PROTOCOL FOR THE ENCOURAGEMENT, PROMOTION, FACILITATION AND PROTECTION OF INVESTMENTS IN CLIMATE CHANGE MITIGATION AND ADAPTATION

('GREEN INVESTMENT PROTOCOL')

COMMENTARY*

> *"We called for strong ambition, for remarkable partnerships, for mobilization of finance, and for implementation of national climate plans. Paris delivered. Now the job becomes our shared responsibility."* -- Jim Yong Kim, President of the World Bank Group, COP-21, December 2015

I. INTRODUCTION

1. International investment treaties (***IIAs)*** provide an opportunity to mobilise foreign investment flows into projects and programmes that implement national climate plans to mitigate and adapt to climate change.[1] But many existing IIAs do not adequately account for the latest developments in climate change and sustainable development standards.[2] The Green Investment Protocol (***Protocol***) aims to promote direction of flows of finance towards 'green' investments, by providing incentives for green investors, while safeguarding States' ability to regulate.[3]

2. **Part II** of this Commentary identifies the critical obstacles to achieving the goals set by the Paris Agreement, as well as the positive contribution that the private sector can make. **Part III** explains how governments can incentivise more ambitious private sector action to tackle climate change, recognising, as stated in the Stockholm Treaty Lab Competition manifesto, that "foreign investments tend to increase where they are protected by a stable and transparent legal framework, including a neutral and reliable enforcement mechanism". **Part IV** explains how these observations are transposed into the core aims of the Protocol: to promote the development of domestic regulatory frameworks that reduce risks for green investments; to grant certain advantages to green investments over investments having a deleterious impact on the environment; to enable action to mitigate and adapt to climate change, including action additional to current international pledges; and to grow and scale foreign investment in carbon emissions reduction and adaptation to climate change over time. The Protocol strives to recalibrate the existing investment treaty framework while striking a balance between the sovereign prerogatives of States to legislate for climate change and the protection of foreign investments.[4] **Part V** outlines how the Green Investment Protocol meets the competition criteria and realises the vision of the competition sponsors.

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[*] The Protocol and Commentary have been submitted in the context of an international competition that asked participants to draft "the most forward-looking, innovative, and workable Model Treaty, with the highest potential to encourage foreign investment in climate change mitigation and adaptation" for the development of future international law policies. As such, the work product does not necessarily reflect the authors' views on the present state of international law, or the optimal way in which the law should be developed in future. The work product resulted from the collaboration of a large team of practitioners and academics, including: Paula Henin, Jessica Howley, Amelia Keene, Nicola Peart (the Core Team), John Feddersen, Alexander Pfeiffer, Assaad Razzouk, Shane Spelliscy, Jorge E. Viñuales, David Wei and Martijn Wilder (the Advisory Team). Team Innovate would like to additionally thank Kate Cook for helpful comments and discussions, as well as Mathilde Adant, Eleni Serifi and Karen Siwek for editing and discrete research assistance. Team Innovate is also grateful for the comments received from the Competition Jury and the opportunity to address these. Each individual participated in their personal capacity, without input from their respective firms or institutions. Neither the Protocol nor the Commentary reflect the views of their respective employers, companies or affiliated institutions.

[1] See *infra* Part III on the role of foreign investment.

[2] See the discussion *infra* Part IV(B).

[3] See *infra* Parts III-IV and particularly [15] and note 83.

[4] See *infra* [15] on this balance.

II. THE ISSUES ADDRESSED BY TEAM INNOVATE'S DRAFT TREATY

3. The Paris Agreement, adopted in December 2015 with near global support, stipulates an ambitious target designed to keep global warming to well below 2°C as compared to pre-industrial levels, to strengthen adaptation to the effects of climate change, and to "mak[e] finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development".[5] That the climate system is warming is "unequivocal", and bears a linear relationship to observed increases in anthropogenic greenhouse gas concentrations.[6] Authoritative scientific analysis states that an approximate 1.5°C global average temperature increase may already be inevitable.[7] Temperature increases beyond this level are anticipated to cause "severe, pervasive and irreversible impacts for people and ecosystems".[8] There is therefore an urgent need to reduce emissions and to prepare those at risk for the effects of climate change.[9]

4. As discussed below, there are obstacles to achieving safe concentrations of global atmospheric greenhouse gases (Part **A**) and to building resilience to climate change impacts (Part **B**). These include barriers to private sector action to tackle climate change, as well as a legacy of investment in carbon-intensive sectors (Part **C**). No investment treaty alone could purport to surmount these obstacles. However, the Green Investment Protocol aims to reduce these barriers to new, green investment and enable States to take measures to meet the objectives of the Paris Agreement.

A. ACHIEVING SAFE CONCENTRATIONS OF GLOBAL ATMOSPHERIC GREENHOUSE GASES

5. The Paris Agreement and UNFCCC strive to achieve safe concentrations of atmospheric greenhouse gases through "mitigation" (i.e. domestic action to limit emissions and preserve or enhance drawdown of emissions).[10] States Parties are required to "prepare, communicate and maintain successive nationally determined contributions" (***NDCs***) that will be revised every five years to reflect increasingly ambitious mitigation contributions.[11] NDCs are to be achieved domestically.[12] Developed countries are to provide finance to developing countries for mitigation and may do so "from a wide variety of sources", including private finance.[13] The private sector will be important for realising current NDCs: this is expressly anticipated by provision in the Paris Agreement for emissions trading and the 'Sustainable Development Mechanism'.[14] The private sector will also play a role in closing the so-called "emissions

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[5] Paris Agreement (adopted 22 April 2016, entered into force 4 November 2016), FCCC/CP/2015/10/Add.1 (**Paris Agreement**), Art. 2. *See also* United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) (**UNFCCC**), Art. 2; Kyoto Protocol to the UNFCCC (adopted 11 December 1997, entered into force 16 February 2005) (**Kyoto Protocol**), Preamble; D. Bodansky *et al*, *International Climate Change Law* (OUP 2017) (***ICCL***), 125-126. This wording is extracted in Protocol, Art. 1.

[6] Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2014: Synthesis Report* (2014), Summary for Policymakers (***IPCC SPM***), 2, 4-5, 10.

[7] Potsdam Institute for Climate Impact Research and Climate Analytics, *4°C, Turn down the Heat: Confronting the New Climate Normal* (World Bank Group, 2014) (***Potsdam Report***), xiii, xvii; IPCC SPM, 10-11 (projected global average surface warming scenarios); *see also* United Kingdom Met Office, 'Global Climate in Context as the World Approaches 1°C Above Pre Industrial for the First Time' (9 November 2015) <https://www.metoffice.gov.uk/research/news/2015/global-average-temperature-2015>.

[8] IPCC SPM, 8. *See* generally Potsdam Report (impact of warming scenarios on development).

[9] *See* Paris Agreement, Preamble; United Nations General Assembly Resolution 70/1, 'Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015) UN Doc A/RES/70/1, 14-27 (***Sustainable Development Goals***, or ***SDGs***), Goal 13: "Take urgent action to combat climate change and its impacts"; generally IPCC SPM, 13 ("[Climate change] [r]isks are unevenly distributed and are generally greater for disadvantaged people and communities in countries at all levels of development"); Potsdam Report, xviii, xxii.

[10] UNFCCC, Art. 4; Paris Agreement, Art. 4. *See* ICCL, 12 (mitigation "encompasses both measures to limit [greenhouse gas] emissions and measures to preserve or enhance sinks").

[11] Paris Agreement, Arts. 4(2), 4(3) and 4(11). New or updated NDCs will be communicated by 2020 (Decision 1/CP.21, 'Adoption of the Paris Agreement' (29 January 2016) FCCC.CP.2015/10/10/Add. (***Decision 1/CP.21***), [20]), and subsequent NDCs will be informed by the Global Stocktake (Paris Agreement, Art. 14(2)).

[12] Paris Agreement, Arts. 4(2) and 4(12). NDCs thus far submitted are called Intended NDCs, or ***INDCs***.

[13] Paris Agreement, Arts. 9(1) and 9(3). *See also* UNFCCC, Art. 4(3); Decision 1/CP.21, [53].

[14] Paris Agreement, Arts. 6(2) (emissions trading) and 6(4) (Sustainable Development Mechanism: *see* ICCL 236-237, stating that the mechanism in the Paris Agreement, Art. 6(4), has been "christened by many as the 'sustainable development mechanism'"). *See, e.g.*, International Carbon Action Partnership (ICAP), *Emissions Trading Worldwide: International Carbon Action Partnership: Status Report 2016* (Berlin, ICAP, 2016) 25, showing more than half of INDCs contemplate use of international carbon markets. *See, e.g.*, Nigeria's INDC (28 November 2015) 4 (national climate change policy to "involve private sector participation in addressing the challenges of climate change").

gap" between what has been pledged and what is required to meet the Paris Agreement's targets.[15] One recent study estimates that current emissions reductions pledges by non-state actors could, if achieved, halve that gap.[16] However, while the private sector and sub-national actors are taking measures to reduce greenhouse gas emissions,[17] greater emissions cuts are necessary, particularly in traditionally carbon-intensive sectors: heat and energy production, agriculture, forestry, other land use change, industry, and transport.[18] The economic transitions necessary in these sectors will require trillions of dollars in new green investments in the coming decades,[19] which in turn provides investors with significant investment opportunities.[20]

B. BUILDING RESILIENCE TO CLIMATE CHANGE IMPACTS AND ADDRESSING LOSS AND DAMAGE

6. The Paris Agreement obliges Parties to engage in adaptation planning and implementation, recognising that it is a "global challenge".[21] It requires developed countries to provide finance to developing countries for adaptation.[22] Adaptation entails capacity building, "strengthening resilience and reducing vulnerability to climate change",[23] and has multiple co-benefits that contribute to the achievement of the 2030 Agenda for Sustainable Development[24] – for instance by building sustainable cities and communities (Goal 11), sustainable innovation and industry (Goal 9), affordable and clean energy (Goal 7), and better health and well-being (Goal 3).[25] The Paris Agreement also calls on States to address "loss and damage" associated with climate change, noting, for example, the role of risk insurance and risk pooling.[26] There is, however, a significant "gap" between finance that is currently available for adaptation and risk reduction, and what is needed.[27] The United Nations Environment Programme (***UNEP***) estimates the total finance for adaptation in 2030 will need to be approximately 6 to 13 times more than at present (and significantly

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[15] United Nations Environment Programme, *The Emissions Gap Report* (October 2017), 25 (***UNEP EGR***). See generally Climate Action Tracker, *Emissions Gap Assessment* (November 2017).
[16] Marrakech Partnership on Global Climate Action, *Yearbook of Global Climate Action 2017*, 17-18.
[17] *See, e.g.*, the commitments to climate action by non-state actors, captured by the NAZCA Platform (<http://climateaction.unfccc.int/>), synthesised in Yale Data-Driven Environmental Solutions Group, *Taking Stock of Global Climate Action* (18 November 2016). *See also* the private sector initiatives reflected in the UN Global Compact, *2016 Status Report: Business Contribution to Global Climate Action* (2016).
[18] IPCC SPM, 28-29; UNEP EGR, xvii. See also the CAIT visualisation tool, which estimates that in 2013, emissions from the energy sector contributed to 72% of global greenhouse gas emissions (<https://www.wri.org/blog/2017/04/interactive-chart-explains-worlds-top-10-emitters-and-how-theyve-changed>).
[19] *See, e.g.*, in the context of renewable energy investment, the findings in Bloomberg New Energy Finance, *Mapping the Gap, the Road from Paris* (27 January 2016) ("The 2ºC scenario represents a $12.1 trillion investment opportunity for new renewable electric power generation over 25 years, or $485bn/yr on average, BNEF estimates. Under BNEF's [Business As Usual] view, that opportunity is $6.9 trillion, or $277bn/yr. Thus the [finance] 'gap' is $5.2 trillion or $208bn/yr"); International Energy Agency, *Energy Technology Perspectives 2016: Pathways to a Clean Energy System* (2016), Executive Summary, 3 ("Decarbonising the power sector … would cost USD 9 trillion between 2016 and 2050"); H. Paulson Jr, 'How to Raise Trillions for Green Investments' *The New York Times* (20 September 2016). *See also* discussion in A. Thompson, 'The Global Regime for Climate Finance: Political and Legal Challenges' in C. Carlarne *et al*, *The Oxford Handbook of International Climate Change Law* (OUP, 2016) 153-156.
[20] International Finance Corporation, *Climate Investment Opportunities in Emerging Markets* (World Bank, 2016), Executive Summary (***IFC Report***), 11 ("IFC assessed the national climate change commitments and other policies in 21 [emerging markets] ... and finds an initial investment opportunity of $23 trillion from 2016 to 2030 in key sectors", including of: $16 trillion in green buildings, particularly in East Asia; $3.7 trillion in sustainable transport, particularly in Latin America; $1.7 trillion in renewable energy). *See* generally on "[t]he great economic potential" of the "green economy": M. Gehring and A. Kent, 'International investment agreements and the emerging green economy: rising to the challenge' in F. Baetens (ed.) *Investment Law within International Law: Integrationist Perspectives* (CUP, 2013) 189 (***Gehring and Kent***).
[21] Paris Agreement, Art. 7(2).
[22] Paris Agreement, Arts. 9(1), 9(3) and 9(4). *See also* UNFCCC, Art. 4(4), Decision 1/CP.21, [53].
[23] Paris Agreement, Art. 7(1).
[24] SDGs, 14-27.
[25] *See* generally A. Dzebo *et al.*, 'Exploring connections between the Paris Agreement and the 2030 Agenda for Sustainable Development' (2017) *SEI Policy Brief* ("many activities under the NDCs overlap with SDG ambitions"). *See, e.g.*, UNFCCC Secretariat, *Opportunities and options for integrating climate change adaptation with Sustainable Development Goals and the Sendai Framework for Disaster Risk Reduction 2015-2030*, FCCC/TP/2017/2 (19 October 2017) and *see* Part II.E ("Linkages between adaptation, the Sustainable Development Goals and the Sendai Framework"), including analysis of SDG references in NDCs.
[26] Paris Agreement, Art. 8(1) and Art. 8(4)(f).
[27] UNEP, *The Adaptation Finance Gap Report* (2016) (***UNEP AGR***), xiv.

more by 2050).[28] Again, the private sector has an important role to play.[29] Investment in adaptation and in addressing loss and damage presents new investment opportunities,[30] and can drive down the costs and risks associated with climate change impacts.[31] Insurance companies, for example, are likely to play an increasingly important role in providing risk transfer services for States as well as private actors,[32] and the digital economy will contribute significantly to building resilience to climate change and achieving the Sustainable Development Goals (***SDGs***).[33]

C. BARRIERS TO PRIVATE SECTOR CONTRIBUTION TO CLIMATE ACTION

7. In light of the significant positive role of foreign investment and the opportunities for investors, it is important to identify the "barriers ... to securing the required scale and pace of investment".[34] These may take many forms, including: unpredictable and inefficient legal and regulatory frameworks; immature markets; currency exchange concerns; corruption; a lack of infrastructure and capacity to receive foreign flows of investment; as well as regulations that restrict foreign investment admission or limit foreign ownership.[35] Specific barriers to investment in climate change mitigation and adaptation include reluctance by private investors to invest in green projects, or increased risk premiums due to market distortions and uncertainties, including those resulting from fiscal measures such as fossil-fuel subsidies; instability of regulatory frameworks, particularly in developing countries; technological

[28] UNEP AGR, xiv. *See also* IFC Report, 64 ("… tens of billions of dollars need to be invested in adaptation. The UNFCCC estimates that between $28 billion and $67 billion in additional investment for adaptation is needed for developing countries alone") (citing UNFCCC, *Factsheet: Financing climate change action* < https://unfccc.int/press/fact_sheets/items/4982.php>). *See also* UN Global Compact *et al.*, *Private Sector Investment and Sustainable Development* (UNGC, UNCTAD, UNEPFI, PRI, 2015), *see*, *e.g.*, 6 ("Institutional investors, companies and foundations provide a large source of private capital available for investment and therefore need to be an integral part of the design and implementation of the strategy to finance the post-2015 sustainability agenda"); UNCTAD, *Investing in Sustainable Development Goals: Action Plan for Private Investments in SDGs* (2015) (***UNCTAD SDG Report***), 7 ("At today's level of investment—public and private—in SDG-related sectors in developing countries, an annual funding shortfall of some $2.5 trillion remains").

[29] UNEP AGR, xiv ("Scaling up both public and private sources of finance is required to bridge the adaptation finance gap, now and in the future"). *See* generally 33-37. *See* IFC Report, 64-65 ("Engaging the private sector [in adaptation] is essential for several reasons. It can mobilize financial resources and technical capabilities, leverage the efforts of governments, engage civil society and community efforts, and develop innovative climate services and adaptation technologies. In addition, private businesses dominate many investments that are vulnerable to climate change impacts, such as infrastructure investments"). Not all adaptation initiatives will be best served by the private sector: *see* discussion in UNCTAD SDG Report, 9-10; UNCTAD, *Investment Policy Framework for Sustainable Development* (UNCTAD: 2015) (***UNCTAD Investment Policy Framework***) 21.

[30] *See*, *e.g.*, discussion in International Finance Corporation, *Climate Investment Opportunities in Emerging Markets* (World Bank, 2016), 3 of possible $2.3 trillion annual investment opportunities in climate-smart agriculture by 2030.

[31] *See*, *e.g.*, discussion in KPMG, *Climate Change Adaptation in the Private Sector: UNFCCC Private Sector Initiative* (30 March 2012), 7 (setting out the business drivers for adaptation). *See also* the UNFCCC Secretariat's *Adaptation Private Sector Initiative*, showcasing private sector adaptation initiatives (<http://unfccc.int/adaptation/workstreams/nairobi_work_programme/items/6547.php>); private sector initiatives such as Ceres' "Connect the Drops" campaign, promoting sustainable water solutions in California (<https://www.ceres.org/campaigns/connect-the-drops>).

[32] UNCTAD SDG Report, 18. *See also* interview with the Least Developed Countries Group on private sector investment: NDCI Global, *Lifelines or Early Movers? Private Sector Investment in the Poorest Nations*, 26 June 2017 (< http://ndci.global/lifelines-or-early-movers-examining-the-channels-for-private-sector-investment-in-the-poorest-nations/>) (insurance plays a "valuable role in providing for loss and damage, as well as adaptation").

[33] UNCTAD, *World Investment Report 2017: Investment and the Digital Economy*, 195 ("Investing in the digital economy can significantly contribute to the SDGs. …Digital technologies can help with climate change mitigation and adaptation. Global CO_2 savings resulting from efficient use of [information and communication technologies] is estimated to amount to 15 % of global emissions [and] may also be used to monitor climate change impacts").

[34] World Economic Forum, *The Green Investment Report - The ways and means to unlock private finance for green growth* (2013) (***WEF Report***), 9.

[35] Energy Charter Secretariat, *Eliminating Barriers to the Entry and to the Establishment of Energy Investments* (2017) (***ECT Barriers Report***), 21-26; UNCTAD SDG Report, 14-17; WEF Report, 19, discussing the risks faced by private investors in green technologies; OECD, *Financing Climate Change Action* (2014), 4, noting the barriers to private investment in green infrastructure.

risks; and limited short-term returns on investment.[36] Green growth opportunities may also be less visible (and appear more risky) than investments in more established resources.[37]

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III. OPPORTUNITIES AND SOLUTIONS

8. States have a sovereign right to regulate foreign investment in their jurisdictions.[38] However, "[i]nvestment policy is not made in a vacuum"[39] and policymakers will aim to balance development priorities with the importance of creating a green investor-friendly regulatory environment – in particular, one that is open, transparent, efficient and predictable.[40] As the Paris Agreement recognises, measures to attract foreign investment in climate change adaptation and mitigation will need to be provided at the domestic policy level,[41] and might include measures such as more efficient regulation of green investments and other regulatory improvements,[42] fiscal measures such as tax breaks for certain kinds of investment,[43] and financial measures such as subsidies.[44] While it is for each State to determine and implement its own domestic policies, economists emphasise the importance of removing fossil fuel subsidies,[45] introducing a price on carbon, whether through a tax on emissions, or an emissions trading scheme,[46] and of creating greater certainty and stability in States' domestic policies relating to green investment.[47] States are also advised to

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[36] A. Boute, 'The Potential Contribution of International Investment Protection Law to Combat Climate Change' (2009) 27 *Journal of Energy and Natural Resources Law* 333, 334-335, 337 (***Boute***); WEF Report, 7, 19; OECD, *How to Unlock Private Investment in Support of Green Growth*? (2013) (***OECD Unlocking Private Investment Report***), 7-8 (noting, *inter alia*, "Lack of clarity and consistency in government commitments to environmental and climate policy is a key barrier"); CDKN, *The Green Climate Fund: Options for Mobilizing the Private Sector* (26 August 2011), 4-5; M. Wilder and L. Drake, 'International Law and the Renewable Energy Sector' in C. Carlarne *et al*, *The Oxford Handbook of International Climate Change Law* (OUP, 2016) (***Wilder and Drake***) 380-387 (detailed outline of the "barriers" for renewable energy, and government policies in response).

[37] WEF Report, 9, 18; UNCTAD Investment Policy Framework, 22-23. *See also* Wilder and Drake, 382-383.

[38] *See*, *e.g.*, ECT Barriers Report, 21, 26; H. Mann, 'The Right of States to Regulate and International Investment Law' Expert Meeting on the Development Dimension of FDI (Geneva, 6-8 November 2002) (***Mann***) 5; S. Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 *JIEL* 1037 (***Spears***), 1038. *See infra* commentary to Protocol, Arts. 10 and 12.

[39] UNCTAD Investment Policy Framework, 12.

[40] ECT Barriers Report, 26 and 43; also UNCTAD, *Global Action Menu for Investment Facilitation* (2016), TD/B/63/CRP.2 (***UNCTAD Menu for Investment Facilitation***), [11]-[13]; OECD Unlocking Private Investment Report, 9 ("To attract investors, targeted incentive schemes must be predictable and stable, and avoid the 'stop-and-go' pattern to policy decision-making that has recently weakened investors' confidence in the renewable energy sector"). *See also* UNCTAD Investment Policy Framework, especially Part V.3, 127-140 ("Promoting Investment in SDGs: Action Menu") and *supra* [7].

[41] D. Bodansky, 'The Paris Agreement: A New Hope?' (2016) 11 *AJIL* 288, particularly 289 (explaining the legal structure of the Paris Agreement and stating: "[t]o safeguard national decision-making, it adopts a bottom-up approach, in which the agreement 'reflects rather than drives national policy' .... But to promote stronger action, states' 'nationally-determined contributions (or NDCs, for short) are complemented by international norms to ensure transparency and accountability and to prod states to progressively ratchet up their efforts") (reference omitted). The Green Investment Protocol takes a fundamentally similar approach.

[42] UNCTAD Menu for Investment Facilitation [11]-[13]; S. Golub, *et al*., 'Defining and Measuring Green FDI: An Exploratory Review of Existing Work and Evidence' *OECD Working Papers on International Investment* (2011) (***OECD Green FDI Report***), 15; WEF Report, 18-26 ("Part 2: Unlocking Private Finance").

[43] OECD Green FDI Report, 15. *See*, *e.g.*, OECD, *Policies to support private investment in renewable energy in the Middle East and North Africa*, 5; KPMG, *Taxes and Incentives for Renewable Energy* (KPMG International, 2015), 10.

[44] *Ibid*; Wilder and Drake, 383-387. Also on "[g]reen energy domestic support schemes"; *see* F. Sindico, 'National Measures and WTO Consistency – Border Measures and other Instruments to Prevent Carbon Leakage and Level the Carbon Playing Field' in C. Carlarne *et al*, *The Oxford Handbook of International Climate Change Law* (OUP, 2016) 321-322 (***Sindico***).

[45] OECD Unlocking Private Investment Report, 8-9 ("Eliminating fossil-fuel subsidies is a threshold measure to reduce market-distortions and shift investment from carbon-intensive or environmentally harmful activities towards greener activities"); The Global Commission on the Economy and Climate, *Better Growth Better Climate: The New Climate Economy Report* (2014) (***Better Growth Report***), 49 ("The most efficient way to implement such reform is to eliminate fossil fuel subsidies and end the under-taxation of fossil fuels … and recycle the resulting taxation revenues for poverty reduction and development.") *See also* Centre for Trade and Economic Integration (CTEI), *UNFCCC Nationally Determined Contributions: Climate Change and Trade* (9 January 2017), 41-42.

[46] OECD Unlocking Private Investment Report, 9 ("Robust carbon pricing from an emissions trading system or carbon tax is the cornerstone of an investment-grade clean energy policy"); Wilder and Drake, 383; Better Growth Report, 173 ("The most economically efficient way to tackle the greenhouse gas market failure is by requiring polluters to pay a price per tonne emitted").

[47] S. Cox, *Financial Incentives to Enable Clean Energy Deployment* (2016) 6; R. Sullivan and W. Blyth, *Climate Change Policy Uncertainty and the Electricity Industry: Implications and Unintended Consequences* (Chatham House, 2006), 3 ("A guarantee of regulatory stability for low-carbon

make use of innovation and new technologies that can enable emissions reductions and climate change resilience.[48] The availability of new financial structures, such as green bonds, , and climate finance partnerships including with initiatives like the Green Climate Fund, may be important tools to consider.[49]

9. In line with the Paris Agreement, the Green Investment Protocol does not purport to tell States which domestic policies they ought to adopt.[50] However, investment treaties can facilitate and promote the necessary domestic action to complement and support the Paris Agreement.[51] To this end, the Green Investment Protocol aims to go beyond the existing international investment framework,[52] and serve two functions:

First, it ensures that the *existing* IIA regime does not itself create barriers to green investment flows, including by addressing potential limitations on States seeking to adopt regulations to implement the Paris Agreement and attract green investment.[53]

Secondly, it amends those IIAs to create a *newly balanced* IIA regime that promotes and enables national policies to incentivise investment in green projects, including by: incorporating sustainable development into IIAs; sending a strong signal to the private sector that they are green, investor-friendly jurisdictions; offering new protections to new investors in mitigation and adaptation projects; phasing out fossil fuel subsidies; and encouraging the redirection of funds towards these green projects.[54]

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IV. THE GREEN INVESTMENT PROTOCOL

10. The following sets out the form and content of the Green Investment Protocol to demonstrate how these aims are achieved.

A. FORM

11. The terminology of a 'Green Investment Protocol' has been deliberately chosen to emphasise that this is not a new, potentially contentious, multilateral treaty,[55] but a tailored Protocol that effectively amends existing IIAs, designed primarily to leverage the framework already in place and therefore to provide a realistic approach to 'greening' international investment law and arbitration.[56] The Protocol does not displace the existing IIAs, but replaces them to

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investments might reduce the required returns and thus stimulate the penetration of these investments"); OECD Unlocking Private Investment Report, 7-8; *supra* [7] and note 40.

[48] *See* Paris Agreement, Art. 10(2) and, e.g, M. Littleton, 'The TRIPS Agreement and Transfer of Climate-Change-Related Technologies to Developing Countries' (2008) *DESA Working Paper No. 71* (***Littleton***), 2-3.

[49] Better Growth Report, 7 ("Financial innovations, including green bonds, risk-sharing instruments and products which align the risk profile of low-carbon assets with the needs of investors, can reduce financing costs, potentially by up to 20% for low-carbon electricity"); WEF Report, 20-21. For an overview of green financing instruments, *see* generally: UNEP, *G20 Green Finance Synthesis Report* (5 September 2016).

[50] *See supra* note 41.

[51] *See*, *e.g.*, OECD, *Policy Framework for Investment* (2015), 28; UNCTAD, SDG Report, 19.; UNCTAD Investment Policy Framework, 71-120; W. Alschner and E. Ruerk, 'The role of international investment agreements in fostering sustainable development' in F. Baetens (ed.) *Investment Law within International Law: Integrationist Perspectives* (CUP, 2013) 221-222 (***Alschner and Ruerk***); I. Dubava, 'The Future of International Investment Protection Law: The Promotion of Sustainable (Economic) Development as a Public Good' in M. Cremona *et al* (eds.) *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann* (Martinus Nijhoff 2014), 391-392 (***Dubava***). *See also supra* note 41.

[52] As to which, *see infra* Part IV(A).

[53] *See* the discussion *infra* Part IV(B).

[54] *See* the discussion of all these issues *infra* Part IV(B).

[55] *See* Gehring and Kent, 189 (suggesting a preference for "integrat[ing] the green economy's goals into IIAs" over a "multilateral investment agreement"). For examples of the use of a Protocol to modify an existing treaty, *see* the Kyoto Protocol, or the Protocol to the Netherlands-Chile BIT (1998). For current controversies regarding IIAs, *see infra* commentary to Part V.

[56] *See* similarly H. Mann *et al*, *IISD Model International Agreement on Investment for Sustainable Development* (2005) (***IISD Model***), expressing the same preference to base itself on thousands of existing investment treaties: *see* vii. However, the IISD Model works slightly differently in that it operates to replace the underlying treaty: *see* Art. 33; further H. Mann et al, *IISD Model International Agreement on Investment for Sustainable*

the extent that any Covered Investment Treaty is incompatible with the Protocol,[57] consistent with the rule in Article 30(3) of the Vienna Convention on the Law of Treaties.[58] Article 24 ensures that the Protocol does not apply retrospectively, but covers only disputes arising subsequent to the Green Investment Protocol entering into force.[59]

12. The Form of the Protocol is modelled on the 2014 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the ***Mauritius Convention***),[60] whereby States unilaterally become parties to a Protocol which then becomes operational to amend any existing IIA where all parties thereto are also party to the Green Investment Protocol.[61] It also draws on the OECD's multilateral tax treaty, which purports to amend roughly 3000 bilateral tax treaties and replace them with a new regime.[62] The Protocol will apply as between any two or more States that are also all parties to a Covered Investment Treaty on or after the date that the Green Investment Protocol enters into force.[63] In the case of a multilateral treaty, if not all of the parties to it have signed the Protocol, then the existing IIA will continue in force for those parties without amendment.[64] Accordingly, an investor of a State Party to a multilateral treaty that has not implemented the Green Investment Protocol will not be able to rely on its terms, unless that investor can invoke a most-favoured-nation clause.[65]

13. This approach is the most effective way to recalibrate existing IIAs to meet the challenges of climate change. *First*, it is politically viable because it does not require the negotiation of new bilateral or multilateral agreements, nor does it necessitate the wholesale redrafting and renegotiation of some 3,000 existing agreements.[66] Not being a draft multilateral convention, it is not subject to any requirement that a large number of States adopt it before entering into force.[67] Rather, it maintains the applicability of existing IIAs while at the same time designing a special regime (*lex specialis*)[68] for Green Investments, as defined in the Protocol. This allows for changes to occur on a State-by-State basis, in a way that could become quickly scaleable, leading to the greatest possible increases in green investment over time.

Development: Negotiators' Handbook (2nd ed, 2006) (***IISD Handbook***), xii. *See also* S. Schill, 'The Mauritius Convention on Transparency: A Model for Investment Law Reform?' *EJIL Talk!* (8 April 2015); G. Kaufmann-Kohler and M. Postetà, 'Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism' (CIDS-Geneva Center for International Dispute Settlement Research Paper, 3 June 2016) (***Kaufmann-Kohler and Postetà***); Gehring and Kent *supra* note 55; *cf* Alschner and Ruerk, 223.

[57] Protocol, Art. 21 and Part VII.

[58] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) (***VCLT***), Art. 30(3) ("When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty"). It is incorporated by reference to the "principle" since not all States are party to the VCLT.

[59] Protocol, Art. 24(2), which provides that the Protocol shall not apply to any dispute "that exists prior to the coming to force of the Green Investment Protocol between the Contracting Parties." The same approach was adopted by IISD Model, Art. 33(D); *see also* Art. 3(D).

[60] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 December 2014, entered into force 18 October 2017).

[61] *See*, on the Mauritius Convention: CIEL/IISD, 'Toward Widespread Ratification of the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration' Briefing Paper (January 2017), <http://www.ciel.org/wp-content/uploads/2017/02/Mauritius-Briefing-Paper-Final-7FEB17.pdf>; E. Shirlow, 'A Step toward Greater Transparency: The UN Transparency Convention' *Kluwer Arbitration Blog* (30 March 2015).

[62] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (2017); also Kaufmann-Kohler and Postetà, [224].

[63] Protocol, Art. 22; VCLT, Art. 30(4). *See infra* note 89.

[64] *See* VCLT, Art. 41(1)(b), according to which, in such a case, the Protocol will "not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations".

[65] *Similarly* Kaufmann-Kohler and Postetà, [230]-[231]. *See* further *infra* Part IV(B)(vi) on MFN.

[66] *See similarly* Kaufmann-Kohler and Postetà, [70]; IIDS Handbook, xii; generally references *supra* [11] and further *infra* note 277. The UNCTAD Investment Policy Hub database includes, as at October 2017, 2950 bilateral IIAs (2360 currently in force) and a further 372 treaties with investment provisions (such as FTAs). It is comprehensive but not exhaustive: http://investmentpolicyhub.unctad.org/IIA. Unless otherwise noted, the IIAs referred to herein are available in this database.

[67] Compare Mauritius Convention, Art. 9 and contrast IISD Model, Art. 56; and, e.g., Draft Trans-Pacific Partnership (2017), Art. 30.5 (<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/index.aspx?lang=eng>) (***TPP***).

[68] *See* generally on the principle of *lex specialis*: *Fragmentation of International Law, Report of the Study Group of the ILC*, UN Doc. A/CN/4/L.702 (18 July 2006), 8-11; E. Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory' (2006) 17 *EJIL* 295.

14. *Secondly*, since the Green Investment Protocol only operates where attached to IIAs in force, a State can unilaterally declare that it signs up to the Protocol without fear of incurring obligations vis-à-vis new States (and their investors). Reliance on the existing IIA framework does limit changes to that system or application beyond those States already a part of it. However, any resulting disadvantage is minor compared to the broader viability and applicability of a treaty that can use the significant system already in place.[69] Moreover, the Protocol has a broader application as it may be incorporated into IIAs that are subsequently signed by Contracting Parties.[70] It is true that, unlike the Mauritius Convention, the Green Investment Protocol does not only address procedural or operational matters but also affects substantive provisions of the underlying IIAs.[71] However, the Protocol has been carefully drafted to ensure that the interaction between the substantive provisions of those IIAs and the terms of the Protocol is clear.[72]

B. CONTENT

15. The need to balance investor interests (e.g. reducing regulatory risk and uncertainty, optimising returns on investment) and State interests (e.g. regulatory autonomy, flexibility to modify economic and development policy and programmes, and the need to protect public health and the environment) underpins the Protocol.[73] Thus, the Protocol establishes international law standards to be maintained, while recognising, in line with the Paris Agreement, that States must be able to tailor the incentives offered to encourage green investment to their own circumstances at the domestic level.[74] The key provisions in the Green Investment Protocol will now be explained.

(i) Preamble and object and purpose

16. A treaty's preamble is a key resource for interpreting and applying its operative terms.[75] Preambles have been interpreted in the past in ways that favour investors over host States – an approach that has attracted criticism.[76] The Green Investment Protocol's preamble is therefore calibrated to promote a balanced interpretation of the Protocol as well as the underlying Covered Investment Treaty.[77] The Preamble situates the common object and purpose of most IIAs (i.e. the promotion and facilitation of foreign investment[78]) firmly within the context of international law on

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[69] *See similarly* Kaufmann-Kohler and Postetà, [69]-[70].
[70] Protocol, Art. 21(2); similarly Kaufmann-Kohler and Postetà, [76].
[71] By contrast, the Mauritius Convention is merely operational, giving effect to the separate (substantive) UNCITRAL Rules on Transparency. *See* generally sources *supra* note 61.
[72] *See supra* [11]-[12]; *infra* commentary to Part VII and compare the approach taken by the OECD, *supra* note 62.
[73] *See, e.g.*, on the need to balance such protection and autonomy: Dubava, 389; Gehring and Kent, 209; Mann, 7; Spears, 1042-1043, 1065; Alschner and Ruerk, 221-222; D. Gaukrodger, 'The balance between investor protection and the right to regulate in investment treaties' *OECD Working Paper 2017/2*; *Saluka Investments BV v Czech Republic, Partial Award,* UNCITRAL (17 March 2006) (***Saluka***) [300], cited in A. Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretative Authority' (2014) 55 *HILJ* 1, 13; *infra* note 175; generally *infra* Part IV(B)(vii) on Art. 12 of the Protocol.
[74] *See supra* [5]-[6], [8] and Bodansky quoted *supra* note 41.
[75] VCLT, Art. 31(1) ("[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"), and Art. 31(2) ("[t]he context for the purpose of the interpretation of a treaty shall comprise … the text, including its preamble"); generally R. Dolzer and C. Schreuer, *Principles of International Investment Law, 2nd ed.* (OUP 2012) (***Dolzer & Schreuer***) 29 ("Tribunals have frequently interpreted investment treaties in light of their object and purpose, often by looking at their preambles"). *See, e.g.*, *Lauder v Czech Republic*, *Award*, UNCITRAL (3 September 2001) [292]; *AFT v Slovakia*, *Award*, UNCITRAL (5 March 2011) [236]-[237]. *See also* Dubava, 398; Gehring and Kent, 202-204.
[76] *See* discussion in Dolzer & Schreuer, 29-30; Spears, 1046-1047, 1065-1066; Dubava, 398.
[77] Protocol, Preamble, recitals 15-16. Recital 15 draws on recital 6 of the Reciprocal Investment Promotion and Protection Agreement between Morocco and Nigeria (3 December 2016) (***Morocco-Nigeria BIT***), and recital 11 of the UN Economic Commission for Africa, *Draft Pan-African Investment Code*, E/ECA/COE/35/18, 26 March 2016 (***Pan-African Code***), which also seeks to balance investor and State rights, in the context of regulatory freedom to pursue sustainable development (recital 10), as to which *see infra* note 87. On interpretation and application of the underlying IIA, *see* Protocol, Preamble, recital 14 and *supra* Part IV(A).
[78] Recital 1 of the Protocol's Preamble is a commonly found provision: *see, e.g.*, Morocco-Nigeria BIT, recital 1. For the effect of such a preamble, *see Saluka* [300] ("The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations").

climate change[79] and sustainable development.[80] As to the former, "ensuring compatibility" with climate change law, the Preamble acknowledges both the regulatory space needed by Contracting Parties when implementing national climate change action plans, as well as regulatory stability for investors to deliver emissions reductions and climate-resilient development.[81] This is in part a response to recent claims brought by renewable energy investors after States altered their incentive schemes.[82] The Preamble creates additional synergies with the Paris Agreement, citing a key objective thereof that flows of investment caught by the Protocol should be consistent with green and climate-resilient development,[83] seeking to promote innovation in mitigation and adaptation technologies;[84] and ensuring that the interpretation and application of the Protocol is guided by the latest advancement in climate science.[85] As to the latter, the Protocol's Preamble notes the role of investment in achieving sustainable development,[86] the States' rights in this respect,[87] and other environmental principles.[88]

(ii) Definitions

17. Part I sets out the defined terms that underpin the Protocol. The Protocol applies in respect of a 'Covered Investment Treaty', adapting the definition of investment treaty used in the Mauritius Convention.[89] Both States and Regional

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[79] *See* Protocol, recital 2 and recital 4, providing for an object and purpose to promote and encourage investment in mitigation and adaptation and Art. 1, which uses language from Paris Agreement, Art. 2. Compare recital 4 of the Protocol with, e.g., CETA, Art. 24.9; Morocco-Nigeria BIT, Preamble, recital 3 and Art. 2. *See also* IISD Model, Art. 1 and IISD Handbook, 4.

[80] Protocol, Preamble, recital 3. Recital 11 of the Protocol, reflecting pursuit of both sustainable development and climate change solutions, is taken almost verbatim from the Agreement on Free Trade and Economic Partnership between Japan and the Swiss Confederation (2017) (<http://www.mofa.go.jp/region/europe/switzerland/epa0902/agreement.pdf>), recital 9.

[81] Protocol, Preamble, recitals 4, 6. *See infra* Part IV(B); *supra* Parts II(C), III and note 5.

[82] *See* generally *infra* commentary to Art. 10 and, in particular, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, Final Award*, ICSID Case No. ARB/13/36 (4 May 2017), [363], [271], [387] and [486] (***Eiser***). Similar claims have not always been successful (*see Charanne and Construction Investments v. Spain, Award*, SCC Case No. V 062/2012(21 January 2016), [573] (***Charanne***); *Isolux Netherlands, BV v. Kingdom of Spain, Award*, SCC Case No. V2013/153 (17 July 2016), [868]; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, Award,* ICSID Case No. ARB/14/3(27 December 2016) [423] (***Blusun***); *JSW Solar (zwei) GmbH & Co. KG et al. v. Czech Republic, Final Award,* PCA Case No. 2014-03 (11 October 2017) (***JSW Solar***), but many are still pending. Thus, recital 6 notes the particular space which may be needed where states are attempting to regulate at the cutting-edge of innovation.

[83] Protocol, Preamble, recital 7, quoting Paris Agreement, Art. 2.1(c) ("this Agreement … aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: … [m]aking finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development").

[84] Protocol, Preamble, recital 5, *see* also Arts. 4(2), 8 and 20(1)(c); and *see* Paris Agreement, Art. 10; UNFCCC, Arts. 4(3), 4(7), 4(8), 4(9) and Art. 11 and especially Art. 4(5), which calls on States to promote and facilitate transfer and access to green technology; *see also ICCL*, 140-141; Kyoto Protocol, Art. 10(c).

[85] Protocol, Preamble, recital 12, which complements Paris Agreement Preamble, recital 4 ("*Recognizing* the need for an effective and progressive response to the urgent threat of climate on the basis of the best available scientific knowledge").

[86] Protocol, Preamble, recitals 8 and 11. Recital 8 is reproduced almost verbatim from the Morocco-Nigeria BIT, recital 2. For examples of preambles citing sustainable development objectives, *see*: North American Free Trade Agreement (1994) (***NAFTA***), Preamble (referring to the need to "promote sustainable development"); Canada–Chile Free Trade Agreement and Chile–US Free Trade Agreement, Preambles (recognising the importance of strengthening capacity to protect the environment and promoting sustainable development); EU–Chile Association Agreement ("taking into account the principle of sustainable development"). *See* generally: Dubava, 397-398; Gehring and Kent, 202-204; Alschner and Ruerk, 222; Spears, 1067-1068; M.C. Cordonier Segger, 'Innovative Legal Solutions for Investment Law and Sustainable Development' in Y. Levashova *et al* (eds.) *Bridging the Gap Between International Investment Law and the Environment* (2016) (***Bridging the Gap***) 10: "commitments to sustainable development are not commonly included in [investment treaty] preambles. If [such treaties] are to be used as a vehicle to promote sustainable development, negotiators and drafters could be encouraged to include language to that effect".

[87] Thus, recital 10, which is similar to Morocco-Nigeria BIT, Preamble recital 5, reaffirms the right to regulate in order to meet sustainable development objectives and is intended to reflect UNFCCC Art. 3(4), which recognises that States have a right to promote sustainable development. *See* similarly IISD Model, Art. 25, and suggesting such an approach: Mann, 5; also Spears, 1068. Protocol, Preamble, recital 9, is taken *verbatim* from Principle 2 of the UN Conference on Environment and Development, 'Rio Declaration on Environment and Development' (14 June 1992) UN Doc A/CONF.151/26/Rev 1 vol. 1, 3 (***Rio Declaration***), Principle 21 of the 1972 *Stockholm Declaration* (UN Conference on the Human Environment, 'Declaration of the United Nations Conference on the Human Environment' (16 June 1972) UN Doc A/CONF.48/14/Rev 1, 3) and UNFCCC Preamble, recital 8; *see also Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, 41 (***Gabcikovo-Nagymaros***) [53]).

[88] Preamble, recital 13, setting out the "precautionary approach", reflects Principle 15 of the Rio declaration; Art. 3(3) of the UNFCCC ("Principles") includes a modified version of the precautionary approach.

[89] Protocol, Part I, recital 10, adapting Mauritius Convention, Art. 1(2). The notion of a 'covered' treaty draws on the OECD Tax Convention, *supra* note 62.

Economic Integration Organisations can be Contracting Parties.[90] Certain definitions mirror language in the UNFCCC and Paris Agreement—for example, the definition of 'Climate Change', 'Greenhouse Gas' and 'National Climate Change Strategy'[91]—and other sources of international environmental[92] and other law.[93]

18. The form of the Protocol is reflected in the distinction between 'Investment' and 'Investor' (which are definitions found in the Covered Investment Treaty)[94] and 'Green Investment' and 'Green Investor'.[95] 'Green Investments' and 'Green Investors' are Investments and Investors that qualify as "green".[96] The Protocol adopts a purposive definition of what constitutes a "green" investment, requiring qualifying Green Investments to contribute to achieving the aims of the Paris Agreement,[97] which are:

> To strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:
> (a) Holding the increase in the global average temperature to well below 2ºC above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5ºC above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;
> (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and
> (c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development.[98]

19. It is envisaged that this will be applied and interpreted by reference to the provisions of the Paris Agreement, including those points set out in Article 9 of the Paris Agreement.

20. Anticipating that the Paris Agreement may one day be superseded or supplemented by new climate change law, the Protocol supplements references to the former by any future relevant protocol adopted under the UNFCCC framework.[99] The Protocol deliberately omits definitions for 'adaptation' and 'mitigation': they are not defined in international law and are terms whose meaning and scope will evolve with innovation and practice.[100] Further, as the

[90] Protocol, Part I, recitals 2, 19 and 20, which draw (with some variations) on Arts. 1(2), 1(3) and 1(10) of the Energy Charter Treaty (1994) (***ECT***). Inclusion of REIOs is particularly important given the increasing role of the European Union in entering into trade and investment agreements on behalf of itself and member States: *see* discussion in C. Titi, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements' (2015) 26 *EJIL* 639, 641-647; *see also* Dubava, 395.

[91] Protocol, Part I, recital 1 (Climate Change), using language from UNFCCC Art. 1(2); recital 8 (Greenhouse Gas), using language from UNFCCC Art. 1(5); and recital 16 (National Climate Change Strategy), which includes NDCs within the meaning of Art. 4 of the Paris Agreement, but is deliberately broader, in order to accommodate States that are not bound thereby.

[92] *See*, *e.g*., Protocol, Part I, recital 23 (Sustainable Development), which reflects the definition set out in United Nations, *Our Common Future - Brundtland Report* (OUP, 1987) [30]. The Brundtland Report also recognizes that "mere increase in flows of capital to developing countries will not necessarily contribute to development" (*ibid*., [7]).

[93] The definition of 'Measure' is taken from the EU-Canada Comprehensive Economic and Trade Agreement (***CETA***) (http://ec.europa.eu/trade/policy/in-focus/ceta/index_en.htm), Art. 1(1), while the definition of 'Territory' is taken, with slight modifications, from the Energy Charter Treaty (***ECT***), Art. 1(10). The definition of 'Subsidy' is incorporated by reference from Art. 1, subparagraph 1.1 of the *Agreement on Subsidies and Countervailing Measures* in Annex 1 of the WTO Agreement. *See* further *infra* commentary to Art. 13.

[94] Protocol, Part I, recitals 9, 11. Generally on investment, *see*: E. Gaillard and Y. Banifatemi, 'The Long March towards a *Jurisprudence Constante* on the Notion of Investment' in M. Kinnear *et al*, *Building International Investment Law: The First 50 Years of ICSID* (Kluwer 2016) 97ff.

[95] Protocol, Part I, recitals 4, 5.

[96] Protocol, Art. 2.

[97] Protocol, Art. 2.

[98] Paris Agreement, Art. 2.1(a)-(c).

[99] Protocol, Art. 1(3).

[100] *See*, *e.g.*, the Working Groups of the Intergovernmental Panel on Climate Change, that publish and update the most authoritative reports on global adaptation and mitigation: IPCC, *Climate Change 2014: Impacts, Adaptation and Vulnerability* (2014), Summary for Policymakers, 11-28 (outlining opportunities for adaptation and building resilience); IPCC, *Climate Change 2014: Mitigation of Climate Change* (2014), Summary for Policymakers, 10-25 (identifying mitigation pathways).

Paris Agreement requires "economy-wide" action to reduce greenhouse gas emissions,[101] the Protocol does not limit the definition of green investment by sector.[102]

21. The Protocol includes four further innovations. *First*, all Investments that (i) qualify as eligible to participate in the 'sustainable development mechanism' envisaged in Article 6(4) of the Paris Agreement; (ii) have received the necessary approvals for participation in 'Joint Implementation' under the Kyoto Protocol; or (iii) qualify as eligible to participate in the Clean Development Mechanism thereunder, will automatically qualify for protection under the Protocol.[103] In anticipation of future changes in technologies or development of new carbon trading instruments, the Protocol also includes, in the definition of 'Green Investments', future mechanisms or technologies created to achieve the Paris Agreement's aims.[104] *Secondly*, the Protocol modifies the Covered Investment Treaty so that neither a qualifying Investment nor a qualifying Investor needs to be for profit, enabling charities to make for-profit investments, or for-profit investors to make not-for-profit investments.[105] *Thirdly*, investors may be publicly owned or controlled,[106] paving the way for institutional investors (e.g. public pension funds, sovereign wealth funds and banks) and public-private partnerships to enjoy protection under the Protocol.[107] *Fourthly*, Contracting Parties are encouraged to establish a Framework for Certification of Green Investments, the criteria for which must, at minimum, reflect the criteria set out in the Protocol.[108] This is inspired by the ASEAN Comprehensive Investment Agreement, which permits Member States to certify covered investments through a domestic law mechanism.[109] The Framework grants a Contracting Party the power to expressly qualify or pre-qualify selected investments as Green Investments.[110]

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[101] Paris Agreement, Art. 4(4).

[102] On indicators of "green" investments, *see*: OECD *Defining and Measuring Green Investments: Implications for Institutional Investors' Asset Allocations* (2012), 10-12, 38: "Institutional investors use a multitude of approaches both at the macro and micro level of decision-making. It is therefore unlikely to find agreement on a meaningful, exact operational definition of 'green or climate change investment'"; International Centre for Trade and Sustainable Development, *Towards an indicative list of FDI sustainability characteristics* (2017) 20.

[103] Protocol, Art. 2(2); *see* Paris Agreement, Art. 6(4) (concerning the 'Sustainable Development Mechanism', *see*: ICCL 236-237); Kyoto Protocol, Art. 6 (on 'Joint Implementation'); and Kyoto Protocol, Art. 12 (concerning the 'Clean Development Mechanism'). *See* discussion in ICCL, 236-237 ("Like the [Clean Development Mechanism, under the Kyoto Protocol], the new [Sustainable Development Mechanism] will generate emission reduction offsets that another country can use to fulfil its NDC"); Centre for Trade and Economic Integration, *UNFCCC Nationally Determined Contributions: Climate Change and Trade* (9 January 2017). Investors in CDM and Joint Implementation projects have already begun to look to investment treaties for protections (*see* P. Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (2016) 28 *J Env. L* 19, 24-25 (stating that "[i]ssues of climate change could also come up … in investor state disputes, with respect to legal challenges to measures taken by states that are aimed at addressing climate change", and noting that he has sat on an arbitration concerning the Kyoto Protocol's Clean Development Mechanism). *See also* C. Brown, 'International, Mixed, and Private Disputes Arising Under the Kyoto Protocol' (2010) 1 *JIDS* 447, 463-467).

[104] Protocol, Art. 2.2(c).

[105] Protocol, Part I, recital 9 and 11. *See, e.g.*, US Model BIT (2012) (defining an 'enterprise' to include entities "whether or not for profit, and whether privately or governmentally owned or controlled…"). *See also* US-Kyrgyz BIT, Art. 1(b); US-Kazakh BIT, Art. 1(b); China-Germany BIT, Art. 1(2). *See also* N. Gallus and L. E. Peterson, 'International Investment Treaty Protection of NGOs' (2006) 22 *Arbitration International* 527–548; L. E. Peterson, 'Bringing not-for-profit investment claims to ICSID', *Kluwer Arbitration Blog* (26 April 2009).

[106] Protocol, definition of 'Investor'. *See* Dolzer & Schreuer, 44 ("International investment law is designed to promote and protect the activities of private foreign investors. This does not necessarily exclude the protection of government-controlled entities as long as they act in a commercial rather than in a governmental capacity"); *CSOB v Slovak Republic, Decision on Jurisdiction* (24 May 1999), [16]-[27] (citing A. Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972) 135 *Recueil des Cours* 331, 354–355: "... for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function").

[107] For discussion of the significance of such investors, *see, e.g.*, OECD, *Financing Climate Change Action* (2014), 7 ("institutional investors such as pension funds, insurance companies and sovereign wealth funds could play a key role in financing the transition to a low-carbon economy"); UNEP *et al*, *Financial Institutions Taking Action on Climate* Change (2014), 4 ("Banks and insurance companies are developing financing solutions to support adaptation projects, primarily in developing countries, with significant potential for more financial institution involvement in partnership with governments, development banks and developing country agencies") (and *see* 13, 16, 21 for examples of investments in adaptation and mitigation by pension funds, state-controlled institutional investors and the World Bank, including through public/private partnerships); World Bank, *A Public-Private Partnership (PPP) Approach to Climate Finance* (2013) 7-11; WEF Report, 22. *See* further *infra* commentary to Protocol, Art. 6.

[108] Protocol, Art. 2.4.

[109] ASEAN Comprehensive Investment Agreement (2009), Art. 4(a) and Annex 1.

[110] Protocol, Art. 2.4. While it would be open to a Contracting Party to certify pre-investment activities if they so choose, the Protocol does not require States to admit Green Investments: *see infra* note 230. Such pre-investment activities would also be covered if already stipulated in the Covered Investment Treaty.

This is an advantage to investors because it provides certainty that they will constitute a Green Investment.[111] A State could also choose to make certain incentives conditional on having this certification. Certification is not a pre-requisite to otherwise qualifying under the Protocol in the normal way.[112] But once granted, the State is potentially prevented from subsequently denying that the investment is not a Green Investment.

(iii) Part III Obligations of Contracting Parties

22. Part III of the Protocol contains various obligations intended to ensure that Green Investment is facilitated.

23. To this end, Article 3 requires that Green Investments be admitted in accordance with the law.[113] The reference to international law is intended to integrate other rules of international law, including trade law norms.[114] Article 4 then obliges Contracting Parties to take measures to promote Green Investments,[115] while Article 4(2) refers to providing assistance to other Contracting Parties in this respect,[116] including relating to the development and transfer of technology.[117] These provisions are intended to facilitate the entry and establishment of Green Investments, including investments in the energy sector,[118] and should be read together with Article 13, discussed below.

24. Article 5, the provisions of which are modelled on those contained in recently negotiated IIAs, sets out that States must maintain standards of environmental protection when promoting investment.[119] It is intended to guard against Contracting Parties competing for foreign investment by lowering or allowing derogation from their environmental laws.[120]

25. Article 6 is an innovative investment law provision, not found in any existing IIA.[121] It is designed to shift available global finance towards Green Investments.[122] Subparagraph (1)(a) is based on recommendations by the *Task Force on Climate-related Financial Disclosures* and obliges States to require all investors to report material climate change risks as part of existing public reporting requirements.[123] The Task Force has outlined what might amount to "climate-

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[111] *See*, on the importance of investors being able to predict coverage in advance: Gehring and Kent, 208-209.
[112] Protocol, Art. 2.5.
[113] It is a variation on Art. 6(1) of the Morocco-Nigeria BIT. Such provisions are not uncommon: *see also, e.g.,* Spain-Iran BIT (2002), Art. 2(2). *See* generally Dolzer & Schreuer, 92ff.
[114] For example, States should not implement discriminatory local content provisions when implementing incentives for new renewable energy providers: Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules,* WT-DS456/AB/R, adopted 22 August 2016. *See*, on concerns about domestic policies violating WTO obligations: Sindico, particularly 321-322.
[115] Art. 4(1) is adapted from Art. 24.9 of CETA and Art. 6(1) of the Morocco-Nigeria BIT. *See also* IISD Model, Arts. 27 and 29. *See* generally UNCTAD Menu for Investment Facilitation. On the other international obligations mentioned *see supra* note 114 and the commentary to Protocol Arts. 5, 7, 13, 14.
[116] It is inspired by IISD Model, Art. 29. The language "to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances" is taken from the Paris Agreement, Art. 2(2). As to the regulatory framework, *see infra* Part IV(B)(v).
[117] *See*, on technology in this context, *infra* commentary to Protocol Arts. 8, 10(1) and 20(1)(c).
[118] *See* generally *supra* [7]-[8] and, e.g., ECT, Barriers Report, 44 ("cutting the red tape is the primary challenge in removing barriers to trade, investment and entrepreneurship"); UNCTAD Menu for Investment Facilitation, Action line 10.
[119] Art. 5(1) is adapted from TPP, Art. 20.3, read with Art. 20.4 and CETA, Art. 24.3 read with Art. 24.4. Art. 5(2) is largely taken from TPP, Art. 20.3(6), with certain language from NAFTA, Art. 1114; *see also* CETA, Art. 24.5 and IISD Model, Art. 21. *See* further UNCTAD, *World Investment Report* (2016), 15-19 (***WIR 2016***); UNCTAD, *World Investment Report* (2017) (***WIR 2017***), 119. *See also* Nigeria-Morocco BIT (Art. 14) (requiring investors or investments to "comply with environmental assessment screening" of their investments prior to establishment and requires investors to conduct "a social impact assessment" of their investments).
[120] *See* discussion in M. Footer, 'Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment' (2009) 18 *Mich. State JIL* 33 (***Footer***), 43-45; generally Dubava, 399.
[121] The genesis of the idea for this provision arose from a conversation with sustainability investor Assaad W. Razzouk, and its development benefited from the assistance of David Wei.
[122] *See*, for this idea, A. Razzouk, 'A barrage of lawsuits is needed to curb climate change' *The Independent* (22 April 2014) (***Razzouk***). *See also* C. Flood, 'Pension funds pressed to protect portfolios from climate change' *The Financial Times* (26 June 2017) (***Flood***); K. Carmichael, 'The climate movement must find the courage to kill some of its many darlings', *Centre for International Governance Innovation* (1 December 2015) (***Carmichael***), referring also to J. Thistlethwaite, 'The Challenges of Counting Climate Change Risks in Financial Markets' *CIGI Policy Brief 62* (June 2015 (***Thistlethwaite***). *See also* TCFD (*infra* note 123) 42 ("more efficient allocation of capital"). Generally *supra* note 83.
[123] TCFD, *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures* (15 June 2017) (***TCFD Recommendations***), iv, 17 ("The Task Force recommends that organizations provide climate-related financial disclosures in their mainstream (i.e., public) annual

related risks",[124] while the 'materiality' standard reflects that applied by most national laws for financial disclosures,[125] recognising that most climate change risk is "non-diversifiable" and "affects nearly all industries".[126] This provision ensures information on such risks is available for investment decision-making purposes.[127] Subparagraph (1)(b) then follows on from the requirements of subparagraph (1)(a)[128] to oblige States to require investors to take into account these material climate change risks in deciding whether and where to invest.[129] Requiring investors, including large-scale shareholder investors such as pension fund trustees,[130] to consider such risks will result in funds being divested from fossil fuels, with significant capital then available for greener investments.[131]

26. Article 7 provides for corporate social responsibility (***CSR***) obligations, in keeping with the sustainable development objectives of the Protocol.[132] Express reference to CSR principles in IIAs is recent,[133] and the Protocol draws on existing language[134] to assist in mainstreaming them. It refers to standards such as international human rights, labour rights, and anti-corruption measures that have been endorsed in IIAs,[135] and includes indigenous rights in light of their particular relevance to the Paris Agreement.[136] Moreover, Article 7(2) requires compliance with the CSR obligations in order for an expectation to be legitimate, thus encouraging CSR due diligence and compliance by the investor.[137]

27. Article 8 marks the beginning of provisions relating to substantive investor protection. Some IIAs do not allow States to insist on certain kinds of performance by investors, including the transfer of technology.[138] Article 8 provides an extremely limited exception to this rule, which allows a State to impose a technology transfer[139] requirement that is non-discriminatory, non-arbitrary, not enacted as a disguised restriction on trade and is reasonable and proportionate to the aim of ensuring compatibility of the Investment with the Contracting Party's National Climate Change

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financial filings"), 33. The Protocol makes this obligatory, noting the Task Force's indication (at 41) that "the success of its recommendations depends on near-term, widespread adoption by organizations in the financial and non-financial sectors". *See also* Thistlethwaite, 3-4. A variety of other frameworks exist: *see* TCFD Recommendations, 33, referencing, *inter alia*, the Climate Disclosure Standards Board.

124 TCFD Recommendations, 5-6. *See also* 8-11, including on "financial impacts". On "loss and damage": *supra* Part II(B).

125 TCFD Recommendations, 17, 33, cf 34. *See also* Flood.

126 TCFD Recommendations, 17, 33.

127 TCFD Recommendations, 5, 8, 42. *See also* Carmichael; M. Carney, 'Remarks on the launch of the Recommendations of the Task Force on Climate–related Financial Disclosures' (14 December 2016) (***Carney***); Thistlethwaite, 1-2.

128 *See, e.g.*, TCFD Recommendations, 34 on the relevance of reporting for "asset managers", and 36-37 (on "measur[ing] exposure to carbon-intensive companies"); also Carney.

129 Following the suggestion in Razzouk; *see also* Flood; Carmichael; TCFD Recommendations, 36 and, for a recent law to this effect, ClientEarth, 'New law says pension funds must assess climate risk' (28 November 2016), referring to *EU Directive 2016/2341* (23 December 2016); F. Guarascio, 'EU requires pension funds to assess climate change risks' *Reuters* (24 November 2016) (***Guarascio***).

130 Specifically addressed in Razzouk; Flood; Thistlethwaite, 3. For recent legal developments on this issue, *see* ClientEarth, 'Pension fund trustees could face legal challenge for ignoring climate risk – leading QC confirms' (2 December 2016). *Cf* on the question of "portfolio investment": IISD Handbook, 6.

131 Razzouk; discussion in Guarascio. On divestment globally, *see, e.g.*: A. Mooney, 'Growing number of pension funds divest from fossil fuels' *Financial Times* (28 April 2017).

132 *See* the discussion of the preambular paragraphs *supra* [16].

133 *See* generally Dubava, 399-400; Gehring and Kent, 209-212; Alschner and Ruerk, 226-228.

134 Art. 7 draws on Colombia-Canada Free Trade Agreement (2008), Art. 816. *See also* International Labour Office, *Corporate social responsibility in international trade and investment agreements* (2016) 9-10, mapping the reference to CSR principles in investment agreements; *OECD Guidelines for Multinational Enterprises* (2011), endorsed by all OECD members as well as Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania. *See* further Gehring and Kent, 211; Alschner and Ruerk, 227; Footer, 58-63.

135 For example, the Japan-Mozambique BIT (2013) refers to anti-corruption measures (Art. 10), while the US Model BIT (2012) seeks to promote "internationally recognized labour rights" (Preamble, recital 5) and the Nigeria-Morocco BIT has a specific provision on labour and human rights protections (Art. 15).

136 Paris Agreement, Preamble, recital 11.

137 J. Viñuales, 'Investor Diligence in Investment Arbitration: Sources and Arguments' (2017) 32 *ICSID Rev* 346.

138 *See e.g.*, CETA, Art. 8.5(1)(f), which prohibits a list of performance requirements, including that a State shall not "impose, or enforce the following requirements, in connection with the establishment, acquisition, expansion, conduct, operation, and management of any investment in its territory to: … (f) transfer technology, a production process or other proprietary knowledge to a natural person or enterprise in its territory." *See also* Dolzer & Schreuer, 90-92.

139 *See infra* note 143. The term is deliberately not defined, allowing for evolution over time. No definition is contained in the UNFCCC, Kyoto Protocol or Paris Agreement.

Strategy, which includes the NDCs.[140] The article is intended to strike a balance between protection of the intellectual property rights of investors, and the "technology gap" faced by many developing States that may impede their ability to achieve their NDCs.[141] A technology transfer requirement could, for example, be used by a host State to encourage a Green Investor to form a joint venture with local partners as a condition of admitting an investment.[142] Article 8 is also complemented by Article 4(2) of the Protocol, pursuant to which the Contracting Parties undertake to provide assistance to less developed States, which may include facilitating the transfer and development of new climate technologies, and Article 20(1)(c). Together these provisions incentivise and promote co-operation and the transfer of mitigation and adaptation technology,[143] furthering States' obligations under the UNFCCC and Paris Agreement.[144]

(iv) Article 9: Expropriation

28. Provisions regulating expropriation are common in IIAs.[145] The Green Investment Protocol amends such provisions in three ways.

29. Subparagraph 1, reflecting wording found in a number of investment treaties,[146] outlines that action taken by States to acquire intellectual property – potentially including climate mitigation and adaptation technology[147] – will not amount to expropriation if permitted under the compulsory licensing scheme in the WTO TRIPS Agreement.[148] Such a compulsory licence would not breach the investment protections relating to expropriation.[149] Along with Article 1(3) of the Protocol, Article 9(1) thus ensures that the Green Investment Protocol is consistent with the TRIPS Agreement,[150] which is necessary given broad WTO membership.[151]

30. Subparagraph 2 addresses indirect expropriation.[152] As opposed to 'direct' expropriation, the actual taking of property, 'indirect' expropriation refers to "measures short of physical takings [which] may also amount to takings in that they permanently destroy the economic value of the investment or deprive the owner of its ability to manage,

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140 This provision is adapted from, and uses language contained in, the United States Model BIT 2012, Arts. 8(1)(f) and 3(c). *See supra* note 84 on NDCs.

141 *See*, *e.g.*, D. S. Olawuyi, 'From Technology Transfer to Technology Absorption: Addressing Climate Technology Gaps in Africa' (2017) *Fixing Climate Governance Series* (Centre for International Governance Innovation), Paper No. 5; *infra* note 143.

142 A model that has been used in other sectors in China with some success: *see* P.J. Buckley *et al* 'Inward FDI and host country productivity: evidence from China's electronics industry' (2006) 15(1) *Transnational Corporations* 13; on the types of joint ventures that may be appropriate in a climate change context *see also* T. Forsyth, 'Enhancing climate technology transfer through greater public-private cooperation: Lessons from Thailand and the Philippines' (2005) 29 *Natural Resources Forum* 165.

143 On allowing performance requirements for climate change purposes, including "technology transfer": B. Güven and L. Johnson, 'International Investment Agreements: Impacts on Climate Change Policies in India, China and Beyond' in *Trade in the Balance: Reconciling Trade and Climate Policy* (Boston University, 2016) 53-54. *See also* IISD Model, Art. 26; Mann, 5 and the commentary to Art. 9(1) *infra*.

144 *See supra* note 84.

145 *See*, *e.g.*, UNCTAD, 'Expropriation', *UNCTAD Series on Issues in International Investment Agreements II* (2012) 5 (***UNCTAD Expropriation***); IISD Handbook, 17.

146 The first sentence is taken almost verbatim from the US Model BIT (2012), Art. 6(5), the Australia-Singapore Agreement to Amend the Free Trade Agreement (2017) (<https://dfat.gov.au/trade/agreements/safta/Documents/agreement-to-amend-the-singapore-australia-free-trade-agreement.pdf>) (***Australia-Singapore FTA Amendment***), Part 8, Art. 13(6); and the TPP, Art. 9.8(5). The second sentence is based on the EU-Singapore Free Trade Agreement (2015) (< http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>), Annex 9C. *See* similarly UNCTAD, *Expropriation*, 133-134; CETA, Art. 8.12; Israel-Japan BIT (2017), Art. 11(5). A similar clause is also included in IISD Model, Art. 8(G).

147 *See* generally the WTO page related to the interaction between the TRIPS Agreement and climate change: https://www.wto.org/english/tratop_e/trips_e/cchange_e.htm; N. Nanda, 'Diffusion of Climate-Friendly Technologies: Can Compulsory Licensing Help?' (2009) 14 *Journal of IP Rights* 241 (***Nanda***) and references therein; J. Sarnoff, 'Intellectual Property and Climate Change, with an Emphasis on Patents and Technology Transfer' in C. Carlarne *et al*, *The Oxford Handbook of International Climate Change Law* (OUP, 2016), particularly 402-407; Littleton, 2-4, 13-15. *See supra* notes 84, 141.

148 *See* UNCTAD, *Expropriation*, 16 (noting such a provision "ensures coherence between international investment law and WTO law"). *See* generally on compulsory licensing: S. Ford, 'Compulsory Licensing Provisions under the TRIPs Agreement: Balancing Pills and Patents' (2000) 15 *AUILR* 941.

149 *See* generally UNCTAD, *Expropriation*, 133-134; IISD Handbook, 17.

150 *See supra* note 148.

151 The WTO currently has 164 members, including the EU: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

152 *See* generally Dubava, 393-394, 400-401; Gehring and Kent, 206-208; UNCTAD, *Expropriation*, Ch. II.

use or control its property in a meaningful way".[153] Uncertainty has arisen regarding whether, and to what extent, States are restricted in their ability to regulate due to obligations not to indirectly expropriate.[154] Article 9(2) reproduces almost *verbatim* part of Annex 8-A to CETA.[155] To provide greater certainty to investors, Article 9 goes on, like CETA, to stipulate in subparagraph 3 the factors that should be taken into account in determining whether a measure amounts to an indirect expropriation.[156] Unlike CETA, however, no specific carve-out is provided for measures taken to protect the public welfare,[157] as Article 9 is subject to language in Article 12 that protects States' rights to regulate.[158] Article 12 is designed to ensure that a State will not be subjected to a finding of expropriation for a reasonable measure that is non-discriminatory and designed to contribute to climate change mitigation and adaptation.[159]

(v) Article 10: Treatment of Investors

31. Fair and equitable treatment (***FET***) obligations, commonly contained in IIAs,[160] protect investors from "serious instances of arbitrary, discriminatory or abusive conduct".[161] Acknowledging that different States have taken different approaches to defining the standard in their IIAs,[162] the Protocol does not dictate a single approach.[163] Rather, it clarifies the FET standard the Contracting Parties have adopted, on the basis that FET clauses have, at times, been broadly interpreted.[164]

32. In particular, a "central" aspect of FET[165] is that the "legitimate expectations" of investors may found claims for breach,[166] including where the State alters regulations existing when the investment was made.[167] The risk, borne out

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[153] UNCTAD, *Expropriation*, 6, also 7-12.

[154] *See* Spears, 1049-1052; Footer, 39-42; UNCTAD, *Expropriation*, 57 and generally 13-14, 57-104, particularly 78-104 (on the "right to regulate in the public interest"); Dolzer & Schreuer, 102. *See also* IISD Handbook, 18. International law recognises that States have "police powers" allowing public regulation: *see* the discussion in UNCTAD, *Expropriation* 79-86 and cases therein; also Gehring and Kent 206-207; Spears, 1046.

[155] CETA, Annex 8-A, Art. 1(b). For similar provisions, *see also* Morocco-Nigeria BIT, Art. 2(a); IISD Model, Art. 8(I); and the examples listed in UNCTAD, *Expropriation*, 13, 59, 86; and Spears, 1051-1052. *See also* Gehring and Kent, 207.

[156] The text is taken almost *verbatim* from CETA, Annex 8-A, Art. 2.

[157] *Cf* CETA, Annex 8-A, Art. 3.

[158] *See infra* commentary to Art. 12 and note 184.

[159] *Cf Compañia del Desarrollo de Santa Elena, S.A. v. Costa Rica, Final Award* (ICSID Case No. Arb/96/1) (17 February 2000) [72], in which the tribunal held that measures ostensibly taken to protect the environment still amounted to an expropriation "no matter how laudable and beneficial to society as a whole." *See* Dolzer & Schreuer, 122.

[160] UNCTAD, 'Fair and Equitable Treatment' in *UNCTAD Series on Issues in International Investment Agreements II* (2012), xiii, 17 (***UNCTAD, FET***). This paper gives a very helpful overview of the key issues arising in relation to the FET standard. It is widely cited. *See, e.g.*, I. Dimitrov, 'Legitimate Expectations in the Absence of Specific Commitments According to the Findings in Blusun v. Italy: Is there Inconsistency Among the Tribunals in the Solar Energy Cases?' *Kluwer Arbitration Blog* (18 August 2017) (***Dimitrov***). *See also* Spears, 1052.

[161] UNCTAD, *FET*, 1, *see also* generally 6-7.

[162] UNCTAD, *FET*, xiii-xiv, 1, 7-8, 11, and the detailed analysis of texts 17-35; also Spears, 1054-1055. These can be (1) the customary "international minimum standard of treatment" (*see* UNCTAD, *FET*, 1, 7-8, 17-18, 23-35 and generally 5-9, 13 and 44-58 for an overview of case law; *see also* J. Sharpe, 'The Minimum Standard of Treatment, *Glamis Gold*, and *Neer's* Enduring Influence' in M. Kinnear *et al*, *Building International Investment Law: The First 50 Years of ICSID* (Kluwer 2016) 273 (***Sharpe***)); (2) particular FET protections (*see* the examples in UNCTAD, *FET*, 29-35); and (3) no such restrictions (UNCTAD, *FET*, 1-2, 7-8, 11-13, 17-23, 85-88, 90, 104-105. *See* the case law discussed 39-102, though *see* 59-61, *e.g. Impregilo S.p.A. v. Argentine Republic (Award)* ICSID Case No. ARB/07/17 (21 June 2011) [286]-[288]. Note, however, recent movement towards adopting the customary standard ("An increasing number of States are linking substantive protections, including fair and equitable treatment, to customary international law": Sharpe, 281); also UNCTAD, *FET*, 23-29 and *see, e.g.*, Australia-Singapore FTA Amendment, Art. 6; generally WIR 2016, 9, 15-19), or to detailing protections (*see* UNCTAD, *FET*, 29-35). Though *see also* UNCTAD, *FET*, 28, also 44-58 (no agreement on minimum standard content).

[163] *Cf* UNCTAD, *FET* 104-111 (different options), 104 (noting possible FET language alteration through protocols, annexes or interpretative statements). This would undermine the Protocol's viability, even if consistency is desirable (*see* Sharpe, 281 (reference to customary standard provides more "clarity, consistency and predictability")).

[164] UNCTAD, *FET*, 11 ("many arbitral awards have interpreted the FET concept rather broadly") and *see* 1 ("the vague and broad wording of the obligation carries a risk of an overreach in its application"), *see also* 7-8, 11-12, 89-90 and *see* Spears, 1053. For a comprehensive overview of the cases, *see* UNCTAD, *FET*, 39-102 and *see* particularly *infra* note 168.

[165] L. Reed and S. Consedine, 'Fair and Equitable Treatment: Legitimate Expectations and Transparency' in M. Kinnear *et al.*, *Building International Investment Law: The First 50 Years of ICSID* (Kluwer 2016) 287; similarly UNCTAD, *FET* 63 (***Reed and Consedine***).

[166] UNCTAD, *FET* 2, 9, 11, 63, and for the case law on this issue 63-78. *See, e.g.*, *Saluka* [302]ff. This includes in minimum standard cases: Sharpe, 273-274; UNCTAD, *FET*, 64.

[167] UNCTAD, *FET*, 9, 63-64. *See* generally Dolzer & Schreuer, 145ff.

by certain cases,[168] and even if other tribunals have taken different views,[169] is that the State's ability to regulate for public interest reasons, including in relation to the environment, is constricted.[170] A number of recent cases have concerned claims regarding the alteration of benefits provided to renewable energy investments.[171]

33. The FET clause in the Protocol takes into account the importance of incentives for Green Investment,[172] but also of States' ability to act to fulfil their Paris Agreement commitments, and to incentivise Green Investment without fear of repercussions,[173] particularly in quickly developing fields in which it is difficult to lay down fixed regulations.[174] It elucidates what kinds of action will violate any FET clause in the Covered Investment Treaty.[175]

34. On the one hand, adopting language from a number of recently drafted IIAs, the Protocol outlines that breach of any Investor's expectations alone is not sufficient to amount to a breach of FET.[176] On the other hand, Green Investments and Investors are given particular protection and greater certainty by provisions that enable reliance on legitimate expectations under certain conditions.[177] These are, *first*, the Green Investor establishes that it had a "legitimate expectation", understood, in light of case law, as a reasonable expectation in the circumstances,[178] and one which takes into account any timetable for alteration provided vis-à-vis a given measure.[179]

35. *Secondly*, UNCTAD has outlined that legitimate expectations arise from "specific commitments addressed to [the investor]" or "rules … which are put in place with a specific aim to induce foreign investments and on which the

[168] UNCTAD, *FET*, 64-67, referring, *inter alia*, to *Tecmed v. Mexico (Award)*, ICSID Case No ARB (AF)/00/2 (29 May 2003), 91. *See also* Reed and Consedine, 283, 287-288; Spears, 1053.

[169] *See* UNCTAD, *FET*, 91, 67-77, referring *inter alia*, to *Saluka*, *see* particularly [304]-[306]; Reed and Consedine, 289-292; Spears, 1053.

[170] *See* UNCTAD, *FET*, 1-2, 9-10, 12, 14, 67, 77-78. *See* particularly *Saluka* [305], referred to in UNCTAD, *FET*, 73, and on environmental protection being a "public good": Dubava, 389, *see also* 392.

[171] *See* the excellent overview of the case law in G. Kaiser 'Arbitration Involving Renewable Energy' in *The Guide To Energy Arbitrations* (2nd ed, Global Arbitration Review, 2017); *see also* Dimitrov and the list *supra* note 82.

[172] *See supra* Parts II(C) and III.

[173] Mann, 8 (on "regulatory chill"); similarly Spears, 1039; S. Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?' (2007) 24 *JIA* 469 (***Schill***); relatedly, on 'chill' as it relates to fossil fuels: Gehring and Kent, 213-215.

[174] *See supra* Part IV(B)(i) and note 171 for cases in which changes were made. *See also* Wilder and Drake, 384 (on uncertainties regarding particular incentives). *Cf* WIR 2017, 119.

[175] *See* UNCTAD, *FET*, 2 ("The vagueness of the FET standard is at the core of the problem"), 3 ("The challenge posed to negotiators in this environment of uncertainty is to establish clearer boundaries as to the types of conduct that constitute a violation of the FET obligation or, conversely, those that may not be considered as breaching the IIA in question. In doing so, a right balance needs to be struck between investment protection, on the one hand, and the preservation of the freedom of legitimate State action, on the other"), similarly 104 ("the principal aim for negotiators in relation to the FET standard should be to clarify the source and the content of the obligation") and generally, on the call for clarity and balance, *ibid*. 9-15; Dubava, 389; Boute, particularly 374-376. *See also* Mann, 8.

[176] Subparagraph 1(a) is adapted from Australia-Singapore FTA Amendment, Ch. 8, Art. 6(4); ("For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result"); similarly China-Hong Kong CEPA Investment Agreement (2017) (***China-HK CEPA***), Art. 4(4); TPP, Art. 9.6(4); *see also* CETA, Art. 8.9(2) ("For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section"). *See* generally WIR 2017, 120; Gehring and Kent, 208 and *see Mesa Power Group LLC v. Canada (Award)* PCA Case No 2012-17 (24 March 2016) [502] ("the Tribunal shares the view held by a majority of NAFTA tribunals ... that the failure to respect an investor's legitimate expectations in and of itself does not constitute a breach of Article 1105, but is an element to take into account when assessing whether other components of the standard are breached"), referred to in, e.g., Kaiser. *But see* S. Lester, 'The Born Interpretation' *International Economic Law and Policy Blog* (15 February 2018); and for uncertainty about how such provisions might operate: Allen & Overy, 'New investment protections offered in ground-breaking Trans-Pacific Partnership' (23 December 2015) (http://www.allenovery.com/publications/en-gb/Pages/New-investment-protections-offered-in-ground-breaking-Trans--Pacific-Partnership.aspx) (***A&O***).

[177] The approach is similar to that taken in CETA, Art. 8.10(4) ("When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated").

[178] *See* UNCTAD, *FET*, 68, referring to *Duke Energy v. Ecuador (Award)*, ICSID Case No. ARB/04/19 (18 August 2008) [340]. *See, e.g.*, *JSW Solar* [407] ("[expectations] must be objectively reasonable ... and must take into account all relevant circumstances"); generally Gehring and Kent 208; M. Barbieri, 'Sovereign wealth funds as protected investors under BITS and the safeguard of the national security of host States' in G Sacerdoti *et al.*, *General Interests of Host States in International Investment Law* (CUP, 2014) 130ff (***Barbieri***), 148.

[179] *Cf Charanne* [497]-[499] (no expectation that would not be changed) [505]-[508] (changes foreseeable); *JSW Solar* [437] (no "commitment" that "would not be altered").

foreign investor relied in making his investment".[180] Subparagraph (b)(ii) reflects this approach, by requiring that "specific" commitments or representations are relied upon by the Green Investor.[181] *Finally*, consideration should be given to the circumstances of the case, including the effects on the Green Investor and the State's need to regulate, in deciding whether there has been a breach.[182] This provision is to be read in line with Article 12,[183] which is more generally applicable.[184]

36. The Article does not include language relating to subsidies included in other IIAs, to the effect that the "mere fact" that a given subsidy is not granted is not sufficient to violate the Protocol.[185] Such provisions might grant a State scope to remove fossil fuel subsidies,[186] but may also restrict the rights of green investors in relation to green incentive schemes.[187] Subsidies are addressed more fully in relation to Article 13 below.

37. Article 10 further clarifies that the obligation of Contracting Parties to provide investors and/or investments with "full protection and security" under Covered Investment Treaties only encompasses obligations relating to their physical security, and does not extend to any guarantees of legal or regulatory stability, which are best addressed under the FET heading. This language is based on Article 8.10(5) of CETA, and seeks to clarify the obligations of Contracting Parties in light of the divided jurisprudence on this issue.[188]

(vi) Article 11: Non-discrimination

38. IIAs usually also contain a clause requiring that a State give the nationals of the other State party the same treatment that it gives to other foreign investors in 'like circumstances' (National Treatment); and no less favourable treatment than that accorded to nationals of other States (Most-Favoured-Nation (***MFN***)).[189] These provisions are essential for removing discriminatory barriers to investment.[190] The core of these obligations is not changed by the Green Investment Protocol. Article 11(1), adopting language in CETA, sets out that the obligation covers "expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of" a Green Investment.[191]

[180] UNCTAD, *FET,* 69 (references omitted), also cited in *Charanne* [489].

[181] As noted, it is similar to the approach taken in CETA, Art. 8.10(4), quoted *supra* note 177. *See* generally the discussion in UNCTAD, *FET*, 69-70 and *see* J. Viñuales, 'Sovereignty in Investment Law' in Z. Douglas *et al*, The Foundations of International Investment Law (OUP, 2014) 339; *e.g.*, *Charanne* [490]; *Eiser* [365] ("regime ... to encourage [investors'] investment"), [382] ("invested in reliance on those regimes"); *Blusun* [371] ("clear distinction between a law, i.e. a norm of greater or lesser generality creating rights and obligations while it remains in force, and a promise or contractual commitment"); *JSW Solar* [407[-[411], [421].

[182] *See, e.g.*, *Charanne* [514] (State action to be, *inter alia*, reasonable and proportionate), [532]; *Eiser* [363] ("total and unreasonable change"); *Blusun* [371], [372] ("not disproportionate"); *JSW Solar,* [308] ("States enjoy the sovereign right to change domestic laws, so long as such changes are not manifestly inconsistent, non-transparent, unreasonable, or discriminatory.") *See* generally Dimitrov. For the wording used in the Protocol, compare the approach sometimes taken to determining an indirect expropriation: UNCTAD, *Expropriation*, 57-77 and *supra* note 156.

[183] *See*, on exception clauses as a means to adjust FET: UNCTAD, *FET*, 110-113.

[184] Similarly UNCTAD, *FET,* 113 ("The preservation of the right to regulate is a concern not only in the context of the discussion on fair and equitable treatment; it is relevant for other IIA obligations, too. Therefore, it may be prudent to apply the right-to-regulate language to the treaty as a whole rather than to the FET standard alone").

[185] *See, e.g.*, Australia-Singapore FTA Amendment, Ch. 8, Art. 6(5) ("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 this Article, even if there is loss or damage to the covered investment as a result"); similarly China-HK CEPA, Art. 4(5); TPP, Art. 9.6(5); also CETA, Art. 8.9(3) ("For greater certainty, a Party's decision not to issue, renew or maintain a subsidy: (a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or (b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy, does not constitute a breach of the provisions of this Section").

[186] *See*, on such subsidies, *supra* Part III and *infra* commentary to Protocol, Art. 13; generally OECD Unlocking Private Investment Report, 8 (such subsidies "substantially distort[ing] energy markets"), also 8-9; Wilder and Drake, 382 on "subsidies that benefit conventional energy sources".

[187] *See* the cases discussed *supra* 171. *See also*, however, A&O, *supra*, for uncertainty on how such clauses might operate.

[188] *Compare, e.g., CME Czech Republic B.V. v. Czech Republic (Partial Award)*, UNCITRAL (13 September 2001) [613] and *Azurix Corp. v. Argentine Republic (Award),* ICSID Case No. ARB/01/12 (14 July 2006) [406]-[408] with *Gold Reserve Inc. v. Bolivarian Republic of Venezuela (Award)*, ICSID Case No. ARB(AF)/09/1 (22 September 2014) [622]-[623] and *Crystallex International Corporation v. Bolivarian Republic of Venezuela (Award)*, ICSID Case No. ARB(AF)/11/2 (4 April 2016) [632]-[635].

[189] C. McLachlan *et al*, 'International Investment Arbitration: Substantive Principles' (2nd ed., OUP, 2017), Ch. 7.

[190] ECT, Barriers Report, 26-27

[191] CETA, Art. 8.6(1). However, the references to "establishment" and "acquisition" are omitted.

39. The Protocol contains a list of circumstances that must be taken into account in determining likeness, based on a similar provision in the Nigeria-Morocco BIT.[192] This includes the "expected greenhouse gas emissions and/or emissions reductions" of an investment, which should have the effect that green investments are not in "like circumstances" to non-green investments, ensuring that non-green investors cannot use an MFN clause in another treaty to access the more favourable treatment (such as greater regulatory certainty) afforded to Green Investors. While the jurisprudence on "like circumstances" is well developed, the requirement to take into account the sectors in which the investment operates is included to guard against 'outlier' decisions on 'likeness' such as that in *Occidental Exploration and Production Co v. Ecuador*.[193]

40. *Secondly*, MFN clauses can allow reform efforts to be circumvented as long as a State has not reformed all of its existing treaties.[194] There is a risk that all investors covered by the Green Investment Protocol could use a MFN clause to avoid the clauses in the Green Investment Protocol that allow for host States to recalibrate their regulations for climate change, and thus disrupt its balance.[195] Specifically, the MFN clause could be used to avoid Article 12, the Right to Regulate, or to avoid the obligations placed on Investors in Part IV. Thus, in order to ensure that the system developed in the Protocol functions as intended, an MFN clause is included that prevents Investors from invoking the more favourable terms of another treaty to undermine the provisions of the Green Investment Protocol.[196]

41. *Finally*, it is accepted that green investors outside the Protocol will be able to use MFN clauses in other IIAs to access the greater protections in the Protocol. However, the MFN clause in the Protocol prevents a 'pick-'n'-mix' approach to treaty provisions by requiring that all of the Articles in the Protocol then apply in their entirety, as the Article invoked "shall be interpreted in the context of all of the provisions of this Green Investment Protocol" (Article 11(4)), which would include the Right to Regulate clause.

(vii) Article 12: Right to Regulate

42. This section accords an express regulatory power to the State, which will apply to all Investments in the Covered Investment Treaty, including Green Investments.[197] This regulatory power is constrained in that it must not constitute a means of arbitrary or unjustified discrimination, and it must serve a legitimate public welfare objective.[198] It is intended to recognise the challenges that States face in providing a sufficiently stable regulatory environment to attract investment and to expressly protect a right to regulate including in light of technological developments. The language "shall be construed" ensures that Article 12 operates as a clarification of each of the specific standards in the treaty, rather than operating as an exception. This form was preferred for two main reasons.

43. *First*, the claimant bears the burden of proving its case under the substantive obligation alleged to be breached (including as to clarificatory language), and also bears the burden of proving that any regulatory actions were

[192] Morocco-Nigeria BIT, Art. 6(3). *See also* Spears, 1058-1059; Mann, 7-8; IISD Model Art. 5; IISD Handbook, 13.
[193] *Occidental Exploration and Production Co v. Ecuador*, UNCITRAL (Final Award), LCIA Case No. UN3467 (1 July 2004), [171]-[176] (likeness not limited to specific sectors; similar tax treatment of domestic exporters in sectors other than oil, such as flowers, mining and seafood products, were in 'like situations' for the purposes of the BIT). That approach has not been applied in any other publicly available investment award. Compare *SD Myers Inc v. Canada*, UNCITRAL, Partial Award (13 November 2000) (***SD Myers***), [250] ("The concept of "like circumstances" invites an examination of whether a non-national investor complaining of less favourable treatment is in the same "sector" as the national investors.") *See* Spears, 1057-1058 and, on this issue in the climate change context, Gehring and Kent, 206.
[194] *See* Alschner and Ruerk, 229.
[195] *See* similarly the discussion in Kaufmann-Kohler and Postetà, [266]-[270] of Art. 2(5) of the Mauritius Convention.
[196] *Cf* CETA, Art. 8.7 and *supra* note 195.
[197] Art. 12 is adapted from the Canada–China BIT (2012), Art. 33(2); the expropriation Annex in the US Model BIT (2012) and the Morocco-Vietnam BIT (2012), Art. 2(4); with reference also to the Japan-Colombia BIT (2011), Art. 15. *See* generally Dubava, 398-399; Gehring and Kent, 204-206; Alschner and Ruerk, 223; Spears, 1059-1064.
[198] Protocol, Art. 12.

inconsistent with the police powers doctrine.[199] Since the burden is on the respondent for any exception invoked,[200] it may, somewhat perversely, be more difficult for a respondent State to argue that the measures taken were justified in the circumstances on the basis of an exception clause than on the basis of a clarificatory clause.

44. *Secondly,* by contrast, if the Green Investment Protocol included an exception clause, there is also a risk that this would be read as displacing the police powers exception.[201] Thus, in *Bear Creek v. Peru*,[202] the Tribunal noted that the police powers doctrine "must be taken into account in the context of the specific provisions provided in the FTA", including a general exception,[203] but concluded that the General Exception provided an exclusive list of exceptions and thus displaced the police powers doctrine.[204] Including a general exception for the environment or climate change measures may thus disrupt the balance that is already being struck in the case law on the police powers doctrine.[205]

45. Some commentators have expressed a view that specific clarifications at the level of each performance standard are to be preferred.[206] The problem with this approach is that it is difficult to achieve in the context of a Protocol that is intended to generally amend all existing IIAs. Instead, the Protocol provides a generally applicable provision that is intended to clarify the scope of the substantive standards, notably including FET and expropriation. Nevertheless, it does not apply to Article 8 on Performance Requirements as this has its own very specific exception to which it would not make sense to then apply Article 12.

46. Importantly, the burden of showing that the right to regulate is not met will *prima facie* fall on the Claimant, because it is part of demonstrating breach of the invoked treaty standard.[207] An evolutionary interpretation of its provisions is also codified in the Protocol.[208] Together with the Preamble, these measures will ensure that the Tribunal can fully take account of relevant (and future) environmental norms and legal developments when carrying out the necessary balancing exercise between State regulatory autonomy and the protection of investors.[209]

47. Finally, for the avoidance of doubt, the term "Measures" is defined for the purposes of this section to include a "Subsidy", to avoid any question as to whether Article 12 also applies to Article 13.

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[199] *Arts et Technique du Progres S.A.S. v. Republic of Poland (Award (Redacted))*, UNCITRAL (14 February 2012) [582]-[584].

[200] *Tokios Tokelés v Ukraine (Award)*, ICSID Case No ARB/02/18, Award (26 July 2007) [121]; *Salini Costruttori SpA and Italstrade SpA v Jordan (Award)*, ICSID Case No ARB/02/13(31 January 2006) [70].

[201] J. Viñuales, 'Foreign Investment and the Environment in International Law: The Current State of Play' in K. Miles (ed), *Research Handbook on Environmental and Investment Law* (Edward Elgar 2016) 309; A. Cosbey, 'The Road to Hell? Investor Protections in NAFTA's Chapter 11' in L. Zarsky (ed), *International Investment for Sustainable Development: Balancing Rights and Rewards* (Earthscan 2005) 150 (noting that the IISD Model did not include a general exception out of a concern that investor-State arbitral tribunals might rely on WTO jurisprudence to narrow the policy space); Dubava, 399; Gehring and Kent, 206; *cf* A. Keene, 'The Incorporation and Interpretation of WTO-Style Environmental Exceptions in International Investment Agreements' (2017) 18 *JWIT* 62.

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

[203] *Ibid* [471], applying Art. 2201.1 of the Canada-Peru FTA.

[204] *Ibid* [473]-[474].

[205] *See Methanex Corporation v. United States of America (Award)*, NAFTA, UNCITRAL, (3 August 2005) (***Methanex***) [136]; *Chemtura Corporation v. Canada (Award)*, UNCITRAL (2 August 2010) [266] ("[T]he Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. ... the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation"); *see also* J. Viñuales, 'Foreign Investment and the Environment in International Law: An Ambiguous Relationship' (2010) 8(1) *BYBIL* 244.

[206] A. Newcombe, 'The Use of General Exceptions in IIA: Increasing Legitimacy or Uncertainty?' in A. de Mestral and C. Lévesque (eds), *Improving International Investment Agreements* (Routledge 2013) 267, 283.

[207] *See supra* note 199.

[208] Protocol, Arts. 1(2) and (3); on evolutionary application of environmental law norms, *see Gabcikovo-Nagymaros* [112]; *Award in the Arbitration Regarding the Iron Rhine Railway (Kingdom of Belgium/ Kingdom of the Netherlands),* 24 May 2005, *RIAA*, Vol. XXVII, 35, [80]; *Indus Waters Kishenganga Arbitration (Pakistan v. India) (Partial Award)*, PCA, 2013, [425]. *See also*, L. Boisson de Chazournes, 'Environmental Protection and Investment Arbitration: Yin and Yang?' (2017) 10 *Anuario Colombiano de Derecho Internacional* 371.

[209] *Adel A Hamadi Al Tamimi v. Oman (Award),* ICSID Case No. ARB/11/33 (3 November 2015) [389] ("When it comes to determining any breach of the minimum standard of treatment under Article 10.5, the Tribunal must be guided by the forceful defence of environmental regulation and protection provided in the express language of the Treaty"); *S D Myers* [221] ("environmental protection and economic development can and should be mutually supportive").

(viii) Article 13: Subsidies

48. In line with the importance of providing incentives to encourage Green Investments,[210] Article 13 provides expressly that subsidies may be provided, as long as this is in line with the Contracting Parties' other international commitments.[211] This Article is inspired by Article 6(1) of the Draft Pan-African Investment Code,[212] as well as the allowances made for States to provide subsidies under the WTO *Agreement on Subsidies and Countervailing Duties*.[213] The definition of 'subsidy' is incorporated by reference from the latter agreement, being an accepted definition that would cover many different types of incentive regimes.[214]

49. This provision has three significant effects. *First*, given the importance of incentive schemes being made known to potential investors,[215] Article 13(2) provides a publication requirement.[216] *Secondly*, Article 13(2) requires that certain details be provided in fulfilling that publication obligation. This is to ensure that States consider, in advance, and communicate to investors, the circumstances under which they may withdraw or modify subsidy regimes, thus avoiding – so far as possible – allegations from investors that their legitimate expectations have been violated.[217] The FET obligation in Article 10 is also intended to encourage States to adopt clear timetables for any such schemes.[218] *Finally,* in light of the acknowledged role of certain existing subsidy schemes, including fossil fuel subsidies, as barriers to green investment,[219] Article 13(3) requires that States give due consideration to phasing out subsidies inconsistent with reaching the aims of the Paris Agreement or any relevant subsequent agreement.[220]

(ix) Part IV: Obligations of Investors

50. Article 14, which is inspired by a trend in recent IIAs to impose obligations on investors,[221] obliges investors to comply at all times with the applicable laws, regulations and standards in force in the Contracting Party in whose territory they invest, including those which find their source in international law, provided they "have the force of law in the Territory of the Contracting Party where the Investment is made".[222] Although it refers broadly to applicable domestic and international law, Article 14 also makes specific reference to norms pertaining to the

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[210] *See supra* [7]-[9].
[211] *See*, *e.g.*, on concerns about domestic policies violating WTO obligations: Sindico, particularly 321-322 and generally *supra* note 114.
[212] *Pan-African Code*, Art. 6. *See also* IISD Model, Art. 27.
[213] *See Agreement on Subsidies and Countervailing Duties*, Art. 8 and generally the WTO website: https://www.wto.org/english/tratop_e/scm_e/subs_e.htm.
[214] *See* generally the overview provided on the WTO website *supra* note 213. Explaining use of the term, and adoption of this definition by some bodies, *see* J. Timperley, 'Explainer: The challenge of defining fossil fuel subsidies', *Carbon Brief* (12 June 2017) https://www.carbonbrief.org/explainer-the-challenge-of-defining-fossil-fuel-subsidies (***Timperley***), though *cf*, *e.g.*, *OECD Companion to the Inventory of Support Measures for Fossil Fuels 2015* (OCED, 2015), 26 (***OECD Companion***), discussed therein.
[215] UNCTAD Menu for Investment Facilitation, Action Line 1.
[216] *See* similarly Morocco-Nigeria BIT, Art. 10 (on transparency). *See also* UNCTAD Menu for Investment Facilitation, Action Line 1.
[217] *See* the discussion *supra* commentary to Art. 10.
[218] Protocol, Art. 10(1)(b)(i), stating that the tribunal shall take into account "any timetable for alteration contained in the relevant commitment or representation" in determining whether it has been breached.
[219] *Supra* note 45. *See also* calls from investors for such removal: 'G20 must phase out fossil fuel subsidies by 2020' (15 February 2017) <https://unfccc.int/news/g20-must-phase-out-fossil-fuel-subsidies-by-2020>.
[220] Compare 'G7 Ise-Shima Leaders' Declaration' (2016) <https://www.mofa.go.jp/files/000160266.pdf> 28, discussed K. Mathieson, 'G7 nations pledge to end fossil fuel subsidies by 2025' *The Guardian*, 27 May 2016), and the other commitments noted in Timperley and *OECD Companion*, 18-19. Terminology of "phase out" is common regarding fossil fuels: e.g. *supra* note 219; Timperley. "Due consideration" language is found, e.g., in the *Agreement on Subsidies and Countervailing Duties*, Art. 12.1.1.
[221] *See*, *e.g.*, Morocco-Nigeria BIT Arts. 14(2), 14(3), 17, 18, 19, 24; Southern African Development Community Model BIT Template (2012) (***SADC Model BIT***) Part 3 ("Rights and Obligations of Investors and State"); Model Indian BIT (2015) (***India Model BIT***), Arts. 11 and 12. *See also* IISD Model, Art. 11(A).
[222] Protocol, Art. 14.

protection of the environment and human rights, which States have sought to invoke in several high profile and controversial IIA cases,[223] and which are particularly relevant in the context of climate change.[224]

51. The idea of imposing obligations on investors within the context of an IIA, which was "unthinkable a few years back",[225] is now making an appearance in recent model BITs and IIAs.[226] The rationale behind the inclusion of this provision is three-fold: *first*, it aims to rebalance the asymmetrical nature of the relationship between investors and States under IIAs;[227] *secondly*, it seeks to promote sustainable investment and development by ensuring that investors conduct their activities in accordance with all relevant norms, including those relating to environmental protection, human rights, labour laws and CSR;[228] and *thirdly*, it seeks to bolster and/or complement domestic and international law by encouraging accountability of corporations for their conduct.[229]

52. The provision ties in with Article 3 (on admission of investments in accordance with laws and regulations in force), and defines the scope of possible counterclaims that Contracting Parties may bring against a Green Investor in an investor-State arbitration pursuant to Article 18. However, the Protocol does not require States to admit Green Investments, as this would impinge too far on their regulatory autonomy.[230]

(x) Part V: Dispute Settlement

53. The Dispute Settlement section of the Green Investment Protocol addresses: *first*, the settlement of any disputes between Contracting Parties regarding the application and interpretation of the Protocol (Article 15); and *secondly*, investor-State dispute settlement (***ISDS***) pursuant to the Protocol (Articles 16-19). The former refers any inter-State disputes arising out of the Protocol to the method of dispute settlement provided in the Covered Investment Treaty. The latter requires more elaboration, considering the controversial nature of ISDS[231] and its particular relevance to the competition's assessment criteria pertaining to the enforceability of the Protocol by green investors.[232]

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[223] *See, e.g., Burlington Resources Inc. v. Republic of Ecuador (Decision on Counterclaims)*, ICSID Case No. ARB/08/5 (7 February 2017) [60], [1075]; *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic (Award)* (8 December 2016) [1155], [1182]-[1191].

[224] *See, e.g.*, UNEP, *Climate Change and Human Rights*, viii-x (Dec. 2015) <http://columbiaclimatelaw.com/files/2016/06/Burger-and-Wentz-2015-12-Climate-Change-and-Human-Rights.pdf>; OHCHR, 'Key Messages on Human Rights and Climate Change' <http://www.ohchr.org/Documents/Issues/ClimateChange/KeyMessages_on_HR_CC.pdf>.

[225] N. Bernasconi-Osterwalder, IISD Presentation, 'Investor Obligations', slide 2 (undated) (<http://investmentpolicyhub.unctad.org/Upload/Documents/IDB%20-%20BERNASCONI%20Investor%20Obligations.pdf>) (***Bernasconi-Osterwalder***). *See also* P. Dumberry and G. Dumas-Aubin, 'How to Impose Human Rights Obligations on Corporations under Investment Treaties? Pragmatic Guidelines for the Amendment of BITs' (2011-2012) 4 *YB Int. Investment Law & Policy* 569, 569 (**Dumberry and Dumas-Aubin**). *See* generally Alschner and Ruerk, 226-228.

[226] *Supra* note 221.

[227] *See, e.g.*, UNCTAD, *Reform Package for the International Investment Regime* 61 (2017) <http://investmentpolicyhub.unctad.org/Upload/Documents/Reform_Package_web.pdf> (***UNCTAD Reform Package***). *See also* Dumberry and Dumas-Aubin, 569 (lamenting that foreign investors are accorded only "substantive *rights* under these treaties without being subject to any specific *obligations*" and arguing that this (and in particular, the lack of reference in IIAs to investors' human rights obligations) "affects the legitimacy of the whole investor-state arbitration system, which is perceived by some as inherently biased towards investors' interests at the expense of the public interest").

[228] *See* L. Cotula, 'Responsible Investment Provisions in International Investment Treaties: Where Next?', *International Institute for Environment and Development* (16 October 16, 2017) <https://www.iied.org/responsible-investment-provisions-international-investment-treaties-where-next>. *See also* UNCTAD Reform Package, 66-67.

[229] UNCTAD Reform Package, 62.

[230] *Cf* OECD, 'Harnessing Freedom of Investment for Green Growth, Freedom of Investment Roundtable' (14 April 2011). *See* similarly discussion IISD Handbook, 9 and, e.g. concerns regarding security discussed in Barbieri, 130ff. *See also supra* note 110.

[231] *See, e.g.*, UNCTAD, *IIA Issues Note No. 4* (November 2017), 1 (ISDS "the subject of an increasingly intense debate in the investment and development community and the general public at large"); A. Reddie, 'Power in International Trade Politics: Is ISDS a Solution in Search of a Problem?' (2017) 19 *Business and Politics (Special Issue No. 4)* 738, 738-757; S. Lester, 'The ISDS Controversy: How we Got Here and Where Next', International Centre for Trade and Sustainable Development (June 2016)(<https://www.ictsd.org/opinion/the-isds-controversy-how-we-got-here-and-where-next>); Spears, 1040.

[232] Competition Criteria, 'How to compete: Assessment Criteria' (model treaties must contain "an effective dispute resolution mechanism, through which both investors and states can bring claims related to the Treaty").

54. Article 16 provides the Contracting Parties' consent to arbitrate "Green Investment Disputes", defined in Part I as any "dispute arising under the Covered Investment Treaty as amended by [the Protocol], between a Green Investor of a Contracting Party and another Contracting Party arising out of or relating to a Green Investment of the former in the Territory of the latter". The ISDS provisions of the Protocol (Arts 17-19) only apply to Green Investment Disputes as so defined.

55. Where the Covered Investment Treaty provides the respondent Contracting Party's consent to arbitration, such consent provides the basis for the arbitral tribunal's jurisdiction to decide the Green Investment Dispute, in accordance with the procedural rules provided in Part V of the Protocol (Art. 16(1)).[233] Where the Covered Investment Treaty does not, however, contain such consent,[234] Article 16(2) provides the Contracting Parties' consent to arbitrate Green Investment Disputes, thereby ensuring the enforceability of the provisions of the Protocol vis-à-vis Green Investors where other investors do not, in the same circumstances, benefit from access to arbitration. Consent under Article 16, however, is expressly subject to, and limited by, the provisions of Articles 16-19, particularly, Article 16(3) relating to the legality of the investment,[235] Article 17(6) imposing a three-year time bar for the submission by an investor of its claims to arbitration,[236] and Article 18 on counterclaims.

56. Article 17 provides for a "cooling-off period" of six months after the receipt by a Contracting Party of a notice of dispute, and compulsory recourse to mediation if the disputing parties fail to settle the dispute within the first three months.[237] By providing for compulsory mediation,[238] it is hoped that the Green Investment Protocol will, in time, be able to rely on the work of the UNCITRAL Working Group II (Dispute Settlement), which "concluded work on instruments to enforce cross border mediation settlements at its meeting on February 5-9, 2018 with a draft Convention and Model Law".[239] If the Green Investment Dispute is not settled during the six-month period, the Green Investor may submit the dispute to arbitration, pursuant to Article 17(4). The Protocol addresses the main obstacle to the assertion of counterclaims by respondent States under existing IIAs (i.e. consent to arbitration),[240] by expressly providing, in Article 18, that by submitting a Green Investment Dispute to arbitration under the Protocol, an investor is consenting to the arbitral tribunal's jurisdiction to decide any counterclaims for alleged breach of Article 14 of the Protocol (investors' obligations to comply with all applicable domestic and international laws), "providing such alleged breach relates to the Green Investment that is the subject of the Green Investment Dispute submitted to

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[233] On limiting investors' access to ISDS by narrowing the scope of States' consent to arbitration, or imposition preconditions to arbitration, in the text of IIAs, *see* generally: L.-Y. Tan & A. Bouchenaki, 'Limiting Investor Access to Arbitration – A Solution Without a Problem?' (2014) 11:1 *Transnational Dispute Management* 1, 53 (concluding that "the response to the existing criticisms of excessive access to ISDS probably lies [in] an ongoing, combined, work of perfecting treaty language and arbitral practice").

[234] This would apply, for instance, to Green Investment disputes between an Indian Green Investor and Brazil, assuming the recently adopted Brazil-India BIT enters into force. *See* G. Francesco Mandelli & R. Volterra, 'India and Brazil: Recent Steps Towards Host State Control in the Investment Treaty Dispute Resolution Paradigm' (2017) 6 *Indian J. Arbitration L*. 90, 109 (stating that the text of the 2016 Brazil-India BIT is reported not to provide for ISDS).

[235] Art. 16(3) of the Protocol is borrowed from CETA, Art. 8.18(3).

[236] This is a relatively common provision in investment treaty practice. For recent examples, *see*: Canada-Mongolia BIT (2016) Arts. 21.2.5.1 and 21.2.6.1; Chile-Hong Kong, China SAR BIT (2016), Art. 24(1); Nigeria-Singapore BIT (2016), Art. 13(3)(a).

[237] This provision is inspired by, and largely based on, Art. 42 of the IISD Model; *see* discussion IISD Handbook, 58-59.

[238] On the use and benefits of mediation to resolve investor-State disputes, *see*, *e.g.*, E. Shirlow, "The Rising Interest in the Mediation of Investment Treaty Disputes, and Scope for Increasing Interaction between Mediation and Arbitration", *Kluwer Arbitration Blog* (29 September 2016); J. Kalicki, "Mediation of Investor-State Disputes: Revisiting the Prospects", *Kluwer Arbitration Blog* (14 June 2013). *See also* the recent adoption of, among others: the Energy Charter Secretariat's *Guide on Investment Mediation* (2016); the SCC Mediation Rules (2014); the ICC Mediation Rules (2014); and the IBA's *Investor-State Mediation* Rules (2012), and the inclusion of mediation provisions in, among others, CETA, Art. 8.20 and Brazil's 2015 Model Cooperation and Facilitation Investment Agreement (*see* J.P. Muniz, K.A.N. Duggal & L.A.S. Peretti, *The New Brazilian BIT on Cooperation and Facilitation of Investments: A New Approach in Times of Change* (2017) 32 *ICSID Rev*. 404, 414-416).

[239] International Mediation Institute, "UNCITRAL's Working Group II Concludes Work on Instrument for Enforcement of Mediation Settlements" (15 February 15 2018), (<http://www.imimediation.org/2018/02/15/uncitrals-working-group-ii-concludes-work-instrument-enforcement-mediation-settlements/>) (further noting that "[t]he documents will be considered for finalization at its meeting in June 2018").

[240] *See* J.A. Rivas and J. Choi, 'Three Recent Decisions Further Shaping Investment Treaty Case Law on Counterclaims', *Kluwer Arbitration Blog* (13 October 2015); T. Ishikawa, 'Marco Gavazzi and Stefano Gavazzi v. Romania: A New Approach to Determining Jurisdiction over Counterclaims in ICSID Arbitration?' (2017) 32 *ICSID Rev*. 721; J. Harrison, 'Environmental Counterclaims in Investor-State Arbitration' (2016) 17 *JWIT* 479.

arbitration pursuant to Article 17(4)". This provision is inspired by Article 9.19(2) of the TPP, which provides a rare example of an IIA expressly providing for States' counterclaims.[241] Similar to Article 14, this provision seeks to redress the asymmetry between foreign investors and host States and promote the enforcement of domestic and international laws relevant to investment activities.[242]

57. In the interest of universality, Article 17(4) provides a wide range of options with regard to the arbitral institutions and/or arbitration rules available to administer and/or govern the procedure, taking into account the potential Contracting Parties' varying positions vis-à-vis the ICSID Convention.[243] Whichever set of procedural rules applies, the Green Investment Protocol modifies them in some important respects, which are designed to address key criticisms of ISDS.[244] *First*, using language found in the opening clause of Art. 2(1) of the Mauritius Convention,[245] it provides for the application of the UNICTRAL Transparency Rules in the arbitration whichever arbitration rules apply.[246] *Secondly*, it refers to the IBA Guidelines on Conflicts of Interests in International Arbitration, which reflect international best practices in arbitration ethics.[247] Third, the Protocol promotes the appointment of arbitrators and experts qualified in environmental law by expressly allowing the disputing parties or, where applicable, the arbitral tribunal or appointing authority, to seek the assistance of the Specialised Panels of Arbitrators and Scientific Experts established pursuant to the Permanent Court of Arbitration's Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.[248]

58. Lastly, Part V contains provisions designed to provide greater access to investor-State arbitration to Green Investors, who may be smaller and more fragmented than other investors. *First*, it contains a consolidation provision (Art. 19), which is based on the consolidation provision in CETA[249] and was included to enable access to arbitration to Green Investors that are smaller or have smaller claims, and therefore may not be willing or financially able to sue the Respondent State individually.[250] While under current IIAs it may be possible for claimants to bring a collective action without the Respondent's consent, in the few cases in which collective action has been permitted, it has been the subject of strong dissents.[251] *Secondly*, a number of the existing renewables treaty claims have been brought by

[241] A draft of the Indian Model BIT made public in March 2015 also included provisions for the assertion of counterclaims by respondent States: Draft Model Text for the Indian Bilateral Investment Treaty, art. 14.11 (Mar. 2015) <https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf>. However, the final version officially adopted and published in December 2015 excludes that provision: India Model BIT.
[242] *Supra* [51].
[243] For a frequently updated list of ICSID member states, visit: https://icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx.
[244] Those criticisms include a perceived lack of transparency and legitimacy; concerns regarding the duration and costs of arbitration; a sense of unfairness and pro-investor bias favouring large multinational companies; a perceived lack of diversity in the pool of arbitrators; and suspicions regarding "double hats" and perceived conflicts of interests resulting therefrom. *See, e.g.*, UNCITRAL Working Group III, Note by the Secretariat, *Possible Reform of investor-State dispute settlement (ISDS)* (September 2017) at 6 [20]; Kaufmann-Kohler and Postetà, [21]-[23]. *See* also Mann, 8-9. On the importance of broad participation in dispute settlement for sustainable development: Gehring and Kent, 197-201.
[245] Mauritius Convention, Art. 2(1).
[246] *See* Art. 1(9) of the UNCITRAL Transparency Rules: "These Rules are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Rules or in ad hoc arbitration proceedings." The UNCITRAL Transparency Rules provide conflict of rules provisions, and therefore the treaty text need not address this question. *See also* Arts. 1(7) and 1(8) of the Transparency Rules, which address and provide a solution to various conflict-of-rules scenarios.
[247] International Bar Association, *Guidelines on Conflicts of Interest in International Arbitration* (2010), 2 [4] ("The Guidelines reflect the understanding of the *IBA Arbitration* Committee as to the *best* current *international practice*" (emphasis added)).
[248] *See* generally J. Levine and N. Peart, "Procedural Issues and Innovations in Environment-Related Investor-State Disputes", in K. Miles (ed.) *Research Handbook on Environment and Investment Law* (Edward Elgar Publishing, 2018).
[249] CETA, Art. 8.43.
[250] *See* S. Wilske, 'Collective Action in Investment Arbitration to Enforce Small Claims – Justice to the Deprived or Death Knell for the System of Investor-State Arbitration?' (2012) 5(2) *Contemp. Asia. Arb. J.* 165, proposing collective action as one possible solution; for an overview of the legal barriers to collective action, *see*: M. Aggarwal and S. Maynard, 'Investment Treaty Arbitration Post-*Abaclat*: Towards a Taxonomy of 'Mass' Claims' (2014) 3(3) *CJICL* 1.
[251] *See, e.g.*, *Ambiente Ufficio S.p.A et al (formerly Giodano Alpi et al) v Argentina (Jurisdiction and Admissibility)*, ICSID Case No ARB/08/9 (8 February 2013); *Abaclat et al (formerly Giovanna A. Beccara and others) v Argentina (Jurisdiction and Admissibility)*, ICSID Case No ARB/07/5 (4 August 2011).

groups of investors, but attempts to consolidate have been resisted by the Respondent State.[252] Article 19 expressly gives the tribunal the power to act absent the Respondent State's consent.[253] But, to prevent abusive or unfair mass claims, Article 19 provides that the tribunal first constituted has the discretion to consolidate "related claims", but is not required to do so, unless all Parties consent.[254]

59. Additionally, to help tailor system to the needs and characteristics of the Green Investors, Article 17(3) provides that, in appointing a mediator, the Appointing Authority must take into account the size of the claim and disputing Parties. Similarly, Article 17(5)(e) provides that the disputing parties can agree upon a sole arbitrator.[255]

(xi) Part VI: Meeting of the Contracting Parties

60. Article 20 has the aim of bringing the Contracting Parties together to forge new investment partnerships and address key issues arising from the implementation of the Protocol.[256] Coincident with the "ambition cycle" established under the Paris Agreement,[257] the Contracting Parties will meet every five years, with the first meeting taking place in 2025.[258] It is not intended to be an onerous obligation on States, conscious of their differing national circumstances.[259] The information made available about up-to-date NDCs, as put forward by States Parties to the Paris Agreement, will be available to inform discussions between the Contracting Parties, including on: actions taken to promote investment in adaptation and mitigation,[260] capacity building in developing countries in order to facilitate FDI in sustainable development,[261] development of technology and promotion of technology transfer,[262] the promotion of CSR, and the identification of climate change risks associated with foreign investment.[263] It can also provide an opportunity to assess the impact of dispute settlement on the ability of Contracting Parties to achieve climate change mitigation and adaptation.[264] Article 20(2) provides that the meeting of the Parties is additional to any committees or

[252] *The PV Investors v Spain*, *see* details at: http://www.energycharter.org/what-we-do/dispute-settlement/investment-dispute-settlement-cases/31-the-pv-investors-v-spain/; L. E. Peterson, "Following PCA Decision, Czech Republic Thwarts Move by Solar Investors to Sue in Single Arbitral Proceeding" *IA Reporter* (1 January 2014).
[253] *Cf*: *Guaracachi America Inc. v Plurinational State of Bolivia (Award)*, PCA Case No 2011-17 (31 January 2014); *Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v Argentine Republic (Jurisdiction)*, ICSID Case No ARB/03/17 (16 May 2006), and *Aguas Cordobesas SA, Suez and Sociedad General de Aguas de Barcelona SA v Argentine Republic*, ICSID Case No ARB/03/18 (discontinued on 24 January 2007).
[254] Compare Protocol, Arts. 19(5) and (6).
[255] CETA, Art. 8.23(5) provides that the parties may agree to appoint a sole arbitrator "in particular if the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low".
[256] Protocol, Art. 20(1).
[257] *See* ICCL, 235: "the expectation of progression, together with the global stocktakes to assess collective progress toward long-term goals… and the binding obligation one ach state to communicate an NDC every five years, informed by the outcome of the global stocktake, form what has come to be characterized as the 'ambition cycle' of the Paris Agreement"; Paris Agreement, Art. 4(9). *See also* Decision 1/CP.1, [23].
[258] Protocol, Art. 20(1).
[259] *Cf supra* note 116.
[260] Protocol, Art. 20(1)(a) citing to Art. 1 and 3 of the Protocol objective. This cross reference to Art. 1 (which contains a reference to Art. 9 of the Paris Agreement) is intended to guide Contracting Parties towards discussing how to use to Protocol to meet their financial obligations under the Paris Agreement.
[261] Protocol, Art. 20(1)(b). This provision of the Protocol is intended to further Art. 11.3 of the Paris Agreement, which urges states to "cooperate to enhance the capacity of developing country Parties to implement this Agreement." One important aspect of such capacity building is so-called climate finance "readiness" (*see* UNDP, *Readiness for Climate Finance: a framework for understanding what it means to be ready to use climate finance* (2012) 4, which defines "readiness" as including: "[n]ational capacities … to plan for finance"; "to access different forms of and types of finance at the national level"; "to deliver finance"; and to monitor and report on results. *See* further: <climatefinanceready.org>, which contains case studies and examples).
[262] Protocol, Art. 20(1)(c). This provision of the Protocol is intended to further Art. 10 of the Paris Agreement and Art. 4.5 UNFCCC. *See also supra* note 84.
[263] Protocol, Art. 20(1)(d).
[264] Protocol, Art. 20(1)(e). This is important, for example, to enable compatibility between arbitral awards and Art. 2(c) of the Paris Agreement ("which requires State party to making finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development"). For discussion of the potential detrimental impact of arbitral awards against developing countries, *see, e.g.*, IISD, *The Stakes Are High: A review of the financial costs of investment treaty arbitration* (2014) 4.

information exchange mechanisms in the underlying treaty, which shall be used to further the objectives and provisions of the Green Investment Protocol.[265]

(xii) Part VII: Final Provisions

61. As discussed above,[266] Part VII of the Protocol makes clear that the Protocol applies and effectively amends the existing IIA framework as it applies between two (or more) States.[267]

62. Article 23 addresses the fact that a number of existing IIAs contain "sunset" clauses[268] or even compatibility clauses.[269] For the most part, these do not pose an obstacle, as most such clauses usually go to unilateral termination, not amendment by agreement. Nevertheless, to ensure that there is no argument that a Covered Investment Agreement with a sunset or compatibility clause is not modified by the Protocol, the Green Investment Protocol includes a provision expressly amending any such clause so as to permit the Protocol to immediately operate.[270] While it is possible that there may be a few IIAs that cannot, on their terms, be modified in this way,[271] this approach ensures that most IIAs are capable of being modified by the Protocol.

63. Articles 25-26 nominate the United Nations Secretary-General as depositary, and set out how the treaty can be signed, ratified and how it will enter into force. These provisions are in line with common final clauses in IIAs.[272] Reservations to the Protocol are not permitted, as this would allow impermissible departures and undermine the theory that one declaration of accession should be effective to apply to modify all Covered Investment Treaties, to the extent that the other State party to the relevant Covered Investment Treaty has done the same.[273] Denunciation is permitted on one year's notice,[274] but a sunset clause is reintroduced to provide greater protection to Green Investors.[275]

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[265] Protocol, Art. 20(2).
[266] *Supra* Part IV(A).
[267] VCLT, Art. 30(3) ("When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty").
[268] For example, Poland-Netherlands BIT (1992), Art. 13(1) ("This Agreement ... shall remain in force for a period of 15 years."). *See* further Kaufmann-Kohler and Postetà, [236].
[269] For example, ECT, Art. 16: "Relation to other Agreements. Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty, … (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment." *See* discussion Kaufmann-Kohler and Postetà, [235].
[270] *See*, on this issue: J. Harrison, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties' (2012) 13 *JWIT* 928; C. Titi, 'Most-Favored-Nation Treatment, Survival Clauses and Reform of International Investment Law' (2016) 5 *Journal of International Arbitration* 425 (suggesting that if the parties replace an existing IIA with a new one, the survival clause in the original IIA is automatically extinguished without the need to expressly agree); *cf* A. Mitchell and T. Voon, 'Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law' (2016) 31(2) *ICSID Review* 413, 430 ("parties to an IIA may as a general matter override a survival clause, so that it has no effect, by agreeing to extinguish it at the same time as they agree to terminate the treaty").
[271] *See* discussion Kauffman-Kohler and Postetà [236].
[272] *See*, *e.g.*, Netherlands-Pakistan BIT (1988), Art. 16; Netherlands-Bulgaria BIT (1999), Art. 14; New Zealand-Malaysia FTA, Art. 18.10. *See also* IISD Model, Art. 59.
[273] *Cf* IISD Model; Kaufmann-Kohler and Postetà, [261].
[274] *Cf* IISD Model, Art. 57.
[275] *See* the discussion *supra* note 268ff and compare the clause found in IISD Model, Art. 57.

V. COMPETITION CRITERIA

Viability The Protocol prioritises viability in its substance and structure. It is structured so as to ensure maximum uptake by States. The Articles are grounded in the existing international investment regime,[276] meaning the Protocol essentially operates on the basis of existing consent to IIAs, making it more likely to be adopted than a multilateral treaty.[277] It also aims to address the potential 'chilling' effect of IIAs and acknowledges the political reality of the criticisms of investment arbitration and recent reform efforts.[278]

Compatibility The Protocol is not only compatible with the Paris Agreement and SDGs,[279] its purpose is to realise the very objectives of those instruments.[280]

Efficacy The terms of the Protocol have been carefully calibrated to effectively increase Green Investments in climate change mitigation and adaptation in two key ways: by strengthening the protections offered to Green Investors and reducing regulatory uncertainty; and by requiring States to take action to remove barriers to Green Investments.[281]

Universality The Protocol ensures that States are given the flexibility and support they need, in light of national circumstances, to both meet their obligations under the Protocol, as well as to attract the investment best suited to their own domestic context.[282]

Enforceability Underpinning the Protocol is its robust enforcement mechanism, tailored in order to take account of the actors, investments and issues relevant to environmental disputes.[283]

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Sincere thanks to the Stockholm Chamber of Commerce for the initiative in proposing this innovation prize.

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[276] Protocol, Part I (definition of 'Covered Investment Treaty,' 'Investment' and 'Investor': *see supra* [18]). *See also supra* Part IV(A).

[277] *See* similarly Kaufmann-Kohler and Postetà, [73]; *supra* Part IV(A). On the Multilateral Agreement on Investment failure: Spears, 1041; Kaufmann-Kohler and Postetà, [15].

[278] *See*, on the 'chilling' effect Mann, 8; Spears, 1039-1040, 1043; Schill, 470; *cf* K. Tienhaara, 'Regulatory chill and the threat of arbitration: a view from political science' in C. Brown and K. Miles (eds.) *Evolution in Investment Treaty Law and Arbitration* (CUP, 2011). *See also* Dubava, 399; Gehring and Kent, 213. *See* more generally on the "backlash": e.g, Kaufmann-Kohler and Postetà, [15]-[17]; Spears, 1041 and the discussion 1038-1041, 1043-1044, 1047 and *supra* commentary to Part V, as it relates to ISDS. *See, e.g.*, Protocol Art. 17(5) (which requires the use of transparency rules and ethical guidelines in arbitration, and promotes the use of environmental expert panels: *supra* IV(B)(x)); Art. 20 (which encourages states to consider the impact of dispute settlement on the ability of States to fulfil their obligations under the UNFCCC and Paris Agreement: *supra* Part IV(B)(xi)).

[279] *See, e.g.*, Protocol, Preamble, recitals 2 and 3 (*supra* Part IV(B)(i)); Part I Definitions (which reflect the definitions in the Paris Agreement, UNFCCC, Kyoto Protocol and Sustainable Development Goals: *supra* Part IV(B)(ii)); Arts 5-7 (which requires that domestic investment policies do not undermine the objectives of the Paris Agreement and SDGs: *supra* [23]-[25]); Arts 9-12 (which amend standard investment protections to ensure compatibility with the Paris Agreement and SDGs: *supra* Part IV(B)(iv)-(vii)).

[280] *See* Protocol, Art. 1 (which reflects Art. 2 of the Paris Agreement and cites to Art. 9 of the same: *supra* Part IV(B)(i)); Art. 2 (which specifically refers to the market mechanisms under the Paris Agreement and Kyoto Protocol: *supra* [19]); Arts 3-4 (which promote implementation of mitigation and adaptation through foreign investment: *supra* [21]-[23]); Art. 20 (establishing an institutional mechanism designed to create opportunities for new investments to implement national climate change strategies: *supra* Part VI(B)(xi)).

[281] On identification of barriers, *see supra* Part II(C). *See, e.g.*, Protocol, Arts 3-4 (promoting green investments), Arts. 9-10: *supra* [21],[22], and Part IV(B)(iv)-(v); Art. 13 (on subsidies).

[282] *See, e.g.* Protocol, Preamble, recital 2 (ensuring compatibility with the principles of the Paris Agreement); Art. 2 (creating a definition of Green Investment tailored to a National Climate Change Strategy, and promoting the use of a national standard for Green Investment); Art. 4. (referring to "appropriate" incentives and using language from the Paris Agreement, Art. 2); generally *supra* Part III.

[283] Protocol, Arts 15-19 (which contain specific rules tailored to green investors, permits counterclaims, and requires the adoption of UNCITRAL Rules on Transparency: *supra* Part IV(B)(x)).