

International Investment Agreements and Climate Change: What is the Role that International Investment Agreements Play in the Transition to a Green Economy?

APEC Investment Experts' Group

July 2024



**Asia-Pacific
Economic Cooperation**



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Note:

Various terms referenced in this report do not imply the political status of any APEC economy.

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List of Acronyms

BITs	Bilateral Investment Treaties
CCSI	Columbia Center on Sustainable Investment
CETA	EU–Canada Comprehensive Economic and Trade Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
ECT	Energy Charter Treaty
ESCAP	Economic and Social Commission for Asia and the Pacific
ESG	Environmental, social and governance
FDI	Foreign direct investment
FET	Fair and equitable treatment
FTAs	Free trade agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GHG	Greenhouse gases
GVC	Global Value Chain
ICSID	International Center for the Settlement of Investment Disputes
IEA	International Energy Agency
IEG	Investment Experts' Group
IAs	International investment agreements
IIED	International Institute for Environment and Development
IISD	International Institute for Sustainable Development
IMF	International Monetary Fund
IPCC	International Panel on Climate Change
ISDS	Investor-state dispute settlement
MST	Minimum standard of treatment
NDCs	Nationally determined contributions
OECD	Organization for Economic Cooperation and Development
TRIMs	Trade-Related Investment Measures Agreement
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNFCCC	United Nations Framework Convention on Climate Change
WTO	World Trade Organization

Introduction

1. This final report provides an in-depth analysis of the interaction between international investment agreements (IIAs), investor-state dispute settlement (ISDS) and climate change, particularly in relation to the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and the 2015 Paris Agreement. The report maps the practices and experiences of APEC economies with IIAs, and provides policy recommendations. The analysis builds on a preliminary report and the discussions at the 5 August 2023 in-person capacity-building workshop: “International Investment Agreements and Climate Change: What is the role that International Investment Agreements Play in the Transition to a Green Economy?” The workshop promoted knowledge exchange among experts, government officials and stakeholders, addressing challenges and opportunities at the intersection of IIAs and climate change. This final report also benefited from pre- and post-workshop surveys with participants from some APEC economies.

2. The report is organized into five chapters. Chapter I provides a policy and literature overview of the relationship between climate change and foreign investment, which serves to contextualize the discussion of the interaction between IIAs, ISDS and climate change measures in subsequent chapters. Chapter I identifies the goals of the UNFCCC and the Paris Agreement that are most relevant for this study, and also looks at the work of key international organizations, including the Organization for Economic Cooperation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), and Asia-Pacific Economic Cooperation (APEC). Chapter II examines the main IIA disciplines, analyzing how these disciplines and ISDS interact with climate change mitigation and adaptation measures. Chapter III presents a study of the provisions on the right to regulate featured in the IIAs in APEC economies. The study builds on UNCTAD’s previous work, as well as its IIAs database. Chapter IV explores the interaction of IIAs and ISDS with international environmental and climate change law from a systemic perspective, looking at how IIAs and ISDS relate to the main principles of this body of law. This chapter also examines the implications of an emerging duty to regulate for climate change. Chapter V provides further analysis and policy recommendations. The report includes three annexes: Annex I contains an extended list of right to regulate provisions, Annex II summarizes the expert presentations at the 5 August 2023 workshop, and Annex III consists of the preliminary report.

3. The policy recommendations build on a growing consensus that governments should invest in understanding and reducing risk in a context of escalating uncertainty (UNDP 2022; UN Office for Disaster Risk Reduction 2022). In the wake of various global crises, climate change being the most urgent, governments should create institutions that can smoothly navigate uncertainty (IMF 2023). The World Bank has advised “governments to embark on an urgent journey to deliver change [...] taking action and making adjustments as needed in a complex and uncertain world” (World Bank 2022, 5). In this light, instead of recommending specific mechanisms or model provisions, the report presents APEC economies with an analysis of the benefits, costs and risks of each policy

option, highlighting that flexible and adaptable tools should be preferred over rigid mechanisms.

4. Policy recommendations follow from the premise that APEC economies are the masters of their IIAs. The most pressing question, therefore, is to identify the best policy approach to ensure sufficient green foreign direct investment (FDI) flows to meet climate mitigation and adaptation targets, while phasing out fossil fuel and projects with high greenhouse gas (GHG) emissions. Once governments reach a consensus, the focus can move to questions of implementation.

5. This final report, the preliminary report and the 5 August 2023 Workshop are part of the APEC project International Investment Agreements and Climate Change. The project aims to provide capacity building on the role that IIAs play in the transition to a green economy, and how far IIAs can synergize with climate change policies. The project has explored two main topics: investment liberalization and investment protection. Chile is the sponsor of the project, which is co-sponsored by Australia; Canada; Hong Kong, China; Malaysia; Peru; Chinese Taipei; and Viet Nam.

I. Climate change, FDI and IIAs: A literature and policy review

6. This first chapter provides a general overview of the interaction between climate change and foreign investment, which serves to contextualize the discussion in subsequent chapters about the alignment between IIAs, ISDS and climate change action. Section A identifies the goals of the UNFCCC and the Paris Agreement that are most relevant for this study. It also examines the synergies between economic growth and climate change action, and the role of FDI in this regard, particularly from the perspective of key international organizations such as the OECD and UNCTAD. Section B discusses how these international organizations see the interaction between IIAs, ISDS and climate change, mapping their main concerns and policy suggestions. Box 1 contextualizes the climate challenge in global debates about governance and uncertainty, briefly discussing recommendations from the World Bank and UNDP. Section C examines the role of foreign investment in climate change discussions at APEC, while Section D reviews APEC's research on IIAs and ISDS.

A. A global perspective on climate change, growth and FDI

7. It is widely agreed that climate change is the most pressing global challenge. Everybody contributes and will be affected by it, even if differentially. Since the early 1970s the international community has recognized the significance and rapidly growing threat that climate change poses to human life and the environment. The 1972 Stockholm Declaration and Action Plan for the Human Environment was the first international declaration to make the environment a central issue. The international community noted their common conviction that every person has a "responsibility to protect and improve the environment for present and future generations" (Principle 1). This responsibility was reaffirmed at the 1992 Conference on Environment and Development, held in Rio de Janeiro, where governments agreed on the Rio Declaration and Agenda 21, and signed the United Nations Framework Convention on Climate Change (UNFCCC).

8. The UNFCCC recognizes the global character of climate change, while acknowledging that parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their "common but differentiated responsibilities and respective capabilities" (Article 3.1). The responsibilities of the parties to the UNFCCC involve taking appropriate climate change mitigation and adaptation measures. Mitigation measures aim to reduce GHG emissions, while adaptation measures entail taking action to adjust to the present and future impacts of climate change. The parties to the UNFCCC also agreed to promote financial aid and technology transfer to facilitate climate action in developing economies (Articles 4.3 and 4.5, UNFCCC Convention).

9. In 2007, the International Panel on Climate Change (IPCC) confirmed that "warming of the climate system is unequivocal" and "very likely due to the observed increase in anthropogenic greenhouse gas concentrations" (IPCC 2007, 5). In 2015, the international community took note of the situation and

agreed for the first time to the clear objective of limiting global warming to well below 2°C compared to pre-industrial levels, preferably to 1.5°C (Paris Agreement 2015). The Paris Agreement reiterates that climate change is a global challenge that imposes responsibilities on all signatories, while stating that “[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances” (Article 2.2. See also Preamble, paragraph 3).

10. Among its provisions, the Paris Agreement requires states parties to prepare and communicate their nationally determined contributions (NDCs) (Article 4.2), and outlines the parties’ goals to “make finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development” (Article 2.1.c), and to “take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases” (Article 5.1).

11. The Paris Agreement also recognizes a wide range of important considerations for its effective implementation, including “the importance of fully realizing technology development and transfer in order to improve resilience to climate change and to reduce greenhouse gas emissions” (Article 10.1). It also recognizes that support should be provided to developing country [sic] Parties, including for “strengthening cooperative action on technology development and transfer at different stages of the technology cycle” (Article 10.6). The preamble of the Paris Agreement also highlights the imperatives of a “just transition” of the workforce, the need to respect human rights, protect vulnerable groups and promote gender equality, and the importance for some of the concept of “climate justice” (Preamble, paragraphs 10–13).

12. The international community agrees that climate change mitigation and adaptation measures to meet the Paris Agreement goals require significant and rapid investment. The 2018 IPCC report underscores that “climate policies in line with limiting warming to 1.5°C would require a marked upscaling of supply-side energy system investments between now and mid-century, reaching levels of between USD 1.6 and 3.8 trillion per year globally with an average of about USD 3.5 trillion per year over 2016–2050” (IPCC 2018, 321). The 2°C would require an average of about 3 trillion USD per year over the same period. Moreover, the IPCC highlights not only “the level of investment but also the type and speed of sectoral transformation” necessary for the transitions associated with 1.5°C-consistent pathways (IPCC 2018, 321). The International Monetary Fund (IMF) estimates that economies must collectively invest at least USD 1 trillion in energy infrastructure by 2030 and USD 3 to 6 trillion across all sectors per year by 2050 to substantially reduce greenhouse gas emissions. Meanwhile, climate change adaptation will require annual investments of around USD 140 to 300 billion by 2030 to address the physical consequences of climate change, such as rising seas and intensifying droughts. This sum could sharply rise to between USD 520 billion and 1.75 trillion annually after 2050 depending on the effectiveness of climate mitigation measures (IMF 2022).

13. The Organization for Economic Cooperation and Development (OECD) has noted the importance of investing in growth and climate action. Its 2017 report *Investing in Climate, Investing in Growth* emphasizes that climate-compatible

growth will require governments to pursue resilient investments, fiscal measures and structural reforms. Governments face a triple imperative: growth, improving livelihoods and addressing climate change. This calls for investments that address multifaceted development objectives and promote long-term resilience in infrastructure, water, communication, agriculture, forestry and energy (climate change mitigation and adaptation measures). Governments also need to consider structural reforms in product markets, financial markets, labor markets and housing markets. “In short, policies that attempt to preserve the status quo – or at most favour an incremental transition – risk falling short from both a climate and an economic point of view” (OECD 2017a, 30).

14. The United Nations Conference on Trade and Development (UNCTAD) has focused on the importance of making growth and climate action compatible. UNCTAD’s *Trade and Development Report 2019* argues that this objective requires re-examining multilateralism and promoting a Global Green New Deal. The first step, the 2019 report explains, is considering “a range of public financing options” (UNCTAD 2019a, 26). Another 2019 UNCTAD report points to the challenges faced by commodity-exporting economies, recommending these economies reduce their dependence on the natural resource sector (UNCTAD 2019b, 3). Its 2021 report *Climate change: green recovery and trade* notes that “[d]espite their limited resources developing countries [sic] are attempting to recover greener,” and that “innovation is perhaps the only climate policy that enjoy[s] support across the entire political spectrum” (UNCTAD 2021, 3).

15. UNCTAD suggests that governments could do more to promote the private sector’s involvement in climate change mitigation and adaptation in developing and least-developed economies. It emphasizes that the increase of FDI in climate change has been limited to renewable energy and concentrated in developed economies. Its 2022 report *Investment policy trends in climate change sectors, 2010-2022* explains that while investment in renewable energies is affected by institutional and macroeconomic conditions, the single most important determinant in attracting foreign investment to this sector is the existence of renewable energy policies, such as incentives, risk mitigation mechanisms and tariff regulation (UNCTAD 2022a). According to UNCTAD’s *World Investment Report 2023*, these mechanisms may be fiscal (tax credits, tax exception, tax relief); financial (subsidized loans, green insurance); or more targeted and complex instruments (feed-in tariffs, energy auctions, guarantee schemes, business facilitation) (UNCTAD 2023a).

16. In 2021, UNCTAD and the Economic and Social Commission for Asia and the Pacific (ESCAP) published a special report on the challenges posed by climate change in the Asia-Pacific region. The report acknowledges that trade and investment have been central for economic growth in the region but that this growth has come “with significant social and environmental costs, including the rapidly worsening climate crisis” (UNCTAD–ESCAP 2021, xv). The report notes that the region has “regressed” in climate action, increasing its GHG emissions by 50% between 1990 and 2018 (UNCTAD–ESCAP 2021, 4). UNCTAD and ESCAP recommend Asia-Pacific economies implement “climate-smart trade and investment policies” (UNCTAD–ESCAP 2021, 10). These policies include the phase out of inefficient fossil fuel subsidies, establishing carbon pricing

mechanisms, and liberalizing trade in environmental goods and services. In the investment domain, the report recommends that economies support climate pledges (i.e., NDCs) with policies and measures to drive a green and fair economic transformation. The report highlights that the majority of regional trade agreements concluded after 2005 include climate change provisions, notably agreements involving the European Union, Japan and the Republic of Korea (UNCTAD–ESCAP 2021, xviii). Most of these provisions call for climate action or promote environmental goods, services or technologies. The report is silent about investment-related climate change provisions.

17. In view of the scale and speed of investments necessary to address the climate crisis, the international community has recognized that public investment is insufficient to achieve the Paris Agreement goals. The International Energy Agency (IEA) considers that USD 3 trillion of the 4.2 trillion required for global investment by 2030 to achieve the 1.5°C target would need to come from the private sector, “mobilised by public policies that create incentives, set appropriate regulatory frameworks and send market signals” (IEA 2021, 82). The importance of private investment to fight climate change was reiterated at COP28, where economies recognized “the role of the private sector” and highlighted “the need to strengthen

policy guidance, incentives, regulations and enabling conditions to reach the scale of investments required to achieve a global transition towards low greenhouse gas emissions” (COP28 2023, 10).

18. Recent estimations by UNCTAD indicate that the international community continues to fall short on the necessary investments to achieve sustainable development and energy transition goals, especially if the justice element of the transition is considered. The 2023 *SDG Investment Trends Monitor* states that the annual sustainable development goals (SDG) investment gap in developing economies is around USD 4 trillion, and that more than half of this relates to the energy transition alone— USD 2.2 trillion (UNCTAD 2023b, 5). UNCTAD concludes that governments must concentrate on facilitating FDI flows—through incentives, guarantees, loans, capacity building—while ensuring they do not lower environmental and social standards, and retain sufficient policy space to implement climate change mitigation and adaptation measures (UNCTAD 2023b, 10–11). UNCTAD’s 2023 *Investment Policies for the Energy Transition: Incentives and Disincentives* report cautions that developing economy governments “rely more on generic promotion instruments” that “can be expensive in the long run” and have low effectiveness “because they do not directly tackle the key challenges for investors in the sector” (UNCTAD 2023c, 25).

B. Global discussions about climate change and IIAs

19. OECD, UNCTAD and other international agencies concur that it is crucial to align the FDI regulatory framework with the Paris Agreement goals. IIAs are a central component of the international regulatory framework of foreign investment, and may be bilateral, plurilateral, sectoral or consist of investment chapters in free trade agreements (FTAs). These international treaties usually

contain anti-discrimination and substantive standards that the signatories grant to investors of the treaty party investing in their territory. Most IIAs allow investors to enforce these standards directly without exhausting local remedies through an arbitral dispute settlement mechanism known as ISDS. The benefits, costs and risks of this international regime have been subject to debate since the 2000s (CCSI 2018). Several research and international organizations suggest that IIAs could make climate change mitigation and adaptation measures more difficult or costly. The 2022 IPCC report notes that:

Investment agreements, which are often integrated in FTAs, seek to encourage the flow of foreign investment through investment protection. While international investment agreements hold potential to increase low-carbon investment in host countries [sic], these agreements have tended to protect investor rights, constraining the latitude of host countries [sic] in adopting environmental policies [...]

Moreover, international investment agreements may lead to ‘regulatory chill’, which may lead to countries [sic] refraining from or delaying the adoption of mitigation policies, such as phasing out fossil fuels. More contemporary investment agreements seek to better balance the rights and obligations of investors and host countries [sic], and in theory offer greater regulatory space to host countries [sic], although it is unclear to what extent this will hold true in practice (IPCC 2022, 1499).

20. The IPCC’s opinion on IIAs and climate change is supported by the relevant literature. A 2020 International Institute for Environment and Development (IIED) report warns that existing IIAs protect most foreign-owned power plants worldwide, and that these investors may resort to ISDS to sue host economies over measures to phase out fossil fuels (IIED 2020). This possibility has already materialized in Canada (*Westmoreland Coal Company v. Canada*¹) and the Netherlands (*Uniper v. The Netherlands*² and *RWE v. The Netherlands*³), while there is evidence that governments have negotiated compensation settlements in the shadow of ongoing ISDS litigation (for instance, *Vattenfall v. Germany I & II*⁴). A 2021 International Institute for Sustainable Development (IISD) report notes that fossil fuel investors are the main claimants in ISDS cases and that the majority of these cases have been decided in their favor. The report also highlights recent academic research showing that IIAs and ISDS originated in proposals put forward by fossil fuel multinational corporations to protect their investments (IISD 2021, 7–8). A 2022 Columbia Center on Sustainable Investment (CCSI) report indicates that Denmark, France and New Zealand have postponed the phasing out of oil and gas exploration and exploitation due to the threat of ISDS claims (CCSI 2022a). A 2022 publication in the academic journal *Science* explores the legal and financial risks that IIAs and ISDS pose to phasing down or phasing out oil and gas production. The authors argue that governments should ensure that fossil fuel investors cannot access IIAs and ISDS protection. According to their research, Indonesia, for instance, could be facing potential claims for around USD 3–4 billion, which is the total estimated present net value of its fossil fuels investments (Tienhaara et al. 2022).

21. Whether IIAs have positive impacts on FDI flows is more controversial. It is sometimes argued that IIAs serve to promote FDI flows, particularly to developing economies, although the evidence in this regard is weak and inconclusive (Brada and Drabek 2021; Gopalan et al. 2023). A 2022 CCSI report notes that the five most significant deterrents of FDI in renewable energies are political instability, legal instability in energy sectors, fiscal instability, the macroeconomic profile of the economy and corruption. According to the same study, investors' preferred mitigation tools are 1) guarantees, 2) co-investing with public entity, 3) credit guarantees, and 4) political risk insurance. Meanwhile, IIAs and green insurance are ranked fifth and sixth, and are thus far from being the most preferred options (CCSI 2022b, 7, 9).

22. Most studies conclude that there is little or no correlation between IIAs and FDI flows, apart from some positive impact with regard to resource-seeking FDI (Bonnitcha et al. 2017, 159–61, 207–10). However, proponents of IIAs insist that they create a predictable legal environment for foreign investors, by providing reassurances about incentives and environmental standards (Newton 2022), as well as by allowing foreign investors to initiate ISDS cases for the non-compliance of climate commitments and NDCs (Watson Farley & Williams 2022, 12). This will be discussed in more depth in Chapter IV.

23. Legal industry reports indicate that IIAs play a positive role in promoting foreign investment flows. Half of respondents to the Queen Mary University 2022 *Future of Arbitration Survey* believe that “the possibility of arbitration encourages investment in energy projects” (Queen Mary 2022, 39). Although respondents perceive ISDS as a last resort option or part of an exit strategy, they consider it a useful mechanism to avoid local courts and ensure awards are enforced (Queen Mary 2022, 7). The main criticisms of ISDS are arbitrator bias, issue conflicts, and the perception that ISDS influences policy developments (Queen Mary 2022, 41). Another survey by Charles Rivers Associates indicates that mining law experts find that IIAs are as useful as legal and fiscal stabilization clauses in investment contracts (Charles Rivers 2023, 28). Law firms generally recommend that investors conduct “treaty due diligence” to ensure ISDS protection for their projects (Watson Farley & Williams 2022, 14; Charles Rivers 2023, 8; Jones Day 2022).

24. In 2021, the OECD launched a program on the future of IIAs, Track 1 of which focuses on their linkages with climate change.⁵ The OECD highlights the importance of aligning financial flows to low emission investments, as required by the Paris Agreement. Governments have a duty to ensure that the measures and incentives they use to promote investment are consistent with their climate change obligations. It is also relevant to note that financial actors are widely recognized as having climate responsibilities for the GHG emissions linked to their portfolios. According to the OECD, although “the scope of covered investment has attracted less attention until recently,” there is a relevant interaction between IIAs and the 2015 Paris Agreement, in particular with regard to aligning finance flows with low emissions as specified in Article 2.1.c (OECD 2023, 3). The OECD observes that economies frequently make climate change commitments, but “it is unclear if governments are addressing the alignment of investment treaty incentives with the Paris Agreement and sustainable finance”

(OECD 2022a, 5). It further indicates that although IIAs can maintain and improve market access for foreign investment in renewable energy and climate-friendly investments, there is “increased attention and concern about the scope of covered investment in investment treaties, and in particular coverage of new investment in coal and other fossil fuels” (OECD 2023, 3).

25. The OECD has noted that the scope of IIAs does not distinguish between fossil fuels and clean energy, potentially promoting investment projects that are not aligned with the goals set by the Paris Agreement. This misalignment prompted a process of modernization of the Energy Charter Treaty (ECT), as well as discussions within the European Union (OECD 2023, 9–10).⁶ Overall, the OECD’s work on Track 1 calls the attention of economies to the incentives that IIAs create and their potential positive and negative interaction with climate change action. By promoting and protecting foreign investment in most sectors, including fossil fuels, the majority of IIAs would be in tension with the goals set by the Paris Agreement, particularly Article 2.1.c regarding aligning finance flows with low emissions. A public consultation on the interrelation between IIAs and climate change was launched in 2021 by the OECD, and a compilation of the submissions is publicly available.⁷ The OECD has also conducted a survey to determine how governments are dealing with the issue (OECD 2024).

26. UNCTAD has devoted several publications to the reform of IIAs in order to improve the balance between investor rights and states’ right to regulate. The 2015 *Investment Policy Framework for Sustainable Development* recognizes the importance of FDI to achieving the 2030 Sustainable Development Goals. UNCTAD suggests that a new generation of IIAs should “stimulate investment specifically geared towards sustainable and inclusive growth, including infrastructure, renewable energy, water and sanitation, food security, health and education (sustainable development goals-related sectors)” (UNCTAD 2015, 6). This objective should be pursued while “ensuring an appropriate balance between protection commitments and regulatory space for development” and “shielding host countries [sic] from unjustified liabilities and high procedural costs” (UNCTAD 2015, 8). The 2018 *Reform Package for the International Investment Regime* focuses not only on the desirable content of new IIAs but also on strategies to reform the existing stock of “old-generation” IIAs (defined as IIAs concluded before 2010). According to UNCTAD, old-generation IIAs provide an unsatisfactory balance between investor rights and states’ right to regulate (UNCTAD 2018, 7–8). These 2015 and 2017 reports also focus on improving coherence between IIAs and other policies, such as climate change action. UNCTAD’s 2020 *IIA Reform Accelerator* estimates that there are around 2,500 old-generation IIAs, accounting for almost “all ISDS cases,” and puts forward a toolkit of options to expedite their reform and make them consistent with the 2030 UN Sustainable Development Goals and states’ right to regulate (UNCTAD 2020, 2).

27. In September 2022, UNCTAD published a report with statistics on ISDS environmental cases. The report highlights that 175 ISDS cases were brought against environmental protection measures, and that fossil fuel investors initiated 192 ISDS cases (including downstream, midstream and upstream investors). Meanwhile, renewable energy investors brought 80 ISDS cases (UNCTAD

2022b, 1). UNCTAD's *World Investment Report 2023* shows that the number of ISDS environmental cases increased significantly in 2023 (UNCTAD 2023a, 92). According to reports from the legal industry, this trend is expected to continue. A 2023 Freshfields study forecasts a large number of cases given that disputes are expected to emerge at times of "transition" (Freshfields 2023, 18). Charles Rivers Associates also predicts increasing disputes as there is a rise in mining activity related to the clean energy transition (Charles Rivers 2023, 4–5).

28. In light of how IIAs and ISDS have been used in the past, and taking into account the uncertainty that governments face in the near future, UNCTAD's *World Investment Report 2023* underscores that ISDS could be used to make the energy transition more difficult or costly, as investors in fossil fuels can use this regime to claim for compensation for the phasing out of fossil fuels or necessary regulatory changes to attain climate change mitigation and adaptation goals (UNCTAD 2023a, 91–92). The report highlights that recognition of the urgency of an energy transition has led to increased attention to the reform of IIAs, acknowledging that this is a "rapidly shifting landscape, which requires flexibility in policymakers seeking to attract renewable energy investment" (UNCTAD 2023a, 90). UNCTAD is not alone in highlighting the increasingly uncertain policy context (See Box I.1 for a discussion).

29. UNCTAD's *World Investment Report 2023* also calls attention to performance requirement prohibitions in IIAs. These provisions may be problematic in terms of meeting the goals set in the UNFCCC and the Paris Agreement, if they act as obstacles to the implementation of measures aimed to transfer technology and create local capacity for dealing with just transition goals (UNCTAD 2023a, 95). A recent study by Boston University similarly concludes that prohibitions on performance requirements, local content requirements and subsidies may limit the policy space of some states, particularly developing states, to implement policies to create domestic capacity to address the just transition (Thrasher and Liu 2023, 6, 9).

30. Another important forum for the discussion of IIAs and ISDS reform is the United Nations Commission on International Trade Law (UNCITRAL) Working Group III. The UNCITRAL mandate includes concerns relating to the lack of consistency, coherence, predictability and "correctness" of ISDS decisions; concerns relating to arbitrators and decision makers; and concerns relating to costs and duration of ISDS cases. Several think tanks have noted that the scope of this discussion is limited and leaves out important questions, including the role of local communities and vulnerable actors, as well as the risk of regulatory chill in relation to climate action measures (IIED, CCSI, IISD 2019). Recently, these cross-cutting issues have attracted some attention from UNCITRAL Working Group III, which released a paper providing specific options (UNCITRAL 2023). However, commentators believe that the discussion in this working group will focus on other questions during 2024 and 2025, such as an appellate mechanism, a standing first-instance tribunal, and a framework agreement (Roberts & St John 2023).

BOX 1: Governance in times of uncertainty

Various international organizations have noted that climate change is a source of increasing uncertainty. According to the UNDP, governments face a challenging regulatory landscape as uncertainty and unpredictability are on the rise. Climate change, together with accelerated societal transformations and the vagaries and vacillations of polarized societies, are identified as the most destabilizing forces. The UNDP *Human Development Report 2021/2022* suggests that “novel layers of uncertainties are interacting to create new kinds of uncertainty—a new uncertainty complex—never seen in human history” (UNDP 2022, 3). The report further considers that “[d]evelopment is perhaps better seen as a process characterized both by adapting to an unfolding unknown reality and by purposefully transforming economies and societies to ease planetary pressures and advance inclusion” (UNDP 2022, 15). The relationship between climate change and escalating uncertainty has also been noted with concern by the World Bank (World Bank 2022) and the IMF (IMF 2023).

Based on its assessment, the *UNDP Strategic Plan 2022–2025* focuses on building resilience “to respond to systemic uncertainty and risk” (Executive Board of the UNDP 2021, 1). UN bodies have insisted that governments should invest in “understanding and reducing risk,” moving toward building institutions that are “comfortable with uncertainty” (United Nations Office for Disaster Risk Reduction 2022, xiii, 202). Similarly, the World Bank has launched the Future of Government project, which aims to reimagine government in light of global challenges and increasing uncertainty (World Bank 2022).

C. APEC’s perspective on climate change, growth and foreign investment

31. The 2021 *APEC Regional Trends Analysis* foregrounds the climate change threats facing the region, as identified in the 2021 IPCC report, including more frequent and intense heatwaves, wildfires, extreme weather events, and heavy precipitation. These will affect production and disproportionately impact vulnerable groups (APEC 2021a, 2). In August 2023, US Secretary of Energy Jennifer M. Granholm urged APEC member economies to address climate change by pursuing “just energy transitions” (APEC 2023c). The APEC region has come to define the world energy economy: “APEC’s 21 members account for 56 percent of world energy demand, 58 percent of world energy supply, and 68 percent of electricity generated” (APEC 2023c). In November 2023, the executive director of the APEC Secretariat, Rebecca Sta Maria, insisted that “the path to a sustainable future is a harmonious integration between prosperity and environmental well-being” (APEC 2023d).

32. APEC economies have been at the forefront of climate change action. The *1993 Leaders’ Declaration* envisioned a region in which “our environment is improved as we protect the quality of our air, water and green spaces and manage our energy sources and renewable resources to ensure sustainable growth” (APEC 1993). Four years later, the *1997 Leaders’ Declaration* contained the first mention of climate change in the APEC context (APEC 1997). In 2007, the Sydney *APEC Leaders’ Declaration on Climate Change, Energy Security and*

Clean Development emphasized the importance of “joint research, development, deployment and transfer of low and zero emission technologies,” forests and land use, and open trade and investment (APEC 2007a).

33. A more recent call for action on climate change is detailed in the 2040 APEC Putrajaya Vision, published in 2020, which calls for strong, balanced, secure, sustainable and inclusive growth in the Asia-Pacific region by promoting economic policies that will tackle climate change. Development in the Asia-Pacific region has been significant but, as a 2021 report indicates, it has also come with costs (such as “environmental damage”) (APEC 2021b, i). In 2021, the 21 APEC member economies developed the Aotearoa Plan of Action, mapping out how to implement the Putrajaya Vision 2040.⁸ The Aotearoa Plan of Action includes: structural reform, facilitation of trade in environmental goods and services, rationalizing and phasing out fossil fuel subsidies that encourage wasteful consumption, promoting sustainable growth across sectors, and the development of cost-effective low- and zero-emissions technologies.⁹

34. The 2021 *APEC Regional Trends Analysis* summarizes the main pillars of APEC’s strategy for climate change mitigation and adaptation. The report indicates that action should be taken as soon as possible and that APEC economies should act in a concerted manner, beyond a statement of commitments, adopting a holistic approach (APEC 2021a, 11). The transition to a green economy requires “extensive structural reforms,” including “shifting public policies to promote investments and jobs that reduce GHG emissions” (APEC 2021a, 12). APEC economies also foresee an increasingly uncertain future, according to an update of the 2022 *APEC Regional Trends Analysis*. The update underscores the importance and complexity of preparedness: “preparing for the next pandemic or crisis and preparing for a future that is inevitably highly digitalized and greatly exposed to the harmful effects of climate change” (APEC 2022a, 5).

35. The *APEC Economic Policy Report 2022* suggests that structural reforms necessary for sustainable outcomes can also promote higher rates of growth. The report claims that there should be no, or limited, trade-offs between growth and climate change action. The key lies in combining market, regulatory and enabling instruments (APEC 2022b, 63–64). A 2022 *APEC Stocktake of Carbon Pricing Initiatives* shows that member economies are seeking ways to reduce GHG emissions while also creating an environment that enables development (APEC 2022c). Decarbonizing power systems—a crucial objective for climate change mitigation—will require significant public-private cooperation, according to the APEC Energy Working Group (APEC 2022d). Research in APEC economies has come to similar conclusions regarding the decarbonization of transportation (APEC 2022e).

36. Promoting green investments in the APEC region, a 2023 report suggests, requires addressing the profitability–risk ratio of green investments (APEC 2023a). Instruments to achieve this goal include credit risk guarantees, environmental insurance and catastrophe bonds. The same report recommends that APEC economies reduce fossil fuel subsidies; define activities that substantially contribute to climate change mitigation and adaptation; and promote

the use of environmental, social and governance (ESG) factors in the decision-making process of firms (APEC 2023e). The *2023 APEC Economic Policy Report* insists that APEC governments should play a crucial role in reducing business exposure to uncertainty and risk (APEC 2023d, vii, 8). It also notes the importance of structural reforms aimed at creating an enabling environment for inclusive, resilient and sustainable businesses, and highlights their transnational implications. The “issues of inclusion, sustainability and resilience have cross-border implications affecting climate change [...] No economy can handle these issues alone, and international cooperation is imperative” (APEC 2023e, ix).

37. A 2022 APEC policy brief emphasizes that climate change mitigation and adaptation should ensure the inclusion of vulnerable groups, “particularly their capacity to access decent work opportunities” (APEC 2022f, 1).¹⁰ APEC governments have undertaken various initiatives to ensure a just transition to low-carbon economies. In November 2023, Ambassador Matt Murray observed that during the preceding year he had spent significant time “traveling and explaining APEC to diverse stakeholder communities, particularly the connections between trade, investment and economic prosperity of everyday life in the region” (APEC 2023f). It is important to note that, as observed by the IPCC, vulnerable groups should be part of the solution to climate change, given that “indigenous and local knowledge can contribute to overcoming the combined challenges of climate change, food security, biodiversity conservation, and combating desertification and land degradation” (IPCC 2019, 31).

38. The APEC Policy Support Unit has highlighted the importance of regularly updating the list of environmental goods as developments in technology in this domain are fast-moving. APEC’s Economic and Technical Cooperation program (ECOTECH) involves cooperation on sustainable cities, sustainable maritime, cleaner production and transition to sustainable development. A 2023 report indicates that trade can serve to ensure the widespread adoption of products and technologies that contribute to reducing GHG emissions. Promoting trade in technologies justifies the elimination of tariffs and non-tariff measures, as well as a consideration of the perspectives of firms when designing trade and investment policies (APEC 2023b). The 2021 *Review of the APEC List of Environmental Goods* notes that a global value chain (GVC) approach would benefit developing economies, as they could produce components required for certain environmental goods (APEC 2021c). Further reports published by APEC and other international organizations, as well as the academic literature, warn that tensions regarding international trade could escalate, weakening the global economy and the flows of goods, investment and technology (for instance, APEC 2019c, 25).

39. Technology diffusion has also attracted attention in APEC studies. A 2022 policy brief suggests that a Bio-Circular-Green Economy will require “access to the right technologies and expertise” (APEC 2022g, 8). Promoting this access, the brief indicates, will entail overcoming obstacles that arise because of intellectual property rights, trade barriers, GVC constraints, poor access to technical and high-level human capital, problems in accessing credit, and restrictions to FDI (APEC 2022g, 8). The policy brief cautions that technology and innovation remain unevenly diffused across APEC economies and that the rate

of diffusion is “below average for some sectors, namely: (1) transport and mobility; and (2) agriculture, food, and hospitality.” Solutions involve increasing “the adopter’s degree of involvement throughout the innovation process,” which requires private and public collaboration (APEC 2022g, 8–9).

40. The 2021 Aotearoa Plan of Action for the implementation of the Putrajaya Vision 2040 acknowledges “the importance of, and will continue to work together to deliver, a free, open, fair, non-discriminatory, transparent and predictable trade and investment environment.”¹¹ APEC economies have pledged to promote quality investment flows, trade and investment facilitation, and multi-stakeholder cooperation to promote responsible business conduct to ensure “adequate and effective protection and enforcement of intellectual property, including by providing capacity building, particularly to spur economic development and innovation.”¹² The *2023 APEC Economic Policy Report* reiterates the importance of establishing regional standards, exchanging experiences and best practices, and leveraging regional fora (APEC 2023e, 113–14).

41. In August 2023, APEC economies approved a Just Energy Transition Initiative to promote energy transitions in the APEC region that engage workers, investors and communities “in an equitable and inclusive way” (APEC 2023g). As a first step, APEC economies agreed on the Non-Binding Just Energy Transition Principles for APEC Cooperation. These principles focus on: 1) taking into account domestically defined economic growth priorities; 2) pursuing positive environmental, social and economic outcomes; 3) delivering domestically defined equitable benefits; 4) supporting inclusion and gender equality; 5) creating resilient firms, institutions and communities; 6) providing support for decent work and workforce development; and 7) promoting healthy lives and well-being for all (APEC 2023g).

D. APEC’s work on IIAs

42. APEC’s Investment Expert’s Group (IEG) has actively discussed and shared experiences regarding the negotiation of IIAs, particularly those currently in force in the APEC economies. The IEG group published reports in 2007 and 2009 identifying and comparing the core elements of IIAs in APEC economies (APEC 2007b; APEC 2009). A handbook for negotiators was published in collaboration with UNCTAD in 2012, mapping experiences that APEC economies may find useful in their efforts to protect the environment or safeguard their regulatory space to implement environmental measures, including preambular language, reference to states’ right to regulate in expropriation provisions, exceptions to performance requirements designed to achieve specified policy objectives, general exceptions, right to regulate provisions, exclusions from dispute settlement (carve-outs), environment-related investor responsibilities or obligations, and not lowering of standards clauses (APEC–UNCTAD 2012).

43. A 2019 APEC policy brief *ISDS as an Instrument for Investment Promotion and Facilitation* notes that economies have moved away from assuming that FDI has net benefits, and there have been more efforts on the part of host economies to regulate the conditions for admission and operation of FDI. This shift includes

new environmental measures. The brief concludes that the reform of IIAs should aim at matching new business realities and climate change concerns (APEC 2019a, 7). The same document argues that the benefits of IIAs should not be assessed simply according to the extent to which they attract FDI to host economies, but also according to the quality of these investment flows, in particular their capacity to promote sustainable development (APEC 2019a, 4). A 2019 report on improving the investment climate in the region suggests that although APEC economies consider that good governance is fundamental to attracting FDI, the evidence regarding the contribution of IIAs to good governance is unclear. IIAs would only complement domestic legal systems and “preliminary calculations by the APEC Policy Support Unit (PSU) indicated that having a specific ISDS mechanism in a BIT [bilateral investment treaty] may not necessarily lead to higher FDI inflows” (APEC 2019b, 17). Another APEC document published the same year similarly highlights the importance of strengthening the domestic rule of law (APEC 2019a, 6).

44. Some of APEC’s recent work on how member economies can promote and attract green FDI also suggests that IIAs play no more than a secondary role. The conclusion of the *2018 Summary Report of APEC Public-Private Dialogue on Green Investment Policy* highlights the need to continue sharing and discussing policies, strategies, programs and barriers to green investment (APEC 2018). The report does not mention IIAs or ISDS. Australia’s 2022 project, *Symposium on Green Foreign Direct Investment in the Energy Transition*, focused on the importance of defining green FDI and the role of incentives and other strategies for green FDI promotion. IIAs were not discussed here either.

45. In 2021, APEC’s IEG organized a capacity-building session on trends in IIA negotiation. The report summarizes the view of various experts. One expert concluded that “it is important to adopt very robust provisions that make manifestly clear that an Economy has this broad exception to adopting measures to protect the environment without fear of liability” (APEC 2021d, 29). Another expert observed that exceptions are the ideal mechanism to protect states’ right to regulate (APEC 2021d, 28–29).

46. Recent APEC data on foreign investment laws and policy provides interesting insights. Regarding international investment protection, as of July 2023, IIAs in the APEC region amounted to 891 BITs and 483 other treaties such as FTAs. Meanwhile, IIAs globally amounted to 5,732 BITs and 3,827 other treaties. These figures include signed and in force treaties, and were prepared by APEC based on UNCTAD data (APEC Policy Support Unit 2023, 10). In relation to market access, the natural resource sector had the most restrictive FDI policy environment in 2020, followed by the services sector. The most restrictive measures were equity requirements and screening and approval measures (APEC Policy Support Unit 2023, 6). The APEC Policy Support Unit report notes that IIAs are a “useful tool to promote and attract FDI” and that comprehensive regional agreements—such as the ASEAN–Australia–New Zealand FTA (AANZFTA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the Regional Comprehensive Economic Partnership (RCEP)—remain central to efforts to achieve APEC trade and investment goals. In this respect, as of July 2023, APEC economies have cumulatively signed a

total of 212 FTAs: 202 are in force—74 of these agreements are intra-APEC FTAs, representing 34.9% of the total FTAs signed by APEC (APEC Policy Support Unit 2023, 6).

II. International Investment Agreements: Disciplines

47. This chapter maps IIA disciplines and identifies recent trends in investment treaty-making. It examines how IIA disciplines and ISDS interact with climate change mitigation and adaptation measures. Section A looks at admission and pre-establishment disciplines, while Section B discusses facilitation and promotion disciplines. Section C studies investment protection standards and ISDS, analyzing how they interact with climate change measures.

A. Admission and pre-establishment¹³

48. Under general public international law, governments have the right to refuse investment in their economies by foreign investors. Equally, governments can close specific sectors to investors, establish screening processes, ownership or other quantitative limitations, or stipulate that investors commit to certain requirements in order to be admitted into the host economy (generally known as performance requirements). Screening mechanisms for foreign investment inflows have become popular since the late 2010s, most commonly for reasons related to national security. At the time of writing, the United States is considering an outbound screening mechanism.¹⁴ Governments have also used screening and approval mechanisms to ensure that foreign investment projects are consistent with their development strategies. When admitting or approving a foreign investment, governments can impose foreign equity limitations (exclusion of foreign participation, restrictions on majority holdings or limits on full foreign ownership). They can require investors to partner with a local firm (joint venture), incorporate local content, transfer technology, or conduct research and development activities (performance requirements). According to general public international law, governments can discriminate during the pre-establishment phase, granting domestic or other foreign investors more favorable treatment.

49. Multilateral, plurilateral and bilateral treaties are often relevant to questions of foreign investment admission and pre-establishment, in addition to broader public international law principles.

50. Multilateral World Trade Organization (WTO) rules include disciplines on services and performance requirements. The General Agreement on Trade in Services (GATS) specifies general and specific liberalization commitments in services, including services provided under Mode 3 (which involves a commercial presence that typically entails FDI). GATS general commitments consist of most-favored nation, transparency, domestic regulation and monopolies. WTO members are also required to submit specific liberalization schedules on agreed sectors. These national schedules follow a positive list approach—those sectors explicitly mentioned are liberalized, while non-listed sectors are subject only to the general commitments. Scheduled sectors are subject to national treatment

and market access commitments, although members maintain the exceptions explicitly listed in their schedules. Market access limitations typically involve: number of suppliers, value of service transactions, number of operations or quantity of output, number of natural persons, type of legal entity, or foreign equity participation. The WTO Trade-Related Investment Measures (TRIMs) Agreement prohibits performance requirements tied to increasing or reducing exports or imports. The TRIMs Agreement thus prevents governments from stipulating that investors ensure a particular level of exports or reduction of imports.

51. Most FTAs include GATS plus commitments in Services chapters. These commitments may be made using positive or negative lists. A positive list approach follows the GATS structure, while a negative list names the sectors or subsectors that are limited or excluded from liberalization, as well as explicitly notes exceptions to national treatment or market access. Some FTAs combine the use of positive and negative lists for different sectors or subsectors.

52. FTAs often have provisions relevant for foreign investment admission and pre-establishment, including on performance requirements. Investment chapters usually extend the national treatment and most-favored nation provisions to the pre-establishment period—see, for instance, Articles 9.4 and 9.5, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). FTAs may also contain annexes or other documents limiting the sectors that benefit from these commitments. Investment chapters in FTAs usually include rules on performance requirements—see, for instance, Article 9.10, CPTPP. A 2020 study found that 60% of FTAs signed between 2010 and 2018 prohibit performance requirements, 58% prohibit technology transfer requirements, 59% prohibit exclusive supplier requirements, and 42% ban R&D requirements. Many of these FTAs incorporate TRIMs plus commitments (Andrenelli et al. 2020, 39).

53. The majority of BITs do not include disciplines on admission, pre-establishment or performance requirements, although some BITs do contain relevant provisions. According to a 2009 study, APEC economies with BITs containing pre-establishment commitments include the United States and Canada (APEC 2009, 6–7). Japan’s BITs also follow this approach (Dolzer et al. 2022, 137). These BITs extend the national treatment and most-favored nation standards to the pre-establishment phase. Although BITs rarely contain schedules for post-establishment standards, whether positive or negative lists, BITs containing pre-establishment provisions usually include schedules or negative lists excluding specific sectors from these commitments. The same 2009 APEC study indicates that 66% of the BITs in force at the time included performance requirements. However, 55% of these only cross-referenced the TRIMs agreement, while just 11% included TRIMs plus commitments, notably those of Canada; Chile; Japan; and the United States (APEC 2009, 15). A 2012 APEC handbook for negotiators provides examples of exceptions to performance requirement prohibitions. Economies may retain a right to implement measures designed to achieve specified policy objectives (for instance, climate change action) or preserve policy freedom in particular economic sectors using schedules (APEC–UNCTAD 2012, 89). A 2019 study indicates that economies have

increasingly included TRIMS plus performance requirement prohibitions influenced by the United States BIT model (Genest 2019, 30).

54. Moreover, IIAs often link admission or project approval processes to the application of ISDS. IIAs frequently define an investment as assets, such as a license or a permit, established according to domestic law. An ISDS claim based on an investment deemed to have been made illegally would be inadmissible or beyond the jurisdiction of the tribunal (Dolzer et al. 2022, 108). Other IIAs establish that a state may deny treaty benefits to an investment that was not established according to domestic law. Some ISDS tribunals have also concluded that investments established illegally cannot benefit from ISDS protection, irrespective of the content of the IIA. The legal status of an investment is to be judged according to the legislation at the time when the investment was made (Dolzer et al. 2022, 109–10).

55. In certain IIAs, approval in writing is legally required and established as a prerequisite for enjoying IIA and ISDS protection. In APEC economies, Thailand's IIAs provide an example of this practice. The 2002 Thailand–Germany BIT stipulates that “[t]his Treaty shall apply only to investments that have been specifically approved in writing by the competent authority, if so required by the laws and regulations of that Contracting Party” (Article 2). ASEAN follows a similar practice—for instance, the 2009 ASEAN Comprehensive Investment Agreement states that “‘covered investment’ means, with respect to a Member State, an investment in its territory of an investor of any other Member State in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and has been admitted according to its laws, regulations, and national policies, and where applicable, specifically approved in writing by the competent authority of a Member State” (Article 4). In spite of the apparent clarity of these provisions, some ISDS tribunals have relativized the importance of the approval in writing as a prerequisite for enjoying ISDS protection.¹⁵

56. As a general rule, governments maintain any regulatory authority to decide on the admission of FDI that they have not relinquished via international law (whether through multilateral, regional or bilateral agreements). Domestic FDI policy can therefore be more liberal than what is required under binding commitments under international law. For instance, governments may decide to admit an investment project either fast-tracking screening procedures or without imposing performance requirements at all. The difference between existing international law commitments and actual policy is often described using the term “water,” borrowing from the trade domain where “water” refers to the difference between bound and applied tariffs (OECD 2023, 6–7).

57. APEC's position, as evidenced in various publications, is that FDI can contribute to the significant investment needed for climate change mitigation and adaptation (See Chapter I). FDI inflows and outflows would also serve to enable the diffusion of technology and innovation. In this light, laws, provisions and mechanisms that limit FDI inflows and outflows would constitute an obstacle to achieving the Paris Agreement goals, particularly in developing economies.

58. On the other hand, economies can use admission, approval or screening mechanisms to block or disincentivize FDI in fossil fuels or projects otherwise not aligned with the Paris Agreement goals. Also, FDI admission and pre-establishment could be reformed and linked to measures or procedures to protect vulnerable groups, promote a just transition to a green economy, or ensure that developing economies play a more significant role in GVCs of green products and services.

59. Under many IIAs, to enjoy ISDS protection, foreign investors are required to comply with these local requirements or processes to be considered as investing in accordance with domestic law. Moreover, as noted above, some ISDS tribunals have reasoned that investing in accordance with domestic law is a prerequisite to access ISDS regardless of the treaty text.

60. Finally, it is important to consider the relationship between performance requirements and climate change mitigation and adaptation.¹⁶ The UNFCCC and the Paris Agreement promote the transfer of technology to developing and least-developed economies. UNCTAD's *World Investment Report 2023* recommends that economies consider incorporating into their IIAs "institutional mechanisms for cooperation on R&D of sustainable technologies," provisions to "encourage transfer of low-carbon and sustainable technologies, including related know-how," and "certain kinds of performance requirements relevant to the energy transition" (UNCTAD 2023a, 95). In a submission to the OECD public consultation on investment treaties and climate change, Professors Anne van Aaken and Tomer Broude suggested that economies may consider "performance requirements connected to climate friendliness, e.g. the sourcing of clean energy in the production processes of companies" but they note that "performance requirements pose problems under IIAs as well as international trade law (including government procurement)" (van Aaken and Broude 2022, 10). Meanwhile, a 2019 OECD study cautions against attempts to "force" technology transfers through joint ventures, conditioning access or markets, or weakening intellectual property rights, suggesting that private firms may not be willing to invest overseas under these conditions (OECD 2017b). A recent paper by Alan Sykes discusses the national security and business tensions related to technology transfer requirements (Sykes 2021).

B. Facilitation and promotion¹⁷

61. Most economies actively seek to promote and attract FDI flows. Under general public international law, economies are free to implement facilitation measures, such as speeding up licensing procedures or streamlining administrative requirements. Equally, there are no limitations to the benefits or incentives that economies may concede to investors in order to promote FDI. These incentives may be fiscal, financial or other regulatory incentives. IIA standards of protection and ISDS can be understood as a regulatory incentive with effects somewhat similar to political risk insurance—the legal industry also compares IIAs and ISDS to stabilization clauses (Charles Rivers 2023, 28).

62. Facilitation or promotion measures may be enshrined in domestic or international law. Most fiscal and financial incentives are implemented through domestic legislation, while regulatory incentives such as investment facilitation or protection measures may be legislated in domestic or international law. IIAs are primarily concerned with investment protection, although there is a new trend to incorporate specific investment facilitation provisions in these treaties. In contrast to old-generation IIAs, essentially “one-off deals” dedicated almost exclusively to foreign investment protection, UNCTAD points out that investment facilitation mechanisms “establish long-lasting cooperation between the treaty parties and their institutions” (UNCTAD 2023d, 1). Most investment facilitation features are non-binding and excluded from ISDS; economies have preferred to rely on amicable consultations and implementation monitoring.

i) Investment facilitation

63. Brazil’s approach in its Investment Cooperation and Facilitation Agreements constitutes a well-known case of an IIA containing investment facilitation mechanisms; this treaty model is exceptional because it provides for state-to-state arbitration exclusively. More recently, the CPTPP and RCEP included some facilitation tools, although Chapter 22 of the CPTPP on Competitiveness and Business Facilitation does not include detailed facilitation provisions, and RCEP contains only soft and limited commitments.

64. The inclusion of investment facilitation provisions in international treaties has accelerated rapidly. Multilateral negotiations on investment facilitation ended successfully in July 2023, when the WTO announced that participants agreed on the text of the Investment Facilitation for Development (IFD) Agreement, which has disciplines on transparency, as well as streamlining and speeding up administrative procedures.¹⁸ Regional negotiations have also incorporated specific investment facilitation commitments. In 2021, ASEAN members established the ASEAN Investment Facilitation Framework, agreeing to “uphold and implement to the extent practicable and in accordance with its respective domestic laws and regulations, as well as its respective international obligations”, a series of investment facilitation mechanisms and institutions. The Draft African Continental Free Trade Area (AfCFTA) Protocol on Investment adopted in February 2023 includes provisions on visa and permit processes, administration procedures, regulatory cooperation, coordination and national focal points (Article 7).

65. UNCTAD reports that 30% of new-generation IIAs include some investment facilitation feature, and that these constitute 70% of all IIAs signed since 2020. The most common provisions refer to the regulatory environment, cooperation mechanisms, stakeholder engagement and sustainable development (UNCTAD 2023d, 1). Economies have also begun to sign agreements devoted exclusively to investment facilitation (e.g., the EU–Angola Sustainable Investment Facilitation Agreement). An important trend is that economies prefer to maintain investment facilitation and protection separately or to explicitly clarify that facilitation does not fall within the scope of ISDS (e.g., the IFD Agreement).

66. At the same time, some of these new agreements explicitly link investment facilitation with climate change, acknowledging the importance of international cooperation to increase green foreign investment flows and meet the Paris Agreement goals. One example is the 2022 Australia–Singapore Green Economy Agreement (GEA), which aims to facilitate trade and investment in green goods and services. This agreement includes provisions on 1) trade and investment; 2) standards and conformance; 3) green and transition finance; 4) carbon markets; 5) clean energy, decarbonization and technology; 6) skills and capabilities; and 7) business engagements and partnerships. Some commentators believe that the GEA is an example of what trust and cooperation may enable economies to achieve, and could serve as inspiration for multilateral initiatives, such as the World Bank’s Action on Climate and Trade (Randhawa 2023).

67. Many APEC economies have also entered into agreements and memoranda of understanding under Article 6 of the Paris Agreement, which allows economies to cooperate with one another to achieve their NDCs and promote sustainable development and environmental integrity. Singapore is a case in point, having signed in 2022 the Singapore–Papua New Guinea Memorandum of Understanding for Collaboration and the Singapore–Peru Memorandum of Understanding for Collaboration. Developed and developing economies have also signed Just Energy Transition Partnerships. Indonesia; South Africa, and Viet Nam, for instance, have signed Just Energy Transition Partnerships, securing USD 20, 9 and 15 billion respectively, including loans and grants to enable reducing their coal use (Ordenez et al. 2023, 1). In the case of APEC economy Viet Nam, its agreement with the International Partners Group (Canada; Denmark; the EU; France; Germany; Italy; Japan; the United Kingdom; the United States; and Norway) explicitly mentions the importance of protecting vulnerable groups (Barnes 2022).

ii) Investment promotion

68. As explained above, most economies implement incentives and other FDI promotional schemes through domestic law. UNCTAD’s *World Investment Report 2023* provides a mapping of the incentives and benefits that economies offer private investors in view of accelerating a green energy transition. Fiscal incentives include reduction of taxes, tax breaks and tax holidays; financial incentives usually consist of grants, subsidies and loans; and regulatory mechanisms include auctions, feed-in tariffs, quotas, renewable energy certificates, guarantees and business facilitation (UNCTAD 2023a, 80–89). Most least-developed and developing economies use fiscal tools, while developed economies prefer financial and other regulatory mechanisms (UNCTAD 2023a). The report also notes that economies continue to subsidize fossil fuels despite their pledges to reduce these subsidies.

69. The 2023 *APEC Green Finance Report* calls on APEC economies to “consider formulating a principle stating that part of fossil fuel subsidies should be phased out, whereas another part should be redirected towards renewable energies, especially for poor and vulnerable populations” (APEC 2023a, 11). The report also points to the importance of addressing the profitability–risk ratio of

green investments to resolve the financial gap—either by resolving market distortions or increasing the provision of green finance (APEC 2023a, 65).

70. Several submissions to the OECD consultation on investment treaties and climate change made the argument that foreign investors in clean energies may be enticed to invest if IIAs and ISDS protection are available, not least because IIAs can signal predictability (Asian Development Bank 2022; Cambridge Research Group on Foreign Investment and the Environment 2022). In this respect, the OECD background note explains that the scope of protection under IIAs is usually broad, including within it green foreign investment; however, fossil fuels and other high GHG emission projects not aligned with the Paris Agreement also fall within the scope of most investment treaties (OECD 2023).

71. Multilateral, plurilateral and bilateral agreements normally establish limitations to the incentives and benefits that economies offer to attract FDI flows. The WTO Subsidies Agreement limits the subsidies that governments may offer, and notably prohibits subsidies tied to increasing exports or reducing imports. In 2024, a global minimum effective rate of corporate tax of 15% will become effective in more than 140 economies. Investment chapters in FTAs usually include provisions prohibiting lowering environmental, labor and other standards to attract foreign investment. In the case of the CPTPP, a provision concerning environmental standards was included in the Environment Chapter (Article 20.3.6). FTAs also contain rules on subsidies, performance requirements and other disciplines that limit the incentives that economies may offer foreign investors. For instance, performance requirement provisions often prohibit linking incentives to local content or technology transfer requirements.

72. According to 2009 and 2012 studies, various BITs of APEC economies included non-lowering standards prohibiting the relaxation of environmental standards to attract foreign investment (APEC 2009, 18–19; APEC–UNCTAD 2012, 185–87). UNCTAD’s *World Investment Report 2023* notes that 24% of all IIAs concluded between 2012 and 2022 included non-lowering provisions concerning environmental standards (UNCTAD 2023a, 90).

73. Economies may also implement unilateral mechanisms to counteract the effects of foreign investment incentives or benefits. Carbon Adjustment Border Mechanisms (CBAM) may be used to ensure that governments do not attract foreign investment by failing to improve or by relaxing their environmental standards. Economies may require foreign investors to comply not only with regulations in the host economy, but also with those in their home economy.

74. The interaction between incentives to promote foreign investment and IIAs has become a significant question in ISDS practice. In the 2000s, many European economies offered generous feed-in tariffs to promote solar energy (Cointe and Nadaï 2018). When these economies were forced to significantly modify the incentives after economic and technological conditions changed, however, foreign investors filed numerous ISDS cases calling for compensation under the ECT. The total number of cases amounts to at least 119, and many were decided against the respondents on the grounds that public measures disappointed investors’ legitimate expectations (UNCTAD 2023a, 92). In a case that is ongoing

at the time of writing,¹⁹ a foreign investor in the wind energy sector claims that the replacement of feed-in tariffs for an auction system affected its rights under the ECT. In relation to these cases, UNCTAD has commented that:

While investors seek stability and guarantee of returns, States should not be unduly hindered in phasing out unsustainable investment and experimenting with incentive schemes in the renewable energy sector, including by adopting and later changing or abrogating such schemes (UNCTAD 2023a, 92).

C. Standards of protection and ISDS²⁰

75. Under general public international law, governments have the right to regulate foreign investors and investments established or operating in their territories. Foreign investors are subject to domestic laws and courts, although home governments may bring an international claim against the host economy after a foreign investor exhausts local remedies. These diplomatic protection claims must be based on the alleged violation of international law—treaty law, customary international law or general principles of law. Customary international law includes a minimum standard of treatment that all economies are obliged to uphold irrespective of their ratified treaties and domestic law (for instance, customary international law includes a denial of justice standard).

76. From the 1960s onward, economies started negotiating IIAs with specific standards of protection and ISDS. These standards regulate the way host governments treat foreign investors after establishment (post-establishment treatment). Standards of protection include national treatment, most-favored nation, expropriation, fair and equitable treatment (FET) or minimum standard of treatment (MST), full protection and security, and umbrella clauses. Under most IIAs, foreign investors can use ISDS to bring cases before international arbitral tribunals for alleged violations of IIAs without having to exhaust local remedies. Home economies have a non-existent or limited role in ISDS; home governments can do little more than submit briefings concerning the interpretation of the applicable IIA. The most common remedy under ISDS is monetary compensation; arbitral tribunals rarely ask governments to rescind or change a public measure.

77. IIAs define a broad scope of application. They usually define investor and investment broadly, extending treaty protection to most investors and investments. Investors must be a national or corporation of the other contracting party; domestic investors are not protected under IIAs. The broad definition of investments provides protection to most assets, although recent IIAs exclude from the scope of protection sovereign debt and investments in the tobacco sector (sectoral carve-outs). IIAs also tend to limit the application of some provisions to tax matters and prudential financial regulations (carve-outs by reference to the nature of the regulation). As mentioned in Chapter I, the OECD has suggested that the broad definitions provided for in IIAs may not be aligned with the Paris Agreement (OECD 2023, 3).

78. Assuming that economies will not discriminate in favor of domestic or other foreign investors after establishment, the most relevant standards of protection for climate change-related ISDS cases are expropriation (especially indirect or regulatory expropriation) and the FET or MST standards. The full protection and security standard has not been relevant in environmental cases to date, although given the context of climate change, it is reasonable to expect that tribunals could be asked to consider whether governments complied with their due diligence obligations to protect the physical integrity of investments from the consequences of climate change, such as flooding or heatwaves. The *Allard v. Barbados* ISDS case illustrates this possibility.²¹ A related issue is whether governments could be obliged under international law to take climate adaptation action related to the physical safety of foreign-owned assets; Chapter IV looks at these questions in more detail.

79. According to APEC's 2012 handbook for negotiators, "[t]he expropriation provision does not deprive States of their right to expropriate property but regulates the manner in which the said right must be exercised" (APEC–UNCTAD 2012, 57). The most relevant condition for any legal expropriation is to pay prompt, adequate and effective compensation. The handbook explains that, "[i]ndirect expropriation happens when a measure or series of measures taken by the host State have effect equivalent to a direct expropriation. Indirect expropriation renders property rights useless, even though the owner may retain the legal title or remain in physical possession of the property" (APEC–UNCTAD 2012, 58). Relevant findings of indirect expropriation in disputes with environmental implications include *Santa Elena v. Costa Rica*,²² *Metalclad v. Mexico*,²³ *TecMed v. Mexico*.²⁴ Meanwhile, important cases related to the environment decided in favor of host economies include *Methanex v. USA*,²⁵ *Glamis v. USA*²⁶ and *Chemtura v. Canada*.²⁷ It is increasingly rare for ISDS tribunals to award compensation for indirect expropriation, as most ISDS tribunals define a high threshold: public measures need to be severe in rendering investor rights "useless." Furthermore, treaty parties have incorporated additional language to clarify that general non-discriminatory measures for a public purpose, such as environmental protection, would rarely constitute indirect expropriation (See Chapter III).

80. The distinction between legitimate regulation and regulatory measures that constitute expropriation remains contentious (Dolzer et al. 2022, 153).²⁸ The awards in *Bear Creek v. Peru*²⁹ and *Rockhopper v. Italy*³⁰ illustrate this tension. The arbitral tribunals decided that the foreign investors had met all the requirements to have been issued a license for their mining or offshore oil projects, and the subsequent decision to cancel the projects constituted expropriation under the Peru–Canada FTA and the ECT. It is noteworthy that the tribunals ruled in favor of the foreign investors although the public measures in question were related to the protection of the environment and vulnerable groups. Meanwhile, the 2022 award in *Lone Pine v. Canada*³¹ rejected a claim of indirect expropriation arising from a ban on gas fracking. This tribunal reasoned that the ban did not deprive the investor of the entire project.³² (For a discussion of *Rockhopper v. Italy* and *Lone Pine v. Canada*, see Arcuri et al. 2024.)

81. The interaction between indirect expropriation and measures necessary for climate change mitigation and adaptation call for further study. It is unlikely that tribunals will make a finding on indirect expropriation if measures are general, non-discriminatory, for a public purpose, and do not render investor rights useless or entirely deprive the investor of its project. Measures necessary for climate change adaptation in sectors such as water or agriculture may impact a project's value or profitability, but would infrequently have a severe impact on a project. The case of climate change mitigation measures—such as restricting or phasing out fossil fuel projects—may be more difficult to determine in advance, as these measures could indeed render the rights “useless.” If a foreign investment project is cancelled or licenses to operate are terminated, there is a possibility that investors obtain an award for indirect expropriation, especially if the measure deprives the investor of its project entirely.³³ The question would hinge on whether the underlying rights were rendered useless, and whether the public measure was general, non-discriminatory, reasonable, proportionate and necessary. According to the *Methanex v. USA* award, the regulatory context at the time of the investment may also be a determinant in deciding a dispute.³⁴

82. Arbitral tribunals will have to consider these elements in light of the applicable IIA. Treaty language may be of consequence in indirect expropriation disputes related to climate change mitigation or adaptation measures. For instance, the India–Kyrgyzstan BIT (2019) states that “[n]on-discriminatory regulatory measures by a Party or measures or awards by judicial bodies of a Party that are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment shall not constitute expropriation under this Article” (Article 5.5). Meanwhile, the CPTPP Annex 9-B states that “[n]on-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.” The meaning of “rare circumstances” is yet to be interpreted by ISDS tribunals.

83. According to APEC's 2012 handbook for negotiators, the FET standard of treatment is “an absolute, not relative, standard of treatment. Its objective is to guarantee a certain minimum standard of treatment that does not require comparison with the treatment which the host State accords to its own investors or to any other foreign investors” (APEC–UNCTAD 2012, 49). This standard may be defined without any qualifications, autonomously, or with reference to customary international law. The 2012 handbook adds that “[t]he content of this obligation varies and depends on the formulation adopted by the Contracting Parties when concluding the treaty” (APEC–UNCTAD 2012, 49). Definitions of this standard of protection have prompted controversy. Many economies have refined their treaty definitions of FET, MST and, more recently, of legitimate expectations.

84. When applying the FET or MST standards, ISDS tribunals usually review whether governments have treated investors in a non-arbitrary, fair, transparent, consistent, proportionate and reasonable manner. Some ISDS tribunals have found that treatment in breach of representations made by the host government

which were reasonably relied on by the investor (legitimate expectations) can violate the FET or MST standards.

85. Most awards against respondents in ISDS cases are based on the FET or MST standards of treatment. In cases involving environmental measures, arbitral tribunals have decided against respondents for arbitrary or inconsistent actions. In *Bilcon v. Canada*³⁵ and *Eco Oro v. Colombia*,³⁶ the arbitral tribunals considered that host economies first actively supported the investment projects, but then shifted their orientation and made it impossible for investors to continue to the extraction phase of the project. In *Bilcon v. Canada*, the Joint Review Panel in Canada privileged “core community values,” which the majority of the arbitral tribunal considered to be an “unprecedented approach” that was “unwinnable” for the investor.³⁷ In *Eco Oro v. Colombia*, the majority of the tribunal found that various government agencies acted in an inconsistent manner, violating the investor’s legitimate expectation that “it would be entitled to undertake mining exploitation” and that “Colombia would ensure a predictable commercial framework for business planning and investment.”³⁸ The majority in the *Lone Pine v. Canada* case decided, however, that a ban on gas fracking was not a violation of the MST.³⁹

86. The dissenting arbitrator in *Eco Oro v. Colombia* suggested that the protection of investors’ legitimate expectations may be inconsistent with climate change action. He observed that:

In the age of climate change and significant loss of biological diversity, it is clear that society finds itself in a state of transition. The law – including international law – must take account of that state of transition, which gives rise to numerous uncertainties.⁴⁰

87. Another group of awards relating to climate change mitigation measures relates to the reconsideration of solar energy subsidies. Foreign investors established solar energy projects enticed by feed-in tariffs mechanisms in Spain, Italy and other European economies. When these governments decided to reconsider these mechanisms—primarily for fiscal reasons—the investors sued the economies under the ECT, asking for compensation. No arbitral tribunals decided that the reconsideration of the feed-in tariffs mechanism constituted indirect expropriation. This position is consistent with the CPTPP (Article 9.8.6). However, many tribunals found that there had been violations of the ECT even where the projects remained profitable, on the basis that governments had breached investors’ legitimate expectations. Recent work has discussed these decisions from a regulatory and economic perspective (Horn 2023). Horn claims that the reform of these incentives can be necessary to “correct for mistakes made in the design of the schemes,” which in some cases were “too generous” (Horn 2023, 30). Because such policy mistakes are to be expected in view of increasing uncertainty, the interaction between IIAs and climate change “raises questions concerning the role of investment agreements in situations with rapidly evolving external conditions” (Horn 2023, 30).

88. There are a number of pending ISDS cases involving environmental or climate change measures. These include disputes related to phasing out coal

plants (*Towra v. Slovenia*,⁴¹ *Westmoreland Coal Company v. Canada*⁴², *AET v. Germany*⁴³), windfall tax over coal (*Klesch Group v. Denmark*,⁴⁴ *Klesch Group v. Germany*,⁴⁵ *Klesch Group v. European Union*⁴⁶) and issues with environmental or other licenses needed for extraction or transport of fossil fuels or other resources (*Zeph v. Australia I*,⁴⁷ *Zeph v. Australia II*,⁴⁸ *Ruby River v. Canada*,⁴⁹ *Ascent Resources v. Slovenia*⁵⁰, *TransCanada v. United States*⁵¹, *Alberta PMC v. United States*⁵²).

89. Assessing the outcome of ISDS disputes related to climate change mitigation is not simple. According to the International Center for the Settlement of Investment Disputes (ICSID), 31% of cases registered with the center by 31 December 2022 were totally or partially resolved in favor of investors, 18% were decided in favor of respondents, 14% were rejected for lack of jurisdiction, while the remainder were either discontinued or settled (ICSID 2023, 13). It is also difficult to predict the number of ISDS disputes related to climate change measures that may arise. Concerns that the Covid-19 crisis would prompt a large number of ISDS cases did not materialize. However, according to UNCTAD, fossil fuels investors are familiar with ISDS and can “be expected to use existing arbitral mechanisms to challenge climate action measures aimed at restricting or phasing out fossil fuels” (UNCTAD 2023a, 92). Reports from the legal industry similarly suggest a surge in ISDS climate-related litigation (Jones Day 2022; Freshfields 2023, 18; Charles Rivers 2023, 4–5).

90. Beyond the actual number of ISDS disputes and their outcomes, commentators have pointed to the risks of regulatory chill in relation to restricting or phasing out the exploration or extraction of fossil fuels or the production of energy from fossil fuels. Harvard Professor Louis T. Wells made this point in his submission to the OECD public consultation, for instance (Wells 2022). According to the CCSI, situations of regulatory chill related to climate change mitigation or adaptation measures have been reported in Denmark, France and New Zealand (CCSI 2022a).

91. Most studies about the relation between IIAs, ISDS and climate change action focus almost exclusively on climate change mitigation measures. However, it is expected that governments will have to take much broader measures to adapt to climate change, particularly in the domains of water, agriculture, health and energy, and that these could also be challenged under the FET or MST standards. As opposed to indirect expropriation cases, arbitral tribunals have found that measures that do not render investor rights “useless” can nevertheless violate these standards of protection. Taking into account the prevailing view that governments need to experiment with flexible and adaptable regulatory options to address climate change, there is a risk of ISDS disputes in relation to climate change adaptation measures. The scale and speed of the required investments, according to the IPCC, indicate that action cannot be delayed until governments design a close to perfect regulatory regime.

92. ISDS may also interact with measures to promote the participation of all stakeholders and protect vulnerable groups. The structure of IIAs and ISDS is asymmetrical in that these agreements only create rights and remedies for foreign investors (IIED 2019). Foreign investors have no or limited binding obligations

under IIAs; for this reason, host governments can rarely initiate ISDS disputes or file counterclaims. Local actors have neither rights under IIAs nor standing in ISDS. In the past, foreign investors have sued host economies for public measures aimed at protecting vulnerable groups or their environment (Perrone 2019). Local actor participation in these ISDS disputes has been limited to amicus curiae submissions, which ISDS tribunals have not always accepted (for instance, *Eco Oro v. Colombia*⁵³).

93. Another area of interaction between ISDS and climate change mitigation and adaptation involves questions of intellectual property (Correa and Viñuales 2016). Intellectual property rights are protected under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Many FTAs contain TRIPS plus protections. These agreements have their own dispute settlement mechanisms but foreign investors can and have relied on ISDS to bring claims for potential violations of their intellectual property rights (for instance, *Eli Lilly v. Canada*⁵⁴). There is a risk, for instance, that investors will consider that measures aimed at transferring or diffusing technology implemented under the terms of the UNFCCC and the Paris Agreement constitute breaches of their intellectual property rights.

94. Governments have reacted to these risks in different ways:

1) Governments have introduced additional language to IIAs to protect their right to regulate. UNCTAD notes that 17% of IIAs signed between 2012 and 2022 include right to regulate provisions (UNCTAD 2023, 90). Most recently, Canada and the EU have published a draft interpretation of the investment chapter in their bilateral Comprehensive Economic and Trade Agreement (CETA), in which Parties agreed that a Tribunal must give due consideration to the commitments of the Parties under multilateral environmental agreements, including the Paris Agreement.⁵⁵ Also, Chile and the EU have concluded a joint interpretative declaration on the provisions on investment protection contained in the Chile-EU Advanced Framework Agreement, in which they confirm that their investors should expect that the Parties will adopt measures to combat climate change.⁵⁶

2) Governments have introduced general exceptions in their agreements similar to those found in Article XX of the General Agreement on Tariffs and Trade (GATT). However, awards in *Bear Creek v. Peru*⁵⁷ and *Eco Oro v. Colombia*⁵⁸ cast doubt on the efficacy of using these provisions to protect states' right to regulate. Canada has abandoned this treaty practice in its new BIT model (Canada's 2021 Foreign Investment Promotion and Protection Agreement Model).⁵⁹

3) Some European economies have exited the ECT, while others have suggested they are unwilling to support a modernized version of the ECT, as the new text falls short of revising the treaty scope and reinforcing the protection of states' right to regulate (OECD 2022). In July 2023, the European Commission proposed a coordinated EU withdrawal from the ECT. On 24 April 2024, the European Parliament voted in favor of an EU withdrawal from the ECT, as this treaty hampers climate transition. The European Council will be able to decide on the withdrawal by a qualified majority (IISD 2024).

95. Discussions at the OECD Future of Investment Treaties (Track 1) suggest that the scope of IIA protection may need to be revisited to make it consistent with the Paris Agreement. A potential solution is a fossil-fuel carve out. An UNCTAD–IIED policy brief makes the following recommendations to IIA negotiators: 1) ensure consistency between IIAs and climate change commitments; 2) distinguish between high and low GHG emission foreign investment; 3) ensure states’ right to promote climate mitigation and adaptation action, through “[r]efining protection standards [which] offers a more systemic approach than issue-by-issue carve-outs for climate or other measures”; 4) enhance investor obligations and other environmental provisions; 5) realign old-generation IIAs with climate change commitments; and 6) strengthen regional and international fora to discuss the interaction between IIAs and climate change action (UNCTAD–IIED 2022).

96. According to UNCTAD’s *World Investment Report 2023*, the most common climate change provisions found in recent IIAs (2012–22) are the following: 1) climate/environmental carve-outs to expropriation—41%; 2) climate/environmental carve-outs to performance requirement prohibition—32% (the percentage concerns only IIAs that include performance requirement provisions, i.e., 94 of the 284 IIAs analyzed); 3) non-lowering/waiving of standards—24%; 4) right to regulate—17%; 5) cooperation on climate action—10%; 6) corporate social responsibility—8%; 7) promotion of sustainable investment—6%; 8) implementation of international environmental obligations—6%; 9) climate/environmental carve-outs to national/most-favored-nation treatment—4%; and 10) respecting host state’s environmental regulations—4% (UNCTAD 2023a, 90).

III. Study of the IIAs in APEC economies

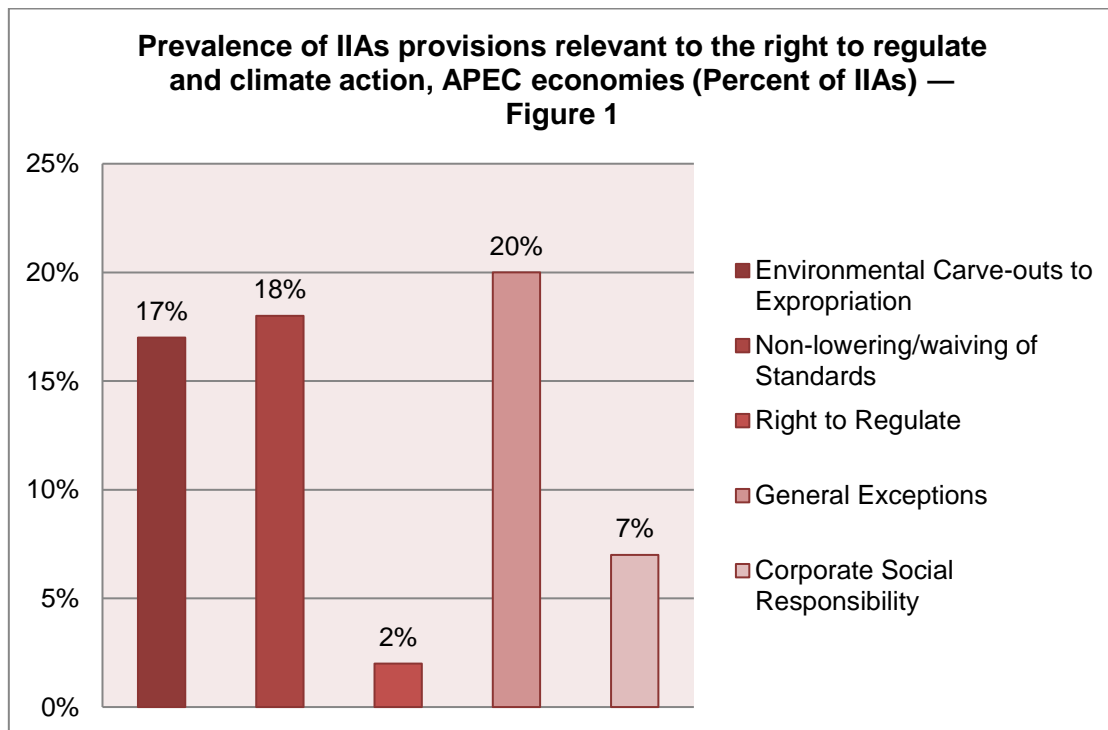
97. Recent studies by international organizations (notably UNCTAD) and academic papers (for instance, Baltag et al. 2023; Masumy and Shang 2023) have examined IIAs through the lens of the right to regulate, assessing the regulatory space that governments have under old-generation and new-generation IIAs. There is no similar analysis looking specifically at the IIAs in APEC economies, however. This chapter fills that gap with a study prepared using UNCTAD’s International Investment Agreements Navigator.

98. A database was prepared of the IIAs in APEC economies, incorporating treaties signed but not in force because they offer insight into current IIA trends. Investment chapters in FTAs are considered in the analysis, as well as other FTA chapters when relevant (in particular Environment, Trade and Development, and General Exceptions chapters, and Cooperation chapters were also occasionally considered). IIAs that have been terminated or are no longer in force were excluded from the database. Treaties that contain none of the typical investment standards of promotion or protection found in IIAs were also excluded; however, relevant treaties without ISDS were included. Results are presented as average percentages of APEC economies IIAs.

99. Section A summarizes the conclusions of this study on the right to regulate to implement climate mitigation and adaptation measures. Following UNCTAD’s *World Investment Report 2023* (UNCTAD 2023a, 90), the IIA provisions examined are: 1) environmental carve-outs to expropriation, 2) non-lowering/waiving of standards, 3) right to regulate, 4) general exceptions, and 5) corporate social responsibility. The study also analyzed performance requirement prohibition provisions and environmental/other carve-outs to performance requirement prohibitions. Various wordings were considered for each provision, and a qualitative analysis was conducted to complement the quantitative analysis. The study identified how many IIAs in force or signed were concluded in 2010 or before—considered to be old-generation IIAs, and how many were concluded in 2011 or after—considered to be new-generation IIAs. Section B looks at recent trends in FTAs considering the text of Investment and other relevant chapters.

A. Results of the study

100. **Provisions relevant to the right to regulate and climate action:** The results for 1) environmental carve-outs to expropriation, 2) non-lowering/waiving of standards, 3) right to regulate, 4) general exceptions, and 5) corporate social responsibility are shown in Figure 1.



101. The wording of these provisions is normally quite similar but not identical, and minor differences may have implications in actual ISDS cases. A selection of relevant examples follows below. An interesting trend found in some agreements is the combination of non-lowering/waiving standards and the right to regulate in the same provision. In light of the variety of approaches to the right to regulate, an extended list of relevant provisions is included in this report as Annex I.

- Selected environmental carve-outs to expropriation provisions:

(2009) ASEAN–Australia–New Zealand Free Trade Area (AANZFTA)
Annex on Expropriation and Compensation

4. Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute expropriation of the type referred to in Paragraph 2(b).

(2018) Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

Annex 9-B

Expropriation

(b) Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.

(2020) Regional Comprehensive Economic Partnership (RCEP)

Annex 10B

Expropriation

4. Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, public morals, the environment, and real estate price stabilisation, do not constitute expropriation of the type referred to in subparagraph 2(b).

- Selected non-lowering/waiving of standards provisions:

(2003) Chile–Korea FTA

Article 10.18: Environmental Measures

2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the Parties shall consult with a view to avoiding any such encouragement.

(2012) Canada–China BIT

Article 18 Consultations

3. The Contracting Parties recognize that it is inappropriate to encourage investment by waiving, relaxing, or otherwise derogating from domestic health, safety or environmental measures.

- Selected right to regulate provisions:

(2014) Turkey–Viet Nam BIT

Article 4

Right to Regulate

1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory 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;
- (c) imposed for the protection of national treasures of artistic, historic, archeological value.

2. Nothing in this Agreement shall be construed:

(a) to require any Contracting Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;

(b) to prevent any Contracting Party from taking any actions that it considers necessary for the protection of its essential security interests

(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,

(ii) taken in time of war or other emergency in international relations,

(iii) to protect critical public infrastructures, including communication, power and water infrastructures, from deliberate attempts intended to disable or degrade such infrastructures;

or

(iv) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices;

or

(c) to prevent any Contracting Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

(2019) EU–Viet Nam FTA

Chapter 2

Investment Protection

Article 2.2

Investment and Regulatory Measures and Objectives

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

2. For greater certainty, this Chapter shall not be interpreted as a commitment from a Party that it will not change its legal and regulatory framework, including in a manner that may negatively affect the operation of investments or the investor's expectations of profits.

3. For greater certainty and subject to paragraph 4, a Party's decision not to issue, renew or maintain a subsidy or a grant shall not constitute a breach of this Chapter in the following circumstances:

(a) in the absence of any specific commitment to an investor of the other Party or to a covered investment under law or contract to issue, renew, or maintain that subsidy or grant; or

(b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy or grant.

4. For greater certainty, nothing in this Chapter shall be construed as preventing a Party from discontinuing the granting of a subsidy or requesting its reimbursement, or as requiring that Party to compensate the investor therefor, where such action has been ordered by one of its competent authorities listed in Annex 1 (Competent Authorities).

(2022) Pacific Alliance–Singapore FTA

Article 8.3: Right to Regulate

1. The Parties reaffirm their right to regulate within their respective territories to achieve legitimate policy objectives.

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

- Selected right to regulate and non-lowering standards provisions:

(2018) EFTA–Indonesia Comprehensive Economic Partnership Agreement

Article 4.8

Right to Regulate

1. Subject to the provisions of this Chapter, a Party may, on a non-discriminatory basis, adopt, maintain or enforce any measure that is in the public interest, such as measures to meet health, safety or environmental concerns or reasonable measures for prudential purposes.

2. A Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, measures to meet health, safety or environmental concerns as an encouragement for the establishment, acquisition, expansion or retention in its territory of a commercial presence of persons of another Party or a non-party.

(2020) Japan–UK Comprehensive Economic Partnership Agreement

Chapter 16

Trade And Sustainable Development

Article 16.2

Right to regulate and levels of protection

1. Recognising the right of each Party to determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify accordingly its relevant laws and regulations, consistently with its commitments to the internationally recognised standards and international agreements to which the Party is party, each Party shall strive to ensure that its laws, regulations and related policies provide high levels of environmental and labour protection and shall strive to continue to improve those laws and regulations and their underlying levels of protection.

2. The Parties shall not encourage trade or investment by relaxing or lowering the level of protection provided by their respective environmental or labour laws and regulations. To that effect, the Parties shall not waive or otherwise derogate from those laws and regulations or fail to effectively enforce them through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.

3. The Parties shall not use their respective environmental or labour laws and regulations in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party, or a disguised restriction on international trade.

- Selected general exceptions provisions:

(1995) Canada–Philippines BIT

Article XVII

Application and General Exceptions

(1) This Agreement shall apply to any investment made by an investor of one Contracting Party in the territory of the other Contracting Party before or after the entry into force of this Agreement.

(2) Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

(3) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:

(a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement.

(b) necessary to protect human, animal or plant life or health; or

(c) relating to the conservation of living or non-living exhaustible natural resources.

(4) The Annex shall form an integral part of this Agreement.

(2009) ASEAN Comprehensive Investment Agreement

Article 17

General Exceptions

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member States or their investors where like conditions prevail, or a disguised restriction on investors of any other Member State and their investments, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures:

(a) necessary to protect public morals or to maintain public order;

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with this Agreement, including those relating to:

(i) the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety;

(d) aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investments or investors of any Member State;

(e) imposed for the protection of national treasures of artistic, historic or archaeological value;

(f) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

2. Insofar as measures affecting the supply of financial services are concerned, paragraph 2 (Domestic Regulation) of the Annex on Financial Services of the General Agreement on Trade in Services in Annex 1B to the WTO Agreement (“GATS”) shall be incorporated into and form an integral part of this Agreement, *mutatis mutandis*.

(2020) RCEP

Article 17.12: General Exceptions

1. For the purposes of Chapter 2 (Trade in Goods), Chapter 3 (Rules of Origin), Chapter 4 (Customs Procedures and Trade Facilitation), Chapter 5 (Sanitary and Phytosanitary Measures), Chapter 6 (Standards, Technical Regulations, and Conformity Assessment Procedures), Chapter 10 (Investment), and Chapter 12 (Electronic Commerce), Article XX of GATT 1994 is incorporated into and made part of this Agreement, *mutatis mutandis*.

2. For the purposes of Chapter 8 (Trade in Services), Chapter 9 (Temporary Movement of Natural Persons), Chapter 10 (Investment), and Chapter 12 (Electronic Commerce), Article XIV of GATS including its footnotes is incorporated into and made part of this Agreement, *mutatis mutandis*.

- *Selected corporate social responsibility provisions:*

(2018) CPTPP

Article 9.17: Corporate Social Responsibility

The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.

(2018) United States–Mexico–Canada Agreement (USMCA)

Article 14.17: Corporate Social Responsibility

The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Party, which may include the OECD Guidelines for Multinational Enterprises. These standards, guidelines, and principles may address areas such as labor, environment, gender equality, human rights, indigenous and aboriginal peoples’ rights, and corruption.

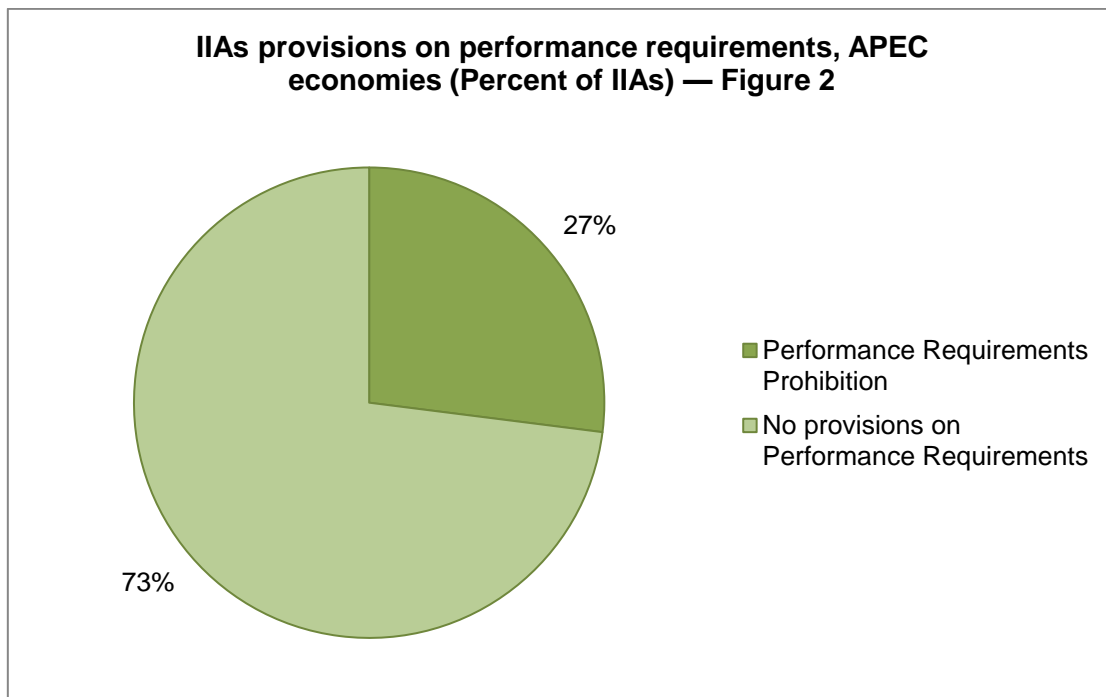
(2020) Australia–UK FTA

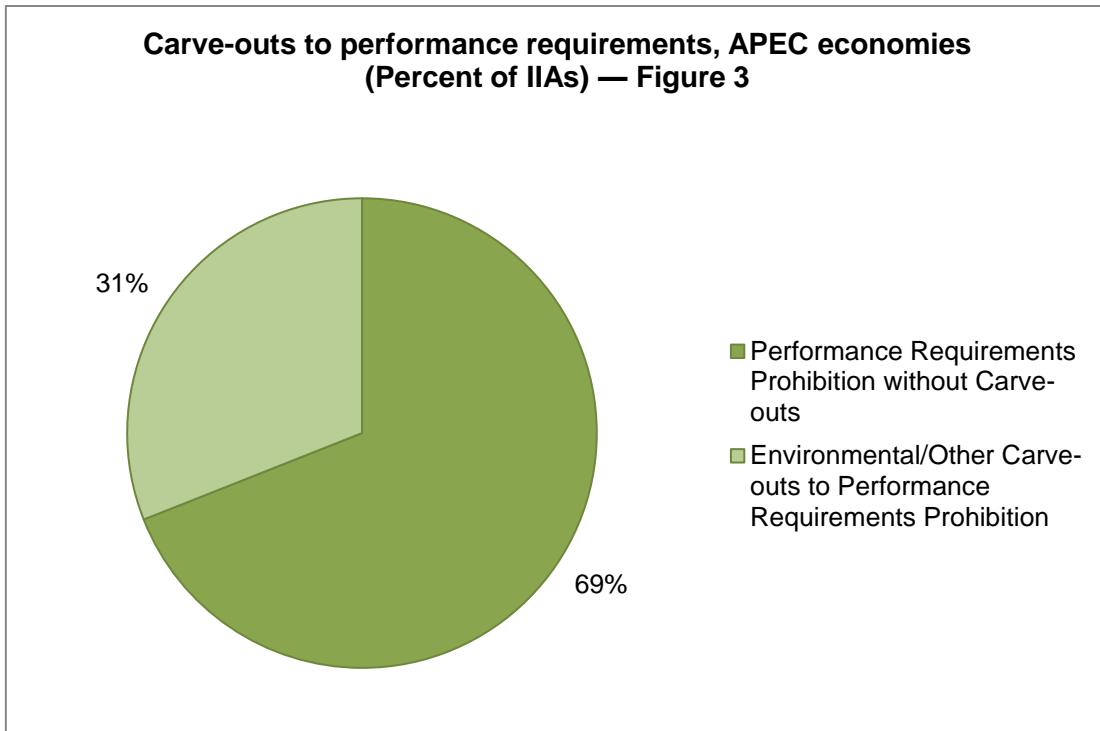
Article 13.19

Corporate Social Responsibility

Each Party reaffirms the importance of encouraging investors operating within its territory or subject to its jurisdiction voluntarily to incorporate into their internal policies those internationally recognised standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Party, such as the OECD Guidelines for Multinational Enterprises done at Paris on 21 June 1976 and the United Nations Guiding Principles on Business and Human Rights done at Geneva on 16 June 2011.

102. **Performance requirement provisions:** The results for performance requirement prohibitions are shown in Figure 2 and for environmental/other carve-outs to performance requirement prohibitions in Figure 3.





103. The IIAs of APEC economies show some consistency regarding environmental/other carve-outs to performance requirement prohibitions. IIAs that only refer to the TRIMs Agreement rarely or never include exceptions. Some IIAs with TRIMs plus commitments refer to the TRIPS Agreement flexibilities, with most of these IIAs including two types of flexibilities that could be relevant for climate change measures.

104. The first type refers to measures that require investments to implement certain technologies for health or environmental reasons. Examples include:

(2003) Panama–Chinese Taipei FTA

Article 10.07 Performance Requirements

7. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 6(b). For greater certainty, Articles 10.02 and 10.03 apply to the measure. [National Treatment and Most Favored Nation standards].

(2016) Canada–Hong Kong, China BIT

Article 9

Performance Requirements

1. A Party may not impose or enforce the following requirements, or enforce a commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of a covered investment in its area: [...]

(f) to transfer technology, a production process or other proprietary knowledge to a person in its area; or [...]

2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements is not inconsistent with subparagraph 1(f).

Pacific Alliance–Singapore FTA (2022)

Article 8.9: Performance Requirements

2. For greater certainty, a measure that requires an investment to use a technology to meet health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1. For greater certainty, Articles 8.5 and 8.6 apply to such a measure. [National Treatment and Most Favored Nation standards].

105. The second type of provision is meant to provide broader flexibility. Examples include:

(2004) Japan–Mexico Economic Partnership Agreement

Article 65

Performance Requirements

1. Neither Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its Area: [...]

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use or accord a preference to goods produced or services provided in its Area, or to purchase goods or services from persons in its Area; [...]

(f) to transfer technology, a production process or other proprietary knowledge to a person in its Area, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with multilateral agreements in respect of protection of intellectual property rights. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with this paragraph. For greater certainty, Articles 58 and 59 shall apply to the measure; [...]

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its Area of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

(a) to achieve a given level or percentage of domestic content;

(b) to purchase, use or accord a preference to goods produced in its Area, or to purchase goods from producers in its Area; [...]

5. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment activities, nothing in subparagraph 1(b) or (c) or 2(a) or (b) above shall be construed to prevent any Party from adopting or maintaining measures:

(a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

(b) necessary to protect human, animal or plant life or health; or

(c) necessary for the conservation of living or nonliving exhaustible natural resources.

(2018) USMCA

Article 14.10: Performance Requirements

1. No Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking: [...]

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use, or accord a preference to a good produced or a service supplied in its territory, or to purchase a good or a service from a person in its territory; [...]

(f) to transfer a technology, a production process, or other proprietary knowledge to a person in its territory; [...]

2. No Party shall condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, on compliance with any requirement: [...]

(b) to purchase, use, or accord a preference to a good produced in its territory, or to purchase a good from a person in its territory; [...]

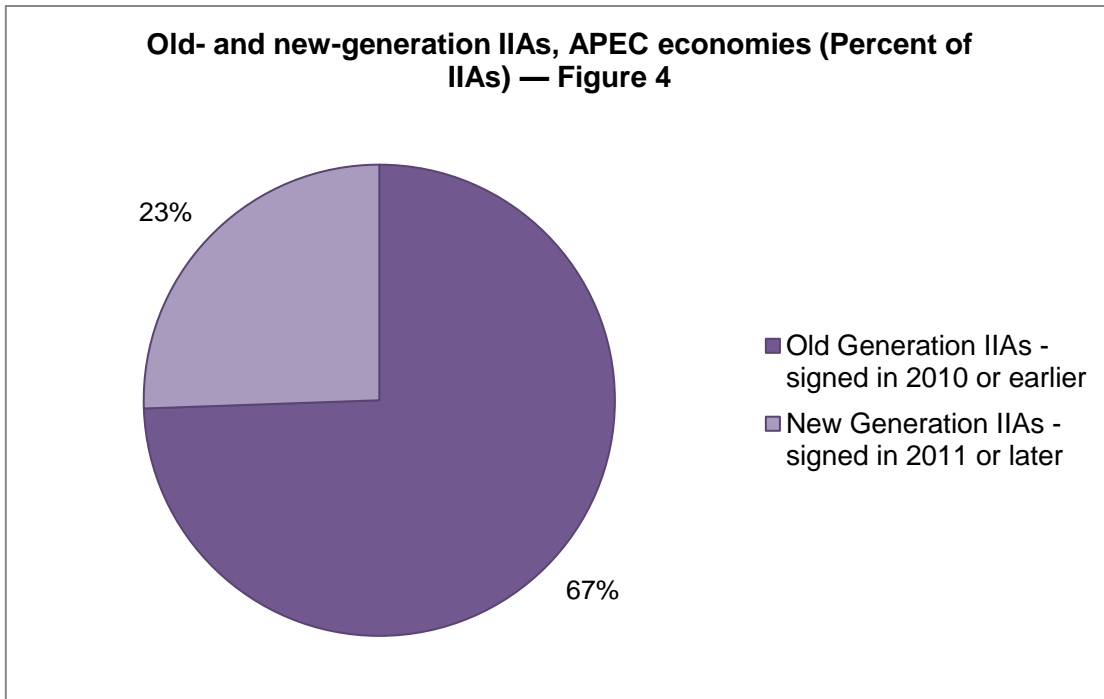
(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), 1(c), 1(f), 2(a), and 2(b) shall not be construed to prevent a Party from adopting or maintaining measures:

(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement,

(ii) necessary to protect human, animal or plant life or health, or

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

106. Old- and new-generation IIAs in APEC economies: An analysis of the IIAs in APEC economies shows that old-generation IIAs continue to constitute a large majority of this treaty network (Figure 4). This finding is consistent with UNCTAD's recent data according to which "[o]ver 88 per cent of IIA relationships" are based on old-generation IIAs. Also, "at least 40 per cent of the relationships created by new-generation IIAs coexist with an earlier one between the same economies [including RCEP and CPTPP]" (UNCTAD 2023e).



B. Potential interactions between FTAs and IIAs relevant to climate change action

107. The interactions between Sustainability, Environment and Cooperation chapters in FTAs with Investment chapters, particularly how these could play out in ISDS cases, may provide a space to align IIAs with climate change.

108. According to the WTO *Climate Change in Regional Trade Agreements 2022*, 97% of regional trade agreements notified to the WTO include at least one environmental provision, “typically in the form of a general exception clause to trade obligations for environment-related considerations, or preambular language emphasizing the importance of environmental protection and sustainable development” (WTO 2022, 4). These provisions are normally included in Environment or Sustainability chapters, and the main proponents of detailed provisions are Canada, Chile, the European Union and the United States (WTO 2022, 4). The WTO report adds that 31% of notified regional trade agreements “requires the parties to ‘effectively apply’, ‘not waive’, ‘not derogate from’ or ‘not relax’ their environmental laws, in order to encourage investment or trade in their territories” (WTO 2022, 5). Moreover, many FTAs currently in force include provisions to facilitate green investments that are not located in Investment chapters; for instance, provisions to facilitate or remove barriers to green FDI (WTO 2022, 7–8). The Annex included in the report shows that recently concluded FTAs include provisions “reaffirming” climate change commitments, “recognizing” the need for action, and “acknowledging” the need for collective action (WTO 2022, 10–12).

109. Only a minority of recent FTAs include explicit references to climate change in their Investment chapter or right to regulate provisions. Climate change is mentioned in relation to the right to regulate, for instance, in the 2022 New

Zealand–UK FTA (Article 14.18.2), the 2023 EU–New Zealand FTA (Article 10.1.2) and the modernized 2023 Canada–Ukraine FTA (Article 17.4). Other FTAs include references to climate change in their Sustainable Development chapters (e.g., 2015 Euroasia–Viet Nam FTA, Article 12.5.4); Trade, Sustainability and Development chapters (e.g., 2010 EU–Korea FTA, Article 13.5.3; 2012 EU–Colombia, Ecuador–Peru Trade Agreement, Article 270) or in their Cooperation chapters (e.g., 2010 Chile–Malaysia 2010 FTA, Article 9.5.4; 2017 Chile–Indonesia FTA Article 9.5.6). References to “global or regional environmental challenges” or a “reaffirmation” of the commitment to implement the Paris Agreement can be found in the 2020 Japan–UK Comprehensive Economic Partnership Agreement (Article 16.4.1 and 16.4.4) and the 2018 EU–Japan Comprehensive Economic Partnership Agreement (Article 16.4.1 and 16.4.1).

110. A relevant provision linking international economic law and climate change commitments can be found in the recent 2023 EU–New Zealand FTA, which states that “[t]he Parties recognise the importance of taking urgent action to combat climate change and its impacts”; “each Party shall effectively implement the UNFCCC and the Paris Agreement, including commitments with regard to Nationally Determined Contributions”; “[a] Party’s commitment to effectively implement the Paris Agreement under paragraph 2 includes the obligation to refrain from any action or omission that materially defeats the object and purpose of the Paris Agreement” (Article 19.6.1-3). These commitments could be enforced through state-to-state dispute settlement. Importantly, similar provisions are not found in other recently concluded FTAs (Institute for European Environmental Policy 2023, 15).

111. How provisions in FTA chapters may interact to facilitate and promote green FDI flows or to strengthen the right to regulate in IIAs or actual ISDS cases remains understudied. The interaction between provisions in Sustainability, Environment or Cooperation chapters in FTAs with Investment chapters calls for further study and analysis, particularly because many provisions relevant to climate change and foreign investment are not specified in Investment chapters. Chapter IV will provide some reflections on the question of systemic integration.

IV. The interaction of IIAs and ISDS with international environmental and climate change law

112. This chapter explores the interaction of IIAs and ISDS with international environmental and climate change law from a systemic perspective. International environmental law has a much longer history than international climate change law, although many concepts and principles of the former apply to and inform the latter. International climate change law is organized as a field to respond to an urgent planetary challenge that “sits squarely within the fields of international environmental law and public international law more broadly” (Bodansky et al. 2017, 11). Crucially, as discussed in Chapter I, the UNFCCC and Paris Agreement goals cannot be met without significant private investment, and thus IIAs and FTAs could be conceived of as fundamental pillars of international climate change law.

113. Section A of this chapter explores relevant principles under international environmental and climate change law and their interaction with IIAs and ISDS. Technically, IIAs and ISDS rarely make climate action impossible, although they may have distributive consequences that hinder or limit public action. Section B considers the issue of interaction and alignment in more detail, re-examining the tension between states' right to regulate and investor rights through the lens of the emerging duty of governments to regulate for climate change. This part also includes a brief analysis of the interaction between IIAs and human rights (Box 2) and investor obligations and responsibilities regarding climate change (Box 3). These two domains could contribute to the systemic alignment of IIAs, ISDS and international climate change law.

A. Relevant principles under international environmental and climate change law and their interaction with IIAs

114. The most important principles under international environmental and climate change law, particularly in relation to IIAs, can be grouped into two categories: preventive and distributive principles. Importantly, each of these principles enjoy different levels of recognition and authority under international law (See Sands 2003; Johansson 2023).

115. Preventive principles refer to governmental action to protect the environment from pollution and degradation. International environmental law defines state responsibility for transboundary environmental harm that affects another state or areas beyond national jurisdiction (Sands 2003, 241). Furthermore, under international environmental law governments may be under an obligation to prevent environmental harm within their own jurisdiction (Sands 2003, 246). International environmental law also establishes the precautionary principle, according to which governments should not refrain from implementing appropriate measures to prevent potential harm when there is a lack of scientific certainty concerning the effects of an activity (Sands 2003, 266). Governments are required according to international environmental law to pass domestic laws and create institutions to implement these principles and their commitments.

116. Distributive principles define the allocation of the burden to protect the environment between states and other relevant actors. Under the polluter pays principle, those who pollute the environment are required to bear the costs of prevention and remediation of environmental harm. This principle also requires creating mechanisms so that states, investors or even consumers internalize the costs of the negative externalities produced by a certain activity (Sands 2003, 279; De Sadeleer 2020, 21-60). The polluter pays principle is included in the Rio Declaration (Principle 16), and in other international treaties in a non-binding and binding manner (See De Sadeleer 2020, 23-32). However, it is not part of the UNFCCC or the Paris Agreement.

117. Moreover, the Paris Agreement notes that it “will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances” (Paris Agreement, Article 2.2. See also Preamble, paragraph 3). Article 4.3. also states

that each party's successive NDCs "will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

118. According to Setzger and Higham, there is ongoing international and domestic litigation in numerous countries [sic] involving the scope and status of each of these principles (Setzger and Higham 2023). There is also litigation involving the scope and status of a human right to a healthy environment (Knox and Pejan 2018).

119. International environmental and climate change law principles may come into tension with IIAs and ISDS at a systemic level. States may be compelled to take action under international environmental and climate change law, as well as under related human rights obligations, while IIAs impose a series of standards of protection for foreign investment that could be in conflict with these actions. States may be obliged to take a measure to prevent environmental harm, leading to the cancellation or redefinition of an investment project. While ISDS awards rarely ask states for restitution or to adopt or withdraw a measure, they play an important role in the distribution of risks and costs, as states may be required to pay compensation. A key policy question is whether IIAs and ISDS may affect the distribution of costs and risks as defined by international environmental and climate change law principles (Cotula 2023, 789).

120. The successful harmonization of environmental, climate change and investment law principles has remained elusive. The principle of systemic integration (Article 31.3.c of the Vienna Convention of the Law of Treaties) has not resolved the tension because some ISDS tribunals have found that paying compensation and protecting the environment are in most cases consistent outcomes.⁶⁰ These awards do not provide a detailed discussion of international environmental and climate change law principles, the urgency of climate action, or the increasingly uncertain regulatory landscape. The shift in the distribution of the burden to protect the environment could lead to regulatory chill, hindering the ability of governments to prevent environmental harm.

B. An emerging duty to regulate for climate change and its interaction with IIAs

121. The debate about whether states can adopt a legitimate measure without paying investors compensation under IIAs and ISDS has largely been analyzed through the lens of the right to regulate (See Chapters I and III). Under international law, states have the sovereign right to regulate domestic affairs without foreign interference; this principle is a keystone of public international law and has been recognized in ISDS awards.⁶¹ However, the difficulty lies in distinguishing with sufficient precision legal and legitimate regulations from opportunistic public action. This section re-examines this discussion in light of a fast-changing scenario in which governments may be progressively required under international law—that is a duty, not a right—to take rapid action to reduce GHG emissions and ensure a just energy transition.

122. The international community has agreed on specific goals regarding climate change, most importantly to keep global warming to well below 2°C compared to pre-industrial levels, preferably below 1.5°C (Paris Agreement, Article 2.1.a). At the same time, the parties to the Paris Agreement granted economies significant flexibility on how to achieve the objectives. Economies are required to submit their NDCs, but the Paris Agreement does not include obligations about the level of these contributions; nor does it create a mechanism to enforce their compliance. The speed and level of action required to address climate change has been discussed in subsequent COPs, and the First Global Stocktake noted “with concern” that “significantly greater emission reductions are required to align with global greenhouse gas emission trajectories in line with the Paris Agreement temperature goal” (CMA, Outcome of the First Global Stocktake 2024, 5).

123. Consensus around more specific goals has remained elusive. In 2021, at COP26, governments decided to phase down unabated coal-fired power and phase out inefficient fossil fuel subsidies. However, some actors criticized this agreement for being insufficient and insisted on a global commitment to phase out fossil fuels (van Asselt 2023). In 2023, at COP28, there were negotiations to implement an internationally agreed broad phase-out of fossil fuels. The outcome of the ‘Global Stocktake’ at COP28 is significant because it recognized the need to accelerate “efforts towards the phase-down of unabated coal power” and “towards net zero emission energy systems, utilizing zero- and low-carbon fuels, well before or by around mid-century” (CMA, Outcome of the First Global Stocktake 2024, 6).

124. In addition to climate change mitigation, governments are expected to take measures to protect their populations from the impact of climate change. Climate change adaptation measures relate to most aspects of life, such as food production, health, work conditions and housing, and will be necessary to meet the Sustainable Development Goals. Under international human rights law, moreover, economies have obligations to protect, respect and promote human rights. The delivery of climate adaptation measures may also be consistent with and complementary to existing international human rights law obligations.

125. The indeterminacy about the scope of governments’ climate change obligations under international law has prompted civil society, international organizations and some governments to request advisory opinions or initiate cases before international courts (Setzer and Higham 2023, 3). Proceedings are pending at the International Court of Justice (ICJ), the International Tribunal on the Law of the Sea (ITLOS), and the Inter-American Court of Human Rights (IACtHR). The European Court of Human Rights (ECHR) recently decided three cases on 9 April 2024. There are also thousands of domestic cases: the Sabin Center has recorded a total of 2,341 cases globally, 190 of which were filed in 2023 (Setzer and Higham 2023, 2–3).

126. The advisory opinion request to ITLOS, submitted by the Commission of Small Island States on Climate Change and International Law, asks the Tribunal for clarification on the scope of states’ obligations under the United Nations

Convention on the Law of the Sea (UNCLOS) with regard to addressing marine pollution and protecting and preserving the marine environment from climate change impacts. Colombia and Chile submitted an advisory opinion request to the IACtHR, asking the court to clarify states' obligations to respond to the climate crisis. The request includes questions of climate adaptation and environmental defenders' protection, which were not addressed in a previous advisory opinion (OC-23/17)⁶² whereby the IACtHR recognized the justiciable right to a healthy environment, with reference to climate change (Viveros and Auz 2023).

127. In 2021, a group of 18 states led by the small island nation of Vanuatu first suggested that the UN General Assembly request an advisory opinion on climate change from the ICJ. On 29 March 2023, the UN General Assembly requested the ICJ by consensus for an advisory opinion on the following questions “(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations? (b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to: (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change? (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?” (UN A/RES/77/276). Although advisory opinions are non-binding under public international law, they can play an important role in the evolution of international law norms (Setzer and Higham 2023, 18).

128. On April 9, 2024, the ECHR decided three cases on states' obligations to take action against climate change under the European Convention on Human Rights.⁶³ Although the cases *Careme v. France* and *Duarte Agostinho et al. v. Portugal and 32 Others* were dismissed on procedural grounds, some climate advocacy groups have described the decision in *KlimaSeniorinnen v. Switzerland* as a “great success” (Torre-Schaub 2024). The ECHR decided that the parties to the European Convention of Human Rights have a primary duty “to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change”, which requires that each contracting party “undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades” (paragraph 548).⁶⁴

129. New FTAs could also play a role in the emergence of an international duty to regulate for climate change. Increasingly, FTAs include provisions reaffirming or reiterating NDCs. The 2023 EU–New Zealand FTA goes further and incorporates a commitment to “effectively implement the UNFCCC and the Paris Agreement, including commitments with regard to Nationally Determined Contributions” (Article 19.6.1). Some authors have recommended governments use FTAs to incorporate specific climate change commitments that could be enforced through state-to-state dispute settlement (Leal-Arcas et al. 2020).

130. Domestic litigation may also influence the evolution of international law, including ISDS practice, and should be considered in any analysis (Setzer and Higham 2023, 33–35). Domestic court decisions may require governments to take climate action that has negative implications for foreign investors, who may then threaten to use ISDS or file an arbitration request. The case of *Waratah Coal Pty Ltd v. Youth Verdict Ltd* (Queensland Land Court, Australia) illustrates such a scenario. Australian judges recommended the refusal of an environmental license for a coal mine project, and on this basis the Queensland Department of Environment and Science refused the request (Dehm 2023). The investor, Zeph Investments Pty Ltd, initiated ISDS cases under the ASEAN–Australia–New Zealand Free Trade Agreement and the Singapore–Australia Free Trade Agreement.

131. Developments on the recognition and scope of governments’ duty to take climate change action to protect populations from environmental degradation could have important repercussions in relation to IIAs and ISDS, including an increase of cases similar to *Zeph v. Australia*. If domestic courts and international tribunals recognize that governments have a duty to take urgent action to address climate change, ISDS tribunals may be asked by governments to reconsider the balance between environmental action and investor rights under IIAs. It can be argued that the balance between the *duty* to regulate and investors’ rights cannot be the same as that between the *right* to regulate and investors’ rights.

132. It can be anticipated that this rebalancing would depend on the scope of the duty (how much flexibility governments still have) and the urgency of public action. If states have a duty to take immediate climate mitigation and adaptation measures in a context of uncertainty, it could be argued that ISDS tribunals would be required to be as deferent as possible when assessing climate measures. Governments could also cite their international duties as justification for a measure or defense against investors’ claims. While governments can choose whether or not to exercise their sovereign prerogative to regulate, and can promise not to regulate in a certain manner either through treaty or contract, they cannot commit not to comply with their international obligations vis-à-vis their population and the entire international community or, at least, no reasonable investors could derive legitimate expectations from such pledges.

133. As mentioned in Chapter I, ISDS could itself be used to enforce governments’ obligations to take climate mitigation and adaptation action, including measures to promote green FDI flows. The promotion of green FDI requires providing sufficient incentives and regulatory advantages, for instance in the electric vehicles sector (OECD 2017a, 29, 34, 112). Foreign investors could allege that they have legitimate expectations that states would maintain or even implement these conditions. The *Allard v. Barbados* award provides an example of how such a situation could play out in an actual ISDS case. In the Allard arbitration, the investor in an eco-tourism project claimed that Barbados had failed to implement “reasonable and necessary environmental protection measures” and “directly contributed” to contaminating the environment, thereby destroying the value of the investment.⁶⁵ Although the ISDS tribunal rejected the claim under the FET, expropriation, and full protection and security standards,

the arbitrators considered the possibility that states may have an obligation to protect investors from environmental damage under the full protection and security standard.⁶⁶

134. The use of ISDS to enforce states' obligations to maintain or implement climate change mitigation and adaptation measures would come with benefits, as well as costs and risks. Some authors have argued that private investors could use ISDS to accelerate the climate transition, for instance by preventing economies from going back to fossil fuels (Krajewski 2012).

135. The economics literature indicates that it is unlikely that ISDS will be mobilized in this way (Horn 2023). So far, ISDS has been ineffective in ensuring that governments do not withdraw benefits or subsidies linked to the low-carbon energy transition. It is noteworthy that the only consequence of ISDS awards against Spain and other European economies for removing solar energy subsidies was paying compensation to investors. ISDS tribunals rarely order governments to withdraw or implement a measure but rather to pay the investor compensation. In this context, the risk that some investors, law firms and third-party funders simply use ISDS to obtain compensation with no or limited effect on public incentives to promote climate change measures must be carefully considered. Economists caution that ISDS claims could slow down or discourage governments from providing the type of benefits that promote green FDI flows (Horn 2023, 30), particularly developing economies that offer general, expensive and less targeted incentives.

BOX IV.1: The interaction between international human rights and IIAs

The interaction between IIAs and international human rights has attracted much attention from academics and international organizations, and has been a recurrent theme in UN Special Rapporteurs' reports.

While a number of academics and organizations argue that IIAs and ISDS may have negative implications for the promotion of human rights, for instance, by "chilling" regulation to protect and advance these rights (e.g. Deva and Van Ho 2023), others argue that IIAs and ISDS could actually contribute to the protection of human rights. One view in favor of the alignment between IIAs and human rights is that fulfilling human rights requires FDI flows, and that IIAs and ISDS could be reformed so to include international human rights as part of the applicable law (Baltag and Dautaj 2021). Another way that FDI can strengthen human rights is through ISDS cases brought by foreign investors challenging measures that affect human rights when they are also detrimental to their projects (King 2020).

The special representative of the UN Secretary-General on human rights and transnational corporations and other business enterprises from 2005 to 2011, John Ruggie, has made various comments about the interaction between IIAs and human rights. These are summarized in his book *Just Business: Multinational Corporations and Human Rights*. Ruggie contends that while there has been some discussion about the duty of states to protect human rights, what has been

“less well internalized is the diverse array of policy domains through which states may fulfill this duty [...] This should be viewed as an urgent policy priority for governments” (Ruggie 2013, 85). He suggests that one particularly important policy cluster is foreign investment, IIAs and ISDS. Ruggie recognizes that IIAs and ISDS are intended to protect investors from arbitrary measures but notes that “they also potentially pose two problems for host governments’ regulatory policy space” (Ruggie 2013, 86). The first of these is the ability of investors to “seek exemption from or compensation for the host government adopting, say, a new labor law, even if it raises costs equally on all enterprises in the country [sic], domestic as well as foreign” (Ruggie 2013, 86), and the second is the possibility of regulatory chill (Ruggie 2013, 87).

In the last decade, the interaction between IIAs and international human rights has continued to attract the attention of the UN human rights system. It has been discussed in several reports which are summarized in a letter that a number of UN Special Rapporteurs submitted for consideration to UNCITRAL Working Group III in 2019 (Special Rapporteurs 2019). In this letter, the independent experts note that IIAs and ISDS “have often proved to be incompatible with international human rights law and the rule of law,” as a result of the risks that they “pose to the regulatory space required by States to comply with their international human rights obligations” (UN Special Rapporteurs 2019, 1–2). The document also refers to the risk of regulatory chill and the negative implications of IIAs and ISDS for local communities.

The UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David Boyd, submitted a report on the consequences of ISDS for climate and environmental action and human rights in 2023. The report underscores that the origins of IIAs and ISDS lie in the demands of the fossil fuel industry (Boyd 2023, 5), arguing that they have gone on to serve the interests of investors almost exclusively (Boyd 2023, 6). In his conclusion, the Special Rapporteur raises the alarm that while action to address climate change “cannot wait,” as governments make efforts to implement climate mitigation and adaptation measures, “they are threatened by foreign investors using ISDS claims and threats to delay, weaken or overturn these imperative actions and seek billions of dollars in compensation” (Boyd 2023, 22).

Overall, there are similarities in how IIAs interact with human rights and with climate change. FDI is essential to enable both the meeting of the Sustainable Development Goals and effective climate change action; however, IIAs and ISDS can have unintended negative consequences for these objectives. APEC economies may want to consider focusing on the interaction between IIAs, human rights and climate change, given that governments’ climate and human rights obligations appear to be converging, and this will have considerable implications in the ISDS domain.

BOX IV.2: Investors' responsibilities and obligations regarding climate change action

Concerns about the interaction between IIAs and climate change, particularly with regard to the UNFCCC and the Paris Agreement, follow from the observation that IIAs can make climate change mitigation and adaptation measures more difficult or costly. Meanwhile, calls to align IIAs, the UNFCCC and the Paris Agreement note that IIAs can be made to work toward climate change mitigation and adaptation by helping to bridge the green investment gap (See Chapter I). Another important dimension of these discussions relates to investors' obligations or responsibilities toward climate change, which may contribute to reducing inconsistencies and promoting alignment.

International obligations are binding duties whose breach creates international responsibility. Responsibilities, on the other hand, are non-binding commitments that refer to the international community's expectations about the behavior of corporations (Ruggie 2013). Their non-compliance would not trigger international responsibility but may nevertheless have legal consequences. While there are few, if any, investor obligations under international law,⁶⁷ the international community has accepted that international investors have responsibilities, most notably in the domain of human rights (UN Guiding Principles on Business and Human Rights).

Although there are references to investor and corporate conduct in international environmental treaties and documents—Agenda 21, for instance (Gleckman 1995, 104)—there is no set of detailed principles on business and climate change comparable to the UN Guiding Principles. To what extent this gap is being filled by corporate initiatives (see APEC Business Advisory Council 2023) and environmental, social and governance (ESG) standards is an important question to address. For instance, some financial actors recognize that they have climate responsibilities for the GHG emissions linked to their portfolios (See OECD 2023).

Investor obligations or responsibilities in relation to climate change could contribute to consistency and alignment between the UNFCCC, the Paris Agreement and IIAs in various ways. Generally, obligations or responsibilities would define what conduct the international community expects from foreign investors, and what consequences would follow in case of breach or non-compliance. The problem of IIAs' scope of protection—that IIAs often protect fossil fuel projects—would be minimized if foreign investors had an obligation to reduce their GHG emissions or a responsibility to conduct due diligence to ensure that GHG emissions decrease. Following the reasoning of some ISDS awards, particularly those in which tribunals decided that investors who relied on corruption to establish a project are not protected by IIAs, it could be argued that investing in breach of international obligations or transnational public order would make an investment ineligible for ISDS protection.⁶⁸

The consequences of failing to conduct appropriate due diligence calls for more analysis on a range of issues, notably the interaction between this responsibility and the human right to a healthy environment. Conducting incomplete or inappropriate due diligence may not constitute a complete lack of due diligence,

and drawing the line between the two may be difficult in ISDS proceedings. Even if arbitrators consider that lack of appropriate due diligence is not an issue of admissibility of an ISDS claim, however, this conduct could have consequences for the definition of investor rights. ISDS tribunals increasingly require investors' due diligence in order to ascertain if investor expectations are legitimate and reasonable.⁶⁹ Failing to consider the climate change implications of a project, along with its consequences for human rights, could undermine investor claims against host governments.

Investor obligations and responsibilities could constitute defenses for governments, as well as bases for potential counterclaims. Governments may take measures affecting foreign investment projects, as a response to investor failure to comply with their obligations or responsibilities; public regulations would in such cases follow directly from investors' breach or non-compliance. As long as the public measure is reasonable and complies with the due process of law, it could be said to be justified on the basis of the investor's misconduct (IISD 2018). Moreover, a breach of international investor obligations would enable the respondent to sue investors directly under an international tribunal with jurisdiction to decide the dispute, while it could also serve as the basis for a counterclaim against investors in ISDS provided that the investor had consented to such a counterclaim. The question of counterclaims is currently under consideration by UNCITRAL Group III (UNCITRAL 2023, 6).

V. Policy analysis and recommendations

136. This chapter provides in-depth policy analysis and recommendations on the alignment of IIAs, ISDS and international climate change law, particularly the UNFCCC and Paris Agreement. It maps benefits, costs and risks of IIAs and ISDS, as well as policy options for improving their climate alignment. The analysis aims to contribute to the understanding of risks in a context of escalating uncertainty, allowing APEC economies to make informed and sustainable policy decisions. In view of the answers to the pre- and post-workshop surveys, the premises of the analysis are that climate change is a priority for APEC economies, and that the alignment between IIAs and climate change is central to stimulate green FDI while phasing out or phasing down fossil fuel and high GHG emission projects.

137. Section A of this chapter provides indicators to analyze the alignment between IIAs, ISDS and the UNFCCC and Paris Agreement. It covers investment promotion, investment facilitation and investment protection. Section B examines the alignment between IIAs, ISDS and the promotion of green FDI flows. Section C studies the alignment between IIAs, ISDS and the facilitation of green FDI flows. Section D explores the alignment between IIAs, ISDS and climate change mitigation and adaptation measures. Section E discusses the possibility of using IIAs and ISDS to enforce climate change commitments. Section F examines whether investor responsibilities or obligations could serve to align IIAs and climate change concerns. Section G looks at IIAs, ISDS and vulnerable groups in the context of a just energy transition. Section H analyzes the alignment between IIAs and technology transfer as required by the UNFCCC and the Paris

Agreement. Lastly, section I offers brief considerations concerning the advantages of not terminating IIAs and ISDS, a policy choice broadly shared by APEC economies according to the pre- and post-workshop surveys.

A. IIAs and international climate change law alignment indicators

138. Interactions between IIAs, ISDS and international climate change law are multiple, affecting most international investment law disciplines. Chapters I to IV have mapped the content of IIAs, including relevant chapters in FTAs, and the main principles of international environmental and climate change law. The report has also identified existing and potential interactions between IIAs, ISDS, and climate mitigation and adaptation measures. Chapters II and III examined the interaction between IIAs, ISDS and climate measures from an investment law perspective, while Chapter IV analyzed the systemic interaction between IIAs and international environmental and climate change law. The analysis has not exhausted all potential interactions, however. The number of treaties, their overlap, their rapid evolution, inconsistent interpretations of standards of protection, and increasing economic, climate and social uncertainty indicate the complexity of this field.

139. Two aspects are worth highlighting. Firstly, multiple international treaties govern foreign investment and climate change; in general, economic treaties deal with foreign investment and environmental treaties focus on climate change. Part of the policy challenge is to align these different fields of international law. At the same time, IIAs are economic treaties dealing mainly with international investment protection, and their coordination and alignment with treaties covering other foreign investment matters, such as trade in services or investment facilitation, remains understudied. As noted in Chapter III, there is a trend in investment treaty-drafting in favor of explicitly separating investment facilitation and investment protection disciplines.

140. Secondly, aligning IIAs with the UNFCCC, the Paris Agreement and climate change law requires recognizing that the international laws on both foreign investment and climate change are in constant evolution. There are various processes considering reform of IIAs and ISDS, while each year governments discuss future climate change action at the COPs and other international meetings. Developments in both areas, particularly climate change law, are fast and result from a conjunction of policy priorities, technological innovation and new climate change data. The evolution of these elements is difficult to predict; the future is increasingly uncertain and international organizations urge governments to create institutions that can handle such uncertainty (Box I.1).

141. In policy terms, in order to meet climate change goals, particularly those laid out in the UNFCCC and the Paris Agreement, the international investment regime should:

- 1) Promote green FDI flows while discouraging fossil fuel and high GHG emission projects;

2) Facilitate green FDI flows while screening and monitoring fossil fuel and high GHG emission projects;

3) Ensure that investment projects are established, operated and concluded successfully and in a manner that is acceptable to investors, governments and other stakeholders. According to the Non-Binding Just Energy Transition Principles for APEC Cooperation, economies should have regulatory space to phase down or phase out high GHG emission projects, while taking into account their domestically defined economic growth priorities. Resilient institutions would allow governments to implement flexible and adaptive regulations in a context of increasing uncertainty.

142. These three *alignment* indicators are based on the consensus that private investment is fundamental to achieving climate change goals, that economies need to implement a swift low-carbon energy transition, and that this transition should take into account the interests of investors, governments and other stakeholders, in particular vulnerable groups. The transition to low-carbon economies depends on private investment—foreign investment when domestic is insufficient—and should consider environmental, social and economic outcomes. An international investment regime aligned with climate change goals would promote and facilitate green FDI flows.

B. Green FDI promotion, IIAs and ISDS

143. There is not sufficient evidence to draw clear conclusions about whether IIAs and ISDS promote green FDI flows. Most academic research suggests that IIAs and ISDS play a minor role, if any, in investment decisions, and thus have a limited impact on FDI flows (Chapter I). Foreign investors are more likely to consider other indicators when making investment decisions, such as market size, taxation, incentives, or natural resource reserves. Moreover, IIAs and ISDS, according to this research, are not the preferred mechanisms to reduce and manage risks. These findings suggest that economies should explore other mechanisms to promote green FDI. Presently, most economies offer fiscal and financial incentives, as well as appropriate regulations to attract investors. UNCTAD indicates that developed economies prefer more detailed or specific schemes while developing economies employ more generic and less targeted tools (UNCTAD 2023a). APEC studies also indicate that domestic laws and the domestic rule of law are important factors in attracting FDI flows (APEC 2019a).

144. This assessment contrasts with the view articulated in some research and reports from the industry—in particular the legal industry. According to this view, IIAs and ISDS contribute to creating good investment conditions, for instance by providing investors with certainty about the legal and tax conditions for a project. The contention in the legal industry literature is that IIAs and ISDS serve to lock in the incentives and regulations that economies offer to attract FDI. Other legal industry documents point to the specific benefits that corporate lawyers find in ISDS, such as removing disputes from local courts and awards enforcement (Queen Mary 2022, 7). These studies indicate that IIAs and ISDS promote FDI

flows, even if this positive impact has thus far remained elusive and difficult to calculate.

145. Other literature suggests that IIAs could have negative impacts on green FDI flows, specifically because governments might decide not to offer incentives in the face of the risk of ISDS litigation (Horn 2023). It is a plausible scenario given that these schemes serve to promote green FDI, and creating incentives against them would likely have a negative effect on green FDI flows. Governments may want to remain alert to this situation, and conduct further research to determine the interaction between incentives for low-carbon investments, IIAs and ISDS. There is academic research on the relations between incentives (regulatory givings) and regulatory or indirect expropriations (regulatory takings) (See, e.g., Bell and Parchomovsky 2001), but the question has not attracted significant interest within investment law scholarship (See Perrone 2021, 33–34, 150–171).

146. It is difficult to meaningfully calculate the overall impact of IIAs on FDI, considering both FDI flows and stocks. Firstly, ISDS is commonly perceived by investors as an exit strategy (Chapter I). ISDS cases are most often filed when investors have decided to leave the host economy. In other words, IIAs and ISDS operate as a political risk insurance scheme, allowing investors to recover their investment and a sum for loss of profits. IIAs could increase investors' confidence encouraging them to establish a project and provide a sense of stability, but subsequently they can create an incentive to terminate a project as soon as disagreements emerge with the host government. For investors, cashing in on a generous compensation would be the most efficient way to maximize profits, and so this built-in incentive would have the overall effect of reducing green FDI stocks, and thereby affecting climate action efforts.

147. Secondly, when ISDS tribunals decide a dispute against the respondent, they normally order governments to pay compensation. Again, ISDS appears to be biased toward the termination of projects, as opposed to promoting their successful conclusion. However, if ISDS prevents arbitrary or opportunistic regulation, IIAs could promote the continuation of projects; the problem here is that ISDS could also chill legitimate climate mitigation or adaptation regulation if not operating in a way that is properly aligned with the Paris Agreement goals.

148. Lastly, the scope of IIAs is quite broad, including fossil fuel and high GHG emission projects. If IIAs had a positive impact on FDI in these sectors, IIAs would be inconsistent with the Paris Agreement (Article 2.1.c). In this respect, economies would gain from determining if IIAs promote FDI flows, or whether what attracts FDI flows are incentives and other positive regulatory conditions, which IIAs may serve to stabilize or consolidate. In this second case, IIAs would only promote FDI flows when they operate in tandem with incentives or other regulatory measures. It is also possible that the effects of IIAs on FDI flows would vary depending on the sector, as noted in Chapter I. It may be that IIAs are more, or only, effective at attracting natural resource projects. Clarifying this question is important for the alignment of IIAs with the Paris Agreement (Article 2.1.c), especially as some economies continue to offer subsidies to fossil fuels.

149. Given that the research is inconclusive and that there are various ways in which IIAs may affect FDI flows and stocks, APEC economies may want to consider conducting further research on the following topics:

1) *Whether IIAs and ISDS serve to promote green FDI flows and stocks.* A relevant question here is whether IIAs promote green FDI from investment through to the end of projects, or rather, if they create an incentive for early exits as some investors may prefer compensation over adjusting their projects to new regulatory conditions. APEC economies could conduct surveys exploring how investors in the low-carbon sector consider the role of IIAs and ISDS in their investment decisions in the Asia Pacific region.

2) *The interaction between IIAs, ISDS and FDI incentives.* IIAs and ISDS may promote green FDI by stabilizing investment conditions. In this case, IIAs and ISDS would promote green FDI flows only when governments offer incentives or other favorable regulatory conditions through domestic laws or contracts. APEC economies could also conduct surveys to explore these questions.

3) *Whether IIAs and ISDS promote fossil fuel and high GHG emission projects.* Relatedly, APEC economies may want to analyze if IIAs and ISDS serve to promote investments in these sectors only when governments offer subsidies and incentives.

4) *The costs and risks of promoting FDI by stabilizing incentives and removing disputes from domestic courts.* By removing investment disputes from domestic courts, IIAs and ISDS create a forum specialized in investment disputes, in which other interests and stakeholders are not present. This omission may promote green FDI flows, as some legal reports suggest, but may also have consequences for a just energy transition, affecting for instance the distribution of costs or the situation of vulnerable groups (See Section G below).

C. Green FDI facilitation, IIAs and ISDS

150. There is significant consensus that IIAs can contribute to investment facilitation, although a major stumbling block continues to be that many IIAs in force are old-generation treaties and incorporate no facilitation mechanisms. As detailed in Chapter II, economies can facilitate green FDI unilaterally, including through streamlining domestic administrative procedures, but other actions require governmental coordination, such as defining green FDI or sharing lists of green investment opportunities. It is noteworthy that APEC economies have recognized that “international cooperation is imperative” to address climate change (APEC 2023e, ix).

151. A central function of international law is to enable collective action. In old-generation IIAs, as UNCTAD explains, the primary role of governments is limited to appearing as respondents before ISDS tribunals if a foreign investor sues them under ISDS (UNCTAD 2023d). Old-generation IIAs do not include mechanisms to foster government cooperation, such as investment facilitation or climate

change mitigation. Importantly, the situation is different in the case of FTAs and new-generation IIAs, which do include platforms for such collaboration.

152. Another limitation to relying on IIAs to facilitate green FDI flows is the potential unintended interactions between investment protection and investment facilitation. There are a growing number of investment facilitation provisions in international treaties, although we should note that many of these treaties focus exclusively on investment facilitation (e.g. EU–Angola), include facilitation but exclude ISDS (e.g. Brazilian IIAs), or explicitly separate ISDS from investment facilitation (e.g. WTO IFD Agreement). As discussed in Chapter III, there are new investment facilitation agreements that focus on green foreign investment (Australia–Singapore GEA), but again these agreements do not include investment protection or ISDS. As governments appear to have a preference for clearly separating investment facilitation and protection from one another, APEC economies might want to better understand the policy rationale for this strategy, and explore the implications of pursuing investment facilitation and investment protection together or separately.

153. Lastly, as a result of the broad scope of IIAs, an important issue is whether IIAs facilitate fossil fuel and high GHG emission projects, which would be inconsistent with the Paris Agreement (Article 2.1.c). This problem would be relevant for facilitation measures of general application, while it would be minimized if governments maintain authority to decide which FDI projects should be facilitated.

154. APEC economies may want to conduct further research and consider the following policy options to increase green FDI facilitation while ensuring the alignment of IIAs with the Paris Agreement:

1) *Incorporate facilitation tools*, including intergovernmental cooperation mechanisms, into their old-generation and future IIAs; however, governments may want to consider potential risks emerging from the interactions between facilitation provisions, standards of investment protection, and ISDS;

2) *Enter into new agreements dedicated exclusively to green investment facilitation*; this option would reduce unintended interactions between ISDS and facilitation, but could also weaken or disregard the alignment of IIAs with climate change goals;

3) *Channel investment facilitation initiatives through other treaties or existing institutional mechanisms*, such as APEC; again, this approach could weaken the alignment of IIAs with climate change goals;

4) *Analyze to what extent fossil fuel and high GHG emission projects could benefit from investment facilitation provisions* in existing and future IIAs or other international agreements.

D. Regulating foreign investment, IIAs and ISDS

155. The discussions at the August 2023 capacity-building workshop on IIAs and climate change indicated that some experts are concerned about whether governments have sufficient regulatory space under IIAs to take climate change action. The concern is that foreign investors may use IIAs and ISDS to challenge climate change measures that affect the conditions of existing projects, particularly fossil fuels or high GHG emission projects. IIAs and ISDS may thus delay climate action, or increase the costs, by inducing a regulatory chill or by ruling that governments compensate investors. Apart from the regulatory chill that arises simply from the threat of ISDS proceedings, these experts argue that even if economies prevail in ISDS cases, governments have to go through prolonged arbitral litigation and may face high legal costs.

156. Other experts at the August workshop argued that the challenge is how to ensure that IIAs and ISDS appropriately recognize and protect governments' right to regulate. Compensating foreign investors when governments take arbitrary or discriminatory measures should serve to promote green FDI, and this outcome is also in line with customary international law. IIAs would, according to this line of reasoning, create an incentive against arbitrary regulations and would thus positively impact action toward climate change mitigation and the Sustainable Development Goals. The problem emerges when ISDS tribunals require governments to pay compensation, including for loss of profits, in situations in which governments did not behave opportunistically, and there is no remedy for an inconsistent or legally incorrect award. The lack of an appeal mechanism has dominated the work of UNCITRAL Working Group III, while many governments have explored mechanisms to strengthen their right to regulate in their recent IIAs (See Chapters I, II and III).

157. Governments and international organizations have been working for at least a decade to ensure a balance between the right to regulate and investors' rights. For instance, UNCTAD has insisted on the need to reform old-generation IIAs. A solution that is entirely satisfactory has not been found, however (Alschner 2022), and governments (including APEC economies) have pursued a variety of formulas in their more recent IIAs (Chapter III). Indeed, the literature suggests that striking a perfect formula may not be possible (Dolzer et al. 2022, 153).

158. APEC economies may want to consider the solutions proposed by international organizations and experts, as well as the recommendations included in this report, and carefully examine their benefits, costs and risks. These are laid out below.

i) A fossil fuel carve-out

159. One solution is to carve out fossil fuels from the scope of IIAs. The broad scope of IIAs can be problematic from a climate perspective, as it means that IIAs and ISDS can promote and protect projects that contribute to climate change. If APEC economies are sensitive to the Paris Agreement goals, and aim to rapidly phase down or phase out fossil fuels, a fossil fuel carve-out may be an effective

policy option. As noted in Chapter I, IIAs already include sectoral carve-outs, most commonly sovereign debt and tobacco.

160. Unlike exception provisions, also known as affirmative defenses, carve-outs remove the sector from the scope of application of IIAs. Foreign investors may nevertheless bring ISDS cases, but tribunals would be required to reject the claim on jurisdictional grounds. Governments would not have to litigate the merits of the claim, and so this type of carve-out would minimize the risks emerging from misapplication of exception provisions, along with the danger of regulatory chill.

161. In addition to including a fossil fuel carve-out in future IIAs, APEC economies could explore options to exclude fossil fuels from existing IIAs. There would be minimal risk of litigation if such a carve-out was the result of mutual agreement, although attention should be paid to implementation in order to avoid unintended consequences.

162. A fossil fuel carve-out may come with problems and risks. One is related to the fact that APEC economies may not be in the same developmental situation, and their dependence on fossil fuels may vary. For economies that are rich in oil, gas or coal, a fossil fuel carve-out could be interpreted by investors in this sector as a bad signal. This has implications for ensuring a just energy transition, that caters to the needs of those who would be most affected by the shift to a low-carbon economy. APEC economies may thus want to consider this carve-out as part of Just Energy Transition Partnerships or other compensatory schemes (See Chapter II).

163. Moreover, fossil fuel carve-outs could be too broad and so include projects that deserve to be promoted and protected, or too narrow excluding projects that are not aligned with the Paris Agreement. For instance, would the carve-out only apply to downstream activities? Or would it also apply to midstream and upstream activities? How is the situation of high GHG emission projects distinct from fossil fuel investments? APEC economies interested in implementing a fossil fuel carve-out in their IIAs may want to consider different formulas and their attendant costs, benefits and risks before taking a decision.

ii) Removing high GHG emission projects from ISDS protection

164. A fossil fuel carve-out would apply to investment in the main fossil fuels, namely oil, gas and coal. If APEC economies seek to remove other high GHG emission projects from the scope of IIAs, they would need to explore alternate mechanisms. Carving out high GHG emission projects from the scope of IIAs comes with challenges as economies may have different views about what level of emissions is high, how they should be calculated, and furthermore, there is a chance that these questions could be decided by ISDS arbitrators in case of ambiguity or vagueness.

165. Approval mechanisms could be more suitable for governments that are looking to remove ISDS protection for high GHG emission projects. As discussed in Chapter II, some APEC economies require that foreign investment projects be approved in writing to enjoy ISDS protection. Governments could examine the

GHG emissions of a project at the approval stage, and if a high GHG emission project is deemed necessary, the project could be admitted through another mechanism clarifying that the investment does not enjoy ISDS protection. This mechanism would allow states to consider GHG emissions in the context of their NDCs. The arbitral interpretation of the approval in writing requirement has not been consistent, and this could be a problem for implementation (See Chapter II). However, governments could issue a joint interpretation clarifying that only certain types of approval imply consent to ISDS jurisdiction. Such reform would not be arbitrary if investors are informed before establishing their projects.

166. This report has also considered how some economies, including APEC economies, have introduced mechanisms to screen FDI. The main motivation for these mechanisms may not be climate change; however, governments could use screening to block high GHG emission projects, or, alternatively, they could use these mechanisms to determine which investments are high GHG emission projects. The latter could be admitted into the economy but excluded from ISDS. This exclusion would require linking screening mechanisms to ISDS in future IIAs. Governments could also reform their existing IIAs to clarify that screening mechanisms can be used to remove high GHG emission projects from the scope of IIAs and ISDS.

167. Further, APEC economies could explore the possibility of creating a mechanism that allows governments to deny benefits to high GHG emission projects. Governments could agree on a list of projects or a level of emissions that they consider to be unacceptable. It could also be argued that high GHG emission projects contravene a transnational public order rule (See *World Duty Free v. Kenya* and its finding regarding a transnational public order rule against investments established through corruption⁷⁰).

168. Lastly, governments could limit the protection of high GHG emissions projects by establishing stringent environmental rules under domestic law. Foreign investors that fail to comply with rules in force at the moment of establishment would be in breach of domestic laws and, under several arbitral precedents, would not enjoy ISDS protection. Many ISDS tribunals have found that those investors are barred from bringing ISDS disputes. Some IIAs have an explicit legality clause (*Plama v. Bulgaria*⁷¹), but such a clause was absent in other cases (*Cortec v. Kenya*⁷²) where the tribunal decided that it lacked jurisdiction.

169. A key advantage of these proposals is that governments would have control over which projects are protected under IIAs, as opposed to granting blanket protection to all FDI projects irrespective of their carbon emissions or other sustainable development considerations. In this way, fossil fuel and high GHG emission projects could be removed from the scope of protection. Governments could incorporate some of these mechanisms in future IIAs. Such a move would not be arbitrary for investors as they would be informed before investing. There are risks in applying some of these mechanisms retrospectively, and removing projects currently within the scope of IIAs from ISDS protection could be interpreted by ISDS tribunals as an arbitrary change of investment conditions.

iii) The right to regulate (climate mitigation and adaptation measures)

170. Advancing climate change objectives, including the Paris Agreement goals, requires that governments can align the terms for the establishment, operation and conclusion of FDI projects with their NDCs and other climate change priorities. These terms must not only be acceptable to investors—given that private investment is essential to enable the meeting of climate change goals—but they should also be aligned with the just energy transition and climate change objectives. Refining the right to regulate FDI in IIAs is therefore fundamental, allowing for legitimate public measures while protecting investors from opportunistic public conduct.

171. Safeguarding the right to regulate in IIAs can be achieved by introducing exceptions, right to regulate provisions, carve-outs, and/or by refining the standards of protection, such as expropriation, FET/MST, and full protection and security. Chapters I and II have described some of the efforts in this direction, and Chapter III has mapped relevant IIA trends in APEC economies. As UNCTAD has consistently observed, old-generation IIAs may be particularly problematic from the perspective of the right to regulate.

172. Analysis of recent IIAs indicates that APEC economies have followed various strategies to refining the right to regulate. Chapter III shows that while environmental carve-outs in expropriation provisions are quite common in new-generation IIAs, other provisions—such as general exceptions—are present in the treaties of some economies only. Similarly, there are IIAs that include special provisions on the right to regulate, while others prefer instead to qualify FET, for example by linking it to the minimum standard of treatment or providing qualifications to the notion of legitimate expectations. Some recent treaties include special provisions on the right to regulate and climate change.

173. Experts agree that finding a perfect formula is not ultimately possible. The award in *Eco Oro v. Colombia* illustrates a recurrent interpretative problem. Some ISDS tribunals have reasoned that IIAs have no effect on climate change mitigation and adaptation action. These arbitrators have reasoned that awards ordering economies to pay compensation neither constitute an obstacle to climate action nor create tensions between IIAs and the UNFCCC or the Paris Agreement. Governments, ISDS arbitrators have claimed, can freely implement the measures as long as they regulate in a non-discriminatory, rational and consistent manner, or pay compensation.

174. As explained throughout this report, in Chapter IV in particular, the contention that IIAs and ISDS awards cannot create negative implications for climate change action needs to be put in context. Firstly, governments being obliged to pay significant compensation for climate change action may induce a regulatory chill. Sometimes compensation may create positive incentives, for instance when governments would otherwise act in an arbitrary or discriminatory manner, but the concern remains that governments are required to pay compensation in other scenarios, such as cases of inconsistent public action or not meeting investors' legitimate expectations,⁷³ and that the amounts may include controversial items particularly loss of profits. ISDS awards have not

dissipated these fears, there is evidence of some cases of regulatory chill, and governments face an increasingly uncertain regulatory landscape (Chapters I and IV).

175. Secondly, where compensation is awarded for conduct other than opportunistic behavior, IIAs and ISDS may be operating against the polluter pays principle and hampering the just energy transition by compelling governments to compensate polluters. This situation would create tensions with the Paris Agreement, the UNFCCC and basic principles of international environmental law. A challenge for ISDS is how to address cases in which there is little certainty about social and environmental impacts and where multiple stakeholders, including vulnerable groups, have legitimate interests. Various governmental agencies may provide different inputs, and ultimately projects may not be approved or may be terminated after a long administrative process. The challenge is how to adjudicate cases in which various public agencies are involved and governments face significant uncertainty (Chapters I and IV).

176. Thirdly, if or when ISDS tribunals rule that governments compensate green investors for reforming incentive schemes, it is arguable that arbitrators are shifting the full risk of policy experimentation onto governments. There is a significant likelihood that governments make policy mistakes, not least because of the urgency of the energy transition and the uncertainty of the context, and thus making policy adjustments would be expected to be a regular governmental task. APEC economies may want to consider whether governments should assume the full risks of these adjustments, especially given that relevant variables for these incentive schemes—such as the state of technology—are out of their control. The policy question is whether IIAs and ISDS can be aligned with a scenario of escalating uncertainty that calls for flexible and adaptable regulation. A related risk is that economies might decide not to offer incentives, which are necessary to promote green FDI, because of the threat of ISDS proceedings.

177. Overall, APEC economies may want to examine in more detail the costs, benefits and risks of ISDS protection. One key question may be whether the situations of regulatory chill in academic research are anecdotal events or rather represent a trend. They may also want to examine if IIAs and ISDS discipline governments for conduct other than opportunistic behavior—and if so, what are the consequences of this stringent review of public action, particularly with regard to climate change action. Another relevant question is whether an emerging duty to regulate for climate change may reconfigure the balance between investors and states under IIAs and ISDS, for instance, by providing governments (respondents in ISDS cases) with robust justifications or defenses for their actions. Lastly, the interaction between IIAs, ISDS and escalating uncertainty related to climate change is another area that may require further consideration. More specifically, APEC economies may want to:

1) *Conduct a detailed analysis of the IIAs of APEC economies.* This analysis should explore their evolution and how each economy has attempted to refine standards of protection and clarify their right to regulate—particularly with regard to climate mitigation and adaptation measures. As discussed in Chapter IV, it may

be appropriate to consider these questions through the lens of a duty to regulate for climate change, as opposed to a right to do so. The study could be mapped against controversial ISDS cases, such as those involving legitimate expectations or inconsistency, to ascertain the risks entailed in ISDS as precisely as possible.

2) *Explore the possibility of carving out climate change-related measures from IIA standards of protection and/or ISDS.* Many IIAs remove taxation measures from the scope of standards of protection or from ISDS. This would be challenging in relation to climate change action as it would potentially encompass a broad sphere of public action measures, especially if both mitigation and adaptation measures are included. On the one hand, adaptation measures are central for climate change action and it will be important for effective action that IIAs and ISDS are aligned with these measures. On the other hand, completely removing adaptation measures from IIAs would significantly reduce the application of these treaties. Removing mitigation measures only is an intermediate option, although one that could also be considered too broad.

3) *Consider establishing a special mechanism for resolving disputes resulting from climate change-related measures.* Defining the scope of these measures would be challenging, as just explained. However, a special mechanism would not completely remove measures from dispute settlement provisions. Following the model of the 2015 Australia–China FTA (Article 9.11), for instance, governments could create an intergovernmental mechanism to decide if the measure is climate change-related and whether the government acted in a non-opportunistic manner. If the home and host economies agree that the measure is legitimate, the dispute would be discontinued. Otherwise, in case of disagreement, the dispute would proceed to ISDS or another dispute settlement mechanism (See Paine and Sheargold 2023 for a specific proposal).

178. APEC economies may want to consider the benefits, costs and risks of the options outlined in 2) and 3) above. These mechanisms may provide governments assurances for implementing climate change measures, especially those that have ambitious NDCs. At the same time, the scope of climate change-related measures could be interpreted too broadly, and investors could claim that carve-outs and related special mechanisms render IIAs meaningless. In the case of special intergovernmental mechanisms, governments could have an incentive to support one another in bilateral settings knowing that they may find themselves facing a similar case. One way to address this might be to create a regional APEC panel to deal with these claims. It is less likely that an APEC panel would be influenced by the preferences of individual governments. Such a panel could generate precedents about what measures fall within the special mechanisms. Other multilateral or regional organizations could also serve this function.

iv) Compensation standards

179. If compensation standards under ISDS are much higher than under domestic law, especially in cases that include loss of profits,⁷⁴ this would mean that IIAs pose a risk of regulatory chill and come into tension with the polluter pays principle. Academic research has suggested that ISDS tribunals rely on compensation standards that are too favorable to investors, particularly when

compared to compensation paid in similar cases in other international and domestic litigation (Aisbett and Bonnitcha 2021; Bonnitcha and Aisbett 2020; Paporinskis 2020). Reducing the amounts of compensation that governments are ordered to pay, especially in controversial cases such as those involving investors' legitimate expectations and inconsistent public action, would reduce these risks and tensions.

180. Under customary international law, some scholars have suggested that compensation standards distinguish between measures affecting one specific investment and measures affecting an entire economic sector or even the whole economy (Williams 1928; Oppenheim and Lauterpacht 1948, 317–18. See also Perrone 2021, 64). In the case of measures affecting an entire economic sector, they argue, a lower compensation would be required if the government could be shown to be pursuing a legitimate objective in a non-discriminatory manner. Under this interpretation, legitimate climate change mitigation and adaptation measures would trigger lower compensations compared to expropriatory measures targeting specific projects. This conclusion is in line with the World Bank *Legal Framework for the Treatment of Foreign Investment*, which states that governments might pay just partial compensation in cases of “large scale social reforms following the most exceptional circumstances,” although these circumstances “rarely occur and [. . .] may be expected to become more uncommon in future” (World Bank 1992, 28–29).

181. APEC economies may want to study this question further and explore alternatives to reduce the amounts of compensation. One option may be to reach an agreement that general non-discriminatory climate mitigation and adaptation measures call for a lower standard of compensation, which takes into consideration the polluter pays principle and the common but differentiated responsibilities principle. Domestic law standards could also be helpful in determining the appropriate levels of compensation. These lower standards could be especially useful for cases in which the controversial measure does not involve a transfer of assets to host economies.

v) *Bringing IIAs and ISDS closer to international climate change law*

182. According to Article 31.3.c of the Vienna Convention on the Law of the Treaties, ISDS tribunals must consider relevant international laws in addition to the IIA applicable to a dispute. Systemic integration may serve to bridge the gap between the standards of protection found in IIAs and states' obligations under international environmental and climate change law. However, the likelihood of success of such an interpretative method in international economic law is uncertain. Many scholars have claimed that a problem of international economic law—in relation to both trade and investment—is the fragmentation or separation of economic, social and environmental considerations. In the 2000s, this claim opened up a research agenda on the linkages between international economic law and other areas of international law (See Lang 2007).

183. Some recent FTAs have attempted to resolve the problem of fragmentation. These treaties include chapters especially dedicated to the environment, labor or sustainability, while some have added specific provisions on climate change (See

Chapter III). Although the interaction between these various FTA chapters remains understudied, there is a trend of incorporating questions of social and environmental sustainability into FTAs. This trend could make systemic integration easier, as the relevant provisions would be within the same treaty.

184. APEC economies may want to consider how Sustainability, Environment and Cooperation chapters could serve to align Investment chapters with the Paris Agreement and the UNFCCC. If governments find that this reform strategy holds some promise, research could be conducted to outline a similar strategy for the reform of old-generation IIAs. The emerging duty to regulate for climate change could be an important part of such a strategy.

E. Using IIAs and ISDS to enforce climate change commitments

185. It has been noted that IIAs and ISDS can serve to strengthen governments' climate change commitments by allowing foreign investors to bring ISDS claims for non- or inadequate compliance. Chapters II and IV discussed relevant ISDS awards and explored how investors could use ISDS to induce governments to comply with their climate change obligations. Foreign investors in the low-carbon economy would have an incentive to file such ISDS cases because the profitability of their projects will often depend on the implementation of incentive schemes and structural reforms related to the energy transition. Foreign investors could claim to have legitimate expectations that certain reforms would be implemented within a specific timeframe. Alternatively, they could argue that governments have obligations to protect their projects from environmental harm under the full protection and security standard. IIAs and ISDS would create additional incentives for governments to implement certain measures, as investors could threaten to file an ISDS case.

186. The possibility that investors use ISDS proceedings to incentivize governments to comply with their climate pledges might come with benefits from a climate perspective, but also with costs and risks. One key concern is that foreign investors could come to define public priorities de facto, as governments would be inclined to prioritize reforms that affect investors' projects. This has implications for any commitment to a just energy transition in which governments should consider first the interests of vulnerable groups, as required by the Paris Agreement and the 2023 Non-Binding Just Energy Transition Principles for APEC Cooperation. Moreover, vulnerable groups could resort to domestic courts or international human rights tribunals, which might find that governments are at fault for not prioritizing the human right to a healthy environment or those people whose human rights are at risk because of climate change. Potential inconsistent investment and human rights decisions would put governments in a difficult position (See the discussion of the *Zeph v. Australia* ISDS case in Chapter IV).

187. Overall, APEC economies may want to consider the benefits, costs and risks of allowing investors to use ISDS to enforce their climate pledges and promises. While moving from the concept of a right to a duty to regulate may strengthen governments' defense in ISDS proceedings, it could also favor investors claiming that states have failed to implement climate measures. Here, again, legitimate

expectations and inconsistency appear as the most contentious standards of protection.

F. Investor responsibilities/obligations, IIAs and climate change

188. Some of the issues that arise in the interaction between IIAs, ISDS and climate change could be addressed by defining international investor responsibilities and obligations. The international community could impose on investors in certain sectors an obligation to reduce their GHG emissions within defined parameters. This obligation could be linked to IIAs and ISDS. If investors failed to comply with their obligations, the project would be ineligible for ISDS protection. Moreover, as explained in Chapter IV, it can be argued that a governmental regulation responding to a breach of investor obligations is legitimate and does not require compensation, as long as it does not discriminate and conforms with due legal process. Investor obligations could also work as a defense for governments in ISDS proceedings, as well as serve as the basis for counterclaims under ISDS.

189. The question of international investor obligations is controversial, however (Ruggie 2013). There are no or few binding human rights investor obligations, and previous international negotiations suggest that defining climate change investor obligations under international law would be contentious.

190. An intermediate option would be to define investors' responsibilities, linking their compliance with standards of protection under IIAs or even access to ISDS. Investors' due diligence could be made a prerequisite to access ISDS or to have "legitimate" expectations under the FET/MST, for instance. In this way, IIAs could serve to incentivize investors to reduce their carbon emissions and align their projects with the Paris Agreement. APEC economies may want to consider the situation and assess the benefits, costs and risks of defining international investor climate change obligations or responsibilities.

G. Just transition, vulnerable groups and IIAs

191. As opposed to the right to regulate, questions related to local and vulnerable communities have attracted less attention in investment law and policy. The two issues are closely related, however. Governments often regulate to protect rights of vulnerable groups; in many cases, government have a duty to implement such measures under international human rights law. Through the Paris Agreement, as well as APEC initiatives related to the energy transition, governments have expressed the view that energy transitions need to take into account distributive considerations.

192. A key risk is that foreign investors may find that policies aimed to protect vulnerable groups affect their rights under IIAs, and use ISDS to challenge these initiatives. By removing disputes from domestic courts, ISDS tribunals analyze and resolve disputes from the perspective of a specific category of claimants (investors) and respondents (governments). In a typical ISDS setting, communities or environmental activists play no role, apart from submitting amicus briefs, in contrast to domestic courts where they are allowed to participate fully.

This situation may affect climate action and also make a “just” transition more difficult, as there would be no representation of local interests in ISDS proceedings (Perrone 2019).

193. According to some reports from the legal industry, foreign investors view IIAs and ISDS as advantageous precisely because they remove disputes from domestic courts, and arguably shield the process from the intervention of communities and environmental activists. This situation creates a policy dilemma that APEC economies may want to consider, for instance, through running focus groups with affected vulnerable communities and foreign investors. Such a process could assist in devising a special procedure for resolving investment disputes involving vulnerable groups.

H. Technology, just transition and IIAs

194. The international community agrees that technology, as much as private investment, has a central role to play in climate action. The UNFCCC and the Paris Agreement explicitly recognize the importance of technology and create mechanisms to ensure that all economies, developing and least developed, have the appropriate technology to face their mitigation and adaptation needs.

195. Technology can be transferred in various ways, and private investors may be involved in several capacities in the process (South Centre 2022). Such a discussion lies beyond the bounds of this report, although it should be noted that performance requirement prohibitions in IIAs may prevent technology transfer. UNCTAD has observed that performance requirements may be a useful tool to transfer technology, and economies may want to consider introducing exceptions for climate change in their IIAs (UNCTAD 2023a, 93).

196. Chapter III shows that many IIAs in APEC economies incorporate some exceptions to performance requirements. IIAs that only include a cross reference to the TRIMs agreement rarely include flexibilities. However, treaties with TRIMs plus commitments often include exceptions—selected provisions are included in Chapter III. APEC economies may want to study the scope of these exceptions and their interaction with the UNFCCC and the Paris Agreement. It is worth mentioning that performance requirements are often exempted from ISDS; however, foreign investors could theoretically invoke ISDS if performance requirements were implemented after the establishment of a project, on the basis of violating FET/MST, for example.

I. Termination of IIAs

197. Some UN reports have suggested that economies should terminate IIAs and ISDS, as the costs and risks of these treaties and ISDS may outweigh their benefits (Boyd 2023). The pre- and post-workshop surveys show that APEC economies do not share this view. Governments consider that IIAs are or can be aligned with climate change goals, and that they may be useful to promote and facilitate green FDI flows.

198. The termination of IIAs is not discussed here, as this is not a strategy likely to be pursued by APEC economies. Governments may want to consider some factors underlying this policy position:

1) Terminating IIAs would require significant global consensus, as investors could plan their investments to benefit from the IIAs that remain in force. Many law firms actively advise investors to do treaty planning and due diligence.

2) Another risk associated with terminating IIAs without a significant global consensus lies in sunset or survival clauses, which allow investors to bring cases after unilateral termination for ten or more years. Governments may want to negotiate a shorter sunset clause if terminating or reforming an IIA, but this policy decision may have unintended negative climate consequences if governments opt to wait until the expiration of the sunset clause to adopt the measure in question. This may be rational from the perspective of mitigating the risk of ISDS claims, as this risk would disappear after the end of the survival clause, but it may chill regulation that might have been adopted if the IIA remained in force (Horn 2023, 24–25).

3) In the absence of a significant consensus for collective termination, economies may be better off reforming IIAs, particularly old-generation IIAs. This report has explored options that would protect governments' ability to pass climate mitigation and adaptation measures in the context of ISDS litigation.

VI. Conclusion

199. This final report has reviewed policy and academic views on the interaction between IIAs, ISDS and climate change. The topic has attracted significant attention from key organizations, such as the IPCC, the OECD, UNCTAD, as well as APEC.

200. Pre- and post-workshop surveys, along with the discussions at the August 2023 capacity-building workshop on IIAs and climate change, were pivotal to identifying the policy priorities of APEC economies toward the preparation of this final report. APEC economies indicated the importance of aligning IIAs and ISDS with climate change objectives. At the August 2023 workshop, experts from international organizations, academia and business shared their views about how to reach this policy goal, with some differing on whether it is achievable at all. This report benefited significantly from these views, and summaries of the presentations are included in this report as Annex II.

201. Chapter I provided an overview of the literature, existing policy discussions and proposals. Taking a climate change perspective, Chapter II mapped the main disciplines included in IIAs, namely investment admission, investment promotion, investment facilitation and investment protection (standards of protection and ISDS). This mapping was complemented with a review of recent IIA trends. Chapter III assessed how APEC economies have attempted to refine and protect their right to regulate, among others, in light of climate change. Annex I includes a selection of relevant provisions on the right to regulate. This analysis could be

considered a first step to developing a full picture of the IIAs in APEC economies. The last comprehensive assessment of this network of treaties was carried out by UNCTAD and APEC in 2009. Chapter IV examined the interaction of IIAs and international environmental and climate change law from a systemic perspective. The analysis considered how the emergence of a duty to regulate for climate change may affect the balance between governments and investors under IIAs and ISDS.

202. Chapter V defined a set of indicators to assess the alignment of IIAs and ISDS with climate action and international climate change law, looking at investment promotion, investment facilitation and investment protection. It provided an in-depth policy analysis and some policy recommendations. Instead of advocating for a specific solution, or focusing on any particular issue, the approach was to present and map the benefits, costs and risks of available policy options. This approach is consistent with recent recommendations from the UN, the IMF and the World Bank, which underscore that governments should invest in understanding and reducing risks.

203. The recommendations are also based on the premise that states are the masters of their international treaties and have the authority under international law to make the changes they consider appropriate. International law is at the service of governments and their mutual objectives. The implementation of some recommendations may require more international cooperation than others, but ultimately the starting point is for APEC economies to agree on a common strategy. The Non-Binding Just Energy Transition Principles for APEC Cooperation may provide a basis for defining such a strategy, recognizing that climate change policies should pursue positive environmental, social and economic outcomes, while taking into account domestically defined economic growth priorities.

204. Overall, a relevant conclusion of this report is that key policy questions involving the interaction between IIAs, ISDS and climate change call for further research and analysis, in spite of the abundant research in international investment law. Some of the questions in need of further research are: 1) if and how IIAs and ISDS promote FDI flows; 2) if and how IIAs and ISDS can serve to facilitate FDI flows; 3) if and how IIAs and ISDS can be refined to protect investors from host state opportunistic behavior only; 4) how IIAs and ISDS interact with FDI incentives, and whether this interaction has an effect on FDI flows; and 5) how IIAs and ISDS can be adapted to a world characterized by escalating uncertainty, arising from climate change, as well as other factors.

205. Developing greater knowledge and understanding about these questions and other policy challenges presented in Chapter V requires a joint effort on the part of the public sector, the private sector, and academia, as well as a consideration of evidence from various economic sectors and all the APEC economies. Given that APEC economies have different capacities to assess benefits, costs and risks, capacity-building events and workshops can play a pivotal role.

¹ *Westmoreland Coal Company v. Canada* (ICSID Case No. UNCT/23/2) Pending. A previous dispute for the same facts was resolved in favour of Canada, as the tribunal decided it lacked jurisdiction to resolve the case. *Westmoreland Mining Holdings, LLC v. Canada* (ICSID Case No. UNCT/20/3) Final Award, 31 January 2022. The foreign investor filed the case again.

² *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands* (ICSID Case No. ARB/21/22) Discontinued.

³ *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands* (ICSID Case No. ARB/21/4) Discontinued.

⁴ John Parnell (2021). Germany Settles Nuclear Phaseout Legal Disputes for \$2.9 B. 5 March 2021. GreenTechMedia. URL: <https://www.greentechmedia.com/articles/read/germany-settles-nuclear-phase-out-legal-disputes-for-2.9b>.

⁵ Two years earlier, the OECD published a working paper on potential avenues for policies relating to investment treaties (OECD 2021). The paper explores how IIAs can contribute to sustainable development and responsible business conduct, market access, FDI facilitation and liberalization, and subsidies regulation, as well as address the interests of foreign investors and governments, including in the context of global challenges such as climate change.

⁶ See Kate Abnett. (2023). EU to propose exit from Energy Charter Treaty over climate concerns. 29 June 2023. Reuters. URL: <https://www.reuters.com/sustainability/climate-energy/eu-propose-exit-energy-charter-treaty-over-climate-concerns-2023-06-29/>.

⁷ OECD. Investment Treaties and Climate Change OECD Public Consultation. January - March 2022. 13 April 2022. Compilation of Submissions (OECD 2022b). URL: <https://www.oecd.org/investment/investment-policy/OECD-investment-treaties-climate-change-consultation-responses.pdf>.

⁸ See APEC (2020). APEC Putrajaya Vision 2040 (Annex to the “APEC 2020 Leaders’ Declaration”). 20 November 2020. URL: https://www.apec.org/Meeting-Papers/Leaders-Declarations/2020/2020_aelm/Annex-A.

⁹ 2021 APEC Aotearoa Plan of Action. URL: <https://aotearoaplanofaction.apec.org/>.

¹⁰ The policy brief references vulnerable groups as follows: “Vulnerable groups like women, the poor, workers, people with disabilities and Indigenous Peoples” (APEC 2022f, 1).

¹¹ 2021 APEC Aotearoa Plan of Action. Trade and Investment URL: <https://aotearoaplanofaction.apec.org/trade-and-investment.html>.

¹² 2021 APEC Aotearoa Plan of Action. Trade and Investment URL: <https://aotearoaplanofaction.apec.org/trade-and-investment.html>.

¹³ For further information, see Dolzer, R., Kriebaum, U. and Schreuer, C. (2022). Principles of international investment law. (Oxford University Press). Chapter VI “Admission and Establishment”; Muchlinski, P. (2021). Multinational enterprises and the law. (Oxford University Press). Chapter 5 “Control of Inward Investment” and Chapter 6 (Liberalization and Promotion of Inward Investment);

Van den Bossche, P. and Zdouc, W. (2021). The Law and Policy of the World Trade Organization. (Cambridge University Press). Chapters 4, 5 and 6 (especially the sections on the GATS Agreement).

¹⁴ FDI Intelligence. (2023). US finalising imminent outbound FDI screening rules. 15 May 2023. URL: <https://www.fdiintelligence.com/content/news/us-finalising-imminent-outbound-fdi-screening-rules-82488>.

¹⁵ See *Walter Bau AG v. Thailand* (UNCITRAL) Partial Award on Jurisdiction, 5 October 2007.

¹⁶ For a discussion of the existing literature, see South Centre (2022).

¹⁷ For further information, see Dolzer, R., Kriebaum, U. and Schreuer, C. (2022). Principles of international investment law. (Oxford University Press). Chapter VI “Admission and Establishment”; International Trade Centre. (2021). Investment Facilitation for Development. A toolkit for policymakers. [Axel Berger and Karl Sauvant (eds)].

¹⁸ URL: https://www.wto.org/english/tratop_e/invfac_public_e/factsheet_ifd.pdf.

¹⁹ *Strabag v. Germany* (ICSID Case No. ARB/19/29) Pending.

²⁰ For further information, Dolzer, R., Kriebaum, U. and Schreuer, C. (2022). Principles of international investment law. (Oxford University Press). Bonnitche, J. (2014). Substantive protection under investment treaties. (Cambridge University Press). Perrone, N.M., (2021). Investment treaties and the legal imagination: How foreign investors play by their own rules. (Oxford University Press).

²¹ *Peter A. Allard v. The Government of Barbados* (PCA Case No. 2012-06) Award, 27 June 2016.

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- ²² *Compañía del Desarrollo de Santa Elena v. Costa Rica* (ICSID Case No. ARB/ 96/ 1) Award, 17 February 2000.
- ²³ *Metalclad v. Mexico* (ICSID Case No. ARB(AF)/ 97/ 1) Award, 30 August 2000.
- ²⁴ *Técnicas Medioambientales (TecMed) v. Mexico* (ICSID Case No. ARB (AF)/00/2) Award, 29 May 2003.
- ²⁵ *Methanex v. USA* (UNCITRAL— NAFTA) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005.
- ²⁶ *Glamis Gold v. USA* (UNCITRAL— NAFTA) Award, 8 June 2009.
- ²⁷ *Chemtura v. Canada* (UNCITRAL— NAFTA) Award, 2 August 2010.
- ²⁸ “The contours of the definition of an indirect expropriation are not precisely drawn. This is so, even under new investment protection treaties that attempt to define indirect investment.” (Dolzer et al. 2022, 153)
- ²⁹ *Bear Creek Mining Corporation v. Peru* (ICSID Case No. ARB/ 14/ 2) Award, 30 November 2017.
- ³⁰ *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic* (ICSID Case No. ARB/17/14) Final Award, 23 August 2022.
- ³¹ *Lone Pine Resources Inc. v. The Government of Canada* (ICSID Case No. UNCT/15/2) Award, 21 November 2022.
- ³² *Lone Pine Resources Inc. v. The Government of Canada* (ICSID Case No. UNCT/15/2) Award, 21 November 2022, paras. 524–27.
- ³³ The *Vattenfall v. Germany I and II* cases would have provided an important precedent in relation to the phasing out of nuclear energy. However, both cases were settled. In 2016 and 2020, the Federal Constitutional Court in Germany indicated compensation for lost power generation was fair. See John Parnell (2021). Germany Settles Nuclear Phaseout Legal Disputes for \$2.9 B. 5 March 2021. GreenTechMedia. URL: <https://www.greentechmedia.com/articles/read/germany-settles-nuclear-phase-out-legal-disputes-for-2.9b>.
- ³⁴ *Methanex v. USA* (UNCITRAL— NAFTA) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, para. Part IV, Chapter D, para. 9.
- ³⁵ *Bilcon of Delaware and others v. Canada* (PCA Case No. 2009- 04) Award on Jurisdiction and Liability, 17 March 2015.
- ³⁶ *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41) Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021. The final award and the calculation of damages is pending.
- ³⁷ *Bilcon of Delaware and others v. Canada* (PCA Case No. 2009- 04) Award on Jurisdiction and Liability, 17 March 2015, paras. 450, 453, 590, 739–40.
- ³⁸ *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41) Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para. 804.
- ³⁹ *Lone Pine Resources Inc. v. The Government of Canada* (ICSID Case No. UNCT/15/2) Award, 21 November 2022.
- ⁴⁰ *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41) Partial Dissent of Philippe Sands, 9 September 2021, para 33.
- ⁴¹ *Towra SA-SPF v. Republic of Slovenia* (ICSID Case No. ARB/22/33) Pending.
- ⁴² *Westmoreland Coal Company v. Canada* (ICSID Case No. UNCT/23/2) Pending.
- ⁴³ *Azienda Elettrica Ticinese v. Federal Republic of Germany* (ICSID Case No. ARB/23/47) Pending.
- ⁴⁴ *Klesch Group Holdings Limited, Klesch Refining Denmark A/S and Kalundborg Refinery A/S v. Kingdom of Denmark* (ICSID Case No. ARB/23/48) Pending.
- ⁴⁵ *Klesch Group Holdings Limited and Raffinerie Heide GmbH v. Federal Republic of Germany* (ICSID Case No. ARB/23/49) Pending.
- ⁴⁶ *Klesch Group Holdings Limited & others v. European Union* (ICSID Case No. ARB(AF)/23/1) Pending.
- ⁴⁷ *Zeph Investments Pte. Ltd. v. Commonwealth of Australia* (PCA Case No. 2023-67 AA917) Pending.
- ⁴⁸ *Zeph Investments Pte Ltd v. Commonwealth of Australia*. Pending. URL: <https://www.ag.gov.au/international-relations/publications/notice-intention-commence-arbitration-zeph-investments>.
- ⁴⁹ *Ruby River Capital LLC v. Canada* (ICSID Case No. ARB/23/5) Pending.
- ⁵⁰ *Ascent Resources Plc and Ascent Slovenia Ltd v. Republic of Slovenia* (ICSID Case No. ARB/22/21) Pending.

⁵¹ *TC Energy Corporation and TransCanada Pipelines Limited v. USA* (ICSID Case No. ARB/21/63) Pending.

⁵² *Alberta Petroleum Marketing Commission v. USA*, (ICSID Case No. UNCT/23/4).

⁵³ *Eco Oro Minerals v. Colombia* (ICSID Case No. ARB/16/41) Procedural Order No. 6, Decision on Non-Disputing Parties' Application, 18 February 2019.

⁵⁴ *Eli Lilly and Company v. Canada* (UNCITRAL, ICSID Case No. UNCT/ 14/ 2) Award, 16 March 2017.

⁵⁵ CETA Joint Committee of... regarding Article 8.10, Annex 8-A, Article 8.9, and Article 8.39 of the Comprehensive Economic and Trade Agreement (CETA). URL: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/2024-interpretation-project-projet.aspx>.

⁵⁶ Declaración interpretativa conjunta relativa a las disposiciones sobre protección de las inversiones que figuran en el Acuerdo Marco Avanzado entre la Unión Europea y sus Estados Miembros, por una parte, y la República de Chile, por otra. URL: https://www.subrei.gob.cl/docs/default-source/acuerdos/uni%C3%B3n-europea/ama-cl---ue.pdf?sfvrsn=942d0266_1.

⁵⁷ *Bear Creek Mining Corporation v. Peru* (ICSID Case No. ARB/ 14/ 2) Award, 30 November 2017.

⁵⁸ *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41) Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021.

⁵⁹ URL: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng>. For a critique of this position, see Alschner, W. (2022). Why omitting general public policy exceptions from investment treaties is a setback for the right to regulate. *Columbia FDI Perspectives* 342.

⁶⁰ See e.g. *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41) Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para. 828; *Suez and others v. Argentina* (ICSID Case No. ARB/ 03/ 17) Decision on Liability, 30 July 2010, paras. 238–40. Also, Cotula, L. (2023). International investment law and climate change: Reframing the ISDS reform agenda. *The Journal of World Investment & Trade*, 24(4-5), 766-791.

⁶¹ See, e.g., *Técnicas Medioambientales (TecMed) v. Mexico* (ICSID Case No. ARB(AF)/00/2) Award, 29 May 2003, para. 115.

⁶² Inter-American Court of Human Rights, *Advisory Opinion (Opinión Consultiva) OC-23/17*, 15 November 2017.

⁶³ The ECHR has decided that governments have an obligation to protect people from environmental harms based on the rights to life and to private and family life—Articles 2 and 8 of the European Convention on Human Rights. See, e.g., *Budayeva et al. v. European Court of Human Rights* - Application no. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/03; *Öneryildiz v. Turkey* [GC] (European Court of Human Rights - Application no. 48939/99); *Murillo Saldías et al. v. Spain* (European Court of Human Rights - Application no. 76973/01).

⁶⁴ *KlimaSeniorinnen v. Switzerland* (European Court of Human Rights - Application no. 53600/20) Judgement, 9 April 2024, paras. 545, 548.

⁶⁵ *Peter A. Allard v. The Government of Barbados* (PCA Case No. 2012-06) Award, 27 June 2016, para. 3

⁶⁶ *Peter A. Allard v. The Government of Barbados*, para. 252.

⁶⁷ See e.g., 1981 Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (Article 9); 2016 Morocco-Nigeria BIT (Articles 14.1-2). Also, *Urbaser v. Argentina* (ICSID Case No. ARB/07/26) 8 December 2016, para. 1199 (“At this juncture, it is therefore to be admitted that the human right for everyone’s dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights.”)

⁶⁸ See e.g., *World Duty Free Company v. Republic of Kenya* (ICSID Case No. ARB/00/7) Award, 4 October 2006. Also, Andrew Newcombe, “Investor misconduct”, in Armand de Mestral and Céline Lévesque (eds), *Improving International Investment Agreements* (Routledge 2013) 195–211.

⁶⁹ *Isolux v. Spain* (SCC Case V2013/ 153) Award, 17 July 2016, paras. 794, 781–93; *Masdar v. Spain* (ICSID Case No. ARB/ 14/ 1) Award, 16 May 2018, para. 490.

⁷⁰ *World Duty Free Company v Republic of Kenya* (ICSID Case No. ARB/00/7) Award, 4 October 2006, para. 157.

⁷¹ *Plama Consortium Ltd v Republic of Bulgaria* (ICSID Case No ARB/ 03/ 24) Award, 27 August 2008, paras. 79–95.

⁷² *Cortec Mining Kenya Ltd v Republic of Kenya* (ICSID Case No ARB/15/29) Award, 22 October 2018, para. 333.

⁷³ Philippe Sands dissent in *Eco Oro v. Colombia* describes some of these risks. See *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41) Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021 (Sands dissent).

⁷⁴ For instance, in *Tethyan Copper v. Pakistan* (ICSID Case No. ARB/12/1), an ICSID tribunal ordered Pakistan to pay more than USD 5.9 billion in compensation, interest and legal costs to the investor. See Schneiderman, D. (2022). International investment law and discipline for the indebted. *European Journal of International Law*, 33(1), 65–96.

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Zeph Investments Pte. Ltd. v. Commonwealth of Australia, PCA Case No. 2023-67 (AA917), Pending.

ANNEX I - Right to Regulate Provisions in IIAs in APEC Economies

(2010) Korea—EU FTA

Chapter Thirteen

Trade and Sustainable Development

Article 13.1

Article 13.3

Right to regulate and levels of protection

Recognising the right of each Party to establish its own levels of environmental and labour protection, and to adopt or modify accordingly its relevant laws and policies, each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental and labour protection, consistent with the internationally recognised standards or agreements referred to in Articles 13.4 and 13.5, and shall strive to continue to improve those laws and policies.

(2011) EFTA—Hong Kong, China FTA

ARTICLE 4.6

Right to Regulate

1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure consistent with this Chapter that is in the public interest, such as measures to meet health, safety or environmental concerns and reasonable measures for prudential purposes.

2. A Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in that Party of a commercial presence of persons of another Party or a non-party.

(2014) Turkey—Viet Nam BIT

Article 4

Right to Regulate

1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory 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;

(c) imposed for the protection of national treasures of artistic, historic, archeological value.

2. Nothing in this Agreement shall be construed:

(a) to require any Contracting Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;

(b) to prevent any Contracting Party from taking any actions that it considers necessary for the protection of its essential security interests

(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,

(ii) taken in time of war or other emergency in international relations,

(iii) to protect critical public infrastructures, including communication, power and water infrastructures, from deliberate attempts intended to disable or degrade such infrastructures;

or

(iv) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices;

or

(c) to prevent any Contracting Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

(2014) EFTA—Philippines FTA

Chapter 11

Trade and Sustainable Development

Article 11.3

Right to Regulate and Levels of Protection

1. Recognising the right of each Party, subject to the provisions of this Agreement, to establish its own levels of labour and environmental protection, and to adopt or modify accordingly its relevant laws, rules, regulations and policies, each Party shall seek to ensure that its laws, rules, regulations, policies or practices provide for and encourage high levels of labour and environmental protection, consistent with standards, principles and agreements referred to in Articles 11.5 (International Labour Standards and Agreements) and 11.6 (Multilateral Environmental Agreements and Environmental Principles) and shall strive to improve the level of protection provided for in those laws, rules, regulations and policies.

2. The Parties recognise the importance of taking account of scientific, technical and other information, and relevant international standards, guidelines and recommendations, in preparing and implementing measures related to environment and labour conditions that affect trade and investment between them.

Article 11.4

Upholding Levels of Protection in the Application and Enforcement of Laws, Rules, Regulations or Standards

1. A Party shall not fail to effectively enforce its labour and environmental laws, rules, regulations or standards in a manner affecting trade or investment between the Parties.

2. Subject to Article 11.3 (Right to Regulate and Levels of Protection), a Party shall not:

(a) weaken or reduce the level of environmental or labour protection provided by its laws, rules, regulations or standards with the sole intention to encourage investment from another Party or to seek or to enhance a competitive trade advantage of producers or service providers operating in its territory; or

(b) waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws, rules, regulations or standards in order to encourage investment from another Party or to seek or to enhance a competitive trade advantage of producers or service providers operating in its territory.

(2016) CETA
Chapter Eight
Investment
Section D
Investment protection
Article 8.9

Investment and regulatory measures

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.

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.

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.

4. For greater certainty, nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy or requesting its reimbursement where such measure is necessary in order to comply with international obligations between the Parties or has been ordered by a competent court, administrative tribunal or other competent authority, or requiring that Party to compensate the investor therefor.

(2018) Georgia—Hong Kong, China FTA

Article 6

Right to Regulate

1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure consistent with this Chapter that is in the public interest, such as measures to meet health, safety or environmental concerns and reasonable measures for prudential purposes.

2. A Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, measures provided in paragraph 1 as an encouragement for the establishment, acquisition, expansion or retention in its Area of the commercial presence of a juridical or natural person of the other Party.

(2018) EFTA—Indonesia FTA

Article 4.8

Right to Regulate

1. Subject to the provisions of this Chapter, a Party may, on a non-discriminatory basis, adopt, maintain or enforce any measure that is in the public interest, such as measures to meet health, safety or environmental concerns or reasonable measures for prudential purposes.

2. A Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, measures to meet health, safety or environmental

concerns as an encouragement for the establishment, acquisition, expansion or retention in its territory of a commercial presence of persons of another Party or a non-party.

(2018) EU—Singapore FTA

Article 2.2

Investment and Regulatory Measures

1. The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection privacy and data protection and the promotion and protection of cultural diversity.

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 Chapter.

3. For greater certainty, a Party's decision not to issue, renew or maintain a subsidy or grant:

(a) in the absence of any specific commitment under domestic law or contract to issue, renew, or maintain that subsidy or grant; or

(b) if the decision is made in accordance with the terms or conditions attached to the issuance, renewal or maintenance of the subsidy or grant, if any, does not constitute a breach of the provisions of this Chapter.

4. For greater certainty, nothing in this Chapter shall be construed as preventing a Party from discontinuing the granting of a subsidy or requesting its reimbursement where such action has been ordered by a competent court, administrative tribunal or other competent authority, or requiring that Party to compensate the investor therefor.

(2019) EU—Viet Nam FTA

Chapter 2

Investment Protection

Article 2.2

Investment and Regulatory Measures and Objectives

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

2. For greater certainty, this Chapter shall not be interpreted as a commitment from a Party that it will not change its legal and regulatory framework, including in a manner that may negatively affect the operation of investments or the investor's expectations of profits.

3. For greater certainty and subject to paragraph 4, a Party's decision not to issue, renew or maintain a subsidy or a grant shall not constitute a breach of this Chapter in the following circumstances:

(a) in the absence of any specific commitment to an investor of the other Party or to a covered investment under law or contract to issue, renew, or maintain that subsidy or grant; or

(b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy or grant.

4. For greater certainty, nothing in this Chapter shall be construed as preventing a Party from discontinuing the granting of a subsidy or requesting its reimbursement, or as requiring that Party to compensate the investor therefor, where such action has been ordered by one of its competent authorities listed in Annex 1 (Competent Authorities).

(2019) Japan—EU Economic Partnership Agreement
Chapter 16
Trade and Sustainable Development
Article 16.2

Right to regulate and levels of protection

1. Recognising the right of each Party to determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify accordingly its relevant laws and regulations, consistently with its commitments to the internationally recognised standards and international agreements to which the Party is party, each Party shall strive to ensure that its laws, regulations and related policies provide high levels of environmental and labour protection and shall strive to continue to improve those laws and regulations and their underlying levels of protection.

2. The Parties shall not encourage trade or investment by relaxing or lowering the level of protection provided by their respective environmental or labour laws and regulations. To that effect, the Parties shall not waive or otherwise derogate from those laws and regulations or fail to effectively enforce them through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.

3. The Parties shall not use their respective environmental or labour laws and regulations in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party, or a disguised restriction on international trade.

(2020) Japan—UK Comprehensive Economic Partnership Agreement
Chapter 16
Trade and Sustainable Development
Article 16.2

Right to regulate and levels of protection

1. Recognising the right of each Party to determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify accordingly its relevant laws and regulations, consistently with its commitments to the internationally recognised standards and international agreements to which the Party is party, each Party shall strive to ensure that its laws, regulations and related policies provide high levels of environmental and labour protection and shall strive to continue to improve those laws and regulations and their underlying levels of protection.

2. The Parties shall not encourage trade or investment by relaxing or lowering the level of protection provided by their respective environmental or labour laws and regulations. To that effect, the Parties shall not waive or otherwise derogate from those laws and regulations or fail to effectively enforce them through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.

3. The Parties shall not use their respective environmental or labour laws and regulations in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party, or a disguised restriction on international trade.

(2021) Trade Continuity Agreement between Canada and the UK (in relation to CETA)

Joint Interpretative Instrument on the Agreement on Trade Continuity Between the United Kingdom of Great Britain and Northern Ireland and Canada

2. Right to regulate

The TCA preserves the ability of the United Kingdom and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest, to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and data protection and the promotion and protection of cultural diversity.

3. Regulatory cooperation

The TCA provides Canada and the United Kingdom with a platform to facilitate cooperation between their regulatory authorities, with the objective of achieving better quality of regulation and more efficient use of administrative resources. This cooperation will be voluntary: regulatory authorities can cooperate on a voluntary basis but do not have an obligation to do so, or to apply the outcome of their cooperation.

(2022) Pacific Alliance—Singapore FTA

Article 8.3: Right to Regulate

1. The Parties reaffirm their right to regulate within their respective territories to achieve legitimate policy objectives.

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

(2022) New Zealand—UK FTA

Chapter 14

Investment

Article 14.1

Objectives

The objective of this Chapter is to encourage and promote the flow of investment between each Party on a mutually advantageous basis, under conditions of transparency within a stable framework of rules to ensure the protection and security of investments by investors of the other Party within each Party's territory, while recognising the right of each Party to regulate in order to achieve legitimate public policy objectives, such as the protection of public health, safety, and the environment.

Article 14.4

Relation to Other Chapters

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.

Article 14.18

Investment and Environmental, Health, and Other Regulatory Objectives

1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing, in a manner consistent with this Chapter, any measure that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, or other regulatory objectives.
2. The Parties recognise the importance of environmental protection, including with respect to climate change mitigation and adaptation, and recall each Party's rights and obligations relating to the protection of the environment provided for in this Agreement.

(2023) EU—New Zealand FTA

Investment Liberalisation and Trade in Services

Section A

General Provisions

Article 10.1

Objectives

1. The Parties, affirming their commitment to create a better climate for the development of trade and investment between them, hereby lay down the necessary arrangements for the progressive reciprocal liberalisation of trade in services and investment.
2. The Parties reaffirm each Party's right to regulate within their territories to achieve legitimate policy objectives, such as the protection of human, animal or plant life or health, social services, public education, safety, the environment, including climate change, public morals, social or consumer protection, animal welfare, privacy and data protection, the promotion and protection of cultural diversity and, in the case of New Zealand, the promotion or protection of the rights, interests, duties and responsibilities of Māori.

Chapter 19

Trade and Sustainable Development

Article 19.2

Right to regulate and levels of protection

1. The Parties recognise the right of each Party to:
 - (a) determine its sustainable development policies and priorities;
 - (b) establish the levels of domestic environmental and labour protection, including social protection, that it deems appropriate; and
 - (c) adopt or modify its relevant law and policies.Such levels, law and policies shall be consistent with each Party's commitment to the Agreements and internationally recognised standards referred to in this Chapter.
3. Each Party shall strive to ensure that its relevant law and policies provide for, and encourage, high levels of environmental and labour protection, and shall strive to improve such levels, law and policies.
4. A Party shall not weaken or reduce the levels of protection afforded in its environmental or labour law in order to encourage trade or investment.
5. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental or labour law in order to encourage trade or investment.

6. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental or labour law in a manner affecting trade or investment.

7. A Party shall not establish or use its environmental or labour law or other environmental or labour measures in a manner that would constitute a disguised restriction on trade or investment.

(2023) Canada—Ukraine Modernized FTA

Section B – Investment Protections

Article 17.4: Right to Regulate

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

(Proposed text) German Non-paper Proposing Draft Decision of the CETA Joint Committee

3. Climate Change

In light of the commitments of the Contracting Parties under the Paris Agreement, an investor should expect that the Contracting Parties will adopt measures that are designed and applied to combat climate change or address its present or future consequences, by mitigation, adaptation, reparation, compensation or otherwise.

When interpreting the provisions of the Investment Chapter, the Tribunal should take due consideration of the commitments of the Parties under the Paris Agreement and their respective climate neutrality objectives.

Thus, the Parties confirm their understanding that the provisions of this Chapter shall be interpreted and applied by the Tribunal by taking due consideration of the commitments of the Parties under the Paris Agreement and their respective climate neutrality objectives and in a way that allows the Parties to pursue their respective climate change mitigation and adaptation policies.

(Proposed text) Joint Interpretative Declaration on the Investment Protection Agreement between Chile and the European Union and its Member States

The European Union and its Member States and Chile make the following Joint Interpretative Declaration at the time of signature of the Investment Protection Agreement between them.

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

applied by the Tribunal by taking due consideration of the commitments of the Parties under the Paris Agreement and their respective climate neutrality objectives and in a way that allows the Parties to pursue their respective climate change mitigation and adaptation policies.

**Annex II – Expert presentations at the Capacity Building Workshop:
International Investment Agreements and Climate Change: What is the
role that international investment agreements play in the transition to a
green economy? (5 August 2023, Seattle, USA)**

**Panel 1. Investment Protection: Panel discussion on the relationship
between investment protection and climate change policies**

1. Lauge Poulsen

Prof. Lauge Poulsen, Chair of OECD's inter-governmental work programme on climate change and investment law, discussed the interactions between climate change and IIAs. He reported that OECD's recent survey of governments showed that investment policy-makers are interested in understanding how to align IIAs with the Paris Agreement and net zero, but many do not know how to do it.

Poulsen highlighted that the starting point in understanding the interaction between the Paris Agreement and investment treaties is Article 2.1.c of the Paris Agreement, which prescribes the parties' commitment to make "finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development." Based on this provision, which has been highlighted in the OECD process, Poulsen emphasized the need to consider whether maintaining investment treaty protections to all fossil fuel investors is aligned with the Paris Agreement.

In this context, Poulsen noted the approach developed in the Energy Charter modernization process where governments could decide which type of investments to exclude from the treaty coverage in the interest of climate. He noted that this approach could be implemented across existing treaties without raising considerable uncertainty in treaty interpretation by ISDS tribunals.

While Article 2.1.c prompts investment policy makers to consider questions of treaty coverage and shaping investment decisions, traditional debates about investment law and climate focus on policy space. Here, Poulsen highlighted a proposal under discussion in the OECD for effectively carving out climate policy measures from existing investment treaties.

2. Hamed El Kady

Hamed El Kady, Senior Coordinator; Investment Agreements, UNCTAD, presented the main challenges of the current investment regime and UNCTAD's work on IIAs and climate action. He stressed that it is time to synchronize efforts to reform the IIA regime and align it with the SDGs to better tackle global crisis relating to climate change, public health and geo-political tensions. El Kady recalled the intensive discussion about the multilateral Energy Charter Treaty; but pointed that governments have paid less attention to BITs, which are amounting to over 2,400. He highlighted three UNCTAD reports dealing with investment treaties and climate action: i) Issues Note: International investment regime and climate action, ii) Issues note on treaty-based investor-State dispute settlement

cases and climate action, and iii) the World Investment Report: Investing for sustainable energy for all.

El Kady said that current IIAs do little to support climate action, and that old-generation treaties can hinder governments' right to regulate the energy transition. He noted that most new-generation agreements fare relatively better in safeguarding the States' right to regulate and in incorporating specific provisions on the protection of the environment, climate action and sustainable development. However, both old and recent IIAs lack pro-active provisions aimed at effectively supporting climate action. In addition, he pointed out that there are numerous climate change-related ISDS cases.

In this context, El Kady presented UNCTAD's new IIA toolbox for the energy transition with policy options covering 4 areas: i) promotion and facilitation of sustainable investment, ii) technology transfer, iii) the right to regulate, and iv) corporate social responsibility. He emphasized that renegotiation, amendment and termination of old-generation IIAs is important to secure climate goals.

In addition to this policy work, UNCTAD has intensified its technical assistance at bilateral, regional and plurilateral levels and worked on the ground directly with governments and regional integration organizations to reform the investment treaty regime to make it more conducive to sustainable development. One of the recent examples is the African Continental Free Trade Area Investment Protocol, which references UNCTAD's work on IIAs in its preamble and includes provisions related to climate action, such as incentives for sustainable investments. El Kady also invited participants to UNCTAD's World Investment Forum which devises strategies and solutions for global investment and development challenges.

3. Kyla Tienhaara

Kyla Tienhaara (Queen's University) analyzed ISDS in the context of the energy transition. She recalled the importance of increasing the costs of fossil fuels production while making renewable energy cheaper. In addition, Tienhaara pointed to the fossil fuel production gap between economies' plans and projections, on the one hand, and the production levels consistent with the 1.5 and 2°C targets of the Paris Agreement, on the other. She mentioned that some governments—e.g. those part of the Beyond Oil and Gas Alliance—have pledged Paris-aligned dates for ending oil and gas production.

In this context, Tienhaara reminded the audience of the presence of over 2,500 investment treaties giving foreign investors access to ISDS. Through ISDS foreign investors can bring claims against states over policy changes conflicting with their 'legitimate expectations' and demand compensation for 'lost future profits'. In this respect, Tienhaara presented cases in which fossil fuel investors initiated ISDS arbitrations challenging climate-related governmental measures. Furthermore, she stressed that 19 per cent of the world's oil and gas assets that did not have a final investment decision as of 31 December 2021 (and would be cancelled under the International Energy Agency's Net-Zero Emissions by 2050 Scenario) are protected by treaties with ISDS.

Tienhaara concluded by noting that governments should cease providing further licenses or permits for oil and gas projects, modify or terminate investment treaties to prevent current license holders from having recourse to ISDS, and make efforts to cap compensation.

4. Ana María Daza-Clark

Ana Maria Daza-Clark (University of Edinburgh) addressed the topic of linkages between FDI, clean energy projects and sustainability. She provided a typology of investor's risks for 'greener' energy projects. These risks could be divided into external and internal. The internal ones include environmental and economic risks, while the external ones are social and political risks. Daza-Clark presented current challenges for the sustainability of clean energy projects, looking at recent fossil fuel phase-out and renewable energy disputes.

In her presentation, Daza-Clark discussed future-proofing legislation and the implementation of a legislative drafting technique that takes into account new developments in green FDI. She stressed the importance of allowing space for adaptation without the need for further legal adjustments. Daza-Clark also drew the attention of the audience to the United Nations GA Resolution A/RES/76/300 on the human right to a clean, healthy and sustainable environment. She noted that while the realisation of this right is primarily the obligation of States, the document is relevant for a rights-based approach defence in ISDS or potential counterclaims.

Lastly, Daza-Clark provided a checklist for clean energy frameworks, consisting of: i) clear energy legal regime (comprising primary and secondary legislation), ii) transparent pre- and post- investment establishment rules, iii) independent institutional and regulatory structures, and iv) adequate dispute prevention and resolution mechanisms. Under transparent pre- and post- investment establishment rules, Daza-Clark outlined, among others, the importance of providing clarity on the guarantees offered prior to the establishment of a project. Regarding independent institutional and regulatory structures, she noted that independent decision-making between different institutions, namely regulatory authorities, ministries and judiciary, should not undermine institutional communication and coordination, when necessary. Meanwhile, dispute prevention and resolution mechanisms are crucial to preserve clean energy projects, while safeguarding the regulatory autonomy of States.

5. Elizabeth Sheargold

Elizabeth Sheargold (Monash University) presented a proposal for a climate change carve-out for investment treaties, based on an article she co-authored with Joshua Paine of the University of Bristol (Paine and Sheargold 2023). Sheargold said that actual or potential ISDS claims may create an additional barrier or disincentive to necessary climate action. For this reason, she suggested carve-outs as an effective means of safeguarding climate policy space under international investment agreements. Sheargold proposed a carve-out that would exclude public measures which have the purpose of reducing or stabilizing

greenhouse gas emissions from the scope of IIAs. Treaties could include a non-exhaustive list of covered measures, such as the phase out of fossil fuels. Sheargold argued that the application of this carve-out would prevent any liability arising under IIA obligations, and would also allow the resolution of disputes before full litigation of the merits.

Regarding the first point, Sheargold outlined that even with modern treaty drafting, there may still be successful ISDS claims challenging climate measures. The proposed carve-out would exclude such measures from the scope of the treaty and as such unambiguously prevent any liability to pay compensation from phasing out fossil fuels. On the second point, she stressed that arbitrations can be lengthy, costly and uncertain and as such have a 'chilling effect' on policy making. Carve-outs, however, would be addressed as a preliminary or jurisdictional issue. As a result, they would allow more efficient dispute resolution without the need to fully litigate the merits of the case.

To conclude, Elizabeth Sheargold put forward a procedural mechanism for when the proposed carve-out is invoked by the defendant. Namely, application of the carve-out should be referred to treaty parties' environmental authorities. In the case that the treaty parties' environmental authorities agree the carve-out applies, the investor's claim would be discontinued. Nevertheless, if there were no agreement, then the issue could be referred to a state-state arbitration before a tribunal with climate expertise.

6. Martin Dietrich Brauch

Martin Dietrich Brauch (Columbia Center on Sustainable Investment) explored the interaction between treaty-based investment protection and arbitration, on the one hand, and climate action, on the other. He outlined the role international investment law should have in climate mitigation and adaptation. Namely, the need to phase out climate-wrecking investment and accelerate climate-aligned investment, which he claimed it fails to do. Brauch emphasized that the numerous investment treaties currently in force and the ISDS mechanism protect investments that are not aligned with the climate system. In this respect, he recalled ISDS cases that challenged governmental climate measures.

In Brauch's opinion, ISDS may delay public climate policies, lower government's levels of ambition, as well as prevent them from adopting or reversing their existing climate policies. He reminded the audience of empirical studies illustrating the negative impact of investment protection and ISDS on different public interest areas, including climate change. At the same time, he noted that there is no conclusive empirical evidence that investment treaties increase FDI flows, in general, or SDG-aligned or climate-aligned flows, in particular.

Lastly, Brauch contended that minor reforms of ISDS and IIAs would be inconsistent with the ample evidence on costs and the lack of evidence regarding the benefits of this international regime. Accordingly, he suggested a comprehensive overhaul, i.e., moving away from investment protection and ISDS. In this respect, governments should include contractual waivers of ISDS and terminate investment treaties and withdraw consent to ISDS. In addition,

governments should commit to domestic SDG- and climate-aligned investment governance, establish cooperation to deal with cross-border governance challenges, and foster financing mechanism for investments in climate-aligned investments. Brauch also pointed out that governments should discourage climate-unfriendly investments and secure a just energy transition.

Panel 2. Investment Market Access. Panel discussion on investment market access and climate-related investments

1. Injy Johnstone

Injy Johnstone (Oxford Sustainable Finance Group) has addressed the topic on net-zero, anchored in the provisions of the Paris Agreement as well as real-world practice of APEC economies, as a new norm of international investment. Johnstone recalled that net-zero is achieved when anthropogenic emissions of greenhouse gases to the atmosphere are balanced by anthropogenic removals over a specified period. She highlighted the distinction between investments that may do-no harm to the climate and investments in climate-aligned sectors. The focus of the presentation was on two climate-aligned sectors: renewable energy and carbon dioxide removal.

Johnstone discussed some commonalities and differences between the investment needs of the mentioned climate-aligned sectors. These commonalities include that they depend on a variety of technologies, rely on significant financial investment, and require a stable regulatory environment. Nonetheless, differences in terms of end-users, and in SDG benefits and risks were also identified.

Johnstone stressed that lessons learned from climate-aligned sectoral deployment are the importance of the design of subsidies, the existing threat of dispute settlement and the huge scope for international partnerships. Transparency, constancy and consistency are central for these climate-aligned sectors. She Johnstone suggested different options for APEC economies to attract investment in climate-aligned sectors but also emphasized the necessity of domestic congruency with such efforts. Namely, governments should align their laws and policies, including on fiscal incentives and subsidies and dispute resolution, with the investment needs of the climate-aligned sectors.

As a general conclusion, Johnstone summarized the importance of i) learning from past experiences, including from developing renewable energy, ii) identifying comparative needs and advantages in a net-zero aligned world, and more generally iii) looking at the overall picture of the investment regime.

2. Vincent Beyer

Vincent Beyer (UNCTAD) focused on different policy options for IIAs aimed at promoting sustainable energy investments. He indicated that old-generation IIAs, 2300 of which are still in force, do not sufficiently ensure an effective energy transition. Beyer presented different provisions included in new-generation IIAs relevant to the energy transition and climate action. He noted that even in new-

generation IIAs, however, provisions aimed to safeguard regulatory space for climate action are rare. He also referred to the numerous ISDS cases related to the fossil fuels, amounting to at least 219, and renewable energy sector, amounting to at least 119.

Beyer highlighted the following goals of IIA reform actions aimed to promote and facilitate sustainable energy investment: i) safeguarding of the right and duty of States to regulate in the public interest, and ii) enhancing the ability of IIAs to positively contribute to the sustainable energy transition.

In the second part of his presentation, Beyer discussed some policy options for achieving these two objectives. He discussed mechanisms that could facilitate sustainable energy investments, such as one-stop shops, preferential treatment of sustainable energy investments, fast track procedures for licences. Beyer also presented policy options for technology transfer and diffusion, for instance, the creation of an enabling environment for receiving technology and sufficient flexibility in provisions on intellectual property and performance requirements. Regarding the right to regulate for climate action in IIAs, Beyer proposed refining investment protection standards and reform of ISDS with regard to energy investments by e.g., carving out fossil fuels, and explicitly acknowledging the need for regulatory flexibility in IIAs. Regarding corporate social responsibility, some of the policy options presented to the audience were binding corporate obligations in the fields of labour, environmental and human rights standards, and provisions ensuring that energy investors comply with requirements for sustainable investment, e.g., by conducting environmental impact assessments.

Beyer concluded by highlighting that implementing some of these policy options could require renegotiating existing IIAs, or their amendment or termination.

3. Jewellord (Jojo) Nem Singh

Jewellord (Jojo) Nem Singh (International Institute for Asian Studies) focused on market-access questions from the industrial policy perspective. In the first part of his presentation, Nem Singh presented a definition of industrial policy, a survey of recent initiatives, three major types of industrial policies (functional, capital accumulation/mobilization of resources, and technology promotion). In addition, he discussed impacts of industrial policy on market access, which depends on the growth strategy adopted by each government, namely extensive or intensive growth strategy. This was followed by examples of industrial policies impacting market access.

The second part of the presentation focused on the clean energy transition from the perspective of industrial policy. Nem Singh indicated that rapid deployment of technologies as part of the clean energy transition implies a significant increase in demand for minerals. Furthermore, different interpretations of decarbonization were provided. On the one hand, climate change is seen as a collective action problem. On the other hand, decarbonization may also be perceived as a technological race. An example of China's Made in 2025 Industrial Strategy was provided. In addition, it was identified that new geopolitical realities mobilized major economies to justify new industrial policy. An example of such policies is,

inter alia, European Union's Green Deal, Net Zero Act, and Critical Raw Materials Act aimed at reducing technology and mineral dependency.

Nem Singh concluded by providing some policy recommendations. First, policy strategies to complement market access ultimately depend on the objective of governments (extensive or intensive growth strategy). Secondly, emerging sectors offer new opportunities for late development. Thirdly, industrial policy coordination goes beyond subsidies, as it requires aligning trade and investment regimes. Ultimately, despite recent geopolitical changes, it is important not to exaggerate the de-risking of major economies.

4. Matthew Stephenson

Matthew Stephenson (World Economic Forum) discussed Preferential Trade and Investment Agreements (PTIAs), Market Access, and Climate Goals. He indicated the strong interest of the World Economic Forum in climate, trade and investment; the forum brings over 130 leading global companies together with policy-makers for action-oriented exchanges to build resilient, sustainable and inclusive trade and investment. Stephenson presented four strategies to increase climate FDI. One of the strategies he emphasized is that authorities should work with governments and stakeholders to include climate FDI facilitation provisions in IIAs and strengthen national frameworks. In addition, Stephenson presented approaches and a model text for climate FDI provision in PTIAs. He highlighted that PTIAs should include coordination provisions that encourage the facilitation of climate FDI between parties.

Stephenson also emphasized that PTIAs can provide market access for climate-relevant goods/technologies and services. PTIAs could help achieve climate goals by ensuring market access for FDI into 25 identified priority technologies, and market access for goods in 25 priority technologies sectors, which in turn could increase export-oriented FDI. In addition, he identified 25 priority climate-relevant services based on their importance for climate mitigation activities. PTIAs could ensure market access for FDI in these sectors. Stephenson indicated that this approach builds on previous APEC's work on Environmental Goods, acknowledging that the current APEC List of Environmental Goods, while serving to improve market access, is not in itself sufficient to support green growth. He noted that a meaningful contribution to supporting green growth requires a more comprehensive range of goods and services, which could be drawn from the identified list of 25 technologies and services to help create a longer, more powerful and environmentally friendly list.

Stephenson concluded with the following observations: i) governments could work together on trade in climate technologies and services as a specific goal within PTIAs, ii) fewer trade and investment barriers to critical climate action technologies and services will have positive knock-on effects on competitiveness and growth opportunities in a net-zero emissions future, iii) rapid technological development is challenging because it can affect the definition and categorization of climate-related goods and services.

5. Cristián Rodríguez-Chiffelle

Cristián Rodríguez Chiffelle (Boston Consulting Group) discussed green FDI in emerging markets. He emphasized the importance of green FDI for achieving net-zero since public funding is not enough to reach climate targets. In addition, there is a need to get enough green FDI so developing economies embark on a green transition while achieving economic development goals. Rodríguez Chiffelle indicated that green FDI consists mainly of renewables, which is also the dominant energy sector in FDI flows in the last years. However, he admitted that developing economies have not been getting their fair share of green FDI.

Rodríguez Chiffelle stressed that green FDI can provide an opportunity to step-up climate action and realize socio-economic benefits. In this regard, he discussed how governments can promote and facilitate green FDI. Factors that should be taken into account are the existence of the green FDI strategy, skills and the knowledge gap, existing restrictions (e.g., monopolistic market structures), and fossil fuel dependence. Regarding the private sector, governments should consider the potential lack of incentives, infrastructural limitations, lack of climate data and transparency.

Rodríguez Chiffelle noted that economies have different starting points, and thus different strategies can be leveraged to attract green FDI. In this respect, governments should consider building a sustained green FDI advantage, unlocking their green FDI potential, pivoting FDI stock and flow to green, and reforming mainly through international cooperation. The green FDI performance of Chile and Indonesia was presented as an example. Chile is outpacing larger economies in green FDI flows, while Indonesia is the 5th economy for total green FDI inflows, mainly in electric vehicles.

Annex III

International Investment Agreements and Climate Change: What is the role that International Investment Agreements Play in the Transition to a Green Economy?

Preliminary Report

1. This preliminary report provides background for discussions at the 5 August 2023 in-person capacity building workshop: “International Investment Agreements and Climate Change: What is the role that International Investment Agreements Play in the Transition to a Green Economy?” The workshop will promote knowledge exchange among experts, government officials and stakeholders, addressing challenges and opportunities at the intersection of international investment agreements (IIAs) and climate change. Participants will evaluate linkages between investment and climate change, exploring strategies to align investments with sustainability goals. The workshop will foster collaboration, understanding, and the development of strategies for sustainable and climate-friendly initiatives.

2. Participants have been invited to complete a pre-workshop survey on the climate-related policies and practices that have been implemented or are under consideration by APEC member economies regarding their IIAs and related policies, to better understand their present knowledge and awareness of the interplay between IIAs and climate change.

3. This preliminary report and the 5 August Workshop are part of the APEC project “International Investment Agreements and Climate Change”. The project aims to provide for capacity building on the role that IIAs play in the transition to a green economy, and how far IIAs can synergize with climate change policies. The project will explore two main topics: investment liberalization and investment protection. Chile is the sponsor of the project, which is co-sponsored by Australia; Canada; Hong Kong, China; Malaysia; Peru; Chinese Taipei; and Viet Nam.

4. A post-workshop survey will be conducted to gather participants’ insights and feedback on the workshop’s content and impact. These surveys will be considered for the elaboration of a final report, which will be presented at the first 2024 meeting of APEC’s Investment Experts’ Group (IEG). The final report will map the practices and experiences of APEC economies with IIAs, and provide policy recommendations. In May 2024, APEC will circulate a post-training survey to IEG participants.

PART I: Context and Literature Review

A. Global Overview

5. Climate change, it is widely agreed, is the most pressing global challenge. Everybody contributes and will be affected by it, even if differentially. Since the early 1970s the international community has recognized the significance and rapidly growing threat that climate change poses to human life and the environment. The 1972 Stockholm Declaration and Action Plan for the Human Environment was the first international declaration to make the environment a central issue. The international community noted their common conviction that every person has a “responsibility to protect and improve the environment for present and future generations” (Principle 1). This responsibility was reaffirmed at the 1992 Conference on Environment and Development, held in Rio de

Janeiro, where governments agreed on the Rio Declaration and Agenda 21, and signed the United Nations Framework Convention on Climate Change (UNFCCC).

6. The UNFCCC recognizes the global character of climate change, while acknowledging that economies have “common but differentiated responsibilities” according to their historical carbon emissions and stage of economic development (Article 3). The responsibilities of the parties to the UNFCCC involve taking appropriate climate change mitigation and adaptation measures. Mitigation measures aim to reduce greenhouse gases (GHG) emissions, while adaptation measures entail taking action to adjust to the present and future impacts of climate change. The parties to the UNFCCC also agreed to promote financial aid and technology transfer to facilitate climate action in developing economies (Articles 4.3 and 4.5).

7. In 2007, the International Panel on Climate Change (IPCC) confirmed that “warming of the climate system is unequivocal” and “very likely due to the observed increase in anthropogenic greenhouse gas concentrations” (IPCC 2007, 5). In 2015, the international community took note of the situation and agreed for the first time to the clear objective of limiting global warming to well below 2°C compared to pre-industrial levels, preferably to 1.5°C (Paris Agreement 2015). The Paris Agreement reiterates that climate change is a global challenge that imposes responsibilities on all signatories, distinguishing between developed, developing, least-developed and other economies in special circumstances (such as small islands). In addition to requiring governments to establish their nationally determined contributions (NDCs), the Paris Agreement asks all economies to “make finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development” (Article 2.1.c) and stipulates that developed economies “shall provide financial resources to assist developing country [sic] parties with respect to both mitigation and adaptation” (Article 9.1).

8. The Paris Agreement recognizes “the importance of fully realizing technology development and transfer in order to improve resilience to climate change and to reduce greenhouse gas emissions” (Article 10.1). The parties to the Paris Agreement created the Technology Mechanism (composed of the Technology Executive Committee and the Climate Technology Centre and Network Technology Mechanism). In their most recent reports, these two bodies emphasize that accelerating technology transfer is imperative if the Paris Agreement goals are to be met, and to that end recommend that governments increase the coordination between technology and finance (UNFCCC 2021, 10–12, 24–25).

9. The international community agrees that climate change mitigation and adaptation measures to meet the Paris Agreement goals require significant and rapid investment. The 2018 IPCC report underscores that “climate policies in line with limiting warming to 1.5°C would require a marked upscaling of supply-side energy system investments between now and mid-century, reaching levels of between USD 1.6–3.8 trillion per year globally with an average of about USD 3.5 trillion per year over 2016–2050” (IPCC 2018, 321). The 2°C would require an

average of about USD 3 trillion per year over the same period. Moreover, the IPCC highlights not only “the level of investment but also the type and speed of sectoral transformation” necessary for the transitions associated with 1.5°C-consistent pathways (IPCC 2018, 321). The International Monetary Fund (IMF) estimates that economies must collectively invest at least USD 1 trillion in energy infrastructure by 2030 and USD 3 to 6 trillion across all sectors per year by 2050 to substantially reduce greenhouse gas emissions. Meanwhile, climate change adaptation will require annual investments of around USD 140 to 300 billion by 2030 to address the physical consequences of climate change, such as rising seas and intensifying droughts. This sum could sharply rise to between USD 520 billion and 1.75 trillion annually after 2050 depending on the effectiveness of climate mitigation measures (IMF 2022).

10. The Organization for Economic Cooperation and Development (OECD) has noted the importance of investing in growth and climate action. The 2017 report *Investing in Climate, Investing in Growth* mentions that climate-compatible growth will require governments to pursue resilient investments, fiscal measures and structural reforms. Governments face a triple imperative: growth, improving livelihoods and addressing climate change. These call for investments that address multifaceted development objectives and promote long-term resilience in infrastructure, water, communication, agriculture, forestry, and energy (climate change mitigation and adaptation measures). Governments also need to consider structural reforms in product markets, financial markets, labor markets and housing markets. “In short, policies that attempt to preserve the status quo – or at most favour an incremental transition – risk falling short from both a climate and an economic point of view” (OECD 2017a, 30).

11. The United Nations Conference on Trade and Development (UNCTAD) has focused on the importance of making growth and climate action compatible. UNCTAD’s *Trade and Development Report 2019* argues that this objective requires reconsidering multilateralism and promoting a Global Green New Deal. The first step, the 2019 report explains, is considering “a range of public financing options” (UNCTAD 2019a, 26). Another 2019 UNCTAD report points to the challenges faced by commodity-exporting economies, recommending these economies reduce their dependence on the natural resource sector (UNCTAD 2019b, 3). The 2021 report *Climate change: green recovery and trade* notes that “[d]espite their limited resources developing countries [sic] are attempting to recover greener,” and that “innovation is perhaps the only climate policy that enjoy[s] support across the entire political spectrum” (UNCTAD 2021, 3).

12. UNCTAD suggests that governments could do more to promote the private sector’s involvement in climate change mitigation and adaptation in developing and least-developed economies. It emphasizes that the growth of foreign investment in climate change has been limited to renewable energy and concentrated in developed economies. The 2022 report *Investment policy trends in climate change sectors, 2010-2022* explains that while investment in renewable energies is affected by institutional and macroeconomic conditions, the single most important determinant in attracting foreign investment to this sector is the existence of renewable energy policies, such as risk mitigation mechanisms and tariff regulation (UNCTAD 2022). According to UNCTAD’s *World Investment*

Report 2023, these mechanisms may be fiscal (tax credits, tax exception, tax relief); financial (subsidized loans, green insurance); or more targeted and complex instruments (feed-in tariffs, energy auctions, guarantee schemes, business facilitation) (UNCTAD 2023).

13. In 2021, UNCTAD and the Economic and Social Commission for Asia and the Pacific (ESCAP) published a special report on the challenges posed by climate change in the Asia-Pacific region. The report acknowledges that trade and investment have been central for economic growth in the region but that this growth has come “with significant social and environmental costs, including the rapidly worsening climate crisis” (UNCTAD–ESCAP 2021, xv). The report notes that the region has “regressed” in climate action, increasing its GHG emissions by 50% between 1990 and 2018 (UNCTAD–ESCAP 2021, 4). UNCTAD and ESCAP recommend Asia-Pacific economies implement “climate-smart trade and investment policies” (UNCTAD–ESCAP 2021, 10). These policies include eliminating fossil fuel subsidies, establishing carbon pricing mechanisms, and liberalizing trade in environmental goods and services. In the investment domain, the report recommends that economies support climate pledges (i.e., NDCs) with policies and measures to drive a green and fair economic transformation. The report highlights that the majority of regional trade agreements concluded after 2005 include climate change provisions, notably agreements involving the European Union, Japan and the Republic of Korea (UNCTAD–ESCAP 2021, xviii). Most of these provisions call for climate action or promote environmental goods, services or technologies. The report is silent about investment-related climate change provisions.

14. In view of the scale and speed of investments necessary to address the climate crisis, the international community has recognized that public investment is insufficient to achieve the Paris Agreement goals. For instance, the International Energy Agency (IEA) considers that USD 3 trillion of the 4.2 trillion required in global investment by 2030 to achieve the 1.5°C target would need to come from the private sector, “mobilised by public policies that create incentives, set appropriate regulatory frameworks and send market signals” (IEA 2021, 82). OECD, UNCTAD and other international agencies concur it is crucial to align the foreign direct investment (FDI) regulatory framework with the Paris Agreement goals.

15. International investment agreements (IIAs) are a central component of the international regulatory framework of FDI. IIAs may be bilateral, plurilateral, sectoral or consist of investment chapters in free trade agreements (FTAs). These international treaties usually contain open-ended anti-discrimination and substantive standards that the signatories grant to investors of the treaty party investing in their territory. Most IIAs allow investors to enforce these standards directly through arbitration without exhausting local remedies. This dispute settlement mechanism is known as investor-state dispute settlement (ISDS). The benefits, costs and risks of this international regime have been subject to debate since the 2000s (CCSI 2018). Several research and international organizations suggest that IIAs could make certain climate change mitigation and adaptation measures more difficult or costly. The 2022 IPCC report notes that:

Investment agreements, which are often integrated in FTAs, seek to encourage the flow of foreign investment through investment protection. While international investment agreements hold potential to increase low-carbon investment in host countries [sic], these agreements have tended to protect investor rights, constraining the latitude of host countries [sic] in adopting environmental policies [...]

Moreover, international investment agreements may lead to ‘regulatory chill’, which may lead to countries [sic] refraining from or delaying the adoption of mitigation policies, such as phasing out fossil fuels. More contemporary investment agreements seek to better balance the rights and obligations of investors and host countries [sic], and in theory offer greater regulatory space to host countries [sic], although it is unclear to what extent this will hold true in practice (IPCC 2022, 1499).

16. The IPCC’s opinion on IIAs and climate change is supported by the relevant literature. A 2020 International Institute for Environment and Development (IIED) report warns that existing IIAs protect most foreign-owned power plants worldwide, and that these investors may resort to ISDS to sue host economies over measures to phase out fossil fuels (IIED 2020). This possibility has already materialized in Canada (*Westmoreland v. Canada*⁷⁵) and the Netherlands (*Uniper v. The Netherlands*⁷⁶ and *RWE v. The Netherlands*⁷⁷), while there is evidence that governments have negotiated compensations in the shadow of ongoing ISDS litigation (for instance, *Vattenfall v. Germany I & II*⁷⁸). A 2021 International Institute for Sustainable Development (IISD) report notes that fossil fuel investors are the main claimants in ISDS cases and that the majority of these cases have been decided in their favor. The report also highlights that IIAs and ISDS originated in proposals put forward by fossil fuel multinational corporations to protect their investments outside their home economies (IISD 2021). A 2022 Columbia Center on Sustainable Investment (CCSI) report indicates that Denmark, France and New Zealand have postponed the phasing out of oil and gas exploration and exploitation due to the threat of ISDS claims. The same report criticizes the alleged benefits of ISDS, pointing out that IIAs increase neither the quantity nor quality of FDI (CCSI 2022). A 2022 publication in the academic journal *Science* explores the legal and financial risks that IIAs and ISDS pose to limiting oil and gas production. The authors argue that governments should ensure that fossil fuel investors cannot access ISDS and IIAs protection. According to their research, Indonesia, for instance, could be facing potential claims for around USD 3–4 billion (which is the total estimated net present value of its fossil fuels investments) (Tienhaara & Cotula 2022).

17. In 2021, the OECD launched a program on the future of IIAs, Track 1 of which focuses on their linkages with climate change.⁷⁹ The OECD highlights the importance of aligning financial flows to low emissions investments, as required by the Paris Agreement. Governments have a duty to ensure that their promotional measures and incentives are consistent with their climate change obligations. It is also relevant to note that financial actors are widely recognized as having climate responsibilities for the GHG emissions linked to their portfolios. According to the OECD, although “the scope of covered investment has attracted less attention until recently”, there is a relevant interaction between IIAs and the

2015 Paris Agreement, especially regarding the need to align finance flows with low emissions (Article 2.1.c.) (OECD 2023, 3). The OECD observes that economies frequently assume climate change commitments, but “it is unclear if governments are addressing the alignment of investment treaty incentives with the Paris Agreement and sustainable finance” (OECD 2022, 5). It further indicates that although IIAs can maintain and improve market access for FDI in renewable energy and climate-friendly investments, there is “increased attention and concern about the scope of covered investment in investment treaties, and in particular coverage of new investment in coal and other fossil fuels” (OECD 2023, 3).

18. The OECD has noted that the scope of IIAs does not distinguish between fossil fuel and clean energy, potentially promoting investment projects that are not aligned with the goals set by the Paris Agreement. This misalignment has prompted a process of modernization of the Energy Charter Treaty (ECT), as well as discussions within the European Union (OECD 2023, 9-10).⁸⁰ Overall, OECD’s work on Track 1 calls the attention of economies to the incentives that IIAs create and their potential positive and negative interaction with climate change action. By promoting and protecting FDI in most sectors, including in fossil fuels, the majority of IIAs would be in tension with the goals set by the Paris Agreement, especially Article 2.1.c regarding aligning finance flows with low emissions. A public consultation on the interrelation between IIAs and climate change was launched in 2021—a compilation of the submissions is publicly available.⁸¹ The OECD has also conducted a survey to determine how governments are dealing with the issue, the results of which are not yet public.

19. UNCTAD has devoted numerous publications to the reform of IIAs in order to improve the balance between investor rights and states’ right to regulate. The 2015 *Investment Policy Framework for Sustainable Development* recognizes the importance of FDI to achieve the 2030 Sustainable Development Goals. UNCTAD suggests that a new generation of IIAs should “stimulate investment specifically geared towards sustainable and inclusive growth, including infrastructure, renewable energy, water and sanitation, food security, health and education (sustainable development goals-related sectors)” (UNCTAD 2015, 6). This objective should be pursued while “ensuring an appropriate balance between protection commitments and regulatory space for development” and “shielding host countries [sic] from unjustified liabilities and high procedural costs” (UNCTAD 2015, 8). The 2018 *Reform Package for the International Investment Regime* focuses not only on the desirable content of new IIAs but also on strategies to reform the existing stock of “old-generation” IIAs (defined as IIAs concluded before 2010). According to UNCTAD, old-generation IIAs provide an unsatisfactory balance between investor rights and states’ right to regulate (UNCTAD 2018, 7-8). These 2015 and 2017 reports also focus on improving coherence between IIAs and other policies, such as climate change action. UNCTAD’s 2020 *IIA Reform Accelerator* estimates that there are around 2,500 old-generation IIAs, accounting for almost “all ISDS cases,” and puts forward a toolkit of options to expedite their reform and make them consistent with the 2030 UN Sustainable Development Goals and states’ right to regulate (UNCTAD 2020, 2).

20. UNCTAD's *World Investment Report 2023* highlights that recognition of the urgency of an energy transition has accelerated the attention to reform of IIAs, acknowledging that this is a "rapidly shifting landscape, which requires flexibility in policymakers seeking to attract renewable energy investment" (UNCTAD 2023, 90).⁸² The report underscores that ISDS could be used to make the energy transition more difficult or costly, as investors in fossil fuels can use this regime to claim for compensation for the phasing out of fossil fuels or necessary regulatory changes (UNCTAD 2023, 91-92).

21. Another important forum for the discussion of IIAs and ISDS reform is the United Nations Commission on International Trade Law (UNCITRAL) Working Group III. The UNCITRAL mandate includes concerns relating to the lack of consistency, coherence, predictability and "correctness" of arbitral decisions; concerns relating to arbitrators and decision makers; and concerns relating to costs and duration of ISDS cases. Several think tanks have noted that the scope of this discussion is limited and leaves out important questions, including the role of local communities and vulnerable actors and the risk of regulatory chill in relation to climate action measures (IIED, CCSI, IISD 2019). Recently, these cross-cutting issues have attracted some work and attention on the part of UNCITRAL Working Group III.

Some questions for APEC economies delegates:

1. How significant is FDI for climate change action in your economy?
2. Has your economy identified any interaction between IIAs and climate change policies?
3. Has your economy identified any interaction between IIAs, the UNFCCC and the Paris Agreement?
4. Do you think these relations differ depending on the level of development of an economy?

B. APEC's view

22. The 2021 APEC Regional Trends Analysis foregrounds the climate change threats facing the region, as identified by the 2021 IPCC report, including more frequent and intense heatwaves, wildfires, extreme weather events, and heavy precipitation. These will affect production and disproportionately impact vulnerable groups (APEC 2021a, 2).

23. APEC economies have been at the forefront of climate change action. The *1993 Leaders' Declaration* envisioned a region in which "our environment is improved as we protect the quality of our air, water and green spaces and manage our energy sources and renewable resources to ensure sustainable growth" (APEC 1993). Four years later, the *1997 Leaders' Declaration* contained the first mention of climate change in the APEC context (APEC 1997). In 2007, the *Sydney APEC Leaders' Declaration on Climate Change, Energy Security and Clean Development* emphasized the importance of "joint research, development,

deployment and transfer of low and zero emission technologies,” forests and land use, and open trade and investment (APEC 2007a).

24. The most recent call for action on climate change is detailed in the 2040 APEC Putrajaya Vision, published in 2020, which calls for strong, balanced, secure, sustainable and inclusive growth in the Asia-Pacific region by promoting economic policies that will tackle climate change. Development in the Asia-Pacific region has been significant but, as a 2021 report indicates, it has also come with costs (such as “environmental damage”) (APEC 2021b, i). In 2021, the 21 APEC member economies developed the Aotearoa Plan of Action, a plan for implementing the Putrajaya Vision 2040.⁸³ The Aotearoa Plan of Action includes: structural reform, facilitation of trade in environmental goods and services, rationalizing and phasing out fossil fuel subsidies that encourage wasteful consumption, promoting sustainable growth across sectors and the development of cost-effective low- and zero-emissions technologies.⁸⁴

25. The 2021 APEC Regional Trends Analysis summarizes the main pillars of APEC’s strategy for climate change mitigation and adaptation. The report indicates that action should be taken as soon as possible and that APEC economies should act in a concerted manner, beyond the statement of commitments, adopting a holistic approach (APEC 2021a, 11). The transition to a green economy requires “extensive structural reforms,” including “shifting public policies to promote investments and jobs that reduce GHG emissions” (APEC 2021a, 12). APEC economies also foresee an increasingly uncertain future, according to a 2022 update of APEC’s Regional Trade Analysis. The update underscores the importance and complexity of preparedness: “preparing for the next pandemic or crisis and preparing for a future that is inevitably highly digitalized and greatly exposed to the harmful effects of climate change” (APEC 2022a, 5).

26. The *APEC Economic Policy Report 2022* suggests that structural reforms necessary for sustainable outcomes can also promote higher rates of growth. The report claims that there should be no, or limited, trade-offs between growth and climate change action. The key lies in combining market, regulatory and enabling instruments (APEC 2022b, 63–64). A 2022 *APEC Stocktake of Carbon Pricing Initiatives* shows that member economies are seeking ways to reduce GHG emissions while also creating an environment that enables development (APEC 2022c). Decarbonizing power systems—a crucial objective for climate change mitigation—will require significant public-private cooperation, according to the APEC Energy Working Group (APEC 2022d). Research in APEC economies has come to similar conclusions regarding the decarbonization of transportation (APEC 2022e). Promoting green investments in the APEC region, a 2023 report recommends, requires addressing the profitability/risk ratio of green investments (APEC 2023). Instruments to achieve this goal include credit risk guarantees, environmental insurance and catastrophe bonds. The same report recommends that APEC economies reduce fossil fuel subsidies; define activities that substantially contribute to climate change mitigation and adaptation; and promote the use of environmental, social and governance (ESG) factors in the decision-making process of firms (APEC 2023).

27. A 2022 APEC policy brief emphasizes that climate change mitigation and adaptation should ensure the inclusion of vulnerable groups, “particularly their capacity to access decent work opportunities” (APEC 2022f, 1).⁸⁵ APEC governments have undertaken various initiatives to ensure a just transition to low-carbon economies. It is important to note, that as observed by the IPCC, vulnerable groups should also be part of the solution to climate change, given that “indigenous and local knowledge can contribute to overcoming the combined challenges of climate change, food security, biodiversity conservation, and combating desertification and land degradation” (IPCC 2019, 31).

28. APEC’s Policy Unit has highlighted the importance of regularly updating the list of environment goods as developments in technology in this domain are fast-moving. APEC’s Economic and Technical Cooperation program (ECOTECH) involves cooperation on sustainable cities, sustainable maritime, cleaner production and transition to sustainable development. A 2023 report indicates that trade can serve to ensure the widespread adoption of products and technologies that contribute to reducing GHG emissions. Promoting trade in technologies justifies the elimination of tariffs and non-tariffs measures, as well as considering perspectives of firms when designing trade and investment policies (APEC 2023b). The 2021 *Review of the APEC List of Environmental Goods* noted that a global value chain (GVC) approach would benefit developing economies, as they could produce some of the components required for certain environmental goods (APEC 2021c). Further reports published by APEC and other international organizations, as well as the academic literature, warn that tensions regarding international trade could escalate, weakening the global economy and the flows of goods, investment and technology (for instance, APEC 2019c, 25).

29. Technology diffusion has also attracted attention in APEC studies. A 2022 policy brief suggests that a Bio-Circular-Green Economy will require “access to the right technologies and expertise” (APEC 2022g, 8). Promoting this access, the brief indicates, will entail overcoming barriers that arise because of intellectual property rights, trade barriers, GVCs constraints, poor access to technical and high-level human capital, problems in accessing credit, and restrictions to FDI (APEC 2022g, 8). The policy brief cautions that technology and innovation remain unevenly diffused across APEC economies and that the rate of diffusion is “below average for some sectors, namely: (1) transport and mobility; and (2) agriculture, food, and hospitality.” Solutions involve increasing “the adopter’s degree of involvement throughout the innovation process,” which requires private and public collaboration (APEC 2022g, 8–9).

30. The 2021 Aotearoa Plan of Action for the implementation of the Putrajaya Vision 2040 acknowledges “the importance of, and will continue to work together to deliver, a free, open, fair, non-discriminatory, transparent and predictable trade and investment environment.”⁸⁶ APEC economies pledge to promote quality investment flows, trade and investment facilitation, multi-stakeholder cooperation to promote responsible business conduct to ensure “adequate and effective protection and enforcement of intellectual property, including by providing capacity building, particularly to spur economic development and innovation.”⁸⁷

31. APEC's IEG has actively discussed and shared experiences regarding the negotiation of IIAs and the IIAs currently in force in the APEC economies. The IEG group published reports in 2007 and 2009 identifying and comparing the core elements of IIAs in APEC economies (APEC 2007b; APEC 2009). A handbook for negotiators was published in collaboration with UNCTAD in 2012, mapping experiences that APEC economies may find useful in their efforts to protect the environment or safeguard their regulatory space to implement environmental measures, including preambular language, reference to states' right to regulate in expropriation provisions, exceptions to performance requirements designed to achieve specified policy objectives (such as environmental goals), general exceptions, right to regulate provisions, exclusions from dispute settlement (carve-outs), environmental-related investor responsibilities or obligations, and not lowering of standards clauses (APEC–UNCTAD 2012). An expert at a 2021 IEG capacity building event concluded that “it is important to adopt very robust provisions that make manifestly clear that an Economy has this broad exception to adopting measures to protect the environment without fear of liability” (APEC 2021d, 29). Another expert observed that exceptions are the ideal mechanism to protect states' right to regulate (APEC 2021d, 28–29).

32. A 2019 APEC policy brief titled *ISDS as an Instrument for Investment Promotion and Facilitation* notes that economies have moved away from assuming that FDI has net benefits, and there have been more efforts on the part of host economies to regulate the conditions for admission and operation of FDI. This shift includes new environmental measures. The brief concludes that the reform of IIAs should aim at matching new business realities and climate change (APEC 2019a, 7). The same document argues that the benefits of IIAs should not be assessed simply according to the extent to which they attract FDI to host economies, but also according to the quality of these investment flows, especially their capacity to promote sustainable development (APEC 2019a, 4). A 2019 report on improving the investment climate in the region suggests that although APEC economies consider that good governance is central to attract FDI, the evidence regarding the contribution of IIAs to good governance is unclear. IIAs would only complement domestic legal systems and “preliminary calculations by the APEC Policy Support Unit (PSU) indicated that having a specific ISDS mechanism in a BIT may not necessarily lead to higher FDI inflows” (APEC 2019b, 17). Another APEC document published the same year similarly highlights the importance of strengthening the domestic rule of law (APEC 2019a, 6).

33. Some of APEC's recent work on how member economies can promote and attract green FDI also suggests that IIAs play no more than a secondary role. The conclusion of the *2018 Summary Report of APEC Public-Private Dialogue on Green Investment Policy* focuses on the need to continue sharing and discussing in-depth policies, strategies, programs and barriers to green investment (APEC 2018). The report does not mention IIAs or ISDS. Australia's self-funded project entitled “Symposium on Green Foreign Direct Investment in the Energy Transition” may shed some light on this question as it brings together governments and the private sector to discuss issues related to green FDI, including a focus on sustainable infrastructure development and low emissions technology.

Some questions for APEC economies delegates:

1. Do you think that IIAs in force in the APEC economies are sufficiently aligned with the 2040 APEC Putrajaya Vision, in particular with climate change goals and policies?
2. Do you think APEC has paid sufficient attention to the potential interaction between IIAs and its climate change goals and policies?
3. Are there areas of work that APEC and the IEG should pursue further to explore how IIAs can synergize with climate change policies?

PART II: International Investment Agreements: Disciplines

A. Admission and Pre-establishment⁸⁸

34. Under general public international law, governments have the right to refuse the entrance of investors into their economies. Equally, governments can close specific sectors to investors, establish screening processes, ownership or other quantitative limitations, or stipulate that investors commit to certain requirements in order to be admitted into the host economy (generally known as performance requirements). Screening mechanisms for FDI inflows have become popular since the late 2010s, most commonly for national security reasons. At the time of writing, the United States is considering an outbound screening mechanism.⁸⁹ Governments have also used screening and approval mechanisms to ensure that FDI projects are consistent with their development strategies. When admitting or approving a foreign investment, governments can impose foreign equity limitations (exclusion of foreign participation, restrictions on majority holdings or limits on full foreign ownership). They can require investors to partner with a local firm (joint venture), incorporate local content, transfer technology, or conduct research and development activities (performance requirements). According to general public international law, governments can discriminate during the pre-establishment phase, granting domestic or other foreign investors more favorable treatment.

35. General public international law is rarely the only source of international law applicable to foreign investment relations. Multilateral, plurilateral and bilateral treaties are often relevant to questions of FDI admission and pre-establishment.

36. Multilateral World Trade Organization (WTO) rules include disciplines on services and performance requirements. The General Agreement on Trade in Services (GATS) specifies general and specific liberalization commitments in services, including services provided under Mode 3 (Mode 3 involves a commercial presence which typically entails FDI). GATS general commitments consist of most-favored nation, transparency, domestic regulation and monopolies. WTO members are also required to submit specific liberalization schedules on agreed sectors. These national schedules follow a positive list approach—those sectors explicitly mentioned are liberalized, while non-listed sectors are subject only to the general commitments. Scheduled sectors are subject to national treatment and market access commitments, although

members maintain the exceptions explicitly listed in their schedules. Market access limitations typically involve: number of suppliers, value of service transactions, number of operations or quantity of output, number of natural persons, type of legal entity, or foreign equity participation. The WTO Trade-Related Investment Measures Agreement (TRIMs) prohibits performance requirements tied to increasing or reducing exports or imports. TRIMs thus prevents governments from stipulating that investors ensure a particular level of exports or reduction of imports.

37. Most FTAs include GATS plus commitments in services chapters. These commitments may be made using positive or negative lists. A positive list approach follows the GATS structure, while a negative list names the sectors or subsectors that are limited or excluded. Exceptions to national treatment or market access are explicitly noted. Some FTAs combine the use of positive and negative lists for different sectors or subsectors.

38. FTAs often have provisions relevant for FDI admission and pre-establishment, including on performance requirements. Investment chapters usually extend the national treatment and most-favored nation provisions to the pre-establishment period—see, for instance, Articles 9.4 and 9.5, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). FTAs also contain annexes or other documents limiting the sectors that benefit from these commitments. Investment chapters in FTAs usually include rules on performance requirements—see, for instance, Article 9.10, CPTPP. A 2020 study found that 60% of FTAs signed between 2010 and 2018 prohibit performance requirements, 58% prohibit technology transfer requirements, 59% prohibit exclusive supplier requirements, and 42% ban R&D requirements (Andrenelli et al. 2020, 39). Many FTAs incorporate TRIMs plus commitments.

39. The majority of bilateral investment treaties (BITs) do not include disciplines on admission, pre-establishment or performance requirements, although some BITs do contain relevant provisions. According to a 2009 study, APEC economies with IIAs containing pre-establishment commitments include the United States and Canada (APEC 2009, 6–7). Japan’s BITs also follow this approach (Dolzer et al. 2023, 137). These BITs extend the national treatment and most-favored nation standards to the pre-establishment phase. Although BITs rarely contain schedules for post-establishment standards, whether positive or negative lists, BITs containing pre-establishment provisions usually include schedules or negative lists excluding specific sectors from these commitments. The same 2009 APEC study indicates that 66% of the BITs in force at the time included performance requirements. However, 55% of these only cross-referenced the TRIMS agreement, while just 11% included TRIMS plus commitments, notably those of Canada; Chile; Japan; and the United States (APEC 2009, 15). A 2012 APEC handbook for negotiators provides examples of exceptions to performance requirements prohibitions. Economies may retain a right to implement measures designed to achieve specified policy objectives (for instance, climate change action), or preserve policy freedom in particular economic sectors using schedules (APEC–UNCTAD 2012, 89). A 2019 study indicates that economies have increasingly included TRIMS plus performance requirements prohibitions influenced by the United States BIT model (Genest 2019, 30 et seq.).

40. Moreover, some IIAs connect the approval of projects to the application of the standards of protection and ISDS. Approval can be necessary for admission; however in the context of IIAs it can also be a necessary condition for enjoying the protection granted in an IIA. In APEC economies, Thailand's IIAs provide an example of this practice. The 2002 Thailand–Germany BIT stipulates that “This Treaty shall apply only to investments that have been specifically approved in writing by the competent authority, if so required by the laws and regulations of that Contracting Party” (Article 2). ASEAN has also followed a similar practice—for instance, the 2009 ASEAN Comprehensive Investment Agreement states that “‘covered investment’ means, with respect to a Member State, an investment in its territory of an investor of any other Member State in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and has been admitted according to its laws, regulations, and national policies, and where applicable, specifically approved in writing by the competent authority of a Member State” (Article 4).

41. As a general rule, governments maintain any regulatory authority to decide on the admission of FDI that they have not relinquished via international law (whether through multilateral, regional or bilateral agreements). Domestic FDI policy can therefore be more liberal than what is required under binding commitments under international law. For instance, governments may decide to admit an investment project either fast-tracking screening procedures or without imposing performance requirements at all. The difference between existing international law commitments and actual policy is often described using the term “water,” borrowing from the trade domain where “water” refers to the difference between bound and applied tariffs (OECD 2023, 6-7).

42. APEC's position, as evidenced in various publications, is that FDI can contribute to the significant investment needed for climate change mitigation and adaptation (See Part I). However, laws, provisions and mechanisms that limit FDI inflows and outflows may become an obstacle to achieving the Paris Agreement goals, especially in developing economies. At the same time, economies can use admission, approval, carve-outs or screening mechanisms to disincentivize or block FDI in fossil fuels or projects otherwise not aligned to the Paris Agreement objectives. Limitations to FDI inflows and outflows may also reduce the diffusion of technology and innovation, another mechanism in the Paris Agreement toolkit to promote climate change mitigation and adaptation.

43. It is important to consider the relationship between performance requirements and climate action, mitigation and adaptation.⁹⁰ The UNFCCC and the Paris Agreement promote the transfer of technology to developing and least-developed economies. In this vein, UNCTAD's *World Investment Report 2023* recommends economies consider incorporating in their IIAs “institutional mechanisms for cooperation on R&D of sustainable technologies,” provisions to “encourage transfer of low-carbon and sustainable technologies, including related know-how,” and “certain kinds of performance requirements relevant to the energy transition” (UNCTAD 2023, 95). In a submission to the OECD public consultation on investment treaties and climate change, Professors Anne van Aaken and Tomer Broude suggested that economies may consider “performance

requirements connected to climate friendliness, e.g. the sourcing of clean energy in the production processes of companies” but they note that “performance requirements pose problems under IIAs as well as international trade law (including government procurement)” (van Aaken and Broud 2022, 10). Meanwhile, a 2019 OECD study cautions against attempts to “force” technology transfers through joint ventures, conditioning access or markets, or weakening intellectual property rights, suggesting that private firms may not be willing to invest overseas under these conditions (OECD 2017b). A recent paper by Alan Sykes discusses the national security and business tensions related to technology transfer requirements (Sykes 2021).

44. FDI admission and pre-establishment may also be linked to measures or procedures to protect vulnerable actors, promote a fair transition to a green economy, or ensure that developing economies play a more significant role in GVCs of green products and services. Governments may involve voices of vulnerable groups in FDI admission or approval processes, or may take advantage of these processes to consider if the projects are aligned with their NDCs and their climate change mitigation and adaptation needs.

Some questions for APEC economies delegates:

1. What interaction do you see between FDI admission and climate change policies?
2. Does your economy review FDI projects for environmental, climate change or other related reasons?
3. Has your economy included limitations to national treatment or market access to promote or facilitate climate change policies or measures?
4. Is there any further work to be done to ensure that provisions on admission, pre-establishment and performance requirements contained in IIAs and other international agreements are aligned with the UNFCCC and the Paris Agreement?

B. Promotion and Facilitation⁹¹

45. Most economies actively seek to promote and attract FDI inflows. Under general public international law there are no limitations to the benefits or incentives that economies may concede to investors in order to promote FDI. These incentives may be fiscal, financial, or other regulatory incentives, such as investment facilitation. IIAs standards of protection and ISDS can be understood as a regulatory incentive with effects somewhat similar to political risk insurance.

46. Incentives or promotion measures may be enshrined in domestic or international law. Most fiscal and financial incentives are implemented through domestic legislation, while regulatory incentives such as investment facilitation or protection measures may be legislated in domestic or international law. IIAs are primarily concerned with investment protection, but some also include provisions on investment promotion and facilitation (for instance, the Brazilian model). Economies have also begun to sign agreements devoted exclusively to

investment facilitation (See, for instance, the EU–Angola Sustainable Investment Facilitation Agreement). FTAs may also contain provisions related to investment facilitation (See, for instance, Chapter 22 of the CPTPP: Competitiveness and Business Facilitation). The WTO announced in 2023 that participants agreed on the text of the Investment Facilitation for Development Agreement, which has disciplines on transparency, as well as streamlining and speeding up administrative procedures.⁹²

47. Multilateral, plurilateral and bilateral agreements establish some limitations to the incentives that economies can offer foreign investors. The WTO Subsidies Agreement limits the subsidies that governments can offer, and notably prohibits subsidies tied to increasing exports or reducing imports. In 2024, a global minimum effective rate of corporate tax of 15% will become effective in more than 140 economies. Investment chapters in FTAs usually include provisions prohibiting lowering environmental, labor and other standards to attract FDI. In the case of the CPTPP, a provision concerning environmental standards was included in the Environment Chapter (Article 20.3.6). FTAs also contain rules on subsidies and other disciplines that limit the type of incentives or benefits that economies can offer foreign investors. According to 2009 and 2012 studies, various BITs of APEC economies included non-lowering standards prohibiting the relaxation of environmental standards to attract FDI (APEC 2009, 18-19; APEC–UNCTAD 2012, 185–187). UNCTAD’s *World Investment Report 2023* notes that 24% of all IIAs concluded between 2012 and 2022 include non-lowering provisions concerning environmental standards (UNCTAD 2023, 90).

48. Economies may also implement unilateral mechanisms to counteract the effects of FDI incentives or benefits. Carbon Adjustment Border Mechanisms (CBAM) may be used to ensure that governments do not attract FDI by failing to improve or by relaxing their environmental standards. Economies may require their investors to comply not only with host but also with their home economy regulations when investing abroad.

49. UNCTAD’s *World Investment Report 2023* provides a global mapping of the incentives and benefits that economies offer private investors to accelerate a green energy transition. Fiscal incentives include reduction of taxes, tax breaks and tax holidays; financial incentives usually consist of grants, subsidies and loans; and regulatory mechanisms include auctions, feed-in-tariffs, quotas, renewable energy certificates, guarantees and business facilitation (UNCTAD 2023, 80-89). Most least-developed and developing economies use fiscal tools, while developed economies prefer financial and other regulatory mechanisms (UNCTAD 2023). The report also notes that economies continue to subsidize fossil fuels despite their pledges to reduce these subsidies. The 2023 *APEC Green Finance Report* calls on APEC economies to stick to pledges made in 2009 to phase out fossil fuels and recommends redirecting some of these funds “towards renewable energies, especially for poor and vulnerable populations” (APEC 2023, 11). The report also points to the importance of addressing the profitability/risk ratio of green investments to resolve the financial gap—either by resolving market distortions or increasing the provision of green finance (APEC 2023, 65).

50. Several submissions to the OECD consultation made the argument that foreign investors in clean energies may be enticed to invest if IIAs and ISDS protection is available, not least because IIAs can signal predictability (Asian Development Bank 2022; Cambridge Research Group on Foreign Investment and the Environment 2022). In this respect, the OECD background note explains that the scope of protection under IIAs is usually broad, including within it green FDI, as well as fossil fuels and other investment projects not aligned with the Paris Agreement (OECD 2023). Accordingly, IIAs may provide economies with no or inappropriate tools to protect investments or projects in particular sectors. Although some IIAs provide protection only to projects approved in writing, some investment awards have relativized the importance of the approval of foreign investment projects for enjoying ISDS protection.⁹³

51. Economies may also consider exploring the implications of ISDS in relation to incentives. In the 2000s, many European economies offered generous feed-in-tariffs to promote solar energy (Cointe and Nadaï 2018). When these economies were forced to significantly modify the incentives after economic and technological conditions changed, however, foreign investors filed numerous ISDS cases calling for compensation under the ECT. The total number of cases amounts to at least 119, and many were decided against the respondents on the grounds that public measures disappointed investors' legitimate expectations (UNCTAD 2023, 92). In a case that is ongoing at the time of writing,⁹⁴ a foreign investor in the wind energy sector claims that the replacement of feed-in-tariffs for an auction system affected its rights under the ECT. In relation to these cases, UNCTAD has commented that:

While investors seek stability and guarantee of returns, States should not be unduly hindered in phasing out unsustainable investment and experimenting with incentive schemes in the renewable energy sector, including by adopting and later changing or abrogating such schemes (UNCTAD 2023, 92).

Some questions for APEC economies delegates:

1. Do you think there is any interaction between IIAs, ISDS and fiscal, financial or other incentives to attract FDI for climate change mitigation and adaptation goals?
2. Do you think IIAs and other international agreements have provided sufficient mechanisms to prevent a regulatory race to the bottom?
3. Do you think IIAs are sufficiently aligned with fiscal, financial and other incentives that economies offer investors in climate change mitigation and adaptation projects?
4. Is there any further work to be done to ensure IIAs provisions on promotion and incentives are aligned with the UNFCCC and the Paris Agreement?
5. Are there cases in which IIAs pose excessive risks to APEC economies' policies to promote green FDI which would entail revisiting fiscal, financial or other incentives?

C. Standards of Protection and ISDS⁹⁵

52. Under general public international law, governments have the right to regulate foreign investors and investments established or operating in their territories. Foreign investors are subject to domestic laws and courts, although home governments can still bring an international claim against the host economy after a foreign investor exhausts local remedies. These diplomatic protection claims must be based on the alleged violation of international law—treaty law, customary international law or general principles of law. Customary international law includes a minimum standard of treatment that all economies are obliged to uphold irrespective of their ratified treaties and domestic law (for instance, customary international law includes a denial of justice standard).

53. From the 1960s onward, economies started negotiating IIAs with specific standards of protection and ISDS. These standards regulate the way host governments treat foreign investors after establishment (post-establishment treatment). Standards of protection include national treatment, most-favored nation, expropriation, fair and equitable treatment (FET) or minimum standard of treatment (MST), full protection and security, and umbrella clauses. Under most IIAs, foreign investors can use ISDS to bring cases before international arbitral tribunals for alleged violations of IIAs without having to exhaust local remedies. The role of home economies in ISDS is non-existent or limited to submitting briefings concerning the interpretation of the applicable IIA, for instance. The most common remedy under ISDS is monetary compensation; arbitral tribunals rarely ask governments to rescind or change a public measure.

54. IIAs define a broad scope of application. They usually define investor and investment broadly, extending treaty protection to most investors and investments. Investors must be a national or corporation of the other contracting party. Domestic investors are not protected under IIAs. The broad definition of investments provides protection to most assets, although recent IIAs exclude from the scope of protection sovereign debt, investments in the tobacco sector, tax matters and prudential financial regulations (carve-outs). As mentioned in Part I, the OECD has suggested that the broad definitions provided for in IIAs may not be aligned with the Paris Agreement (Article 2.1.c).

55. Assuming that economies will not discriminate in favor of domestic or other foreign investors after establishment, the most relevant standards of protection for climate change-related ISDS cases are expropriation (especially indirect or regulatory expropriation) and the FET or MST standards. The full protection and security standard has not been relevant in environmental cases to date, although given the context of climate change, it is reasonable to expect that tribunals will be asked to consider whether governments complied with their due diligence obligations to protect the physical integrity of investments from the consequences of climate change, such as flooding or heatwaves.

56. According to APEC's 2012 handbook for negotiators, "[t]he expropriation provision does not deprive States of their right to expropriate property but regulates the manner in which the said right must be exercised" (APEC–UNCTAD 2012, 57). The most relevant condition for any legal expropriation is to pay

prompt, adequate and effective compensation. The handbook explains that, “[i]ndirect expropriation happens when a measure or series of measures taken by the host State have effect equivalent to a direct expropriation. Indirect expropriation renders property rights useless, even though the owner may retain the legal title or remain in physical possession of the property” (APEC–UNCTAD 2012, 58). Relevant ISDS awards condemning respondents for indirect expropriation in disputes with environmental implications include *Santa Elena v. Costa Rica*,⁹⁶ *Metalclad v. Mexico*,⁹⁷ *TecMed v. Mexico*.⁹⁸ Meanwhile, important cases related to the environment decided in favor of host economies include *Methanex v. USA*,⁹⁹ *Glamis v. USA*¹⁰⁰ and *Chemtura v. Canada*.¹⁰¹ It is increasingly rare for ISDS tribunals to award compensation for indirect expropriation, as most ISDS tribunals have defined a high threshold: public measures need to be severe rendering investor rights “useless.” Furthermore, treaty parties have incorporated additional language to clarify that general non-discriminatory measures for a public purpose, such as environmental protection, do not—or rarely—constitute indirect expropriation.

57. The distinction between legitimate regulation and regulatory measures that constitute expropriation remains contentious (Dolzer et al. 2023, 153).¹⁰² The awards in *Bear Creek v. Peru*¹⁰³ and *Rockhopper v. Italy*¹⁰⁴ illustrate the tension. The arbitral tribunals decided that the foreign investors had met all the requirements to have been issued a license for their mining or offshore oil projects, and the subsequent decision to cancel the projects constituted indirect expropriation under the Peru-Canada FTA and the ECT. It is noteworthy that the tribunals ruled in favor of the foreign investors although the public measures in question were related to the protection of the environment and vulnerable groups. Meanwhile, the 2022 award in *Lone Pine v. Canada*¹⁰⁵ rejected a claim of indirect expropriation arising from a ban of gas fracking.

58. The interaction between indirect expropriation and measures necessary for climate change mitigation and adaptation call for further study. It is unlikely that tribunals will make a finding on indirect expropriation if measures are general, non-discriminatory, for a public purpose, and do not render investor rights useless. Measures necessary for climate change adaptation in sectors such as water or agriculture may impact a project’s value or profitability, but would infrequently constitute indirect expropriation. The case of climate change mitigation measures—such as restricting or phasing out fossil fuel projects—may be more difficult to determine in advance, as these measures could render the rights “useless.” If a foreign investment project is cancelled or licenses to operate terminated, there is a possibility that investors obtain an award for indirect expropriation.¹⁰⁶ The question would hinge on whether the underlying rights were rendered useless, and whether the public measure is general, non-discriminatory, reasonable, proportionate and necessary. Arbitral tribunals will have to weigh up these elements. According to the *Methanex v. USA* award, the regulatory context at the moment of the investment may also be a determinant in deciding a dispute.¹⁰⁷

59. Treaty language may be of consequence in indirect expropriation disputes related to climate change mitigation or adaptation measures. For instance, the India–Kyrgyzstan BIT (2019) states that “Non-discriminatory regulatory measures

by a Party or measures or awards by judicial bodies of a Party that are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment shall not constitute expropriation under this Article” (Article 5.5). Meanwhile, the CPTPP Annex 9-B states that “Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.”

60. According to APEC’s 2012 handbook for negotiators, the FET standard of treatment is “an absolute, not relative, standard of treatment. Its objective is to guarantee a certain minimum standard of treatment that does not require comparison with the treatment which the host State accords to its own investors or to any other foreign investors” (APEC–UNCTAD 2012, 49). This standard may be defined without any qualifications, autonomously, or with reference to customary international law (MST). The 2012 handbook adds that “[t]he content of this obligation varies and depends on the formulation adopted by the Contracting Parties when concluding the treaty” (APEC–UNCTAD 2012, 49). Definitions of this standard of protection have prompted controversy. When applying the FET standard, ISDS tribunals review whether governments have treated investors in a non-arbitrary, fair, transparent, consistent, proportionate, and reasonable manner. Treatment in breach of representations made by the host government which were reasonably relied on by the investor (investor legitimate expectations) is also considered to be in violation of the FET standard.

61. Most awards against respondents in ISDS cases are based on the FET or MST standards of treatment. In cases involving environmental measures, arbitral tribunals have decided against respondents for inconsistency or arbitrary actions. In *Bilcon v. Canada*¹⁰⁸ and *Eco Oro v. Colombia*,¹⁰⁹ the arbitral tribunals considered that host economies first actively supported the investment projects, but then shifted their orientation and made it impossible for investors to continue to the extraction phase of the project. The Joint Review Panel in Canada privileged “core community values,” which the majority of the arbitral tribunal considered to be an “unprecedented approach” that was “unwinnable” for the investor.¹¹⁰ In *Eco Oro v. Colombia*, the majority of the tribunal found that various government agencies acted in an inconsistent manner, violating the investor’s legitimate expectation that “it would be entitled to undertake mining exploitation” and that “Colombia would ensure a predictable commercial framework for business planning and investment.”¹¹¹ The majority in the *Lone Pine v. Canada* case decided, however, that a ban on gas fracking was not a violation of the MST.¹¹²

62. Another group of awards relating to climate change mitigation measures relates to the reconsideration of solar energy subsidies. Foreign investors established solar energy projects enticed by feed-in-tariffs mechanisms in Spain, Italy and other European economies. When these governments decided to reconsider these mechanisms—primarily for fiscal reasons—the investors sued the governments under the ECT, obtaining in several cases favorable awards for the violation of their legitimate expectations. Some tribunals decided that there had been violations of the ECT even where the projects remained profitable.

However, no arbitral tribunals decided that the reconsideration of the feed-in-tariffs mechanism constituted indirect expropriation. This position is consistent with the CPTPP (Article 9.8.6).

63. There are a number of pending ISDS cases involving environmental or climate change measures. These include disputes related to phasing out coal plants (*RWE v. The Netherlands*¹¹³ and *Westmoreland v. Canada*¹¹⁴) and issues associated with environmental or other licenses needed for extraction or transport of fossil fuels or other resources (*Zeph v. Australia*,¹¹⁵ *Ruby River v. Canada*,¹¹⁶ *Ascent Resources v. Slovenia*¹¹⁷ and *TransCanada v. United States*¹¹⁸).

64. Assessing the outcome of ISDS disputes related to climate change mitigation is not simple. According to the International Center for the Settlement of Investment Disputes (ICSID), 31% of cases registered with the center by 31 December 2022 were totally or partially resolved in favor of investors, 18% were decided in favor of respondents, 14% were rejected for lack of jurisdiction, while the remainder were either discontinued or settled (ICSID 2023, 13). It is also difficult to predict the number of ISDS disputes related to climate change measures that may arise. Concerns that the Covid-19 crisis would prompt a large number of ISDS cases did not materialize. However, according to UNCTAD, fossil fuels investors are familiar with ISDS and can “be expected to use existing arbitral mechanisms to challenge climate action measures aimed at restricting or phasing out fossil fuels” (UNCTAD 2023, 92).

65. Beyond the actual number of ISDS disputes and their outcomes, commentators have pointed to the risks of regulatory chill. Harvard Professor Louis T. Wells made this point in his submission to the OECD public consultation, for instance (Wells 2022). According to the CCSI, situations of regulatory chill related to climate change mitigation or adaptation measures have been reported in Denmark, France and New Zealand (CCSI 2022).

66. Most studies about the relation between IIAs, ISDS and climate change action focus almost exclusively on climate change mitigation measures that aim to restrict or phase out the exploration or extraction of fossil fuels or the production of energy from fossil fuels. However, it is expected that governments will have to take much broader measures to adapt to climate change, particularly in the domains of water, agriculture, health, and energy, which could also be challenged under the FET or MST standards. As opposed to indirect expropriation cases, arbitral tribunals have found that measures that do not render investor rights “useless” can still violate these standards of protection. Taking into account UNCTAD’s view that governments may need to experiment with different regulatory options to address climate change, there might be a risk of ISDS disputes in relation to climate change adaptation measures. The scale and speed of the required investments, according to the IPCC, indicate that action cannot be delayed until governments design a close to perfect regulatory regime.

67. ISDS may also interact with measures to promote the participation of all stakeholders and protect vulnerable groups. The structure of IIAs and ISDS is asymmetrical in that these agreements only create rights and remedies for foreign investors (IIED 2019). Foreign investors have no or limited binding obligations

under IIAs; for this reason, host governments can rarely initiate ISDS disputes or file counterclaims. Local actors have neither rights under IIAs nor standing in ISDS. In the past, foreign investors have sued host economies for public measures that protect vulnerable local actors or their environment. Local actor participation in these ISDS disputes has been limited to amicus curiae submissions, which ISDS tribunals have not always accepted (for instance, *Eco Oro v. Colombia*¹¹⁹).

68. Another area of interaction between ISDS and climate change mitigation and adaptation involves questions of intellectual property (Correa and Viñuales 2016). Intellectual property rights are protected under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Many FTAs contain TRIPS plus protections. These agreements have their own dispute settlement mechanisms but foreign investors can and have relied on ISDS to bring claims for potential violation of their intellectual property rights (for instance, *Eli Lilly v. Canada*¹²⁰). In other words, there is a risk that investors will consider that measures aimed to transfer or diffuse technology implemented under the terms of the UNFCCC and the Paris Agreement constitute breaches of their intellectual property rights.

69. Governments have reacted to these risks in different ways: i) Governments have introduced additional language to their IIAs to protect their right to regulate. UNCTAD notes that 17% of IIAs signed between 2012 and 2022 include right to regulate provisions (UNCTAD 2023, 90). In the context of the EU–Canada Comprehensive Economic and Trade Agreement (CETA), for instance, Germany proposed adding a reference to measures taken to meet the goals set by the Paris Agreement, requesting ISDS tribunals “take due consideration of the commitments of the Parties under the Paris Agreement and their respective climate neutrality objectives.”¹²¹ ii) Governments have introduced general exceptions in their agreements similar to those found in Article XX of the General Agreement on Tariffs and Trade (GATT). However, awards in *Bear Creek v. Peru*¹²² and *Eco Oro v. Colombia*¹²³ cast doubt on the efficacy of using these provisions to protect states’ right to regulate. Canada has abandoned this treaty practice in its new BIT model (Canada’s 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model).¹²⁴ iii) Some European economies have exited the ECT, while others have suggested they are unwilling to support a modernized version of the ECT, as the new text falls short of revising the treaty scope and reinforcing the protection of states’ right to regulate (OECD 2022).

70. Discussions at the OECD Future of Investment Treaties (Track 1) suggest that the scope of IIAs protection may need to be revisited to make it consistent with the Paris Agreement. A potential solution is a fossil-fuel carve out, an option that has also been explored in the literature (Paine and Sheargold 2023). An UNCTAD–IIED policy brief makes the following recommendations to IIAs negotiators: i) ensure consistency between IIAs and climate change commitments; ii) distinguish between high and low GHG emission FDI; iii) ensure states’ right to promote climate mitigation and adaptation action, through “[r]efining protection standards [which] offers a more systemic approach than issue-by-issue carve-outs for climate or other measures”; iv) enhance investor obligations and other environmental provisions; v) realign old-generation IIAs with

climate change commitments; and vi) strengthen regional and international fora to discuss the interaction between IIAs and climate change action (UNCTAD-IIED 2022).

71. According to UNCTAD's *World Investment Report 2023*, the most common climate change provisions found in recent IIAs (2012–22) are the following: i) climate/environmental carve-outs to expropriation—41%; ii) climate/environmental carve-outs to performance requirements prohibition—32% (the percentage concerns only IIAs that include performance requirements provisions, i.e., 94 of the 284 IIAs analyzed); iii) non-lowering/waiving of standards—24%; iv) right to regulate—17%; v) cooperation on climate action—10%; vi) corporate social responsibility—8%; vii) promotion of sustainable investment—6%; viii) implementation of international environmental obligations—6%; ix) climate/environmental carve-outs to national/most-favored-nation treatment—4%; x) respecting host state's environmental regulations—4% (UNCTAD 2023, 90).

72. The literature has also discussed various IIAs reform options, such as using these treaties to enforce investor environmental or climate change obligations. IIAs can make ISDS protection conditional on investor compliance with certain laws or obligations (admissibility of the claim). Alternatively, IIAs may impose certain obligations on investors, allowing governments to initiate ISDS claims, counterclaim or use investor misconduct as a defense in a ISDS case. Moreover, either through treaty making or via precedent, a transnational public policy may emerge prohibiting foreign investors from initiating ISDS cases if they have not complied with their climate change responsibilities. An analogous development occurred in the domain of anti-corruption law; for instance the tribunal in *World Duty Free v. Kenya* decided that bribery is contrary to transnational public policy.¹²⁵ IIAs can be adjusted to work as an incentive to establish a project, as well as a mechanism to deter investors' misconduct related to climate change action.

Some questions for APEC economies delegates:

1. Do you think IIAs and ISDS protection can provide foreign investors with appropriate incentives to invest in climate change mitigation or adaptation projects?
2. Do you think IIAs and ISDS are sufficiently aligned with the UNFCCC and the Paris Agreement?
3. Do you think IIAs sufficiently promote private-public cooperation to accelerate climate change mitigation and adaptation?
4. How concerning is the ISDS-related “chill” of regulation required for climate change action?
5. Given the precedent of solar energy disputes under the ECT, do you think there is a significant risk of ISDS litigation related to promotional measures, such as fiscal, financial or other regulatory incentives? Could this experience deter economies from implementing incentives necessary to meet their NDCs?

6. Are the inclusion of general exceptions, clarifications to states' right to regulate and carve-outs sufficient to balance investor rights and states' right to regulate in the context of climate change?
7. Should governments consider IIAs and ISDS when discussing or implementing climate change adaptation measures?
8. Should governments consider IIAs and ISDS when designing policies to accelerate the diffusion and transfer of green technologies?
9. Is there further work to be done to ensure that IIAs and ISDS are not an obstacle to ensuring a fair energy transition that protects vulnerable groups?

⁷⁵ *Westmoreland Coal Company v. Canada* (ICSID Case No. UNCT/23/2) Pending. A previous dispute for the same facts was resolved in favor of Canada, as the tribunal decided it lacked jurisdiction to resolve the case. *Westmoreland Mining Holdings, LLC v. Canada* (ICSID Case No. UNCT/20/3) Final Award, 31 January 2022. The foreign investor filed the case again.

⁷⁶ *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands* (ICSID Case No. ARB/21/22) Discontinued.

⁷⁷ *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands* (ICSID Case No. ARB/21/4) Pending.

⁷⁸ John Parnell (2021). Germany Settles Nuclear Phaseout Legal Disputes for \$2.9 B. GreenTechMedia. URL: <https://www.greentechmedia.com/articles/read/germany-settles-nuclear-phase-out-legal-disputes-for-2.9b>.

⁷⁹ Earlier in 2021, the OECD published a working paper on potential avenues for future policies relating to investment treaties (OECD 2021). The paper explores how IIAs can contribute to sustainable development and responsible business conduct, market access, FDI facilitation and liberalization, and subsidies regulation, as well as address the interests of foreign investors and governments, including in the context of global challenges such as climate change.

⁸⁰ Some media outlets indicate that the European Union may be considering an “exit” from the ECT. See Kate Abnett. (2023). EU to propose exit from Energy Charter Treaty over climate concerns June 29, 2023. Reuters. URL: <https://www.reuters.com/sustainability/climate-energy/eu-propose-exit-energy-charter-treaty-over-climate-concerns-2023-06-29/>.

⁸¹ OECD. Investment Treaties and Climate Change OECD Public Consultation. January - March 2022. 13 April 2022. Compilation of Submissions. URL: <https://www.oecd.org/investment/investment-policy/OECD-investment-treaties-climate-change-consultation-responses.pdf>.

⁸² The challenge of a “rapidly shifting landscape” and increasing uncertainty has also been highlighted by the UNDP *Human Development Report 2021/2022*, which states that “Novel layers of uncertainties are interacting to create new kinds of uncertainty—a new uncertainty complex—never seen in human history” (UNDP 2022, 3). These layers include climate change, accelerated societal transformations, and the vagaries and vacillations of polarized societies.

⁸³ See APEC (2020). APEC Putrajaya Vision 2040. (Annex to the “APEC 2020 Leaders’ Declaration.” 20 November 2020. URL: https://www.apec.org/Meeting-Papers/Leaders-Declarations/2020/2020_aelm/Annex-A.

⁸⁴ 2021 APEC Aotearoa Plan of Action. URL: <https://aotearoaplanofaction.apec.org/>.

⁸⁵ The policy brief references vulnerable groups as follows: “Vulnerable groups like women, the poor, workers, people with disabilities and Indigenous Peoples” (APEC 2022f, 1).

⁸⁶ 2021 APEC Aotearoa Plan of Action. Trade and Investment URL: <https://aotearoaplanofaction.apec.org/trade-and-investment.html>.

⁸⁷ 2021 APEC Aotearoa Plan of Action. Trade and Investment URL: <https://aotearoaplanofaction.apec.org/trade-and-investment.html>.

⁸⁸ For further information, see Dolzer, R., Kriebaum, U. and Schreuer, C. (2022). Principles of international investment law. (Oxford University Press). Chapter VI “Admission and Establishment”; Muchlinski, P. (2021). Multinational enterprises and the law. (Oxford University Press). Chapter 5 “Control of Inward Investment” and Chapter 6 (Liberalization and Promotion of Inward Investment);

Van den Bossche, P. and Zdouc, W. (2021). *The Law and Policy of the World Trade Organization*. (Cambridge University Press). Chapters 4, 5 and 6 (especially the sections on the GATS Agreement).

⁸⁹ FDI Intelligence. (2023). US finalising imminent outbound FDI screening rules. May 15, 2023. URL: <https://www.fdiintelligence.com/content/news/us-finalising-imminent-outbound-fdi-screening-rules-82488>.

⁹⁰ For a discussion of the existing literature, see South Centre (2022).

⁹¹ For further information, see Dolzer, R., Kriebaum, U. and Schreuer, C. (2022). *Principles of international investment law*. (Oxford University Press). Chapter VI “Admission and Establishment”; International Trade Centre. (2021). *Investment Facilitation for Development. A toolkit for policymakers*. [Axel Berger and Karl Sauvant (eds)].

⁹² URL: https://www.wto.org/english/tratop_e/invfac_public_e/factsheet_ifd.pdf.

⁹³ See *Walter Bau AG v. Thailand* (UNCITRAL) Partial Award on Jurisdiction, 5 October 2007.

⁹⁴ *Strabag v. Germany* (ICSID Case No. ARB/19/29) Pending.

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⁹⁹ *Methanex v. USA* (UNCITRAL— NAFTA) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005.

¹⁰⁰ *Glamis Gold v. USA* (UNCITRAL— NAFTA) Award, 8 June 2009

¹⁰¹ *Chemtura v. Canada* (UNCITRAL— NAFTA) Award, 2 August 2010.

¹⁰² “The contours of the definition of an indirect expropriation are not precisely drawn. This is so, even under new investment protection treaties that attempt to define indirect investment.” (Dolzer et al, 153)

¹⁰³ *Bear Creek Mining Corporation v. Peru* (ICSID Case No. ARB/ 14/ 2) Award, 30 November 2017.

¹⁰⁴ *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic* (ICSID Case No. ARB/17/14) Final Award, 23 August 2022.

¹⁰⁵ *Lone Pine Resources Inc. v. The Government of Canada* (ICSID Case No. UNCT/15/2) Award, 21 November 2022.

¹⁰⁶ The *Vattenfall v. Germany I and II* cases would have provided an important precedent in relation to the phasing out of nuclear energy. However, the two cases were settled. In 2016 and 2020, the Federal Constitutional Court in Germany indicated compensation for lost power generation was fair. See John Parnell (2021). *Germany Settles Nuclear Phaseout Legal Disputes for \$2.9 B*. GreenTechMedia. URL: <https://www.greentechmedia.com/articles/read/germany-settles-nuclear-phase-out-legal-disputes-for-2.9b>.

¹⁰⁷ *Methanex v. USA* (UNCITRAL— NAFTA) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, para. Part IV, Chapter D, at 9.

¹⁰⁸ *Bilcon of Delaware and others v. Canada* (PCA Case No. 2009- 04) Award on Jurisdiction and Liability, 17 March 2015.

¹⁰⁹ *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41) Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021. The final award and the calculation of damages is pending.

¹¹⁰ *Bilcon of Delaware and others v. Canada* (PCA Case No. 2009- 04) Award on Jurisdiction and Liability, 17 March 2015, paras. 450, 453, 590, 739– 40.

¹¹¹ *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41) Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para. 804

¹¹² *Lone Pine Resources Inc. v. The Government of Canada* (ICSID Case No. UNCT/15/2) Award, 21 November 2022.

¹¹³ *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands* (ICSID Case No. ARB/21/4) Pending.

¹¹⁴ *Westmoreland Coal Company v. Canada* (ICSID Case No. UNCT/23/2) Pending.

¹¹⁵ *Zeph Investments Pte Ltd v The Commonwealth of Australia* Pending. There are reports that Zeph has brought another claim against Australia in 2023. See URL: <https://www.theguardian.com/australia-news/2023/jul/10/clive-palmers-second-case-against-australia-is-413bn-claim-it-broke-trade-deal>.

¹¹⁶ *Ruby River Capital LLC v. Canada* (ICSID Case No. ARB/23/5) Pending.

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¹¹⁸ *TC Energy Corporation and TransCanada Pipelines Limited v. USA* (ICSID Case No. ARB/21/63) Pending.

¹¹⁹ *Eco Oro Minerals v. Colombia* (ICSID Case No. ARB/16/41) Procedural Order No. 6, Decision on Non-Disputing Parties' Application, 18 February 2019.

¹²⁰ *Eli Lilly and Company v. Canada* (UNCITRAL, ICSID Case No. UNCT/ 14/ 2) Award, 16 March 2017.

¹²¹ URL: https://www.bmwk.de/Redaktion/DE/Downloads/G/german-non-paper-proposing-draft-decision-of-the-ceta-joint-committee.pdf?__blob=publicationFile&v=4.

¹²² *Bear Creek Mining Corporation v. Peru* (ICSID Case No. ARB/ 14/ 2) Award, 30 November 2017.

¹²³ *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41) Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021.

¹²⁴ URL: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng>. For a critique of this position, see Alschner, W. (2022). Why omitting general public policy exceptions from investment treaties is a setback for the right to regulate. *Columbia FDI Perspectives* 342.

¹²⁵ *World Duty Free Company v Republic of Kenya* (ICSID Case No. Arb/00/7) Award, 4 October 2006, para. 157.

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