CLIMATE CHANGE DISPUTES IN INTERNATIONAL INVESTMENT DISPUTE SETTLEMENT: HARDENING, ALIENATION, AND FUTURE TRENDS*

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Table of Content

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Abstract:
As the climate crisis intensifies, there is mounting pressure on international legal mechanisms to enforce state obligations in a meaningful manner. While the prevailing climate regime continues to be characterized by soft-law instruments, a novel dynamic is emerging within the domain of international investment law. Recent treaty practice and arbitral jurisprudence indicate that climate-related provisions in international investment agreements are undergoing a process of normative "hardening," whereby soft commitments are interpreted as binding obligations. The present analysis posits that this transformation is being driven by a form of judicial activism, manifest through untraditional approach of treaty interpretation by investment tribunals or dispute panels, that expands the legal consequences of climate clauses beyond their original textual scope. Through a comparative textual analysis and case study examination, the article demonstrates how adjudicators are increasingly treating environmental and climate-related standards as norms of legal binding force. The present article provides a critical assessment of the implications of this trend, identifying two key risks: the alienation of IIL from its foundational goal of investment protection, and the erosion of state consent through the imposition of obligations not expressly agreed by states. By conceptualizing this trend as both a response to global regulatory failure and a potential source of institutional backlash, the article proposes a reframing of IIL as a hybrid governance regime. The analysis concludes that while judicial hardening may support climate enforcement, its long-term legitimacy will depend on preserving a delicate balance between environmental ambition, legal coherence, and sovereign consent.

I. INTRODUCTION

Climate change represents not merely an environmental emergency,[1] but also a considerable challenge for the international law to tackle issues, which require collective action that across international boundaries.[2] Despite the adoption of significant treaties such as the United Nations Framework Convention on Climate Change (UNFCCC),[3] the Kyoto Protocol,[4] and the Paris Agreement,[5] global climate governance continues to face challenges including ineffective enforcement, under-implementation, and pervasive non-compliance.[6] The fundamental issue underlying this challenge emerges from the inherent flexibility in international climate obligations, which, despite their normative ambition, frequently lack tangible legal consequences in the event of infringement.[7] This persistent discrepancy in compliance gives rise to a fundamental question: Whether other areas of international law could contribute to enhancing climate-related commitments?

A growing trend that is becoming increasingly evident is the incorporation and evolving interpretation of climate obligations within

1 *The Climate Crisis—A Race We Can Win*, UNITED NATIONS, https://www.un.org/en/un75/climate-crisis-race-we-can-win (last visited Jun. 30, 2025).

2 *See* António Guterres, *Remarks at 2019 Climate Action Summit*, UNITED NATIONS (Sept. 23, 2019), https://www.un.org/sg/en/content/sg/speeches/2019-09-23/remarks-2019-climate-action-summit (Secretary-General António Guterres pointed out that "the climate emergency is a race we are losing, but it is a race we can win."). *See also* RICHARD A. POSNER, CATASTROPHE: RISK AND RESPONSE 21 (2004).

3 UN Framework Convention on Climate Change, *Climate Change: Small Island Developing States* (2005), https://unfccc.int/resource/docs/publications/cc_sids.pdf (last visited May 12, 2025).

4 During Kyoto Protocol Implementation Period (2005–2012), global greenhouse gas emissions continued to rise rapidly, widening the gap between emission reduction targets and reality. *See* Charalampos Giannakopoulos, *Paradigms of Justice and the Limits of ISDS Reform*, 16 J. INT'L DISP. SETTLEMENT (forthcoming Mar. 2025); Gloria M. Alvarez et al., *A Response to the Criticism Against ISDS by EFILA*, 33 J. INT'L ARB. 1 (2016). *See also Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, IPCC 2–4 (2014), https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf.

5 *See* Paris Agreement preamble, Dec. 12, 2015, 3156 U.N.T.S. 79..

6 Jiang Qifan (姜启帆), *Guizhi Qihou Bianhua de Xin Lujing: Lun Zhongou Quanmian Touzi Xieting zhong Kechixu Fazhan Zhangjie de Kezhixing* (规制气候变化的新路径：论《中欧全面投资协定》中可持续发展章节的可执行), [New Approaches to Climate Change Governance: An Analysis of the Enforceability of the Sustainable Development Provisions in the China-EU Comprehensive Agreement on Investment] 8 OUZHOU FALÜ PING LUN (欧洲法律评论) [CHINESE J. EUR. L.] (forthcoming 2025). *See also* DAVID G. VICTOR, THE COLLAPSE OF THE KYOTO PROTOCOL AND THE STRUGGLE TO SLOW GLOBAL WARMING 109–16 (2001).

7 *See* Noémie Rachel Kugler & Pilar Moraga Sariego, *Climate Change Damages: Conceptualization of a Legal Notion with Regard to Reparation Under International Law*, 13 CLIMATE RISK MGMT. 103 (2016).

the domain of international investment law (IIL).[8] A growing number of international investment agreements (IIAs) now include provisions referencing environmental protection, sustainable development, and in some cases, explicit commitments to climate governance.[9] While such clauses were traditionally regarded as non-binding , recent jurisprudence suggests a normative shift: arbitral tribunals and dispute panels are expected to interpret these provisions in a manner that "hardens" their legal effect. This emerging practice gives rise to several critical questions concerning the future trends of IIL and its interface with climate governance.

The present article investigates the hypothesis that such hardening is driven not only by treaty reform, but by a form of judicial activism exercised by dispute adjudicators including investment arbitrators, panels, and other international bodies, who in responding to the normative urgency of climate change, engage in expansive treaty interpretation under the Vienna Convention on the Law of Treaties (VCLT).[10] Judicial activism refers to the practice whereby judges exceed established norms of adjudication,[11] often employing non-traditional interpretive methods or result-oriented decisions,[12] hereby extending beyond the scope of their designated responsibility.[13] Despite the extensive academic debates surrounding the adoption of judicial activism by tribunals, with certain critics associating it with negative connotations,[14] this article focuses on the phenomenon itself,

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8 *See* Paolo Turrini, *International Investment Law: The Anarchical Society Where Development and Sustainability Are Frenemies and Participation Plays Gooseberry*, *in* SUSTAINABILITY THROUGH PARTICIPATION? PERSPECTIVES FROM NATIONAL, EUROPEAN AND INTERNATIONAL LAW 458 (Eva Julia Lohse ed., 2023); Rosalien Diepeveen et al., *Conference Report "Bridging the Gap Between International Investment Law and the Environment", 4th and 5th November, The Hague, The Netherlands*, 30 UTRECHT J. INT'L EUR. L. 145. (2014).

9 *Strengthening Sustainable Investment Through International Investment Agreements*, OECD (Oct. 30, 2024), https://doi.org/10.1787/a8729c98-en.

10 *See* Katia Fach Gómez & Alexandra Diehl, *2023 in Review: Climate Change and ISDS—Reshaping Investment Arbitration to Achieve Climate Goals*, KLUWER ARBITRATION BLOG (Jan. 31, 2024), https://arbitrationblog.kluwerarbitration.com/2024/01/31/2023-in-review-climate-change-and-isds-reshaping-investment-arbitration-to-achieve-climate-goals/.

11 *See* Michael Green, *An Intellectual History of Judicial Activism*, 58 EMORY L. J. 1195, 1200 (2009).

12 *See* Keenan D. Kmiec, *The Origin and Current Meanings of Judicial Activism*, 92 CAL. L. REV. 1441 (2004); Matthias Herdegen, *Interpretation in International Law*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2013).

13 *See* Kmiec, *The Origin and Current Meanings of Judicial Activism*; Herdegen, *Interpretation in International Law.*

14 *See* HANS KELSEN, PURE THEORY OF LAW 353–56 (2005); Bradley C. Canon, *A Framework for the Analysis of Judicial Activism*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 395 (Stephen C. Halpern & Charles M. Lamb eds., 1982); STANLEY FISH, DOING WHAT COMES

rather than its value judgment. This interpretive activism has the capacity to transform otherwise soft or aspirational clauses into binding standards, with the potential to substantially increase the climate governance obligations of host states. While such developments may represent a promising pathway for addressing climate wrongful action or omit, they also raise two interrelated concerns, which are at the core of this article.

Firstly, the risk of alienation: As ISDS (Investor-State Dispute Settlement) tribunals increasingly deploy environmental or climate-oriented interpretations in disputes originally rooted in economic relations, the function of IIAs may begin to deviate from their foundational purpose, namely the protection of foreign investment.[15] This potential functional drift may compromise the internal coherence of IIL and challenge its legitimacy in the eyes of investors and host states alike.[16] Secondly, and more significantly, the hardening of obligations through judicial interpretation may infringe the foundational principle of state consent.[17] The unilateral expansion of treaty-based commitments through adjudication by tribunals has the potential to impose obligations that states have not expressly accepted. This situation could lead to a backlash against international adjudicatory mechanisms and even calls for ISDS reform or withdrawal.[18]

These concerns are not merely theoretical. The aforementioned subjects have already become apparent. Indeed, states have already expressed discomfort with expansive interpretations of investment

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NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 92–93 (1989); PAUL W. KAHN, THE CULTURAL STUDY OF LAW 119 (1999).

15 *See* Gian Maria Farnelli, *Investors as Environmental Guardians? On Climate Change Policy Objectives and Compliance with Investment Agreements*, 23 J. WORLD INV. & TRADE 887 (2022); Bradly J. Condon, *Climate Change and International Investment Agreements*, 14 CHINESE J. INT'L L. 305 (2015); Joshua Paine & Elizabeth Sheargold, *A Climate Change Carve-Out for Investment Treaties*, 26 J. INT'L ECON. L. 285 (2023).

16 *See* Maria Farnelli; Condon; Paine & Sheargold. *See also* KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT, AND THE SAFEGUARDING OF CAPITAL (2013).

17 Ximena Soley & Stephan Steininger, *Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights*, 14 INT'L J. L. IN CONTEXT 237 (2018); FREDERICK COWELL, THE LAW, POLITICS AND THEORY OF TREATY WITHDRAWAL (2023); William B. McElhiney III, *Responding to the Threat of Withdrawal: On the Importance of Emphasizing the Interests of States, Investors, and the Transnational Investment System in Bringing Resolution to Questions Surrounding the Future of Investments with States Denouncing the ICSID Convention*, 49 TEX. INT'L L.J. 601 (2014).

18 Soley & Steininger; COWELL; McElhiney.

standards.[19] The incorporation of climate-related hard obligations without the formal renegotiation, has the potential to exacerbate existing tensions, particularly in the Global South,[20] where states are confronted with greater implementation burdens but often possess limited treaty-making leverage. Simultaneously, it would be an oversimplification to dismiss this interpretive shift as merely illegitimate overreach. In situations marked by normative urgency and institutional paralysis, the adoption of judicial activism may represent the feasible legal avenue for the advancement of significant climate obligations within the confines of prevailing legal frameworks. In times of crisis in international law, international tribunals could adapt to challenges by shaping the legal framework (*lex ferenda*).

The central research question of this article is thus twofold: How and to what extent are climate-related provisions in IIAs being hardened through judicial activism in ISDS and other dispute forums? It is imperative to ascertain the normative and structural ramifications of this phenomenon for the legitimacy, function and future of international investment law.

Existing scholarship on climate change and investment law has largely concentrated on the risk that environmental regulation may trigger ISDS claims, thereby chilling state action.[21] While acknowledging the significance of this literature, it is imperative to recognize an overlooked reverse trend: the increasing capacity of investment dispute mechanisms to function as "catalysts" of climate norms.[22] This phenomenon is particularly evident in instances where tribunals invoke either external multilateral environmental agreements (MEAs) or general principles of international law, or both, in order to uphold evolving standards of due diligence.[23] The present

19 *See* Julian Arato et al., *Parsing and Managing Inconsistency in Investor-State Dispute Settlement*, 21 J. WORLD INV. & TRADE 336 (2020); Julian Arato, *The Private Law Critique of International Investment Law*, 113 AM. J. INT'L L. 1 (January 2019).

20 Arato et al.; Arato.

21 *See* Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, 7 TEL 229 (2018); KYLA TIENHAARA, EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION (Chester Brown & Kate Miles eds., 2011); Caroline Côté, *A Chilling Effect? The Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment* (2014) (Ph.D. dissertation, London School of Economics and Political Science) (LSE Theses Online).

22 *See* Ladan Mehranvar & Lisa Sachs, *Chapter 11: The Role and Relevance of Investment Treaties in Promoting Renewable Energy Investments*, *in* INVESTMENT ARBITRATION AND CLIMATE CHANGE 263 (Anja Ipp & Annette Magnusson eds., 2024).

23 *See* Rechtbank Den Haag [The District Court of the Hague], May 26, 2021, Milieudefensie et al. v. Royal Dutch Shell PLC, Judgment, ECLI:NL:RBDHA:2021:5339 (Neth.); Gerechtshof Den Haag [Court of Appeal The Hague], Nov. 12, 2024, Milieudefensie et al. v. Royal Dutch Shell PLC, ECLI:NL:GHDHA:2024:2100 (Neth.). *See also* Jason Rudall, *Emission Impossible? Corporations, Supply Chains, Courts, and Climate Change*, 118 AJIL UNBOUND 284 (2024).

article seeks to rebalance the discussion by analyzing how interpretive practices, rather than merely focus on new treaty design, may reshape the legal relationship between investors, host states and the global climate regime.

This article is structured in three parts. The first part examines the increasing inclusion of climate-related provisions in IIAs and bilateral investment treaties (BITs), identifying how such clauses have begun to be activated through interpretive practices in select investor–state dispute settlement (ISDS) proceedings. It analyzes the textual design of these provisions and considers whether the emerging trend toward their operationalization is likely to become generalizable, given the fragmented and inconsistent nature of investment arbitral jurisprudence.

The second part turns to the growing jurisprudence from international courts and tribunals—including the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the Inter-American Court of Human Rights (IACtHR), and the African Court on Human and Peoples' Rights (AfCHPR)—which demonstrates an emerging mode of climate-oriented judicial activism. Drawing on both finalized and pending advisory proceedings, this section argues that such decisions are likely to serve as authoritative interpretive references, shaping how ISDS tribunals approach treaty interpretation in future climate-related disputes.

The third part critically examines the risks and structural challenges posed by this interpretive shift. It argues that while the hardening of climate-related obligations through judicial reasoning may enhance the normative force of climate-related commitments within the investment regime, it also carries the risk of eroding state consent, generating normative "alienation", and triggering institutional backlash.

The present article contends that international investment law is evolving into a hybrid framework, where economic protection and environmental governance coexist in a fragile normative balance. The outcome of this emerging model – whether it results in synergy or alienation – is contingent on the navigation of the delicate balance between legality, legitimacy, and consent in the age of climate emergency by adjudicators, and states.

II. A PARADIGM SHIFT FROM SOFT TO HARD: TEXTUAL ANALYSIS OF THE SUSTAINABLE DEVELOPMENT CHAPTER OF THE CLIMATE CHANGE PROVISIONS ON INTERNATIONAL INVESTMENT AGREEMENTS

A. The Development of the New Generation of International Investment Agreements

This article selects several recent investment treaties, including the EU–China Comprehensive Agreement on Investment (CAI), for focused analysis because they contain clear references to climate or environmental obligations. These agreements illustrate how sustainable development chapters are evolving to include climate-related commitments. In particular, the this IIAs reflect the emerging practice of incorporating climate governance into investment regulation by referencing the UNFCCC and the Paris Agreement.[24]

By a general overview of existing legal documents, sustainable development provisions have become increasingly prevalent in IIAs. In recent years, over 60 IIAs have included specific clauses addressing sustainable development. Many provisions related to the promotion of environment and labor health and safeguards could be found. For instance, Article 17 of the Brazil–United Arab Emirates BIT states that: "Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure it deems appropriate to ensure that investment activity... according to the labor, environmental and health legislation of that Party," provided these measures are not applied in an arbitrary or unjustifiably discriminatory manner.[25] Article 2(7) of the Hungary–Kyrgyzstan BIT (2020) prohibits parties from encouraging investment by lowering domestic labor, environmental, or occupational health and safety standards. It also allows consultations if one party perceives such behavior in the other.[26] Article 13 of the Mexico–Hong Kong SAR BIT (2020) encourages enterprises to voluntarily adopt corporate social

24 *See* Jiang, *supra* note 6.

25 Cooperation and Facilitation Investment Agreement, Brazil-U.A.E., art. 17, Mar. 15, 2019, https://investmentpolicy.
unctad.org/international-investment-agreements/treaty-files/5855/download.

26 Agreement for the Promotion and Reciprocal Protection of Investments, Hung.-Kyrg., art. 2(7), Sept. 29, 2020, https://
investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6037/download.

responsibility policies aligned with internationally recognized sustainability standards.[27]

The CAI, though not yet ratified, exemplifies the trend of mainstreaming climate objectives within economic agreements. Subsection II, Chapter 7 of the CAI—entitled "Investment and Climate Change"[28] — stipulates that parties shall effectively implement their respective obligations under the UNFCCC and the Paris Agreement. While the language used reflects "hard law" in form (e.g., use of "shall"), the substantive obligations depend on the soft and flexible mechanisms within those multilateral environmental agreements. Nonetheless, the inclusion of climate obligations in the CAI has been regarded as a legal innovation that opens the door for potential enforceability, especially when viewed in light of evolving adjudicative practice.[29]

In conclusion, when observed from the perspective of climate governance, contemporary IIAs are discreetly moving closer to the objectives of sustainable development. A substantial number of recent treaties have incorporated extensive clauses concerning sustainable development, which either make reference to "multilateral environmental agreements, including the UNFCCC and the Paris Agreement," or utilize climate-related terms without specifying a particular treaty. These open-ended references implicitly incorporate the substance of climate conventions into the investment regime. When employed in conjunction with the terms "shall" or "should", these provisions serve to augment the scope available to the host state in pursuit of ambitious decarbonization objectives. Moreover, they provide investment tribunal or panel with the appropriate doctrinal foundation to incorporate climate-related obligations into investor-state relations.

Nevertheless, the present field remains significantly fragmented. The majority of traditional IIAs do not address carbon concerns in their drafting. Consequently, climate-related obligations are either inadequate or non-existent. Despite the existence of such provisions, there remains a paucity of clear enforcement mechanisms. In this landscape, characterized by its lack of uniformity, subsequent cases act as "catalysts". The subsequent analysis demonstrates the manner in

27 Agreement for the Promotion and Reciprocal Protection of Investments, H.K.-Mex., June 11, 2020, art. 13, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6129/download

28 Comprehensive Agreement on Investment, EU-China, sec. IV, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/eu-china-agreement-principle_en.

29 *See* Jiang, *supra* note 6.

which tribunals utilize these ambiguous clauses to trigger the such obligation in climate change-related disputes.

B. Comparing with Different Investment Cases: The Tendency of Development in the Field of Climate Change

In 2021, the European Union successfully invoked a sustainable development (labor rights) clause in the EU–Korea Free Trade Agreement, marking the first time a "soft" commitment was enforced through a formal dispute mechanism.[30] This case signaled that previously aspirational provisions in trade agreements can acquire binding force, illustrating a transformation from soft-law pledges to hard-law compliance.[31]

As the climate change agenda evolves, a parallel trend is emerging in international investment arbitration: this mechanism is increasingly used to resolve climate change-related disputes, reflecting an intersection of climate policy and investment law.[32] In practice, such disputes typically fall into two categories—challenges to states' environmental regulatory measures and challenges to adjustments in energy policy made for climate-change reasons. Notably, climate-related investment cases have arisen both as investor-initiated claims and as host-state counterclaims within arbitration proceedings.

A significant early case revealing how environmental protection obligations intersect with investment law is *Allard v. Barbados*. In this dispute, a Canadian investor brought a claim under the Canada–Barbados BIT, alleging that Barbados failed to prevent environmental harm to his eco-tourism project. Although the arbitral tribunal dismissed the claim due to lack of sufficient evidence of state-attributable damage, it explicitly recognized that a state's international environmental obligations—such as those under the Convention on Biological Diversity (CBD) and the Ramsar Convention—could be relevant in interpreting standards like fair and equitable treatment (FET) or full protection and security (FPS).[33] This reasoning sets a

30 *See* Jil Murray et al., *Report of the Panel of Experts*, PANEL OF EXPERTS PROCEEDING CONSTITUTED UNDER ARTICLE 13.15 OF THE EU-KOREA FREE TRADE AGREEMENT (Jan. 20, 2021), https://www.moel.go.kr/common/downloadFile.do?file_seq=20210102347&bbs_seq=20210101434&bbs_id=9&file_ext=pdf.

31 *See* Jiang, *supra* note 6.

32 Lin Wei (林洧), *Guoji Touzi Zhongcai Jiejue Qihou Bianhua Zhengyi De Lujing Zhengcheng* (国际投资仲裁解决气候变化争议的路径证成) [*Justifying the Pathways for Addressing Climate Change Disputes through International Investment Arbitration*], 11 ZHONGGUO RENKOU·ZIYUAN YU HUANJING (中国人口·资源与环境) [CHINA POPULATION, RESOURCES AND ENVIRONMENT] 34, 90–99 (2024).

33 Allard v. Government of Barbados, PCA Case No. 2012-06, Award, ¶¶ 3, 51, 139 (June 27, 2016). *See also* Beata Gessel-Kalinowska vel Kalisz et al., *Chapter 1: Types of State Action*

valuable precedent for future climate-related arbitration, where claimants may invoke state inaction in meeting climate commitments (e.g., under the Paris Agreement) as a basis for liability. The Allard award thus underscores both the opportunities and evidentiary challenges in integrating climate governance into investment dispute settlement.

Recent investment arbitration cases illustrate this growing intersection. In *Vattenfall v. Germany (II)*, the investor challenged Germany's decision to phase out nuclear energy following the Fukushima disaster, initially claiming €4.3 billion.[34] The dispute ended in a €1.6 billion settlement. In *Westmoreland v. Canada*, a U.S. investor challenged Alberta's accelerated coal phase-out under the Climate Leadership Plan, arguing it was unfairly excluded from compensation.[35] Though dismissed for lack of jurisdiction, the case typifies the risk of investor claims arising from ambitious climate policies.

In *Rockhopper v. Italy*, Italy's offshore drilling ban—aimed at environmental protection and climate objectives—was found to breach the Energy Charter Treaty, resulting in a €190 million award to the investor.[36] Similarly, in *Greentech v. Italy*, the tribunal ruled that retroactive cuts to solar energy subsidies violated legitimate expectations, awarding €15 million.[37]

Counterclaims have also become a tool for states to hold investors accountable for environmental harm. In *Perenco v. Ecuador*, Ecuador successfully claimed compensation for environmental damage in the Amazon region caused by oil extraction.[38] Likewise, in Burlington v. Ecuador, the tribunal ordered the investor to pay $41 million in counter-damages for environmental degradation.[39]

These cases demonstrate a shift: international adjudicators increasingly consider climate-related interests, both to challenge and defend against investment claims. What began as soft-law objectives now shape legally consequential outcomes, pointing to a long-term

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Leading to Climate-Related Investor Claims, *in* INVESTMENT ARBITRATION AND CLIMATE CHANGE 12 (Anja Ipp & Annette Magnusson eds., 2024).

34 Vattenfall AB and Others v. Fed. Republic of Ger. (II), ICSID Case No. ARB/12/12, Decision on the Achmea Issue (Aug. 31, 2018).

35 Westmoreland Coal Co. v. Gov't of Can., ICSID Case No. UNCT/20/3, Notice of Arbitration (Aug. 12, 2019).

36 Rockhopper Italia S.p.A. v. Italian Republic, ICSID Case No. ARB/17/14, Award (Aug. 24, 2022).

37 Greentech Energy Sys. A/S, NovEnergia II Energy & Environment (SCA) SICAR v. Italian Republic, SCC Arbitration V (2015/095), Award (Dec. 23, 2018).

38 Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Award (Sept. 27, 2019).

39 Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Award (Feb. 7, 2017).

integration of environmental and climate concerns into the fabric of international investment law.

III. THE UNFOLDING OF CLIMATE GOVERNANCE IN INVESTMENT DISPUTE SETTLEMENT: IMPLEMENTATION AND SYNERGY

As demonstrated in the preceding section, recent IIAs and judicial decisions indicate a growing trend towards the incorporation and operationalization of climate-related obligations. However, these developments remain partial and fragmented.[40] The jurisprudence of ISDS continues to demonstrate a lack of coherence, with tribunals applying divergent interpretive approaches and displaying uneven receptivity to environmental and climate-based claims. [41] This fragmentation gives rise to a fundamental question: The present study seeks to explore the capacity of the ISDS system, originally conceived as a safeguard for foreign investment, to meaningfully contribute to global climate governance in the absence of institutional or normative coherence.

In order to address this question, the present section shifts focus from textual inclusion and case-specific outcomes to the broader structural and systemic forces that are reshaping the legal environment in which investment disputes arise. The study commences with an examination of the role of the Paris Agreement. It is important to note that this is not considered as a directly enforceable legal instrument in investment arbitration, but rather as a normative anchor that increasingly informs the interpretive context of treaty obligations. The subsequent discussion then shifts to the emergence of international advisory opinions from courts such as ITLOS, ICJ, and IACtHR, which are beginning to establish interpretive benchmarks that may exert persuasive authority across legal regimes, including ISDS. The section goes on to consider the legitimacy dilemmas posed by this interpretive shift, with particular reference to the tensions created with the principle of state consent. Finally, it explores the potential for a more integrated model of investment law, one that balances investor protection with climate ambition, and assesses whether such a normative synergy is feasible – or whether climate governance will ultimately alienate the investment regime from its foundational mandate.

Furthermore, the distinction between "soft" and "hard" obligations warrants clarification. International obligations arise from

40 *See* Jiang, *supra* note 6.
41 *Id.*

acts or omissions that are inconsistent with binding legal commitments,[42] which may stem from *jus cogens*, treaties, customary international law, or general principles recognized by the international community,[43] as well as from non-binding instruments. Obligations derived from the first three sources—enumerated in Article 38 of the ICJ Statute—are traditionally classified as being "hard". In contrast, obligations from instruments such as the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) are generally considered soft law.

A. The Paris Agreement as a Normative Anchor: Systemic Integration in Treaty Interpretation

Despite the fact that the Paris Agreement is not directly enforceable within investor-state dispute settlement (ISDS) proceedings, [44] its significance as a normative reference point is steadily growing. The Paris Agreement, the most widely ratified and politically authoritative climate instrument to date, serves as a conceptual anchor for the global governance of climate change.[45] The legal architecture of the Paris Agreement is centered on nationally determined contributions (NDCs), progressive ambition cycles, and transparency frameworks. [46] Collectively, these elements serve as a universal language for assessing states' climate-related obligations, even in instances where such obligations are articulated in soft-law terms.[47] In this respect, the Paris Agreement performs a quasi-constitutional function within the broader system of international law,[48] shaping the interpretive environment in which other treaty regimes, including investment law, can be interpreted.

From a doctrinal perspective, Article 31(3)(c) of the VCLT stipulates that the interpretation of treaty provisions must be undertaken in consideration of "any relevant rules of international law applicable in the relations between the parties."[49] This development

42 JASON RUDALL, RESPONSIBILITY FOR ENVIRONMENTAL DAMAGE 3 (2024).

43 Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031, T.S. No. 993.

44 *See* Arman Sarvarian, *Invoking the Paris Agreement in Investor-State Arbitration*, 38(2) ICSID REV. 422 (2023), https://doi.org/10.1093/icsidreview/siad006.

45 *See* Achim Steiner, *quoted in* James Rothwell et al., *Paris Climate Change Deal - Ministers Adopt Historic Agreement to Keep Global Warming "Well Below" 2C*, THE TELEGRAPH, Dec. 12, 2015.

46 *See* DANIEL BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW 119 (2017).

47 *Id. See also* Geoffrey Palmer, *The Paris Climate Change Agreement and the Law*, (2016) NZLJ 152.

48 *See* Laura Wegener, *Can the Paris Agreement Help Climate Change Litigation and Vice Versa?*, 9 TRANSNAT'L ENV'T L. 17 (2020).

49 *See* Vienna Convention on the Law of Treaties arts. 31(c), May 23, 1969, 1155 U.N.T.S. 331.

enables arbitral tribunals to consider the Paris Agreement when interpreting environmental or sustainable development clauses embedded in IIAs. This interpretive cross-referencing is of particular relevance in disputes concerning fair and equitable treatment (FET), full protection and security (FPS), or regulatory autonomy, where investment protections intersect with host states' climate-related regulatory measures.[50] The Paris Agreement, although non-binding in many of its substantive aspects, thus acquires a second-order legal influence: not through direct application, but through its normative weight and systemic relevance.

This evolving interpretive dynamic is evident in the arbitral reasoning that acknowledges international environmental obligations, even when not explicitly incorporated into the investment treaty. For instance, in *Allard v. Barbados*, the tribunal suggested that a host state's international environmental commitments might inform the scope of treaty standards such as FPS.[51] While the case was ultimately decided on evidentiary grounds, it illustrated how external climate instruments, such as the Paris Agreement, may influence the expectations of due diligence or reasonableness under investment treaties.[52] The risk of fragmentation in ISDS jurisprudence remains high,[53] but the emergence of the Paris Agreement as a universal point of reference offers a potential harmonizing function.

In conclusion, although the Paris Agreement may not serve as a direct legal basis for claims within the ISDS framework, its normative architecture is increasingly relevant to the interpretation and application of IIA provisions. As international tribunals are confronted with disputes pertaining to climate-related issues, systemic integration under the VCLT offers a mechanism for reconciling investment protection with evolving environmental obligations. Consequently, the Paris Agreement functions not solely as a contextual backdrop, but as a normative anchor, thereby shaping the interpretive trajectory of investment law in an era characterized by climate consciousness.

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50 *See* Arman Sarvarian, *Investment Arbitration and Climate Change (reviewing Investment Arbitration and Climate Change, Anja Ipp & Annette Magnusson eds.)*, 2024 BRIT. Y.B. INT'L L. brae004; Orlando Federico Cabrera Colorado, *Investment Arbitration and Climate Change (book review)*, ICSID REV., siae030 (2024); Gessel-Kalinowska vel Kalisz et al., *supra* note 33, at 12.

51 Allard v. Barbados, PCA Case No. 2012-06, Award, ¶ 3 (June 27, 2016).

52 *Id.*

53 *See* Chester Brown et al., *Parsing and Managing Inconsistency in Investor-State Dispute Settlement*, 21 J. WORLD INV. & TRADE 336 (2020) ; SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE (2024).

B. The Role of Climate Advisory Opinions: From Fragmented Jurisprudence to Interpretive Coherence

Judicial activism refers to the practice whereby judges tend to establish new norms of ruling,[54] often employing non-traditional interpretation or result-oriented decisions,[55] thereby extending beyond the scope of their designated responsibility.[56] Although the extensive academic discourse surrounding the adoption of judicial activism by tribunals, with certain critics associating it with negative connotations,[57] this article concentrates on the phenomenon itself, rather than on any value judgments associated with it. This phenomenon indeed advance the legal coherence of international law and provide the possibility to "hardened" obligation within IIL framework.

This phenomenon is exemplified by the increasing number of climate-related advisory opinions issued , or currently under review by prominent international and regional judicial bodies. While these opinions are not legally binding, they represent a significant shift in the judicial approach towards the broad interpretation of states' climate obligations. This reframing of soft-law commitments as normative standards has the potential to guide other adjudicative forums, including ISDS tribunals.

A landmark example of this judicial turn is the *2024 Advisory Opinion* issued by the ITLOS.[58] In response to a request by the Commission of Small Island States, the ITLOS concluded that anthropogenic greenhouse gas emissions constitute marine pollution under Article 194 of the United Nations Convention on the Law of the Sea (UNCLOS).[59] The tribunal emphasized that states have affirmative obligations to prevent, reduce, and control such pollution, including through the implementation of international climate agreements.[60] Although ITLOS operates within the specific confines of the law of the sea, its opinion exemplifies a broader methodological trend, namely the elevation of soft environmental obligations to actionable legal standards through systematic and scientifically grounded interpretation. Investment tribunals, while not bound by ITLOS jurisprudence, may find themselves increasingly guided by its

54 Green, *supra* note 11, at 1200.

55 Kmiec, *supra* note 12; Herdegen, *supra* note 12.

56 Kmiec; Herdegen.

57 KELSEN, *supra* note 14, at 353–56; Canon, *supra* note 14, at 385, 395; FISH, *supra* note 14, at 92–93; KAHN, *supra* note 14, at 119.

58 See Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, 2022 ITLOS 31 (May 21).

59 *Id.*

60 *Id.*

interpretive approach, particularly in disputes where host states invoke environmental necessity or climate measures as regulatory justifications.[61]

The situation is further complicated by two pending advisory proceedings, which are likely to generate additional momentum. Firstly, the ICJ has been requested – pursuant to a General Assembly resolution spearheaded by Vanuatu – to clarify the obligations of states to protect the climate system and the legal consequences of harmful acts or omissions.[62] Secondly, the IACtHR is conducting its own advisory procedure on climate change and human rights.[63] The present proceedings are poised to establish normative baselines for assessing climate responsibility, particularly in relation to principles of prevention, precaution, and intergenerational equity.[64] The 2017 IACtHR opinion (OC-23/17) established a significant precedent by affirming the extraterritorial scope of environmental human rights obligations, and it has been cited in both domestic court rulings and UN treaty body decisions.[65] It is evident that these interpretive pathways are not confined to human rights law; they increasingly resonate with broader international obligations that may emerge in investment dispute contexts. A recent petition to the AfCHPR requesting an advisory opinion on climate-related state obligations further illustrates the expanding judicial engagement with climate governance.[66]

Collectively, these advisory opinions indicate a shift towards interpretive coherence, signifying a gradual yet increasingly coordinated judicial consensus that climate change is a matter of legal significance. Although ISDS tribunals are not hierarchically subordinate to these courts, they operate within the same international

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61 *See* Alberto Pecoraro, *UNCLOS and Investor Claims for Deep Seabed Mining in the Area: An Investment Law of the Sea?* 3 (GCILS, Working Paper No. 5, Nov. 2020); Peter Tzeng, *Investment Protection in Disputed Maritime Areas*, 19 J. WORLD INV. & TRADE 828 (2018).

62 *See* UN. General Assembly, Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, UN Doc. A/RES/77/276 (Mar. 29, 2023).

63 *See* Request for an Advisory Opinion on the Climate Emergency and Human Rights submitted by the Republic of Colombia & the Republic of Chile, Inter-Am. Ct. H.R. (Jan. 9, 2023) (pending).

64 *See* Lena Riemer & Luca Scheid, *Leading the Way: The IACtHR's Advisory Opinion on Human Rights and Climate Change*, VERFBLOG (Jan. 18, 2024), https://verfassungsblog.de/leading-the-way/.

65 *See* The Environment and Human Rights, Advisory Opinion, 2016 Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017).

66 *See* Yusra Suedi, *Africa's Turn? The African Court's Advisory Opinion on Climate Change*, EJIL:TALK! (May 22, 2025), https://www.ejiltalk.org/africas-turn-the-african-courts-advisory-opinion-on-climate-change/.

legal system. This may result in them feeling compelled to engage with the reasoning of these courts for the sake of coherence, legitimacy and legal evolution.[67] Advisory opinions thus serve as vectors of systemic integration, offering interpretive scaffolding that investment adjudicators may draw upon when evaluating the scope and relevance of climate-related obligations. As this judicial coherence deepens, the ISDS may be pressured – not formally, but normatively – to align with an emerging global consensus on climate responsibility.

C. Legitimacy Tensions: State Consent and Normative Overreach

The increasing use of judicial activism in climate governance, particularly through broad interpretations in advisory opinions and investment arbitration, creates a fundamental tension at the core of international law.[68] This tension arises from the need to balance the normative ambition of climate governance with the principle of state consent.[69] While there appears to be interpretive coherence around climate obligations, this may enhance the coherence and perceived legitimacy of international environmental law, it simultaneously risks undermining the foundational legitimacy of ISDS mechanisms if such obligations are introduced through methods not expressly agreed to by states.

The core of this tension can be found in the consensual basis of international investment law.[70] IIAs are defined as negotiated instruments that reflect the mutual intentions of sovereign states to

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67 *See* Martin Jarrett, *ISDS 2.0: Time for a Doctrine of Precedent?* 27 J. INT'L ECON. L. 41 (2023); Aarohi Chaudhuri, *Systemic Integration: Resolving the Dichotomy of Competing Obligations in International Investment Law*, ARIA'S BLOG (Nov. 16, 2020), https://aria.law.columbia.edu/systemic-integration-resolving-the-dichotomy-of-competing-obligations-in-international-investment-law/

68 *See* Obligations of States in Respect of Climate Change, Written Statement of the People's Republic of China, I.C.J. (Mar. 22, 2024); Leoni Ayoub, *Judicial Activism in the Evolution of a Judicial Function for the International Courts: The Role of Compétence de la Compétence*, 69 Neth. Int'l L. Rev. 29 (2022); Jean d'Aspremont, *Legal Positivism*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Jan. 2023), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1856; Jutta Brunnée, *Consent*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Jan. 2022), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1388; ROSSANA DEPLANO & NICHOLAS TSAGOURIAS eds., RESEARCH METHODS IN INTERNATIONAL LAW: A HANDBOOK 98 (2021).

69 *See* Obligations of States in Respect of Climate Change; Ayoub; d'Aspremont; Brunnée; Deplano & Tsagourias.

70 *See* Alexander Orakhelashvili, *Consensual Principle*, *in* MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL PROCEDURAL LAW (Apr. 2020), https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3131.013.3131/law-mpeipro-e3131?prd=MPIL.

attract and protect foreign investment within a defined legal framework.[71] When tribunals invoke external climate treaties like the Paris Agreement – or reference advisory opinions from unrelated judicial bodies to reinterpret IIA clauses, it can be argued that they stretch the mandate conferred upon them by the disputing parties. This issue has proven to be a particularly contentious one, particularly in instances where tribunals derive binding consequences from non-binding texts, thereby effectively circumventing the established treaty negotiation process.[72] These developments have prompted critiques of "judicial overreach" and calls for greater discipline in the interpretive method used by ISDS tribunals.[73]

This issue carries particular significance for states in the Global South, many of which encounter disproportionate implementation burdens under global climate and investment frameworks.[74] These states frequently lack the negotiating leverage to shape IIA language in a manner that aligns with their preferences, and may find themselves subject to obligations that are interpreted in a novel manner and exceed their original consent.[75] The increasing tendency to incorporate environmental norms into investment law, without the need for formal treaty amendments, could be regarded as a form of normative imposition. This phenomenon has the potential to exacerbate historical power imbalances and contribute to perceptions of illegitimacy. In response, some states have already expressed dissatisfaction with the unpredictability of ISDS rulings, including in high-profile reform discussions under UNCITRAL Working Group III and in treaty withdrawals.[76]

Furthermore, the increasingly indistinct boundary between adjudication and norm-creation poses a significant threat to the

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71 *See* DAVID COLLINS, AN INTRODUCTION TO INTERNATIONAL INVESTMENT LAW (2d ed. 2023).

72 *See* STEPHAN W. SCHILL ET AL., THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 1095–1115 (Jean d'Aspremont & Samantha Besson eds., 2017).

73 *See* Charalampos Giannakopoulos, *Paradigms of Justice and the Limits of ISDS Reform*, 16 J. INT'L DISP. SETTLEMENT 1; Gloria M. Alvarez et al., *A Response to the Criticism Against ISDS by EFILA*, 33 J. INT'L ARB. 1 (2016).

74 *See* Lukas H. Meyer, *Why Historical Emissions Should Count*, 13 CHINESE J. INT'L L. 597 (2013).

75 *See* Obiora Chinedu Okafor, *Newness, Imperialism and International Legal Reform in Our Time: A TWAIL Perspective*, *in* LEADING WORKS IN INTERNATIONAL LAW 145 ((Donna Lyons ed., 2023). *See also* Olufunmilola Olabode, *A TWAIL Approach to Reforming the International Investment Regime*, 2023 EUR. Y.B. INT'L ECON. L. 93.

76 *See* José Carlos Bernal Rivera & Mauricio Viscarra Azuga, *Life after ICSID: 10th Anniversary of Bolivia's Withdrawal from ICSID*, KLUWER ARB. BLOG (Aug. 12, 2017), https://arbitrationblog.kluwerarbitration.com/2017/08/12/life-icsid-10th-anniversary-bolivias-withdrawal-icsid/.

confidence placed in ISDS institutions themselves. Should investment tribunals be regarded as substantively reconfiguring treaty obligations under the guise of interpretation, this may result in a more extensive backlash against international adjudication, both in terms of procedure and politics.[77] In this context, the legitimacy of environmental protection is not contingent solely on the substance of such protection; rather, it is contingent on the procedural fidelity of interpretive practices with regard to the consent-based architecture of international law.[78]

However, it would be a simplistic approach to reject interpretive innovation in its entirety. As evidenced in domestic constitutional systems, judicial activism can play a constructive role in responding to normative emergencies, particularly where treaty regimes lag behind emerging global threats such as climate change.[79] The challenge, therefore, lies not in determining the propriety of tribunals engaging with climate obligations, but rather in formulating a methodology that would enable such engagement in a manner that respects both normative responsiveness and procedural legitimacy.

IV. "ALIENATION" OR "SYNERGY"? THE POTENTIAL ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS IN CLIMATE GOVERNANCE

The preceding analysis has demonstrated that climate governance is increasingly embedded within the interpretive and institutional landscape of ISDS. This development is driven not only by treaty reform and the inclusion of sustainability clauses in new-generation IIAs, but also by the interpretive influence of judicial bodies engaged in climate-related advisory opinions. However, as this judicially driven coherence unfolds, a more profound structural dilemma emerges: namely, whether such developments represent a legitimate evolution of international investment law, or a departure from its foundational design.

This section addresses this question by examining the evolving relationship between host states and investors in the context of climate-related obligations. The analysis evaluates the manner in which IIAs are adapting to incorporate environmental carve-outs and corporate

77 *See* Tarald Laudal Berge, *Dispute by Design? Legalization, Backlash, and the Drafting of Investment Agreements*, 64 INT'L STUD. Q. 919 (2020).

78 *See* Jason Rudall, *Greening International Investment Agreements*, 2023 NETH. Y.B. INT'L L. 133.

79 *See* KELSEN, *supra* note 14, at 353–6; Canon, *supra* note 14; FISH, *supra* note 14, at 92–93; KAHN, *supra* note 14, at 119.

responsibility provisions, and the manner in which tribunals are mediating this dual mandate. The analysis goes on to explore the question of whether the expanding intersection between investment and climate regimes has the potential to engender a governance model that is mutually reinforcing, or whether it will instead provoke systemic resistance and illegitimacy.

A. The Functional Reorientation of Investment Law: From Protection to Regulation

IIL was originally designed as a regime to protect foreign investors against political risk, particularly expropriation and unfair treatment.[80] However, the incorporation of sustainable development and environmental clauses in new-generation IIAs marks a gradual but significant reorientation of its functional identity.[81] As host states seek greater policy space to enact climate mitigation and adaptation measures—such as emissions caps, energy transition policies, or land use regulations—investment treaties are increasingly framed not solely as instruments of protection, but also as vehicles of public regulatory governance.[82]

This shift is evident in treaties that include environmental carve-outs, allowing states to adopt climate-related measures without breaching their investment obligations. Agreements such as the United States-Mexico-Canada Agreement (USMCA)[83] or the EU-Canada Comprehensive Economic and Trade Agreement (CETA)[84] explicitly recognize the legitimacy of climate objectives and incorporate provisions that either limit the scope of investor protections or encourage environmental responsibility. These developments reflect an emerging normative equilibrium where investor rights and host state responsibilities are no longer seen as strictly opposed, but as co-dependent elements within a broader governance framework.

Nevertheless, this shift in focus remains unfinished. A significant number of older-generation BITs are found to be deficient in such explicit safeguards, and tribunals interpreting vague standards such as fair and equitable treatment (FET) or legitimate expectations are compelled to determine the extent to which environmental

80 *See* KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL (2013).

81 Rudall, *supra* note 78.

82 *Id.*

83 *See generally* United States-Mexico-Canada Agreement ch. 24, Nov. 30, 2018, https://ustr.gov/sites/default/files/files/agreements/usmca/24_Environment.pdf.

84 *See* Comprehensive Economic and Trade Agreement Ch. 22, EU-Canada, 2017 O.J. (L 11) 23.

considerations can be integrated. The absence of uniformity across treaty texts and jurisprudence emphasizes the fragility of this functional transformation and underscores the role of adjudicators in either reinforcing or resisting it.

B. The Evolving Rights and Obligations of Host States and Investors

As climate obligations assume greater significance within the framework of international law, the legal relationship between host states and investors is undergoing a dynamic rebalancing.[85] On the one hand, host states are increasingly expected to align their domestic policies with their international climate commitments, including obligations under the Paris Agreement, regional frameworks, and sustainable development goals.[86] These commitments have the potential to influence the scope of regulatory due diligence,[87] or to serve as a defence in ISDS claims when environmental measures impact foreign investments.

Conversely, investors do not merely passively benefit from the provisions of the treaty.[88] A significant number of recent IIAs have encouraged – or even required – investors to conduct environmental impact assessments, respect corporate social responsibility norms, and even support host states' sustainability efforts.[89] This duality is particularly evident in CETA and the EU's model investment agreements, which integrate climate action into both investor obligations and dispute resolution procedures.

The challenge, however, lies in operationalizing this balance in arbitral settings. It is evident that certain tribunals have commenced engagement with these evolving norms, recognizing the pertinence of environmental treaties and global climate standards. However, it is noteworthy that other tribunals persist in maintaining a narrow focus on the conventional investor protection paradigm. The possibility of institutionalizing this rebalancing is contingent not only on the drafting of the treaty, but also on the interpretive willingness and systemic coherence across adjudicative forums.

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85 Jiang, *supra* note 6.

86 *Id.*

87 *Id. See also* David Krebs, *Environmental Due Diligence Obligations in Home State Law with Regard to Transnational Value Chains*, *in* CORPORATE LIABILITY FOR TRANSBOUNDARY ENVIRONMENTAL HARM 245 (Philipp Gailhofer et al. eds., 2023).

88 Rudall, *supra* note 78.

89 *See* Julia Sinnig & Dirk Andreas Zetzsche, *The EU's Corporate Sustainability Due Diligence Directive: From Disclosure to Prevention of Adverse Sustainability Impacts in Supply Chains*, 16 EUR. J. RISK. REGULATION.1 (2025).

C. Synergy or Alienation: Assessing the Future Trends

In light of these considerations, a pivotal question emerges: The present study seeks to contribute to the ongoing discourse on the evolution of investment regimes by exploring the potential for a synergistic relationship with climate governance. The central question guiding this inquiry is whether the investment regime is undergoing a shift that might lead it to deviate from its foundational purpose, potentially becoming alienated from external normative demands.

The response to this question is most likely contingent upon the interaction between legal design and interpretive practice. The possibility of synergy is contingent upon the clear articulation of climate obligations, the consent of the parties involved through treaty text, and the interpretation of these obligations within the bounds of established adjudicatory authority. However, there is an increased risk of alienation when tribunals reinterpret vague clauses using external norms that are not agreed upon by the parties involved, or when investors face unexpected regulatory shifts that are framed as environmental measures. It is not merely a circular argument; rather, it is an inherent inadequacy at the fundamental level of international law.

It is imperative to acknowledge that alienation is not merely a legal problem, but rather a legitimacy problem. Should ISDS be perceived as exceeding its mandate by enforcing climate norms without state consent, it has the potential to provoke further backlash, particularly in states that are already critical of ISDS's asymmetries. Conversely, if ISDS can facilitate the enforcement of well-drafted, climate-aligned investment treaties, it may gain renewed relevance in a world where global economic governance must also serve planetary interests.

The future of international investment law may ultimately be contingent on its capacity to evolve into a climate-compatible governance regime, one that is able to maintain its fundamental protective functions whilst also acknowledging the existential urgency of climate action. It is evident that this will necessitate a high level of institutional creativity, substantial treaty reform, and judicious judicial restraint.

V. CONCLUSION

This article has examined the evolving interface between IIL and climate governance, analyzing how climate-related obligations are gradually being integrated into treaty drafting, arbitral reasoning, and

global legal discourse. The article commenced with the identification of a trend towards the normative hardening of soft climate commitments. This was observed through both treaty language and interpretive practice in select ISDS proceedings. The development is then situated within a broader pattern of judicial activism, whereby investment and international courts engage with climate norms through expansive interpretive methods that often extend beyond traditional adjudicatory mandates.

The second part of the analysis demonstrated how the Paris Agreement, while not directly enforceable in the ISDS, has emerged as a normative anchor within a system of systemic integration. The third section demonstrated that international judicial bodies – including ITLOS, ICJ, IACtHR, and potentially the AfCHPR – are contributing to a process of interpretive coherence, setting soft precedents that may shape how investment tribunals approach climate-related disputes. However, it is important to note that this interpretive momentum is not without cost. As the third chapter of the article explored, the hardening of climate obligations through adjudication gives rise to significant legitimacy concerns, particularly with regard to the principle of state consent. These concerns are amplified within the domain of investment law, where the ISDS framework, founded upon treaty obligations, has traditionally emphasized standards that are narrowly defined and investor-centric.

In its concluding section, the article evaluated whether this trend indicates a pathway towards functional synergy or systemic alienation. The article concludes that investment law is at a critical juncture, facing a decision between two potential evolutionary paths. The first path is characterized by the potential transformation of investment law into a hybrid regime that successfully balances the objectives of investment protection with those of global sustainability. The second path, however, is marked by the possibility of encountering significant resistance and calls for reform if it is regarded as exceeding its consensual and protective mandate.