International Investment Agreements and Climate Change: The Potential for Investor-State Conflicts and Possible Strategies for Minimizing It

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Editors' Summary

Much concern has been raised regarding the possibility that measures governments take to mitigate and adapt to the impacts of climate change will conflict with their obligations under the law of the World Trade Organization. What has not yet received adequate attention, but poses a potentially greater threat of government liability under international law, is the possibility that the climate change-related measures States implement will be inconsistent with their obligations under the roughly 5,600 international investment agreements (IIAs) to which they are currently party. Although States do likely face exposure to IIA-based claims for their actions on climate change, there are strategies governments can and should pursue to minimize their potential liability.

On April 7, 2009, the *Financial Times* reported that "Germany could be forced to pay more than €1bn compensation to a state-owned Swedish power company after Green politicians slapped restrictions on a new coal-fired power plant in Hamburg."[1] The power company, Vattenfall, is seeking compensation under a multilateral agreement, the Energy Charter Treaty, and is pursuing its claims through arbitration at the World Bank's International Centre for Settlement of Investment Disputes (ICSID).[2]

This investor-State dispute raises questions regarding whether and to what extent governments may be liable when their environmental regulations negatively impact investors' bottom lines (or expectations about those bottom lines). To date, however, these questions as they relate to the particular area of climate change regulation have received only minimal attention. Yet, as is suggested by Vattenfall's claim that Germany should be liable for more than one billion euros as a result of the State's environmental regulation of a coal-fired power plant, the relationship between international investment law and climate change regulation needs to be addressed, as it has potentially significant implications for, on the one hand, States' willingness and ability to implement climate change mitigation and adaptation measures[3]; and, on the other, the impacts of climate change regulations on multinational enterprises (MNEs).

Three issues are particularly ripe for discussion: (1) whether and to what extent measures taken by States to respond to challenges of climate change may be inconsistent with their obligations to foreign investors; (2) whether, if State actions are likely to violate their substantive obligations to foreign investors, there are exceptions under international law to excuse those violations; and (3) whether, if such exceptions are not available, or if their coverage is uncertain, States can and might want to identify other means of ensuring they have sufficient regulatory discretion to implement climate change mitigation and adaptation measures without unnecessarily exposing themselves to the threat of significant legal action by foreign investors. These issues are especially relevant now due to the convergence of two main phenomena: first, over roughly the past decade, foreign investors have filed an

1. Chris Bryant, *Germany Faces Action Over Power Plant*, Financial Times, Apr. 7, 2009, http://www.ft.com/cms/s/0/b4188738-2398-11de-996a-00144feabdc0.html?nclick_check=1 (last visited Oct. 7, 2009).
2. *Id.*
3. Mitigation measures are those that "reduce the sources or enhance the sinks of GHGs [greenhouse gases]. Examples include using fossil fuels more efficiently for industrial processes or electricity generation, switching to solar energy or wind power, improving the insulation of buildings, and expanding forests and other 'sinks' to remove greater amounts of carbon dioxide from the atmosphere." United Nations Framework Convention on Climate Change [UNFCCC], Glossary of Climate Change Acronyms, http://unfccc.int/essential_background/glossary/items/3666.php (last visited Oct. 1, 2009). Adaptation measures are those that are designed to adjust "natural or human systems in response to actual or expected climatic stimuli or their effects," so as to "moderate[ ] harm or exploit[ ] beneficial opportunities." *Id.*

increasing number of arbitration actions against the States hosting their investments, seeking significant damage awards for alleged harm to their investments[4]; and, second, in light of growing awareness of the threat and possible impacts of climate change, countries are more intensely exploring and enacting measures to mitigate and adapt to the challenges posed by it.

In recognition of these two phenomena, and in an attempt to increase timely dialogue about the climate change and investment law arena, this Article discusses in Part I some possible ways in which measures taken by States to reduce greenhouse gas (GHG) emissions, or to improve their ability to adapt to the challenges of climate change, may be inconsistent with their obligations and subject them to liability under international investment law. Although thorough analysis of international investment law and its complexities is outside the scope of this Article, this section does provide an overview of some key investment law principles and suggests how they might come into play as a result of climate change-related measures. Then, in Part II, this Article analyzes whether one exception contained in many international investment agreements, the "national security" exception, can be invoked by States to justify their climate change-related measures.[5] Finally, in Part III, this Article discusses other options available to States to minimize current uncertainty regarding the scope of regulatory discretion they possess under international investment agreements to respond to climate change challenges.

I. The Potential for Conflicts

A. *International Investment Agreements and Foreign Direct Investment*

International investment agreements (IIAs), which may be in the form of bilateral investment treaties (BITs), free trade agreements (FTAs), or other economic cooperation arrangements containing provisions regarding investment protection, are treaties in which signatory States explicitly affirm that they owe certain obligations to foreign investors, and that such foreign investors have rights and remedies to protect their investments. Countries enter into these IIAs in order to attract foreign investment in their territories, and to ensure their nationals have certain protections when investing abroad.[6] Nearly every country of the world has entered into at least one IIA, with the vast majority being party to several.[7] The total number of IIAs that countries have concluded now exceeds 5,600.[8]

Encouraged by the protections afforded by these agreements,[9] foreign direct investment (FDI) inflows into States—both developed and developing—throughout the world reached an all-time high of $1,833 billion in 2007.[10] By the end of that year, the global stock of FDI exceeded $15 trillion.[11] While investment flows subsequently declined in conjunction with the global economic downturn, countries are continuing to enter into IIAs in order to protect and pro-

4. *See* United Nations Conference on Trade and Development [UNCTAD], Latest Developments in Investor-State Dispute Settlement: IIA Monitor No. 1, at 2, U.N. Doc. UNCTAD/WEB/DIAE/IA/2009/6/Rev1 (2009) (discussing trends in the number of new cases filed) [hereinafter UNCTAD, Latest Developments 2009]; Occasional Note, UNCTAD, International Investment Disputes on the Rise 1, U.N. Doc. UNCTAD/WEB/ITE/IIT/2004/2 (Nov. 29, 2004) (discussing the rise in investor-State arbitrations); Gus van Harten, Investment Treaty Arbitration and Public Law 32 (2007) (stating that the "rapid proliferation [of] investment treaties fuelled a burst of claims" starting after 1996 in particular).

5. Although this Article focuses on the national security exception, that particular provision is not the only legal basis on which countries may rely to avoid liability for measures that are allegedly inconsistent with their obligations under international investment law. Provisions in agreements such as the Kyoto Protocol (or other treaties entered into pursuant to the UNFCCC) may, for example, affect the scope and interpretation of governments' obligations under international investment law by narrowing the substance of those obligations, and may enable countries to avoid having to rely on any exceptions to excuse them from liability for climate change-related measures. IIAs may also afford other exceptions respondent countries could invoke, such as exceptions allowing countries to take measures aimed at environmental protection or promotion of public health and safety. *See* UNCTAD, The Protection of National Security in IIAs 73-75 (2009) (discussing language used in various IIAs including a BIT between Hungary and the Russian Federation allowing measures "necessary for . . . protection of the environment," and a bilateral investment treaty (BIT) between Japan and the Republic of Korea allowing the contracting parties to "take any measure necessary to protect human, animal or plant life or health"). This Article, however, focuses on the national security exception because it is increasingly used in IIAs, and because, even where absent from the text of the governing IIA, countries may nevertheless invoke a national security defense by citing to customary international law. *See id*. at 34-37, 121 (explaining that "even in the absence of any national security exception in the IIA, the host country may nevertheless be able to justify its measure under the rules of customary international law"). *See also infra* Section II.B.

6. *See, e.g.*, The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows (Karl P. Sauvant & Lisa E. Sachs eds. 2009) [hereinafter Effect of Treaties]; U.S. Model Bilateral Investment Treaty, Preamble (2004) [hereinafter U.S. Model BIT], *available at* http://www.state.gov/documents/organization/38710.pdf ("*Desiring* to promote greater economic cooperation between [the Parties] with respect to investment by nationals and enterprises of one Party in the territory of the other Party; [and] *Recognizing* that agreement to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties.") (emphasis added); Agreement Between the Government of Canada and the Government of the Republic of Argentina *for the Promotion and Protection of Investments*, Arg.-Can., Nov. 5, 1991 (emphasis added).

7. UNCTAD, International Investment Rule-making: Stocktaking, Challenges, and the Way Forward 6 (2008). *See also* UNCTAD, Recent Developments in International Investment Agreements (2007-June 2008): IIA Monitor No. 2, at 2, U.N. Doc. UNCTAD/WEB/DIAE/IA/2008/1 (2008) (stating that at the end of 2007, 179 countries had entered into BITs); UNCTAD, *World Investment Report 2008: Transnational Corporations and the Infrastructure Challenge*, at xvii, 14-16 (2008) (stating that as of the end of 2007, there were 2,608 BITs and an additional 254 FTAs and economic cooperation arrangements containing provisions regarding investment protection) [hereinafter *World Investment Report 2008*].

8. UNCTAD, Div. on Inv. & Enter., *Investment Policy Developments in G-20 Countries* 7, U.N. Doc. UNCTAD/WEB/DIAE/IA/2009/9 (Aug. 7, 2009).

9. *See* UNCTAD, International Investment Rulemaking 39. (noting empirical studies had shown that IIAs can help attract investment, yet also noting that the presence of such agreements was only one factor shaping the investment climate in host countries, and that, depending on other relevant factors and characteristics of host countries, whether or not it was party to any IIAs could have varying levels of significance). *See also* Effect of Treaties, *supra* note 6 (containing various articles and perspectives regarding the impacts IIAs have on attracting FDI).

10. *World Investment Report 2008*, *supra* note 7, at xv.

11. *Id.* at xvi.

mote international investment, and to prevent the financial crisis from spawning a "retreat into protectionism."[12]

The international transfers of capital encouraged and protected by IIAs have significant implications for GHG emissions and climate change. Promoting FDI in clean technologies, for example, is seen by many governments and researchers as a crucial aspect of the strategy for reducing GHG emissions and helping developing countries follow a low-carbon development pathway.[13] A vast number of public and private entities are proposing strategies for increasing the amount of foreign investment in green technology and adaptation measures in order to bridge the current, highly problematic funding gap between the amount of money estimated to be necessary to meet mitigation and adaptation challenges and the amount of money that governments have given and are likely to contribute to those efforts.

Yet, just as it can be part of the climate change mitigation solution, FDI can also be a part of the problem. Through the projects it finances, for example, FDI has contributed to GHG emissions: MNEs emit GHGs when they manufacture industrial products, grow and harvest agricultural goods, ship raw materials and intermediate products to manufacturing facilities, and transport final products to markets. Furthermore, MNEs investing in services and infrastructure affect GHG emissions when undertaking such activities as designing and operating energy projects, waste treatment facilities, commercial properties, and transportation networks.

Given the GHG-emitting activities of MNEs, regulations aimed at mitigating GHG emissions are likely to affect many MNEs' foreign investments. If, for example, a government enacts regulations requiring all fossil fuel-fired power plants to employ carbon capture and storage technology, an entity involved in developing a power plant subject to the new regulations may face increased costs, and may even find that the investment is no longer economically viable in light of the technology available to it. Similarly, if a government imposes strict energy efficiency requirements or emissions standards on certain energy-intensive industries, those new rules might harm the regulated entities' profitability and competitiveness. Adaptation measures may also raise the same issues: if a government were to impose land use regulations requiring seaside hotels to be set back a certain distance from vulnerable coastlines,[14] or to decide to condition final regulatory approval of major infrastructure projects on performance of "adaptation assessments,"[15] such measures could dampen the attractiveness or significantly increase the costs of investors' investments.

When the government's climate change-related measure causes economic harm to its own nationals, the ability of those injured domestic investors to seek compensation from the government will generally be limited. The doctrine of sovereign immunity in particular erects a high barrier shielding the government from liability for such actions.[16] And while certain legal principles—such as the notion that property owners in the United States should be paid compensation for "regulatory takings"—may provide a possible avenue of recovery for investors negatively impacted by government regulations, the legal threshold for establishing government liability on such theories generally makes compensation due in only exceptional and egregious cases.[17]

In contrast, *foreign* investors protected by IIAs often have greater legal rights to challenge the regulatory actions of governments hosting their investments. Significantly, IIAs grant foreign investors the right to directly challenge host government actions and to seek compensation from host governments through binding investor-State arbitration.[18] With the growth in the number of IIAs providing for such private rights of action there has, not surprisingly, also been a rise in the number of arbitration actions foreign investors have brought against host States.[19] During the three decades prior to 1996, for example, one key investment arbitration facility, ICSID, had registered only a total of 35 investor-State claims[20]; yet between 1996 and 2005, ICSID registered 166 such claims.[21] And as of 2008, there were 318 known[22]

12. *See* UNCTAD, *supra* note 8, at 2 (discussing an Apr. 2, 2009 pledge by the Group of Twenty (G-20) members).
13. The literature on this subject is extensive. Much of it is due to analysis of ways to utilize the Clean Development Mechanism defined under the Kyoto Protocol. *See, e.g.*, Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 12, Dec. 10, 1997, 37 I.L.M. 22 (defining the Clean Development Mechanism, through which private parties can invest in projects in developing countries in order to help those reduce their GHG emissions or avoid future emissions and, in turn, generate emissions reductions credits).
14. *See* Occasional Note, *supra* note 4, at 3 (noting that investor-State arbitrations have been brought in response to government rezoning actions).
15. "Adaptation assessments" would be similar to and could be conducted as part of environmental impact assessments. They would require developers of certain new projects, such as long-lived infrastructure projects, to assess the projects' vulnerability to and viability in the face of the effects of climate change.
16. *See, e.g.*, Ronald Mok, *Expropriation Claims in United States Courts: The Act of State Doctrine, the Sovereign Immunity Doctrine, and the Foreign Sovereign Immunities Act. A Roadmap for the Expropriated Victim*, 8 Pace Int'l L. Rev. 199 (1996).
17. *See, e.g.,* Lucas v. So. Carolina Coastal Council, 505 U.S. 1003, 1018, 22 ELR 21104 (1992) (noting that only in "relatively rare situations [has] the government deprived a landowner of all economically beneficial uses").
18. The U.S. 2004 Model BIT, for example, provides that an investor "may submit to arbitration" a claim that the host state breached its obligations under the BIT or other investment agreement and that, as a result of the breach, the investor suffered damages. U.S. Model BIT, *supra* note 6, art. 24. It further provides that if the arbitral tribunal finds in favor of the investor, it may require the host government to pay monetary damages (including any applicable interest), provide restitution of property, and pay costs and attorneys fees. *Id.* art. 34.
19. *See supra* note 3 and accompanying text.
20. Van Harten, *supra* note 4, at 30.
21. *Id.*
22. These numbers underrepresent the total number of investor-State arbitration disputes that have been initiated because the ICSID facility is the only facility that maintains a publicly available registry of claims. ICSID, Administrative and Financial Regulations, Regs. 22 & 23 (2006) (requiring publication of registered claims). *See also* Center for International Environmental Law [CIEL] & International Institute for Sustainable Development [IISD], Revising the UNCITRAL Arbitration Rules to Address State Arbitrations (2007), *available at* http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration.pdf (discussing policy concerns arising out of the secrecy surrounding investor-State arbitration under UNCITRAL rules and suggesting reforms). Other facilities, such as the United Nations Commission on International Trade Law (UNCITRAL) arbitration facility, maintain the confidentiality of investor-State claims, and do not require disclosure of disputes or the parties involved. *See* CIEL & IISD, *supra*, at 8-10 (noting that UNCITRAL's rules do not specifically bar disclosure of information stating what claims have been filed, nor do they prohibit "documents or information supplied to the arbitral tribunal" by the parties from being made publicly available, but there likewise is no policy or procedure in place to provide the public with access to that information). Rules of confidentiality in ICSID and UN-

IIA-based investor-State disputes that had been initiated by investors against 78 different host States—17 developed, 48 developing, and 13 with economies in transition.[23]

These trends are predicted to continue, with the current number of disputes likely representing "just the tip of the iceberg."[24] The various factors underlying this projection include the general growth in international investment activity by MNEs, the rise in the number of IIAs, the trend in IIAs to cover increasingly broad types of investments, and investors' increasing awareness of the possibility of large damage awards (or, similarly, the possibility to use the threat of large awards in order to induce settlement payments).[25] With respect to that last factor in particular, investors' rates of success in the investor-State arbitrations they initiate are not negligible, and potential damages awards significant: of the 119 publicly available decisions that had been rendered in investor-State arbitrations as of the end of 2007, investors had prevailed in or obtained settlements in 65%.[26] In 2007 alone, of the 10 publicly available decisions on the merits, investors prevailed in 7.[27] And, based again on only the information that is publicly available, these decisions have cumulatively ordered States to pay investors $2.8 billion.[28] While this amount represents just a fraction of what the investors had claimed,[29] it may be that investors are filing particularly inflated claims for damages on the reasoning that (1) there is no penalty or disincentive for doing so,[30] and (2) the high claims will induce governments to settle.

Combining these factors—the growing number of IIAs, the great number of States who are parties to those agreements, the vast financial flows and varied types of investments covered by them, foreign investors' increasing submission of claims against host States to arbitration, and the possibility of inducing settlements and/or obtaining significant damage awards—with the likelihood that climate change regulations will impact foreign investors, makes it likely that the future will see an increasing number of investor-State arbitrations specifically involving challenges to government actions aimed at implementing climate change mitigation and adaptation policies.[31] In turn, this likelihood raises significant concerns about the extent and scope of host State liability to foreign investors arising out of climate change regulations, and whether and to what extent the threat of such liability (and/or the expense of defending against possible investor suits) will prevent governments from taking necessary steps to reduce GHG emissions or implement adaptation policies. To better assess the existence and extent of possible conflicts between host States' climate change measures and obligations under IIAs, this next section examines some key provisions of IIAs that investors may rely on to support their claims.

B. Foreign Investors' Rights and Host Countries' Obligations Under IIAs

IIAs often contain several provisions that investors could potentially invoke to challenge host States' climate change-related measures. The most significant will likely be those provisions: (1) barring host States from expropriating investors' property without paying compensation; (2) requiring host States to accord investors "fair and equitable treatment;" (3) restricting host States' discretion to modify their regulatory frameworks; and (4) elevating breaches of contracts and other promises or undertakings to violations of international law. Each of those provisions, and the extent to which climate change regulations may be inconsistent with them, is discussed briefly below.

One caveat to the following discussion is that due to factors such as the lack of *stare decisis*, confidentiality of proceedings and decisions, absence of an appeals mechanism to resolve inconsistent rulings, and the many variations in phrasing IIAs use to express States' rights and obligations,[32]

CITRAL generally require confidentiality of pleadings submitted, and issues raised in the disputes, unless both of the disputing parties agree otherwise. *See* UNCITRAL Rules art. 32(5) (providing that "[t]he award may be made public only with the consent of both parties"); *id.* art. 25(4) (stating that "[h]earings shall be held in camera unless the parties agree otherwise"). *See also* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 48(5), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (prohibiting publication of awards without the parties' consent). Rules and practices under some IIAs, such as the North American Free Trade Agreement (NAFTA), modify these rules and traditions to some extent, and allow for a greater degree of transparency. *See* Loukas A. Mistelis, *Confidentiality and Third Party Participation:* UPS v. Canada *and* Methanex Corp. v. United States, *in* International Investment Law and Arbitration: Leading Cases From the ICSID, NAFTA, Bilateral Treaties and Customary International Law 169, 179-87 (Todd Weiler ed. 2005).

23. UNCTAD, Latest Developments 2009, *supra* note 4, at 2. Another study of ICSID investor-State disputes found that, of the 75 cases for which an award on jurisdiction had been rendered by March 31, 2006, 76% had been brought against lower middle- or upper middle-income countries. *See* van Harten, *supra* note 4, at 32.
24. Van Harten, *supra* note 4, at 32 (quoting C. McLachlan, *Commentary: The Broader Context*, 18 Arb. Int'l 339, 343 (2002)).
25. *See* Occasional Note, *supra* note 4, at 4 (stating that "well-publicized claims" may be contributing to the growing tendency of foreign investors to litigate claims). *See also* The Oxford Handbook of International Investment Law 19-20 (Peter Muchlinski et al. eds. 2008).
26. UNCTAD, Latest Developments 2009, *supra* note 4, at 3. There were 119 publicly available decisions as of the end of 2007; an additional 17 cases were decided, but the decisions were not made public. Of the 119, investors prevailed in 40, obtained settlements in 37, and lost in 42. It is important to note that not all of these decisions represent awards on the merits. Some involved other matters such as jurisdictional issues and claims for annulment. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 9.
30. In contrast to the U.S. federal court system, there is no "Rule 11" or other mechanism in investment facilities requiring parties or their attorneys to certify that "pleading[s], written motion[s] or other paper[s] [are] not being presented for any improper purpose, such as to harass," "are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law," and that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b). The U.S. *Federal Rules of Civil Procedure* also provide for sanctions for violations of Rule 11(b). Fed. R. Civ. P. 11(c). *See also* Occasional Note, *supra* note 4, at 3 (stating that "there are no penalties for claimants filing particularly high claims").
31. *See* Occasional Note, *supra* note 4, at 4 (noting that "more investment may lead to more disputes—and more occasions for disputes combined with more IIAs are likely to lead to more cases").
32. States may use different language in the various IIAs to which they are party in order to express similar obligations. As a result, tribunals must often determine whether these differences in language substantively affect the scope of countries' obligations. Norway, for example, is party to an IIA with Lithuania that obligates each State party to accord investors from the other State party "equitable and reasonable" treatment. Yet Norway is also party to other IIAs where the stated obligation is to provide "fair and equitable" treatment to cov-

there is much uncertainty regarding the interpretation of and practical requirements imposed by these standards regarding the treatment of foreign investors.[33] Thus, while some trends can be highlighted, the meaning and proper application of these host State obligations is far from being a settled area of law.

1. Expropriation

One common obligation States assume in IIAs is the commitment not to expropriate or otherwise take investors' property unless the expropriation is (1) done for a public purpose, (2) nondiscriminatory, (3) accomplished in accordance with due process of law, and (4) accompanied by payment of compensation.[34] IIAs, therefore, do not bar host States from expropriating investors' property; rather, they set forth the conditions under which expropriation will be lawful, making clear that States taking investors' property must comply with certain requirements, including the obligation to pay compensation.[35] Because a duty-to-pay compensation accompanies acts of expropriation, the meaning of "expropriation" under international investment law has significant ramifications for host States' fiscs.

A general definition of an expropriation is an action (or, in some cases, omission) by the government, taken in its sovereign capacity,[36] that unreasonably interferes with or prevents the enjoyment of property rights.[37] IIAs (and, in the absence of a specific definition in the agreement, arbitral tribunals) also define expropriation broadly to cover direct and indirect takings, and measures having the effect of, or being tantamount to, takings.[38] The taking need not be the result of any one particular act, but may be the cumulative effect of a series of measures "slow[ly] and incremental[ly] encroach[ing] on one or more of the ownership rights of a foreign investor."[39] Further, the dominant view expressed by tribunals charged with determining whether an expropriation has occurred is that an investor alleging an expropriation need not establish that the expropriation was intentional or was effected for illegitimate motives.[40] Courts and tribunals evaluating investors' takings claims have found a wide range of actions and inactions to constitute expropriations, including direct physical takings of property; disproportionate tax increases; interference with management of an investment through the government's arrest or deportation of key personnel, or the government's appointment of managers; and revocation or denial of necessary permits or licenses.[41]

While these interpretations seem to bring much within the umbrella of expropriation, there are limits on the concept that make it difficult for investors to actually succeed on claims alleging that the State illegally indirectly expropriated their property. For one, the threshold for liability on an expropriation claim is high: to prevail, investors need to meet the difficult burden of establishing that the allegedly offending measures caused the "neutralization, radical deprivation, irretrievable loss, [or] inability to use, enjoy or dispose of the property."[42] Measures likely do not rise to such threshold when the investment is not rendered "worthless" by State action[43]; when the investor retains control of the investment and directs its day-to-day operations; and when the State does not detain the "officers or employees of the investment, . . . supervise the work of officers or employees of the Investment, . . . take any of the proceeds of company sales (apart from taxation), . . . interfere with management or shareholders' activities, . . . prevent the Investment from paying dividends to its shareholders, . . . interfere with the appointment of directors or management [or] take any other

ered foreign investors. *See* Parkerings v. Lithuania, ICSID Case No. ARB/05/8, Award, ¶¶ 271-279 (Sept. 11, 2007). In a case against Lithuania, a Norwegian claimant argued that the "equitable and reasonable" standard in the Norway-Lithuania BIT was different from and stricter than the "fair and equitable" standard. *Id.* ¶¶ 272-273. The tribunal rejected the claimant's assertion, explaining that the investor had failed to provide "any evidence which could demonstrate that, when signing the BIT, the Republic of Lithuania and the Kingdom of Norway intended to give a different protection to their investors than the protection granted by the 'fair and equitable' standard." *Id.* ¶ 277.

33. *See, e.g.*, L. Yves Fortier, *Caveat Investor: The Meaning of "Expropriation" and the Protection Afforded Investors Under NAFTA*, News From ICSID (ICSID, Washington, D.C.), Summer 2003, at 1, 10-13 (noting the uncertainty arising from different applications of the expropriation standard); UNCTAD, Latest Developments 2009, *supra* note 4, at 12 (noting divergent interpretations of the obligations under IIAs).
34. *See, e.g.*, North American Free Trade Agreement art. 1110(1), Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 605, 641 (1993) (prohibiting nationalization or expropriation of property except "for a public purpose," "on a non-discriminatory basis," "in accordance with due process of law," and on payment of compensation equal to the fair market value of the investment immediately before the expropriation) [hereinafter NAFTA]; Noah Rubins & N. Stephan Kinsella, International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide (2005), at 200-12 (discussing expropriation claims under international investment law).
35. Rubins & Kinsella, *supra* note 34, at 200-12.
36. *See* Waste Management, Inc. v. Mexico, ICSID Case No. ARB(AF)/00/3, Award, ¶ 174 (Apr. 30 2004) ("The mere non-performance of a contractual obligation is not to be equated with a taking of property, or (unless accompanied by other elements) is it tantamount to expropriation."); Azurix Corp. v. Argentina, ICSID Case No. ARB/01/12, Award, ¶ 315 (July 14, 2006) ("Whether one or a series of breaches can be considered to be measures tantamount to an expropriation will depend on whether the State or its instrumentality has breached the contract in exercise of its sovereign authority, or as a party to a contract.").
37. *See* August Reinisch, *Expropriation, in* The Oxford Handbook of International Investment Law, *supra* note 25, at 407, 422.
38. *See id.* at 428. Even if an IIA does not contain a specific definition stating that "expropriation" includes direct and indirect takings, arbitral tribunals will assign the term that meaning based on the understanding that "the very concept of expropriation includes indirect takings and measures equal to a taking in their effect." Rubins & Kinsella, *supra* note 34, at 202.
39. UNCTAD, Taking of Property 11, UNCTAD/ITE/IIT/15 (2000).
40. *See* Rubins & Kinsella, *supra* note 34, at 205-11. *See also* Nat'l Grid v. Argentina, UNCITRAL, Award, ¶ 147 (Nov. 3, 2008) (holding that under the U.S.-Argentine BIT, "[i]t is clear . . . that whether the party concerned had the intent to expropriate or to nationalize in taking measures equivalent to either is not a requirement. Article 5(1) [regarding expropriations] is concerned only measures having an *effect* equivalent to nationalization or expropriation"). For an expression of the minority view, i.e., that it is appropriate when determining whether there has been an expropriation to look beyond the effects of the measure to the validity of its aims, see *Tecnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), *reprinted in* 43 I.L.M. 133 (2004), *cited in* Rubins & Kinsella, *supra* note 34, at 210 (examining whether the State's actions were "proportional to the public interest presumably protected" by them and "the protection legally granted to investments").
41. *See* Reinisch, *supra* note 37, at 451-56.
42. *Nat'l Grid*, *supra* note 40, ¶ 149.
43. *Id.* ¶ 154.

actions ousting the Investor from full ownership and control of the Investment."[44]

Moreover, some (though a limited number of) IIAs contain "public safety" or "police powers" exceptions that protect States' regulatory discretion from expropriations charges.[45] The U.S. 2004 Model BIT, for example, states that "[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[46] And even where the applicable IIA lacks such explicit "police powers" exceptions, arbitral tribunals have nevertheless held that "non-discriminatory regulation[s] [enacted] for a public purpose" will generally "not [be] deemed expropriatory and compensable."[47]

Statistics regarding investors' success rates evidence the difficulty of establishing that their property has been expropriated. Of the seven investor-State decisions rendered in 2008 in which the arbitral tribunals addressed claims of expropriation, the tribunal found in favor of the investor/claimant in only two, and only awarded damages in one.[48] Nevertheless, while States apparently frequently prevail on this issue, their victories may come at a high price, as the legal fees and costs States incur in defending their actions (or inactions) are often significant.

With respect to the climate change regulation context, given the relatively low rates of success investors have in their expropriation claims and apparent deference toward measures aimed at promoting public welfare and environmental protection, it may be that States' good faith, nondiscriminatory mitigation and adaptation measures will generally be upheld against investor allegations that they constitute compensable takings. Investors' success on the merits might, however, not be necessary for this cause of action under an IIA to chill or narrow the scope of States' efforts to enact climate change legislation. If, for example, a State decides to cease providing subsidies to an old coal-fired power plant and, instead, to provide additional subsidies or other incentives to a new competitor who produces wind power; and, as a result of the State's change in policies, the coal-fired plant can no longer generate a profit, a foreign investor with a stake in the coal-fired plant may initiate an action against the State alleging indirect expropriation. The State, in turn, would either be forced to incur the expense of defending the measure and risk losing at the end of the process, or it could repeal the allegedly offending measure in order to avoid arbitration and the possibility of liability. Because respondent States frequently must pay millions of dollars in legal fees and costs in connection with defending a single arbitration action and paying the arbitrators' fees, the incentive to abandon the measure might be high.[49]

2. Fair and Equitable Treatment

Another obligation host States assume in IIAs that could impact climate change legislation is the duty to accord covered foreign investors and investments fair and equitable treatment (FET). As compared to the standard for expropriation, the threshold for finding a host State liable for violating the FET requirement seems to be relatively low.

Although generalizations about the meaning of the FET standard should be accepted with caution due to variations in phrasing countries use in IIAs to set forth the standard, and different interpretations tribunals and scholars have given the FET obligation,[50] it may be said that the FET standard requires a State's actions toward its foreign investors to be transparent, in good faith, consistent with due process, and not arbitrary, unjust, or unfair.[51] The State must not violate the "investor's legitimate expectations" regarding the applicable legal and regulatory framework and the State's perfor-

44. Pope & Talbot, Inc. (U.S.) v. Gov't of Canada, NAFTA/UNCITRAL, Interim Award, ¶ 102 (June 26, 2000).

45. Rubins & Kinsella, *supra* note 34, at 204.

46. U.S. Model BIT, *supra* note 6, Annex B.4(b). *See also* Canadian Model Bilateral Investment Treaty, Annex B.13(1)(c) (2004):

> Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.

47. Methanex Corp. v. United States, NAFTA/UNCITRAL, Final Award pt. IV, ch. D, ¶ 7 (Aug. 3, 2005), *reprinted in part* 44 I.L.M. 1345, 1456 (2005). *See also* Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, ¶ 262 (Mar. 17 2006), *available at* http://www.pca-cpa.org/upload/files/SAL-CZ%20Partial%20Award%20170306.pdf ("[T]he principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today."). *See also* Reinisch, *supra* note 37, at 433 ("In principle there is widespread consensus that regulatory measures pursued for legitimate objectives cannot be regarded as indirect expropriation."). *But see* Azurix Corp. v. Argentina, ICSID Case No. ARB/01/12, Award (July 14, 2006); *Tecnicas Medioambientales*, *supra* note 40; Compania del Desarrollo de Santa Elena, S.A. v. Costa Rica, Award, 5 ICSID Reports 153 (Feb. 17, 2000). Where the line is between those legitimate measures enacted pursuant to police powers and those effecting a taking is a question without any clear answer, but which tribunals attempt to identify based on the facts of the particular cases before them. *See generally* UNCTAD, Latest Developments 2009, *supra* note 4, at 8 (discussing cases reflecting "the difficulty of drawing the line between indirect expropriation and legitimate regulatory measures").

48. UNCTAD, Latest Developments 2009, *supra* note 4, at 8. The two decisions in which tribunals found in favor of the claimants on the expropriation issue were *Rumeli Telekom AS & Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award (July 29, 2008), and *Biwater Gauff Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award (July 18, 2008). The award of damages was in the *Rumeli* case.

49. *See* UNCTAD, Latest Developments 2009, *supra* note 4, at 11 (discussing awards of fees and costs and providing examples of the magnitude of the dollar amounts involved, including a charge of more than $1 million for arbitrators' fees and costs alone incurred in connection with an action against Argentina, Chile's expenditure of $4.3 million for legal fees and costs incurred in defending an action against it, and Bulgaria's $13.2 million legal defense costs).

50. Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 121 (2008). *See also Biwater Gauff*, *supra* note 48, Award, ¶¶ 593-596 (referring to the wide latitude tribunals have to interpret the FET in each particular case); Glamis Gold v. United States, NAFTA/ICSID, Award (May 16, 2009) ¶¶ 19-21, 600, 606-612 (explaining how the content of the FET standard differs depending on whether its meaning should be derived from the text of the treaty alone or based on customary international law, and proceeding to interpret the FET provision in the NAFTA as being equivalent to the customary international law standard).

51. *See Rumeli Telekom*, *supra* note 48, ¶ 609. *See also* UNCTAD, Latest Developments 2009, *supra* note 4, at 6.

mance of contractual obligations.[52] No bad-faith showing is required to establish a violation.[53]

The types of government actions that have been found to violate their FET obligations are broad and varied: In the 2008 decision *Biwater Gauff v. Tanzania*,[54] for example, the tribunal held that the government violated its FET obligations toward the investor, City Water, when the government publicly criticized the investor's poor performance in providing water and sewerage services in the city of Dar es Salaam, and also publicly announced that it had terminated City Water's contracts to provide those services. According to the tribunal, "despite [the investor's] poor record, and despite all the public criticisms [of City Water's performance], City Water still had a right to the proper and unhindered performance of the contractual termination process," which the government undermined by making statements that "inflamed the situation . . . and polarized public opinion still further." In another decision issued in 2008, *National Grid v. Argentina*,[55] the tribunal found that the government breached the FET standard by failing to conduct "meaningful negotiations" with the investor and by requiring the investor to renounce certain legal remedies it may have had as a condition to pursing contractual renegotiations.

Due to the arguable breadth of obligations under the FET standard,[56] FET claims are "the most relied upon and successful basis for a treaty claim."[57] Of the 13 known decisions issued in 2008, each involved an FET claim; and investors prevailed on the majority of them.[58] In a number of cases where tribunals declined to find the host States' actions constituted expropriations, they did find that the States violated their FET obligations.

The FET obligation will thus likely be an important legal basis for investors seeking redress for negative impacts of climate change measures on their investments. Where their expropriation claims fail, the FET requirement may provide a basis for relief. As a result, any comfort States gain by the high threshold for takings liability may be nullified by their actual or perceived exposure to FET liability. Concerns about the likelihood of drawing and having to defend against FET-based legal challenges may consequently slow States' action to pursue important mitigation and adaptation strategies; and investors' claims based on this obligation may put significant strain on States' resources.

3. Stabilization Clauses

Stabilization clauses, like FET provisions, provide protection for investors' expectations, but do so at an enhanced and more explicit level.[59] The provisions vary widely in form and scope, but can be grouped into three broad categories: (1) those that "freeze the law of the host state with respect to the investment project over the life of the project"; (2) those that "require the investor comply with new laws but also require that the investor be compensated for the cost of complying with them"; and (3) those that "require the state to restore the investor to the same position it had prior to changes in law, including, by exemptions from new laws."[60]

Stabilization clauses are thus a risk-management device designed to ensure investors that the legal and regulatory frameworks governing their investments will not change or that, if they do change, the investor will be compensated for any resulting harm.[61] These clauses are defended as being important for incentivizing foreigners to invest in especially large and long-term projects, such as development of energy infrastructure,[62] but are vulnerable to criticism on the grounds that they chill or prevent implementation of crucial improvements in environmental and social legislation, and achievement of progressive policy goals.[63] One study by the International Finance Corporation, for example, found that some stabilization clauses will exempt foreign investors from, or will require the host State to compensate investors for, having to comply with, those changes in the law that are "non-discriminatory, bona fide, and even foreseeable."[64]

In light of the strong protections these provisions can accord investors, the possibility that new climate change leg-

52. *See, e.g.*, Duke Energy v. Ecuador, ICSID Case No. ARB/04/19, Award (Aug. 18, 2008). *See also Glamis*, ¶¶ 620-621 ("Merely not living up to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA. Instead, Article 1105(1) requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations.").
53. Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007); Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award (Feb. 6, 2007); *Glamis*, *supra* note 50, ¶¶ 22-616.
54. *Biwater Gauff*, *supra* note 48, ¶ 627.
55. Nat'l Grid v. Argentina, UNCITRAL, Award, ¶¶ 179-180 (Nov. 3, 2008).
56. UNCTAD, Latest Developments 2009, *supra* note 4, at 6 (noting the "breadth and scope of the standard"). *See also Biwater Gauff*, *supra* note 48 (finding an obligation of the FET standard when the State did not follow "the proper and unhindered . . . contractual termination process" to which the investor was purportedly entitled). *But see Glamis*, *supra* note 50, ¶ 22 (arguably setting forth a narrower interpretation of the FET standard, one which is shown by a "gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons").
57. UNCTAD, Latest Developments 2009, *supra* note 4, at 7.
58. *Id.* (citing cases).
59. *See generally* Int'l Fin. Corp. [IFC], Stabilization Clauses and Human Rights: A Research Project Conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights (2008). Many stabilization clauses are contained not in the IIA itself, but are set forth in contracts between the investor and the host State. *Id.* at 4. If the host State were to breach its obligations under a contractual stabilization clause, the investor might still be able to raise that breach as a violation of the IIA by saying that it constitutes a breach of the FET obligation or an umbrella provision. *See id.* at x-xi. *See also infra* Section II.B.4. (discussing umbrella clauses).
60. IFC, *supra* note 59, at vii, 5-9.
61. *See generally id.*
62. *See id.* at 4-5 (recounting some of the defenses of stabilization clauses). *See also* Paul E. Comeaux & N. Stephan Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA and OPIC Investment Insurance*, 15 N.Y.L. Sch. J. Int'l & Comp. L. 1 (1994) (describing stabilization clauses as a means for investors to reduce risks to their investments).
63. IFC, *supra* note 59, at vii-viii, x, 10-11, noting that
> [e]vidence supports the hypothesis that some stabilization clauses can be used to limit a state's action to implement new social and environmental legislation to long-term investments. The data show that the text of many clauses applies to social and environmental legislation, so that investors are able to pursue exemptions or compensation informally and formally.

64. *Id.* at 18.

islation will conflict with States' obligations under them is consequently high.[65]

4. Umbrella Clauses

Numerous IIAs include provisions requiring each State party to "observe any other obligation it has assumed with regard to investments by nationals or companies of the other Contracting Party in its territory."[66] These clauses, often referred to as "umbrella clauses," have been subject to two general lines of interpretation, each with different implications for the extent of host States' liability to foreign investors.[67] According to the broad reading of umbrella clauses, such provisions essentially elevate States' commercial, contractual, or other similar undertakings to obligations under international law. When an umbrella clause is present in a BIT, for example, "any violation of a contract thus covered [by the BIT], becomes a violation of [that] BIT."[68] Consequently, the allegedly injured investor can invoke the BIT's dispute settlement provisions (including those subjecting disputes to mandatory binding arbitration and requiring payment of damages) in order to seek compensation for even simple breaches of contract.

The narrow view of umbrella clauses, on the other hand, holds that such provisions do not elevate "ordinary commercial breaches of a contract" to the status of treaty breaches.[69] Consequently, when the host State's breach of a contract with an investor is of a "commercial nature" akin to the "conduct of an ordinary contract party," the presence of an umbrella clause in a BIT will not render that breach actionable under the BIT.[70] Only when the host State's breach "involves a kind of conduct that only a sovereign State function or power could effect,"[71] such as the enactment of "major legal and regulatory changes," will the umbrella clause cover the breach and transform it into a violation of international law.[72]

Under either interpretation, however, it is foreseeable that host States' mitigation and adaptation actions will draw challenges from investors, because such measures will conceivably consist of significant regulatory changes modifying prior arrangements between investors and States, and will likely be enacted by States in their sovereign capacities.

II. The Applicability of "National Security" Exceptions

If a foreign investor brings an IIA-based claim against a host State in response to the State's enactment of climate change-related measures, it is arguable that the investor will succeed in convincing the arbitral tribunal that the State's action was inconsistent with one or more of its obligations to the investor. Even if a violation is found, however, it is not necessarily the case that the State will be held liable. This is because IIAs generally set forth exceptions permitting host States to deviate from their obligations under specific circumstances. One such exception that could cover host States' climate-change-related measures is the so-called national security or essential security exception (referred to herein as the national security exception).[73] Moreover, even if the exception is absent from the text of the IIA itself, customary international law similarly allows States to take measures necessary to protect their national security interests, provided that certain conditions are met.

In order to assess whether and to what extent this exception will be able to cover States' climate-change-related measures, this section first briefly examines some of the links between climate change and threats to national and international security. It then discusses how international arbitration tribunals have interpreted the national security exception, and discusses the possible applicability of that provision in the climate change context.

A. *Links Between Climate Change and National Security*

The implications of climate change for national security issues are numerous and diverse, with varying levels of directness. In some cases of security concern, climate change "may be a proximate and powerful cause; in others, it may only be a minor and distant player in a tangled story that involves

65. *See also supra* note 59 (noting that a stabilization clause need not necessarily be incorporated in the IIA in order to support a claim under it).
66. German-Argentine BIT, F.R.G.-Arg., Apr. 9, 1991, BGBl. II 1993, 1244.
67. Cases involving a broad interpretation of the obligations imposed on states and rights of covered foreign investors under umbrella clauses include the following: Supporting the broader view, see *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, ¶¶ 89-95 (Sept. 25, 2007); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, ¶¶ 204-206 (Feb. 6, 2007); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 169-175 (Oct. 3, 2006); *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, ¶¶ 46-62 (Oct. 12, 2005); *SGS v. Philippines*, ICSID Case No. ARB/02/6, ¶¶ 113-128; *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, ¶¶ 244-260 (Aug. 19, 2005). Cases supporting a narrower reading include *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶¶ 305-314 (Sept. 28, 2007); *Pan Am. Energy LLC, & BP Arg. Exploration Co. v. Argentine Republic*, ICSID Case No. ARB/03/13 (2006); *BP Am. Prod. Co. v. Argentine Republic*, ICSID Case No. ARB/04/8 (consolidated claims), Decision on Preliminary Objections, ¶¶ 100-116 (July 27, 2006); *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶¶ 71-88 (Apr. 27, 2006); and *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶¶ 296-303 (May 12, 2005).
68. *Siemens*, *supra* note 67, ¶ 201 (quoting Siemens' argument in support of this broad reading).
69. *Sempra Energy*, *supra* note 67, ¶ 310.
70. *Id.* ¶¶ 310-311.
71. *Id.* ¶ 310.
72. *Id.* ¶ 311.
73. According to a recent study by UNCTAD, national security exceptions are "included in the majority of [FTAs] with investment provisions, and in 12 per cent of the [BITs] reviewed." UNCTAD, The Protection of National Security in IIAs 3 (2009). That same study found that
> [c]ountries have adopted a variety of approaches concerning the drafting of a national security exception in IIAs. Differences exist with regard to the term used (e.g., national security, essential security interests, international peace and security, or public order), the conditions under which the exception can be invoked, and the degree of autonomy that Contracting Parties reserve for themselves in assessing whether a threat to national security exists and how to respond to it.

Id. at xix. The key difference this paper analyzes with respect to the variations in phrasing countries have used to set forth the exception is whether or not the exception is self-judging. *See infra* Section II.B.

many political, economic, and physical factors."[74] Nevertheless, a few broad conclusions about the range of possible threats countries are projected to face as a result of global warming can be drawn.[75]

Perhaps the most visible threats of climate change will be (and are already being) suffered by countries with low-lying coastal areas vulnerable to more frequent flooding, storms, sea-level rise, and even complete inundation.[76] Rising sea levels could likely displace hundreds of millions of people,[77] and threaten the very existence of small island states.[78] For larger countries, although the percentage of the total land area affected by sea-level rise may be small, the impact could be disproportionately great. China's coastal regions, for example, are the drivers of its dramatic economic growth, accounting for only 16.8% of its total land area, but 72.5% of its gross domestic product.[79] Consequently, the climate change-exacerbated threats to those particular vulnerable coastal areas disproportionately "threaten economic development [in the country] at local, regional, and national levels."[80]

In addition to losing lands by rising seas, countries may also have to redraw their borders due to other changes. Melting glaciers in the Alps, for example, have prompted Austria, France, Italy, and Switzerland to all engage in discussions with each other in order to redefine their borders, which had been demarcated based on the location of those mountain glaciers.[81] Other territorial issues are arising in the Arctic, where melting sea ice is opening up new shipping routes and enabling access to new sources of energy and minerals.[82] Countries such as Canada, Denmark, Norway, and Russia have already made competing territorial claims to previously ice-blocked assets.[83] And according to the U.S. Director of National Intelligence, although tensions over the Arctic are "unlikely to spawn major armed conflict," they could give rise to "serious near-term tension . . . result[ing] in small-scale confrontations."[84]

Climate change is also predicted to give rise to and/or exacerbate resource scarcity, which may cause or contribute to conflicts within or between nations. Spreading desertification, long-term drought, loss of freshwater resources, increased intensity of storms, and increasing inland intrusion of salt water due to rising sea levels are projected to harm access to and use of water, and to negatively impact agricultural production.[85] Declines in water resources and agricultural production are further predicted to be "disproportionately concentrated" in developing countries.[86] For many developing countries where agriculture represents a large share of the national economy, and where residents are living at or close to subsistence levels, this "decreased agricultural output will be devastating."[87]

These projected effects of climate change—impaired access to food and water, increasing number and intensity of extreme weather events, land and infrastructure loss due to rising sea levels and increased storm surges—and others, including the spread of disease-causing conditions, increased heat-related deaths,[88] and growing numbers of environmental refugees, can be stresses that even seemingly stable governments cannot handle.[89] In turn, weakened and failing governments, unable to meet the needs of their populations as they attempt to adapt to climate change, "foster the conditions for internal conflicts, extremism, and movement toward increased authoritarianism and radical ideologies."[90]

74. Thomas Homer-Dixon, *On the Threshold: Environmental Changes as Causes of Acute Conflict*, Int'l Security, Fall 1991, at 76, 77.
75. Increased attention is being paid worldwide to the linkage between climate change and national security. In addition to the sources cited in this section, two recent comprehensive works by governmental and private authors are the following: Climatic Cataclysm: The Foreign Policy and National Security Implications of Climate Change (Kurt M. Campbell ed. 2008); and German Advisory Council on Global Change, Climate Change as a Security Risk (2008). The concept that environmental issues including climate change can give rise to national security threats is, however, not a new one. *See, e.g.,* Kurt M. Campbell & Christine Parthemore, *National Security and Climate Change, in* Climatic Cataclysm, *supra*, at 1, 2 (stating that "[a]lthough the intersection of climate change and national security has yet to be fully mapped, there is a long, rich history of scholars and strategists exploring this territory" and examining the works of some of those authors). *See also* Partnership for a Secure America, Climate Change Threatens All Americans, http://www.psaonline.org/article.php?id=560 (last visited Oct. 23, 2009).
76. *See, e.g.*, Intergovernmental Panel on Climate Change [IPCC], *Technical Summary*, *in* Climate Change 2007: Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change 40-41 (2007).
77. Susmita Dasgupta et al., *The Impact of Sea Level Rise on Developing Countries: A Comparative Analysis* 44 (World Bank, Policy Research Working Paper Series No. 4136, 2007), *available at* http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2007/02/09/000016406_20070209161430/Rendered/PDF/wps4136.pdf (discussing impacts on 84 developing countries throughout the world of sea-level rises of between one and five meters).
78. *See, e.g.,* UNFCCC, Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries 25-26 (2008) (describing the threats to small island developing nations, including complete inundation or inundation to the extent that the state is uninhabitable and loses its sovereignty); Hon. Elias Camsek Chin, Vice President of the Republic of Palau, Statement to the 63rd Regular Session of the United Nations General Assembly (Sept. 25, 2008), *available at* http://www.un.org/ga/63/generaldebate/pdf/palau_en.pdf (stating that Palau and other small island developing states "live in danger of disappearing entirely as nations," and that the situation is "a security matter which has gone unaddressed").
79. Joint Global Change Research Inst. & Battelle Mem'l Inst., China: Impact of Climate Change to 2030: A Commissioned Research Report 22 (2009) [hereinafter China: 2030].
80. *Id.* at 4. *See also* Nat'l Dev. & Reform Comm'n, People's Republic of China, China's National Climate Programme (2007), *available at* http://www.ccchina.gov.cn/WebSite/CCChina/UpFile/File188.pdf (discussing implications of climate change for China).
81. *See, e.g., A Movable Border: How Global Warming Can Shrink Glaciers and Alter Frontiers*, The Economist, Apr. 16, 2009, http://www.economist.com/PrinterFriendly.cfm?story_id=13496212 (last visited Oct. 10, 2009); *Melting Glaciers Force Italy, Swiss to Redraw Border*, CNN, Mar. 25, 2009, http://edition.cnn.com/2009/WORLD/europe/03/25/italy.swtizerland.alps.border/index.html (last visited Oct. 10, 2009).
82. Dir. of Nat'l Intelligence [DNI], Global Trends 2025: A Transformed World 53 (2008).
83. *Id.*
84. *Id.*
85. *See, e.g.*, IPCC, *Technical Summary*, *supra* note 76, at 35-37, 48; Joint Global Change Research Inst. & Battelle Mem'l Inst., India: The Impact of Climate Change to 2030: A Commissioned Research Report (2009) [hereinafter India: 2030]; China: 2030, *supra* note 79.
86. DNI, Global Trends 2025, *supra* note 82, at viii. *See also* IPCC, *Technical Summary*, *supra* note 76, at 48; UNFCCC, *supra* note 78, at 5 ("Over the next decades, it is predicted that billions of people, particularly those in developing countries, face shortages of water and food and greater risks to health and life as a result of climate change.").
87. DNI, Global Trends 2025, *supra* note 82, at viii.
88. *See, e.g.*, IPCC, *Technical Summary*, *supra* note 76, at 43-47.
89. CNA Corp., National Security and the Threat of Climate Change 13-18 (2007).
90. *Id.* at 6. *See also id.* at 15 (discussing how long periods of drought in Darfur have led to conflicts between herders and farmers).

Such conflicts may be confined within a particular country, or can spill over into, or be directly with others.[91] Climate change, in essence, "acts as a threat multiplier for instability in some of the most volatile regions of the world."[92]

Moreover, even if a country—whether by virtue of geographic location and/or possession of adequate resources to adapt to climate change—is able to address the internal challenges caused by climate change, and avoid or resolve potential conflicts it may have with other nations due to climate change-caused or exaggerated stresses, its national security may nevertheless be impacted in several ways. For one, the country could face significant domestic impacts if a country or region experiencing climate change-related conflicts is a crucial trading party or ally. Second, and relatedly, if there is climate change-induced instability in one country or region, that can give rise to broader geostrategic concerns for other States. The instability caused by climate change in one part of the world may thus cause other nations to "be drawn more frequently . . . to help provide stability before conditions worsen[, and to] undertake stability and reconstruction efforts once a conflict has begun, to avert further disaster and reconstitute a stable environment."[93]

Third, in addition to having to play an increased role in political stabilization efforts, national and international forces will also likely be called upon more frequently to provide humanitarian aid in direct response to natural disasters. A 2009 study reports that due to the increased frequency and severity of extreme weather events predicted as a result of climate change, the number of people affected each year by climate-related disasters will grow from the current approximate 250 million, to an average of 375 million by 2015.[94] Responding to this need will foreseeably further strain the world's already inadequate capacity to respond to humanitarian crises, and will require additional commitments of financial and human resources.[95]

And fourth, the problems caused by climate change create the conditions cited as giving rise to terrorism—a national security threat of concern to countries worldwide irrespective of their vulnerability to a changing climate alone.

In sum, though the direct impacts of climate change will vary greatly within and between countries, and though the capacity for those impacts to translate into direct national security threats will depend on a multitude of complex and possibly unpredictable factors, the link between climate change and national security is undeniable. Consequently, just as likelihood is high that investors will bring challenges against host States due to the States' climate change-related measures, the possibility is very real that host States will seek to defend such a challenge by relying on a national security exception in the applicable IIAs. The merits of such reliance are discussed below.

B. The National Security Exception in Practice

The language setting forth the exception varies between IIAs, and the differences in language have implications for the exception's scope. The key variation between agreements explored in this Article is whether the exception is "self-judging."

1. Self-Judging Versus Non-Self-Judging Provisions

> Traditionally, the right of a country to invoke an exception for actions taken in pursuance of its essential security interests is without qualification. There is a commonality of expression . . . which recognizes that a party may take any action which it *considers* necessary to protect these interests. This language confers a large degree of "self-judgment" on the party invoking the exception and makes challenge by another party that feels itself aggrieved by such action difficult.[96]

An example of a self-judging national security exception is set forth in Article 18 of the U.S. 2004 Model BIT. It provides: "Nothing in this Treaty shall be construed . . . to preclude a Party from applying measures *that it considers necessary* for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."[97]

Other IIAs, however, particularly older agreements, do not contain language indicating that the security exception is self-judging. Article XI of the BIT between Argentina and the United States, for example, states: "This Treaty shall not

91. *Id.* at 18. *See also* India: 2030, *supra* note 85, at 4, 27 (noting that environmental migrants from Bangladesh "are subject to outbreaks of xenophobic violence if they resettle in India," and that such migration might cause tension in Indian-Bangladeshi relations); UNFCCC, *supra* note 78, at 18 (noting that, as a result of climate change, "Africa will face increasing water scarcity and stress with a subsequent potential increase of water conflicts as almost all of the 50 river basins in Africa are transboundary").

92. CNA Corp., *supra* note 89, at 6.

93. *Id.*

94. Tanja Schuemer-Cross & Ben Heaven Taylor, The Right to Survive: The Humanitarian Challenge for the Twenty-First Century 2, 25 (2009).

95. *Id.* CNA Corp., *supra* note 89, at 34. *See* H. Permanent Select Comm. on Intelligence & H. Select Comm. on Energy Independence & Global Warming, 110th Cong., National Intelligence Assessment on the National Security Implications of Global Climate Change to 2030: Statement of Dr. Thomas Fingar, at 16, *available at* http://www.dni.gov/testimonies/20080625_testimony.pdf ("As climate changes spur more humanitarian emergencies, the international community's capacity to respond will be increasingly strained . . . . The demands of these potential humanitarian responses may significantly tax U.S. military transportation and support force structures, resulting in a strained readiness posture and decreased strategic depth for combat operations.").

96. Organization for Economic Cooperation & Development [OECD], *Negotiating Group on the Multilateral Agreement on Investment (MAI): National Security Measures: Note by the Chairman*, at 4, Doc. No. DAFFE/MAI(95)7 (Nov. 21, 1995), *available at* http://www1.oecd.org/daf/mai/pdf/ng/ng957e.pdf [hereinafter OECD Report] (emphasis added).

97. U.S. Model BIT, *supra* note 6, art. 18(2) (emphasis added). *See also* General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 ("Nothing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests."); NAFTA, *supra* note 34, art. 1018, 32 I.L.M. at 620 ("Nothing in this [Agreement] shall be construed to prevent a Party from taking any action . . . which it considers necessary for the protection of its essential security interests" related to certain circumstances and issues); NAFTA Implementation Act of 1993, Statement of Administrative Action, *reprinted in* H.R. DOC. 103-159, at 666 (stating that NAFTA's "national security exception is self-judging in nature, although each government would expect the provisions to be applied by the other in good faith").

preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests."[98]

Arbitral decisions reviewing States' application of the national security exception indicate that the presence or absence of self-judging words such as "considers" or "determines" will have significant ramifications for a country's ability to invoke that defense.[99] When the provision does contain language indicating it is self-judging, reviewing tribunals will generally defer to the State's determination of necessity, subject to a review of whether the State acted reasonably and in good faith.[100] In contrast, when there is no explicit self-judging language, the host State's actions will be subject to greater scrutiny.

In the 2007 *Enron v. Argentina* award,[101] for example, the arbitral tribunal rejected Argentina's contention that the U.S.-Argentine BIT, quoted above, allowed "each party [to] be the sole judge of when the situation requires measures of the kind envisioned by the Article, subject only to a determination of good faith by tribunals that might be called upon to settle a dispute on this question."[102] The tribunal noted that "[t]ruly exceptional and extraordinary clauses such as a self-judging provision normally must be expressly drafted to reflect that intent."[103] And given the absence of such "precise" self-judging language in the BIT between Argentina and the United States, the *Enron* tribunal found that the Article XI exception was not self-judging.[104] Consequently, when examining whether Argentina's acts were wrongful, or were "necessary" and thus justified by Article XI, the tribunal declared it had to look beyond the simple issue of whether Argentina acted in good faith, and instead inquire "whether the requirements under customary law or the Treaty" were met.[105]

98. Treaty Concerning the Reciprocal Encouragement and Protection of Investment art. XI, U.S.-Arg., Nov. 14, 1991, 31 I.L.M. 124, 135 (1992).
99. *See, e.g.,* Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA), Merits, 1986 ICJ Reports 14, ¶ 222 (stating that "whether a measure is necessary to protect the essential security interests of a party is not, as the Court has emphasized . . . purely a question for the subjective judgment of the party; the text does not refer to what the party 'considers necessary' for that purpose").
100. Robyn Briese & Stephan Schill, "If the State Considers": Self-Judging Clauses in International Dispute Settlement 13 (2008). *See also id.* at 40 (stating that some States, including the United States, appear to take the position, at least in the context of disputes under the General Agreement on Tariffs and Trade, that the national security exception is a jurisdictional defense, and that tribunals do not have authority to review States' invocation of it); Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France) 2008 ICJ Reports, ¶ 147 (June 4, 2008) (stating that France's discretion under a self-judging provision was "subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties"); UNCTAD, The Protection of National Security in IIAs 39-40 (2009) (discussing States' obligations to act in good faith when seeking to rely on a self-judging national security exception).
101. Enron Corp & Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007).
102. *Id.* ¶ 324.
103. *Id.* ¶ 335.
104. *Id.* ¶ 336.
105. *Id.* ¶ 339. *See also* Cont'l Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶¶ 182-188 (Sept. 5, 2008) (finding the security clause to be non-self-judging); Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 388 (Sept. 28, 2007); LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 214 (Oct. 3, 2006); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 374 (May 12, 2005) (stating that the non-self-judging nature of the clause required substantive review of "whether the state of necessity or emergency [met] the conditions laid down by customary international law and the treaty provisions and whether it is thus or is not able to preclude wrongfulness").

2. Non-Self-Judging Provisions: Looking Beyond Good Faith

This next step in the analysis of a non-self-judging exception—determining whether the measure is necessary under the customary international law and/or the terms of the governing IIA—involves an examination of (1) the importance of the security or national interest at stake, (2) the severity of the threat, and (3) the closeness of the fit between the measure and its objective, with each inquiry consisting of stringent tests.[106]

The decision in *Gabcikovo-Nagymaros Project*[107] illustrates this multipart inquiry. In that case, the International Court of Justice (ICJ) evaluated whether the customary international law defense of necessity covered Hungary's breach of a treaty it had entered into with Slovakia relating to the construction and operation of projects designed to produce hydroelectricity, improve navigation, and control flooding on the Danube River.[108] According to Hungary, after it had entered into the treaty, concerns mounted that completion of the project would negatively impact the environment by threatening to lower groundwater levels, impair water quality in the river and its tributaries, and cause the extinction of various flora and fauna.[109] Hungary argued that due to its growing awareness of the projects' economic viability and, more significantly, those environmental impacts, the principle of "ecological necessity" excused it from performing its obligations under the treaty.[110]

To determine whether the customary international law defense of necessity justified Hungary's actions, the ICJ referred to Article 33 of the International Law Commission's[111] Draft Articles on the Responsibility of States for Internationally Wrongful Acts (the Draft Articles on State Responsibility).[112] That Article, like the provision the ILC subsequently finalized and adopted as the current Article 25 of the Draft Articles on State Responsibility, provided

106. *See generally* Andrea K. Bjorklund, *Emergency Exceptions, in* The Oxford Handbook of International Investment Law, *supra* note 25, at 459, 476-85. In addition to these affirmative requirements, actions taken pursuant to the necessity defense must not impair the essential interests of other States, or the "international community as a whole." Int'l Law Comm'n, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts With Commentaries* art. 25(1) (2001) [hereinafter ILC Draft Articles], *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. A State also may not invoke the defense if barred from doing so by "the international obligation in question," or if "the State has contributed to the defense of necessity." *Id.* art. 25(2).
107. Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7 (Int'l Court of Justice 1997).
108. *Id.* at 18.
109. *Id.* at 34-35.
110. *Id.* at 35.
111. The United Nations General Assembly established the International Law Commission (ILC) in 1947 in order to further the "progressive development of international law and its codification." Bjorklund, *supra* note 106, at 476-85.
112. *Gabcikovo-Nagymaros Project*, *supra* note 107, at 39-40.

that States may invoke the "state of necessity" defense to "preclude[e] the wrongfulness of an act" if the act was the "*only*" way the country could safeguard its "*essential interest[s]* against a *grave and imminent peril*".[113]

Regarding the first part of the inquiry—the importance of the interest to be protected—the *Gabcikovo-Nagymaros Project* tribunal stated that Hungary's environmental concerns were indeed "essential interests" that could support reliance on the necessity defense.[114] It explained, however, that with respect to the second part of the inquiry, the alleged harm to Hungary's essential interests was long-term in nature and not even certain to occur and was, consequently, neither "grave" nor "imminent" as was required for the defense to apply.[115] The tribunal also noted that the relationship between the measure and its objective was not sufficiently close, concluding that Hungary could have "resorted to other means in order to respond to the dangers that it apprehended."[116]

Other more recent decisions have similarly stated that Article 25 of the Draft Articles of State Responsibility reflects the customary international law defense of necessity, and that its successful invocation requires respondent States to establish that their challenged measures were the only means they had available to safeguard their essential interests against grave and imminent threats.[117] States, in turn, have faced significant difficulties in making those required showings.

In *Sempra v. Argentina*,[118] for example, the tribunal rejected Argentina's attempts to rely on the necessity defense to justify actions it took in response to its economic crisis. According to the tribunal, although there was nothing in theory "that would prevent an interpretation allowing for the inclusion of economic emergency" in the list of "[e]ssential security interests," the arbitrators were neither "convinc[ed]" that the "very existence" of the country was threatened by its financial crisis,[119] nor believed that Argentina's chosen course of action "was the only one available."[120]

Although these investor-State arbitration decisions have no precedential effect per se, they are contributing to the development of a body of jurisprudence and State practice evidencing that States' discretion to deviate from their obligations under IIAs is greater when the exceptions to those obligations are self-judging. In such cases, the primary constraint on State action will be the requirement that its actions were taken in good faith. In contrast, States may face high hurdles when seeking to rely on non-self-judging security exceptions (or customary international law) in order to justify their otherwise IIA-inconsistent measures. Good faith, though necessary, will not save them. Rather, host States seeking to rely on the national security exception will arguably have to establish that their measures were the only available means of safeguarding their essential interests against grave and imminent harm.

C. Application of the National Security Exception to the Climate Change Context

Based upon linkages between climate change and national security as discussed above, there are solid arguments that measures taken to mitigate or adapt to its challenges should be justified by the national security exception. Efforts made by governments to study those linkages, and expert reports concluding that climate change is giving rise to a new and different era of security threats, could support invocation of the exception. Further, the fact that studies regarding those climate change-related threats are being undertaken by various public and private entities now, i.e., apart from the context of an investment dispute when the purposive nature of such analyses could diminish the persuasiveness of their conclusions,[121] would further seem to lend credibility to a government's argument that a climate change-related measure was enacted in good faith as a necessary effort to protect national security.

Yet, while such evidentiary support might be enough to save measures covered by self-judging national security exceptions, the question is much closer when the exceptions are non-self-judging (or when there is no such exception at all), in which cases the customary international law defense of necessity may apply.[122] Because of information that cli-

113. *Id.* (emphasis added). *See also* Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶¶ 347, 350-351 (Sept. 28, 2007) (noting the requirement set forth in Article 25 of the Articles of State Responsibility that the measure in question "must be the only way for the State to safeguard an essential interest against a grave and imminent peril" and finding that the "choice made" by the Argentinean government did "not appear to have been" the "only one available") (emphasis added).

114. *Id.* at 41 ("The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabcikovo-Nagymaros Project related to an 'essential interest' of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission.").

115. *Id.* at 42-44.

116. *Gabcikovo-Nagymaros Project*, *supra* note 107, at 45.

117. *See, e.g.*, *Sempra Energy*, *supra* note 113; Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005). *But see* LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006); Cont'l Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision on Annulment, ¶¶ 89-95 (Sept. 25, 2007).

118. *Sempra Energy*, *supra* note 113, ¶ 374.

119. *Id.* ¶ 348. *See also* Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007) (reaching similar conclusions); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005) (same). *But see* LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006) (finding that Argentina could place limited reliance on the "necessity" defense); Cont'l Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008) (same).

120. *Sempra Energy*, *supra* note 113, ¶ 350.

121. *See* Charles N. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 Int'l L. 47 (1994) (discussing tribunals' preference for evidence based on contemporaneous documents, as opposed to documents prepared specifically in anticipation of or in connection with the litigation).

122. *See Sempra Energy*, *supra* note 113, ¶ 376 (equating the non-self-judging national security exception with the customary international law defense of necessity); *Enron*, *supra* note 119, ¶¶ 333-334 (same); *CMS*, *supra* note 119

mate change poses a threat to national and international peace and security, the nature of the risk would seem to justify invocation of a national security defense. Moreover, relatively recent case law of the U.S. Supreme Court supports the argument that, despite the fact that the negative effects of climate change may occur over a relatively long time-horizon, the phenomenon nevertheless creates an "actual or imminent"[123] risk of "particularized" harm that could satisfy the requirement that the threat be severe and not speculative.[124] If, however, tribunals strictly applied a requirement that the challenged climate change-related measures be the "only" measures available to address the national security threat, such requirement could be an insurmountable barrier preventing States from successfully invoking the defense. Indeed, given the complexity of the climate change challenge and the multitude of strategies countries are contemplating adopting in order to tackle the problem, it appears unrealistic to request States to establish that there were no other alternatives to the measure they chose to adopt.[125] The current strict formulation of the customary international "necessity" test thus seems ill-suited for analyzing the legitimacy of measures designed to address climate change.

III. Possible Ways Forward

As discussed above, whether a non-self-judging national security exception will cover a climate change-related measure is a question lacking a clear answer. This uncertainty is disadvantageous for both investors and States; consistent with the very principles underlying IIAs and investor-State arbitration, investors should have more certainty regarding the scope of measures that host States can legitimately take with respect to climate change regulation. States, in turn, should not have to refrain from enacting crucial climate change regulations out of fear that such moves might cause them to expend significant sums in arbitration and may result in large damage awards against them; and they should not be penalized for taking proactive mitigation and adaptation measures.

At least two options exist for addressing these problems of uncertainty. One option is for States to undertake to revise the IIAs to which they are a party. When an IIA does not contain a national security exception, States could negotiate an amendment to add a self-judging national security provision. When an IIA contains an exception that is not explicitly self-judging, States could negotiate an amendment or otherwise make clear that they interpret the exception as being self-judging.[126]

Another option would be for States to enter into a broad multilateral agreement making clear that *reasonable measures enacted in good faith to respond to climate change, and not as a disguised attempt to violate the rights of foreign investors*, will presumptively be valid.[127] This option has a number of advantages over the first. First, it would likely be simpler, more efficient in terms of transaction costs, and more comprehensive than the first proposal. Second, it would produce a more predictable, uniform investment framework for investors worldwide, sending a clear signal that States do have reasonable regulatory discretion to enact climate change-related measures.[128] Third, it could minimize inconsistent rulings by tribunals analyzing the permissibility of climate change regulations and legislation.[129] Fourth, and related to the third, it could discourage the filing of speculative, questionable claims by investors seeking to take advantage of the legal uncertainty regarding how tribunals will treat climate change legislation impacting foreign investors. And fifth, it could avoid—for at least the present—larger questions regarding the proper scope and meaning of national security—a concept that not only has significance for application of the national security exception in the investor-State context, but also has ramifica-

(same). *But see LG&E*, *supra* note 119, ¶ 245; *Cont'l Casualty*, *supra* note 119, ¶¶ 160-168; and *CMS Annulment*, *supra* note 117, ¶¶ 128-131.

123. Massachusetts v. EPA, 549 U.S. 497, 521, 37 ELR 20075 (2007) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 22 ELR 20913 (1992)).

124. *Id.* at 522-23.

125. One argument States could make is that there are no "alternatives" because all possible options need to be explored.

126. Under NAFTA, for example, a Free Trade Commission (FTC) comprised of trade ministers for Canada, Mexico, and the United States has the authority to issue an interpretation of NAFTA "binding on a Tribunal established" to resolve investor-State disputes. NAFTA, *supra* note 34, art. 1131(2), 32 I.L.M. at 645. It first exercised that authority in July 2001 "to clarify and reaffirm" the meaning of Article 1105 of NAFTA and its obligations for States to accord the minimum standard of treatment, fair and equitable treatment, and full protection and security. Some have criticized that move of the FTC as an improper attempt to *amend* the scope of investor protection under NAFTA, rather than to merely interpret agreement's provisions. Amendments to NAFTA must be made in accordance with Article 2202, not through an FTC interpretation. *See* Investor's First Submission re NAFTA FTC Statement on Article 1105 at 17-20, Methanex v. United States (Sept. 18, 2009), *available at* http://www.naftaclaims.com/disputes_us_methanex.htm. Many countries are involved in renegotiating their IIAs for various reasons, such as to add provisions relating to investor-State dispute settlement, or to "clarify treaty provisions and to reassess the actual balancing of private and public interests in IIAs." UNCTAD, International Investment Rule-making, *supra* note 7, at 25, 43. As UNCTAD has noted, by the end of 2007, States had renegotiated a total of 120 BITs. *Id.*

127. Language could, for example, provide: "Consistency with States' Obligations to Foreign Investors: Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against other State Parties, or a disguised restriction on investments of foreign investors, any Party may take measures reasonably directed to mitigating their greenhouse gas emissions or adapting to predicted effects of climate change." There is no requirement in this language for a showing of necessity, which can increase the amount of regulatory flexibility governments have to implement their climate change-related measures. *See* UNCTAD, The Protection of National Security in IIAs 94-95 (2009) (discussing IIAs that similarly do not include "necessary to" language and addressing the significance of omitting that phrase).

128. A comprehensive solution is also important to prevent changes made to individual IIAs being unintentionally undone by operation of States' most-favoured-nation (MFN) obligations. An MFN provision in an IIA requires each State party to treat investors of the other State party no less favourably than investors from other States. The obligation may thus effectively nullify any substantive differences between the various IIAs a given country has signed, and require that country to accord *all* covered investors the most favourable treatment specified in any agreement it has entered into. *See* UNCTAD, International Investment Rule-Making, *supra* note 7, at 57 (citing cases and noting that "the MFN clause may, against the intention of a contracting party, incorporate into the IIA containing this clause certain procedural or substantive rights from other IIAs").

129. If countries could agree on a specific standard to guide evaluation of climate change measures, this could minimize inconsistent decisions by arbitral tribunals, and could lead to the development of case law regarding appropriate treatment of such measures. *See* Jeffrey P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. Int'l Arb. 129 (2007) (discussing the de facto development of investment treaty case law).

tions for trade disputes under the World Trade Organization (WTO) and actions by the United Nations.[130]

Negotiation of such an amendment would also likely be politically feasible, as it recognizes the need for continued and legitimate protection of investors' rights. Countries could negotiate such an agreement as a stand-alone arrangement, or as part of the broader multilateral climate change negotiations currently ongoing.[131]

IV. Conclusion

Governments are currently proposing and evaluating a broad menu of policy options for reducing their GHG emissions and adapting to the challenges of climate change. As highlighted by the Vattenfall claim, however, it is important for States to be aware of how such environmental measures may draw legal challenges by foreign investors. Investors do seem to have several grounds upon which they could base a claim that climate change-related measures enacted by host States are inconsistent with host States' obligations under IIAs; and it is a close question whether the national security exception can afford relief. Consequently, States would be wise to start exploring options to minimize uncertainty regarding the scope of their regulatory discretion, and to do so *before* the legal claims are brought.

130. *See, e.g.*, Campbell & Parthemore, *supra* note 75 (discussing broader debates about and attempts to expand the concept of "national security" outside the context of IIAs). *See also* UNCTAD, The Protection of National Security in IIAs (2009) (discussing issues and problems that might arise as a result of expanding notions regarding what the national security exception covers).

131. *See* Joost Pauwelyn, *WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for "Conflict Diamonds,"* 24 Mich. J. Int'l L. 1177 (2003) (discussing a similar move taken by countries to negotiate a waiver allowing countries to take measures that might be inconsistent with WTO rules, but arguing that such a move was likely not necessary, as the measures would have presumably been covered by the General Agreement on Tariffs and Trade's exceptions, including its national security exception).