ISDS AND CLIMATE CHANGE: WHAT HAPPENS NEXT?

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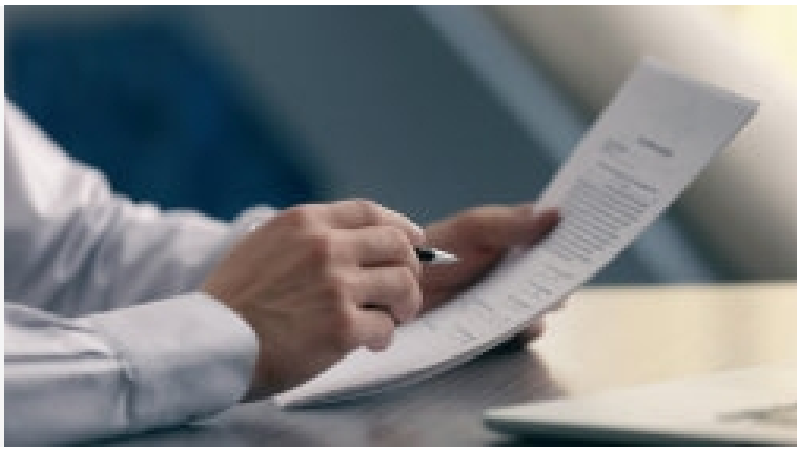

In the leadup to this year's global climate change conference COP27 the United Nations Conference on Trade and Development ("UNCTAD") released two companion Issue Notes covering investor-state dispute settlement ("ISDS") and its impact on countries' ability to effectively legislate against climate change.[1] According to UNCTAD, the risk of private companies using the ISDS system to challenge climate policies is a major concern. Reforms to ISDS are "essential" to ensure investment treaties and their dispute resolution systems "don't hinder states from achieving a just transition to low-carbon economies."

UNCTAD's publications are the latest salvo in an intensifying public debate over ISDS and its role in international climate policy. Critics suggest that the existing system heavily favours investors, who may be large multinationals with the skill and resources to outmanoeuvre states on the policy front. Advocates claim international investment treaties provide much-needed legal stability and encourage cross-border investment – two key assets for the renewable energy transition.

Who has it right, and what should investors and states be aware of?

ISDS AND THE INVESTMENT TREATY LANDSCAPE

UNCTAD's proclamations concern international investment law, the collection of international law governing treatment of foreign direct investment by host states. Under this regime, countries are linked together by a network of treaties called international investment agreements (or "IIAs"). IIAs can take multiple forms, including two-party Bilateral Investment Treaties ("BITs") and sprawling multilateral free trade agreements ("FTAs") governing a wide array of business activity among several states. Currently, there are some 2,300 IIAs in force around the world.[II]

Investment treaties elaborate the substantive and procedural rights enjoyed by covered investors and their investments within a state's territory. Common protections include:

- **National Treatment ("NT")/Most-Favoured Nation treatment ("MFN"):** Host states commit to treating foreign investors and their investments no less favourably than domestic operations ("NT") or foreign operations ("MFN") in like circumstances. If discriminatory treatment arises, investors can sue the state for damages under these clauses;

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- **Fair and Equitable Treatment ("FET"):** States promise to treat foreign investors and investments reasonably, fairly and without discrimination. The standard is purposefully vague – it varies by treaty and often invites multiple interpretations. FET clauses generally set a minimum standard of protection that states cannot violate without breaching the treaty; and
- **Prohibitions against expropriation:** Treaties generally protect against mandatory title transfer or physical seizure of an investor's property by a host state (direct expropriation). They also prohibit indirect expropriation, where states degrade and destroy the value of an investment over time via unfriendly regulatory measures.

IIAs also include dispute resolution systems for resolving disagreements between states and investors. International investment arbitration is the primary choice. Investment arbitration tribunals are generally composed of three private adjudicators called arbitrators – one chosen by the state, another by the investor and a third by mutual agreement or institutional appointment. The parties litigate their grievances against each other before these tribunals, making written and oral submissions. The tribunal then renders an award that can be enforced in a variety of national courts, often without further substantive review of the dispute. Arbitration proceedings are usually closed to the public, though submissions, decisions and awards are often published afterwards. This system is known variously as "investor-state arbitration" or "ISDS".

Recently, ISDS has run into stiff headwinds. States are raising sovereignty concerns, complaining that their legislation is now subject to private challenge by foreign investors before "secretive" ad-hoc bodies. Institutional capacity is another threat – aggrieved investors are often large multinational corporations with extensive legal resources, facing down states who may lack the requisite institutional knowledge. Other criticisms include excessive costs and years-long proceedings, a seeming lack of consistency in awards, impartiality concerns and diversity issues within the investment arbitration community.'"

"Most IIAs do not explicitly mention or regulate climate goals. Largely built in an era before widespread climate action, the investment treaty system is at best 'climate neutral or climate blind'."

ISDS AND CLIMATE CHANGE

Climate change is posing some serious difficulties for the investment treaty system. The climate situation is getting worse by year. This year's summer monsoons put a third of Pakistan – the world's fifth-most-populated country – under water. Scorching heatwaves pummelled India, Europe and North America. While the world is making heartening progress in renewable energy, the climate crisis remains a danger to the planet and to global stability.

As the crisis deepens, countries are pushing for new solutions. The Paris Climate Agreement, signed in 2015, seeks to significantly reduce climate changes' impact by capping the increase in global average temperature "to well below two degrees Celsius above pre-industrial levels" (preferably 1.5 degrees).[iv] The Agreement requires its 196 signatories to develop long-term plans to reduce greenhouse gas emissions, pushing them toward net-zero emissions status.[v] These "nationally determined contributions" are updated every five years and are composed of domestic mitigation measures, often laws enacted to support a country's climate goals. In the years since the Agreement entered into force, many state signatories have overhauled their climate policies and worked to spur large-scale energy transitions.

Investment treaty law may set a few roadblocks. Most IIAs do not explicitly mention or regulate climate goals. Largely built in an era before widespread climate action, the investment treaty system is at best "climate neutral or climate blind". As a result, commentators worry that it "both fails to advance and also hinders climate action."[vi]

States advancing ambitious climate legislation may be targeted by disgruntled investors using existing investment treaties Climate policies that subsidise low-emission domestic investment while penalising high-emissions activities could run afoul of National Treatment or MFN clauses. Forced nationalisation of oil plants would likely generate expropriation claims, as would harsh regulatory measures designed to degrade the value of high-emissions activities as part of a shift to clean energy generation. Phasing out coal could spur fair and equitable treatment charges.

> "As treaties have flourished over the last few decades, they have generated a relatively harmonious set of institutional rules and practices, providing legal stability and certainty whilst maintaining some independence from states and state politics."

What's more, most investment treaties are long-lasting instruments, with lifecycles at 25 years or more. Even after termination, many key treaty protections remain in place via "sunset clauses", which aim to protect investments made before termination in reliance on a legal regime no longer in place. These clauses can extend old treaty protections for years, unless mutually dropped by the contracting parties. Finally, states argue that existing dispute resolution mechanisms generate "regulatory chill", leaving nations uncertain or reluctant to pursue certain policies for fear of legal challenge and blowback.

These uncertainties have caused outcry, and a strong clamour for reform of the existing system. Many such efforts are already underway. They include the United Nations Commission on International Trade Law's ("UNCITRAL") Working Group III, explicitly constituted to pursue investor-state dispute resolution reforms.[vii] Elsewhere, parties to the important Energy Charter Treaty ("ECT") – which covers many foreign investments in the European energy sector and is the most frequently invoked treaty in investor-state arbitration – renegotiated key provisions in an effort to assist a low-carbon transition, including changes to the treaty's ISDS mechanisms.[viii] Alternative suggestions include a resort to national courts for investment disputes, as well as increased investor-state mediation and even a permanent standing Multilateral Investment Court.[ix] Even these efforts may not be enough to assuage state concerns- France and the Netherlands both recently announced they would leave the ECT entirely, renegotiations notwithstanding.

This is the landscape UNCTAD's publications arrive in, heated and controversial.

UNCTAD ISSUE NOTE #3: THE INTERNATIONAL INVESTMENT TREATY REGIME AND CLIMATE ACTION

In this publication, UNCTAD takes a deep dive into the history and type of investment treaties around the globe. There were 3,300 investment treaties concluded between 1959 and 2009. As noted, some 2,300 of them are still in force today. Per UNCTAD, IIAs "proliferated in the 1990s as an instrument of global investment policymaking and have become increasingly contentious over the past decade, including due to the fast-growing number of ISDS claims and States' increased exposure to ISDS risks and costs."[x]

Many of these treaties are "old-model" IIAs, short, succinct instruments with broadly written clauses and few clear limitations on investment protection. These treaties say little about environmental protection. They do not contain explicit provisions preserving states' rights to regulate in the name of the environment or pursue climate action. According to UNCTAD, the vast majority of ISDS cases are brought under these older treaties.[xi]

New-generation treaties are more generous to states. Many make a point of safeguarding states' right to regulate and "generally contain more circumscribed and clarified substantive provisions, often accompanied by narrower access to ISDS".[xii] They also incorporate specific provisions protecting the environment and encouraging climate action and sustainable development. These include:

> "In sum, UNCTAD's mooted reforms may not move the needle much. The fight against climate change is by definition a global conflict, involving a series of entrenched problems."

- **Treaty preambles:** Treaty preambles establish the overall objective of an IIA. New treaties may reference promoting sustainable development and environmental protection, reaffirm states' rights to regulate in the name of the environment and reiterate certain environmental commitments. They may also highlight commitments to mitigate climate change or directly reference climate action treaties like the Paris Agreement.[xiii]
- **Substantive protections:** Some treaties contain clauses imposing substantive environmental and climate obligations on the signing parties. These can range from specific treaty chapters on environmental protection to the promotion of climate-friendly investment;[xiv]
- **Carve-outs for environmental measures:** Some new treaties carve out environmental protection from substantive treatment standards, making these measures more difficult to challenge and giving states more room to regulate. Carve-outs are often found in indirect expropriation and national treatment clauses, though not in fair and equitable treatment provisions;[xv]
- **Procedures for compliance and implementation of environmental protection:** Some treaties explicitly require the contracting parties to effectively enforce their own environmental laws or to establish institutional mechanisms to promote climate cooperation;[xvi] and
- **Environmental protection as a general exception:** Some new treaties include the environment as a public policy area where state flexibility needs to be preserved.[xvii]

According to UNCTAD, neither treaty generation is perfect. Neither type of treaty meaningfully distinguishes between low and high-carbon investments – and all "lack proactive provisions aimed at effectively supporting climate action".[xviii] Nevertheless, "as old-generation IIAs significantly outnumber new-generation ones, it is critical to address the problems and risks post by old-generation IIAs."

Clearly, UNCTAD wants to see treaty reform – and fast. In the Note, they suggest two broad approaches:

1. making individual treaties climate-responsive by ensuring that only low-carbon and sustainable investments are covered, by safeguarding state regulatory power and by adding provisions aimed at promoting sustainable investment; and
2. reconceptualising the scope, purpose and design of the IIA regime at the multilateral, regional, bilateral and national levels.[xix]

> "For the ISDS system, the shift in climate priority means that the norms on which future treaties and state policies are based will continue to change, leaving those currently in place at increased risk of conflict."

UNCTAD maintains a suite of tools that states can use to reform their existing IIAs. The goal? "Ensur[ing] that IIAs do not hinder States from implementing climate change measures and from achieving a just transition to low-carbon economies", all in a manner that will "minimise the States' risk of facing ISDS claims related to climate change policies and those related to high-carbon investments".[xx]

UNCTAD ISSUE NOTE #4: TREATY-BASED INVESTOR-STATE DISPUTE SETTLEMENT CASES AND CLIMATE ACTION

In this publication, UNCTAD performed an extensive analysis of ISDS cases relevant to climate action, identifying at least 175 cases concerning measures taken for environmental protection.[xxi] Taken together, UNCTAD believes hostile investment arbitration will pose problems for states' climate mitigation measures down the road.

Fossil fuel investors are frequent ISDS litigants. UNCTAD found 192 cases brought by fossil fuel sector participants, though not always in relation to climate measures. This, for UNCTAD, establishes a pattern. "As fossil fuel investors have frequently resorted to ISDS, they can also be expected to use existing ISDS mechanisms to challenge climate action measures aimed at restricting or phasing out fossil fuels."[xxii]

Renewable energy investors are also taking advantage of ISDS mechanisms. UNCTAD totals some 80 cases brought by renewable investors in the last decade, primarily concerning government changes to feed-in tariffs and other incentives designed to spark investment in solar photovoltaic power generation.[xxiii] States like Spain and Italy are still defending ISDS claims triggered by legislative changes made in the early 2010s, some generating massive damages awards in favour of aggrieved investors.[xxiv] Energy is clearly a prime area of conflict between investors and states, and it poses uncertain lessons for the energy transition.

Does all this litigation mean that states lose more often? No, in fact. It's about an even split in terms of results. Per UNCTAD's analysis of concluded environmental ISDS cases, 40% were decided in favour of the states, with the tribunal declining jurisdiction or dismissing claims on the merits. Investors won only 38%.[xxv]

Nonetheless, UNCTAD is still worried. They single out two cases suggesting that ISDS mechanisms are being used to directly challenge important environmental policies:

- *Eco Oro Minerals Corp. v. Republic of Colombia*:[xxvi] The *Eco Oro* dispute involved a Canadian mining company extracting gold and silver deposits in the Colombian mountains, per a mining concession from the Colombian government. This concession was later eroded through successive environmental bans, causing Eco Oro to lose over 50% of its mining rights. The company filed for arbitration against Colombia under the Colombia-Canada FTA (2008). The tribunal found Colombia's bans violated the treaty's minimum standard of treatment, inflicting damage on "Eco Oro without serving any apparent legitimate purpose."[xxvii] The tribunal also held that the FTA's general environmental exception did not preclude payment of compensation. According to UNCTAD, *Eco Oro* "signals that measures taken for the protection of the environment can be challenged and deemed a violation of IIAs" and "sheds doubt on" the effectiveness of "explicit safeguards and exceptions" included to protect a state's climate regulation;[xxviii] and

> "Invest sustainably. Where possible, prioritise investments that contribute to the green transition and avoid those that may run afoul of changing climate legislation. Many governments offer attractive incentives to promote sustainable growth – identify and capitalise on the ones that are right for you."

- *RWE v. the Netherlands*:[xxix] In the first-ever investment treaty case filed against the Netherlands, RWE (a German energy company) attacked a measure phasing out coal-fired electricity generation by 2030. RWE argues that the measure – an attempt to address the Netherlands' Paris Agreement commitments – was tantamount to an expropriation of its investments in the Netherlands. RWE is also arguing that the Dutch government failed to grant enough time and resources for the company to shift away from coal production without losing an immense amount of money. The case is ongoing, though parallel German court proceedings may halt it.[xxx] Uniper, another German energy company, was recently forced to drop a similar lawsuit as a condition for receiving a bailout from the German government.[xxxi] To UNCTAD, *RWE* "demonstrates countries' risk when implementing regulations for phasing out fossil fuels".

Other cases (unmentioned in the UNCTAD report) suggest investors do indeed use treaties to challenge states' climate actions, though without much success. In *Westmoreland Holdings v. Canada*, a U.S. investor attacked Alberta Province's attempt to phase out coal-generated electricity, arguing that the ban violated its legitimate expectations and constituted unfair discrimination. The case, filed under the old North American Free Trade Agreement (NAFTA) was dismissed on jurisdiction without a ruling on the merits.[xxxii] In *Lone Pine v. Canada,* a U.S. investor challenged Quebec's suspension of oil and gas exploration permits as part of an anti-fracking initiative (the claim was dismissed last month, with two of three arbitrators finding no NAFTA violation).[xxxiii] Outside the climate sphere, companies like Philip Morris have used investment treaties to challenge anti-smoking public health measures in Uruguay and Australia (though all were unsuccessful).[xxxiv]

ISDS suits against climate change measures do pose some threat to states, though there are few clear investor wins to date. As the crisis deepens and legislative responses proliferate, the ISDS bill might get steep. Some commentators suggest that climate adaptation claims may run states as much as USD 340 billion by the end of the century.[xxxv]

So, what do UNCTAD's proclamations mean for investment treaty law?

CLIMATE CHANGE AND INTERNATIONAL LAW

"Do your treaty due diligence. Understand your host country's investment treaty landscape. When you set up in-country operations, make sure you are covered by one or more investment treaties with generous procedural and substantive protections."

UNCTAD's proclamations are entering a charged (and changing) public international law space. The Paris Climate Agreement – the driving force behind UNCTAD's positions –is growing in stature. On 1 July 2022, Brazil's Supreme Court became the first to label the Paris Agreement a human rights treaty, elevating it above conflicting national legislation.[xxxvi] Other states may soon follow.

Climate change litigation is becoming ever more common, as we at WFW often note.[xxxvii] Since the Paris Agreement was signed, the cumulative number of climate change-related cases has more than doubled.[xxxviii] Around one-quarter of these cases were filed in the last two years. Climate litigation is increasingly being used to enforce or enhance a government's climate commitments as a matter of domestic law and international obligation.

Litigants are successfully targeting private companies, too. In *Milieudefensie et al. v. Royal Dutch* Shell, a group of environmental foundations filed a class action lawsuit against the energy giant, arguing that its development plans failed to align with the Paris accords and violated domestic and European legal standards. A Netherlands court agreed, ordering Shell to curtail its global carbon emissions by 45% by 2030.[xxxix] A 2019 lawsuit against Enea, a Polish power company, argued that a planned coal-fired power plant was indefensibly risky as it was sure to become a stranded asset given the oncoming energy transition. A Polish judge agreed, and the project was abandoned.[xl]

Litigation strategies are getting ever more creative. In 2008, the Alaskan village of Kivalina – located on low-lying coastline – sued more than 20 energy companies for the proceeds needed to move the whole town inland.[xli] Other U.S. cities, including San Francisco and Oakland, have filed similar suits. The doctrine of fractional culpability is also expanding. As attributive science advances, litigants are delineating private roles in climate activities with ever greater precision. An indigenous Peruvian farmer is suing a German energy company, alleging proportionate responsibility for estimated future repair costs for home flooding generated by melting glaciers.[xlii] On climate law's very frontier, lawsuits are exploring the legal personhood of animals, trees and lakes.[xliii]

"Prepare a legal strategy for future disputes. Identify key challenges for your investment and have a dispute strategy ready if the state relationship turns sour. Know your rights under domestic and international law. If a dispute does arise, consult sophisticated outside counsel early in the process and get an honest read on your chances."

There is even some talk that environmental protection is now a fundamental norm of international law. Fundamental norms – also known as peremptory or *jus cogens* norms – are widely recognised by the international community. They cannot be derogated from (devalued, diminished, reduced) and can only be modified by a subsequent norm of international law – one that is just as strong, with the same character.[xliv] The International Court of Justice has already labelled environmental protection as an essential interest of the state,[xlv] suggesting it is a clear customary international law principle set forth in state practice and instruments like the Paris Agreement, the Rio Declaration and the UNFCC. If future cases uphold this trend, the consequences could be immense.

Investor-state arbitration is not immune to these developments. Increasingly, investors may be using treaties to force states to adopt suitable environmental protection measures. In *Allard v. Barbados*, an eco-tourism operator claimed that Barbados had failed to institute "reasonable and necessary environmental protection measures" and "directly contributed" to contaminating the environment, destroying the value of the investment. These failures amounted to indirect expropriation of the operator's investment and breached the standard of fair and equitable treatment under the Canada-Barbados BIT. The claim was unsuccessful, but the *Allard* tribunal recognised that states may have treaty-based obligations to protect investments against environmental damage.[xlvi] Tribunals have also recognised treaty-based environmental defenses to investor claims. In *Burlington Resources v. Ecuador*, Ecuador counterclaimed for compensation for an investor's breach of domestic environmental laws, eventually winning US$41m.[xlvii] In *Cortec Mining v. Kenya*, a tribunal declined jurisdiction over a mining concession dispute because the investor's activities failed to substantially comply with local environmental law. The *Cortec* tribunal noted that Kenya's environmental obligations were of "fundamental importance" and the claimant's failure to abide by related environmental regulations eliminated its claimed "investment" as a matter of treaty law.[xlviii]

"Create good policy. Above all, states should have clear national policies to promote low-carbon investment. Facilitate new market entrants who can jumpstart green investments and enact market creation policies to foster demand for low-carbon products."

IS THE ISDS CRITICISM VALID?

The accusations levelled against ISDS have a mixed record. It's not clear, for example, whether ISDS-linked regulatory chill poses a significant threat. As commentators have noted, "regulations related to public interests such as the environment, health and natural resources are often fraught with political debate, and the possibility of ISDS may be just one of a number of factors leading to the regulatory chill." International treaty law is also hardly alone in causing problems for legislators pushing climate initiatives. A 2017 French law attacking fossil fuel concessions and exploration permits was amended after the administrative high court (the Conseil d'Etat) noted it could undercut the rights of existing concession holders as a matter of domestic law.

Furthermore, ISDS is (in theory) a neutral dispute resolution mechanism. As the *Allard* case suggests, ISDS could also help enforce and strengthen climate commitments.

Investment treaties and ISDS have other positive impacts. As treaties have flourished over the last few decades, they have generated a relatively harmonious set of institutional rules and practices, providing legal stability and certainty whilst maintaining some independence from states and state politics. This surety generated strong cross-border capital flows, which have assisted states' economic development (at least to some extent) and will remain important to the fight against climate change. Revising or eliminating this system could undermine legal certainty and discourage investment. The International Energy Agency estimates that the world needs USD 131 trillion in investment by 2050 to keep warming at or below 1.5 degrees Celsius.[xlix] Foreign investment will be key here, particularly as countries seek funding to meet their domestic climate commitments.

In sum, UNCTAD's mooted reforms may not move the needle much. The fight against climate change is by definition a global conflict, involving a series of entrenched problems. Many states may be in no real rush to penalise high-emissions investments regardless of treaty law. Most fossil fuels are owned by national governments, and the reserves are national assets. As commentators have noted, fossil fuel reserves are "already collateral, and a steady source of income and, for quite a few of these nations, a big portion of their wealth."[i] As the energy transition strands these assets, many states will lose money – even if they counter these losses with wise renewable plays. More broadly, global capital tends to flow to the highest rate of return regardless of provenance or social desirability. Global finance is greening (with difficulty and controversy),[ii] but the balance may not have tipped just yet.

The ongoing energy transition is strikingly ambitious, but the fight against climate change is sure to be long and fraught. The International Energy Agency has said that spurring this transition "involves nothing less than a complete transformation of how we produce, transform and consume energy".[iii] For the ISDS system, the shift in climate priority means that the norms on which future treaties and state policies are based will continue to change, leaving those currently in place at increased risk of conflict.

TAKEAWAYS FOR INVESTORS AND STATES

How do you give states the needed space to regulate for the good of the climate? As a corollary, how do you give investors stability and certainty? Investments will be impacted by the energy transition – but who will bear the cost for that, and how?

These questions go far beyond investment treaties and investor-state dispute settlement. But UNCTAD's policy notes hold some sharp lessons for investors and states seeking to navigate uncertain times.

We make the following recommendations:

> "Incorporate climate protection into new treaties. Consider negotiating new treaties where appropriate. As opportunities for new trade deals arrive, make sure to preserve your regulatory authority on the climate and environment."

For investors

- **Invest sustainably.** Where possible, prioritise investments that contribute to the green transition and avoid those that may run afoul of changing climate legislation. Many governments offer attractive incentives to promote sustainable growth – identify and capitalise on the ones that are right for you. WFW is a key player in the global sustainable transition and can advise you on accessing capital markets, completing mergers and acquisitions, financing your investment and planning your dispute resolution strategies;
- **Do your treaty due diligence.** Understand your host country's investment treaty landscape. When you set up in-country operations, make sure you are covered by one or more investment treaties with generous procedural and substantive protections. Be sure to do this **before** a dispute arises, or your claim may be denied on jurisdictional grounds. WFW can assist with your investment planning needs, helping you address urgent issues ranging from the type of local corporate presence you need to the duration and character of the protections you will receive;
- **Know your host country's climate policy**. Monitor domestic politics and stay abreast of climate-based initiatives, particularly in energy (a hugely important political issue). Know the country's Paris commitments and its domestic climate goals. Track upcoming legislation to ensure you understand how your activities fit within it;

- **Know your host country's treaty plans.** Consider your host state's current attitudes on investment treaties and monitor their upcoming trade deals. New treaties may look very different from existing ones. India, for example, has terminated most of its old investment treaties in favour of extremely limited new agreements that abolish traditional ISDS entirely. Thailand is currently pursuing an FTA with the European Union, which will likely resemble the EU's deals with Vietnam and Singapore (more room to regulate on the climate front, restructured dispute resolution systems).[liii] WFW tracks treaty developments regularly and can assist you here;
- **Communicate and advocate.** Cultivate good relationships with your host state's regulators and other government officials. Keep your licenses and permits up to date and follow all relevant laws and procedures. Join commerce groups and work with other companies on areas of common interest. If your investment makes use of host country incentives (like feed-in tariffs for power generation or special custom levies for green manufacturing), advocate for their protection and extension. Publicise your role locally and focus on the benefits of green investments; and
- **Prepare a legal strategy for future disputes.** Identify key challenges for your investment and have a dispute strategy ready if the state relationship turns sour. Know your rights under domestic and international law. If a dispute does arise, consult sophisticated outside counsel early in the process and get an honest read on your chances. If arbitration is not feasible for you, consider active talks with the relevant host state officials to resolve the dispute early.

For states

- **Create good policy.** Above all, states should have clear national policies to promote low-carbon investment. Facilitate new market entrants who can jumpstart green investments and enact market creation policies to foster demand for low-carbon products. Vietnam is a great recent example, as the nation heavily incentivised investment in solar and wind generation to become one of the world's clean energy leaders;[liv]
- **Review your treaties and plan your defense.** Conduct a thorough review of existing IIAs. Know the treaties you are party to and understand how they may or may not protect you in the event you pass new environmental regulation. Be aware of your regulatory authority under these treaties – do they provide leeway to regulate in defense of the environment? Do they contain generous investment protection standards that may make your regulatory job difficult? Create a good legal strategy – if you are sued in arbitration, don't be afraid to try novel or unique legal arguments while presenting a thorough defense;
- **Consider compensation.** Climate change legislation is often drastic (necessarily so). Consider the investment interests at play when you are drafting legislation. If you have the fiscal room, consider fair compensation or monetary incentives as an alternative to measures that may land you in arbitration;

- **Incorporate climate protection into new treaties.** Consider negotiating new treaties where appropriate. As opportunities for new trade deals arrive, make sure to preserve your regulatory authority on the climate and environment. Creating and agreeing new investment treaties is a complicated process. Nonetheless, parties drafting new treaties with an eye to climate protection should focus on the following:
  - **preamble**: referencing the importance of climate action, incorporating relevant climate law principles and treaties, committing to uphold environmental standards and promising cooperation on climate change mitigation and sustainable development;
  - **treaty scope**: distinguish between climate-friendly and climate-harmful investments via lists, schedules and annexes as well as classification mechanisms and treaty definitions of sustainable investments;
  - **climate action regulation**: carve out climate action measures from some investment standards, include general climate law exceptions and clarify compensation mechanisms;
  - **investor obligations and responsibilities**: incorporate CSR codes and sustainable investment requirements;
  - **climate change and investment governance**: commit to institutional cooperation on climate action, including implementing important climate treaties; and
  - **promote sustainable investment**: encourage development and transfer of low-carbon technologies, provide preferential treatment for qualifying investments.

Bangkok Trainee Teresa McGillivray also contributed to this article.

FOOTNOTE

[i] UNCTAD, The International Investment Treaty Regime and Climate Action (5 September 2022), available here ("UNCTAD Issue #3"); UNCTAD, Treaty-Based Investor-State Dispute Settlement Cases and Climate Action, available here ("UNCTAD Issue #4");

[ii] UNCTAD Issue #3 at 3.

[iii] European Journal of International Law, "Reform of ISDS: Matching Concerns and Solutions" (3 April 2019), available here.

[iv] The Paris Climate Agreement (12 December 2015), Article 2, available here.

[v] The Paris Climate Agreement, Article 4.

[vi] Martin Dietrich Brauch, Reforming International Investment Law for Climate Change Goals in Research Handbook on Climate Finance and Investment Law, available here.

[vii] UNCITRAL Working Group III (last accessed 23 September 2022), available here.

[viii] S&P Global, Energy Charter Treaty "modernized" to reflect low-carbon transition needs after two years of talks (30 June 2022), available here.

[ix] European Commission, Multilateral Investment Court Project (last accessed 23 September 2022), available here.

[x] UNCTAD Issue #3 at 2.

[xi] UNCTAD Issue #3 at 15.

[xii] UNCTAD Issue #3 at 3.

[xiii] See, e.g., Myanmar–Singapore BIT (2019), Preamble:

"RECOGNISING the important contribution investments can make to sustainable economic growth and development, and seeking to promote, protect, and facilitate such investments within the territories of the Parties.

REAFFIRMING the Parties' right to regulate and to introduce new measures, such as health, safety, and environmental measures relating to investments in their territories in order to meet legitimate public policy objectives."

[xiv] See, e.g, China–Switzerland FTA (2013), Art. 12.3:

"1. The Parties shall strive to facilitate and promote investment and dissemination of goods, services, and technologies beneficial to the environment.

2. For the purpose of paragraph 1, the Parties agree to exchange views and will consider cooperation in this area.

3. The Parties shall encourage cooperation between enterprises in relation to goods, services and technologies that are beneficial to the environment."

[xv] See, e.g, Canada–EU CETA (2016), Chapter 8 Investment, Art. 8.9:

"1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity."

[xvi] USMCA (2018), Chapter 24 Environment Art. 24.25

"1. The Parties recognize the importance of cooperation as a mechanism to implement this Chapter, to enhance its benefits, and to strengthen the Parties' joint and individual capacities to protect the environment, and to promote sustainable development as they strengthen their trade and investment relations.

2. The Parties are committed to expanding their cooperative relationship on environmental matters, recognizing it will help them achieve their shared environmental goals and objectives, including the development and improvement of environmental protection, practices, and technologies.

3. The Parties are committed to undertaking cooperative environmental activities pursuant to the Agreement on Environmental Cooperation among the Governments of Canada, the United Mexican States, and the United States of America (ECA) signed by the Parties, including activities related to implementation of this Chapter. Activities that the Parties undertake pursuant to the Environmental Cooperation Agreement will be coordinated and reviewed by the Commission for Environmental Cooperation as

provided for in the ECA."

[xvii] Burkina Faso–Türkiye BIT (2019), Art. 5

"1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or applying non-discriminatory legal measures:

(a) designed and applied for the protection of human, animal or plant life or health, or the environment;

(b) related to the conservation of living or non-living exhaustible natural resources.

[…]

4. This Agreement shall not imply in any way an obligation for the Contracting Parties to relax their laws and regulations regarding health, safety or environment in order to encourage investment. Neither Contracting Party is under any obligation to waive or otherwise derogate, or to offer to waive or otherwise derogate from such measures for the purpose of encouraging the establishment, acquisition, expansion or the maintenance of an investment in its territory by an investor of the other Contracting Party."

[xviii] UNCTAD Issue #3 at 1.

[xix] UNCTAD Issue #3 at 17.

[xx] UNCTAD Issue #3 at 2.

[xxi] UNCTAD Issue #4 at 2.

[xxii] UNCTAD Issue #4 at 4.

[xxiii] UNCTAD Issue #4 at 5.

[xxiv] IISD Investment Treaty News, Spain's Renewable Energy Saga: Lessons for international investment law and sustainable development

[xxv] UNCTAD Issue #4 at 2.

[xxvi] Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41 (2021), available here.

[xxvii] Eco Oro at para. 821.

[xxviii] UNCTAD Issue #4 at 2.

[xxix] RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands, ICSID Case No. ARB/21/4 (2021), available here.

[xxx] Bloomberg Law, RWE, Uniper Can't Sue Netherlands Over Forced Coal Exit (1) (8 September 2022), available here.

[xxxi] Financial Times, Uniper drops coal case as tensions rise over treaty on fossil fuel projects (15 August 2022), available here.

[xxxii] Westmoreland Coal Company v. Government of Canada, ICSID Case No. UNCT/20/3 (2018), available here.

[xxxiii] Lone Pine Resources Inc. v. Gov't of Canada, No. UNCT/15/2 (2013), available here.

[xxxiv] See, e.g., Phillip Morris et al. v. Uruguay, ICSID Case No. ARB/10/7 (2010), available here.

[xxxv] Kyla Tienhaara et al., Investor-state disputes threaten the global green energy transition (5 May 2022), available here.

[xxxvi] Climate Home News, Brazilian court world's first to recognise Paris Agreement as human rights treaty (7 July 2022), available here.

[xxxvii] Watson, Farley & Williams, Climate Change Litigation: Where Are We Now? (1 August 2022), available here.

[xxxviii] London School of Economics, Global trends in climate change litigation: 2022 snapshot (30 June 2022), available here.

[xxxix] The Guardian, Court orders Royal Dutch Shell to cut carbon emissions by 45% by 2030 (26 May 2021), available here.

[xl] The Economist, Lawsuits aimed at greenhouse-gas emissions are a growing trend (23 April 2022), available here.

[xli] Environmental Law Alliance Worldwide, Kivalina v. ExxonMobil (last accessed 11 October 2022), available here.

[xlii] Columbia Climate School, Landmark Climate Change Lawsuit Moves Forward As German Judges Arrive in Peru (4 August 2022), available here.

[xliii] The New Yorker, A Lake in Florida Suing To Protect Itself (18 April 2022), available here.

[xliv] Vienna Convention on the Law of Treaties (1969), Article 53, available here.

[xlv] The International Court of Justice, CASE CONCERNING THE GABCIKOVO-NAGYMAROS PROJECT (25 September 1997), available here.

[xlvi] Peter A. Allard v. The Government of Barbados, PCA Case No. 2012-06, available here.

[xlvii] IISD Investment Treaty News, Ecuador awarded USD41 million in counterclaim against U.S. oil and gas company Burlington Resources (26 September 2017), available here.

[xlviii] Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29, available here.

[xlix] International Energy Agency, World Energy Transition Outlook (October 2021), available here.

[l] Financial Times, Kim Stanley Robinson: a climate plan for a world in flames (20 August 2021), available here.

[li] Financial Times, How ESG investing came to a reckoning, available here.

[lii] IEA, World Energy Transition Outlook at 13.

[liii] Watson, Farley & Williams, New Thailand-EU Partnership & Cooperation Agreement: A Step Towards A Free Trade Agreement? (25 October 2022), available here.

[liv] Watson, Farley & Williams, Vietnam's Draft Master Plan VIII And The Energy Transition (14 October 2021), available here.

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