State Responsibility for Climate Inaction in International Investment Law

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What is state responsibility under international law for failing to take climate action? The existing literature and state practice have primarily focused on international environmental law and human rights law to address this question. This paper explores state responsibility for climate inaction under international investment law. The existing literature has mainly focused on how states' climate action, such as phasing-out policies, could harm foreign investments in the fossil fuel industries and potentially lead to violations of investment treaty obligations. This paper illustrates how international investment law could also support claims against climate inaction. It distinguishes between two types of climate risks that affect foreign investments–physical risks and transition risks–which have opposite implications on state responsibility to protect foreign investments. Based on an analysis of investment arbitration jurisprudence, the paper argues that a host state's climate inaction that causes damages to foreign investments can violate investment treaty obligations. The paper proposes investment tribunals adopt a balanced interpretation of investment treaties when determining state responsibility for climate inaction. This requires a contextual analysis that takes into account (1) the foreign investor's due diligence in mitigating and adapting to physical climate damages; (2) the host state's resources and capacity to adopt climate action; and (3) whether force majeure can be a justifiable ground for failing to prevent damages caused by unforeseeable climate effects.

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I. INTRODUCTION

How is a state held accountable under international law for failing to take action to address climate change?[1] This question is critical for our generation as immediate global action is necessary to combat climate change.[2] While the UN Framework Convention on Climate Change (UNFCCC) and Paris Agreement provide binding obligations for climate mitigation and adaptation, the implementation of these commitments is left up to each state's discretion through nationally determined contributions (NDCs).[3] This bottom-up approach makes it challenging to establish clear responsibility under international law if a state fails to adopt the climate action expected by the international community.[4]

In recent years, there has been an increasing effort by states and international organizations to seek clarity on the issue of state liability for climate change. For instance, in January 2023, Chile and Colombia jointly requested an advisory opinion from the Inter-American Court of Human Rights (IACtHR) to clarify the human rights obligations of states in dealing with climate emergencies[5] The UN General Assembly (UNGA) also requested an advisory opinion from the International Court of Justice (ICJ) in April 2023 on the international law obligations of states with regards to climate change and the legal consequences for states that have caused sig-

1. This article uses the terms "climate inaction" and "climate omission" interchangeably to describe the failure of a host State to take action on climate change, including climate mitigation and adaptation, which result in damages to foreign investments.

2. HOESUNG LEE ET AL., CLIMATE CHANGE 2023: SYNTHESIS REPORT. CONTRIBUTION OF WORKING GROUPS I, II AND III TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 92 (2023).

3. The United Nations Framework Convention on Climate Change art. 2, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC]; Paris Agreement to the United Nations Framework Convention on Climate Change art. 3-4, Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].

4. Maiko Meguro, *Litigating Climate Change Through International Law: Obligations Strategy and Rights Strategy*, 33 LEIDEN J. INT'L L. 933, 945-48 (2020); Benoit Mayer, *Climate Change Mitigation as an Obligation under Customary International Law*, 48 YALE J. INT'L L. 105, 106 (2023).

5. Request for an Advisory Opinion on Climate Emergency and Human Rights to the Inter-American Court of Human Rights from the Republic of Colombia and the Republic of Chile (Jan. 9, 2023), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230109_18528_petition-2.pdf.

nificant harm to the climate system through their actions or omissions.[6] In May 2024, the International Tribunal for the Law of the Sea (ITLOS) delivered an advisory opinion confirming the responsibility of states to combat climate change under the United Nations Convention on the Law of the Sea (UNCLOS).[7]

Existing scholarship and state practice primarily adopt two general approaches for establishing state responsibility for climate inaction: the environmental obligations-based approach and the human rights-based approach.[8] The former uses international environmental law as a basis for state responsibility for climate inaction and analyzes how states are liable under treaty obligations and customary international law that prohibit transboundary environmental pollution.[9] The latter aligns environmental protection with human rights and explores how states are liable for climate inaction that harms human rights within and outside their territories.[10]

An issue that has been inadequately analyzed is the state responsibility towards the global private sector that suffers from climate change impacts. Despite the traditional view that multinationals are polluters and contributors to climate change, recent studies have highlighted the ways in which they are also victims of physical climate risks, such as heat waves, water stress, floods, sea level rise,

6. Obligations of States in Respect of Climate Change (Request for Advisory Opinion Submitted by the General Assembly of the United Nations), G.A. Res. 77/276 (Mar. 29, 2023).

7. Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, Case No. 31, ITLOS (May 21, 2024), https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf.

8. Although this paper focuses on State responsibility under international law, it is important to note the existence of numerous climate litigation cases based on domestic law, including both public and private law. For an overview of climate litigation at both domestic and international levels, see UNEP, GLOBAL CLIMATE LITIGATION REPORT: 2023 STATUS REVIEW (2023), https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3.

9. *See generally* RODA VERHEYEN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY 43-223 (2005); Christina Voigt, *State Responsibility for Climate Change Damages*, 77 NORDIC J. INT'L L. 1 (2008).

10. MARGARETHA WEWERINKE-SINGH, STATE RESPONSIBILITY, CLIMATE CHANGE AND HUMAN RIGHTS UNDER INTERNATIONAL LAW (2019). For a skeptical view on establishing State responsibility for climate change under human rights treaties, see Benoit Mayer, *Climate Change Mitigation as an Obligation under Human Rights Treaties?*, 115 AMERICAN J. INT'L L. 409 (2021).

and hurricanes.[11] These climate effects can cause damage to foreign investments by harming infrastructure, disrupting supply chains, and reducing productivity.[12] This includes both direct disruptions of firm operations and indirect disruptions through impacts on the supply chains upon which the firm relies, including suppliers, buyers, and resource bases.[13] As a result, host states may need to adopt appropriate measures to protect foreign investments from climate damages, such as early warning systems to prevent harm caused by floods or adaptive measures along the coastline to prevent damage caused by sea level rise. The question is: what is the host state's responsibility if its failure to adopt such measures causes damage to foreign investments?

Under customary international law, it is widely recognized that a state has an obligation to protect aliens and their properties within its territories.[14] Since World War II, the modern international investment legal regime was established to safeguard foreign investors and their investments.[15] This regime is now composed of over 2,600 investment treaties in force, which define the host state's responsibility to protect foreign investments.[16] These treaties require states to provide non-discriminatory,[17] fair and equitable treatment,[18] as well as to ensure full protection and security to foreign investments.[19] In case of an expropriation of their invest-

11. Xia Li & Kevin P. Gallagher, *Assessing the Climate Change Exposure of Foreign Direct Investment*, 13 NATURE COMMC'NS 1451, 1453 (2022).

12. Falik Shear, et al., *Sensing the Heat: Climate Change Vulnerability and Foreign Direct Investment Inflows*, 66 RSCH. INT'L BUS. AND FIN., 2 (2023).

13. Martina K Linnenluecke, et al., *Firm Relocation as Adaptive Response to Climate Change and Weather Extremes*, 21 GLOB. ENV'T CHANGE 123, 123 (2011).

14. Francis J. Nicholson, *The Protection of Foreign Property under Customary International Law*, 6 BC INDUS. & COM. L. REV. 391, 415 (1964).

15. Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 427 (2010).

16. UNCTAD, International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements.

17. Andrea K. Bjorklund, *The National Treatment Obligation*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 532 (Katia Yannaca-Small ed., 2d ed. 2018). Tony Cole, *The Boundaries of Most Favored Nation Treatment in International Investment Law*, 33 MICH. J. INT'L L. 537 (2012).

18. Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BRIT. Y.B. INT'L L. 99 (2000). Rudoff Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 INT'L LAW. 87 (2005).

19. Christoph Schreuer, *Full Protection and Security*, 1 J. INT'L DISPUTE

ments, the host state must provide adequate compensation to foreign investors.[20] The regime also includes a robust enforcement mechanism that allows foreign investors to directly bring a claim against the host state in international investment tribunals when a foreign investment dispute arises.[21]

Despite the growing exposure of foreign investments to climate risks, academic study of the interaction between international investment law and climate change has focused primarily on how host states' climate *action* that interferes with foreign investments could lead to disputes under investment treaties.[22] These potential litigation risks may deter host states from implementing climate measures, resulting in a "chilling effect" on climate regulation.[23] However, there has been limited examination of how climate *inaction* might also breach investment treaties. This gap may perpetuate a misconception among states that only climate action poses litigation risks under investment treaties, while inaction does not, further dissuading states from enacting climate measures and intensifying the chilling effect. Analyzing states' accountability for climate inaction under international investment law offers a means to mitigate this chilling effect. Nevertheless, excessive protection of foreign investments against climate damage could burden the host state. It especially undermines the interests of developing nations with limited resources.[24] Moreover, it may externalize costs that

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SETTLEMENT 353, 353 (2010).

20. Steven R. Ratner, *Compensation for Expropriations in a World of Investment Treaties: Beyond the Lawful/Unlawful Distinction*, 111 AM. J. INT'L L. 7, 7 (2017).

21. This regime in currently undergoing a reform process, see Anthea Roberts & Taylor St. John, *Complex Designers and Emergent Design: Reforming the Investment Treaty System*, 116 AM. J. INT'L L. 96 (2022).

22. *E.g.*, Joshua Paine & Elizabeth Sheargold, *A Climate Change Carve-Out for Investment Treaties*, 26 J. INT'L ECON. L. 285, 288 (2023); Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, 7 TRANSNAT'L ENV'T L. 229, 233-39 (2018).

23. *Id.*

24. For an overview of the concept of climate justice and its evolution, see David Schlosberg & Lisette B. Collins, *From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice*, 5 WILEY INTERDISC. REVIEWS: CLIMATE CHANGE 359 (2014); HENRY SHUE, CLIMATE JUSTICE: VULNERABILITY AND PROTECTION (2014); Mary Robinson & Tara Shine, *Achieving a Climate Justice Pathway to 1.5 °C*, 8 NATURE CLIMATE CHANGE 564 (2018).

should be borne by the foreign investors and discourage private adaptation efforts.[25] Therefore, it is essential to strike a balance between the interests of the host state and the foreign investor in determining whether climate inaction amounts to a violation of international investment law.

Responding to these policy concerns, this paper examines whether and to what extent a state's failure to adopt climate action violates its international investment law obligations. Based on an analysis of investment arbitration jurisprudence, the paper concludes that a host state's climate inaction that causes climate damages to foreign investments can violate investment treaty obligations, but there remains uncertainty in establishing liability for such inaction. First, while investment tribunals have recognized that omissions can violate the full protection and security standard and the fair and equitable treatment standard, it is controversial whether inaction alone can amount to expropriation. Second, it is uncertain whether environmental security is protected by the full protection and security standard and what level of due diligence is required under this standard. Third, while foreign investors' legitimate expectations may arise from the host state's specific commitment regarding climate action, it is unclear whether such expectations can be generated from general climate laws or international commitments. The paper recommends that treaty-makers and investment tribunals clarify these questions to increase the predictability of state responsibility for climate inaction under international investment law.

In addition, the paper proposes that this issue should be examined in the broader context of climate justice, and investment tribunals should adopt a balanced interpretation of investment treaties when determining state responsibility for climate inaction. This requires a contextual analysis that takes into account the following circumstances: (1) the foreign investor's due diligence in mitigating and adapting to physical climate damages; (2) the host state's resources and capacity to adopt climate action; and (3) whether *force majeure* can be a justifiable ground for failing to pre-

25. Private adaptation plays a crucial role in the overall climate adaptation process. See Emma L. Tompkins & Hallie Eakin, *Managing Private and Public Adaptation to Climate Change*, 22 GLOB. ENV'T CHANGE 3, 3-4 (2012); Tina Schneider, *Responsibility for Private Sector Adaptation to Climate Change*, 19 ECOLOGY AND SOC'Y 8 (2014).

vent damages caused by unforeseeable climate effects. This approach ensures that investment tribunals do not unduly burden host states with unrealistic obligations to protect foreign investments from climate damages.

The paper has two broader implications. First, it broadens the discussion of state responsibility for climate inaction beyond the realm of international environmental law and human rights law. In addition to these current approaches, the paper proposes exploring how international economic law can hold states liable for failing to implement climate actions that result in adverse impacts on international trade, investment, and finance. Historically, international economic law, focused on advancing trade and investment liberalism, has been viewed as a potential barrier to states' environmental regulation that could conflict with obligations under trade or investment treaties.[26] The key focus has been on exempting states' legitimate environmental regulation from violating international economic rules.[27] Recent academic research has advanced the integration of international economic law with environmental objectives, emphasizing the need for a new generation of trade and investment agreements to support green trade and investments.[28]

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26. Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700 (1992); Thomas J. Schoenbaum, *International Trade and Protection of the Environment: the Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268 (1997); Joanne Scott, *International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO*, 15 EUR. J. INT'L L. 307 (2004).

27. Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37 (1991); Amelia Keene, *The Incorporation and Interpretation of WTO-Style Environmental Exceptions in International Investment Agreements*, 18 J. WORLD INV. & TRADE 62 (2017).

28. Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, *Redesigning the Energy Charter Treaty to Advance the Low-Carbon Transition*, 1 TDM (2019); Elena Cima & Daniel C. Esty, *Making International Trade Work for Sustainable Development: Toward a New WTO Framework for Subsidies*, 27 J. INT'L ECON. L. 1 (2024). Recent years have seen cases where green sectors have utilized international trade and investment legal frameworks to challenge States' regulations that are detrimental to their interests. For example, China filed a WTO complaint against the EU's imposition of subsidy duties on electric vehicles imported from China. *See* WTO, *China Initiates WTO Dispute Complaint Regarding EU Subsidy Duties on Electric Vehicles* (Aug. 14, 2024), https://www.wto.org/english/news_e/news24_e/ds626rfc_14aug24_e.htm. Moreover, there have been investment arbitration cases where renewable energy investors have claimed that the removal of incentive policies for renewable energy in various countries such as Spain, Italy, Canada, and France violated investment treaty obligations. *See* Fernando Dias Simoes, *When Green Incentives Go Pale: Investment Arbitration and Renewable Energy Policymaking*, 45 DENV. J. INT'L L. & POL'Y 251, 257-63 (2016).

This paper suggests a further progression by highlighting that the alignment between international economic law and climate goals extends beyond the promotion of green sectors. Given the susceptibility of various economic sectors to physical climate risks, a more comprehensive legal framework is necessary to mandate regulatory measures that safeguard the global supply chain and capital flows from climate hazards.[29]

Second, the paper contributes to the ongoing debate on the reform of international investment law. While existing literature has predominantly criticized international investment law for its chilling effect on state's climate action, this paper shows that granting more discretion and policy space to host states may have the unintended consequence of limiting their liability for climate inaction under international investment law, which is contrary to climate goals. Restricting investment protection under investment treaties may protect states' sovereignty but not necessarily align with climate objectives. The paper contends that the chilling effect is not due to a strong international investment law regime that limits states' regulatory space, but rather the uneven application of this regime where only climate action results in state responsibility while climate inaction does not. To counterbalance the chilling effect on climate action, the paper proposes that reformers consider strengthening state responsibility for climate inaction in investment treaties. This approach would promote a more balanced and effective international investment law regime that supports climate objectives while also protecting the rights and interests of foreign investors.

The paper proceeds as follows. Part I introduces the existing approaches for establishing state responsibility for climate inaction in international law, including the environmental obligations-based approach and the human rights-based approach. Part II examines the interaction between international investment law and climate change. It analyzes two types of climate risks faced by foreign investments, namely physical climate risks and regulatory

29. Recent economic studies have demonstrated that international trade, foreign direct investment and finance are vulnerable to physical climate risks. *See, e.g.*, Alan Feng & Haishi Li, *We Are All in the Same Boat: Cross-Border Spillovers of Climate Risk Through International Trade and Supply Chain* (IMF, Working Paper No. 21/13, 2021); Li & Gallagher, *supra* note 111, at 1451; Karianne de Bruin, et al., *Physical Climate Risks and the Financial Sector — Synthesis of Investors' Climate Information Needs*, HANDBOOK OF CLIMATE SERVICES 135 (Walter L. Filho & Daniela Jacob eds., 2020).

risks, and their opposite implications for state responsibility. While combatting physical climate risks imposes on states a positive obligation to take climate action, refraining from regulatory risks means a negative obligation to avoid climate actions that unfairly damage foreign investments. Part III examines state responsibility for climate inaction under international investment law through an analysis of investment arbitration jurisprudence. It evaluates such responsibility under three standards of protection in international investment law: full protection and security, fair and equitable treatment, and compensation for expropriation. In a broader context of climate justice, Part IV proposes a balanced interpretation of investment treaty obligations that takes into account the foreign investors' due diligence in climate mitigation and adaptation, the principle of common but differentiated responsibilities, and *force majeure* as a justifiable ground for host states' failure to take climate action.

II. STATE RESPONSIBILITY FOR CLIMATE INACTION: EXISTING APPROACHES

The current analysis of state responsibility for climate inaction has primarily focused on two main approaches. The first approach is based on environmental obligations and aims to establish state responsibility for climate inaction under international environmental law. This body of law includes obligations in climate treaties as well as the rules of customary international law on the prevention of transboundary environmental harm. The second approach is based on human rights; it emphasizes the impact of climate change on human rights and considers a state's failure to combat climate change as a violation of its international human rights obligations.

A. *The Environmental Obligations-based Approach*

The first approach to establishing state responsibility for climate inaction focuses on international environmental law. In the context of climate change, this approach involves two major sources of obligations to take climate action: climate treaties and customary international law.

Climate treaties are the main legal source for establishing state

obligations for climate mitigation and adaptation under international law.[30] However, the language used in climate treaties is too vague to prove conclusively that a particular state has violated its climate mitigation and adaptation obligations.[31] For example, Article 4 of the UNFCCC provides states' commitments to achieve climate goals while allowing for significant discretion to states.[32] States are allowed to fulfill these commitments "taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives, and circumstances."[33] As criticized by some scholars, the UNFCCC is "an interesting basis for interpreting state's obligations, but it is not the source of any binding obligation," and it creates, at most, a "non-binding quasi-target and -timetable."[34]

While the Paris Agreement has clarified states' climate obligations, the legal nature of these obligations remains intricate.[35] As Rajamani notes, the Paris Agreement includes a mix of hard, soft, and non-obligations.[36] One key aspect of the Paris Agreement is the NDC regime, which allows states to set their own timelines for climate mitigation and adaptation. Article 4(2) of the Paris Agreement provides that "[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."[37] Although the use of the word "shall" in this provision suggests a binding obligation, the obligation primarily concerns a procedural requirement to communicate NDCs, with significant discretion accorded to countries to decide their own mitigation timelines and specific domestic implementation methods.[38] While

30. VERHEYEN, *supra* note 9, at 43-136.

31. Meguro, *supra* note 4, at 945-48.

32. UNFCCC, *supra* note 3, art. 4.

33. *Id.*

34. Armando Rocha, *Suing States: The Role of Courts in Promoting States' Responsibility for Climate Change*, *in* BLUE PLANET LAW: THE ECOLOGY OF OUR ECONOMIC AND TECHNOLOGICAL WORLD 99, 104 (Maria da Glória Garcia & António Cortês eds., 2023).

35. Jacob Werksman, *Remarks on the International Legal Character of the Paris Agreement*, 34 MD. J. INT'L L. 343 (2019); Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 REV. OF EUR., COMPAR. & INT'L ENV'T L. 142 (2016).

36. Lavanya Rajamani, *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations*, 28 J. OF ENV'L L. 337 (2016).

37. Paris Agreement, *supra* note 3, art. 4(2).

38. Bodansky, *supra* note 35, at 146.

there are strong normative expectations that the NDCs should reflect each Party's "highest possible ambition" and "represent a progression" over time, it is challenging to establish a state's failure to adopt certain climate actions as a violation of their obligations under climate treaties. Moreover, the United States' recent withdrawal from the Paris Agreement indicates a shift in global climate cooperation and raises concerns about the effectiveness of existing climate treaties. [39]

Due to the challenges of establishing state liability for climate inaction under treaty obligations, scholars have sought legal support from customary international law, particularly the obligation to prevent transboundary environmental harm.[40] However, state responsibility for transboundary environmental harm is subject to strict conditions under international law. In the *Trail Smelter* case, the arbitrators stated that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."[41] Therefore, according to *Trail Smelter*, two specific conditions must be met to establish state responsibility for transboundary harm: the harm must be "of serious consequence," and "the injury is established by clear and convincing evidence." The same approach has been adopted by the subsequent cases in international environmental law. In the *Certain Activities* case, the ICJ stated that "to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a state must, before embarking on an activity having the potential adversely to affect the environment of another state, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment."[42]

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39. The White House, *Putting America First in International Environmental Agreements* (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/putting-america-first-in-international-environmental-agreements/.

40. Mayer, *supra* note 4, at 106-13; Masoud Raei Deheghi, et al., *Review: The Approach of Customary Rules of International Environmental Law in Climate Change*, 22 J. LEGAL RES. 201 (2023).

41. The *Trail Smelter* Case (U.S. v. Can.), 3 R.I.A.A. 1905, 1964 (1941).

42. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), ¶ 104, 2015 I.C.J. Rep. 665 (Dec. 16).

B. *The Human Rights-based Approach*

The second source of state responsibility for climate damage is international human rights law. The integration of human rights and the environment has been widely recognized in international law.[43] In 2021, the United Nations Human Rights Council took a historic step by adopting Resolution 48/13, which recognizes the right to a clean, healthy, and sustainable environment as a human right.[44] Subsequently, in 2022, the UN General Assembly adopted a resolution recognizing the human right to a clean, healthy, and sustainable environment.[45]

At the regional level, there has been a growing number of climate claims brought under human rights treaties before regional tribunals, including the European Court of Human Rights (ECtHR), the East African Court of Justice and the IACtHR.[46] For instance, climate claims have been brought before the ECtHR based on the European Convention on Human Rights (ECHR).[47] These claims typically challenge states' failure to adopt climate action as a violation of Article 2 (right to life) and Article 8 (right to respect for private and family life) of the ECHR.[48] In April 2024, the ECtHR, in the *KlimaSeniorinnen* case, for the first time found that a

43. *See, generally*, Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized*, 35 DENV. J. INT'L L. & POL'Y 129 (2006); Francesco Francioni, *International Human Rights in an Environmental Horizon*, 21 EUR. J. OF INT'L L. 41 (2010).

44. U.N. Human Rights Council Res. 48/13, U.N. Doc. A/HRC/RES/48/13 (Oct. 8, 2021).

45. G.A. Res. 76/300, U.N. Doc. A/RES/76/300 (July 28, 2022).

46. U.N. Env't Programme, Global Climate Litigation Report: 2023 Status Review, at 31–35 (2023), https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf.

47. *Id.* at 34-35.

48. *See, e.g.*, Carême v. France, App. No. 7189/21, ¶ 88 (Eur. Ct. H.R. Apr. 9, 2024) (A former mayor of a French city claimed that the France's failure to take climate measures constitutes a violation of human right protected under ECHR, including right to life under Article 2 and right to respect for private and family life under Article 8. The Court denied the admissibility of the case.); Duarte Agostinho and Others v. Portugal and 32 Other States, App. No. 39371/20, ¶ 231 (Eur. Ct. H.R. Apr. 9, 2024). (Six Portuguese youth claimed that the 33 countries' failure to take sufficient climate action violated their human rights protected under the ECHR, including right to life (Article 2), right to respect for private and family life (Article 8) and non-discrimination (Article 14). The Court only accepted the jurisdiction for claims against Portugal but found that the case was inadmissible since the applicants had not exhausted domestic remedies.)

state's failure to take adequate climate action violated the Convention.[49] The ECtHR held that Switzerland had violated Article 8 of the Convention, which protects the right to private and family life, by failing to quantify national GHG emissions limitations and failing to meet emission reduction targets.[50] Additionally, it found that the failure of Swiss courts to hear climate litigation regarding such inaction amounted to a violation of Article 6(1) of the Convention, which protects the right to a fair trial.[51] However, the enforcement mechanism of these treaty obligations remains weak.

In addition, some human rights cases concern the relationship between climate inaction and the right to property. In these cases, claimants sought redress from the government for the infringement of their property rights due to climate change. Article 1 of the First Protocol to the ECHR provides that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."[52] This article imposes both negative and positive obligations on member states to respect the right to property.[53] The negative obligation requires states to refrain from unjustified interference with a person's property rights, while the positive obligation requires states to take necessary measures to protect property rights.[54]

For instance, in the *Öneryıldız v. Turkey* case, the ECtHR found that Turkey's gross negligence in protecting the applicant's house from a methane explosion resulted in "the breach of a positive obligation, since the state officials and authorities did not do every-

49. Andreas Hösli & Meret Rehmann, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*: the European Court of Human Rights' Answer to Climate Change*, CLIMATE LAW, 2 (2024).

50. Verein Klimaseniorinnen Schweiz and Others v. Switzerland, App. No. 53600/20, ¶ 573 (Eur. Ct. H.R. Apr. 9, 2024),.

51. *Id.* ¶¶ 639-40.

52. Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Mar. 20, 1952, E.T.S. No. 009.

53. EUR. CT. H.R., GUIDE ON ARTICLE 1 OF PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION

ON HUMAN RIGHTS, PROTECTION OF PROPERTY, ¶ 182, https://rm.coe.int/guide-art-1-protocol-1-eng/1680a20cdc.

54. *Id.* ¶ 183.

thing within their power to protect the applicant's proprietary interests." [55] The ECtHR noted in the commentary to Article 1 of Protocol No. 1 that the *Öneryıldız v. Turkey* case demonstrates that "effective exercise of the right protected by Article 1 of Protocol No. 1 does not depend merely on the state's duty not to interfere but may require positive measures of protection, particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and their effective enjoyment of their 'possessions'."[56] Likewise, in the case of *Anton Foley and others v. Sweden*, a group of young people filed a lawsuit against Sweden in the ECtHR, claiming that Sweden's inadequate climate action violated their rights under the ECHR, including the right to property under Article 1 of the First Protocol to the ECHR.[57]

Similarly, in 2019, Earthjustice, on behalf of the Arctic Athabaskan Council, lodged a petition against Canada with the IACtHR, alleging that Canada's failure to implement regulations on reducing black carbon emissions has caused environmental harm to the Arctic environment and violates the human rights of indigenous Arctic Athabaskan people, including the right to property.[58] The petitioners argued that the American Declaration protects the right to "own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home."[59] Additionally, the American Convention on Human Rights provides that "[e]veryone has the right to the use and enjoyment of their property."[60] The petitioners cited several cases to support their argument that "[e]nvironmental degradation—

55. Öneryıldız v. Turkey, Application No. 48939/99, Judgment, ¶ 135 (Eur. Ct. H.R. Jun. 18, 2002).

56. EUR. CT. H.R., GUIDE ON ARTICLE 1 OF PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, PROTECTION OF PROPERTY, ¶ 184 (Aug. 31, 2020), https://rm.coe.int/guide-art-1-protocol-1-eng/1680a20cdc

57. Anton Foley and Others v. Sweden, (2022) Case No. T 8304–22 (Swed.), https://climatecasechart.com/non-us-case/anton-foley-and-others-v-sweden-aurora-case/

58. Inter-Am. Comm'n H.R., *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada*, Petition (Apr. 23, 2013), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2013/20130423_5082_petition.pdf.

59. *Id.* at 64.

60. *Id.*

whether caused by a state's actions or inactions—can violate the human right to property and give rise to an obligation on states to take positive measures to ensure that third parties do not infringe upon property rights, especially those of indigenous people."[61]

Human rights treaties offer an alternative to climate treaties in holding states accountable for their failure to implement adequate climate measures.[62] Nevertheless, using human rights treaties to address states' climate inaction faces several challenges. The first challenge pertains to the admissibility of the case, as it is difficult to identify the damages suffered by applicants and establish the direct causal link between these damages and the climate inaction.[63] Furthermore, there is a lack of explicit climate obligations under human rights treaties.[64] Some scholars have attempted to address this issue through treaty interpretation to identify an implicit climate mitigation obligation within human rights treaties.[65] Despite these debates, human rights-based climate litigation plays a strategic role in urging states to tackle climate issues and inspires discussions on establishing state responsibility for climate inaction beyond the realm of climate treaties. The next Part will delve into a nuanced and complementary approach to establishing state responsibility for climate inaction under international investment law.

III. AN INVESTOR RIGHTS-BASED APPROACH: INTERNATIONAL INVESTMENT LAW AND CLIMATE INACTION

As stated above, the current analysis of state responsibility for climate inaction primarily focuses on international environmental and human rights law. An understudied field is the state responsibility under international investment law for failing to protect foreign property from climate harm. This Part includes two sections.

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61. *Id.* at 65.

62. Jacqueline Peel & Hari M Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 TRANSNAT'L ENV'L L. 37, 42 (2018).

63. Tim Eicke, *Climate Change and the Convention: Beyond Admissibility*, 3 EUROPEAN CONVENTION ON HUMAN RIGHTS LAW REVIEW 8, 9 (2022).

64. Mayer, *supra* note 10, at 423.

65. Mayer has outlined three academic approaches to identifying "implied" mitigation obligations under human rights treaties: (1) the extraterritorial application of human rights treaties, (2) interpreting human rights obligations as "collective obligations," and (3) recognizing other-regarding obligations of cooperation within human rights treaties. *Id.* at 423-24.

The first section examines the emerging interaction between foreign investment and climate change. It identifies two types of climate risks that affect foreign investments: physical risks and transition risks. The second section explores the role of international investment law in addressing this interaction. While existing literature has primarily focused on how international investment law protects foreign investments from transition risks, this paper argues that international investment law can also serve as a legal basis for states' obligations of safeguarding foreign investments from physical climate risks.

A. *Foreign Investment and Climate Risks*

Today, foreign investments are increasingly vulnerable to two types of climate risks: physical climate risk and transition risk. Physical climate risk refers to the direct damage or impairment of assets caused by climate change, such as the threat of flooding to coastal properties.[66] On the other hand, transition risks arise from the shift towards a low-carbon economy, including regulatory change, technological development, and the change of consumer preferences.[67] This highlights the dual impact of climate regulation on the private sector: while climate transition measures such as carbon taxes or fossil fuel phase-out regulations may negatively affect the economic interests of certain industries, a failure to implement such measures may also increase their vulnerability to physical climate risks.

Foreign investments are encountering physical climate risks, the impact of which vary across economic sectors and industries.[68] A recent survey shows that foreign investments in agriculture, forestry, and fishing industries are most vulnerable to heat stress risks, while the manufacturing sector faces the highest risk of water stress.[69] The mining industry is most susceptible to floods, and the trade industry encounters the greatest risks related to sea level rise

66. Stefano Giglio, et al., *Climate Finance*, 13 ANNUAL REV. OF FINANCIAL ECONOMICS 15, 17 (2021).

67. Gregor Semieniuk, et al., *Low-carbon Transition Risks for Finance*, WILEY INTERDISCIPLINARY REVIEWS: CLIMATE CHANGE, Jan.-Feb. 2021 at 3.

68. Yuan Li & Gallagher, *Assessing the Climate Change Exposure of Foreign Direct Investment*, 13(1) NATURE COMMUNICATIONS, 1451, 1453 (2022).

69. *Id.*

and hurricane/typhoon incidents.[70] Hence, protecting foreign investments requires proactive action by states in climate mitigation and adaptation. Failure to do so can result in damages to the interests of foreign investments. For example, a host state's failure to take adaptive measures to deal with sea level rise in coastal areas may jeopardize foreign investments in coastal properties, leading to disputes between foreign investors and the host state. Failure to adopt early warning measures for flooding may also harm the interests of foreign investments located in flooded areas and potentially result in disputes.

Besides physical climate risks, foreign investments are also experiencing economic losses due to the increasing transition risk resulting from climate regulation. While climate change necessitates a low-carbon transition that affects the entire economic regime, the energy sector bears the brunt of transition risks. For sunset industries such as the fossil fuel industry, it is evident that the state's climate mitigation regulation may cause economic damage. Recent years have seen some investment arbitration cases initiated by foreign investors in the fossil fuel sector against the host state's phase-out legislation. For example, in the cases of *RWE v. Netherlands* and *Uniper v. Netherlands*, foreign investors operating coal plants claim that the Netherlands' new Coal Ban Act harms their economic interests and violates investment treaty obligations. For sunrise industries such as the renewable energy sector, climate transition also entails risks, creating "green bubbles" of speculation and over-investment.[71] This may lead to policy changes by the host state's government in the renewable energy sector. Notably, the adjustment of incentive schemes for renewable energy by some countries, such as Spain and Italy, has resulted in a number of foreign investment disputes in investment arbitration.[72] In comparison to the fossil fuel sector, foreign investment in the renewable energy sector has a more complex relationship with climate regulation. On one hand, international investment law provides a legal regime to pro-

70. *Id.*

71. Semieniuk, et al., *supra* note 67, at 4.

72. Simoes, *supra* note 28, at 251; Yulia S. Selivanova, *Changes in Renewables Support Policy and Investment Protection Under the Energy Charter Treaty: Analysis of Jurisprudence and Outlook for the Current Arbitration Cases*, 33 ICSID REVIEW-FOREIGN INVESTMENT LAW JOURNAL 433, 433 (2018).

tect the interests of foreign investors in renewable energy, facilitating climate transition.[73] On the other hand, the regime may restrict the flexibility and discretion of the state's regulation on renewable energy and may be abused by opportunistic investors.[74]

In sum, the interplay between foreign investments and climate risks is two-fold. On the one hand, foreign investments in various industries are increasingly vulnerable to physical climate damage, necessitating states' climate action to prevent and mitigate such adverse impacts. On the other hand, state climate action may itself jeopardize the economic interests of foreign investors. This has been typically observed in the energy sector, but it also exists in other sectors since the entire economic structure is undergoing climate transition.

B. *International Investment Law and Climate Change*

1. *The Regime of International Investment Law*

The history of international investment law dates back to the protection of aliens and their property under international law. Prior to World War II, the discourse on state responsibility of the protection of aliens and their properties centered mainly on the situations where foreigners were harmed due to events such as riots, civil war, and other similar disturbances.[75] The traditional state responsibility doctrine mandates that states provide aliens as well as their properties within their territories with adequate protection.[76] After WWII, the growth of foreign investments on a global scale stimulated the need to establish an international legal regime to protect and promote foreign investment.[77] This constituted the

73. Anatole Boute, *Combating Climate Change through Investment Arbitration*, 35 FORDHAM INT'L LJ 613, 625 (2011).

74. Simoes, *supra* note 28, at 263.

75. *See generally*, Julius Goebel, *The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil Wars*, 8 AMERICAN JOURNAL OF INTERNATIONAL LAW 802 (1914).

76. Gordon A Christenson, *Attributing Acts of Omission to the State*, 12 MICH. J. INT'L L., 312, 326 (1990).

77. Jeswald W Salacuse, *The Treatification of International Investment Law*, 13 LAW & BUS. REV. AM. 155, 155 (2007). However, the effectiveness of investment treaties for promoting foreign investments remains controversial. *See* Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment-Some Hints from Alternative Evidence*, 51 VA. J. INT'L L., 397 (2010); LAUGE N. SKOVGAARD POULSEN, BOUNDED

background for the establishment of modern international investment law, mainly through the creation of investment treaties. Up to date, countries have signed more than 3,000 investment treaties, of which more than 2,600 are currently in force.[78]

Despite their large number, the structure and content of these investment treaties are largely similar, mostly containing two parts: substantive protection and dispute settlement. The substantive protection part establishes the standards of treatment that host states should provide to foreign investments in their territories. It typically requires states to provide non-discriminatory, fair and equitable treatment to foreign investments and obliges states to provide foreign investments with full protection and security. It also commonly requires states to provide adequate compensation if the state directly or indirectly expropriates the foreign investor's properties. The dispute settlement part of investment treaties provides the dispute settlement procedures in case of a dispute between the foreign investor and the host state. It generally allows foreign investors to bring claims directly against the host state under the Investor-State Dispute Settlement (ISDS) mechanism. These claims are addressed by investment arbitration tribunals, which are constituted either ad hoc or under the auspices of an investment arbitration institution. Today, there have been more than 1,000 investment arbitration cases, covering numerous respondent states worldwide.[79] The foreign investors initiating these cases cover a wide variety of industries under the primary (such as agriculture and mining), secondary (such as manufacturing), and tertiary (such as service supply) economic sectors.[80]

2. *International Investment Law and Climate Action*

The interaction between international investment law and climate change is a recent phenomenon. In recent years, there has been a rise in climate-related investment arbitration cases based on investment treaties challenging states' climate regulation. In these

RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES (2015).

78. U.N. Conf. on Trade & Dev. (UNCTAD), *International Investment Agreements Navigator*, https://investmentpolicy.unctad.org/international-investment-agreements.

79. U.N. Conf. on Trade & Dev. (UNCTAD), *Investment Dispute Settlement Navigator*, https://investmentpolicy.unctad.org/investment-dispute-settlement.

80. *Id.*

cases, states' domestic legislative or administrative measures to mitigate climate change have been alleged as a violation of their obligations under investment treaties. For instance, two German investors operating coal power plants in the Netherlands challenged the Netherlands' Coal Ban Act, which was enacted to phase out coal by 2030.[81] The investors claimed that the Coal Ban Act violated obligations under the Energy Charter Treaty (ECT), to which the Netherlands is a Contracting Party.[82] In another recent case, a foreign investor in the coal mining sector challenged the Climate Leadership Plan enacted by Alberta, Canada.[83] The investor claimed that the Climate Leadership Plan breached Canada's obligations under the North American Free Trade Agreement (NAFTA).[84]

Commentators generally perceive these cases as an example of how international investment law may create an obstacle for the host state's climate action.[85] Some scholars argue that international investment law has a "chilling effect" on states' climate regulation, as the states may fear that their climate measures may violate their investment treaty obligations. [86] The literature has focused on how this chilling effect may negatively affect states' climate regulation.[87] Scholarships on climate litigation commonly regard investment arbitration as a type of "non-climate-aligned cases" that are against climate goals.[88] In line with this understanding, the IPCC has raised alarm that international investment law might provide a forum for foreign investors to impede states' climate regulation.[89]

Responding to this chilling effect, scholars have made various

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81. RWE AG & RWE Eemshaven Holding II BV v. Kingdom of the Neth., ICSID Case No. ARB/21/4, Claimants' Memorial, ¶ 1 (Dec. 18, 2021); Uniper SE, Uniper Benelux Holding B.V. & Uniper Benelux N.V. v. Kingdom of the Netherlands, ICSID Case No. ARB/21/22, Claimants' Memorial, ¶ 33 (May 20, 2022).

82. *Id.*

83. Westmoreland Mining Holdings, LLC v. Canada, ICSID Case No. UNCT/20/3, Final Award, ¶ 2 (Jan. 31, 2022).

84. *Id.* ¶ 94

85. Paine & Sheargold, *supra* note 22;Tienhaara, *supra* note 22.

86. *Id.*

87. *Id;* Paine & Sheargold, *supra* note 22, at 285.

88. Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2023 Snapshot*, 26, (2023) https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf.

89. A. Patt et al., *International Cooperation*, in Climate Change 2022: Mitigation Of Climate Change 1451, 1505-6 (PR Shukla et al. eds., Intergovernmental Panel on Climate Change, 2022).

proposals to reform international investment law to protect states' right to regulate the climate.[90] The main aim of this reform is to carve out climate regulatory space from investment protection obligations under investment treaties.[91] Reform proposals include terminating investment treaties, carving out climate measures from the scope of treaty protection, clarifying investment treaty standards, and inserting exceptions clauses and conflict clauses to resolve the tension.[92] For instance, the Energy Charter Treaty (ECT) is currently undergoing a modernization process that establishes a flexible mechanism to carve out fossil fuel sectors from the covered investments protected by investment treaties.[93] Some recent investment treaties have clarified investment protection standards or included exceptions clauses to balance the interests of foreign investors and the state's right to regulate environmental interests.[94]

While the existing literature on the relationship between international investment law and climate change has primarily focused on preserving states' right to regulate foreign investments to achieve climate goals, what has been less discussed is that international investment law may also be a forum to establish state responsibility for climate inaction that causes damages to foreign investments.

3. *International Investment Law and Climate Inaction*

Just as foreign investment disputes arising from climate action, states' failure to address climate change may also cause damages to foreign investments and create legal disputes. The question is:

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90. *See, e.g.*, Sheng Zhang & Ni Li, *Addressing Climate Change through International Investment Agreements: Obstacles and Reform Options*, 16 SUSTAINABILITY 1471, 1478-1487 (2024); Paine & Sheargold, *supra* note 22, at 291-304 ; Lorenzo Cotula, *International Investment Law and Climate Change: Reframing the ISDS Reform Agenda*, 24 J. OF WORLD INV. & TRADE 766, 788-791 (2023).

91. *Id.*

92. *Id.*

93. Energy Charter Secretariat, Decision of the Energy Charter Conference, Public Communication Explaining the Main Changes Contained in the Agreement in Principle (June 24, 2022), https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf.

94. Laura Rees-Evans, *The Protection of the Environment in International Investment Agreements–Recent Developments and Prospects for Reform*, 5 EUROPEAN INVESTMENT LAW AND ARBITRATION REVIEW ONLINE 355, 372-384 (2020).

Does international investment law oblige states to act to protect foreign investments from physical climate risks?

This relationship between international investment law and climate inaction has received inadequate attention and lacks systematic examination. In international investment law, states can be held liable for their inaction that causes damages to foreign investments. It is well established under international law that state responsibility can arise from both action and omission. Article 2 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts explicitly provides that "[t]here is an internationally wrongful act of a state when conduct consisting of an action *or omission*: (a) is attributable to the state under international law; and (b) constitutes a breach of an international obligation of the State"[95] (emphasis added).

International responsibility for actions and omissions arises from different primary obligations. To violate international law through action, a state must breach a negative obligation, which is an obligation not to do something (i.e., a prohibition).[96] On the other hand, a state's omission violates international law when it has a positive obligation to do something but fails to do so.[97] This means that if there is an obligation to act under international law, the failure to act would constitute a wrongful omission.[98] Conversely, if there is no positive obligation to act under international law, a state's failure to act would not be considered a wrongful omission under international law.[99]

Investment treaties contain both negative and positive obligations for the protection of foreign investments. For instance, the non-discrimination standard commonly adopted in the national treatment and most-favored nation treatment clauses in investment treaties requires host states to accord treatment to foreign investments no less favorable than the treatment accorded to similar domestic investors or investors from a third country. This entails both negative and positive obligations. The negative obligation entails

95. Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 2, at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

96. JAMES CRAWFORD, et al., THE LAW OF INTERNATIONAL RESPONSIBILITY 356 (2010).

97. *Id.* at 357.

98. *Id.* at 358.

99. *Id.*

that the host state should not treat foreign investors in a discriminatory way. The positive obligation requires that the host state should provide the same benefits to foreign investments if such benefits are provided to similar investors domestically or investors from a third country. Accordingly, both actions and omissions by the host state may violate the non-discrimination requirement.

For instance, in *Alpha Projektholding v. Ukraine*, the tribunal stated that "[i]n order to prove a national treatment violation, it is necessary first and foremost to establish that a government action *or inaction* has discriminated between domestic and foreign investors, i.e., that it has accorded 'less favorable' treatment to foreign as opposed to domestic investors"[100] (emphasis added). Therefore, if both foreign and domestic property are exposed to flooding risks and the host state only adopts adaptive measures in the region where domestic investors reside, the host state may violate the non-discrimination standard in investment treaties by failing to protect foreign investments in the same manner.

Another example is the full protection and security standard, which requires states to provide full protection and security to foreign investments and includes both negative and positive obligations for the host state. In *Cengiz v. Libya*, the claimants alleged that the Libyan government's actions and omissions during the civil war violated its investment treaty obligations.[101] The claimant alleged that, on one hand, Libya had harmed the investments through its army, and on the other hand, Libya had failed to provide reasonable protection to its investments (while it did offer such protection to other foreign investors).[102] The tribunal acknowledged that the full protection and security standard entails a two-fold obligation: first, a "negative obligation" that states should refrain from harming foreign investments; second, a "positive obligation to exercise due diligence or take necessary measures of vigilance to prevent damage."[103]

In sum, international investment law contains positive obliga-

100. Alpha Projektholding GmbH v. Ukr., ICSID Case No. ARB/07/16, Award, ¶ 426 (Nov. 8, 2010).

101. Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya, ICC Case No. 21537/ZF/AYZ, Award (Nov. 7, 2018), ¶ 372.

102. *Id.*

103. *Id.* ¶ 371.

tions that require states to adopt actions to protect foreign investments. In the case of climate change, the host state's failure to enforce those positive obligations by climate inaction may result in state liability under investment treaties. In the existing investment arbitration jurisprudence, foreign investment disputes leading to investment arbitration have arisen from various sectors, including water supply, construction, wholesale and retail trade, transportation, and real estate.[104] Today, all these sectors are exposed to physical climate risks. For instance, foreign investments in water supply may suffer losses caused by water stress, while foreign investments in real estate in coastal areas may suffer from sea level rise or flooding. Foreign investors may claim that the host state violated investment treaty obligations when it failed to adopt measures to protect foreign investments from such damage.

Although there has been no investment arbitration case directly arising from the host state's failure to combat climate change, the recent *Allard v. Barbados* case can serve as an illustrative example where the foreign investor claimed the host state's failure to protect the environment as a violation of investment treaties. In 1994, Peter A. Allard, a Canadian retired attorney and businessman, purchased land in Barbados with the intention of developing an eco-tourism site.[105] Two years later, he established a Barbadian company to acquire a sanctuary located at the wetlands on the south coast of Barbados.[106] Allard claims that since acquiring the sanctuary, it has suffered severe environmental degradation, transforming it from a "natural wonder" into "little more than a mosquito-infested swamp."[107] Consequently, he had to close the eco-tourism attraction and instead operate a roadside café on the site.[108] In 2010, Allard initiated an investment arbitration against Barbados under the bilateral investment treaty between Barbados and Canada.[109]

Allard holds the Barbadian government responsible for the environmental degradation and alleges that the improper operation

104. UNCTAD, Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement.

105. Peter A. Allard v. Government of Barb., Perm. Ct. Arb. Case No. 2012-06, Award, ¶ 1 (Jun. 27, 2016).

106. *Id.* ¶ 33.

107. *Id.* ¶¶ 55-56.

108. *Id.* ¶ 82.

109. *Id.* ¶ 3.

of the sluice gate caused most of the damage.[110] The sluice gate was meant to allow for proper tidal exchange between seawater and the sanctuary's swamp but was left closed due to the government's lack of maintenance.[111] This led to the wetlands becoming cut off from the sea and transforming from a brackish to a freshwater system, which was detrimental to the mangrove trees and the many species that rely on a brackish ecosystem.[112] Allard argued that Barbados has "failed to take reasonable and necessary environmental protection measures and, through its organs and agents, has directly contributed to the contamination of the Claimant's eco-tourism site, thereby destroying the value of his investment."[113] He claimed that Barbados' omissions of environmental protection violated investment treaty obligations, including the fair and equitable treatment (FET) clause, the full protection and security (FPS) clause, and the expropriation clause.[114]

The *Allard v. Barbados* case serves as an example of how foreign investors use investment treaties and their arbitration mechanism to challenge states' inaction in environmental protection. In the context of climate change, foreign investors may bring similar claims against host states for their failure to take climate action. For instance, a foreign investor may claim that the host state's failure to take adaptation measures against floods or wildfires has resulted in damages to its properties and constituted a violation of investment treaty obligations. The next Part will analyze three scenarios of state responsibility under international investment law arising from climate inaction.

IV. STATE RESPONSIBILITY FOR CLIMATE INACTION: STANDARDS OF PROTECTION

The previous Parts have highlighted the emerging climate risks faced by foreign investments and the gap in the literature on how international investment law can be used to establish state responsibility for climate inaction. This Part aims to illustrate the legal issues related to establishing state responsibility for climate inaction

110. *Id.* ¶ 58.
111. *Id.*
112. *Id.*
113. *Id.* ¶ 3.
114. *Id.* ¶ 51.

under three standards of protection in international investment law: FPS, FET, and compensation for expropriation.

A. *Climate Inaction as a Violation of the Full Protection and Security Standard*

Investment treaties commonly include the FPS standard which provides that foreign investments "shall enjoy full protection and security" in the territory of the host state.[115] The FPS standard imposes a positive obligation on host states to protect foreign investments in their territories. To comply with the FPS standard, the host state must not only refrain from unfairly interfering with foreign investments but also take positive action to protect them through preventive measures. It obliges states to prevent damage to foreign investments regardless of whether such damages are attributed to the states. In other words, no matter whether the damage to the foreign investments is committed by agents of the state (such as infringement of property by government officials) or by third parties (such as riots or theft caused by non-state actors), the states have obligations under the FPS standard to take reasonable actions to prevent such harm.[116] For instance, in *AAPL v. Sri Lanka*, the tribunal noted that in circumstances of an insurrection taking place in a state's territory, although that state is not responsible for loss or damage suffered by foreign investors caused by the insurrection itself, it bears international responsibility to provide foreign investors "the standard of protection required, either by treaty, or under general customary law."[117] The tribunal further illustrated that such a standard of protection requires "a certain degree of vigilance" that "differs according to the circumstances."[118] The tribunal noted that such protection entails a duty to "exercise due diligence."[119]

115. *See, e.g.*, Treaty of the Reciprocal Enforcement and Protection of Investment, Bangl.-U.S., Mar. 12, 1986, art II (3), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/278/download.

116. Ampal-American Israel Corporation v. Arab Rep. of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶ 245 (Feb. 21, 2017).

117. Asian Agricultural Products Ltd. v. Rep. of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 72 (Jun. 27, 1990).

118. *Id.* ¶ 73.

119. *Id.* ¶ 76.

1. *The FPS Standard and Environmental Security*

Does the host state's failure to prevent environmental harm to foreign investments constitute a violation of the FPS standard? In other words, does the FPS standard require states to ensure the environmental security of foreign investments, and if so, what is the threshold for meeting such a standard?

The investment arbitration jurisprudence has well recognized that the FPS standard requires the host state to provide police protection to foreign investments in its territories. Police protection requires that the host state is responsible for safeguarding aliens against physical harm through its police powers. This obligation is firmly rooted in customary international law, which mandates that states provide police protection for aliens against harms caused by private actors. Investment arbitration jurisprudence has similarly held states liable for failing to protect foreign investments that have been harmed by riots or protestors. Today, investment tribunals have recognized that police protection is a central obligation under the FPS standard. For instance, in *Saluka v. Czech* Republic, the tribunal held that the FPS standard is "not meant to cover just any kind of impairment of an investor's investment but to protect more specifically the physical integrity of an investment against interference by the use of force."[120]

Nonetheless, investment arbitration jurisprudence has been inconsistent on whether the FPS standard only protects physical security or if it extends to a wider scope of protection that covers legal security.[121] Legal protection obliges states to have an administrative and legal system that can effectively prevent harm against foreign investments.[122] If a state does not have a functioning legal system to prevent harm against foreign investments, or if it has such a system but fails to enforce it, the state may be held liable for any harm that results.[123]

In the *Allard v. Barbados* case, the tribunal faced the question of

120. Saluka Invs. B.V. v. Czech, UNCITRAL, Partial Award, ¶ 484 (Mar. 17, 2006).

121. George K Foster, *Recovering Protection and Security: The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, 45 VAND. J. TRANSNAT'L L., 1098 (2012); AUGUST REINISCH & CHRISTOPH SCHREUER, INTERNATIONAL PROTECTION OF INVESTMENTS: THE SUBSTANTIVE STANDARDS 569 (Cambridge University Press. 2020).

122. REINISCH & SCHREUER, *supra* note 121, at 190.

123. *Id.*

whether the FPS standard can be interpreted to include providing environmental security for foreign investments. In this case, the Barbados-Canada BIT provides that "[e]ach Contracting Party shall accord investments or returns of investors of the other Contracting Party: [. . .] (b) full protection and security [. . .]."[124] Allard claimed that Barbados breached this FPS standard by failing to protect the environment, including the failure to manage the environment in the Sanctuary and the failure to enforce the Marine Pollution Control Act.[125] Allard argued that the FPS standard is not limited to protection against "physical interference" with property and that "in any event, the claim here is one of physical interference with property through the unlawful trespass of pollutants." [126] Allard cited the *Trail Smelter* case to prove that "damage to private property caused by pollution is an actionable injury under customary international law." [127]

However, Barbados contended that the FPS standard only protects foreign investments against "direct physical harm" and that it does not impose "liability on the host state for alleged violations by third parties of domestic environmental legislation." [128] Barbados argued that the FPS standard only reflects customary international law.[129] For the investment arbitration cases cited by Allard as proving that the FPS standard covers "more than physical harm," Barbados noted that they are "controversial."[130] Barbados also noted that the *Trail Smelter* case is "irrelevant" since it is an inter-state dispute and that it manifests "the concepts of national sovereignty and non-interference."[131]

The tribunal in this case did not explicitly respond to the question of whether a failure to protect the environment can amount to the FPS standard. After assessing the facts, the tribunal found that

124. *Agreement between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments*, Can.-Barb., art. II(2), May 29, 1996, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/280/download.

125. Peter A. Allard v. Barb., PCA Case No. 2012-06, Award, ¶¶ 232, 239 (June 27, 2016).

126. *Id.* ¶ 231.

127. *Id.*

128. *Id.* ¶ 235.

129. *Id.* ¶ 236.

130. *Id.*

131. *Id.* ¶ 236.

Barbados had established a committee to investigate and coordinate actions towards the protection of the environment at the Sanctuary, whose actions "do not fall short of what was appropriate and sufficient for purposes of the duty of due diligence" under the FPS standard in the BIT.[132] Therefore, it found that "[e]ven accepting the Claimant's articulation of the FPS standard as including an obligation of the host state to protect foreign investments against environmental damage, and assuming (*quod non*) that environmental damage was proven in the present case, the Tribunal finds that no violation of the FPS standard."[133]

Although the tribunal did not provide a clear guidance, this paper argues that in the modern era, the FPS standard should encompass a duty to safeguard the environmental security of foreign investments. First, environmental security can be interpreted as a type of physical security protected by the FPS standard. Investment tribunals have commonly interpreted police protection as protection against "physical harm" or "physical damage" to the foreign investors' assets.[134] Therefore, when foreign property is located in an area subject to environmental harm, states have an obligation under the FPS standard to provide duly diligent protection against such physical harm. For instance, a coastal property owned by a foreign investor may face threats of sea level rise or flooding, which requires states to take adaptive actions to prevent such harm.

Second, an obligation to ensure environmental security can also derive from legal protection duties under the FPS standard. This refers to the scenario where the foreign investment is not physically damaged by environmental degradation but suffers losses due to a weak environmental legal framework or a failure to enforce existing environmental law. For example, in *Allard v. Barbados*, Allard claimed that Barbados breached the FPS by failing to enforce the Marine Pollution Control Act.[135] For another example, a foreign investment in the water supply sector may lose profits if the host state has failed to exercise due diligence in addressing water stress or contamination. In such a situation, even though there

132. *Id.* ¶¶ 245-9.

133. *Id.* ¶ 252.

134. *See* OI European Group B.V. (OIEG) v. Bol. Rep. of Venez., ICSID Case No. ARB/11/25, Award, ¶ 576 (Mar. 10, 2015); Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Rep. of Kaz., ICSID Case No. ARB/05/16, Award, ¶ 668 (July 29, 2008).

135. *Id.* ¶ 251.

is no physical harm to the foreign investors' assets per se, the foreign investor may claim that the host state has failed to provide the required legal protection under the FPS standard.

2. *The Level of Due Diligence in an Era of Climate Change*

Besides the scope of the FPS standard, the investment tribunal also needs to decide the threshold of the FPS standard. If we acknowledge that, in the contemporary world, the FPS standard should protect foreign investments with respect to environmental security, what level of protection is required by that standard?

As a historical standard, the customary international law on the treatment of aliens was established in the *Neer* case in 1926, which was brought by the United States against Mexico before the US-Mexico General Claims Commission.[136] The case concerns the murder of a US national, Neer, in Mexico.[137] The US alleged that Mexico had lacked diligence in the investigation and prosecution of the crime.[138] The Commission hearing the case set a standard for protecting aliens under international law: "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[139] The Commission finally found that Mexico had not breached this standard and thus dismissed the US's claim.[140]

This standard, recognized as the Neer standard, imposes on the host state a not very stringent duty to protect aliens.[141] It is controversial in the investment arbitration case law whether this standard in customary international law still applies today.[142] Some investment tribunals hold the opinion that the FPS standard requires no

136. L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mex. States, 4 U.N. R. Int'l. Arb. Awards 60, ¶ 1 (Gen. Claims. Comm'n U.S.-Mex. Oct. 15, 1926).

137. *Id.*

138. *Id.*

139. *Id.* ¶ 4.

140. *Id.* ¶ 6.

141. U.N. Conference on Trade & Dev. (UNCTAD), *Fair and Equitable* Treatment, at 46 (2011), https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf.

142. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 166 (2012).

more than the customary international law standard regarding the protection of aliens. For instance, the tribunal in *El Paso v. Argentina* stated that the FPS standard "is no more than the traditional obligation to protect aliens under international customary law." [143] However, some other tribunals found that the FPS standard "may go further" than what is required by general international law.[144] Some investment treaties adopt wordings that provide some guidance on the relationship between the FPS standard and international law. For instance, the 1991 Argentina-United States BIT provides: "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law." [145] Nonetheless, it is still unclear from the treaty text what exactly is the obligation of the host state required by international law with respect to providing full protection and security to foreign investments.

Recent years have seen some efforts in treaty practice to clarify the FPS standard. For example, the United States has equated the FPS standard in its investment treaties to customary international law. In 2001, the NAFTA Free Trade Commission adopted a Note of Interpretation which provides that the FPS standard "does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[146] Likewise, the 2012 US Model BIT provides that "'full protection and security' requires each Party to provide the level of police protection required under customary international law."[147] Although this clause provides some clarification by limiting

143. *See* El Paso Energy Int'l Co. v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶ 522 (Oct. 31, 2011). *See also* Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, ¶ 164 (Oct. 12, 2005).

144. DOLZER & SCHREUER, *supra* note 142, at 166.

145. Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. II(2)(a), Nov. 14, 1991, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/127/download.

146. Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Comm'n, July 31 2001, https://files.pca-cpa.org/pcadocs/bi-c/2.%20Canada/4.%20Legal%20Authorities/RA-49%20-%20NAFTA%20FTC,%20Notes%20of%20Interpretation%20(July%2031,%202001).pdf.

147. 2012 U.S. Model Bilateral Investment Treaty [hereinafter 2012 US Model BIT], art. 5(2)(b), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

the FPS standard to police protection and restricting such protection to what is provided under customary international law, it remains ambiguous what the exact standards of protection under customary international law are and whether such standards have evolved since the early *Neer* case.

Despite the ambiguity surrounding the relationship between the FPS standard and customary international law, investment tribunals generally recognize that the FPS standard does not require strict liability of states to protect foreign investments but only "due diligence" or "reasonable care."[148] In other words, the FPS standard does not guarantee absolute protection of foreign investments against all physical or legal infringements but only requires states to exercise due diligence to protect foreign investments.[149] As the tribunal in *El Paso v. Argentina* stated: "[T]he obligation to show 'due diligence' does not mean that the state has to prevent each and every injury. Rather, the obligation is generally understood as requiring that the state take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury. The precise degree of care, of what is 'reasonable' or 'due,' depends in part on the circumstances."[150]

However, the standard of "reasonable" and "due" care remains vague, requiring the tribunal to decide on a case-by-case basis whether the host state has provided due diligence in protecting foreign investments in specific circumstances. In the context of climate change, the foreign investor may argue that the host state fails to exercise due diligence to prevent foreign investments from climate damage such as flooding or extreme weather events. The question faced by the tribunal is: What should be the reasonable duty of care provided to foreign investments in an era of climate change?

It would be unreasonable to assume that the FPS standard in the climate change era remains the same as the standard set in the

148. *See* Técnicas Medioambientales Tecmed, S.A. v. United Mex. States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 177 (May 29, 2003); Peter A. Allard v. Barb., PCA Case No. 2012-06, Award, ¶ 243 (June 27, 2016).

149. DOLZER & SCHREUER, *supra* note 142, at 161.

150. *See* El Paso Energy International Company v. Arg. Rep., ICSID Case No. ARB/03/15, Award, ¶ 523 (Oct. 31, 2011); *See also* Electrabel S.A. v. Republic of Hung., ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.83 (Nov. 30, 2012); Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Rep. of Alb., ICSID Case No. ARB/11/24, Award, ¶ 821 (Mar. 30, 2015).

Neer case in 1926. Rather, the FPS standard in investment treaties should be interpreted in the context of the climate obligations of the host state. According to Article 31(3)(c) of the VCLT, a treaty should be interpreted by taking into account "any relevant rules of international law applicable in the relations between the parties."[151] If both the host state and the home state of the foreign investor are Parties to the climate treaties, including the UNFCCC and the Paris Agreement, the interpretation of the "due diligence" of the FPS standard should take into account the climate obligations of the host state. For instance, in a scenario where the host state's failure to adapt to climate change caused the loss of property owned by the foreign investor, the tribunal taking a systemic interpretation approach should take into account the state's obligations under climate treaties to decide what level of due diligence is reasonable. Nonetheless, since climate treaties leave large discretion to states in implementing the obligations, it is difficult to ascertain what is the exact level of due diligence under climate treaties. The foreign investors may refer to the specific promises made by the states in their NDCs as a basis of the level of due diligence in climate mitigation and adaptation.

Nevertheless, the interpretation of the FPS standard with climate obligations taken into account does not mean that a violation of climate treaties will automatically lead to a violation of the FPS standard. The tribunal needs to conduct a contextual analysis of each case to decide whether the FPS standard has been breached as a result of a failure to fulfill climate obligations. This approach has been taken by the tribunal in *Allard v. Barbados*. In this case, Allard argued that Barbados' international obligations under the Convention on Biological Diversity and the Ramsar Convention "heighten the level of diligence."[152] However, the tribunal denied this argument, finding that "[t]he fact that Barbados is a party to the Convention on Biological Diversity and the Ramsar Convention does not change the standard under the BIT, although consideration of a host state's international obligations may well be relevant in the application of the standard to particular

151. Vienna Convention on the Law of Treaties, art. (31)(3)(c), May 23, 1969, 115 U.N.T.S. 331, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

152. *Id.* ¶ 230.

circumstances."[153]

Moreover, the due diligence of the host state in an era of climate change requires an exercise of precautionary action against climate harm. This means that the FPS standard requires more than redressing climate harm after the damage has occurred to foreign investments. Rather, host states should also adopt precautionary measures to prevent such harm from happening. Investment tribunals have commonly recognized that the due diligence requirement under the FPS standard requires states to adopt precautionary actions to prevent potential harm to foreign investments. A failure to adopt such precautionary measures would result in the liability of states under the FPS standard. As stated by Brownlie and cited by the tribunal in the *AAPL v. Sri Lanka* case, a state's "substantial negligence to take reasonable precautionary and preventive action" is sufficient to result in its international responsibility for the damage to foreign property.[154] In *AMT v. Zaire*, the tribunal decided that the failure by Zaire to take any precautionary measures to prevent riots that loot foreign investments breached Zaire's obligation to protect under the FPS provision.[155] Since Zaire took "no measure whatever" to ensure the protection and security of foreign investments, the tribunal found it useless to "enter into the debate whether in the case on hand Zaire is bound by an obligation of result or simply an obligation of conduct."[156] The obligation to take precautionary measures under the FPS standard is also recognized by the tribunal in *OI European Group v. Venezuela*.[157]

In conclusion, the host state's failure to protect foreign investments from climate harm may violate the FPS standard. The tribunal should assess on a contextual basis whether the host state has failed to exercise due diligence to prevent climate harm to foreign investments. Such due diligence also includes the obligation to adopt precautionary actions to prevent potential climate harm. Moreover, in examining the due diligence of the host state, the tribunal should take into account the host state's obligations under

153. *Id.* ¶ 244.

154. Asian Agricultural Products Ltd. v. Rep. of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 76 (June 27, 1990).

155. American Mfg. & Trading, Inc. v. Dem. Rep. Congo, ICSID Case No. ARB/93/1, Award, ¶¶ 6.07-6.08 (Feb. 21, 1997).

156. *Id.* ¶ 6.08.

157. OI European Group B.V. v. Bol. Rep. of Venez., ICSID Case No. ARB/11/25, Award, ¶ 580 (Mar. 10, 2015).

climate treaties in accordance with Article 31(3)(c) of the VCLT, although a violation of climate treaties does not automatically lead to a conclusion of the violation of the FPS standard.

B. *Climate Inaction as a Violation of the Fair and Equitable Treatment Standard*

The failure of the host state to take action on climate change may also violate the FET standard in international investment law. The FET standard is a fundamental principle in international investment law. Most investment treaties have a concise FET clause stating that host states should accord "fair and equitable treatment" to foreign investors in their territories.[158] Like the FPS standard, the FET standard is also a proactive standard, meaning that a failure to act can amount to a violation of the standard.[159] The following paragraphs will analyze how the failure of the host state to take climate action may frustrate the legitimate expectations of the foreign investor, resulting in a violation of the FET standard.

1. *The FET Standard and Legitimate Expectations*

The vagueness of the terms "fair" and "equitable" makes the scope of protection provided by the FET standard a broad one, with its meaning dependent on the specific circumstances of a particular case.[160] In investment arbitration jurisprudence, tribunals have gradually developed the meaning of the FET standard, but in an inconsistent manner. The main controversy surrounds the relationship between the FET standard and customary international

158. Some recent investment treaties have clarified the clause to refrain an overly broad interpretation of the standard. For example, the 2022 Israel - Philippines BIT provides that the FET standard is breached "if a measure or series of measures constitute: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; or (d)targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief." Agreement between the Government of the State of Israel and the Government of the Republic of the Philippines on Promotion and Protection of Investments, Isr.-Phil., art. 2(2), June 3, 2022.

159. In *MTD v. Chile*, the tribunal noted that the FET standard requires a proactive duty of the state to protect the foreign investment. It stated: "its terms are framed as a pro-active statement –'to promote', 'to create', 'to stimulate'- rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors." MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Rep. of Chile, ICSID Case No. ARB/01/7, Award, ¶ 113 (May 25, 2004).

160. DOLZER & SCHREUER, *supra* note 142, at 139.

law. Like the FPS standard, the FET standard derives from customary international law on the treatment of aliens. There have been inconsistencies among investment tribunals regarding whether the *Neer* standard still applies today, or whether customary international law has evolved to a higher standard than *Neer*.

Some tribunals insist that the FET standard should be interpreted in the same way as the *Neer* standard, rejecting the notion that customary international law on the treatment of aliens has evolved. For instance, the tribunal in *Glamis Gold v. United States* stated that for an act to violate the FET standard, it "must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons."[161] On the other hand, some other tribunals have taken an opposite position, arguing that the *Neer* standard, invented in 1926 in a murder case, is outdated and fails to reflect the evolved standard of protection for foreign investors and their investments in the contemporary world. As stated by the tribunal in *ADF v. United States*, the customary international law related to the FET standard is "constantly in a process of development."[162]

Nonetheless, despite such controversy, investment tribunals have widely acknowledged that the FET standard requires the protection of the foreign investor's legitimate expectations.[163] As stated by the tribunal in *Saluka v. Czech Republic*, the protection of the foreign investor's legitimate expectations is the "dominant element" of the FET standard.[164] Other tribunals have also considered the protection of legitimate expectations as "one of the major components"[165] or even "the most important function"[166] of the FET standard.

However, one should be cautious in that the protection of the

161. Glamis Gold, Ltd. v. U.S., UNCITRAL, Award, ¶ 22 (Jun. 8, 2009).

162. ADF Group Inc. v. U.S., ICSID Case No. ARB/00/1, Award, ¶ 179 (Jan. 9, 2003).

163. Técnicas Medioambientales Tecmed, S.A. v. United Mex. States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 154 (May 29, 2003). Crystallex International Corporation v. Bol. Rep. of Venez., ICSID Case No. ARB/11/2, Award, ¶ 546 (Apr. 4, 2016).

164. Saluka Investments B.V. v. Czech, UNCITRAL, Partial Award, ¶ 302 (Mar. 17, 2006).

165. EDF (Services) Limited v. Rom., ICSID Case No. ARB/05/13, Award ¶ 216 (Oct. 8, 2009).

166. Electrabel S.A. v. Rep. of Hung., ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.75 (Nov. 30, 2012).

foreign investor's expectations should not be broader than the scope of protection under investment treaty obligations. As stated by the Annulment Committee in the *MTD v. Chile* case, it would be questionable to treat the investor's expectations as the source of the host state's treaty obligations because "[t]he obligations of the host state towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have."[167] Therefore, not every expectation of a foreign investor is protected under investment treaties. These expectations must meet the threshold of "legitimacy and reasonableness in light of the circumstances" of a particular case.[168] Furthermore, these expectations must be based on a diligent process of decision-making at the time of investment.[169] It is also noteworthy that the foreign investor's expectations must be significant enough to be protected under the FET standard. Therefore, although legitimate, foreign investors' expectations do not *ipso facto* constitute a breach of the FET standard.[170] As stated by the tribunal in the recent *Arif v. Moldova* case, "[N]ot every expectation of an investor is protected; rather it must be an expectation recognized and protected in international law. Some expectations may simply be too minor for this end."[171]

2. *Legitimate Expectations and Climate Inaction*

As stated by Dolzer and Schreuer, the foreign investor's legitimate expectations "are based on the host State's legal framework and on any undertakings and representations made explicitly and implicitly by the host state."[172] These include not just the state's domestic legislation and executive documents but also treaties and

167. MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Rep. of Chile, ICSID Case No. ARB/01/7, Decision on Annulment, ¶ 67 (Mar. 21, 2007). *See also* Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Arg. Rep., ICSID Case No. ARB/03/19, Decision on Liability, ¶ 224 (Jul. 30, 2010).

168. Saluka Investments B.V. v. Czech, UNCITRAL, Partial Award, ¶ 304 (Mar. 17, 2006).

169. IC Power Asia Development Ltd. v. Rep. of Guat., PCA Case No. 2019-43, Final Award, ¶ 478 (Oct. 7, 2020). *See also* Álvarez y Marín Corporación S.A. and others v. Rep. of Pan., ICSID Case No. ARB/15/14, Final Award, ¶ 337 (September 12, 2018).

170. Mr. Franck Charles Arif v. Rep. of Mold., ICSID Case No. ARB/11/23, Award, ¶ 536 (Apr. 8, 2013).

171. *Id.*

172. DOLZER & SCHREUER, *supra* note 142, at 145.

contractual undertakings, as well as specific representations.[173] The tribunal in the *Suez and Vivendi v. Argentina* case also stated that the foreign investor's legitimate expectations can be created by the host state's "laws, regulations, declared policies, and statements."[174] The following paragraphs will illustrate two scenarios where the host state's climate inaction may frustrate the foreign investor's legitimate expectations protected under the FET standard.

a. *Legitimate Expectations and the Failure to Enforce Climate Law*

The concept of a climate legal framework can be broad, including various laws and regulations related to climate mitigation and adaptation at the national and sub-national levels.[175] These laws are diverse in their precision and contents. Some of them are framework laws that only generally provide directions and pathways for achieving climate goals, while others provide more detailed implementation methods.[176]

The failure to enforce climate laws may violate the FET standard. Although a state's violation of its domestic law does not directly result in international responsibility, it may result in the frustration of the foreign investor's legitimate expectations and thus constitute a violation of the FET standard under investment treaties.[177] As stated by the tribunal in *RREEF v. Spain*, the host state is expected "to observe and enforce domestic law as a part of the FET standard and basis for legitimate expectations."[178] In this case, the

173. *Id.*

174. Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Arg. Rep., ICSID Case No. ARB/03/19, Decision on Liability, ¶ 222 (Jul. 30, 2010).

175. As of now, the Climate Change Laws of the World database has recorded 1325 climate laws. *See* CLIMATE CHANGE LAWS OF THE WORLD, https://climate-laws.org/?c=Legislation (last visited May 10, 2025).

176. *Id.*

177. It is widely recognized in international law that the legality of conduct under domestic law does not necessarily lead to the same conclusion in international law. Conduct that is lawful under domestic law may be illegitimate under international law, while conduct that is unlawful under domestic law may be legitimate under international law. *See* Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331; Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, art. 3, 2001, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

178. RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, ¶ 287 (Nov. 30, 2018).

tribunal found that the decrees enacted by Spain that regulate the renewable energy sector in which the foreign investment was made "are essential components of the domestic legal environment of the investment, and the Claimants could legitimately expect the state would observe and enforce them in conformity with general rules of international law."[179]

When a failure to enforce climate laws causes damage to the foreign investment, the foreign investor may claim that its legitimate expectations have been frustrated and that the host state has violated the FET standard. In investment arbitration practice, some tribunals have examined whether the host state's failure to enforce domestic law has resulted in a breach of the treaty standard. In the *GAMI v. Mexico* case, the foreign investor claimed that Mexico's failure to implement its laws amounted to a violation of the FET standard.[180] However, Mexico insisted that the tribunal "does not have the mandate to control the application of national law by national authorities."[181] The tribunal stated that "a government's failure to implement or abide by its own law in a manner adversely affecting a foreign investor *may but will not necessarily lead to* a violation of [the FET standard]. Much depends on the context. The imposition of a new license requirement may, for example, be viewed quite differently if it appears on a blank slate or if it is an arbitrary repudiation of a preexisting licensing regime upon which a foreign investor has demonstrably relied"[182] (emphasis added).

Likewise, in *Bilcon v. Canada*, the tribunal found that Canada's violation of its environmental law amounted to a violation of the FET standard. The tribunal stated:

> The Tribunal at this stage simply holds that the applicant was not treated in a manner consistent with Canada's own laws, including the core evaluative standard under the CEAA and the standards of fair notice required by Canadian public administrative law.

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179. *Id.* ¶ 286.

180. Gami Investments Inc. v. United Mex. States, UNCITRAL, Final Award, ¶ 88 (Nov. 15, 2004).

181. *Id.* ¶ 90.

182. *Id.* ¶ 91. The tribunal, citing Waste Management II, made the following statements: "(1) The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law. (2) A failure to satisfy requirements of national law does not necessarily violate international law. (3) Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements. (4) The record as a whole - not isolated events - determines whether there has been a breach of international law." *Id.* ¶ 97.

> The Tribunal is not here deciding what the actual outcome should have been, including what mitigation measures should have been prescribed if the JRP had carried out the mandate contained in applicable laws.[183]

b. *Legitimate Expectations and the Failure to Comply with Climate Treaties*

A state's failure to implement environmental treaty obligations may frustrate the legitimate expectations of foreign investors and result in investment arbitration. The *Allard v. Barbados* case provides an example of this scenario. In this case, the foreign investor Allard claimed that Barbados's failure to protect the environment of the Sanctuary invested in by the foreign investor breached investment treaty obligations, including the FET standard. Allard cited Barbados's obligations under the United Nations Convention on Biological Diversity and the Ramsar Convention.[184] Allard argued that in interpreting the standards of treatment under the investment treaty, the tribunal should consider "the obligations with respect to the Sanctuary that Barbados assumed in its environmental treaties."[185] Allard contended that Barbados's obligations under these environmental treaties "confirm the reasonableness" of Allard's expectations protected by the FET standard.[186] The use of the word "confirm" here indicates that Allard did not base his expectations directly on the host state's environmental treaty obligations but claimed that such expectations were confirmed by these international obligations.

However, Barbados rejected the application of the Convention on Biological Diversity and the Ramsar Convention in this case. Barbados argued that the tribunal lacked jurisdiction to hear breaches of these environmental treaties and that a breach of other treaties did not constitute a breach of the FET standard. Barbados also emphasized that it had ratified the Ramsar Convention after the foreign investor had made its investment and that it had complied with its obligations under both environmental treaties.[187]

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183. William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v. Government of Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 602 (Mar. 17, 2015).

184. Peter A. Allard v. Barb., PCA Case No. 2012-06, Award, ¶ 178 (Jun. 27, 2016).

185. *Id.*

186. *Id.*

187. *Id.* ¶ 190.

The tribunal did not directly address the question of whether the host state's environmental treaty obligations could impact the foreign investor's legitimate expectations. Instead, the tribunal stated that "[h]aving found no direct and specific representation capable of giving rise to legitimate expectations on the part of Mr. Allard regarding the environmental protection of the Sanctuary generally, the Tribunal need not address the question of whether Barbados' international obligations arising from its environmental treaties confirmed or reinforced the legitimacy of the Claimant's expectations."[188]

However, future investment arbitration tribunals may face this question in cases arising from a state's climate inaction. In the context of climate change, a foreign investor suffering losses caused by climate change may argue that its legitimate expectations are not only based on the host state's domestic climate legal framework but also, as argued by Mr. Allard, "confirmed by" the state's international obligations under climate treaties. These obligations may include climate treaty obligations and commitments under NDCs. The tribunal would need to determine whether the foreign investor's legitimate expectations could derive from the host state's international climate obligations.

Investment arbitration jurisprudence has been inconsistent regarding the role of environmental treaties in the interpretation of investment treaty obligations.[189] For example, in *S.D. Myers v. Canada*, the tribunal considered the North American Agreement on Environmental Cooperation (NAAEC) in interpreting the standards of protection in NAFTA, [190] while in *Glamis Gold v. United States*, the tribunal did not analyze the United States's obligations under the Convention concerning the Protection of the World Cultural

188. *Id.* ¶ 208.

189. Some investment arbitration cases are related to the host state's obligations under environmental treaties. These cases commonly involve the state's implementation of environmental treaties, such as imposing trade bans under the Basel Convention or prohibiting mining projects to comply with the World Heritage Convention. In these cases, the host States used their obligations under environmental treaties as a defense for violating investment treaty obligations. *See, e.g.*, S.D. Myers, Inc. v. Can., UNCITRAL, Partial Award, ¶ 150 (Nov. 13, 2000); Glamis Gold, Ltd. v. U.S., UNCITRAL, U.S. Counter-Memorial, pp. 33-35 (Aug. 19, 2006). For a detailed analysis of the relevant jurisprudence, see Ying Zhu, *Fair and Equitable Treatment of Foreign Investors in an Era of Sustainable Development*, 58 NAT. RES. J. 319, 346-353 (2018).

190. S.D. Myers, Inc. v. Can., UNCITRAL, Partial Award, ¶¶ 217-221 (Nov. 13, 2000).

Property and Natural Heritage in examining standards of protection.[191] Similarly, in *Unglaube v. Costa Rica*, the tribunal did not address the Inter-American Convention for the Protection and Conservation of Sea Turtles in the examination of standards of protection in investment treaties.[192]

This paper posits that, first, the obligations under climate treaties and the NDCs are too broad to be the sole basis for a foreign investor's legitimate expectations. Investment tribunals typically restrict the protection of legitimate expectations to those created by "specific" commitments made by the host state. For example, in *Crystallex v. Venezuela*, the tribunal noted that the promises or representations "must be sufficiently specific, i.e. it must be precise as to its content and clear as to its form" to give rise to legitimate expectations.[193] The tribunal in *Arif v. Moldova* also stated that "a claim based on legitimate expectations must proceed from the exact identification of the origin of the expectation alleged, so that its scope can be formulated with precision."[194]

Second, although it may be difficult to derive a foreign investor's expectations solely from the host state's international climate obligations, those obligations may still impact the interpretation of the FET standard in determining the legitimacy of the foreign investor's expectations. According to Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("VCLT"), the interpretation of investment treaties should take into account "any relevant rules of international law applicable in the relations between the parties."[195] The role of an environmental treaty in investment arbitration must be analyzed on a contextual basis, depending on the texts of the investment treaty in question and the specific facts of the case.[196] For example, in a hypothetical case where the host state

191. The tribunal only mentioned this convention in the factual summary part of the Award. *See* Glamis Gold, Ltd. v. U.S., UNCITRAL, Award, ¶¶ 83-84 (Jun. 8. 2009).

192. Marion Unglaube v. Rep. of Costa Rica, ICSID Case No. ARB/08/1, Award (May 16, 2012).

193. Crystallex International Corporation v. Bol. Rep. of Venez., ICSID Case No. ARB(AF)/11/2, Award, ¶ 547 (Apr. 4, 2016).

194. Mr. Franck Charles Arif v. Rep. of Mold., ICSID Case No. ARB/11/23, Award, ¶ 535 (Apr. 8, 2013).

195. Vienna Convention on the Law of Treaties, art 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331.

196. For example, some investment treaties contain clauses dealing with the relationship between investment and environmental treaties. *See* North American Free Trade Agreement, art. 104, Dec. 17, 1992, 32 I.L.M. 289; United States-Mexico-Canada Agreement,

breaches a specific commitment to a foreign investor regarding the development of a climate adaptation project in an area vulnerable to climate risks, the state's commitment in the NDCs report for climate adaptation in that area could support the legitimacy of the foreign investor's expectations that the development plan would not be later withdrawn by the host state.

In conclusion, a host state's failure to adopt climate action may frustrate a foreign investor's legitimate expectations and constitute a violation of the FET standard. If the host state fails to enforce its domestic climate law, which contains a specific commitment relied upon by the foreign investor to make its investment, the host state could be liable for the damage suffered by the foreign investor. However, it remains uncertain whether a host state's obligations under climate treaties can be relied upon by foreign investors to generate legitimate expectations. While the obligations in climate treaties or NDCs may be too broad to constitute specific commitments made to foreign investors, these obligations may still be taken into account in interpreting the FET clause, particularly in determining the legitimacy of the foreign investor's expectations.

C. *Climate Inaction as Expropriation*

A state's failure to protect foreign investments from climate damage may constitute expropriation under international investment law. The concept of expropriation is similar to "takings" in domestic law. International investment law recognizes two types of expropriation: direct and indirect.[197] Direct expropriation occurs when the host state's measure results in a transfer of legal title from the foreign property owner to the host state or a third party.[198] Indirect expropriation occurs when the host state's measure, despite not involving a formal transfer of ownership, results in a substantial deprivation of the foreign investment that has an effect similar to a formal taking.[199] In international law, states have the sovereign right to expropriate foreign investments within their territories,

art. 1.3, Dec. 10, 2019.

197. Peter D. Isakoff, *Defining the scope of indirect expropriation for international investments*, 3 GLOB. BUS. L. REV., 191-3 (2013); Robert D. Sloane & W. Michael Reisman, *Indirect Expropriation and its Valuation in the BIT Generation*, 75 BRIT. Y.B.INT'L L. 115, 118-9 (2004).

198. Isakoff, *supra* note 197, at 191-92.

199. *Id.* at 202-03.

subject to certain conditions. Investment treaties typically require that a legitimate expropriation must meet four conditions: it must serve a public purpose, be conducted in due process, be conducted in a non-discriminatory way, and be accompanied by adequate compensation.[200] For example, Article 6(1) of the 2012 US Model BIT provides that:

> Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3).[201]

However, the definition of indirect expropriation is not clear-cut and involves a high degree of complexity in determining when a host state's measure that interferes with the interests of foreign investments amounts to a level of indirect expropriation.[202] It is particularly challenging to draw a clear line between indirect expropriation, which requires states to compensate foreign investors, and legitimate regulatory conduct that is non-compensable.[203] Investment arbitration tribunals have adopted various approaches to deciding how to draw this line. Some tribunals have adopted a "sole effects" approach, arguing that the effects of the measure are the only yardstick for determining whether the measure amounts to a level of expropriation.[204] A regulatory measure that has expropriatory effects will constitute an indirect expropriation even if it is adopted for a public purpose.[205] On the other hand, some tribunals have adopted a "police powers" doctrine, arguing that a regulatory measure does not amount to indirect expropriation if it is

200. *Id.* at 191.

201. 2012 US Model BIT, *supra* note 147, art. 6(1).

202. DOLZER & SCHREUER, *supra* note 142, at 99.

203. *See* L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, 13 ASIA PACIFIC L. REV. 79 (2005); Ying Zhu, *Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space*, 60 HARV. INT'L L. J. 377 (2019).

204. Ben Mostafa, *The Sole Effects Doctrine, Police Powers and Indirect Expropriation Under International Law*, 15 AUSTL. INT'L L. J. 267 (2008).

205. *Id.* at 275.

taken within the host state's police powers to promote public interests.[206]

While the literature has mostly focused on whether climate regulatory measures can amount to expropriation, less discussed is whether a state's failure to protect the climate, which causes damages to foreign investments, can amount to expropriation. This may occur in a scenario of flooding, for instance, where a state's failure to implement early warning or adaptive measures leads to significant damage to a foreign investor's assets and results in substantial deprivation of the value of property. The foreign investor may argue that the state's failure to act results in a substantive deprivation of its investments and amounts to an expropriation that obliges the host state to compensate the foreign investor. The question is whether such an omission can constitute indirect expropriation.

1. *Omission as Expropriation*

In domestic law, it is controversial whether omission or inaction can amount to a taking. U.S. takings law, for example, requires government action to constitute a taking.[207] This creates a perverse incentive: the government may face takings litigation if its adaptation measure interferes with property interests, but the government would not be responsible if its failure to act exposes property owners to climate harm.[208] This makes adaptation more costly, discouraging adaptation measures.[209] To solve this problem, Serkin proposed the idea of "passive takings," arguing that the government has an "affirmative obligation" under the Takings Clause to adopt measures to combat climate effects, and a failure to do so could result in takings liability.[210]

In international investment law, it is well-established that a combination of acts *and* omissions may amount to expropriation. For instance, in *Vivendi v. Argentina*,[211] the tribunal found that Argentina's acts and omissions cumulatively amounted to a violation of

206. *Id.* at 272-73.

207. Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 346 (2014).

208. *Id.* at 347.

209. *Id.*

210. *Id.* at 404.

211. Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly

the FET standard in the investment treaty.[212] Moreover, in examining the expropriation clause, the tribunal noted that "[i]t is well-established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached."[213] The tribunal also cited the ILC Articles, which state that when there is a series of acts or omissions, the time of the occurrence of a wrongful act is defined as "the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last of the series."[214]

However, it is less clear whether an omission *by itself* can constitute expropriation.[215] In most investment treaties, the expropriation clause usually uses the term "measure" to describe what may constitute expropriation. It is controversial whether an omission can amount to a "measure" that constitutes expropriation under investment treaties.

In *Eureko v. Poland*, the tribunal interpreted "measure" as including both action and inaction. The dispute settlement clause in the investment treaty states that it covers "[a]ny dispute between one Contracting Party and an investor of the other Contracting Party relating to the effects of a *measure* taken by the former Contracting Party with respect to the essential aspects pertaining to the conduct of business"[216] (emphasis added). Moreover, the expropriation clause in that treaty provides that "[n]either Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments . . . ."[217] Poland contended that the usage of the words "measure taken" in the dispute settlement clause and "measure" in the expropriation clause "was meant to exclude omissions from the ambit of the

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Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux) v. Argentine Republic, ICSID, Case No. ARB/97/3, Award (Aug. 20, 2007).

212. *Id.* ¶ 7.4.46.

213. *Id.* ¶ 7.5.31.

214. *Id.* ¶ 7.5.32.

215. REINISCH & SCHREUER, *supra* note 122, at 69.

216. Agreement Between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments, art. 8, ¶ 1, 1992, UNCTAD.

217. *Id.* Art. 5.

Treaty."[218]

Nonetheless, the tribunal rejected this restrictive interpretation of the word "measure" in the treaty.[219] Citing *CME v. Czech Republic*, the tribunal noted: "It is obvious that the rights of an investor can be violated as much by the failure of a Contracting State to act as by its actions. Many international arbitral tribunals have so held."[220] The tribunal also cited the Commentary to the ILC Articles on State Responsibility, which stresses that state responsibilities may arise from "one or more actions or omissions or a combination of both."[221]

Similarly, in *Busta v. Czech*, the tribunal also acknowledged that the host state can expropriate foreign investments by omission.[222] The case concerns the alleged inaction by the Czech police against the accused theft conduct by a local Czech company who moved goods owned by the claimants out of a warehouse.[223] The claimants argued that the Czech Police's failure to protect their properties amounted to an expropriation.[224] The tribunal noted diverging jurisprudence on whether an omission can constitute an expropriation of foreign investment.[225] Citing Article 2 of the ILC Articles on State Responsibility, the tribunal noted that "a State's international responsibility can be engaged by both action and inaction of its organs."[226] However, after examining the facts of the case, the tribunal ultimately found that the state's inaction did not amount to an expropriation.[227]

A few other tribunals took the opposite opinion that states cannot expropriate foreign investments through omission. An early award before the Iran-U.S. Claims Tribunal adopting this approach was *Sea-Land v. Iran*, where the tribunal said:

> A finding of expropriation would require, at the very least, that the Tribunal be satisfied that there was *deliberate governmental interference* with the conduct of Sea-Land's operation, the effect of

218. Eureko B.V. v. Pol., Partial Award, ¶ 185 (Aug. 19, 2005).
219. *Id.* ¶ 186.
220. *Id.*
221. *Id.* ¶ 188.
222. Busta v. Czech, SCC, Case No. 2015/014, Final Award (Mar. 10, 2017).
223. *Id.* ¶¶ 1-5.
224. *Id.* ¶ 357.
225. *Id.* ¶ 398.
226. *Id.* ¶ 399.
227. *Id.* ¶ 437.

> which was to deprive Sea-Land of the use and benefit of its investment. Nothing has been demonstrated here which might have amounted to an intentional course of conduct directed against Sea-Land. *A claim founded substantially on omissions and inaction in a situation where the evidence suggests a widespread and indiscriminate deterioration in management, disrupting the functioning of the port of Bandar Abbas, can hardly justify a finding of expropriation* (emphasis added).[228]

Although the statement above mainly discusses whether intent is necessary for establishing expropriation, it implies that an omission by negligence is unlikely to amount to expropriation. However, the Iran-U.S. Claims Tribunal adopted a different approach in the *Tippetts* award, which was made almost simultaneously with the *Sea-Land v. Iran* award. In *Tippetts*, the tribunal found that "[t]he intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."[229] This statement was cited by the tribunal in *Tecmed v. Mexico*.[230] Despite the diverging approaches of the two awards, subsequent awards made by the Iran-U.S. Claims Tribunal generally supported the approach in *Tippetts*, with no support for *Sea-Land v. Iran*.[231]

The tribunal in *Olguin v. Paraguay* more explicitly noted that omission by states cannot amount to expropriation. The tribunal stated that expropriation "requires a teleologically driven action for it to occur; omissions, however egregious they may be, are not sufficient for it to take place."[232] This statement was subsequently cited by the tribunal in the *AWG v. Argentina* case in deciding whether a failure to revise a tariff constituted an expropriatory "measure."[233] The tribunal in *AWG v. Argentina* noted that "A 'measure' . . . is usually interpreted to mean an action taken to achieve a

228. Sea-Land Service, Inc. v. Iran, IUSCT, No. 135-33-1, Award, ¶ 50 (Jun. 22, 1984). This approach was criticized by Judge Holtzmann in his sperate opinion. *See Opinion of Howard M. Holtzmann Dissenting As to Award on the Claims and Concurring as to Dismissal of Counterclaims*, pp. 53-54. https://iusct.com/wp-content/uploads/2020/10/C33-Doc-125.pdf.

229. Tippetts v. TAMS-AFFA, IUSCT, No. 141-7-2, Award, ¶ 22 (Jun. 29, 1984).

230. Tecmed S.A. v. The United Mexican States, ICSID, Case No. ARB (AF)/00/2, Award, ¶ 116 (May 29, 2003).

231. George H Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran–United States Claims Tribunal*, 88 AM. J. OF INT'L L. 585, 603 (1994).

232. Olguín v. Para., ICSID Case No. ARB/98/5, Award, ¶ 84 (July 26, 2001).

233. AWG Group v. The Argentine Rep., UNCITRAL, Decision on Liability, ¶ 141

particular purpose."[234] Nonetheless, the tribunal noted that the refusal to revise the tariff in this case was not an omission but "the result of a carefully considered decision," which "was certainly teleologically driven."[235]

In sum, although international law acknowledges that both action and inaction can amount to international wrongfulness, there have been diverging views in investment arbitration practice whether an omission by itself can constitute expropriation. This inconsistency in jurisprudence creates uncertainty for claims that a host state's failure to take climate action constitutes an expropriation.

2. *Climate Inaction and Substantial Deprivation*

If the tribunal recognizes that the host state's inaction can amount to an indirect expropriation, the next test is whether the foreign investment has suffered an expropriatory effect due to such inaction. For an action or omission to constitute expropriation, it must have caused substantial deprivation of the economic value of foreign investment.

In the context of climate change, there are two scenarios in which the host state's failure to adopt climate action results in substantial deprivation of foreign investments. The first scenario is when physical damage to the foreign property amounts to a substantial deprivation of the value of such property. For instance, the state's failure to adopt precautionary and protective measures during a flood may cause the complete destruction of the foreign investor's property due to flooding. In such a case, even though the foreign investor still owns the property, its value has been substantially deprived. The second scenario is when climate effects substantially deprive the "use" of the property for a certain purpose expected by the foreign investor. For instance, if a foreign investor invests in a coastal property for tourism purposes on the beach, sea-level rise may make it impossible to use it in a way that aligns with the foreign investor's expectations.

A case that illustrates this point is *Allard v. Barbados*. In this case,

(July 30, 2010).

234. *Id.*

235. *Id.*

the foreign investor Allard alleged that Barbados had failed to protect the environment surrounding the eco-tourism attraction where he had invested.[236] Allard claimed that this failure had substantially deprived the economic benefits of the property since the environmental degradation made it impossible to operate the site as an eco-tourism attraction.[237] Therefore, although Allard remained the owner of the Sanctuary and continued to use it for commercial operations, he argued that there was an indirect expropriation since he had lost "the ability to carry on an eco-tourism business." [238] However, the tribunal denied the claim of indirect expropriation,[239] finding that there was no substantial deprivation in this case since "Mr. Allard remains the owner of the Sanctuary grounds, on which he continues to operate a café," which means "the Claimant has not been deprived of his entire investment in Barbados." [240]

In response to Mr. Allard's claim that "what has been expropriated is neither the land nor the café, but his ability to run an eco-tourism business," the tribunal did not explicitly conclude whether such a restriction on the use of property constitutes indirect expropriation.[241] Rather, the tribunal stated that "even if the Tribunal were to accept that the destruction of the Claimant's ability to run an eco-tourism business on the Sanctuary grounds could constitute an indirect expropriation . . . , the Tribunal's conclusion on the facts that the Claimant has failed to establish that his decision to cease operating the Sanctuary was due to any degradation of the environment at the Sanctuary forecloses the expropriation claim."[242] Therefore, it appears that the tribunal did not deny the possibility that the host state's failure to protect the environment may cause an indirect expropriation of foreign investment whose operation depends on a healthy environment.

In conclusion, the host state's failure to adopt climate action may constitute an expropriation of foreign investment if it substantially deprives the value of the investments. However, it should be

236. Peter A. Allard v. The Gov't of Barb., PCA Case No. 2012-06, Award, ¶¶ 254-55 (Jun. 27, 2016).

237. *Id.*

238. *Id.* ¶ 256.

239. *Id.* ¶ 266.

240. *Id.* ¶ 264.

241. *Id.* ¶ 265.

242. *Id.*

noted that investment arbitration case law has been inconsistent on whether omission by itself can constitute expropriation, which creates an obstacle for establishing state responsibility for climate inaction under the expropriation clause as compared to the FPS and FET standards.

V. TOWARDS A BALANCED INTERPRETATION OF STATE RESPONSIBILITY FOR CLIMATE INACTION UNDER INTERNATIONAL INVESTMENT LAW

The previous Part examined how climate inaction may violate investment treaty obligations under the FPS, FET, and expropriation clauses. This Part assesses this regime in the broader context of climate justice. While establishing state responsibility for climate inaction is assumed to benefit climate goals, achieving this goal under international investment law involves more intricate policy concerns. The international investment law regime is designed to protect only foreign investors, whereas climate justice requires equal protection for all stakeholders from climate harm. One-sided protection of foreign investments from climate inaction may result in climate injustice to the public interests of the host state. This Part assesses the mechanism of establishing state responsibility for climate inaction under international investment law in the context of climate justice and proposes solutions to interpret investment treaty obligations in a balanced way to fit climate justice goals.

A. *Balancing Climate Interests Between the Foreign Investor and the Host State*

Unlike international environmental law and human rights law, international investment law is originally designed to promote and protect foreign investments rather than public interests. This targeted and one-sided protection under international investment law may cause climate injustice among different stakeholders in the host state and create inefficiencies in combating climate change.

From a fairness perspective, distributional injustice may arise since only foreign investors enjoy protection under investment treaties, while other stakeholders do not enjoy this protection. For instance, when the host state's failure to adopt adaptive measures results in flooding of both domestic and foreign property, only foreign property owners can enjoy protection under investment treaties and can bring claims against the host state before international tribunals, while domestic property owners have to pursue remedies

in domestic courts under domestic law. This creates a fragmented and imbalanced protection between foreign investors and other stakeholders. Foreign investors enjoy a stronger regime for remedying damages resulting from climate inaction compared to other stakeholders, most of whom may be more vulnerable than foreign investors, even though these climate victims suffer the same level of harm resulting from the same misconduct in the same state. This imbalanced protection may not only cause climate injustice in the remedy stage but may also affect the host state's behavior from the outset. The host state's government may prioritize the interests of foreign investors over those of domestic people for fear that the foreign investor may bring an investment arbitration claim.

For the sake of efficiency, absolute protection of foreign investments from climate damage may conflict with the polluter-pays principle and even create moral hazard. Foreign investors have dual roles in climate change: they create carbon emissions and also suffer from climate harm. Therefore, remedying foreign investments for climate damage may violate the polluter-pays principle, which requires polluters to pay for their environmental harm. Moreover, requiring states to pay for climate inaction may externalize the climate costs that foreign investors should bear to host states and disincentivize investors from making their own climate adaptation efforts. For instance, foreign investors who invest in coastal properties and know for sure that the government is obliged to take adaptive measures and will be responsible for the climate damages caused by sea-level rise will have less incentive to undertake private adaptation efforts.

To overcome these problems, the tribunal needs to strike a balance between the host state's obligation to protect foreign investments from climate harm and the foreign investors' due diligence to mitigate and adapt to rising climate risks.

First, the tribunal should take into account the foreign investor's due diligence when examining investment treaty obligations. A foreign investor who fails to exercise due diligence for climate adaptation should bear the relevant costs resulting from such failure. Such due diligence should be conducted by the foreign investor both before and during the life of the investment.[243] In investment arbitration, tribunals have considered the due diligence of

243. HEIKE KRIEGER ET AL., DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER 279 (Oxford Univ. Press 2020).

foreign investors as a prerequisite for receiving a remedy under investment treaties. For instance, in *Plama v. Bulgaria*, regarding the foreign investor's claim that Bulgaria's tax law violated its obligations under the investment treaty, the tribunal stated that the foreign investor should have exercised due diligence in tax reduction: "it is clear to the Tribunal that the Claimant, as the investor, was responsible for doing its due diligence regarding the tax consequences of debt reduction and for taking the necessary measures to deal with them."[244]

Second, the assessment of whether the foreign investor has exercised "due" diligence should be contextual, taking into account the specific circumstances of the investment environment. For example, in *Churchill v. Indonesia*,[245] the tribunal took into account the foreign investors' lack of diligence in making the investment.[246] The tribunal noted that the foreign investors "were aware of the risks involved in investing in the coal mining industry in Indonesia" and that they "knew that investing in the coal mining sector in Indonesia entailed serious risks."[247] The tribunal further stated that "one would expect an investor aware of the risks of investing in a certain environment to be particularly diligent in investigating the circumstances of its investment."[248] Moreover, the tribunal noted that investors should "exercise a heightened degree of diligence" when investing in a risky environment.[249]

Accordingly, if the foreign investor makes an investment in a country with high climate risks or limited capacity to combat climate effects, the foreign investor should have been aware of this context at the time of investment and should exercise due diligence in the construction and operation of the investment project to mitigate climate risks. While the foreign investor may expect the host state's climate regulation to improve, such expectations should be reasonable and not overly optimistic. This was recognized in *Mamidoil v. Albania*. In this case, the foreign investor claimed that Albania violated the FPS standard by failing to enforce

244. Plama Consortium Ltd. v. Republic of Bulg., ICSID Case No. ARB/03/24, Award, ¶ 268 (Aug. 27, 2008).

245. Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indon., ICSID Case No. ARB/12/14 and 12/40, Award (Dec. 6, 2016).

246. *Id.* ¶¶ 508, 516.

247. *Id.* ¶ 517.

248. *Id.* ¶ 518.

249. *Id.* ¶ 519.

its law on fuel smuggling, adulteration, and tax evasion.[250] However, the tribunal noted that the foreign investor was aware of the existence of smuggling, fuel adulteration, and tax evasion in Albania when making its investment: "Claimant acknowledges that it was aware of this situation. It was part of the general business environment and investment conditions. Claimant decided to make its investment under these conditions of insecurity. Smuggling, fuel adulteration, and tax evasion existed prior to the investment and therefore were not specific to Claimant's investment. It is therefore not correct to allege that the problem distorted the conditions of the investment after it has been made."[251] Moreover, the tribunal stated that "[w]hile Claimant might have been entitled to expect that the general conditions of insecurity would improve over time, it was not entitled to expect that Respondent would protect its investment against the general insecurity that was inherent to the investment climate as opposed to specific instances of harassment."[252] In conclusion, the tribunal found that Albania had not breached the FPS standard.[253]

Finally, the tribunal should take into account the foreign investor's due diligence in fulfilling its own environmental protection duties when assessing investment treaty obligations. The foreign investor should be responsible for climate damage if it contributes to part or all of the climate effect. A lack of due diligence by the foreign investor can trigger a counterclaim by the host state against the foreign investor in investment arbitration. For instance, in *Perenco v. Ecuador*, foreign investors claimed that Ecuador breached its obligations under the Ecuador-France BIT and the relevant contracts related to the exploration and exploitation of two blocks in the Amazon region.[254] The tribunal found that Ecuador had breached the contracts, violated the FET clause, and expropriated foreign investments.[255] In this case, Ecuador brought two counter-

250. Mamidoil Jetoil Greek Petroleum Products Societe S.A., ICSID Case No. ARB/11/24, Award, ¶ 803 (Mar. 30, 2015).

251. *Id.* ¶ 823.

252. *Id.* ¶ 824.

253. *Id.* ¶ 829.

254. Perenco Ecuador Ltd. v. Rep. of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, ¶ 4 (Sept. 12, 2014).

255. *Id.* ¶ 713.

claims against the foreign investor, alleging that the foreign investor was liable for environmental damages in the two blocks caused by the foreign investor's oil operation.[256] Ecuador argued that the foreign investor failed to operate the two blocks "in accordance with the requisite degree of care," failing to take proper measures to prevent and repair environmental harms.[257] The tribunal found that the foreign investor breached Ecuador's environmental laws and was liable for the environmental harm it generated.[258] It is noteworthy that, in this case, the tribunal applied Ecuadorian law, including the Constitution and relevant regulatory provisions, in deciding the foreign investor's liability for the environmental damages.[259] In particular, the tribunal found that the foreign investor bears strict liability for environmental damage in accordance with the Ecuadorian Constitution's strict-liability regime for environmental harm.[260]

B. *Interpreting Investment Protection Obligations in Account of the CBDR Principle*

Does the Common But Differentiated Responsibilities (CBDR) principle affect the state's responsibility for climate inaction under international investment law? In other words, should the host state's development status be considered when deciding its responsibility for climate inaction under investment treaties? This is a complex issue. Although the CBDR is a well-established principle in international environmental law in general and climate treaties in particular, investment treaties do not differentiate the host state's responsibility based on its development status. Unless provided otherwise in investment treaties, developed and developing countries bear the same level of responsibility under investment treaties to protect foreign investments in their territories. For instance, Dolzer and Schreuer noted that lack of resources cannot be an excuse for a state's failure to take appropriate action to satisfy

256. Perenco Ecuador Ltd. v. Rep. of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, ¶ 5 (Aug. 11, 2015).

257. *Id.* ¶ 37.

258. *Id.* ¶ 611.

259. *Id.*

260. *Id.*

the FPS obligation.[261]

However, protecting foreign investments regardless of the resources and capacity of the host state might create an unfair position for developing countries. Requiring developing countries to act in the same way as developed countries regarding climate action may violate the CBDR principle. Moreover, the capacity to act is an important element to consider when deciding whether the host state's conduct is reasonable. When there is a lack of resources to compensate all victims for disaster remedies, the host state should have the discretion to prioritize remedies for more vulnerable communities compared to foreign investments. Requiring the host state to compensate foreign investors regardless of the investment environment's context would impose an undue burden on the host state, especially for developing countries, and may indirectly sacrifice the interests of the people most vulnerable to climate harm in the host state.

The paper proposes that investment tribunals interpret investment treaty obligations based on Article 31(3)(c) to take into account the CBDR principle. This requires that, in examining whether climate inaction violates investment protection obligations, the tribunal should consider the investment environment's context, particularly the host state's resources and capacity. A contextual analysis of investment obligations is consistent with investment arbitration jurisprudence. For instance, tribunals have recognized that the interpretation of the FET standard should be based on the particular case's context. In *Saluka v. Czech Republic*, the tribunal noted that the foreign investor's expectations "must rise to the level of legitimacy and reasonableness in light of the circumstances."[262] The tribunal in *Duke v. Ecuador* also stated that "[t]he assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment but also the political, socioeconomic, cultural, and historical conditions prevailing in the host state."[263]

The same contextual analysis approach can also be seen in the tribunal's examination of the FPS standard. The tribunal in *Pan-*

261. DOLZER & SCHREUER, *supra* note 142, at 162.

262. Saluka Investments B.V., UNCITRAL, Partial Award, ¶ 304 (Mar. 17, 2006).

263. Duke Energy Electroquil Partners & Electroquil S.A. v. Rep. of Ecuador, ICSID Case No. ARB/04/19, Award, ¶ 340 (Aug. 18, 2008).

techniki v. Albania, citing the work of Newcombe and Paradell, further noted that the standard of due diligence is "a modified objective standard" and that "tribunals will likely consider the state's level of development and stability as relevant circumstances in determining whether there has been due diligence."[264] Likewise, the tribunal in *Cengiz v. Libya* stated that the FPS standard, as a positive obligation, "requires the state to exercise reasonable care to prevent damage caused by third parties. Reasonableness must be measured taking into consideration the state's means and resources and the general situation of the country. This obligation of vigilance does not grant insurance against damage or a warranty that the property shall never be occupied or disturbed—it simply requires that the state apply reasonable means to protect foreign property."[265]The tribunal in *Mamidoil v. Albania* adopted the same approach, stating that "the standard of constant protection and security does not imply strict liability but rather obliges states to use due diligence to prevent harassment and injuries to investors. The measure of due diligence is conditioned by the circumstances."[266] The tribunal found that Albania did not violate the FPS standard since it had conducted "the due diligence that it was able to use under the specific circumstances" to protect foreign investments.[267]

However, the host state's lack of resources does not exempt *all* types of investment protection obligations. For example, the country's developing status may excuse the lack of an advanced alarming system for natural disasters but will not excuse a denial of justice in climate litigation. This different has been illustrated by the *Pantechniki v. Albania* tribunal. The tribunal noted that the lack of resources does not affect a state's responsibility arising from a denial of justice but does affect state responsibility under the FPS standard. The tribunal stated:

> Should a state's international responsibility bear some proportion to its resources? Should a poor country be held accountable to a minimum standard which it could attain only at great sacrifice while a rich country would have little difficulty in doing so?

264. Pantechniki S.A. Contractors & Engineers (Greece) v. Rep. of Alb., ICSID Case No. ARB/07/21, Award, ¶ 81 (Jul. 30, 2009).

265. Cengiz İnşaat Sanayi ve Ticaret A.S, ICC Case No. 21537/ZF/AYZ, Award, ¶ 406 (Nov. 7, 2018).

266. Mamidoil Jetoil Greek Petroleum Products Societe S.A., ICSID Case No. ARB/11/24, Award, ¶ 821 (Mar. 30, 2015)

267. *Id.* ¶ 822.

> No such proportionality factor has been generally accepted with respect to denial of justice. Two reasons appear salient. The first is that international responsibility does not relate to physical infrastructure; [...] What matters is rather the human factor of obedience to the rule of law. [...] The second is that a relativistic standard would be none at all. International courts or tribunals would have to make ad hoc assessments based on their evaluation of the capacity of each state at a given moment of its development. International law would thus provide no incentive for a state to improve. It would in fact operate to the opposite effect: a state which devoted more resources to its judiciary would run the risk of graduating into a more exacting category.[268]

Nonetheless, the tribunal noted that the FPS standard differs from the denial of justice standard in that a state's responsibility under the FPS standard should be proportionate to its resources. The tribunal explained:

> There is an important distinction between the two in terms of the *consciousness* of state behavior in each case. A legal system and the dispositions it generates are the products of deliberate choices and conduct developed or neglected over long periods. [...] A failure of protection and security is to the contrary likely to arise in an unpredictable instance of civic disorder which could have been readily controlled by a powerful state but which overwhelms the limited capacities of one which is poor and fragile. There is no issue of incentives or disincentives with regard to unforeseen breakdowns of public order; it seems difficult to maintain that a government incurs international responsibility for failure to plan for unprecedented trouble of unprecedented magnitude in unprecedented places. The case for an element of proportionality in applying the international standard is stronger than with respect to claims of denial of justice.[269]

Moreover, considering the host state's resources does not imply an absolute exemption from investment protection obligations. Instead, it means that the level of protection should be adjusted according to the specific circumstances of the case. In *Cengiz v. Libya*, the tribunal assessed whether Libya met the full protection and security standard for protecting foreign investments from being looted during a civil war.[270] Libya argued that, given the civil war

268. Pantechniki S.A. Contractors & Engineers (Greece), ICSID Case No. ARB/07/21, Award, ¶ 76 (Jul. 30, 2009).

269. *Id.* ¶ 77.

270. Cengiz İnşaat Sanayi ve Ticaret A.S, ICC Case No. 21537/ZF/AYZ, Award, ¶ 442 (Nov. 7, 2018).

situation, it would be unreasonable to expect the Libyan government to use scarce resources to protect projects invested in by foreign investors.[271] However, the tribunal rejected this argument.[272]

The tribunal distinguished between two types of protection by the host state: dynamic protection and static protection.[273] The tribunal acknowledged that the FPS standard does not require Libya to provide "dynamic protection" to allow the projects to continue their work since it "would have over-stretched the resources" of Libya.[274] Rather, Libya is only obliged to provide "basic static protection" to the projects "as a deterrent against theft and plunder by violent mobs."[275] The tribunal found that Libya had failed to provide such protection.[276] The tribunal also took into account the facts that Libya had the ability to provide such protection and had provided such protection to a Turkish investor.[277] The tribunal finally found that Libya's omission in protecting foreign investments breached the FPS standard.[278]

In conclusion, when deciding whether a host state's climate inaction constitutes a violation of investment treaties, tribunals should conduct a contextual analysis of investment treaty obligations. This analysis requires tribunals to consider the relevant circumstances of the host state regarding climate action. However, this does not mean that a host state with limited resources to adopt climate action will be completely exempted from investment treaty obligations. Nor does it mean that all investment obligations are affected by such incapacity. Rather, the tribunal must conduct a case-by-case analysis to determine whether and to what extent the incapacity affects the exercise of the particular investment protection obligation.

C. *Exempting the Host State's Obligations in Case of Force Majeure*

When determining state responsibility for climate inaction that

271. *Id.* ¶ 443.
272. *Id.* ¶ 444.
273. *Id.* ¶ 447.
274. *Id.*
275. *Id.* ¶ 448.
276. *Id.*
277. *Id.* ¶¶ 449-50.
278. *Id.* ¶ 452.

damages foreign investors, it is important to consider that some climate harms are beyond the control of the host state. In exceptional circumstances where the climate effect is unforeseeable or irresistible, the host state may invoke *force majeure* as a defense for its inaction in dealing with physical climate risks.

International law recognizes *force majeure* as an exception to a state's wrongful acts under international law, as provided in Article 23 of the ILC Articles on State responsibility.[279] However, establishing *force majeure* is demanding as it requires the state to prove three elements: "(a) the act in question must be brought about by an irresistible force or an unforeseen event; (b) which is beyond the control of the state concerned; and (c) which makes it materially impossible in the circumstances to perform the obligation."[280] In investment arbitration, the host state may invoke *force majeure* to justify a violation of investment treaties where it fails to protect foreign investments against physical climate risks such as natural disasters. The host state may argue that the natural disaster is unforeseeable and irresistible, which constitutes a *force majeure* that can exempt the state's obligation to adopt required action under investment treaties.

However, caution should be exercised to prevent the host state from abusing the application of *force majeure* to justify all its climate inaction. For the host state to successfully invoke *force majeure*, several conditions must be met. First, the climate harm must be "irresistible" or "unforeseeable." An "irresistible force" refers to a constraint that the state is "unable to avoid or oppose by its own means."[281] An "unforeseen event" means that "the event must have

279. Article 23 of the ILC Articles on State responsibility provides: "1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Para. 1 does not apply if:

(a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) the State has assumed the risk of that situation occurring." *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. Int'l L. Comm'n, Article 23, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

280. *Id.* at 76.

281. *Id.*

been neither foreseen nor of an easily foreseeable kind."[282] Moreover, there must be a causal link between the "irresistible force" or "unforeseen event" and the situation of material impossibility.[283] For example, if a foreign property is flooded due to extreme weather events, the foreign investor may claim that the host state has failed to adopt relevant climate adaptation measures such as building bans, which has contributed to the damages or losses suffered by the foreign investor. The host state, on the other hand, may defend that the floods should be regarded as *force majeure* that precludes its obligations under the investment treaty. In such a case, the host state must prove that the flood is "irresistible" or "unforeseeable" and has made it impossible for the state to adopt the required action to protect foreign investments.

Additionally, the host state must also prove that there is "no real possibility of escaping the effects" of the climate harm.[284] If the host state can adopt adaptive measures in advance to prevent the natural disaster that harms the foreign investor, the host state cannot rely on *force majeure* to justify its failure to act. *Force majeure* also does not cover situations caused by the neglect or default of the state, "even if the resulting injury itself was accidental and unintended."[285] Therefore, if the reason for a flood is the state's misconduct, such as a failure to protect the environment, the host state cannot invoke *force majeure* as a justification.

In sum, the host state may invoke *force majeure* to preclude the wrongfulness of climate inaction under international investment law. However, it must prove that the climate harm is "irresistible" or "unforeseeable," there is no real possibility of escaping the effects of climate harm, and the climate harm is not caused by the host state's neglect or default. Additionally, even if *force majeure* is established, the foreign investor can still seek compensation from the host state for its failure to adopt relevant action to mitigate or remedy the damage if such omission violates investment treaty obligations.

282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*

VI. CONCLUSION

With the growing impact of climate change, the increase in extreme weather events and environmental disasters poses a threat to foreign investments, necessitating host states to ensure the protection of foreign investments from environmental harm. The recent *Allard v. Barbados* case serves as an example of how international investment law can be utilized to safeguard foreign investments from environmental damage. This poses a question rarely delved into in traditional international law: whether host states are bound by international law to ensure environmental security for foreign property and what liabilities they bear for failing to safeguard foreign investments from environmental harm. By examining investment arbitration jurisprudence, the paper argues that foreign investors can initiate arbitration claims against host states to seek compensation for losses resulting from climate inaction under the FPS, FET and expropriation clauses in investment treaties. However, the outcome of these claims depends on the precise wording of treaty clauses and the interpretation methods adopted by investment tribunals. The paper proposes that future investment tribunals should take a balanced approach when interpreting a host state's responsibility for climate inaction. This approach should take into account the foreign investor's diligence in addressing climate risks, the host state's capacity and resources for enacting climate measures, and the application of *force majeure* in cases of unforeseeable or irresistible climate impacts.