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INVESTMENT TREATIES IN A WARMING WORLD: RETHINKING PROTECTION, RISK, AND RESPONSIBILITY IN THE AGE OF CLIMATE TRANSITION

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ABSTRACT: *The accelerating climate crisis calls for a profound recalibration of regulatory priorities of host states, particularly in the realms of energy, finance, and environmental governance. As governments implement sweeping measures to decarbonise their economies – phasing out fossil fuels, imposing carbon pricing regimes, and incentivising green technologies – these policies increasingly intersect and, in some instances, collide with the legacy architecture of international investment law. Anchored in treaties designed to protect investor expectations and capital flows, the international investment regime now stands at a critical juncture: whether to evolve in response to planetary imperatives or risk obsolescence through normative dissonance.*

This article interrogates the legal and conceptual tensions at the heart of this transition. It critically examines how investment tribunals have addressed disputes arising from climate-related regulation and probes the evolving contours of "legitimate expectations", "fair and equitable treatment", and regulatory risk under a changing global environmental order. It explores whether traditional treaty protections inadvertently constrain the sovereign regulatory space necessary for states to meet their climate obligations under international law, including the Paris Agreement and emerging customary norms concerning environmental stewardship.

Drawing on doctrinal analysis, recent arbitral jurisprudence, and interdisciplinary insights from climate science and sustainable finance, the article proposes a rethinking of protection, risk, and responsibility in the investment law paradigm. It argues for a normative and structural realignment of investment treaties – through climate-responsive treaty language, public interest exceptions, and reimagined dispute settlement mechanisms – to ensure coherence between economic governance and environmental sustainability. Ultimately, it advances a vision of international investment law that is not merely compatible with, but actively facilitative of, the global climate transition.

KEYWORDS: Investment treaties, climate transition, decarbonisation, sustainable finance, regulatory risk, investment protection, climate governance, environmental objectives.

INTRODUCTION

The international investment regime, once championed as a cornerstone of global economic stability and liberalisation, now faces a formidable challenge from an increasingly urgent planetary crisis. As climate change accelerates and states adopt sweeping regulatory measures to decarbonise their economies, the foundational assumptions underpinning investor protection frameworks are being called into question. The investment framework, particularly bilateral investment treaties (BITs) and investor-state dispute settlement (ISDS) mechanisms—were constructed in an era largely indifferent to environmental constraints, prioritising the protection of foreign capital over the exigencies of ecological stewardship. In the age of climate transition, this legacy architecture sits uneasily alongside emerging climate norms, sustainability commitments, and the regulatory autonomy required to manage profound structural shifts in energy, finance, and industry.

The collision between climate imperatives and international investment law is no longer speculative. Regulatory measures aimed at reducing carbon emissions such as the phase-out of fossil fuels, the implementation of carbon pricing, or the introduction of clean energy mandates have already triggered high-profile ISDS claims, such as those brought by energy firms against the Netherlands following its coal ban.[1] Such disputes expose the normative tensions within a system that simultaneously purports to uphold sovereign rights of host states and protect investor expectations, yet struggles to reconcile the two when environmental urgency demands bold state action.[2]

As climate policy becomes more and more ambitious and urgent, especially in light of the Paris Agreement's ratcheting mechanism, legal systems must retain flexibility to accommodate rapid policy innovation. By mapping the doctrinal complexities and political dilemmas at the heart of the climate-investment nexus, this article aims to advance a jurisprudence of coherence: a framework in which legal regimes converge, rather than clash, in the pursuit of planetary integrity and intergenerational justice.

The article adopts a model of comprehensive analysis of the evolving relationship between climate governance and investment protection. It interrogates the extent to which traditional treaty standards—such as fair and equitable treatment (FET), indirect expropriation, and the doctrine of legitimate expectations impede or enable climate regulation. It further considers whether current investment treaties adequately reflect the shifting balance between investor rights and state responsibilities in the Anthropocene.[3]

The argument is presented in six segments. The first segment traces the historical evolution of the international investment regime and its foundational commitment to capital protection, situating this framework within the context of post-war economic liberalism.[4] The second surveys the architecture of international climate governance, mapping its influence on domestic

[1] See *RWE v Netherlands* and *Uniper v Netherlands*, ICSID Case Nos ARB/21/4 and ARB/21/22.

[2] Lise Johnson, Jesse Coleman, and Brooke Güven, 'International Investment Law and Climate Change' (Columbia Center on Sustainable Investment, 2020).

[3] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013).

[4] Jason Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence' (2008) 51(2) Va J Intl L 397.

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regulatory pathways and the convergence of environmental law and economic policy.[5] The third identifies key doctrinal fault lines in ISDS cases involving environmental and climate-related measures, with attention to how tribunals interpret regulatory risk.[6] The fourth evaluates emerging treaty practice and reform initiatives aimed at incorporating environmental considerations, including public interest exceptions, climate carve-outs, and ESG-linked obligations.[7] The fifth segment engages with broader questions of distributive justice, climate risk, and the political economy of decarbonisation, highlighting the role of investment law in either reinforcing or remedying global asymmetries.[8]

The final segment of the article concludes by proposing a blueprint for reconciling investment protection with planetary boundaries, arguing that a legitimate and future-facing investment regime must evolve to support—not to inhibit— the green transition.[9]

The Evolution of International Investment Law and Its Protectionist Logic

International investment law emerged in the aftermath of decolonisation and the post-war global economic reordering, developed primarily through Bilateral Investment Treaties (BITs) designed to protect foreign investors against expropriation and discriminatory treatment in host states. Initially driven by capital-exporting Western countries, these treaties established a framework based on market liberalism, legal predictability, and investor confidence.[10] The earliest BIT, concluded between Germany and Pakistan in 1959,[11] laid the groundwork for a rapidly expanding treaty network that now encompasses over 2,500 agreements worldwide.[12]

These treaties typically include core protection mechanisms: fair and equitable treatment (FET), full protection and security, national treatment, most-favoured-nation treatment, and protections against direct and indirect expropriation.[13] In addition, many treaties provide access to Investor – State Dispute Settlement System (ISDS), which permit investors to bypass domestic courts and bring claims before international arbitral tribunals. While originally aimed at depoliticising disputes and promoting rule of law, ISDS has become the focal point of criticism due to its perceived encroachment on state sovereignty and lack of transparency.[14]

The early jurisprudence under ISDS was investor-friendly, often prioritising stability and regulatory predictability over sovereign flexibility.[15] Legal doctrines such as fair and equitable treatment, indirect expropriation, and legitimate expectations—once conceived as guardians of

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[5] Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2010).

[6] Markus W Gehring and Marie-Claire Cordonier Segger (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011).

[7] UNCTAD, 'Reform of the IIA Regime' (2023) https://investmentpolicy.unctad.org Assessed 20 May 2025

[8] Julia Dehm, 'Carbon Majors and the Right to a Healthy Environment' (2020) 68(1) UCLA L Rev 78.

[9] Stephen W Schill, 'Reforming Investor–State Dispute Settlement: A (Comparative) Constitutional Perspective' (2015) 20(1) Lewis & Clark L Rev 59.

[10] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd edn, OUP 2012).

[11] Germany-Pakistan BIT (1959).

[12] UNCTAD, World Investment Report 2023 (UN 2023).

[13] UNCTAD, IIA Issues Note No. 1 (2020).

[14] Gus Van Harten, Investment Treaty Arbitration and Public Law (OUP 2007).

[15] Stephan W Schill, The Multilateralization of International Investment Law (CUP 2009).

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economic stability—have increasingly come under scrutiny.[16] In decisions such as *Tecmed v Mexico*[17] and *CMS v Argentina*,[18] tribunals interpreted the FET standard expansively, grounding it in the doctrine of legitimate expectations and requiring states to maintain a stable regulatory framework. Such interpretations were premised on the belief that investors should be shielded from abrupt or unforeseeable legal change, even where such change was in the public interest.

However, this protectionist logic has become increasingly untenable in light of contemporary regulatory demands, particularly those arising from environmental and climate-related imperatives. As the regulatory landscape evolves to reflect the existential urgency of the climate crisis, rigid adherence to investor expectations risks disabling the capacity of states to adapt laws and policies in response to ecological realities.[19] It is now evident that regulatory stability cannot be presumed in a world where regulatory dynamism is a condition of survival.

Moreover, the geopolitical landscape has shifted. Emerging economies, many of which are now capital exporters in their own right, have begun to reassess their investment treaty models. The 2015 Indian Model BIT and Brazil's Cooperation and Facilitation Investment Agreements (CFIAs) reflect a recalibration of priorities, emphasising state rights and regulatory autonomy over investor privilege.[20] Brazil's CFIAs notably exclude ISDS entirely and instead rely on state-to-state dispute resolution and ombudsperson mechanisms. Likewise, the African Continental Free Trade Area (AfCFTA) Investment Protocol, adopted in 2023, includes sustainable development as a core objective and mandates consideration of climate change mitigation in investment policymaking.[21]

In Europe, the EU's post-Lisbon treaty practice further reflects these shifts. Agreements such as the EU–Vietnam Investment Protection Agreement (2020) and the EU–Canada Comprehensive Economic and Trade Agreement (CETA) incorporate sustainable development chapters and explicitly reaffirm states' rights to regulate in pursuit of environmental objectives.[22] The recently published EU Draft Model BIT (2021) goes further in emphasising climate protection and ESG obligations, marking a departure from older, purely protectionist models.[23]

Together, these developments point to an emerging consensus that investment law must be reoriented to reflect the imperatives of environmental sustainability. Treaty drafters and policymakers are increasingly aware that investor protections cannot come at the cost of global

[16] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007)

[17] Tecnicas Medioambientales Tecmed SA v Mexico (ICSID Case No ARB(AF)/00/2), Award, 29 May 2003.

[18] CMS Gas Transmission Company v Argentina (ICSID Case No ARB/01/8), Award, 12 May 2005.

[19] Kate Miles, The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital (CUP 2013).

[20] Government of India, 'Model Text for the Indian Bilateral Investment Treaty' (2015), Brazilian Model CFIAs.

[21] AfCFTA Secretariat, 'Protocol on Investment' (2023) https://au-afcfta.org/wp content/uploads/2023/Protocol-on-Investment.pdf accessed 10 May 2025.

[22] EU–Vietnam Investment Protection Agreement (2020) OJ L 186/3.

[23] European Commission, 'EU Model Bilateral Investment Treaty' (2021) https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/eu-model-bilateral-investment-treaty_en accessed 10 May 2025.

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climate commitments.[24] The recalibration underway is not just doctrinal but ideological, signalling a shift towards embedding climate consciousness into the DNA of investment governance.[25] This is not merely a prudent legal adjustment—it is an essential evolution towards ensuring that international investment law supports the structural transition to a low-carbon, climate-resilient global economy.

Ultimately, the international investment regime's historical commitment to investor protection must now be situated within a broader framework that recognises the legitimacy of state regulation in the face of climate challenges. As this article will argue, the evolving normative architecture of climate governance demands a corresponding transformation and re-invention in investment treaty design and interpretation. The conceptual foundations of investment law rooted in its approach to risk, stability, and expectation, must be reimagined if it is to remain relevant in a warming world.

The Architecture of International Climate Governance

The climate governance landscape is a complex, multilayered and fragmented regime shaped by a convergence of international treaties, national commitments, soft law instruments, and evolving customary norms. At its centre lies the 2015 Paris Agreement, which has transformed the trajectory of global climate cooperation by shifting from a prescriptive model of emissions reductions to a nationally determined contributions (NDCs) framework rooted in state ownership, transparency, and progressive ambition.[26] As a legally binding treaty under the United Nations Framework Convention on Climate Change (UNFCCC), the Paris Agreement sets out a shared objective to limit global warming to well below 2°C, with efforts to cap it at 1.5°C above pre-industrial levels.[27] It obligates parties not only to prepare, communicate, and maintain NDCs, but to update them every five years in line with increasing ambition.[28]

Importantly, the Paris Agreement integrates mitigation, adaptation, and finance into a holistic vision of climate governance. It recognises that transitioning to a low-carbon economy entails significant shifts in regulatory frameworks, investment flows, and development priorities.[29] Article 2(1)(c), in particular, signals a paradigm shift by committing states to "making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development".[30] This provision embeds financial regulation and economic law into the core of climate governance, raising new questions about the compatibility of international investment norms with climate-aligned policy trajectories.[31]

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[24] UNCTAD, 'Taking Stock of IIA Reform' (2020) IIA Issues Note No 1 https://unctad.org/system/files/official-document/diaepcbinf2020d1_en.pdf.

[25] IISD, *Model International Agreement on Investment for Sustainable Development* (2005).

[26] Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, International Climate Change Law (OUP 2017) 220.

[27] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS No. 54113, art 2(1)(a).

[28] ibid art 4(2).

[29] ibid arts 7–9.

[30] See Article 2(1)(c)

[31] Paris Agreement, art 2(1)(c); see also International Energy Agency, 'Financing Clean Energy Transitions' (IEA, June 2021).

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Beyond the Paris Agreement, a growing body of soft laws and intergovernmental frameworks further shapes the climate legal regime. The United Nations Sustainable Development Goals (SDGs), especially Goal 13 on climate action, and Goal 7 on affordable and clean energy, amplify normative expectations around regulatory reform and investment alignment.[32] The recommendations of the Task Force on Climate-related Financial Disclosures (TCFD), the EU's Green Deal and taxonomy, and the principles of the Glasgow Financial Alliance for Net Zero (GFANZ) all reflect a profound reorientation of financial governance toward climate objectives. These initiatives influence regulatory design, investor due diligence, and public-private cooperation at a global scale.[33]

In parallel, judicial developments suggest the gradual crystallisation of climate-related obligations as components of customary international law. National and regional courts have increasingly recognised climate change as engaging fundamental human rights, thus reinforcing the legal basis for ambitious state actions. Notably, in *Urgenda Foundation v The Netherlands*, the Dutch Supreme Court found that the state's failure to implement effective mitigation policies violated its duty of care and the right to life under the European Convention on Human Rights.[34] Similar cases are being litigated in Germany, Colombia, and before the European Court of Human Rights, contributing to a growing consensus that states must regulate in accordance with climate science and public interest.[35]

Together, these instruments and developments constitute a dynamic architecture that reshapes the legal terrain in which investment treaties operate. States are not merely encouraged but increasingly compelled legally, politically, and ethically, to regulate carbon-intensive industries, redirect capital towards sustainable sectors, and adopt transformative policies in energy, transport, agriculture, and finance. As this article will argue in subsequent sections, the failure of investment treaties to internalise these imperatives creates legal and normative dissonance and fragmentation. Investment law cannot remain aloof from a regulatory environment undergoing a tectonic shift in response to planetary boundaries and intergenerational equity.

Thus, international climate governance is no longer an externality to economic law; it is a constitutive force that redefines the scope and legitimacy of state conduct. Its integration into investment law is not a matter of discretion, but of legal coherence and normative alignment.

Key Doctrinal Conflicts in Climate-Related ISDS Cases

As climate-related ISDS claims rise, the urgency for normative realignment intensifies.[36] As states implement increasingly assertive climate measures, investor-state dispute settlement (ISDS) tribunals are being called upon to adjudicate disputes that rest at the intersection of sovereign environmental regulation and foreign investment protection. The jurisprudence emerging from these cases reveals deep doctrinal conflicts, particularly with respect to three

[32] See SDG Goals 13 and 7

[33] European Commission, 'EU Sustainable Finance Taxonomy' (2022); TCFD Final Report (2017); GFANZ Progress Report (2022).

[34] *Urgenda Foundation v The Netherlands* (2019) Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007.

[35] Joana Setzer and Catherine Higham, 'Global Trends in Climate Litigation: 2022 Snapshot' (Grantham Research Institute on Climate Change and the Environment, LSE, July 2022).

[36] Philippe Sands, *Principles of International Environmental Law* (3rd edn, CUP 2012).

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core concepts: fair and equitable treatment (FET), indirect expropriation, and legitimate expectations. Each of these standards, while initially developed to shield investors from arbitrary and discriminatory conduct, now occupies a contested space where investor protection confronts climate exigency and the evolving scope of legitimate regulatory governance.

The fair and equitable treatment standard has proven especially contentious in climate-related disputes. Tribunals have often interpreted FET clauses to require stability in the legal and regulatory environment. In *Tecmed v Mexico*, the tribunal held that investors are entitled to a regulatory framework that remains consistent throughout the life of their investment.[37] However, such expectations of immutability become problematic in the face of regulatory dynamism driven by evolving scientific consensus and international environmental commitments. In disputes involving coal phase-out policies, such as *RWE v Netherlands* and *Uniper v Netherlands*, claimants have argued that decarbonisation measures constituted abrupt, unforeseeable shifts that violated FET protections.[38]

These claims expose the limitations of a static conception of regulatory stability. As climate policy becomes more ambitious and urgent, especially in light of the Paris Agreement's ratcheting mechanism, legal systems must retain flexibility to accommodate rapid policy innovation. A rigid application of FET that penalises regulatory adaptation risks creating a chilling effect on necessary and legitimate climate legislation, undermining both domestic policy autonomy and international environmental obligations.[39]

The doctrine of indirect expropriation also generates significant legal friction. Under many BITs, states may be held liable if environmental regulations have an effect equivalent to expropriation, even in the absence of direct taking of property. Tribunals have grappled with the threshold at which public interest regulation crosses into compensable expropriation. In *Methanex v. United States*, the tribunal adopted a deferential approach, finding that *bona fide* environmental regulation does not amount to expropriation.[40] However, in other cases, such as *Yukos v Russia*, tribunals have taken a broader view, reinforcing investor claims even where the measures pursued a legitimate public interest objective.[41] This inconsistency reveals the lack of a clear doctrinal standard that reconciles environmental regulation with investor protection.

Similarly, the notion of legitimate expectations, a central tenet of investment protection, has also generated considerable notions of contestation. Investors frequently invoke legitimate expectations to challenge regulatory actions of host states, arguing that such actions bring about changes that violate their reliance on prior legal frameworks. This raises a conceptual dilemma: to what extent can private actors legitimately expect that laws will remain static in areas where scientific, political, and normative developments demand evolution? Climate policy, by its

[37] *Tecmed v Mexico* (ICSID Case No ARB(AF)/00/2), Award (29 May 2003).

[38] *RWE v Netherlands*, ICSID Case No ARB/21/4; *Uniper v Netherlands*, ICSID Case No ARB/21/22.

[39] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013).

[40] *Methanex Corporation v United States of America* (UNCITRAL), Final Award (3 August 2005).

[41] *Yukos Universal Limited v Russian Federation* (PCA Case No AA 227), Final Award (18 July 2014).

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nature, must be adaptive.[42] Tribunal jurisprudence is increasingly recognising this point. In *Parkerings v. Lithuania*, the tribunal noted that investors must anticipate changes in law, particularly in heavily regulated and evolving sectors.[43]

Despite this growing recognition, arbitral practice and outcome remain uneven and inconsistent. Some tribunals continue to apply legitimate expectations doctrines in ways that privilege investor certainty over regulatory responsiveness. A particularly recent and notable case is *EP Wind GmbH v. Romania*[44], where an arbitral tribunal in April 2025 found that Romania had breached its treaty obligations under the Energy Charter Treaty (ECT) by infringing on the investor's legitimate expectations. The tribunal emphasised that the investor's certainty in the regulatory framework at the time of investment outweighed Romania's later regulatory changes. This is a clear and obvious prioritisation of investor protection. This threatens to entrench a form of legal conservatism that is incompatible with the climate emergency. More fundamentally, it raises questions about the hierarchy of legal norms: should the protection of transnational capital override a state's duty to protect its environment and fulfil international climate obligations?

These doctrinal tensions reflect a broader structural challenge. The ISDS system was not designed to adjudicate global public law disputes involving competing rights and policy priorities. Yet in climate-related cases, tribunals increasingly operate at the fault line of multiple legal regimes: investment law, environmental law, human rights, and climate governance. The lack of institutional safeguards such as appellate review or *amicus* participation further compounds the risk of inconsistent, investor-biased outcomes.[45]

To conclude on this point, the current interpretive approaches to FET, indirect expropriation, and legitimate expectations fail to adequately reflect the normative transformation underway in climate law and policy. To restore balance and legitimacy, arbitral doctrine must evolve. This requires a shift from investor-centric interpretations to context-sensitive assessments that recognise the necessity and legitimacy of regulatory transformation in the face of a global ecological crisis.

Treaty Innovation and Environmental Reform Trajectory

The last decade has witnessed a marked shift in the draughting practices of international investment treaties, prompted by a growing awareness of the environmental externalities of foreign investment and the imperative of regulatory space for sustainable development. Modern treaty texts now increasingly seek to incorporate climate-conscious language and public interest safeguards, signalling a normative shift and reorientation of investment law toward a more balanced equilibrium between investor protection and state prerogatives in environmental governance.

A key innovation in this regard has been the inclusion of explicit environmental exceptions in investment treaties. Such clauses operate as shields, preserving the right of states to regulate in

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[42] Jutta Brunnée and Stephen J Toope, 'Legitimacy and Legality in International Law: An Interactional Account' (CUP 2010).

[43] *Parkerings-Compagniet AS v Lithuania* (ICSID Case No ARB/05/8), Award (11 September 2007).

[44] *EP Wind GmbH v. Romania* (ICSID Case No. ARB/23/15)

[45] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007).

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pursuit of environmental and climate objectives without incurring treaty liability. For instance, the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) affirms the right of parties to take measures to conserve natural resources and protect the environment, provided such measures are not applied in a discriminatory or arbitrary manner.[46] Likewise, the 2019 Netherlands Model BIT expressly permits regulatory measures aimed at protecting health, safety, and the environment, reinforcing the principle that investment protection cannot override vital public interest goals.[47]

Beyond exception clauses, treaty practice has evolved to incorporate preambular language that recognises sustainable development and environmental protection as foundational treaty objectives. While not directly enforceable, such preambular references provide interpretative guidance that may influence the manner in which tribunals assess the proportionality and legitimacy of environmental regulations.[48] This reflects a growing reliance on teleological interpretation strategies, as encouraged by Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), which urge adjudicators to construe treaties in light of their object and purpose.[49]

Consistent with these textual reforms, certain treaties have introduced ‘climate carve-out provisions that exempt specific environmental measures, particularly those related to climate change mitigation, from ISDS scrutiny. The EU-Canada Comprehensive Economic and Trade Agreement (CETA), for instance, permits parties to adopt climate measures that may affect investments, provided they align with international obligations and are applied proportionately.[50] While such carve-outs remain rare, they represent a promising direction for the alignment of investment treaties with climate objectives.

Environmental, social, and governance (ESG) considerations have also gained prominence in investment treaty reform. Emerging treaty models, such as the Morocco-Nigeria BIT (2016), include corporate social responsibility (CSR) obligations on investors, encouraging responsible environmental conduct and adherence to domestic laws.[51] Although largely aspirational and lacking binding enforcement mechanisms, these provisions mark an important shift in rebalancing rights and obligations within the investment regime.

Furthermore, states have begun to integrate references to international environmental agreements, most notably the Paris Agreement, into their investment treaties. This approach serves to harmonize investment protection standards with global climate commitments, reinforcing a coherent international legal architecture. Prior to the EU withdrawal from the

[46] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018).

[47] Netherlands Model Investment Agreement (2019), art 2 and art 9.

[48] Stephan W Schill, ‘Preambles in Treaty Interpretation: The Role of Sustainable Development in Investment Treaty Arbitration’ in Andrea K Bjorklund (ed), Yearbook on International Investment Law and Policy 2012–2013 (OUP 2014).

[49] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 31–32.

[50] Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU (signed 30 October 2016, provisionally applied 21 September 2017), art 28.3.

[51] Bilateral Investment Treaty between the Federal Republic of Nigeria and the Kingdom of Morocco (signed 3 December 2016), arts 18–19.

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Energy Charter Treaty, the draft Energy Charter Treaty (ECT) modernization proposals were submitted wherein the EU had sought to align treaty obligations with the Paris Agreement and exclude fossil fuel investments from protection after 2030.[52] This signaled an important step towards 'greening' the international investment framework.

However, significant obstacles persist. Many legacy treaties remain in force, containing broad investor protections with no corresponding environmental safeguards.[53] Moreover, reform efforts are hampered by geopolitical divergences, power asymmetries, and the inertia of entrenched treaty networks. Developing countries, in particular, face pressure to maintain investor-friendly terms to attract capital, even at the expense of regulatory sovereignty.

Despite these challenges, the direction of travel is clear. Treaty innovation, though uneven and incomplete, is moving towards the embedding of environmental norms within the investment regime. To consolidate this trajectory, future treaties must not only enshrine environmental exceptions and CSR principles but also establish procedural innovations such as transparency mechanisms, standing for third-party intervenors, and interpretive authorities, to ensure that climate-responsive investment governance becomes both a legal and institutional reality.

Distributive justice, Climate Risk, and the Political Economy of Transition

Climate change is not merely an environmental phenomenon; it is an existential challenge that implicates fundamental questions of fairness, responsibility, and political economy. At the heart of the global climate regime lies the principle of distributive justice: the idea that the burdens and benefits of climate action must be equitably shared among and within nations.[54] This concept acquires heightened significance in the context of international investment law, where the rights of foreign investors-often hailing from high-emission, industrialised states-are enforced against host states, many of which are in the Global South and disproportionately vulnerable to climate impacts.[55]

The architecture of international investment protection has historically been blind to questions of equity. Bilateral investment treaties and ISDS mechanisms do not assess the legitimacy of a claim based on the investor's historical carbon footprint or the developmental needs of the host state. Instead, they apply universalised standards that prioritise legal stability, regulatory predictability, and capital protection. This formal neutrality, however, entrenches material inequality. By shielding transnational corporations from the economic consequences of

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[52] European Commission, 'Proposal for the Modernisation of the Energy Charter Treaty' (15 July 2021); See however Briefing on EU withdrawal from the Energy Charter Treaty (European Parliamentary Research Service), December 2023 on EU' withdrawal from the ECT. Note that after Italy withdrew in 2016, four EU countries formally notified their withdrawal: France indicated to leave the ECT on 8 December 2023, Germany on 20 December 2023, Poland on 29 December 2023 and Luxembourg on 17 June 2024.

[53] See for instance the Energy Charter Treaty. Particularly the effect of its Sunset Clause contained under Article 47(3)

[54] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS No. 54113, preamble.

[55] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013).

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necessary climate reforms, investment law can frustrate equitable climate transitions and widen global asymmetries.[56]

Moreover, climate risk, which encompasses both physical risks from climate-induced events and transition risks arising from policy shifts, intersects with investment law in complex ways. On one hand, climate change poses profound threats to the value of investments across sectors; on the other, measures taken to mitigate such risks may themselves provoke legal challenges.[57] For example, fossil fuel divestment, carbon taxation, or green industrial policies may be framed as indirect expropriation or breaches of FET by investors adversely affected by the transition.

This raises a profound dilemma: how can states act boldly in the face of climate urgency without incurring crippling liability under existing investment treaties? The answer lies not only in reforming treaty texts as canvassed earlier,[58] but also in addressing the broader political economy of transition. Wealthier states, which have historically benefited from carbon-intensive development, must support the decarbonisation efforts of developing countries through finance, technology transfer, and policy space.[59] Investment law, however, rarely facilitates such solidarity; instead, it institutionalized asymmetrical accountability, allowing capital-exporting states to enforce investor rights without reciprocal obligations for climate responsibility.

Furthermore, the current investment regime tends to obscure the identities and interests at stake in ISDS claims. Treaties treat foreign investors as monolithic entities, eliding the differentiated impacts of climate policies on workers, communities, and marginalised groups.[60] In doing so, they prioritise property rights over social rights, monetary compensation over ecological restoration, and corporate mobility over democratic deliberation.[61] This disjunction not only weakens the legitimacy of investment law but also misaligns it with the broader ethos of sustainable development and climate justice.

A just transition, in contrast, demands a recalibration of legal priorities. It requires that investment protection be subordinated, where necessary, to the imperatives of climate resilience, intergenerational equity, and ecological sustainability.[62] The concept of a 'just transition'—endorsed in the preamble of the Paris Agreement captures this normative ambition.[63] It enjoins states to integrate social justice into climate action, ensuring that workers and vulnerable populations are not left behind in the shift to a low-carbon economy. Investment

[56] M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015).

[57] Sarah Barker and Ellie Mulholland, 'Climate Change and the Fiduciary Duties of Directors' (2017) Commonwealth Climate and Law Initiative Report.

[58] See the arguments raised under this heading: Treaty Innovation and Environmental Reform Trajectory

[59] UNFCCC, 'Financing Climate Action' https://unfccc.int/topics/climate-finance accessed 10 May 2025.

[60] Lorenzo Cotula, *Investment Treaties and the Legal Imagination: How Foreign Investors Play By Their Own Rules* (OUP 2021).

[61] David Schneiderman, *Resisting Economic Globalisation: Critical Theory and International Investment Law* (Palgrave Macmillan 2010).

[62] Carmen G Gonzalez, 'Environmental Justice, Human Rights, and the Global South' (2015) 13 Santa Clara J Intl L 77.

[63] Paris Agreement, preamble.

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law must internalise these objectives, either through treaty redesign or interpretive innovation or both.

There are some emerging jurisprudence that gestures in this direction. In *Bear Creek v Peru*, the tribunal acknowledged the importance of community consent and environmental impact in assessing the legality of an investment.[64] Though the case did not involve climate regulation, it indicates a growing sensitivity to distributive concerns within arbitral reasoning. Nonetheless, isolated decisions are insufficient. What is needed is a structural reorientation of the ISDS regime to account for the realities of climate risk and the imperatives of global justice.

Finally, it is argued that the intersection of investment law and climate transition cannot be understood in isolation from questions of equity and power. Distributive justice and climate risk must be foregrounded in any legitimate reform agenda. Without this shift, investment law risks becoming a bulwark against, rather than a facilitator of, a just and sustainable global order.

Re-imagining Investment Law for a Climate-Constrained Future

The evolution of international investment law in the age of climate crisis demands not a mere reformist lens, but a transformative re-imagination of its normative core and structural design. The historical imperative that shaped international investment agreements—namely, the unqualified promotion and protection of capital—must be recalibrated to respond to the ecological constraints and justice imperatives of the Anthropocene.

At the heart of this reconfiguration lies a normative realignment. The prevailing orientation of investment law which prioritises investor certainty and the sanctity of commercial expectations, sits increasingly at odds with the dynamic regulatory landscapes necessitated by climate mitigation and adaptation.[65] In the face of planetary emergency, legal frameworks must abandon outdated dichotomies between economic governance and environmental stewardship.[66] Investment treaties must embed climate responsiveness not as a rhetorical ambition but as a binding legal standard, reconstituting the purpose of foreign investment in support of sustainability and resilience.[67]

One avenue of reimagining lies in treaty design. Future IIAs should incorporate explicit climate provisions, including obligations to support nationally determined contributions (NDCs), foster green finance, and refrain from contesting good-faith climate regulations.[68] Provisions could establish substantive investor duties, such as ESG compliance, disclosure of climate-related risks, and net-zero alignment as preconditions for investment protection.[69] Such measures

[64] *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Award (30 November 2017).

[65] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007).

[66] Nathalie Bernasconi-Osterwalder, 'Harnessing Investment Treaties to Advance Climate Action' (IISD, 2020) https://www.iisd.org/articles/harnessing-investment-treaties-advance-climate-action Assessed 1 May 2025

[67] UNCTAD, 'Taking Stock of IIA Reform' (2020) IIA Issues Note No 1 https://unctad.org/system/files/official-document/diaepcbinf2020d1_en.pdf Assessed 20 May 2025

[68] David Gaukrodger, 'The Balance between Investor Protection and the Right to Regulate in Investment Treaties' (OECD, 2017).

[69] Markus Krajewski, 'Model Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation' (FFU-Report 06-2015, Freie Universität Berlin).

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would shift the regime from a one-sided system of entitlements to a framework of mutual obligation and responsibility.

Moreover, ISDS mechanisms must evolve or be replaced. Their asymmetrical design, which grants enforceable rights only to investors, undermines procedural legitimacy, particularly in climate-sensitive disputes where public interest stakes are profound.[70] Tribunals must incorporate standards for admissibility of climate-based regulatory defenses and provide mechanisms for affected communities and civil society to participate meaningfully in proceedings.[71] Options for reform range from multilateral appellate bodies and advisory centers to climate-specific dispute resolution for rootedness in transparency and inclusivity.[72]

Additionally, investment law must address global asymmetries in climate vulnerability and regulatory capacity. The principle of common but differentiated responsibilities (CBDR), central to international environmental law, should be mirrored in investment treaties through differentiated obligations, technical assistance clauses, and regulatory space for developing states to pursue climate objectives without investor backlash.[73] Investment law must thus internalize equity as a foundational principle.

Procedural innovation is also critical. Public participation, proactive disclosure of investment-related environmental risks, and open hearings can enhance the democratic legitimacy of climate-related investment adjudication.[74] Enabling the submission of amicus curiae briefs from environmental experts, NGOs, and indigenous groups can ensure that tribunals are informed by climate science and local realities.

Legal scholarship has converged on the urgency of reconciling investment protection with environmental imperatives. Cotula argues for a jurisprudence of proximity, one that connects global investment flows to local environmental contexts.[75] Miles underscores the historical entrenchment of exploitative hierarchies within investment law and calls for an epistemic rupture.[76] These insights suggest that merely inserting environmental clauses into existing frameworks is insufficient; what is needed is a profound shift in how investment law conceptualises legitimacy, authority, and responsibility.

Finally, political and institutional leadership will be essential. The path forward may involve plurilateral coalitions of climate-committed states designing model treaties, reinterpretation protocols, or withdrawing from regimes—such as the Energy Charter Treaty—that are irreconcilable with climate goals.[77]

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[70] Stephan Schill, ‘Reforming ISDS: Conceptual Framework and Options’ (UNCTAD, 2013)

[71] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013).

[72] Lorenzo Cotula, *Investment Treaties and the Legal Imagination* (OUP 2020).

[73] Philippe Sands, *Principles of International Environmental Law* (3rd edn, CUP 2012).

[74] IISD, *Model International Agreement on Investment for Sustainable Development* (2005).

[75] Lorenzo Cotula, ‘Reimagining Investment Law for Sustainability’ (IIED, 2021).

[76] Kate Miles, ‘Investor-State Dispute Settlement and Climate Change’ in Malgosia Fitzmaurice et al (eds), *Research Handbook on International Environmental Law* (Edward Elgar 2010).

[77] UNFCCC, ‘Joint Statement on the Withdrawal from the Energy Charter Treaty’ (2023) https://unfccc.int/news/eu-member-states-to-exit-ect Assessed 29 April 2025

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The contours of a re-imagined investment regime must be one grounded in mutual obligations, participatory legitimacy, and ecological rationality. As the climate crisis reshapes the contours of international law, investment law must not remain static. It must transform into an enabling framework for just, equitable, and science-informed climate transitions.

CONCLUSION: Toward a Just and Climate-Friendly Investment Regime

The global investment landscape is undergoing a profound transformation, prompted by the imperatives of climate change and the emerging recognition that the traditional investment law paradigm is no longer fit for purpose. The sweeping changes underway in energy systems, environmental regulation, and global finance demand a new legal architecture—one that does not simply accommodate climate objectives as peripheral concerns but places them at the heart of investment governance.

This article has illustrated that the current regime, while historically instrumental in fostering cross-border investment flows, is structurally misaligned with the exigencies of planetary stewardship. Legal doctrines such as fair and equitable treatment, indirect expropriation, and legitimate expectations—once conceived as guardians of economic stability—have increasingly come under scrutiny for entrenching investor privileges at the expense of sovereign regulatory autonomy and environmental responsibility.[78] As climate-related ISDS claims rise, the urgency for a normative realignment intensifies.

What emerges is the need for a paradigm shift—one that redefines the very objectives of international investment law. The recalibration must begin with treaty reform, including the introduction of binding climate clauses, ESG-based investor obligations, and exceptions for good-faith environmental measures.[79] These innovations should be framed not merely as technical adjustments but as a profound reconceptualisation of what it means for investment to be "sustainable" - economically, environmentally, and socially.

Equally important is the transformation of ISDS procedures. Greater procedural transparency, the inclusion of affected communities, the recognition of amicus briefs from environmental stakeholders, and even the consideration of climate science as admissible evidence are all essential to restoring legitimacy and democratic accountability.[80] Future-facing dispute mechanisms must operate not in isolation from but in dialogue with the broader corpus of international environmental and human rights law.

Moreover, principles of equity and climate justice must be central. The structural inequalities that shape the distribution of both investment flows and climate harms require investment treaties to embed differentiated responsibilities, carve-outs for developmental regulation, and technical and financial support mechanisms for climate adaptation in vulnerable economies.[81]

[78] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007).

[79] UNCTAD, 'Taking Stock of IIA Reform' (2020) IIA Issues Note No 1 https://unctad.org/system/files/official-document/diaepcbinf2020d1_en.pdf Assessed 10 May 2025

[80] IISD, *Model International Agreement on Investment for Sustainable Development* (2005

[81] Philippe Sands, *Principles of International Environmental Law* (3rd edn, CUP 2012).

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Without these redistributive correctives, investment law risks exacerbating rather than alleviating the global climate divide.

The case for change is not only normative but also practical. As more states implement ambitious climate policies and revisit outdated treaties—witnessed in the wave of denunciations of the Energy Charter Treaty—the political momentum for reform is building.[82] The era of regulatory chill must give way to an era of climate-conscious legal innovation. Scholars, practitioners, and policymakers alike must envision and construct a regime where law becomes an enabler—not an obstacle—to ecological transition.

In closing, international investment law stands at a historic inflection point. Its future relevance will depend not on its capacity to defend the status quo but on its ability to evolve into an instrument of climate governance. The legitimacy of the investment regime in the twenty-first century will be judged not by how much capital it protects, but by how effectively it serves the transition to a sustainable and just global economy. It is through this lens that new jurisprudence must be developed, new treaties crafted, and new responsibilities embraced. This transformation is not merely a legal necessity but a generational obligation.

[82] UNFCCC, 'Joint Statement on the Withdrawal from the Energy Charter Treaty' (2023) https://unfccc.int/news/eu-member-states-to-exit-ect Assessed 15 May 2025

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