources', including therefore the protection of the climate system, forms part of the common EU commercial policy and must be reflected in the investment treaties concluded by the Union.[36] Finally, the 2023 EU Model clauses for bilateral investment treaties contains specific clauses referring to climate change.[37]

[31] Annex II: List of parties to investment treaties with climate change clauses.
[32] Annex I States had, pursuant to UNFCCC, art 4, para 2, the obligation to take measures to reduce their greenhouse gas emissions to 1990 levels by the year 2000.
[33] Annex II: List of parties to investment treaties with climate change clauses.
[34] The same observation is valid for the UK that, after Brexit, had to conclude new investment treaties.
[35] See Consolidated version of the Treaty on the Functioning of the European Union (signed 13 December 2007, entered into force 1 January 2009) art 207(1) (ex-art 133) read together with art 21(f), and art 205 (available here).
[36] Court of Justice of the European Union (full Court), *Opinion 2/15* of the Court (16 May 2017) paras 142–49 <https://curia.europa.eu/juris/document/document_print.jsf?pageIndex=0&docid=190727&doclang=EN&text=&cid=199904>
[37] See EU Model Clauses for BITs (adopted 21 September 2023) (available here) (in particular the model article on 'Investment and regulatory measures', the model article on 'investment and climate change', the model article on 'Dialogue and cooperation on investment-related sustainable development issues' and the model Annex on 'Expropriation').

The failure of States to embrace fully a policy of updating their investment treaties to reflect climate change considerations is concerning. The UNFCCC and the Paris Agreement are widely ratified,[38] and may be characterized as 'international instruments of a universal or quasi-universal character'.[39] In addition, the obligation to protect and preserve the climate system is an obligation *erga omnes* that is opposable to all the members of the international community.[40] Accordingly, all States must adopt regulatory measures, including through their international investment agreements, to protect and preserve the climate system. It is doubtful that the States that did not refer to climate change in their agreements, when they had the opportunity to do so, may justify their decision by invoking the principle of common but differentiated responsibilities. According to the International Tribunal for the Law of the Sea, the common but differentiated responsibilities principle means that 'States with greater means and capabilities must do more to reduce [greenhouse gas] emissions than States with less means and capabilities'.[41] Concluding investment treaties to promote, facilitate or protect climate-friendly investments, or to attract investments for climate adaptation, does not contravene the principle of common but differentiated responsibilities.

B. *An Evolving Practice*

The inclusion of climate change clauses in investment treaties is gaining momentum. From 1991 (when the practice started) to 2010, States included climate change clauses only in 30 treaties, which represent 27.52 per cent of the 109 treaties surveyed in this article.[42] From 2010 to the cut-off date of this article (10 February 2025), they did so in 79 treaties (or 72.47 per cent). The practice seems to have intensified since 2015, following the conclusion of the Paris Agreement. Indeed, 61 treaties (55.96 per cent of the total), were concluded during this period.[43]

The number of climate change clauses in investment treaties has also evolved over time. In the beginning, treaties consisted primarily of a single clause that appeared either in the preamble of the treaty,[44] or in a substantive provision identifying possible areas of cooperation between the parties. This was the case in the EU's association

[38] The Paris Agreement has been ratified by 195 parties, whereas the UNFCCC has 198 parties. Some investment treaties concluded when climate change treaties were not that ratified stipulated that the parties should promote their ratification. See Treaty establishing the Common Market for Eastern and Southern Africa (signed 5 November 1993, entered into force 8 December 1994) art 124.1 (available here); Political Dialogue and Cooperation Agreement between the Andean Community and the European Community (signed 15 December 2003) art 38(1) (available here).

[39] See *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* Preliminary Objections Judgment [1970] ICJ Rep 3, 32, para 34.

[40] *Obligations of States in respect of Climate Change* (Advisory Opinion), ICJ Proceedings, Written Statement of Burkina Faso (2 April 2024) paras 389–95.

[41] *Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS Case No 31, Advisory Opinion (21 May 2024) para 227.

[42] Gordon and Pohl's conclusion, based on a review of international investment agreements until 2010, that climate change did not yet penetrate the list of environmental concerns that States addressed in their international investment agreements, is therefore not entirely correct. Gordon and Pohl (n 20) 6.

[43] Annex III: Chronological table of the adoption of investment treaties containing climate change clauses.

[44] See Energy Charter Treaty (concluded 17 December 1994, entered into force 16 April 1998) preamble, para 14 (available here). Commenting on the environmental requirement, the Energy Charter Secretariat notes that: 'The provisions [on the environment] are more aspirational rather than legally binding, in part because of the differences in economic development between the Contracting Parties but also because it was felt more appropriate to leave the development of binding rules to the international environmental bodies'. See the Energy Charter Secretariat Guide to the Energy Charter, 12 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2427/download> (accessed 23 May 2024). See also Treaty establishing the Common Market for Eastern and Southern Africa 1994 (n 38) (available here).

and cooperation agreements.[45] The practice persists. Some of the most recent treaties continue to address climate change considerations only in their preamble.[46] In such treaties, climate change is merely an element of the context of the treaty terms that is relevant to identify their object and purpose when interpreting them.[47] Other treaties continue to address climate change consideration only through a single cooperation clause.[48]

[45] EC–Hungary Association Agreement 1991 (n 27) art 79 (environment) (available here); EC–Poland Association Agreement art 80 (environment) (signed 16 December 1991, entered into force 1 February 1994) (available here); EC–Romania Association Agreement (signed 1 February 1993, entered into force 1 February 1995) art 81 (environment) (available here); EC–Bulgaria Association Agreement (signed 8 March 1993, entered in force 1 February 1995) art 81 (environment) (available here); EC–Czech Republic Association Agreement art 81 (environment) (signed 4 October 1993, entered in force 1 February 1995) (available here); EC–Slovak Republic Association Agreement (signed 4 October 1993, entered into force 1 February 1995) art 81 (environment) (available here); EC–Ukraine Partnership and Cooperation Agreement (signed 14 June 1994, entered into force 1 March 1998) art 63 (environment) (available here); EC–Russia PCA (signed 24 June 1994, entered into force 1 December 1997) art 69 (environment) (available here); EC–Moldova, Republic of Partnership and Cooperation Agreement (signed 28 November 1994, entered into force 1 July 1998) art 61 (environment) (available here); EC–Kazakhstan Cooperation Agreement art 55 (environment) (signed 9 February 1995, entered into force 1 July 1999) (available here); EC–Kyrgyzstan Cooperation Agreement (signed 9 February 1995, entered into force 1 July 1999) art 55 (environment) (available here); Belarus–European Communities Cooperation Agreement (signed 6 March 1995, not yet in force) art 46 (environment) (available here); EC–Estonia Association Agreement (signed 12 June 1995, entered into force 1 February 1998) art 82 (environment) (available here); EC–Lithuania Association Agreement (signed 12 June 1995, entered into force 1 February 1998) art 83 (environment) (available here); EC–Latvia Association Agreement (signed 12 June 1995; entered into force 1 February 1998) art 83 (environment) available here); EC–Georgia Cooperation Agreement (signed 22 April 1996; entered into force 1 July 1999) art 57 (environment) (available here); Armenia–EC Cooperation Agreement (signed 22 April 1996, entered into force 1 July 1999) art 55 (environment) (available here); Azerbaijan–European Communities Partnership and Cooperation Agreement (signed 22 April 1996, entered into force 1 July 1999) art 56 (environment) (available here); EC–Slovenia Association Agreement (signed 10 June 1996, entered into force 1 July 1999) art 82 (Environment and Protection against Natural Disasters) (available here); EC–Uzbekistan Cooperation Agreement (signed 21 June 1996, entered into force 1 July 1999) art 54 (Environment and Human Health) (available here); EC–Tajikistan Partnership Agreement (signed 11 October 2004, entered into force 1 January 2010) art 52 (Environment and health) (available here)

[46] See eg Trade and Economic Partnership Agreement between the EFTA States (Iceland, Liechtenstein, Norway and Switzerland) and India (adopted 10 March 2024, not yet in force) art 11.5 (available here). See also Chile–Paraguay FTA (signed 1 December 2021, entered into force 14 February 2024) art 12.15 (available here); Turkey–United Kingdom FTA (signed 29 December 2020, not yet in force) Preamble, para 7 (available here) (this is the only meaningful climate clause in this treaty. The other climate clause (art 13.2) only includes climate change in the list of topics for review and further negotiations); EU–Kenya EPA (signed 18 December 2023, not yet in force) art 83, para 2(g)(iv) (available here).

[47] See Vienna Convention on the Law of Treaties between States (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31, para 2. See also *Dispute between Argentina and Chile concerning the Beagle Channel* (18 February 1978) XXI UNRIAA 53, 89, para 19 (holding that: 'Although Preambles to treaties . . . are not operative clauses . . . they may be relevant and important as guides to the manner in which the Treaty should be interpreted, and in order . . . to "situate" it in respect of its object and purpose').

[48] See Economic Complementation Agreement No 75 between the Republic of Chile and the Republic of Ecuador (signed 13 August 2020, entered into force 16 May 2022) art 17.17 (available here); Andean Community–EC Political Dialogue and Cooperation Agreement 2003 (n 38) art 38, para 1 (available here); Japan–Mexico EPA (signed 11 October 2004, entered into force 1 January 2020) art 147, para 1 (available here) (indicating that cooperation activities between the parties may include 'promotion of capacity and institutional building to foster activities related with the Clean Development Mechanism under the Kyoto Protocol to the United Nations Framework Convention on Climate Change'); China–Peru FTA (signed 28 April 2009, entered into force 1 March 2009) art 162 (available here); Chile–Turkey FTA (signed 14 July 2009, entered into force 1 March 2011) art 37, para 8(a) (available here); Chile–Malaysia FTA (signed 13 November 2010, entered into force 18 April 2012) art 9, para 5 (available here) (expressing the parties 'intention . . . to cooperate in environmental areas of common global or domestic concern, which may include, among others: (a) climate change'); Chile–Vietnam FTA (signed 12 November 2011, not yet in force) art 9, para 3(k) (available here); Colombia–Korea FTA (signed 21 February 2013, entered into force 15 July 2016) art 17.5, para 2(d) and Annex XVI-A (available here); Chile–Thailand FTA (signed 4 September 2013, entered into force 5 November 2013) art 11.5 (available here); Malaysia–Turkey FTA (signed 17 April 2012, entered into force 1 August 2015) art 9, para 10(1)(a) (available here); Eurasian Economic Union–Vietnam FTA (signed 29 May 2015, entered into force 5 October 2016) art 12.5, para 3(c) (available here); Chile–Uruguay FTA (signed 4 October 2016, entered into force 12 December 2018) arts 13.3. and 12.11 (available here); Argentina–Chile FTA (signed 2 November 2017, entered into force of 1 May 2019) art 13.10 (available here) (noting, in particular, that there are 'important spaces for collaboration between the Parties on climate change adaptation, based on the experiences that each has developed at the subnational level'); Australia–Peru FTA (signed 12 February 2018; entered into force 11 February 2020) (available here); Central America Republics–Korea FTA (signed 21 February 2018, not yet in force) art 17.11, para 3(i) (available here); Trade and Economic Partnership Agreement between the EFTA States (Iceland, Liechtenstein, Norway and Switzerland) and India 2024 (n 46) art 11.5 (available here) (providing that the parties 'shall endeavour to cooperate bilaterally, and in other fora, as appropriate'); EFTA–Kosovo (signed 23 January 2025, not yet in force) art 6.8 (available here). EU–Kenya EPA 2023 (n 46) art 83, para 2(g)(iv) (available here).

Nevertheless, most recent climate change clauses are markedly more numerous and more detailed than previous ones.[49] These clauses are sometimes gathered in a climate change chapter[50] (while also appearing in other relevant sections of the treaty). A notable example is the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom, of the other part (2020) (the EU–Euratom–UK TCA). The climate change clauses of the Agreement are among the most elaborate provisions surveyed in this article. This is consistent with the parties' view that they share the 'same biosphere'.[51]

C. *Inserting Climate Change in Investment Treaties as an Afterthought*

Three reasons suggest that climate change clauses have been included in investment treaties as an afterthought.

First, climate change clauses appear more in preferential trade agreements with an investment chapter than in bilateral investment treaties. This finding is consistent with the marked tendency of including environmental clauses more in preferential trade agreements with an investment chapter than in bilateral investment treaties.[52] The solidarity between parties to bilateral investment treaties seems weaker than the one existing between those that conclude preferential trade agreements with an investment chapter. Indeed, the greater integration of the economies of the parties is one of the objectives of preferential trade agreements.

Secondly, investment treaty climate change clauses appear more readily in other chapters of preferential trade agreements than in their investment chapters.[53] For instance, there are 111 occurrences of the term 'climate change' in the Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of the African, Caribbean and Pacific States (OACPS), of the other part (2023). No such occurrence is to be found, however, in the chapter entitled 'Investment'. There are six other occurrences, including three in the 'Science, Technology, Innovation and Research' chapter,[54] and three other occurrences in the chapter entitled 'Trade Cooperation'.[55] The FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom (2021) (Iceland–Liechtenstein–Norway–UK FTA) follows a similar pattern.[56] States

[49] See eg the Sustainable Investment and Facilitation Agreement between the European Union and the Republic of Angola (signed 17 November 2023, entered into force 1 September 2024) (available here).

[50] See eg the Strategic Partnership, Trade and Cooperation Agreement between the Republic of Moldova and the United Kingdom (signed 24 December 2020, entered into force 1 January 2021) (available here) (in this agreement, ch 17 deals with 'climate action' in general, and more specific provisions follow, namely arts 333(4), 334(c) and 342 (j)).

[51] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom, of the other part (signed 30 December 2020, entered into force 1 May 2021) art 393 (available here).

[52] Gordon and Pohl (n 20) 7.

[53] See eg Trade and Economic Partnership Agreement between the EFTA States (Iceland, Liechtenstein, Norway and Switzerland) and India 2024 (n 46) art 11.5 (available here). Compare also the references to climate change in the Trade in Services and Investment Chapter of the EU–New Zealand FTA (signed 9 July 2023, entered into force 1 May 2024) (available here) with the same reference in ch 19 on 'Trade and Sustainable Development'.

[54] Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of the African, Caribbean and Pacific States, of the other part 2023 (n 23) art 46, para 6 (available here) (see also art 47, para 3 of the same instrument).

[55] ibid art 49, paras 3–4.

[56] Of the 30 references to climate change in the Agreement, only one appears in the chapter on investment. See FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 3.11 (available here).

seem to view a stronger connection between climate change and trade than between climate change and investments.

Thirdly, when climate change clauses appear in the investment section of the relevant treaties, they tend to appear in the facilitation and cooperation clauses, or the clauses seeking to prevent a finding of State responsibility for climate change measures. However, they hardly appear in the standards of protection clauses, such as the most favoured nation clause, the national treatment clause, the prohibition on expropriation without compensation or the denial of benefits clause.[57] The trend is to shoehorn climate change considerations into the traditional environmental clauses of investment treaties, as apparent from the above-mentioned interpretative clauses that include measures or laws relating to climate change in their definition of 'environmental laws' or 'environmental measures'.[58]

From that perspective, States seem to consider climate change as a 'business-as-usual' environmental issue, and deal with it as an afterthought. However, two new trends seem to focus more on the relations between climate change and investment. First, following the EU Model BIT,[59] it is increasingly common to see specific clauses devoted to climate change and investment.[60] Secondly, States have started to conclude economic treaties devoted specifically to climate change. Instead of including climate change clauses in investment treaties, these treaties build rather investment treaties around climate change. This is the case of the regional Indo-Pacific Economic Framework for Prosperity Agreement Relating to a Clean Economy (2024)[61] and of the trans-regional Agreement on Climate Change, Trade and Sustainability (2024) between Costa Rica, Iceland, New Zealand and Switzerland.[62] Whereas the clauses of the former record primarily the intention of the parties to cooperate in respect of climate change and do not stipulate binding substantive provisions, the clauses of the latter contain binding climate change clauses dealing primarily with trade.[63] These

[57] See, however, Chile–EU Advanced Framework Agreement (signed 13 December 2023, not yet in force) Annex XXXX, para 3 (available here); Decision of the Energy Charter Conference: Amendments to the Energy Charter Treaty (CCDEC—12 GEN) (2024) (signed 3 December 2024, not yet in force) art 4 (available here) (with respect to art 34, para 8) (with respect to art 13, para 4). This study discusses these clauses in Section IV.C.(ii)(d).

[58] See eg FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13.2, para 2 (available here).

[59] EU Model Clauses for BITs (n 37) (available here); Italy Model BIT (published 1 August 2022) (available here).

[60] China–EU Comprehensive Agreement on Investment (signed 22 January 2021, not yet in force) art 6 (available here); ACFTA Protocol on Investment (signed 21 January 2023, not yet entered into force) art 26 (available here); Sustainable Investment and Facilitation Agreement between the European Union and the Republic of Angola 2023 (n 49) art 32 (available here); Australia–United Arab Emirates CEPA (signed 6 November 2024, not yet in force) art 11.4 (available here); New Zealand–United Arab Emirates Comprehensive Economic Partnership Agreement (signed 14 January 2025, 28 August 2025) art 8.4 of (available here).

[61] Indo-Pacific Economic Framework for Prosperity Agreement Relating to a Clean Economy (Australia, Brunei Darussalam, Fiji, India, Indonesia, Japan, the Republic of Korea, Malaysia, New Zealand, Philippines, Singapore, Thailand and Vietnam) (signed 6 June 2024, entered into force 11 October 2024) (available here)

[62] Agreement on Climate Change, Trade and Sustainability (Costa Rica, Iceland, New Zealand, Switzerland) (signed 15 November 2024, not yet in force) (available here) (the objective of this treaties is 'to foster the contribution of international trade in addressing climate change and other serious environmental challenges, including loss of biological diversity and pollution, thereby contributing to the achievement of sustainable development, through such actions as: (a) removing tariffs on environmental goods; (b) liberalising trade in environmental and environmentally related services; (c) disciplining and eliminating harmful fossil fuel subsidies in order to mitigate their adverse impact on the environment and contribute to global efforts to rapidly reduce greenhouse gas emissions resulting from production and consumption of fossil fuels; and (d) providing guidelines for voluntary eco-labelling programmes and mechanisms').

[63] This treaty is based on the parties' determination to 'to enhance the contribution of trade and trade policy as important levers in the transition to net-zero emissions, more resource-efficient and circular economies, thereby improving economies and raising income'. Agreement on Climate Change, Trade and Sustainability 2024 (Costa Rica, Iceland, New Zealand, Switzerland) (n 62) (available here).

two treaties are part of a burgeoning trend of multilateral sustainable development treaties.[64]

In conclusion, the practice of including climate change clauses in investment treaties is still developing. In the sections below, this article distinguishes investment treaty clauses depending on whether they seek to provide support to the climate change regime or to mobilize investments and investment law to contribute to the fight against climate change and examines these two categories of clauses in turn.

III. CLAUSES SEEKING TO SUPPORT THE CLIMATE CHANGE REGIME

Investment treaty clauses dealing with climate change are premised on the parties' shared views on the reality of climate change. Some of them reaffirm the gravity of the loss and damage caused by climate change,[65] especially to 'the most vulnerable populations liv[ing] in developing countries, in particular in Least Developed Countries and Small Island ACP [ie African, Caribbean and Pacific] States',[66] as well as to future generations.[67] Others stressed the urgent need to address climate change.[68] Some treaties recognize the importance of 'collaborating on the transition toward net zero emissions by 2050'[69] or reaffirm the parties' ambition in this respect.[70] Treaties support these consensual views on climate change by referring to the UNFCCC and the Paris Agreement primarily.[71] Some treaties refer also to the Kyoto Protocol.[72] The overwhelming number of references to the UN climate change treaties reinforce their status as the agreed global framework for combating it.[73]

The parties to investment treaties implemented their shared views on climate change by providing support to the climate change regime through treaty clauses.

[64] WTO, 'Investment Facilitation for Development' (published 29 February 2024, not yet in force) (available here); Indo-Pacific Economic Framework for Prosperity Agreement Relating to a Fair Economy (signed 6 June 2024, not yet in force) (available here).

[65] FTA between the Republic of Chile and the Federative Republic of Brazil (signed 21 November 2018, entered into force 25 January 2022) art 17.14, para 1 (available here) (recognizing that 'climate change poses significant risks to communities, infrastructure, the economy, the environment and human health, with potential consequences for international trade, and that efforts are required to build resilience').

[66] Cotonou Agreement (signed 23 June 2000, entered into force 1 April 2003) (available here) Preamble, para 15.

[67] Colombia–Ecuador–EU Peru FTA (signed 26 June 2012, entered into force 1 June 2013) art 275, para 1 (available here).

[68] FTA between New Zealand and the United Kingdom (signed 28 February 2022, entered into force 31 May 2023) art 22.3, para 3(c) (available here) (recognizing that 'the urgent need to address climate change, as outlined in the Intergovernmental Panel on Climate Change Special Report on Global Warming of 1.5 °C, is a contribution to the economic, social, and environmental objectives of sustainable development'. See also FTA between the United Kingdom and Australia (signed 16 and 17 December 2021, entered into force 31 May 2023) art 22.5, para 2 (available here).

[69] Australia–United Arab Emirates CEPA (n 60) art 18.3, para 2 (available here) (referring in this respect to 'the importance of collaborating on the transition toward net zero emissions by 2050 in light of the significant complementarities between their economies and the potential for trade and investment between the Parties, together with other forms of joint activity including those set out in paragraph 5 of Article 18.5 (Climate Change), to contribute to both Parties' achievement of net zero').

[70] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom, of the other part 2020 (n 51) art 355, para 3 (available here).

[71] Trade and Economic Partnership Agreement between the EFTA States (Iceland, Liechtenstein, Norway and Switzerland) and India 2024 (n 46) art 11.5, para 1 (available here). See also EFTA–Moldova FTA (signed 27 June 2023, not yet entered into force) art 9.8 (available here); Agreement between the United Kingdom and Japan for a Comprehensive Economic Partnership (signed 23 October 2020, entered into force 1 January 2021) art 16.4, para 4 (available here).

[72] Strategic Partnership, Trade and Cooperation Agreement between the Republic of Moldova and the United Kingdom 2020 (n 50) art 333, para 4 (available here).

[73] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part 2020 (n 51) art 764, para 1 (available here) (providing that 'each Party shall respect the Paris Agreement, and the process set up by the UNFCCC and refrain from acts or omissions that would materially defeat the object and purpose of the Paris Agreement').

The support provided by these clauses may be general and relate to the regime as a whole (A) or sectoral when treaties focus only on specific aspects of the climate change regime (B). I examine these clauses in turn before assessing their significance (C).

A. *Clauses Providing General Support*

The degree of support that investment treaty clauses provide to the climate change regime varies. Whereas some clauses provide little support to the climate change regime considering their limited added value (i), the support provided by other clauses is more meaningful (ii).

(i) *Clauses providing limited support to the climate change regime*

Three types of clauses provide only a limited support to the climate change regime, namely clauses that reaffirm commitments or obligations made by the parties under this regime (a), those imposing a duty for the parties to cooperate in respect of climate change (b) and clauses requiring from them to promote or advocate some climate change policies or actions (c).

a) Clauses reaffirming commitments in respect of climate change

Treaty clauses that reaffirm climate change commitments lend themselves to four main observations. First, their formulation is not uniform. Although this article uses the verb 'reaffirm' to characterize these clauses, other formulas appear in treaty practice, including 'affirming', 'confirming' or 'recalling'.[74]

Secondly, the clauses refer more readily to the parties' 'commitments' than to their legal obligations,[75] even if some treaties reaffirm these obligations themselves.[76] It is doubtful whether great legal significance should be placed on this choice of words. Nevertheless, the word 'commitments' emphasizes more the agency of the party that makes the relevant commitments—and, therefore, its ability to withdraw them, compared to the word 'obligations' which does not have a similar connotation.

Thirdly, there are nuanced differences in terms of the precise commitments being affirmed. Some clauses reaffirm the parties' commitment to *reaching the objectives of the multilateral climate change conventions*.[77] Other clauses reaffirm the parties'

[74] Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part (signed 27 June 2012, entered into force 1 October 2016) art 1, para 2 (available here); Australia–United Arab Emirates CEPA (n 60) art 18.5, para 1 (available here).

[75] Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part (n74) art 1, para 2 (available here); Strategic Partnership and Cooperation Agreement between the United Kingdom and Georgia (signed 21 October 2019, entered into force 1 January 2021) art 222, para 4 (available here); FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13.22, para 2(c) (available here); Economic Complementation Agreement No 75 between the Republic of Chile and the Republic of Ecuador 2020 (n 48) art 17.17 (available here); Trade and Economic Partnership Agreement between the EFTA States (Iceland, Liechtenstein, Norway and Switzerland) and India 2024 (n 46) art 11.5, para 2 (available here); Chile–Paraguay FTA 2021 (n 46) art 12.15(1) (available here).

[76] See eg FTA between New Zealand and the United Kingdom 2022 (n 68) art 14.18, para 2 (available here) (providing that: 'The Parties recognise the importance of environmental protection, including with respect to climate change mitigation and adaptation, and recall each Party's rights and obligations relating to the protection of the environment provided for in this Agreement'). See also Decision of the Energy Charter Conference: Amendments to the Energy Charter Treaty (CCDEC—12 GEN) (2024) (n 57) art 5, para 1 (available here) (with respect to art 19, para 2).

[77] Strategic Partnership and Cooperation Agreement between the United Kingdom and Georgia 2019 (n 75) art 222, para 4 (available here); EU–Georgia Association Agreement (signed 27 June 2014, entered into force 1 July 2016) art

climate change commitments themselves.[78] Yet, others reaffirm the parties' commitment to *implementing climate change treaties*,[79] or to implementing them *effectively*.[80] This last type of clauses build upon the practice relating to multilateral environmental agreements, whereby parties to investment treaties commit to implement their obligations arising from these agreements.[81]

Fourthly, three legal instruments, namely the UNFCCC, the Kyoto Protocol and the Paris Agreement, are often referred to as the sources of the commitments that the parties reaffirm.[82] However, some treaties refer to other legal instruments such as the 2021 Glasgow Global Methane Pledge.[83]

Clauses reaffirming previous commitments or obligations remind the parties of their commitments under the climate change regime. They do not as such create new legal obligations under the international investment agreements themselves. The same is not true of investment treaty clauses imposing a duty to cooperate in respect of climate change, as discussed in the next section.

b) Clauses creating obligations to cooperate in the fight against climate change

Clauses requiring parties to cooperate in respect of climate change are most numerous in investment treaties. They are also the lowest common denominator of the substantive clauses appearing in investment treaties. As mentioned above, cooperation clauses are the only climate change clauses in some investment treaties. The content of cooperation clauses is not uniform. In the paragraphs below, I review the most significant aspects of the cooperation clauses, starting with the contours of the obligation to cooperate (i), the areas of cooperation (ii), the principles governing cooperation (iii) and the concrete steps that the parties committed to undertake to implement their duty to cooperate (iv).

230, para 4 (available here); Korea–United Kingdom FTA (signed 22 August 2019, entered into force 1 January 2021) art 13.5, para 3 (available here).

[78] FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13.22, para 2(c) (available here). See also Economic Complementation Agreement No 75 between the Republic of Chile and the Republic of Ecuador 2020 (n 48) art 17.17 (available here).

[79] See eg FTA between New Zealand and the United Kingdom 2022 (n 68) art 22.6, para 2 (available here); Colombia–Ecuador–EU Peru FTA 2012 (n 67) (available here) art 270 (in reference to the Kyoto Protocol).

[80] See eg Trade and Economic Partnership Agreement between the EFTA States (Iceland, Liechtenstein, Norway and Switzerland) and India 2024 (n 46) art 11.5, para 2 (available here); Chile–Paraguay FTA 2021 (n 46) art 12.15(1) (available here). See FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13.22, para 2(a) (available here). See also Agreement between the United Kingdom and Japan for a Comprehensive Economic Partnership 2020 (n 71) art 16.4 (available here); EU–Kyrgyzstan Enhanced Partnership and Cooperation Agreement (signed 25 June 2024, not yet in force) art 177, para 2 (available here); EU–Japan Economic Partnership (signed 17 July 2018, entered into force 1 February 2019) art 16.4, para 4 (available here).

[81] See eg Economic Partnership Agreement between the CARIFORUM States, of the one part, and the United Kingdom, of the other part (signed 22 March 2019, not yet in force) arts 183, paras 3 and 4 (available here). See also Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part (signed 10 June 2016, not yet in force) art 8 (available here); Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018) art 20.4 (available here); FTA between the Republic of Colombia and the Republic of Panama (signed 20 September 2013, not yet in force) art 9.3 (available here).

[82] See however, Strategic Partnership and Cooperation Agreement between the United Kingdom and Georgia 2019 (n 75) art 222, para 4 (available here) (which does not refer to the Paris Agreement).

[83] Canada–Ukraine Modernized FTA (signed 22 September 2023, entered into force 1 July 2024) art 13.10, para 6 (available here) (reaffirming the parties' intention 'to reduce global anthropogenic methane emissions across all sectors by at least 30 per cent below 2020 levels by 2030'). Art 13.10, para 1 of the Treaty also provides that the parties are 'resolved to demonstrate international leadership and work together to pursue domestic and global efforts to limit the global temperature increase to 1.5 degrees Celsius above pre-industrial levels *and transition to net-zero greenhouse gas emissions by 2050*' (emphasis added).

i. The obligation to cooperate: Treaties word the obligation to cooperate in respect of climate change differently. Some treaties record the parties' agreement to cooperate.[84] Other clauses impose on the parties a binding obligation to cooperate or to develop and strengthen their cooperation in respect of climate change.[85] Other treaties give more content to the obligation to cooperate by identifying in a detailed manner the objectives of the cooperation. These objectives revolve around mitigation of and adaptation to climate change. For instance, the Canada–Ukraine Modernized FTA (2023) obligate the parties 'to find innovative solutions to mitigate and adapt to the effects of climate change, including through the use of market-based approaches and trade-related climate measures to achieve overall green growth objectives'.[86] Some treaties provide a long list of the cooperation objectives pursued by the parties.[87]

[84] Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part (n 74) art 31, para 1 (available here) (providing that: 'The Parties agree to cooperate to accelerate the fight against climate change and its impact on environmental degradation and poverty, promote policies to help mitigate climate change and adapt to the negative effects of climate change, especially the rise of sea level, and to set their economies on sustainable low-carbon growth paths'). See also Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part (signed 10 May 2010, entered into force 1 June 2014) art 24 (available here); FTA between New Zealand and the United Kingdom 2022 (n 68) art 22.6, para 3 (available here); Agreement between the United Kingdom and Japan for a Comprehensive Economic Partnership 2020 (n 71) art 16.4, para 4 (available here); ASEAN–Australia–New Zealand FTA Second Protocol (2023) (signed 21 August 2023, entered into force 21 April 2025) art 2 (available here).

[85] Strategic Partnership and Cooperation Agreement between the United Kingdom and Georgia 2019 (n 75) art 284 (available here) (providing that 'The Parties shall develop and strengthen their cooperation to combat climate change. Cooperation shall be conducted considering the interests of the Parties on the basis of equality and mutual benefit and taking into account the interdependence existing between bilateral and multilateral commitments in this area'). See also EU–Kyrgyzstan Enhanced Partnership and Cooperation Agreement 2024 (n 80) art 263 and art 264 (available here); EU–Georgia Association Agreement 2014 (n 77) art 307 (available here); EU–Moldova Association Agreement (27 June 2014, entered into force 1 July 2016) art 93(c) (available here); Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part (signed 21 December 2015, entered into force 1 March 2020) art 315 (available here); Australia–EU Framework Agreement (signed 7 August 2017, entered into force 21 October 2022) art 46 (available here).

[86] See Canada–Ukraine Modernized FTA 2023 (n 83) art 13.10, para 6 (available here). See also art 13.23 (imposing on the parties the obligation to 'cooperate in international forums on ways to further facilitate and liberalize global trade in environmental goods and services'). The free-market approach appears also from EU–Kyrgyzstan Enhanced Partnership and Cooperation Agreement 2024 (n 80) art 2, para 3, art 263 (available here).

[87] Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part 2010 (n 84) art 24, para 1 (available here) (cooperation between the parties shall 'aim at': '(a) combating climate change, with the overall goal of a rapid transition to low-carbon societies, through nationally appropriate mitigation and adaptation actions; (b) advocating the efficient use of resources, inter alia through widespread use of best available and economically viable low carbon technologies and standards for mitigations and adaptation; (c) exchanging expertise and information regarding benefits and architecture of trading schemes; (d) enhancing public and private sector financing instruments, including market mechanisms and public private partnerships which could effectively support action to combat climate change; (e) collaborating on low-carbon technology research, development, diffusion, deployment and transfer in order to mitigate greenhouse gas emissions while maintaining economic growth; (f) exchanging experience and expertise, where appropriate, in monitoring and analysing greenhouse gases' effects and developing mitigation and adaptation programmes; (g) supporting, where appropriate, mitigation and adaptation action of developing countries, including through the Flexible Mechanisms of the Kyoto Protocol'. See also art 18, para 2(c) of the same instrument (with respect to cooperation in reducing greenhouse gas emission in transport sector) and art 17 (1)(a) and (b) with respect to cooperation in the field of renewable energy); art 2, paras (d) and (f) (on the aims of cooperation), and art 6(e) of the same instrument with respect to the aims of development cooperation between the parties; Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part 2012 (n 74) art 31, para 1 (available here); Chile–United Arab Emirates CEPA (signed 29 July 2024, not yet in force) art 16.5, para 7 (available here) (listing the following areas of cooperation '(a) research and development of cost-effective low carbon emission technologies; (b) energy efficiency; (c) development of clean and renewable energy; (d) co-benefits in enhancing air quality through air pollution control measures; (e) monitoring and reporting and verification (MRV); (f) methodologies of accounting for greenhouse gas (GHG) emissions reduction in the framework of international agreements, and (g) market and non-market carbon pricing mechanisms'). EU–Kyrgyzstan Enhanced Partnership and Cooperation Agreement 2024 (n 80) arts 263 to 265 (available here). See Central America–EU Association Agreement (signed 29 June 2012, entered into force 1 May 2024) art 50, para 3(c)–(d) (available here). From the same agreement, see art 63, para 2(b) (concerning trade-related cooperation for the implementation of the current and future international climate change regime); Australia–Korea FTA (signed 8 April 2014, entered into force 12 December 2024) art 18.8, para 2 (available here); Australia–EU Framework Agreement 2017 (n 85) art 46 (available here); Armenia–EU Comprehensive and Enhanced Partnership Agreement (signed 24 November 2017, entered into force 1 June 2018) art 54 (available here).

Other treaties target specifically the transition to a low-carbon economy,[88] including by requiring cooperation 'on ways to encourage a transition towards a resource efficient and circular economy',[89] or 'on means to promote low-carbon technologies, other climate-friendly technologies and energy efficiency'.[90]

ii. Areas of cooperation: Cooperation clauses in investment treaties frequently identify the areas of cooperation between the parties. Like the cooperation objectives, areas of cooperation extend beyond mitigation,[91] and include adaptation and resilience to climate change. Some treaty clauses mention so expressly.[92]

Treaties often provide a list of areas of cooperation between the parties.[93] Among the most interesting examples, several cooperation clauses concluded by the EU identify, as an area of cooperation:

> cooperation on trade-related aspects of the current and future international climate change regime, including issues relating to global carbon markets, ways to address adverse effects of trade on climate, as well as means to promote low carbon technologies and energy efficiency.[94]

[88] See eg art 20.15 (Transition to a Low Emissions and Resilient Economy) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership 2018 (n 81) (available here).

[89] FTA between New Zealand and the United Kingdom 2022 (n 68) art 22.13 (available here). See also FTA between the United Kingdom and Australia 2021 (n 68) art 22.7, para 3 (available here); European Union–Singapore FTA (signed 19 October 2018, entered into force 21 November 2019) art 12.11, para 3 (available here)

[90] EU–Japan Economic Partnership 2018 (n 80) art 16.12 (available here).

[91] Korea–Peru FTA (signed 11 November 2010, entered into force 1 August 2011) art 19, para 8 (available here) (extremely careful to focus only on adaptation to climate change).

[92] FTA between New Zealand and the United Kingdom 2022 (n 68) art 22.10, para 4(c) (available here). See Strategic Partnership and Cooperation Agreement between the United Kingdom and Georgia 2019 (n 75) art 288 (available here). See also New Zealand–United Arab Emirates Comprehensive Economic Partnership Agreement 2025 (n 60) art 14.7, para 5(b) (available here) (the parties agree to cooperate bilaterally and internationally to 'mitigate and adapt to climate change including through: i) implementation of the Paris Agreement; ii) international trade-related aspects of effective action against climate change; and iii) contributing to a reduction in greenhouse gas emissions and increased climate resilience'). EU–Georgia Association Agreement 2014 (n 77) art 308 (available here); Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part 2015n 85) art 216 (available here); art 217 of the same legal instrument; Armenia–EU Comprehensive and Enhanced Partnership Agreement 2017 (n 87) art 52 (available here).

[93] FTA between the Republic of Chile and the Federative Republic of Brazil 2018 (n 65) art 17.14, para 4 (available here) (creating between the parties an obligation to 'cooperate to address matters of common interest', including 'climate finance; climate governance and institutions; sustainable consumption and production and climate change; air quality co-benefits of greenhouse gas control measures; climate change mitigation and adaptation; resilient water management; sustainable agriculture; energy efficiency; research and development of cost-effective low-emission technologies; development of alternative, clean and renewable energy sources; solutions to deforestation and forest degradation; recovery of degraded areas; monitoring, reporting and verification (MRV) of greenhouse gas (GHG) emissions; methodologies for accounting for GHG emissions reductions under international agreements; carbon pricing mechanisms and other complementary measures to support a low-emissions transition; control of the spread of pests and diseases; preparedness for and action against extreme events related to climate change, such as forest fires, drought and desertification'). See also Chile–Paraguay FTA 2021 (n 46) art 12.15, para 4 (available here); Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part (n 74) art 32, paras (j)–(k) (available here); FTA between the United Kingdom and Australia 2021 (n 68) art 22.5, para 3 (available here); Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part 2020 (n 51) art 401, para 2 (available here); Economic Complementation Agreement No 75 between the Republic of Chile and the Republic of Ecuador 2020 (n 482) art 17.17, paras 3–4 (available here); Australia–United Arab Emirates CEPA 2024 (n 60) art 18.5, para 3 (available here) (it is noteworthy that one of the areas of cooperation in this context is 'capacity building for climate vulnerable countries'); Cotonou Agreement 2000 (n 66) art 32A (available here) (identifying as focus area of the cooperation between the parties, 'enhance the capacity of ACP States in the development of, and the participation in, the global carbon market' and 'assisting ACP states to adapt to climate change in relevant sectors such as agriculture, water management and infrastructure, including through transfer and adoption of relevant and environmentally sound technologies').

[94] Korea–United Kingdom FTA 2019 (n 77) art 1(f) Annex 13 (available here); Central America–EU Association Agreement 2012 (n 87) art 63, para 2(b) (available here); Strategic Partnership and Cooperation Agreement between the United Kingdom and Georgia 2019 (n 75) art 231(j) (available here); Agreement between the United Kingdom and Japan for a Comprehensive Economic Partnership 2020 (n 71) art 16.12(h) (available here); Strategic Partnership,

Similarly, other treaties obligate the parties to 'cooperate to promote the positive contribution of trade to the transition to low greenhouse gas emissions and climate-resilient development'.[95] Treaties concluded by some Latin American countries stress that cooperation may relate to 'different economic, social and environmental policy instruments that enable the achievement of national climate change objectives and support the achievement of their international climate change commitments'.[96] Some treaties indicate that cooperation may cover 'policy dialogue and cooperation regarding implementation of the Paris Agreement'.[97] Yet, other treaties suggest that the parties were not satisfied with the Paris Agreement. This is the case of the EU–Australia Framework Agreement (2017), in which the parties identify as area of their cooperation, '(g) working together to achieve a robust and legally binding international climate agreement applicable to all countries'.[98]

Some topics are rarely identified in investment treaties as areas of cooperation in respect of climate change. This is the case of intellectual property. The parties to the UK–New Zealand FTA (2022), in what is an exception to the general practice, recognized the growing importance of the protection of intellectual property in further promoting trade and investment between them and identified, as areas of cooperation and dialogue, 'cooperation on intellectual property issues relevant to science, technology, and innovation activities, including in *the areas of clean growth, low-carbon, and environmentally beneficial technologies and other climate friendly technologies*'.[99] Sustainable water management is increasingly addressed separately as an area of cooperation between some investment parties in light of 'the crucial role of water in climate change adaptation and mitigation'.[100]

Trade and Cooperation Agreement between the Republic of Moldova and the United Kingdom 2020 (n 50) art 342(j) (available here).

[95] Agreement between the United Kingdom and Japan for a Comprehensive Economic Partnership 2020 (n 71) art 16.4, para 4 (available here); FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13.22, para 3(b) (available here); Ecuador–EFTA Comprehensive Economic Partnership Agreement (signed 25 June 2018, entered into force 1 November 2020) art 8.11, para 2(c) (available here) ('promote the contribution of trade to the transition to a low-carbon-, sustainable and climate resilient economy').

[96] FTA between the Republic of Chile and the Federative Republic of Brazil 2018 (n 65) art 17.14 (available here); EU–Moldova Association Agreement 2014 (n 85) art 95 (available here) (referring to climate preparedness cooperation); EU–Kosovo Stabilisation and Association Agreement (signed 27 October 2015, entered into force 1 April 2016) art 116 (available here) (cooperating in the development of Kosovo's climate policy and mainstreaming climate considerations in various fields of activities); Political, Free Trade and Strategic Partnership Agreement between the United Kingdom and Ukraine (signed 8 October 2020, entered into force 1 January 2021) art 341(c) (available here) (regarding the development and implementation of a policy on climate change in line with international agreements).

[97] European Union–New Zealand FTA (signed 9 July 2023, entered into force 1 May 2024) art 19.6, para 5 (available here) (providing that cooperation may cover '(a) policy dialogue and cooperation regarding implementation of the Paris Agreement, including with respect to means to promote climate resilience, renewable energy, low-carbon technologies, energy efficiency, sustainable transport, sustainable and climate-resilient infrastructure development, emissions monitoring, and emissions action in relation to third countries as appropriate'). Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part 2020 (n 51) art 401, para 3 (available here).

[98] Australia–EU Framework Agreement 2017 (n 85) art 46(g) (available here). See also EU–Singapore FTA (signed 19 October 2018, entered into force 21 November 2019) art 12.6, para 3 and art 12.10, para (f) (available here) (referring to 'work together to strengthen the multilateral, rules-based regime under the UNFCCC building on the UNFCCC's agreed decisions, and to support efforts to develop a post-2020 international climate change agreement under the UNFCCC applicable to all parties'). Strategic Partnership, Trade and Cooperation Agreement between the Republic of Moldova and the United Kingdom 2020 (n 50) art 333, para 4 (available here) (the parties commit to 'cooperating on the development of the future international climate change framework under the UNFCCC and its related agreements and decision').

[99] FTA between New Zealand and the United Kingdom 2022 (n 68) art 22.7, para 1(f) (available here) (emphasis added). For another energy-efficiency clause, see Strategic Partnership and Cooperation Agreement between the United Kingdom and Georgia (n 75) art 280 in ch 2 (energy cooperation) (available here) (with a similar wording).

[100] Australia–United Arab Emirates CEPA 2024 (n 60) art 18.11 (available here) (providing that '2. The Parties shall cooperate on efforts to develop and implement water-related climate solutions, such as addressing water pollution, improving wastewater management and treatment, enhancing circular systems of reusing and recycling water, water efficiency and sustainability as well as strengthening water governance and water resources management, protecting and restoring water- associated ecosystems, and encouraging investment in sustainable water- related infrastructure').

iii. Principles governing cooperation: Some treaty clauses often identify the principles that should govern cooperation between the parties. Treaties often do so by referring to terminology that is found in the United Nations climate change regime. For instance, the Australia–Peru FTA (2018) stresses that cooperation should reflect 'domestic circumstances and capabilities'.[101] The Colombia–Ecuador–EU Peru FTA (2012) expresses the parties' resolve to enhance their efforts regarding climate change:

> on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions, and taking particularly into account the needs, circumstances, and high vulnerability to the adverse effects of climate change of those Parties which are developing countries.[102]

Other treaties identify principles of cooperation that do not mirror closely those to be found in the UN climate change regime. For instance, Article 263 of the EU–Kyrgyzstan Enhanced Partnership and Cooperation Agreement (2024) provides that '[c]ooperation shall be conducted while taking into account the interests of the Parties on the basis of equality and mutual benefit, as well as the interdependence existing between their bilateral and multilateral commitments in that field'.[103] The Cotonou Agreement between African, Caribbean and Pacific (ACP) States and the EU (2000) stressed that cooperation shall:

> recognise the vulnerability of ACP States and in particular of small islands and low-lying ACP States to climate-related phenomena such as coastal erosion, cyclones, flooding and environmentally induced displacements, and in particular of least developed and landlocked ACP States to increasing floods, drought, deforestation and desertification.[104]

iv. Concrete cooperation steps: Treaties often identify the concrete steps that the parties will take to cooperate in respect of climate change. Parties may agree to share experiences, information and expertise or to undertake joint research activities in respect of climate change.[105] In general, the concrete steps identified by the parties are not immediately actionable. For instance, in the Australia–EU Framework Agreement (2017), the parties agreed merely 'to maintain regular dialogue and

[101] Australia–Peru FTA 2018 (n 48) art 19.4, para 7 (available here). See also Economic Complementation Agreement No 75 between the Republic of Chile and the Republic of Ecuador 2020 (n 48) art 17.18, para 2 (available here) (referring to '[t]aking into account their priorities, national circumstances and available resources').

[102] See Colombia–Ecuador–EU Peru FTA 2012 (n 67) art 275, para 2 (available here).

[103] EU–Kyrgyzstan Enhanced Partnership and Cooperation Agreement 2024 (n 80) art 263 (available here); Armenia–EU Comprehensive and Enhanced Partnership Agreement 2017 (n 87) art 51 (available here). See also Chile–Indonesia Comprehensive Economic Partnership Agreement (signed 15 December 2017, entered into force 10 August 2019) art 9.5, para 6(a) (available here).

[104] Cotonou Agreement 2000 (n 66) (available here).

[105] Armenia–EU Comprehensive and Enhanced Partnership Agreement 2017 (n 87) art 53 (available here) (the parties agree to '(a) exchange information and expertise; (b) implement joint research activities and exchanges of information on cleaner and environmentally sound technologies; (c) implement joint activities at regional and international level'). See also EU–Vietnam FTA (signed 30 June 2019, entered into force 1 August 2020) art 13.6 (available here) (referring to sharing 'share information and experiences of priority or of mutual interest, including: (a) best practices and lessons learned in designing, implementing, and operating mechanisms for pricing carbon; (b) the promotion of domestic and international carbon markets, including through mechanisms such as Emissions Trading Schemes and Reducing Emissions from Deforestation and Forest Degradation; and (c) the promotion of energy efficiency, low-emission technology and renewable energy'); art 13.14, para 1(m) of the same legal instrument); Economic Complementation Agreement No 75 between the Republic of Chile and the Republic of Ecuador 2020 (n 48) art 17.17, para 3 (available here); Chile–Paraguay FTA 2021 (n 46) art 12.15, para 3 (available here); Chile–EU Interim Trade Agreement (signed 13 December 2023, entered into force 1 February 2025) art 26.10, para 4 (available here). Colombia–Ecuador–EU Peru FTA 2012 (n 67) art 275, para 2 (available here).

cooperation at political, policy and technical levels, both bilaterally and in relevant plurilateral and multilateral fora'.[106] Article 31, paragraph 1, of the 2012 Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part, provides that:

> In order to achieve the objectives set out in paragraph 2, the Parties shall:
>
> (a) intensify policy dialogue and cooperation at the technical level;
> (b) promote cooperation on Research and Development (R&D) activities and low-emission technologies;
> (c) strengthen cooperation on nationally appropriate mitigation actions, low carbon growth plans, national programmes for adaptation to climate change and on Disasters Risks Reduction;
> (d) enhance capacity building and strengthen institutions to address climate change challenges;
> (e) promote awareness raising, especially for the most vulnerable populations and those living in vulnerable areas, and facilitate the participation of local communities in response to climate change.[107]

c) Clauses obliging the parties to promote or advocate for certain principles or policies in respect of climate change

Some States and groupings of States used their investment treaties to impose obligations to promote or advocate their preferred climate change principles and policies, at the domestic,[108] regional[109] or international level. As an example of regional and international advocacy, treaties have demanded that the parties advocate 'the fight against climate change in international forums, including by engaging with other countries and regions to increase their level of ambition in the reduction of greenhouse emissions'[110] or to 'promote the mutual supportiveness of investment and climate policies and measures',[111] and even 'the contribution of trade to sustainable development and the transition to a sustainable low-emission

[106] Australia–EU Framework Agreement 2017 (n 85) art 46 (available here).

[107] Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part 2012 (n 74) art 31, para 1 (available here). See also art 39, para 1 of the same instrument; Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part 2010 (n 84) art 24, para 2 (available here); EU–Kyrgyzstan Enhanced Partnership and Cooperation Agreement 2024 (n 80) art 265 (available here); EU–Iraq Cooperation Agreement (signed 11 May 2012, entered into force 1 August 2018) art 93 (available here) (cooperation should focus, inter alia, on 'supporting capacity building in the field of environment, for example climate change mitigation and adaptation'); EU–Ukraine Association Agreement (signed 27 June 2014, entered into force 20 December 2015) art 376(h) (available here); Comprehensive Trade and Economic Agreement between Canada and the European Union (signed 30 October 2016, entered into force provisionally on 21 September 2017) art 24.12(e) (available here).

[108] FTA between the Republic of Colombia and the Republic of Panama 2013 (n 81) art 9.6 (available here).

[109] EU–Kyrgyzstan Enhanced Partnership and Cooperation Agreement 2024 (n 80) art 265, para 3 (available here).

[110] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom, of the other part 2020 (n 51) art 764, para 2 (available here).

[111] Sustainable Investment and Facilitation Agreement between the European Union and the Republic of Angola 2023 (n 49) art 33, para 2(b) (available here) (explaining that this would contribute to 'the transition to a low greenhouse gas emission, resource-efficient economy and to climate-resilient development'). See also EFTA–Moldova FTA 2023 (n 71) art 9.8 (available here); Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part 2020 (n 51) art 401, para 2(a)–(b) (available here); EU Vietnam FTA (signed 30 June 2019, entered into force 1 August 2020) art 13.6 (available here); Korea–New Zealand FTA (signed 23 March 2015, entered into force 20 December 2015) art 16.3 para 1 (available here) (referring to the 'mutual supportiveness between multilateral environmental agreements to which both Parties are party and international trade rules').

economy and climate-resilient development'.[112] Still others commit the parties to cooperate in the 'development of low-carbon development' plans, strategies or policies.[113]

Treaties concluded by the EU are more specific in this respect and often entail the obligation to promote certain controversial climate policies, such as 'emissions trading as an effective policy tool for reducing greenhouse gas emissions efficiently'.[114] The promotion of carbon markets is also a distinctive feature of EU investment treaties.[115] Other policies promoted are less controversial and relate to 'carbon pricing as an effective policy tool for reducing greenhouse gas emissions efficiently',[116] and 'the role of nature-based solutions in addressing climate change' and 'knowledge and evidence-based innovations, including local and Indigenous knowledge, especially technological innovations'.[117] Treaties have also started to require the parties to promote 'environmental integrity in the development of international carbon markets',[118] having seemingly learned from the criticisms against clean development projects.

(ii) *Clauses with meaningful legal significance*

Compared to the clauses providing limited support to climate change regime, other clauses are more meaningful and normatively significant. For the purpose of this

[112] EFTA–Thailand FTA (signed 23 January 2025, not yet in force) art 10.8, para 2(a) (available here); EFTA–Kosovo 2025 (n 48) art 6.8, para 2(c) (available here); New Zealand–United Arab Emirates Comprehensive Economic Partnership Agreement 2025 (n 60) art 8.4, para 2(d) (available here); Australia–United Arab Emirates CEPA 2024 (n 60) (available here); EFTA States–Moldova FTA (signed 27 June 2023, not yet entered into force) (available here); FTA between the Republic of Chile and the Federative Republic of Brazil 2018 (n 65) art 17.14, para 2 (available here); Economic Complementation Agreement No 75 between the Republic of Chile and the Republic of Ecuador 2020 (n 48) art 17.17 (available here); Free Trade Agreement between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland (signed 8 July 2021, entered into force 1 September 2022) art 13.22, para 2(b) (available here); Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of the African, Caribbean and Pacific States (OACPS), of the other part 2023 (n 23) preamble, para 10 (available here).

[113] Armenia–European Union Comprehensive and Enhanced Partnership Agreement (signed 24 November 2017, entered into force 1 June 2018) art 54(e) (available here); European Union–Moldova Association Agreement (27 June 2014, entered into force 1 July 2016) (available here); see also European Union–Kosovo Stabilisation and Association Agreement (signed 27 October 2015, entered into force 1 April 2016) art 116 (available here) (cooperation between the parties must 'assist Kosovo in establishing adequate administrative capacities and coordination procedures between all relevant actors to enable the adoption and implementation of low-carbon and climate-resilient growth policies').

[114] See EU–New Zealand FTA (n 53) art 19.6, para 4 (available here). For some criticisms on emissions trading, see Benjamin Sovacool, 'Four Problems with Global Carbon Markets: A Critical Review' (2011) 22(6) Energy and Environment 681–94; Michael W Wara, 'Measuring the Clean Development Mechanism's Performance and Potential' (2007) 55(6) UCLA L Rev 1759.

[115] Cotonou Agreement 2000 (n 66) (available here); see also EU–Georgia Association Agreement 2014 (n 77) art 308(c) (available here); EU–Moldova Association Agreement 2014 (n 85) art 93(c) and art 95(f) (available here); EU–Ukraine Association Agreement 2014 (n 107) art 338(k) (available here); Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part EPCA 2015 (n 85) art 216(c) (available here); EU–Vietnam FTA 2019 (n 105) art 13.6, para 2(a) (available here); Political, Free Trade and Strategic Partnership Agreement between the United Kingdom and Ukraine 2020 (n 96) art 323(l) (available here); Canada–Ukraine Modernized FTA 2023 (n 83) art 13.10, para 6 (available here); Central America–EU Association Agreement 2012 (n 87) art 65 (available here); New Zealand–United Arab Emirates Comprehensive Economic Partnership Agreement 2025 (n 60) art 14.7, para 4(a) (available here).

[116] FTA between New Zealand and the United Kingdom 2022 (n 68) art 22.6(c) (available here); see also Canada–Ukraine Modernized FTA 2023 (n 83) art 13.10, para 8(h) (available here) (imposing on the parties the obligation to '(h) promote carbon pricing and measures to mitigate carbon leakage risks'). The IPCC found that 'carbon pricing instruments have incentivized low-cost emissions reduction measures'. See IPCC (n 9) para C.6.4.

[117] New Zealand–United Arab Emirates Comprehensive Economic Partnership Agreement 2025 (n 60) art 14.7, para 4(e) (available here). See also Canada–Ukraine Modernized FTA 2023 (n 83) art 13.10, para 2 (available here) (referring only to the importance of nature-based solutions, but see also art 13.10, para 5 that refers to the 'important contribution', among others, of indigenous peoples in addressing and responding to climate change).

[118] FTA between New Zealand and the United Kingdom 2022 (n 68) art 22.6(c) (available here); New Zealand–United Arab Emirates Comprehensive Economic Partnership Agreement 2025 (n 60) art 14.7, para 4(b) (available here) (referring to promoting '(b) environmental credibility in the development of international carbon markets').

study, these clauses are those that impose on the parties a separate obligation—under the relevant international investment agreement—to comply with climate change obligations (a), and those that remove barriers to trade in climate-friendly goods and services (b).

a) Clauses creating obligations to implement climate change obligations

States are cautious and do not usually create a separate obligation—under their international investment agreements—to respect or implement their climate change obligations. As a case in point, the Amendments to the Energy Charter Treaty of 3 December 2024 merely 'reaffirm[]' the parties' commitment to effectively implement their commitments and obligations under the UNFCCC and the Paris Agreement.[119] However, some international investment agreements do create such separate obligations. Typically, these clauses provide that the parties 'shall . . . effectively implement the UNFCCC and the Paris Agreement'.[120] Article 7.4 of the EU–Euratom–UK TCA (2020) goes beyond a general reference to some climate change legal instruments and identifies some of the 'internationally recognized environmental principles' that the parties commit to respect.[121]

Some treaties detail the legal significance of the obligation to 'effectively implement' climate change treaties by borrowing the language from Article 18 of the 1969 Vienna Convention on the Law of Treaties.[122] For instance, the EU–New Zealand FTA (2023) explains that '[a] Party's commitment to effectively implement the Paris Agreement under paragraph 2 includes the obligation to refrain from any action or omission that materially defeats the object and purpose of the Paris Agreement'.[123]

[119] Energy Charter Treaty, art 19*bis*, para (a), as amended by art 5, para 5, of the Decision of the Energy Charter Conference: Amendments to the Energy Charter Treaty (CCDEC—12 GEN) (2024) (n 57) (available here); Central America–EU Association Agreement 2012 (n 87) art 287, para 2 (available here) (which singles out only the Kyoto Protocol).

[120] Sustainable Investment and Facilitation Agreement between the European Union and the Republic of Angola 2023 (n 49) art 33, para 2 (available here) (identifying specifically the 'commitments with regard to its Nationally Determined Contributions'). See also Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part 2020 (n 51) art 401, para 2(a) (available here) (providing that 'each Party: (a) commits to effectively implementing the UNFCCC, and the Paris Agreement adopted thereunder of which one principal aim is strengthening the global response to climate change and holding the increase in 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'). FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13.22, para 2(a) (available here); EFTA–Moldova FTA 2023 (n 71) art 9.8 (available here); Canada–Ukraine Modernized FTA 2023 (n 83) art 13.10, para 3 (available here) (referring only to the Paris Agreement). EFTA–Thailand FTA 2025 (n 112) art 10, para 8 (available here) (the parties committed to 'effectively implement their respective obligations and commitments under the UNFCCC and the Paris Agreement'); Ecuador–EFTA Comprehensive Economic Partnership Agreement 2018 (n 95) art 8.11(a)–(b) (available here); China–EU Comprehensive Agreement on Investment 2021 (n 60) art 6(a) (available here); Chile–EU Interim Trade Agreement 2023 (n 105) art 26.10, para 2(a) (available here).

[121] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part 2020 (n 51) art 393, para 1 (available here) (referring to 'the internationally recognised environmental principles to which [each Party] has committed, such as in the Rio Declaration on Environment and Development . . . and in multilateral environmental agreements, including in the United Nations Framework Convention on Climate Change . . . [] and the Convention on Biological Diversity . . . in particular: (a) the principle that environmental protection should be integrated into the making of policies, including through impact assessments; (b) the principle of preventative action to avert environmental damage; (c) the precautionary approach referred to in Article 356 (2) [Right to regulate, precautionary approach and scientific and technical information]; (d) the principle that environmental damage should as a priority be rectified at source; and (e) the polluter pays principle').

[122] Vienna Convention on the Law of Treaties between States (n 47) 1155 UNTS 331, art 18 (providing that: 'A State is obliged to *refrain from acts which would defeat the object and purpose of a treaty* when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed' (emphasis added)).

[123] EU–New Zealand FTA 2023 (n 53) art 19.6 (available here). For another treaty providing for an obligation not to defeat the object and purpose of the Paris Agreement, see Trade and Cooperation Agreement between the European

Investment treaty clauses that impose an obligation to implement climate change treaties effectively create a separate ground of responsibility—under the relevant investment agreement—for States that fail to implement them. However, this study did not find any treaty clause that subjects investment treaty climate change clauses to legal means of dispute settlement, such as arbitration. Climate change clauses are typically excluded from the jurisdiction of the binding dispute settlement mechanisms provided for in these investment treaties.[124] This choice reflects a desire from the parties to keep the question of compliance with investment treaty climate change obligations at the diplomatic level,[125] or to give preference to other international fora.[126] In this respect, it is notable that the United Nations climate change treaties provide only for third-party facilitation mechanisms,[127] and not for third-party binding dispute settlement means.

b) Clauses relating to the removal of tariff and non-tariff barriers to the trade of climate-friendly goods and services

The practice of including treaty clauses removing tariff and non-tariff barriers to trade in climate-friendly goods and services concerns only New Zealand and appears only in two treaties. In the New Zealand–Taiwan Economic Cooperation Agreement (2013), the parties recognized that:

> trade in environmental goods and services through elimination of tariff and non-tariff barriers can enhance economic performance and address global environmental challenges including *climate change*; natural resources protection; water, soil and air pollution; management of waste and waste water; and depletion of the ozone layer.[128]

Accordingly, they agreed to eliminate all tariffs on environmental goods and services, facilitate the temporary entry in their territories of businesspersons when related to environmental goods and services. They also agreed to endeavour to address non-tariff barriers related to such goods and services, and to apply good regulatory principles with respect to them.[129] A similar clause appears in the EU–New Zealand FTA (2023).[130]

B. *Clauses Providing Sectoral Support*

Investment treaty climate change clauses that seek to provide support to sectoral aspects of the climate change regime build upon the structure of the general clauses

Union and the European Atomic Energy Community, of the one part, and the United Kingdom, of the other part 2020 (n 51) art 764, para 1 (available here).

[124] See eg Trade and Economic Partnership Agreement between the EFTA States (Iceland, Liechtenstein, Norway, and Switzerland) and India 2024 (n 46) art 11.11 (available here); Chile–Paraguay FTA 2021 (n 46) art 12.22 (available here); New Zealand–United Arab Emirates Comprehensive Economic Partnership Agreement 2025 (n 60) art 8.5 (available here).

[125] See eg Indo-Pacific Economic Framework for Prosperity Agreement Relating to a Clean Economy (n 61) art 30 (available here).

[126] See Decision of the Energy Charter Conference: Amendments to the Energy Charter Treaty (CCDEC—12 GEN) (2024) (n 57) art 6, para 10 (available here) (with respect to art 30*bis*) (providing that if a dispute regarding climate change and sustainable development clauses is not solved amicably through diplomatic channels, the parties 'shall endeavour to make recourse to arrangements for the consideration of such dispute in other appropriate international fora'. It is only when these fora fail that conciliation under the Amended Energy Charter Treaty is possible).

[127] UNFCCC (n 4) (available here) and Article 15 of the Paris Agreement (n 6) art 8 (available here).

[128] New Zealand–Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu Economic Cooperation Agreement (signed 10 July 2013, entered into force 1 December 2013) ch 17, art 3, para 1 (available here) (emphasis added).

[129] ibid art 3.

[130] EU–New Zealand FTA 2023 (n 53) art 19.11 para 2 (available here) (referring to art 2.5 of the same legal instrument).

discussed above. In these clauses, the parties to these agreements affirm some shared views in respect of climate change before stipulating concrete obligations.[131] While the subject matter of the sectoral support varies, many of these clauses concern the protection and preservation of components of the climate system, namely forests (i), the marine environment (ii), the ozone layer (iii) and biological diversity (iv). The clauses may also deal with issues related to climate change, such as air pollution (v). They may also concern human activities that are significantly affected by climate change, such as agriculture (vi), or activities that have a significant impact on climate change, such as transport[132] and energy (vii). Finally, a few clauses also provide support in the transfer of climate technology (viii). Treaty practice reveals that Annex I countries are those that champion the inclusion in their investment treaties of clauses relating to forests, the marine environment, the ozone layer, biological diversity, air pollution and energy. Non-Annex I countries focus more on agriculture. These clauses providing sectoral support are examined in turn below.

(i) *Forests*

Investment treaty climate change clauses often stress the importance of forests in the fight against climate change, including their role in capturing and stocking carbon, as well as the necessity of their conservation and sustainable management. However, treaty practice shows ambivalent trends. Whereas some treaties focus on the protection and conservation of forestry, without linking them to trade,[133] other treaties emphasize the importance of trade and investment in forest products that they consider to be an element of the conservation and sustainable management of forests.[134]

The most normative obligation arising from the investment treaty climate change clauses dealing with forests relates to logging, although its binding character varies depending on the wording of the relevant treaty. Clauses may obligate the parties to 'combat illegal logging by improving forest law enforcement and governance and by ensuring that only legally sourced timber is traded among the Parties',[135] to 'contribute to combating illegal logging and related trade including, as appropriate,

[131] FTA between the United Kingdom and Australia 2021 (n 68) art 22.13 (available here) (concerning the conservation and sustainable forest management).

[132] EU–Kyrgyzstan Enhanced Partnership and Cooperation Agreement 2024 (n 80) art 257 (available here) (providing that: 'The parties shall cooperate in the area of transport with the following objectives . . . (d) developing sustainable transport systems, including their social and environmental aspects, in particular regarding climate change'); see also art 258 of the same legal instrument. See also FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13.23, para 2 (available here).

[133] See eg Cotonou Agreement 2000 (n 66) art 32(A)(d)(v) (available here) (one of the cooperation focuses of the parties was 'providing financial and technical support for mitigation action of ACP States in line with their poverty reduction and sustainable development objectives, including reducing emissions from deforestation and forest degradation and reducing emissions in the agricultural sector'); China–Peru FTA 2009 (n 48) art 162 (available here) (defining as an aim of the cooperation between the parties, 'improving the rehabilitation and sustainable management of forest with the aim of increasing carbon sinks and reduce the impact of climate change in the Asia-Pacific region'); Korea–Peru FTA 2010 (n 91) art 20, para 7(2)(d) (available here) (the parties agree to cooperate and facilitate the 'promotion of joint measures to limit or reduce the adverse effects of the climate change'); Colombia–Korea FTA 2013 (n 48) art 17, para 5 (available here); Australia–Korea FTA 2014 (n 87) art 16.7 (available here); Korea–New Zealand FTA 2015 (n 111) art 14.5, para (d) (available here).

[134] Agreement between the United Kingdom and Japan for a Comprehensive Economic Partnership 2020 (n 71) art 16.7 (available here); Canada–Ukraine Modernized FTA 2023 (n 83) art 13.22, para 3 (available here).

[135] Ecuador–EFTA Comprehensive Economic Partnership Agreement 2018 (n 95) art 8.10, para 2(c) (available here); EFTA–Kosovo 2025 (n 48) art 6.7, para 2(a) and (c) (available here); EFTA–Thailand FTA 2025 (n 112) art 10.7, para (a) and (c) (available here).

the trade with third countries',[136] or to cooperate for this purpose.[137] Other clauses require the parties to 'implement measures to combat illegal logging and related trade, including through cooperation activities with third countries as appropriate'.[138] Some other clauses create an obligation to 'encourage trade in forest products from sustainably managed forests harvested in accordance with the law of the country of harvest'.[139] Some clauses demand the parties to cooperate, *inter alia*, to 'promote the development and use of certification schemes for forest products from sustainably managed forests',[140] and to:

> promote the effective implementation and use of legality assurance system for timber as required in Forest Law Enforcement Governance and Trade Voluntary Partnership Agreement and corresponding schemes, with the aim to combat illegal logging and eliminate trade of illegal timber products.[141]

The remaining obligations that appear in investment treaty forest clauses relate to the promotion of the effective use of certain legal instruments such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora,[142] to exchange of information and sharing of best practices,[143] and cooperation 'where appropriate, in international fora that deal with the conservation and sustainable management of forests',[144] including 'through existing bilateral arrangements if applicable and in the relevant multilateral fora in which they participate, in particular in Reducing

[136] Agreement between the United Kingdom and Japan for a Comprehensive Economic Partnership 2020 (n 71) art 16.7(2)(b) (available here); Canada–Ukraine Modernized FTA 2023 (n 83) art 13.22, para 3 (available here); New Zealand–United Arab Emirates Comprehensive Economic Partnership Agreement 2025 (n 60) art 14.11, para 2(b) (available here) (referencing also 'communities dependent on forests').

[137] FTA between the United Kingdom and Australia 2021 (n 68) art 22.13, paras 3 and 5 (available here) (the parties 'shall: (a) cooperate and exchange information, as appropriate, on the implementation of measures that contribute to combatting illegal logging and related trade, including with respect to third countries; and (b) cooperate bilaterally and in multilateral fora, as appropriate').

[138] Chile–European Union Interim Trade Agreement (signed 13 December 2023, not yet in force) art 26.11, para 2(a) (available here); see also Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part 2020 (n 51) art 403, para 2(a) (available here); EFTA–Thailand FTA 2025 (n 112e) art 10.7, para 2(c) (available here).

[139] Canada–Ukraine Modernized FTA 2023 (n 83) art 13.22, para 4 (available here); see also Chile–Paraguay FTA 2021 (n 46); EU–Vietnam FTA (n 105); Comprehensive Trade and Economic Agreement between Canada and the European Union (n 107) art 24.10, para 2(a) (available here) (obligation to '(a) encourage trade in forest products from sustainably managed forests and harvested in accordance with the law of the country of harvest'); EFTA–Kosovo 2025 (n 48) art 6.7, para 2(b) (available here) (creating an obligation to 'promote trade in products that derive from sustainably managed forests and ecosystems'); EFTA–Thailand FTA 2025 (n 112) art 10.7, para 2(b) (available here); New Zealand–United Arab Emirates Comprehensive Economic Partnership Agreement 2025 (n 60) art 14.11, para 2(c) (available here)

[140] Ecuador–EFTA FTA (signed 25 June 2018, entered into force 1 November 2020) art 8.10, para 2(b); Comprehensive Economic Partnership Agreement between the Republic of Indonesia and the EFTA States (signed 1 November 2018, entered into force 16 December 2021) art 8.8(d) (available here).

[141] Comprehensive Economic Partnership Agreement between the Republic of Indonesia and the EFTA States 2018 (n 140) art 8.8, para 2(c) (available here).

[142] Ecuador–EFTA Comprehensive Economic Partnership Agreement 2018 (n 95) art 8.10, para 2(a) (available here) (the parties committed to 'promote the effective use of CITES with regard to endangered timber species'); Comprehensive Trade and Economic Agreement between Canada and the European Union (n 107) art 24.10, para 1(c) (available here); EFTA–Kosovo 2025 (n 48) art 6.7, para 2(d) (available here); EFTA–Thailand FTA 2025 (n 112) art 10.7, para 2(d) (available here).

[143] Comprehensive Trade and Economic Agreement between Canada and the European Union (n 107) art 24.10, para 2(b) (available here); Comprehensive Economic Partnership Agreement between the Republic of Indonesia and the EFTA States 2018 (n 140) art 8.8(d) (available here).

[144] Comprehensive Trade and Economic Agreement between Canada and the European Union (n 107) art 24.10, para 2(d) (available here); FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13.27 (available here).

Emissions from Deforestation and Forest Degradation (REDD+) as encouraged by the Paris Agreement'.[145]

(ii) *The marine environment*

The marine environment is rarely addressed in investment treaty climate change clauses. The clauses that refer to it are premised on the importance of marine ecosystems in the natural sequestration and storage of carbon, on the one hand, and the adverse impact of climate change on these ecosystems, on the other hand. The relevant treaty clauses stipulate primarily obligations to cooperate. For instance, the Iceland–Liechtenstein–Norway–UK FTA (2021) provides that '[t]he Parties shall promote the conservation and sustainable use of marine ecosystems and species, including those in the areas beyond national jurisdiction', and 'may cooperate on matters of mutual interest with respect to the conservation of marine ecosystems and species'.[146] Similarly, Article 315 of the Strategic Partnership and Cooperation Agreement between the United Kingdom and Georgia (2019) provides that:

> Taking into account their cooperation in the spheres of fisheries, sea-related transport, environment and other policies, and in accordance with the relevant international agreements on the law of the sea based on the United Nations Convention on the Law of the Sea, the Parties shall also develop cooperation on an integrated maritime policy, in particular . . . promoting integrated coastal zone management, in line with the ecosystem approach, to ensure sustainable coastal development and to enhance the resilience of coastal regions to coastal risks including the impacts of climate change.[147]

For its part, Article 18.12, paragraph 4, of the Australia—United Arab Emirates CEPA (2024) provides that the parties 'shall endeavour to conserve and restore blue carbon ecosystems, including through consideration of nature-based solutions for mitigation of and adaptation to climate change, improving biodiversity and by drawing on traditional and Indigenous knowledge'.[148] They shall also 'cooperate, as appropriate, in knowledge and best practice sharing to strengthen protection and restoration of blue carbon ecosystems, as well as by collaboration and capacity building through existing initiatives'.[149]

(iii) *The ozone layer*

The ozone layer often appears in investment treaty climate change clauses.[150] In these treaties, the parties acknowledge that substances that deplete the ozone layer also have

[145] Ecuador–EFTA FTA 2018 (n 145) art 8.10(c); FTA between the United Kingdom and Australia 2021 (n 68) art 22.13, paras 3 and 5 (available here); EFTA–Kosovo 2025 (n 48) art 6.7, para 2(e) (available here); EFTA–Thailand FTA 2025 (n 112) art 10.7, para 2(e) (available here).

[146] FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13.26 (available here); see also Australia–Korea FTA 2014 (n 87) art 16.6(e) (available here); Korea–New Zealand FTA 2015 (n 111) art 14.6, para 2(c) (available here).

[147] Strategic Partnership and Cooperation Agreement between the United Kingdom and Georgia 2019 (n 75) art 315 (available here); EU–Georgia Association Agreement 2014 (n 77) art 339(c) (available here).

[148] Australia–United Arab Emirates CEPA 2024 (n 60) art 18.12, para 4 (available here).

[149] ibid para 5.

[150] Comprehensive Trade and Economic Agreement between Canada and the European Union (n 107) art 20.5 (available here); FTA between New Zealand and the United Kingdom 2022 (n 68) art 22.14 (available here); FTA between the United Kingdom and Australia 2021 (n 68) art 22.8 (available here); FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13.24 (available here); Canada–Ukraine Modernized FTA 2023 (n 83) art 13.11 (available here); Australia–United Arab Emirates CEPA 2024 (n 60) art 11.8 (available here).

greenhouse effects and are, therefore, one of the causes of climate change. Accordingly, States often adopted obligations in respect of them. For instance, pursuant to Article 13.24 of the Iceland–Liechtenstein–Norway–UK FTA (2021), the Parties agreed to 'take measures to control the production and consumption of, and trade in, substances controlled by the Montreal Protocol' and to 'support an ambitious phase-down of hydrofluorocarbons according to the Kigali Amendment, including by reducing the use of pre-charged equipment containing hydrofluorocarbons'.[151] In addition, the parties agreed that they:

> May cooperate on matters of mutual interest related to ozone-depleting substances and their alternatives, including:
>
> (a) promoting the production and trade of environmentally friendly alternatives to ozone-depleting substances and hydrofluorocarbons;
> (b) refrigerant management practices, policies and programmes including life-cycle management of coolants and refrigerants;
> (c) methodologies for stratospheric ozone measurements;
> (d) combating illegal trade in ozone-depleting substances and hydrofluorocarbons;
> (e) emerging technologies for sustainable, climate-friendly cooling, refrigeration and heat pumps; and
> (f) barriers to trade in, and uptake of sustainable, climate-friendly cooling, refrigeration and heat pump technologies.[152]

(iv) *Biological diversity*

Some international investment agreements recognize that biodiversity contributes to carbon sequestration, that climate change causes biodiversity loss and that biologically diverse ecosystems are more resistant to the adverse impacts of climate change. Accordingly, the parties often provided for specific obligations to protect biological diversity. For instance, in the New Zealand–United Kingdom FTA (2022), the parties agreed that each shall:

> (d) promote and encourage the conservation and sustainable use of biodiversity including in trade-related activities, in accordance with its law or policy; and
> (e) promote the conservation of marine ecosystems and species, including those in the areas beyond national jurisdiction.[153]

It further stipulated that:

> the Parties may cooperate on matters of mutual interest such as:
>
> (a) protection of terrestrial and marine ecosystems and ecosystem services, including marine ecosystems and species in areas beyond national jurisdiction from trade-related impacts.[154]

[151] FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13.24, para 1 (available here).

[152] ibid para 3; see also Australia–United Arab Emirates CEPA 2024 (n 60) art 18.3, para 2 (available here); EU–Moldova Association Agreement 2014 (n 85) art 95(i) of art 93(c) (available here).

[153] FTA between New Zealand and the United Kingdom 2022 (n 68) art 22.12, para 6(d)–(e) (available here).

[154] See eg FTA between New Zealand and the United Kingdom 2022 (n 68) art 22.12, para 7(a) (available here); see also Trade Agreement between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 112 art 13.25 (available here); FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13.25 (available here).

These treaties tend to support trade and investment in biodiversity.[155]

(v) *Air pollution*

Air pollution appears in some investment treaty climate change clauses, especially in treaties concluded by the UK. In these treaties, the parties 'note that reducing air pollution can help reduce emissions of greenhouse gases and contribute to addressing climate change and other environmental problems'. Accordingly, they 'recognise the value of an integrated approach in addressing air pollution and climate change'.[156] However, the obligations that they adopt pursuant to these shared views do not have a strong normative content. These obligations are obligations (i) to '*endeavour to reduce* air pollution',[157] (ii) to 'make air quality data and information about its associated programmes and activities publicly available and *[to] seek to ensure* that data and information are easily accessible and understandable to the public'[158] and (iii) to:

> cooperate to address matters of mutual interest with respect to air quality, which may include: (a) ambient air quality planning; (b) modelling and monitoring, including spatial distribution of main sources of air pollution and their emissions; (c) measurement and inventory methodologies for air quality and emissions' measurements; and (d) reduction, control, and prevention technologies and practices.[159]

(vi) *Agriculture and food security*

Agriculture and food security are human necessities that are highly vulnerable to climate change. In the Economic Complementation Agreement No 75 between the Republic of Chile and the Republic of Ecuador (2020), the parties:

> recognize the increasing impact that global changes such as climate change, biodiversity loss, land degradation, droughts and the emergence of new pests and diseases have on the development of productive sectors such as agriculture, livestock and forestry.[160]

Not surprisingly, non-Annex I countries show a preponderant interest in addressing the adverse impact of climate change on agriculture in their investment treaty clauses.[161] These countries approach the link between agriculture and climate change primarily through agricultural productivity and food security. Thus, the only climate change clause of some investment treaties concluded by China emphasizes why it is important to 'promote effective risk management in the agribusiness chains

[155] See eg Agreement between the United Kingdom and Japan for a Comprehensive Economic Partnership 2020 (n 71) art 16.6 (available here).

[156] FTA between New Zealand and the United Kingdom 2022 (n 68) art 22.15, para 1 (available here).

[157] ibid art 22.15, para 2 (emphasis added).

[158] FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13.23, para 3 (available here) (emphasis added).

[159] FTA between New Zealand and the United Kingdom 2022 (n 68) art 22.15, para 3 (available here). See also FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13.23 (available here); Canada–Ukraine Modernized FTA 2023 (n 83) art 13.14 (available here).

[160] Economic Complementation Agreement No 75 between the Republic of Chile and the Republic of Ecuador 2020 (n 48) art 17.14, para 1 (available here)

[161] Australia–United Arab Emirates CEPA 2024 (n 60) art 7.3, para 1(b) (available here) (explaining that 'the diversity of agricultural production and methods, climatic conditions, environmental factors, and economic and social conditions between and within the Parties necessitates flexibility for each Party to tailor its sustainability approaches accordingly, reflecting the principle of no-one-size-fits-all').

aiming to incorporate measures for adaptation and mitigation of climate change and variability'.[162] Other clauses of China's treaties oblige the parties to promote:

> sustainable agriculture and organic farming through enhanced food safety and security, environment friendly production techniques and efficient management of natural resources which include use of renewable energy and water savings system to reduce production cost and increase resilience to climate change.[163]

Unlike non-Annex I countries, Annex I countries tend to envision agriculture more as one of the emitters of greenhouse gases, and, therefore, as one of the causes of climate change and its adverse impacts. Clauses may identify as an area of cooperation between the parties 'promoting modern and sustainable agricultural production, respectful of the environment and of animal welfare . . . taking into account climate change'.[164] Cooperation may also relate to:

> (a) food production methods and practices which aim to improve sustainability, including organic farming and regenerative agriculture, amongst others; . . .
> (c) the environmental and climate impacts of food production, including on agricultural greenhouse gas emissions, carbon sinks and biodiversity loss.[165]

Concerning the specific obligations that States commit to, they often agree to share information and experiences, and 'to seek to improve agricultural productivity considering the protection and sustainable use of ecosystems and natural resources . . . in order to contribute to the effective adaptation and mitigation of the agricultural, forestry and food sector to global changes',[166] to promote 'policies and repurposing public support which support the achievement of climate goals, including policies regarding food systems and agriculture',[167] or to 'endeavour, as appropriate, to promote cooperative activities', including scientific and technological developments in 'climate change adaptation and mitigation [and] mitigation of climate-related extremes'.[168] In this respect, the Canada–Ukraine Modernized FTA (2023) indicates that cooperation between the parties shall take into account 'the protection and sustainable use of ecosystems and natural resources, adaptation and resilience to climate change, and meeting the particular needs of farmers and rural

[162] China–Costa Rica FTA (signed 1 April 2010, entered into force 1 August 2011) art 123, para 2(d) (available here). See also Korea–New Zealand FTA 2015 (n 111) art 14.3, para 1(a)(ii) (available here) (referring to 'sustainable production systems, including for example climate change impacts, mitigation and adaptation, and the role of the agriculture, forestry and fisheries sectors in contributing to low-carbon green growth'); China–Nicaragua FTA (signed 31 August 2023, entered into force 1 January 2024) art 18, para 5 (available here); Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of the African, Caribbean and Pacific States, of the other part 2023 (n 23) art 30, para 3 (available here) (obliging the parties to 'promote actions on adaptation to climate change and variability throughout the food production value chains'); Australia–United Arab Emirates CEPA 2024 (n 60) art 7.4, para 1(c) (available here) (in relation to 'climate-smart agricultural practices').

[163] China–Mauritius FTA (signed 17 October 2019, entered into force 1 January 2021) art 12.7, para 2(a) (available here).

[164] Political, Free Trade and Strategic Partnership Agreement between the United Kingdom and Ukraine 2020 (n 96) art 369(c) (available here).

[165] EU–New Zealand FTA 2023 (n 53) art 7.4, para (a) and (c) (available here); Chile–EU Interim Trade Agreement 2023 (n 105) art 7.4, para (a) and (c) (available here) (see also, para (e) on 'Innovation and technologies that contribute to adaptation and resilience to climate change impacts').

[166] See eg Economic Complementation Agreement No 75 between the Republic of Chile and the Republic of Ecuador 2020 (n 48) art 17.14, para 1 (available here); FTA between the Republic of Chile and the Federative Republic of Brazil 2018 (n 65) art 17.13 (available here); Chile–Paraguay FTA 2021 (n 46) art 12.13 (available here).

[167] New Zealand–United Arab Emirates Comprehensive Economic Partnership Agreement 2025 (n 60) art 14.7, para 4(d) (available here). See also ibid art 14.8, para 1; art 14.19 (sustainable agriculture).

[168] Australia–Korea FTA 2014 (n 87) art 16.4 (available here).

communities'.[169] For its part, Article 7.9 of the Chile–EU Interim Trade Agreement (2023) require the parties:

> to cooperate as appropriate, in multilateral fora to foster the global transition towards sustainable food systems that contribute to the achievement of internationally agreed environmental, nature and climate protection objectives.[170]

(vii) *Energy*

Emissions of greenhouse gases in the atmosphere, especially through the burning of fossil fuel to generate energy, is the main driver of climate change.[171] Curbing the emissions of greenhouse gases, while transitioning towards renewable energy, is therefore crucial to fight climate change successfully. Investment treaty climate change clauses cover several issues related to this question and contain clauses relating to 'renewable energy' (a), processes and methods of energy production (b), carbon pricing (c), fossil fuel subsidies (d), but do not address directly the fossil fuel industry (e).

a) Clauses on renewable energy

Investment treaties reveal that States have embraced the need to transition towards renewable energy, and sustainable energy production and consumption in light of 'the important contribution that renewable fuels, inter alia, renewable hydrogen, including their derivatives, and renewable synthetic fuels, in reducing greenhouse gas emissions to address climate change'.[172] Relevant clauses may in this context create obligations to cooperate in respect of renewable energy in general,[173] or to:

> promote trade and investment in goods and services that contribute to sustainable development, such as renewable energy and energy-efficient products and services, including through addressing related non-tariff barriers, or the adoption of policy frameworks which will support the use of the best practicable environmental options, as appropriate.[174]

Standards setting, especially with respect to renewable fuel, is increasingly an area of interest for parties to international investment agreements. Some treaties impose an obligation to cooperate 'on convergence or harmonization where possible of certification schemes for renewable fuels, such as with regard to lifecycle emissions and safety standards',[175] whereas other treaties require the parties to:

> as appropriate, encourage the development and implementation of international standards and regulatory cooperation with respect to renewable fuels and cooperate in relevant international fora with a view to develop relevant certification schemes that avoid the emergence of unjustified barriers to trade.[176]

[169] Canada–Ukraine Modernized FTA 2023 (n 83) art 13.20, para 4 (available here).
[170] Chile–EU Interim Trade Agreement 2023 (n 105) art 7.9 (available here) (see also, para (e) on 'Innovation and technologies that contribute to adaptation and resilience to climate change impacts').
[171] IPCC (n 9) para A. 1.4. See also ibid C.3.2.
[172] Chile–EU Interim Trade Agreement 2023 (n 105) art 8.15, para 1 (available here)
[173] See eg Australia–United Arab Emirates CEPA 2024 (n 60) art 18.5, para 3(d) (available here); New Zealand–United Arab Emirates Comprehensive Economic Partnership Agreement 2025 (n 60) art 17.2, para 3(d) (available here); Chile–United Arab Emirates CEPA 2024 (n 87) art 16.10, para 7(c) (available here);
[174] See eg FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13.10, para 2(c) (available here); see also European Union–Vietnam FTA (signed 30 June 2019, entered into force 1 August 2020) arts 7.1 and 7.4 (available here); European Union–Singapore FTA 2018 (n 89) arts 7.1 and 7.4 (available here).
[175] Chile–EU Interim Trade Agreement 2023 (n 105) art 8.15, para 2 (available here).
[176] ibid art 8.15, para 4.

Some treaties identify the objectives of the cooperation between the parties concerning renewable energy. For instance, the parties to the Chile–EU Interim Trade Agreement (2023) undertook the obligation to cooperate with a view to 'foster[ing] bilateral trade facilitating initiatives to promote the production of renewable hydrogen' and 'promot[ing] the use of renewable fuels considering their contribution to the reduction of greenhouse gas emissions'.[177] Other clauses seek to mobilize cooperation to promote mutually beneficial contacts with a view to 'enhancing cooperation to improve energy security and to combat climate change, through the promotion of renewable energy sources, energy efficiency and reduction of gas-flaring'.[178] Yet other clauses obligate the parties to:

> endeavour, within the scope of their respective competences, to enhance cooperation in this field with a view to . . .
>
> (f) promoting the development and uptake of clean, diverse, cost-effective and sustainable energy technologies, including renewable and low emission energy technologies;
> (g) achieving rational use of energy with contributions from both supply and demand sides by promoting energy efficiency in energy production, transportation, distribution and end-use; and
> (h) sharing best practices in energy exploration and production.[179]

The European Union–Kyrgyzstan Enhanced Partnership and Cooperation Agreement (2024) identifies the concrete steps for States to take in cooperating in the field of renewable energy resources. It lists, inter alia:

> (a) the development of renewable energy sources in an economic and environmentally sound manner, including cooperation on regulatory issues, certification and standardisation as well as on technological development;
> (b) facilitating exchanges and research cooperation between institutions, laboratories and private sector entities of the European Union and the Kyrgyz Republic, including through joint programmes, with the aim of implementing best practices towards creating the energy of the future and the green economy;
> (c) conducting joint seminars, conferences and training programmes, and exchanging information and open statistical data, as well as information on the development of renewable energy sources.[180]

b) Clauses on energy production

Investment treaties do not significantly engage with energy production in the fossil fuel industry. Yet, three sets of obligations appear in treaty practice. First, treaties often require the parties to conduct climate impact assessment for some activities relating to energy production. For example, Article 13, paragraph 8, of the EU–New Zealand FTA (2023) requires the parties to conduct an environmental impact assessment for activities related to production of energy goods or raw materials, where such activities may have a significant impact on the environment. In this context,

[177] ibid art 8.15, para 3(b)–(c). See also EU–Kyrgyzstan Enhanced Partnership and Cooperation Agreement 2024 (n 80) art 254(c) (available here) (the cooperation areas include 'enhancing renewable energy sources').

[178] EU–Iraq Cooperation Agreement 2012 (n 107) art 91 (available here).

[179] Australia–EU Framework Agreement 2017 (n 85) art 48 (available here) (here the parties).

[180] European Union–Kyrgyzstan Enhanced Partnership and Cooperation Agreement (signed 25 June 2024, not yet in force) art 255 (available here).

each party has the obligation, as required by its laws and regulations, to 'identify and assess as appropriate the significant effects of a project on . . . land, soil, water, air, and climate'.[181] Secondly, a treaty requires the parties to promote the reduction of gas flaring.[182] Finally, some treaties list among the joint cooperative activities of the parties research and development, and exchanging views on policies relevant to enhanced academic and scientific exchanges 'relating to the exploration, extraction, processing, transportation and use of energy and mineral resources, including energy efficiency measures and measures relating to climate change'.[183] Others simply provide that:

> the Parties will . . . promote trade and investment measures that promote and facilitate access, dissemination and use of best available technologies for clean energy production and use, and for mitigation of and adaptation to climate change.[184]

c) Clauses on carbon pricing

Carbon pricing rarely appears in investment treaties. When treaties do include carbon pricing, they simply identify it as one of the matters on which the parties may cooperate.[185] The EU–Euratom–UK TCA (2020) is the treaty with the most significant clauses in respect of carbon pricing. Each party is required to 'have in place an effective system of carbon pricing as of 1 January 2021', covering 'greenhouse gas emissions from electricity generation, heat generation, industry and aviation', and the effectiveness of which 'shall uphold the level of protection provided for by Article 391 [Non-regression from levels of protection]'.[186] Concretely, it provides that '[e]ach Party shall maintain its system of carbon pricing insofar as it is an effective tool for each Party in the fight against climate change and shall in any event uphold the level

[181] EU–New Zealand FTA 2023 (n 53) art 13.8 (available here). See also Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part 2020 (n 51) art 393 (available here) (not directly, climate impact assessment) (see also the provision with respect to the enforcement of climate laws (art 7.5); Decision of the Energy Charter Conference: Amendments to the Energy Charter Treaty (CCDEC—12 GEN) (n 57) art 5, para 2 (available here) (with respect to art 19, para 5(i)); Chile–EU Interim Trade Agreement 2023 (n 105) art 8.8 (available here).

[182] EU–Iraq Cooperation Agreement 2012 (n 105) art 91, para 2(e) (available here) (agreeing to 'promote mutually beneficial contacts with a view to . . . enhancing cooperation to improve energy security and to combat climate change, through the promotion of renewable energy sources, energy efficiency and reduction of gas-flaring').

[183] Australia–Korea FTA 2014 (n 87) art 16.14 (available here); Central America–EU Association Agreement 2012 (n 87) art 65 (available here) (including renewable energy);

[184] Colombia–Ecuador–European Union–Peru FTA (signed 26 June 2012, entered into force 1 June 2013) art 275, para 4 (available here).

[185] Chile–United Arab Emirates CEPA 2024 (n 87) art 16, para 7 (available here). See also Indo-Pacific Economic Framework for Prosperity Agreement Relating to a Clean Economy (Australia, Brunei Darussalam, Fiji, India, Indonesia, Japan, the Republic of Korea, Malaysia, New Zealand, Philippines, Singapore, Thailand and Vietnam) 2024 (n 61) art 16, para 4 (available here) (explaining that: 'Interested Parties intend to cooperate to promote the development of carbon pricing, including sharing information and experiences regarding pricing and pricing policies and practices, and to facilitate transparency and the removal of market distortions'). Chile–European Union Interim Trade Agreement 2023 (n 138) art 26.10, para 4(a) (available here) (here, the parties 'shall cooperate in areas such as: (a) exchanging knowledge and experience regarding the implementation of the Paris Agreement, as well as on initiatives to promote climate resilience, renewable energy, low emission technologies, energy efficiency, carbon pricing, sustainable transport, sustainable and climate-resilient infrastructure development, emissions monitoring, and nature-based solutions; as well as explore options to cooperate in areas such as short-life climate pollutants and soil carbon sequestration'); Canada–Ukraine Modernized FTA 2023 (n 83) art 13.11, para 7(h) (available here) (the parties agreed to cooperate bilaterally and in international forums to address matters of mutual interest, as appropriate, to '(h) promote carbon pricing and measures to mitigate carbon leakage risks'). European Union–New Zealand FTA 2023 (n 97) art 19.6, para 5(b) (available here) (the parties agreed to enhance their cooperation in areas that may 'cover policy and technical exchanges regarding the development and implementation of domestic and international carbon pricing, including emissions trading and the promotion of effective standards of environmental integrity in their implementation'). FTA between the Republic of Chile and the Federative Republic of Brazil 2018 (n 65) art 17.14, para 4 (available here) (providing that the parties shall cooperate on matters of common interests such as 'carbon pricing mechanisms and other complementary measures to support a low-emissions transition').

[186] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom, of the other part 2020 (n 51) art 392, paras 1–3 (available here).

of protection provided for by Article 391'.[187] Furthermore, the parties 'shall give serious consideration to linking their respective carbon pricing systems in a way that preserves the integrity of these systems and provides for the possibility to increase their effectiveness'.[188]

d) Clauses on fossil fuel subsidies

A few treaties tackle the question of fossil fuel subsidies. Some treaties are rather timid. This is the case where clauses merely identify fossil fuel subsidies as an area of cooperation between the parties.[189] It is also the case of treaties, such as EU–New Zealand FTA (2023), that: merely recognises that fossil fuel subsidies can distort markets, disadvantage renewable and clean energy, and be inconsistent with the goals of the Paris Agreement and explains that the Parties 'share the goal of reforming and progressively reducing fossil fuel subsidies and reaffirm their commitment to work to meet that goal in accordance with national circumstances, while taking fully into account the specific needs of populations affected'.[190]

Other treaties represent a bold step in dealing with fossil fuel subsidies. For instance, in the EU–Euratom–UK TCA (2020), the parties recognized 'the importance of a secure, affordable and sustainable energy system and environmental sustainability, notably in relation to the fight against climate change which represents an existential threat to humanity'.[191] Accordingly, Article 367, paragraph 14, of the treaty seeks to regulate the good use of subsidies in this field and provides, without prejudice to Article 366 on the principles governing subsidies, that:

> the subsidies in relation to energy and environment shall be aimed at, and incentivise the beneficiary in, delivering a secure, affordable and sustainable energy system and a well-functioning and competitive energy market or increasing the level of environmental protection compared to the level that would be achieved in absence of the subsidy. Such subsidies shall not relieve the beneficiary from liabilities arising from its responsibilities as a polluter under the law of the relevant Party.[192]

Article 22.8 of the New Zealand–United Kingdom FTA (2022), which imposes obligations designed to eliminate harmful fossil fuel subsidies, is slightly more constraining than Article 367, paragraph 14, of the EU–Euratom–UK TCA (2020). The parties recognize therein that fossil fuel subsidies 'can distort trade and investment, disadvantage renewable and clean energy, encourage wasteful consumption, and

[187] ibid art 392, para 5 (which concerned merely sharing information and best practices about designing, implementing and operating mechanisms of pricing carbon).

[188] ibid art 392, para 6.

[189] See eg FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13. 22, para 3(h) (available here) (identifying the 'the global phase-out of inefficient fossil fuel subsidies' as an area of cooperation on mutual interest). Yet, this agreement represents a significant progress from the EC–Israel Association Agreement (1995) that provided that 'the parties consider that global warming and the depletion of fossil fuel sources are a serious threat to mankind'. See EC–Israel Association Agreement (signed 20 November 1995, entered into force 1 June 2000) (available here); see also European Union–Singapore FTA 2018 (n 89) art 12.11, para 4 (available here) (the parties expressed their shared goal to progressively reduce subsidies for fossil fuel, while reiterating that coal subsidies were not prohibited under the treaty. They also note that reductions to fossil fuels may be 'accompanied by measures to alleviate the social consequences associated with the transition to low fossil fuels').

[190] EU–New Zealand FTA 2023 (n 53) art 19.7, paras 2–3 (available here).

[191] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom, of the other part 2020 (n 51) art 367, para 14 (available here).

[192] ibid.

contribute significantly to global greenhouse gas emissions'.[193] Accordingly they provided that:

each Party shall:

(a) take steps to eliminate harmful fossil fuel subsidies where they exist, with limited exceptions in support of legitimate public policy objectives;
(b) as fellow members of the Powering Past Coal Alliance, end unabated coal-fired electricity generation in their territories as part of a clean energy transition aligned with the goals of the Paris Agreement;
(c) encourage the transition to clean energy for electricity, heat, and transport;
(d) ensure that information on fossil fuel support measures, including any subsidies, is published;
(e) end new direct financial support, such as officially supported export credits, for fossil fuel energy in non-parties, except in limited circumstances where it:
  (i) meets a legitimate policy goal, such as improved safety or environmental standards; or
  (ii) supports a clean energy transition aligned with the goals of the Paris Agreement;
(f) end international aid funding for fossil fuel energy except in limited circumstances where it is not feasible to provide access to energy solely from renewable sources and the aid:
  (i) is essential as part of a humanitarian response;
  (ii) is to meet a legitimate policy goal such as improved safety or environmental standards; or
  (iii) supports a clean energy transition aligned with the goals of the Paris Agreement; and
(g) encourage non-parties to develop and undertake best practice approaches to fossil fuel subsidy reform.[194]

The 2024 Agreement on Climate Change, Trade and Sustainability is to date (10 February 2025) the most detailed treaty on fossil fuel subsidies. The objective of the treaty is:

to foster the contribution of international trade in addressing climate change and other serious environmental challenges. . . thereby contributing to the achievement of sustainable development, through such actions as . . . disciplining and eliminating harmful fossil fuel subsidies in order to mitigate their adverse impact on the environment and contribute to global efforts to rapidly reduce greenhouse gas emissions resulting from production and consumption of fossil fuels.[195]

Accordingly, Chapter 4 of the treaty has the specific objective:

to discipline and eliminate harmful fossil fuel subsidies in order to mitigate their adverse impact on the environment and contribute to global efforts to rapidly reduce greenhouse gas emissions resulting from production and consumption of fossil fuels.[196]

Concretely, Article 4.5 of the Agreement bans a number of fossil fuel subsidies, subjects the introduction of some to strict conditions, phases out others, and requires the parties to regularly review their scheduled fossil fuel subsidies with a view to assessing their possible elimination.[197]

[193] FTA between New Zealand and the United Kingdom 2022 (n 68) art 22.8, para 1 (available here).
[194] ibid art 22.8, para 2.
[195] Agreement on Climate Change, Trade and Sustainability (Costa Rica, Iceland, New Zealand, Switzerland) 2024 (n 62) art 1.1, para (c) (available here).
[196] ibid art 4.1.
[197] ibid art 4.5. See also Indo-Pacific Economic Framework for Prosperity Agreement Relating to a Clean Economy (Australia, Brunei Darussalam, Fiji, India, Indonesia, Japan, the Republic of Korea, Malaysia, New Zealand, Philippines, Singapore, Thailand and Vietnam) 2024 (n 61) art 5, para 5(5) (available here) (explaining that 'the Parties intend to . . .

e) Clauses on the fossil fuel industry

States do not impose obligations on the fossil fuel industry in their investment treaties, even though the activities of this industry play a significant role in the emission of greenhouse gases. Of note, however, is the Georgia–United Kingdom Strategic Agreement (2019) and the European Union–Georgia Association Agreement (2014). While not exceptions, these treaties allow the parties to impose on enterprises, in the general economic interest, obligations relating to 'environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such obligations shall be clearly defined, transparent, proportionate and verifiable.'[198] They also provide that the parties 'shall ensure that energy markets are operated with a view to achieving competitive, secure and environmentally sustainable conditions and shall not discriminate between enterprises as regards rights or obligations'.[199]

(viii) *Climate technology*

This study did not find any treaty clause whereby the parties committed to transfer technology with a view to advancing the fight against climate change. The most advanced clauses in this respect appear in a handful of treaties concluded by the UK and the EU. They provide that the parties' cooperation on climate change 'shall cover inter alia . . . measures to promote technology transfer'.[200] Some clauses further specify that the cooperation 'may cover, among others, the development and implementation of . . . measures to promote technology transfer on the basis of a technology needs assessment',[201] or that cooperation may cover 'measures to promote technology transfer on the basis of Nationally Determined Contributions'.[202]

Several treaty clauses require the parties to cooperate on means to promote low carbon technology,[203] or cooperate on 'research, development, demonstration, deployment and diffusion of safe and sustainable low carbon and adaptation

(b) cooperate through sharing knowledge, best practices, and technical expertise to reduce dependence on unabated fossil fuels; and (c) cooperate on the deployment of advanced planning and forecasting techniques to identify sustainable pathways to rapidly transform energy systems to increase the use of clean energy and reduce the use of and dependence on unabated fossil fuels, while maintaining and ensuring the reliability, affordability, and availability of energy and energy systems').

198 Strategic Partnership and Cooperation Agreement between the United Kingdom and Georgia 2019 (n 75) art 208 (available here); European Union–Georgia Association Agreement (signed 27 June 2014, entered into force 1 July 2016) art 216, para 1 (available here).

199 Strategic Partnership and Cooperation Agreement between the United Kingdom and Georgia 2019 (n 75) art 208 (available here); European Union–Georgia Association Agreement 2014 (n 198) art 216, para 1 (available here).

200 European Union–Kyrgyzstan Enhanced Partnership and Cooperation Agreement 2024 (n 180) art 265, para 2(a) (available here); Armenia–European Union Comprehensive and Enhanced Partnership Agreement 2017 (n 113) art 54(h) (available here).

201 Strategic Partnership, Trade and Cooperation Agreement between the Republic of Moldova and the United Kingdom of Great Britain and Northern Ireland 2020 (n 50) art 86(g) (available here); European Union–Moldova Association Agreement 2014 (n 113) art 95(g) (available here); European Union–Georgia Association Agreement 2014 (n 198) art 310(c) (available here).

202 Strategic Partnership and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and Georgia (signed 21 October 2019, entered into force 1 January 2021) art 290(b) (available here); art 13.13 1(f) (working together on sustainable development) of the European Union–Vietnam FTA 2019 (n 174) (available here).

203 Cooperation on Trade and Sustainable Development of the Korea–United Kingdom FTA 2019 (n 77) Annex XIII 1(f) (available here); European Union–Japan Economic Partnership (signed 17 July 2018, entered into force 1 February 2019) art 16.12(h) (available here); Comprehensive Trade and Economic Agreement between Canada and the European Union 2016 (n 107) art 24.12, para 1(e) (available here) (referring to cooperation on issues such as 'means to promote energy efficiency and the development and deployment of low-carbon and other climate-friendly technologies').

technologies'.[204] Other treaties identify low carbon technologies as an area of cooperation between the parties,[205] or obligate them to promote 'new, innovative, safe and sustainable low-carbon and adaptation technologies'.[206]

C. *Assessment of Significance*

Investment treaty clauses that seek to support the climate change regime rest upon the prevailing consensus in the international community on climate change, its causes, its effects and its consequences. In general, these clauses do not create new or more binding obligations with respect to climate change than those arising from the UN climate regime. Their legal significance is therefore limited. Most of the obligations concern cooperation in respect of climate change. However, Article 4, paragraph 1(d) of the UNFCCC already imposes on the States parties the obligation to cooperate in respect of climate change and to:

> promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems.[207]

Article 56 of the UN Charter, as well as customary international law,[208] also does the same, albeit in more general terms.[209] The precise added value of these obligations, beyond the identification of concrete areas or objectives of cooperation, is therefore limited.

The most normatively consequential provisions in investment treaty clauses that seek to support the climate regime are:

(i) clauses that create for the parties a separate obligation—arising from international investment agreements—to comply with their obligations and commitments under the climate change regime;[210]

[204] Strategic Partnership and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and Georgia 2019 (n 102) art 288(d) (available here); Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part 2015 (n 85) art 216(d) (available here); European Union–Georgia Association Agreement 2014 (n 198) art 308(d) (available here).

[205] Chile–United Arab Emirates CEPA 2024 (n 87) art 16.5, para 7 (available here); European Union–New Zealand FTA 2023 (n 97) art 19.6, para 5 (available here); Free Trade Agreement between New Zealand and the United Kingdom of Great Britain and Northern Ireland (signed 28 February 2022, entered into force 31 May 2023) art 17.13 1(f) (available here); Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part 2020 (n 51) art 401, para 3 (available here); see also European Union–Singapore FTA 2018 (n 89) art 12.11, para 4 (available here); European Union–Japan Economic Partnership 2018 (n 203) art 16.12(h) (available here); Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part 2010 (n 84) Annex XIII (available here); Chile–European Union Interim Trade Agreement 2023 (n 138) art 8, para 2(a) (available here).

[206] European Union–Kyrgyzstan Enhanced Partnership and Cooperation Agreement 2024 (n 180) art 264(d) (available here); Cotonou Agreement 2000 (n 66) art 32A (available here).

[207] UNFCCC (n 4) UNTS, vol 1771, 107, art 4, para 1(d).

[208] SeeUNGA Resolution 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV) (restating the principle that 'states have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences').

[209] See UN Charter, art 56 read together with art 55.

[210] See Section III.A.(ii)(a).

(ii) clauses creating obligations to remove tariff and non-tariff barriers to environmental goods and services; and
(iii) clauses that seek to regulate the relation between climate change and energy, especially those that encourage the use of carbon pricing by the parties, or discourage or ban some fossil fuel subsidies, as well as those that encourage or require climate impact assessment.[211]

Admittedly, these clauses appear only in the treaties that were concluded by the five treaty parties that have concluded the most investment treaties with climate change clauses, namely the EU, Chile, the UK, New Zealand and Australia. Except for Chile, all these countries are Annex I countries.

Nevertheless, cooperation and promotion in investment treaty clauses are not deprived of significance since, from the perspective of the climate change regime, they create a framework for cooperation between the parties. Even when the clauses do not have a strong normative content, they trigger the duty to justify non-compliance that may be sufficient, in some cases, to nudge towards total or partial compliance.[212] This is even more the case when the relevant treaties subject the parties to a periodic review to assess the measures that they took to comply with these obligations. Thus, the Indo-Pacific Economic Framework (IPEF) Clean Agreement (2024), despite its non-binding provisions, is a step in the right direction. It establishes an IPEF Clean Economy Committee with the mandate to consider the implementation of the IPEF by the parties. The Clean Economy Committee's mandate extends to '(a) the policies and measures that the Party has adopted, modified, or plans to adopt to support implementation of this Agreement; and (b) how such policies and measures contribute or are expected to contribute to the achievement of the objectives of this Agreement'.[213]

From the perspective of international investment law, climate change clauses form part of the 'context' of the investment clauses of the treaties that contain them, pursuant to Article 31, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties.[214] They may therefore serve to interpret the investment clauses of treaties in which they are included. Exceptionally, these clauses may be applicable to foreign investments under the international investment agreement when a specific treaty provision so provides. This is the case under the Canada–Ukraine Modernized FTA (2023), Article 17.3 of which provides that all other chapters of the treaty, including the climate change chapter, prevail over the investment chapter in case of inconsistency.[215]

211 See Section III.B.(vii).
212 See Abi-Saab (n 22) 158 (explaining that the duty to provide justifications is in international law the evidence of a legal obligation).
213 Indo-Pacific Economic Framework for Prosperity Agreement Relating to a Clean Economy (Australia, Brunei Darussalam, Fiji, India, Indonesia, Japan, the Republic of Korea, Malaysia, New Zealand, Philippines, Singapore, Thailand and Vietnam) 2024 (n 61) art 24, para 5(b) (available here).
214 Vienna Convention on the Law of Treaties between States (n 47) 1155 UNTS 331, art 31, para 2.
215 Canada–Ukraine Modernized FTA 2023 (n 83) art 17.3 (available here).

IV. CLAUSES SEEKING TO MOBILIZE FOREIGN DIRECT INVESTMENTS AND INTERNATIONAL INVESTMENT LAW TO SUPPORT CLIMATE ACTION

Investment treaties, in addition to containing clauses that support the climate change regime as a whole, also contain clauses dealing specifically with the relation between foreign investments and climate change. States acknowledge in these clauses that foreign direct investments may play a significant role in the fight against climate change.[216] Accordingly, some treaty clauses request the parties to promote or facilitate the contribution of trade and investment in the fight against climate change.[217] Investment treaty clauses build upon this understanding. Some clauses require the parties to enhance their cooperation in investment matters relevant for climate change (A). Other clauses seek to facilitate climate-friendly investments (B). Yet, others reveal the parties' intent to protect their regulatory space (C). However, very few clauses seek to regulate the conduct of foreign investors in relation to climate change (D). The sections below review these clauses in turn before assessing their significance (E).

A. *Clauses Seeking to Enhance Cooperation in Investment Matters Relevant for Climate Change*

Treaty clauses calling upon States to cooperate in relation to investment matters relevant for climate change may cover the bilateral and multilateral cooperation of the parties. Their subject matter may relate to the adoption of norms and policies (i) or that of practical measures (ii).

(i) *Clauses relating to the adoption of norms and policies*

The clauses relating to the adoption of norms and policies may be worded in more or less binding terms. The Sustainable Investment and Facilitation Agreement between the European Union and the Republic of Angola (2023) exemplifies a clause that is worded in vague terms. It obliges the parties to '*work together to strengthen* their cooperation on investment-related aspects of climate change policies and measures bilaterally, regionally and in international fora, as appropriate, including in the UNFCCC, the WTO, the Montreal Protocol on Substances that Deplete the Ozone Layer . . . and the International Maritime Organization', as well as regarding 'investment-related aspects of biodiversity policies and measures bilaterally, regionally and in international fora, as appropriate, including in the CBD

[216] ibid art 13.23, para 1 (recognizing 'the importance of trade and investment in environmental goods and services, including those goods and services that are particularly relevant to climate change mitigation and adaptation and, in particular, clean technologies, as a means of improving environmental and economic performance, contributing to green growth and jobs, and encouraging sustainable development, while addressing global environmental challenges'). See also Sustainable Investment and Facilitation Agreement between the European Union and the Republic of Angola 2023 (n 49) art 32, para 1 (available here); Canada–Ukraine Modernized FTA 2023 (n 83) art 13.23 (available here); FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13.22 (available here).

[217] See also EFTA–Moldova FTA 2023 (n 71) art 9.8 (2)(b) (available here) (commit to 'promote the contribution of trade and investment to the transition to a low-carbon-economy and to climate-resilient development'); Colombia–Ecuador–EU Peru FTA 2012 (n 67) art 275, para 4 (available here); Economic Partnership Agreement between the CARIFORUM States, of the one part, and the United Kingdom, of the other part 2019 (n 81) art 183, para 5 (available here).

and CITES'.[218] The same goes for the Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part (2012). In this Agreement:

> The Parties agree to enhance cooperation in the energy sector with a view to . . . supporting the development of appropriate policy frameworks to create favorable conditions for investment and a level playing field for renewable energy and the integration into relevant policy areas.[219]

Conversely, cooperation clauses relating to the adoption of norms and policies may be worded in stronger terms. For instance, the Protocol to the African Continental Free Trade Area on Investment (2023) (ACFTA Protocol on Investment) provides that:

> Each State Party shall . . . cooperate with the other State Parties on investment-related aspects of climate change policies and measures.[220]

Climate finance is not generally identified as an area of cooperation in investment treaty climate change clauses. Article 11.14 of the New Zealand–United Kingdom FTA (2022) on sustainable finance is an exception. The parties recognized in this provision the:

> importance of international cooperation to facilitate the inclusion of environmental, social, and governance considerations in investment decision-making and other business activities, in order, thereby, to increase investment in sustainable activities.[221]

They also clarified that:

> The inclusion of environmental considerations in investment decision-making and other business activities involves, inter alia, the assessment and pricing of climate-related risks and opportunities, and the exploration of environmental and sustainable projects and infrastructure.[222]

The parties further acknowledged the:

> importance of encouraging financial services suppliers to develop an approach to managing climate-related financial risks. Specifically, the Parties recognise the importance of encouraging the uptake of climate-related financial disclosures for financial service suppliers, including forward-looking information, in line with initiatives in international fora, such as the Task Force on Climate-Related Financial Disclosures.[223]

[218] Sustainable Investment and Facilitation Agreement between the European Union and the Republic of Angola 2023 (n 49) art 32, para 3 (available here) (emphasis added). See also EFTA–Moldova FTA 2023 (n 71) art 9.8(c) (available here); China–EU Comprehensive Agreement on Investment 2021 (n 60) art 6(c) (available here).

[219] Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part 2012 (n 74) art 42(a) (available here).

[220] ACFTA Protocol on Investment 2023 (n 60) art 26, para f (available here); see also Decision of the Energy Charter Conference: Amendments to the Energy Charter Treaty (CCDEC—12 GEN) (2024) (n 57) art 5, para 5 (available here) (with respect to art 19*bis*).

[221] FTA between New Zealand and the United Kingdom (n 68) art 11.4, para 1 (available here).

[222] ibid.

[223] ibid art 11.14, para 3.

Based on these premises, Article 11.14, paragraph 4, of New Zealand–United Kingdom FTA (2022) provided that:

> The Parties shall cooperate in relevant international fora, and where agreeable, in the development and adoption of internationally recognised standards for the inclusion of environmental, social, and governance considerations in investment decision-making and other business activities.[224]

(ii) *Clauses requiring cooperation at a practical level*

Clauses requiring cooperation at a practical level are not concerned with the establishment or norms, policies or frameworks. They identify rather concrete areas of cooperation to support investment in climate change goods and services. For instance, the parties to the Comprehensive Trade and Economic Agreement between Canada and the European Union (2016) 'commit[ed] to cooperate on trade-related environmental issues of common interest, in areas such as . . . trade and *investment* in environmental goods and services, including environmental and green technologies and practices; renewable energy; energy efficiency; and water use, conservation and treatment'.[225] The Iceland–Liechtenstein–Norway–UK FTA (2021) follows a similar approach. It requires the parties to cooperate 'on issues of mutual interest', including areas such as '(c) trade and *investment* in renewable energy technologies and energy efficient goods and services'.[226] The Investment Memorandum of Understanding between the Government of the United Arab Emirates and the Government of Australia on Investment Cooperation in Green and Renewable Energy, which is annexed to the Australia–United Arab Emirates BIT (2024), is the most unique instrument in this respect since it lists 12 areas of investment in green and renewable energy as areas of cooperation between the parties.[227] It also provides that '[m]ore broadly, cooperation will also involve facilitating activities to match investors and financiers with suitable projects'.[228] Article 8 of the ACFTA Protocol on Investment (2023), for its part, indicates simply that the parties 'may introduce incentives in order to attract, retain and expand investments that foster sustainable development of State Parties' and provides some examples of such investments.[229]

B. *Clauses Supporting Climate-Friendly Investments*

Investment treaty practice shows that States are increasingly focusing on investment facilitation, and not just its protection. Investment treaty climate change clauses align with this trend and seek to support climate-friendly investments either by facilitating these investments (i) or by removing relating obstacles (ii). This study did

[224] ibid art 11.4 (sustainable finance) para 1. See also FTA between the United Kingdom and Australia 2021 (n 68) art 9.19 (available here); Australia–United Arab Emirates CEPA 2024 (n 60) art 9A.11 (sustainable finance) (available here).

[225] Comprehensive Trade and Economic Agreement between Canada and the European Union (n 107) art 24.12, para 1 (e)(f)(h) (available here) (emphasis added); EU–Georgia Association Agreement 2014 (n 77) art 239, para (j) (available here).

[226] FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13.22 (Trade and Climate Change) (available here) (emphasis added); see also Strategic Partnership and Cooperation Agreement between the United Kingdom and Georgia 2019 (n 75) art 231(j) (with a similar wording) (available here).

[227] Investment Memorandum of Understanding between the Government of the United Arab Emirates and the Government of Australia on Investment Cooperation in Green and Renewable Energy annexed to the Australia–United Arab Emirates BIT (6 November 2024, not yet in force) para (3)(1) (available here).

[228] ibid para (3)(3) (available here).

[229] African Union, ACFTA Protocol on Investment 2023 (n 60) (available here).

not encounter any investment treaty that distinguishes between climate-friendly and climate-hostile investments to provide a protection specific to climate-friendly ones. However, the recent amendments to the Energy Charter Treaty extend the scope of the coverage of the treaty to climate-friendly energy sources and activities that were not already covered by the treaty (iii).

(i) *Treaty clauses facilitating climate-friendly investments*

Treaty clauses that impose an obligation to facilitate or promote trade and investment in climate-friendly goods and services may phrase the relevant obligation as an obligation to make efforts or an obligation to facilitate. Concerning the former, the Canada—Ukraine Modernized FTA (2023) requires the parties '*to endeavour to facilitate and promote* trade and investment in environmental goods and services', 'that are particularly relevant to climate change mitigation and adaptation and, in particular, clean technologies', including by exchanging information on policies and programmes, practices, promotion of research and development.[230] The wording of the Agreement between the United Kingdom and Japan for a Comprehensive Economic Partnership (2020) is more encompassing but it still dilutes the relevant obligation. According to its Article 16.5 (b)–(d), the parties:

(b) *shall strive to facilitate and promote trade* and investment in environmental goods and services, in a manner consistent with this Agreement;
(c) *shall strive to facilitate* trade and investment in goods and services of particular relevance to climate change mitigation, such as those related to sustainable renewable energy and energy efficient goods and services, in a manner consistent with this Agreement;
(d) *shall strive to promote* trade and investment in goods that contribute to enhanced social conditions and environmentally sound practices, including goods that are the subject of labelling schemes, and recognise the contribution of other voluntary initiatives, including private ones, to sustainability.[231]

With respect to the latter, the EU–New Zealand FTA (2023) provides that 'each Party shall promote and facilitate trade and investment in: (a) environmental goods and services', understood to include climate-friendly goods and services.[232] Article 33 of the Sustainable Investment and Facilitation Agreement between the European Union

[230] Canada–Ukraine Modernized FTA 2023 (n 83) art 13.23 (available here); see Comprehensive Trade and Economic Agreement between Canada and the European Union (n 107) art 24.9, para 1 (available here). See also New Zealand–United Arab Emirates Comprehensive Economic Partnership Agreement 2025 (n 60) art 8.2 (available here) (according to this provision, 'the Parties *shall endeavour to take appropriate measures to promote an attractive investment climate*, including by: (a) encouraging investments between the Parties, especially those that will support decarbonisation efforts and the development of clean technologies'); ibid art 8.4(d) provides that the parties 'shall endeavour to enhance their respective capacities to address investment-related environmental issues, including cooperation . . . supporting the transition to low carbon and climate resilient economies'). EU–Vietnam FTA 2019 (n 105) art 13.10, para 2(c) (available here).

[231] Agreement between the United Kingdom and Japan for a Comprehensive Economic Partnership 2020 (n 71) art 16.5(b)–(d) (available here) (emphasis added). See also Strategic Partnership and Cooperation Agreement between the United Kingdom and Georgia 2019 (n 75) art 334 (b)–(d) (available here); EU–Japan Economic Partnership 2018 (n 80) art 16.5 (available here).

[232] EU–New Zealand FTA 2023 (n 53) art 19.11, para 4 (available here). See also Chile–Paraguay FTA (n 46) (available here); Comprehensive Trade and Economic Agreement between Canada and the European Union (n 107) art 24.9, para 2 (available here); FTA between New Zealand and the United Kingdom 2022 (n 68) art 22.6.2, para (b) (available here); ibid art 22.7(b); FTA between the United Kingdom and Australia 2021 (n 68) art 22.6 (available here); New Zealand–United Arab Emirates Comprehensive Economic Partnership Agreement 2025 (n 60) art 14.13 (available here); EU–Kyrgyzstan Enhanced Partnership and Cooperation Agreement 2024 (n 80) art 178, para 1 (available here); China–EU Comprehensive Agreement on Investment 2021 (n 60) art 6(b) (available here). Chile–EU Interim Trade Agreement 2023 (n 105) art 26.10, para 2(c) (available here).

and the Republic of Angola (2023) obliges the parties 'to facilitate and encourage investment in sustainable production and consumption, in environmental goods and services, and investment of relevance for climate change mitigation and adaptation', 'investment for the sustainable use of biological resources and the conservation of bio-diversity', 'investment in a way that is consistent with the conservation and sustainable management of forests' and 'investment in a way that is consistent with the conservation and sustainable management of marine biological resources and marine ecosystems'.[233]

The ACFTA Protocol on Investment (2023) has the most detailed clauses regarding facilitation and promotion of climate-friendly investments. Pursuant to its Article 26, each State party shall, in accordance with its domestic climate change policies, the principle of common but differentiated responsibilities, and relevant climate change instruments:

(a) promote and facilitate investments that support actions to mitigate greenhouse gas emissions and measures to adapt to the negative impacts of climate change;
(b) promote and facilitate investments that support initiatives conducive to the financing of regional climate mitigation and adaptation programmes;
(c) promote and facilitate investment of relevance for a fair and just transition in sectors such as renewable energy, low-carbon technologies, and by adopting policy frameworks conducive to transfer and deployment of climate-friendly technologies and goods and services, taking into account socio-economic constraints, in particular those related to the transition of the workforce;
(d) promote, facilitate and encourage new investment regimes, such as low or zero carbon Special Economic Zones;
(e) encourage investments that mitigate climate change impacts on exhaustible natural resources such as fresh water and biological diversity.[234]

In general, the treaties surveyed do not define what facilitation and promotion of investment in climate-friendly goods and services means. Notably, however, the EU–New Zealand FTA (2023) does so and exemplifies the promotional and facilitation activities by listing:

(a) awareness-raising actions and information and public education campaigns;
(b) adoption of policy frameworks conducive to the deployment of best available technologies;
(c) encouraging the uptake of transparent, factual and non-misleading sustainability schemes, especially for SMEs [Small and Medium-sized Enterprises];
(d) addressing related non-tariff barriers; and
(e) reference to relevant international standards, such as the ILO conventions and guidelines or MEAs [Multilateral Environmental Agreements].[235]

[233] See respectively Sustainable Investment and Facilitation Agreement between the European Union and the Republic of Angola 2023 (n 49) article 33, paras 1, 2, 4, 5 and 6 (available here); see also Canada–Ukraine Modernized FTA 2023 (n 83) art 13.23 (available here).
[234] ACFTA Protocol on Investment 2023 (n 60) art 26, paras (a)–(e) of the (available here).
[235] EU–New Zealand FTA 2023 (n 53) art 19.11, para 5 (available here).

(ii) *Treaty clauses facilitating the removal of obstacles to investment in climate-friendly goods and services*

The wording of investment treaty clauses on the removal of obstacles mirrors that of treaty clauses seeking to facilitate investment in climate-friendly goods and services. Instead of obliging the parties to remove these obstacles, some clauses insist that they must make efforts to facilitate their removal. For instance, Article 223(c) of the Strategic Partnership and Cooperation Agreement between the United Kingdom and Georgia (2019) requires the parties:

> *to strive to facilitate* the removal of the obstacles to trade or investment concerning goods and services of particular relevance to climate change mitigation, such as sustainable renewable energy and energy efficient products and services.[236]

Parties may show creativity by using different wording, but to the same effect. For instance, Article 24.9, paragraph 2, of the Comprehensive Trade and Economic Agreement between Canada and the European Union (2016) provides that:

> The Parties shall, consistent with their international obligations, *pay special attention to facilitating* the removal of obstacles to trade or investment in goods and services of particular relevance for climate change mitigation and in particular trade or investment in renewable energy goods and related services.[237]

However, a few clauses stipulate normatively stronger obligations to facilitate the removal of obstacles to trade and investment in green goods and services. For instance, pursuant to Article 19.6, paragraph 4, of the EU–New Zealand FTA (2023), each party shall:

> (b) facilitate the removal of obstacles to trade and investment in goods and services of particular relevance for climate change mitigation and adaptation, such as renewable energy and energy efficient products and services, for instance through addressing tariff and non-tariff barriers or through the adoption of policy frameworks conducive to the deployment of best available technologies.[238]

[236] Strategic Partnership and Cooperation Agreement between the United Kingdom and Georgia 2019 (n 75) art 223(c) (available here) (emphasis added) (explaining further that: 'This may include the adoption of appropriate technologies and the promotion of standards that respond to environmental and economic needs and minimise technical obstacles to trade'); Strategic Partnership, Trade and Cooperation Agreement between the Republic of Moldova and the United Kingdom 2020 (n 50) art 334 (available here); EU–Georgia Association Agreement 2014 (n 77) art 231(c) (available here). Colombia–Ecuador–EU Peru FTA 2012 (n 67) art 275, para 5(a) (available here) ('The Parties agree to consider actions to contribute to achieving climate change mitigation and adaptation objectives through their trade and investment policies, inter alia by: (a) facilitating the removal of trade and investment barriers to access to, innovation, development, and deployment of goods, services and technologies that can contribute to mitigation or adaptation, taking into account the circumstances of developing countries; (b) promoting measures for energy efficiency and renewable energy that respond to environmental and economic needs and minimise technical obstacles to trade'); Armenia–EU Comprehensive and Enhanced Partnership Agreement 2017 (n 87) art 276(c) (available here).

[237] Comprehensive Trade and Economic Agreement between Canada and the European Union (n 107) art 24.9, para 2 (available here) (emphasis added); EU–Singapore FTA 2018 (n 98) art 12.11, para 2 (available here).

[238] See EU–New Zealand FTA 2023 (n 53) art 19.6, para 4 (available here). See also Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom, of the other part 2020 (n 51) art 401, para 2(c) (available here).

(iii) *Clauses extending the scope of treaty protections to investment in green energy sources and activities*

The clauses that are discussed in this section are found only in the amended version of the Energy Charter Treaty, following the decision of the Energy Charter Conference of 3 December 2024. They seek to support climate-friendly investments by extending the treaty protection to them. For context, Article 1, paragraph 4, to be read in conjunction with Annex EM of the Energy Charter Treaty, lists the energy materials and products to which the treaty is applicable. Annex EM was amended by the 2024 decision of the Energy Charter Conference to extend the scope of the protection granted by the treaty to economic activities that could have a positive impact on climate change such as 'the capture, utilization and storage of carbon dioxide in order to decarbonize the energy system',[239] as well as to green energy materials and products, namely ethanol, hydrogen, anhydrous ammonia, methanol, biomass, biogas, biomass and synthetic fuels.[240] Besides, the 2 December 2024 amendments to the Energy Charter Treaty provided for a five-year periodic review of economic activities, and energy materials and products, that are covered by the treaty.[241] The goal of this periodic review is 'to give Contracting Parties the possibility to react to technological as well as political developments',[242] including therefore those relating to climate change.

C. *Clauses Seeking to Prevent State Responsibility in Connection with the Adoption of Climate Change Measures*

States sought to prevent liability under their investment treaties for the measures that they may adopt to mitigate greenhouse gas emissions or to adapt to the adverse effects of climate change. For this purpose, they used several drafting techniques. The list of clauses for this purpose includes those that allow some parties to exclude future investments in some fossil fuels from the protection of the treaty *or* phasing out the treaty protection that is granted to some existing fossil fuel investments (i), clauses protecting States' right to regulate (ii) and clauses imposing some climate-related obligations on States with respect to foreign investors (iii).

(i) *Treaty clauses allowing some parties to exclude or phase out their protection for fossil fuel related investments*

Investment treaties do not, in general, exclude from their protection fossil fuel investments. Even the Indo-Pacific Economic Framework for Prosperity Agreement Relating to a Clean Economy (2024) does not contain a clause to that effect. The 3 December 2024 decision (CCDEC 2024—13 GEN) of the Energy Charter Conference takes a step in this direction through the so-called flexibility mechanism,

[239] Decision of the Energy Charter Conference: Amendments to the Energy Charter Treaty (CCDEC—12 GEN) (2024)(n 57) art 2, para 7(b) (with respect to art 1, para 5) (available here).

[240] Decision of the Energy Charter Conference: Modifications and Changes to Annexes to the Energy Charter Treaty (CCDEC 2024—13 GEN) (3 December 2024) 6, modification to Annex EM (original ECT)/EM I (ECT as amended in 1998) (available here).

[241] Decision of the Energy Charter Conference: Amendments to the Energy Charter Treaty (CCDEC—12 GEN) (2024) (n 57) art 8, paras 4–5 (with respect to art 34, para 7) (available here).

[242] See, Agreement in principle on the modernisation of the ECT (CCDEC 2022—10 GEN) (adopted 24 June 2022) pillar III (available here).

pursuant to the amended text of Article 1, paragraph 5.[243] In substance, the mechanism allows States that have been authorized by the Conference to exclude from the scope of Annex NI, which lists the economic activities protected by the Energy Charter Treaty, investment in some fossil fuel related activities. The EU and the UK took advantage of this flexibility. For the EU, Section B(1) of the 3 December 2024 Decision of the Energy Charter Conference allows it to exclude, from the scope of the protection granted in Part III of the Energy Charter Treaty, investments made on or after 3 September 2025 in coal, natural gas, petroleum and petroleum products, 2804.10 Hydrogen, synthetic fuels, as well as investments in the capture, utilization and storage of carbon dioxide, subject to a limited number of exceptions.[244] The same goes for the UK. However, the latter does not exclude from the scope of the protection it grants under the Energy Charter Treaty investments in the capture, utilization and storage of carbon dioxide.[245]

Amended Article 1, paragraph 5, of the Energy Charter Treaty, pursuant to the 2024 decision of the Energy Charter Conference (CCDEC—12 GEN), also allows treaty parties, subject to a decision of the Conference, to phase out the protection granted to some existing investments. The EU successfully secured the authorization of the Conference and scheduled the end of the protection it confers to some existing fossil fuel investments under the treaty 10 years after the entry into force of the 2024 amendments to the Energy Charter Treaty, and in any case, no later than 31 December 2040.[246] The UK also did so, but stipulated more exceptions to the list of existing investments it phased out.[247]

(ii) *Clauses seeking to protect States' right to regulate*

Clauses seeking to protect the right of States to regulate may appear in other chapters of preferential trade agreements with an investment chapter, including the climate change, the environment or sustainable development chapters, as relevant.[248] Since the clauses are generally worded in general terms in reference to the relevant agreement as a whole, they apply also to the investment chapters. Accordingly, this study does not distinguish whether the right to regulate clause appears in the investment chapter or not. Of all the treaty clauses that we have hitherto examined, clauses protecting the regulatory powers of States are those that have the strongest normative content. They may reaffirm in general the right to regulate (a), safeguard the ability of the parties to adopt climate measures (b), regulate the plea of fundamental change of circumstances in relation to climate change (c) or declare climate measures as consistent with the treaty (d).

a) Clauses seeking to protect the right to regulate in general terms

Treaties that seek to protect States' right to regulate in general terms included climate change among the legitimate grounds justifying the exercise of regulatory powers and illustrate how climate change considerations have been shoehorned into existing

[243] Decision of the Energy Charter Conference: Amendments to the Energy Charter Treaty (CCDEC—12 GEN) (2024) (n 57) art 2, para 7 (with respect to art 1, para 5) (available here).
[244] Decision of the Energy of the Energy Charter Conference: Modifications and Changes to Annexes to the Energy Charter Conference (CCDEC 2024–13 GEN) (3 December 2024) s B(1) (available here).
[245] ibid s B(3).
[246] ibid s C(1).
[247] ibid s C(2).
[248] FTA between New Zealand and the United Kingdom 2022 (n 68) art 22.6, para 1 (available here). See also Section IV.C(ii), which discusses more in-depth treaty clauses seeking to protect States' right to regulate.

environmental clauses of investment treaties. Some treaties did so either in the clause reaffirming the right to regulate or through an explanatory note. Article 17.4 of the Canada–Ukraine Modernized FTA (2023) exemplifies the former option when it:

> reaffirm[s] the right of each Party to regulate within its territory to achieve legitimate policy objectives, such as with respect to: *the protection of the environment and addressing climate change*; national security and territorial integrity; the enforcement of domestic law; social or consumer protection; or the promotion and protection of health, safety, rights of Indigenous peoples, gender equality, or cultural diversity.[249]

The explanatory note in Annex D, paragraph E, of the New Zealand–United Arab Emirates BIT (2025) illustrates the latter option.[250] In this context, treaty clauses may provide that measures adopted pursuant to the right to regulate should not be established or used in a manner that would constitute a disguised restriction on trade or investment between the parties.[251] They may also identify the legal basis of the right to regulate. For instance, the ACFTA Protocol on Investment (2023) reaffirms States' right to regulate '[i]n accordance with customary international law and other general principles of international law', including to take measures to ensure that investment in its territory is consistent, among others, with 'climate action . . . policy objectives'.[252]

Other treaties reaffirmed the right to regulate through safeguard clauses. Investment treaties that choose this avenue may provide, as does the Comprehensive Economic Partnership Agreement between Japan and the United Kingdom (2020), that:

> Nothing in this Section shall affect the right of a Party to define or regulate its own levels of protection in pursuit or furtherance of its public policy objectives in areas such as . . . (e) the environment including climate change.[253]

[249] Canada–Ukraine Modernized FTA 2023 (n 83) art 17.4 (available here) (emphasis added). See also the interpretative clause ibid art 29.9, para 3, concerning the general exceptions to trade EU–New Zealand FTA 2023 (n 53) art 10.1, paras 2, 12.3 (available here); Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom, of the other part 2020 (n 51) arts 123, para 2, 198, 303, 304, para 5 and 356 (available here); Sustainable Investment and Facilitation Agreement between the European Union and the Republic of Angola 2023 (n 49) art 2, para 2 (available here); EU–Kyrgyzstan Enhanced Partnership and Cooperation Agreement 2024 (n 80) art 70, para 4 (available here); Chile–EU Advanced Framework Agreement 2023 (n 57) art 10. 2 (available here); China–EU Comprehensive Agreement on Investment 2021 (n 60) art 1, para 2 (available here) (to be read together with art 10.14 which specifically seeks to exclude responsibility due to the failure to grant, renew, modify or reduce a subsidy); Chile–EU Interim Trade Agreement 2023 (n 105) art 10.2 (available here); EU–Kyrgyzstan Enhanced Partnership and Cooperation Agreement 2024 (n 80) art 70, para 4 (available here). Decision of the Energy Charter Conference: Amendments to the Energy Charter Treaty (CCDEC—12 GEN) (n 57) art 4, para 22 (available here) (with respect to art 17*bis*).

[250] New Zealand–United Arab Emirates BIT (signed 14 January 2025, not yet in force) Annex D, para E (available here) ('For greater certainty, New Zealand reaffirms its right to regulate within its territory to achieve legitimate policy objectives, such as the protection of human, animal or plant life or health, social services, public education, safety, the environment including *climate change*, public morals, social or consumer protection, animal welfare, privacy and data protection, or the promotion and protection of cultural diversity and the promotion and protection of the rights, interests, duties and responsibilities of Māori related to te Tiriti o Waitangi/the Treaty of Waitangi. The interpretation of te Tiriti o Waitangi/the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement' (emphasis added)); ASEAN–Australia–New Zealand FTA Second Protocol (n 84) Annex III—List A, para 8 (available here).

[251] FTA between New Zealand and the United Kingdom 2022 (n 68) art 22.4 (available here); FTA between the United Kingdom and Australia 2021 (n 68) art 22.3, para 6 (available here).

[252] ACFTA Protocol on Investment 2023 (n 60) art 24, para 1 (available here).

[253] Agreement between the United Kingdom and Japan for a Comprehensive Economic Partnership 2020 (n 71) art 18.1, para 2 (available here); see also Decision of the Energy Charter Conference: Amendments to the Energy Charter Treaty (CCDEC—12 GEN) (n 57) art 5, para 10 (available here) (with respect to art 24, para 1(b)). EU–Japan Economic Partnership 2018 (n 80) art 18.1, para 2(e) (available here).

b) Clauses seeking to protect the ability of the parties to adopt climate change measures

The wording of investment treaty clauses, instead of reaffirming in general terms States' right to regulate as discussed in the previous section, may focus on the ability of the parties to adopt climate change measures. To do so, treaty clauses may declare that the provisions of the treaty shall not prevent the parties from adopting climate change measures, including by referring to climate change agreements. The reference to climate change agreements may be implicit when the parties make a general reference to multilateral environmental agreements. For instance, Article 333 of the Strategic Partnership, Trade and Cooperation Agreement between the Republic of Moldova and the United Kingdom (2020) provides that:

> Nothing in this Agreement shall prevent the Parties from adopting or maintaining measures to implement the MEAs to which they are party, provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade.[254]

It may also be express when the parties refer to the relevant treaties directly. For instance, the parties to the New Zealand–United Kingdom FTA (2022):

> recognise that nothing in this Agreement prevents a Party from taking measures to fulfil its commitments under the UNFCCC and the Paris Agreement provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination against the other Party or a disguised restriction on trade.[255]

In addition, treaties may seek to protect parties' right to regulate by providing interpretative guidelines as to how the relevant treaty should be construed, including by emphasizing the self-judging character of some aspects of a treaty clause. For instance, Article 14.18, paragraph 1, of the New Zealand–United Kingdom FTA (2022), which appears in the investment chapter of the treaty, stresses that:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing, in a manner consistent with this Chapter, *any measure that it considers appropriate* to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, or other regulatory objectives.[256]

Other treaties do so by incorporating the general exceptions of Article XX GATT, which provides that the GATT shall not be construed to prevent the adoption or enforcement by a contracting party of a number of measures. This is the case of

[254] Strategic Partnership, Trade and Cooperation Agreement between the Republic of Moldova and the United Kingdom 2020 (n 50) art 333 (available here). See also FTA between New Zealand and the United Kingdom 2022 (n 68) art 22.6 (available here); Agreement between the United Kingdom and Japan for a Comprehensive Economic Partnership 2020 (n 71) art 16.4, para 5 (available here); the Strategic Partnership and Cooperation Agreement between the United Kingdom and Georgia 2019 (n 75) (available here); European Union–Georgia Association Agreement 2014 (n 198) art 230, para 5 (available here). European Union–Moldova Association Agreement 2014 (n 113) art 366, para 5 (available here); Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part 2012 (n 74) art 55, para 2 (available here) (providing that: 'This Agreement shall not affect the application or implementation of commitments undertaken by the respective Parties in relations with third parties', including therefore climate change commitments).

[255] FTA between New Zealand and the United Kingdom 2022 (n 68) art 22.6, para 1 (available here).

[256] ibid art 14.18, para 1 (emphasis added) (to be read in conjunction with art 14.18, para 2, specifies that '[t]he Parties recognise the importance of environmental protection, including with respect to climate change mitigation and adaptation').

Article 14.1 of the Iceland–Liechtenstein–Norway–UK FTA (2021) that incorporates and declares applicable *mutatis mutandis* Article XX GATT general exceptions to its investment liberalization section, among others. It further clarifies that, for this purpose, 'environmental measures include climate change mitigation measures' that would be otherwise inconsistent with its investment liberalization section.[257] The Chile–EU Advanced Framework Agreement (2023) provides interpretative guidance by annexing a joint interpretative declaration in respect of climate change. The joint interpretative declaration seeks to regulate both the expectations of investors and the interpretation by investment tribunals of the investment protection clauses. It provides that:

> [1] In light of their commitments under the Paris Agreement, the Contracting Parties confirm that their investors should expect that the Contracting Parties will adopt measures that are designed and applied to combat climate change or address its present or future consequences, by mitigation, adaptation, reparation, compensation or otherwise.
> [2] When interpreting the provisions of the Investment Protection Agreement, the Tribunal should take due consideration of the commitments of the Parties under the Paris Agreement and their respective climate neutrality objectives.
> [3] Thus, the Parties confirm their understanding that the provisions of the Investment Protection Agreement shall be interpreted and applied by the Tribunal by taking due consideration of the commitments of the Parties under the Paris Agreement and their respective climate neutrality objectives and in a way that allows the Parties to pursue their respective climate change mitigation and adaptation policies.[258]

This provision is significant not only because it recognizes the possibility of compensation or reparation as a means to address the present or future consequences of climate change in a treaty applicable to the EU. It is also important for the interpretative guidelines it provides to investment tribunals, among others interpretation in a way that allows the parties to pursue their respective climate change mitigation and adaptation policies.

c) Clauses governing the application of the plea of fundamental change of circumstances in relation to climate change

Article 411, paragraph 1, of the EU–Euratom–UK TCA (2020) is a unique example of an investment treaty clause that seeks to govern how the plea of fundamental change of circumstances applies to the treaty, including in relation to climate change. It derogates, therefore, to that extent from Article 62 of the 1969 Vienna Convention on the Law of Treaties, which enumerates a restrictive list of exceptional circumstances within which a fundamental change of circumstances may be invoked

[257] FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 14.1, paras 1 and 3 (available here).

[258] Joint Interpretative Declaration annexed to the Chile–EU Advanced Framework Agreement 2023 (n 57) (available here).

as a ground for suspending, terminating or withdrawing from a treaty.[259] This provision that is entitled 'Rebalancing' provides that the parties:

> recognise the right of each Party to determine its future policies and priorities with respect to labour and social, environmental or *climate protection*, or with respect to subsidy control, *in a manner consistent with each Party's international commitments*, including those under this Agreement. At the same time, the Parties acknowledge that significant divergences in these areas can be capable of impacting trade or investment between the Parties in a manner that changes the circumstances that have formed the basis for the conclusion of this Agreement.[260]

Accordingly, Article 411, paragraph 2, of the Agreement provides that:

> If material impacts on trade or investment between the Parties are arising as a result of significant divergences between the Parties in the areas referred to in paragraph 1, either Party may take appropriate rebalancing measures to address the situation. Such measures shall be restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Agreement. A Party's assessment of those impacts shall be based on reliable evidence and not merely on conjecture or remote possibility.[261]

This clause safeguards the regulatory power of the EU and the UK to adopt 'rebalancing measures' that are strictly necessary and proportionate when significant divergences on climate change materially impact investment between them. Article 411, paragraph 3, of the Agreement prescribes the 'procedures to be applicable in such circumstances'.[262]

d) Clauses declaring climate measures as consistent with the treaty

Some treaties declare that climate mitigation and adaptation measures are in conformity with the relevant treaty. This declaration seems to be directed towards investment tribunals that may have to review their legality. Article 24, paragraph 2, of the ACFTA Protocol on investment is probably the clearest provision in this regard and provides concerning the right to regulate, including in respect of climate action, that:

> For greater certainty, measures taken by a State Party to comply with its international obligations under other relevant treaties shall not constitute a breach of this Protocol.[263]

[259] Vienna Convention on the Law of Treaties between States (n 47) 1155 UNTS 331, art 62 (providing that: '1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (*a*) be bound by the treaty; and the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (*b*) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (*a*) if the treaty establishes a boundary; or (*b*) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty').

[260] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom, of the other part 2020 (n 51) art 411, para 1 (emphasis added) (available here).

[261] ibid art 411, para 2.

[262] ibid art 411, para 3.

[263] ACFTA Protocol on Investment 2023 (n 60) art 24, para 3 (available here). For a clause that may be interpreted in a similar sense, see FTA between the United Kingdom and Australia 2021 (n 68) art 13.18, para 2(d) (available here) (the treaty recalls, in its investment chapter, its provisions that are applicable to promoting mutually supportive investment and environmental outcomes *and that are consistent* with the sovereign right of each State to set its level of environmental protections, including as set out in the relevant provisions, exceptions, and exclusions of this chapter, of Annex I

Similarly, Article 13.22 of the Iceland–Liechtenstein–Norway–UK FTA (2021) provides that those actions taken to achieve the ultimate objective of the UNFCCC and the Paris Agreement in order to address the urgent threat of climate change 'are consistent with this Agreement'.[264]

Some treaties identify specifically the investment standard of protection with which climate change measures shall be considered as consistent or that would not be considered as breached by climate measures. For instance, Annex 17-D, paragraph (c), of the Chile–EU Advanced Framework Agreement (2023) provides that:

> For greater certainty, non-discriminatory measures of a Party that are designed and applied to achieve legitimate policy objectives, such as the protection of . . . environment, including climate change . . . do not constitute indirect expropriations, unless the impact of a measure or series of measures is so severe in light of its purpose that it is manifestly excessive.[265]

At the same time, the Spanish solar panel cases seem to have prompted investment treaty parties to clarify circumstances when the regulation of subsidies should not be considered as a breach of the treaty. For instance, the Chile–EU Advanced Framework Agreement (2023) specifies that:

> For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party does not constitute a breach of obligations of this Section [Investment Protection], even if it results in loss or damage to the covered investment:

(a) in the absence of any specific commitment at law or under a contract to issue, renew or maintain that subsidy or grant; or
(b) in accordance with any terms or conditions attached to the issuance, renewal, modification or reduction of that subsidy or grant.[266]

D. *Clauses Engaging Foreign Investors in Respect of Climate Change*

Investment treaty clauses seeking to mobilize investment law and foreign direct investments to address climate change, similarly to investment treaty clauses that seek to provide a general support to the climate change regime, do not address private entities, including the fossil fuel industry. For instance, Article 3.11 of the Iceland–Liechtenstein–Norway–UK FTA (2021) remains State-centric when it declares that:

(Schedules of Non-Conforming Measures for Services and Investment) and Annex II (Schedules of Non-Conforming Measures for Services and Investment), of ch 31 (General Provisions and Exceptions), and of ch 22 (Environment). It indicates further that these provisions, exceptions, and exclusions include those that are applicable to '(d) supporting the transition to low carbon and climate resilient economies; and (e) encouraging investment in environmental goods and services').

[264] FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 13.22 (available here).

[265] Chile–EU Advanced Framework Agreement 2023 (n 57) Annex XXXX, para 3 (available here) (which provides that: 'For greater certainty, non-discriminatory measures by a Party that are designed and applied to achieve legitimate policy objectives, such as the protection of . . . environment, including climate change . . . do not constitute indirect expropriations, unless the impact of a measure or series of measures is so severe in light of its purpose that it is manifestly excessive'); Decision of the Energy Charter Conference: Amendments to the Energy Charter Treaty (CCDEC—12 GEN) (2024) (n 57) art 4 (with respect to art 34, para 8) (with respect to art 13, para 4) (available here).

[266] See Chile–European Union Advanced Framework Agreement (signed 13 December 2023, not yet in force) art 10.14, para 3 (available here); see also ibid art 101.4, para 4; Pacific Alliance–Singapore Free Trade Agreement (signed 26 January 2022, entered into force 3 May 2025) art 8.13, para 6 (available here) (with respect to indirect expropriation); European Union–Singapore FTA 2018 (n 89) art 2.2, para 3 (available here).

> The Parties recognise the importance of environmental protection in connection with the establishment and operation of enterprises and reaffirm the Parties' rights and obligations relating to the protection of the environment, including climate change, provided for in this Agreement.[267]

That said, this study notes two developments towards addressing private entities. First, as mentioned above, the joint interpretative declaration between Chile and the EU clarifies that investors should expect that the parties adopt climate change adaptation, mitigation, reparation or compensation measures.[268] Secondly, Article 30 of the Draft Pan-African Investment Code provides that:

> Investors are encouraged to provide adequate financial resources, including for the transfer of technology, needed for implementing measures to assist the Member States that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to, or mitigation of those adverse effects.[269]

These two clauses represent a step forward compared to the usual 'responsible business conduct clauses', the most normatively strong of which tend to provide that:

> Each Party shall encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their business practices and internal policies, internationally-recognised principles, standards and guidelines of responsible business conduct, in its environmental dimension, that have been endorsed or are supported by that Party.[270]

E. *Assessment of Significance*

The contribution of investment treaty clauses that seek to mobilize foreign direct investments and international investment law to support the fight against climate change is limited. Certainly, the treaties reviewed contain specific cooperation and facilitation clauses in respect of investment in climate-friendly goods and services. However, the relevant clauses are often worded as obligation to make efforts.[271] In addition, treaties do not generally address, let alone phase out existing investments in goods and services detrimental to the fight against climate change. Furthermore, investment treaties do not tailor their procedural and substantive guarantees to the contribution of the underlying investment to climate change adaptation and mitigation. This study did not, for instance, encounter treaty clauses that make

[267] FTA between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom 2021 (n 25) art 3.11 (available here).

[268] Joint Interpretative Declaration on the Chile–EU Advanced Framework Agreement 2023 (n 57) (available here).

[269] Draft Pan-African Investment Code (adopted 1 December 2016, not yet in force) art 30, para 2 (available here); see also Morocco Model BIT (2019) (published 1 June 2019) art 20.4 (providing that 'Investors will be expected to manage or operate their investments in compliance with international obligations regarding human and labor rights, responsible business conduct, health and environmental protection, *and consistent with climate change mitigation and adaptation objectives*') (emphasis added) (available here).

[270] See eg Chile–United Arab Emirates CEPA 2024 (n 87) art 16.5, para 8 (available here); see also WTO, 'Investment Facilitation for Development' (published 29 February 2024, not yet in force) (available here); Chile–EU Advanced Framework Agreement 2023 (n 57) art 10.23 (available here); Chile–Paraguay FTA 2021 (n 46) art 11.8 (available here); China–European Union Comprehensive Agreement on Investment (signed 22 January 2021, not yet in force) art 2 (available here). Economic Complementation Agreement No 75 between the Republic of Chile and the Republic of Ecuador 2020 (n 48) art 16.8 (available here).

[271] See Section IV.A–B(i)–(ii).

investments in climate change-friendly goods and services decisively more attractive than investments in climate neutral or hostile goods and services. Similarly, it did not find any investment treaty clause that specifically discourages, let alone prohibits, future investment in goods and services that undermine the fight against climate change.

The 3 December 2024 amendments to the Energy Charter Treaty are to a limited extent the only exception to this finding since the flexibility mechanism allows parties authorized by the Conference to phase out the protection granted to existing fossil fuel investments and not to extend the treaty protections to such future investments. However, only the EU and the UK were authorized by the Conference to take advantage of the flexibility mechanism to exclude some fossil fuel activities and investments from the coverage of their obligations under the Energy Charter Treaty. [272] Tellingly, the Contracting Parties to the Energy Charter Treaty sought to limit the significance of the flexibility mechanism and to deprive it of any value as a precedent. They:

> confirmed that it was *an exceptional measure* to allow fossil fuels to be excluded from investment protection through the modifications to Annex NI as a result of the modernisation of the Energy Charter Treaty and *do not set this as a basis for the negotiation of new agreements or revision of other agreements*, including agreements related to the promotion and protection of investments.[273]

Except therefore for those amendments to the Energy Charter Treaty, the only provisions that have a strong normative content in these clauses are those that seek to preserve the parties' regulatory space: these clauses are not only worded in binding legal terms, but their normative content is not diluted. For this purpose, the parties used various drafting techniques, including by reaffirming States' right to regulate through general clauses, by including safeguard clauses or WTO-style general exceptions in the relevant treaty, by regulating the invocation of the plea of fundamental change of circumstances in respect of climate change, or by declaring that climate measures do not breach or are consistent with the parties' obligations under the relevant investment agreement.[274] These clauses shield, at least on their face, the possibility for States to adopt climate change measures without incurring international responsibility. From the perspective of the fight against climate change, however, they leave to each State the decision as to whether and when to exercise their regulatory powers to support climate action. They also do not intrude on States' discretion as to the measures to be adopted. These clauses express, therefore, more a desire to prevent a possible finding of liability than a desire to support climate action immediately.

This mindset that can be characterized as defensive has obvious shortcomings. The choice to safeguard States' regulatory space through general exceptions or safeguard clauses, which play as affirmative defences, is questionable. In addition, as mentioned above, very few States defended successfully their investment (or trade) measures based on environmental exceptions and safeguard clauses.[275] It is

[272] See Section IV.A.
[273] Decision of the Energy Charter Conference: Modifications and Changes to Annexes to the Energy Charter Treaty (CCDEC 2024—13 GEN) (2024)(n 240) para 1, 6 modification to Annex EM (original ECT)/EM I (ECT as amended in 1998) (emphasis added) (available here).
[274] See Section IV.C(ii).
[275] See in this respect, the case law referred to in n 16 above.

against this background that investment treaty clauses declaring that climate change measures are consistent with the relevant investment treaty are to be interpreted. Furthermore, clauses seeking to protect States' regulatory space leave in general open the question of whether compensation is to be paid following an otherwise lawful exercise of regulatory powers to address any related loss or damage.[276] The ACFTA Investment Protocol is one of the few international investment agreements to address this issue with respect to climate change explicitly. It provides that 'the exercise of the right to regulate . . . cannot give rise to any claim by an investor for compensation'.[277]

V. CONCLUSION

The purpose of this article was to review climate change clauses in investment treaties to map them and determine how their wording reflects States' engagement with the urgent need for climate action. This study identified two main groups of climate change clauses in investment treaties, namely those that seek to support the climate change treaty regime and those that seek to mobilize investments and investment law in the fight against climate change.

Investment treaty clauses that seek to support the climate change regime are the following:

(i) clauses expressing the shared views of the parties on the reality of climate change and the necessity to mitigate climate change and adapt to its adverse impacts;[278]
(ii) clauses reaffirming the commitments or obligations of the parties pursuant to the UN climate change regime;[279]
(iii) clauses relating to the cooperation between the parties in respect of climate change;[280]
(iv) clauses creating an obligation to advocate for or to promote specific policies in respect of climate change;[281]
(v) clauses creating a separate obligation, pursuant to international investment agreements, to implement the parties' obligations and commitments arising from the climate change regime;[282]
(vi) clauses imposing obligations to remove tariff and non-tariff barriers to the trade on climate-friendly goods and services;[283]
(vii) clauses seeking to regulate the use by the parties of fossil fuel subsidies or to encourage the parties to use carbon pricing and climate impact assessment;[284]
(viii) clauses calling for cooperation to protect forests, the marine environment, the ozone layer, biodiversity, and to cooperate on renewable energy, considering their contribution in the fight against climate change;[285]

[276] See eg Decision of the Energy Charter Conference: Amendments to the Energy Charter Treaty (CCDEC—12 GEN) (n 57) art 5, para 10 (with respect to art 24, para 1) (available here).
[277] ACFTA Protocol on Investment 2023 (n 60) art 24, para 3 (available here).
[278] Section III.A (introduction).
[279] Section III.A(i)(a).
[280] Section III.A.(i)(b).
[281] Section III.A.(i)(c).
[282] Section III.A.(ii)(a).
[283] Section III.A.(ii)(b).
[284] Section III.B.(vii)(b)–(d).
[285] Section III.B.(i)–(iv) and (vii).

(ix) clauses calling for cooperation in the fight against air pollution in light of the incidental benefit that this could have in the fight against climate change;[286]
(x) clauses calling for cooperation in respect of agriculture in light of the adverse impacts of climate change on agriculture and food systems, as well as of the contribution of agriculture to greenhouse gas emissions;[287]
(xi) clauses recognizing that the parties may regulate the fossil fuel industry and energy markets with a view to achieving competitive, secure and environmentally sustainable conditions;[288]
(xii) clauses relating to cooperation or promotion of low carbon technology or technology transfer in relation to climate change;[289] and
(xiii) clauses providing that disputes with respect to climate change clauses may not be settled through the binding legal mechanisms provided for under the relevant investment agreement, or providing that such disputes will be settled through diplomatic means, including facilitative means, processes and institutions.[290]

Investment treaty clauses that seek to mobilize foreign direct investments and investment law in the fight against climate change are the following:

(i) clauses seeking to enhance the cooperation between the parties in investment matters relevant for the fight against climate change;[291]
(ii) clauses on the facilitation of investment in climate-friendly goods and services or relating to the removal of obstacles to such investment;[292]
(iii) clauses allowing some parties to exclude future fossil fuel investments or to phase out existing ones from the protection of the treaty;[293]
(iv) clauses seeking to protect States' regulatory space by reaffirming the right of the parties to regulate in respect of climate change, clarifying that nothing in the treaty shall affect the right of the parties to regulate in respect of climate change, addressing the application of the plea of fundamental change of circumstances in respect of climate change, or stating that climate measures do not breach, or are consistent with, the relevant treaty;[294]
(v) clauses clarifying that investors should expect States' climate change regulations;
(vi) clauses encouraging or imposing on the parties an obligation to encourage investors to provide financial resources and to transfer technology to assist in the fight against climate change.[295]

The breadth of these clauses and the number of issues that they cover are impressive. The list of the clauses reads somewhat as an outline for a draft zero of a multilateral treaty on climate change, investment and trade. Almost all the key issues arising from the need to mobilize investment and trade in the fight against climate change appear in this practice. Nevertheless, the practice, when considered

[286] Section III.B.(v).
[287] Section III.B.(vi).
[288] Section III.B.(vii)(e).
[289] Section III.B.(viii).
[290] Section III.A.(ii)(a).
[291] Section IV.A.
[292] Section IV.B.
[293] Section IV.C.(i).
[294] Section IV.C.(ii).
[295] Section IV.D.

as a whole, remains underwhelming, even if the obligation bearing upon States to take climate considerations into account in their economic actions and policies 'to the extent possible', pursuant to Article 4, paragraph 1(f), of the UNFCCC, is not worded in the strongest terms possible. From the outset, these clauses concern very few States. The large majority of States did not deem it necessary to update their investment treaties to align them with the urgent need for climate action. In addition, almost a third of the treaties reviewed in this study (31 out of 109 treaties) are not yet in force. Furthermore, only a handful of States have included many of the clauses listed above in their treaties. The practice of including systematically climate change clauses in investment treaties concerns chiefly the EU, Chile, the UK, New Zealand and Australia. Finally, the large majority of the clauses enumerated above stipulate obligations to cooperate in respect of climate change. The most normatively strong provisions are those that create binding obligations (i) to implement obligations under the climate change regime; (ii) to remove tariff and non-tariff barriers to trade and investment in climate-friendly goods and services; (iii) to prohibit fossil fuel subsidies or promote the use of carbon pricing and climate impact assessment, and (iv) to facilitate or to remove the obstacles to investment and trade in climate-friendly goods and services. In addition to these four types of clauses, the list includes (v) the clauses allowing some parties to investment treaties to phase out investment treaty protection for existing fossil fuel investments or to deprive future fossil fuel investments from such protection and (vi) those that seek to protect States' regulatory powers.

The breadth of investment treaty climate change clauses, together with the limited number and scope of provisions with a strong normative content in these treaties, suggest that time is ripe for a thorough review of this practice by States. Such a review should critically examine both the legislative techniques that investment treaty parties are using to implement their obligation to protect and preserve the climate system when engaging in economic matters, on the one hand, and the content of the clauses themselves, on the other hand.

States have so far used several drafting techniques, including (i) shoehorning climate change considerations into existing treaty provisions, (ii) adopting a specific article or chapter devoted to the relations between trade, investment and climate change, (iii) adopting joint interpretative decisions on some investment treaty clauses, (iv) providing a flexibility mechanism to individual treaty parties, (v) adopting a memorandum of understanding on some aspects of climate change and (vi), adopting treaties between a limited number of parties devoted specifically to climate change and the transition towards a clean or green economy. Parties to treaty clauses that are not devoted to climate change specifically seem to perceive climate change as an environmental challenge similar to all environmental ones. However, the magnitude, scope of interests and activities affected by climate change, including those of States, peoples, indigenous peoples and individuals, as well as the severity of the consequences that impact humanity as a whole, distinguish climate change from typical domestic or regional environmental issues. Accordingly, shoehorning climate change considerations into old generation treaty clauses that were intended to deal with traditional environmental problems is misaligned with the very nature of climate change. For similar considerations, a regional or transregional agreement may serve to address some regional or transregional aspects of the fight against climate change. However, its scope would not cover the global aspects of taking into account climate change in economic relations. A multilateral treaty among the pacesetters only may allow States that are ready to make the strongest commitments on climate change and investment to do so, even if it might exclude entire regional and national perspectives from the discussion on the balance between climate change, trade and investment.

Only a multilateral treaty, in the negotiations of which all States are able to participate, may address fully all the global aspects of the relations between climate change, investment and trade. The practice reviewed showed that developing States adopted more investment treaties with climate change clauses when they participated in investment treaties as groupings of States, such as the African Union, the Pacific alliance, the OACPS or the Andean Community. For instance, no African country, except for Kenya, included a climate change clause in its treaties when one excludes treaties adopted as a member of the African Union or the OACPS. Developing countries appear, therefore, to prefer addressing climate change in a multilateral context. However, it is doubtful whether there is a sufficient degree of consensus in the international community that would allow successful negotiations on a binding multilateral treaty on climate change, trade and investment.

For this reason, this study suggests that, despite the urgent need for climate action, the initial steps towards a binding multilateral instrument on the topic should take the form of negotiations, under the aegis of the UNGA, for the adoption of a declaration of principles, including principles of international law, governing climate change, investment and trade. For one, the UNFCCC is not the exclusive framework for the discussion of climate change matters. The UNGA has regularly adopted resolutions on climate change.[296] Moreover, the UNGA has often adopted resolutions on principles of international law that paved the way to the adoption of a treaty on the same topic.[297] Adopting a declaration of principles in a resolution of the UNGA that is reviewed annually may allow the crystallization of a consensus on the core elements of a binding multilateral agreement on climate change, trade and investment. Such a binding legal instrument could be adopted by the UNGA itself, at a separate diplomatic conference, or as an agreement under the UNFCCC.

Concerning its substance, such a multilateral agreement on trade, investment and climate change would need to do away with the great nervousness that is apparent from several clauses that this study reviewed. Admittedly, not all clauses in a treaty need to be worded in binding terms and to have a normatively strong content. It would be naive to expect only binding and normatively strong clauses in a treaty on a topic like climate change and economic matters. States have been cautious not to adopt normatively strong obligations in their negotiations under the UNFCCC. Nevertheless, the content of investment treaty climate obligations should not be diluted to the point of evanescence. Obligations to cooperate, facilitate or promote in respect of climate change do not bind the parties to materialize the intended outcome of their cooperation, facilitation and promotion activities. When these obligations are worded as obligations to make efforts to cooperate, to facilitate or to promote, as it is often the case in the investment treaties surveyed in this study, their normative content is further diluted. Accordingly, clauses creating obligations 'to strive to facilitate', 'to endeavour to cooperate' and similar wording that appear

[296] See eg UNGA Resolution 79/206 'Protection of global climate for present and future generations of humankind' (23 December 2024) A/RES/79/29. A resolution of the General Assembly on this topic is adopted annually.

[297] Etienne Klein and Stefanie Schmahl, 'Functions and Powers—Article 10' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012) 482.

in many investment treaty climate change clauses, should be carefully avoided, lest such clauses signal mere lip service to the urgent need for climate action.

In addition, a multilateral treaty on climate change, trade and investment will need to identify precisely the commitments States are ready to take in respect of climate change, investment and trade. Currently, investment treaty climate change clauses reveal more a desire of the parties to safeguard their right and ability to adopt climate change measures at the moment of their choosing. This appears from the cooperation and promotion clauses, the clauses seeking to protect their regulatory powers, as well as from the flexibility mechanism provided for under the Energy Charter Treaty. Of course, such an approach does not align with the urgent need of climate action. Once obligations are clearly defined, compliance with them may be reviewed, including by non-binding facilitation and dispute settlement mechanisms. This is why one should not discard fully the declarations of intention enshrined in the Indo-Pacific Economic Framework for Prosperity Agreement Relating to a Clean Economy (2024), subject to how effective the Clean Development Committee will review States' reports on the actions they undertook to implement their declarations of intention.

Finally, a multilateral treaty on trade, investment and climate change will need to be based on a strong consensus on climate finance, the legal regime applicable to existing and future fossil fuel investments, and the adoption of a greener economy, at the multilateral level.

SUPPLEMENTARY MATERIAL

Supplementary material is available at *ICSIDR* online.

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