Young European Federation for Investment Law and Arbitration

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# Young EFILA Submission to the OECD Consultation on Investment Treaties & Climate Change

## I. INTRODUCTION

This submission of Young European Federation for Investment Law and Arbitration (Young EFILA)[1] is responding to the OECD's Consultation on Investment and Climate Change.

Young EFILA recently has been established as a network of young arbitration lawyers and academics under the auspices of the European Federation for Investment Law and Arbitration (EFILA) which aims to promote the sharing of knowledge of all aspects of international investment law (including arbitration) at the European level amongst younger members of the arbitration community and provide opportunities for its members to exchange views on topical issues.

The members of Young EFILA act in their personal capacity and none of the views expressed in this submission should be attributed to any of the organizations with which they are associated.

The purpose of this submission is to address several important aspects related to investment treaties and climate change by proposing specific draft provisions, which could be used as a basis for inclusion in investment treaties. In this way, Young EFILA wishes to contribute to this important ongoing debate by offering meaningful commentary and concrete proposals for practical use by policy makers.

## II. MOST FOSSIL FUELS SHOULD CONTINUE TO RECEIVE INVESTMENT TREATY PROTECTION

### A. RECOMMENDATION

Neither existing bilateral investment treaties (BITs) and multi-lateral investment agreements (MIAs) nor future BITs and MIAs should be renegotiated or drafted to exclude investments in the fossil fuel sector from the definition of "covered investments." To the extent that the parties to these treaties wish to discourage or phase-out additional investments in the fossil fuel sector, those policy objectives should be achieved within the existing legal framework of investment protection; *i.e.*, through a lawful exercise of State regulatory power that does not undermine investors' legitimate expectations or otherwise result in unfair or inequitable treatment.

[1] Young EFILA is grateful to the authors and editors of this text, including but not limited to Emma Iannini, Agata Daszko, Isabel San Martin, Özge Varis, and Guofang Xue.

### B. POSSIBLE PROVISIONS

**Provision 1 –**

"*For avoidance of any doubt, investments made by investors from a Contracting State in the territory of another Contracting State into the hydrocarbons sector, including but not limited to the extraction, refining, and production of (coal),*[2] *oil or natural gas, shall continue to enjoy all the substantive and procedural protections contained within this Treaty*."

**Provision 2 –**

"*While investments in clean energy are highly desired and also may be preferred, nothing in this Treaty shall be construed to limit the protections guaranteed to investments in the hydrocarbons sector."*

### C. COMMENTARY

In recent years there has been a vibrant discussion in the academia and in the international investment arbitration community as to whether "climate carve-outs" or other limitations should be included in investment treaties so as to exclude perceived "dirty" investments[3] into carbon-based energy sources from investment treaties' subject matter jurisdiction.[4] For several reasons, such limitations to investment tribunals' jurisdiction *ratione materiae*, whether imposed through the renegotiation of existing frameworks such as the Energy Charter Treaty (ECT) or inclusion in new and future BITs and MIAs, should not be adopted at this time.

*First*, fossil fuel extraction, production, and use may still be necessary to power the world through the transition phase to a green economy based on renewable energy sources. Thus, investment in fossil fuels, especially in under-developed countries or countries with an "imbalanced" energy mix, may still be needed. Fossil fuel investments should be protected in

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[2] The authors believe that the removal of certain types of "dirty" coal as opposed to "clean" or "cleaner" coal from the scope of investment treaty coverage may be warranted in certain cases, especially in BITs and MIAs concluded between high-income States. Presumably, high-income States, as opposed to low-income States still in the initial phases of industrialization and economic development, will have less need of further investment into the most polluting energy sectors: most high-income States and OECD Members have already developed robust renewable energy sectors and should instead privilege further development in these areas and less "dirty" fossil fuels such as natural gas. In these cases the inclusion of foreign investments into the "coal" sector in the scope *ratione materiae* of existing and future BITs and MIAs may not be needed, in the authors' view.

[3] *I.e.*, those investments perceived to impede the attainment of the Paris Agreement goals, the UN Sustainable Develop Goals (SDGs), or the green energy transition generally. Included within the definition of such "dirty" investments are often any investments into traditional fossil fuel sectors such as coal, oil and natural gas. *See e.g.* Lise Johnson, Lisa Sachs, & Nathan Lobel, *Aligning International Investment Agreements with the Sustainable Development Goals*, COLUMBIA J. OF TRANS. L. 58, 71. (2019); M.D. Brauch et al., *Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation: Aligning international investment law with the urgent need for climate change action*, 36 J. OF INT'L. ARB. 1, 7-35 (2019).

[4] Also known as jurisdiction *ratione materiae*.

order to ensure that the "bridge" does not fall out from underneath the energy transition and trigger a *décroissance*.

*Second*, renewable energy sources fluctuate seasonally and, in some places, they currently cannot be relied upon to supply an entire nation's electricity grid without improvements in battery technology and storage. For this reason, at this point in time, many countries still need to ensure that they have a reliable backstop of carbon-based energy production to counter the vagaries of renewables' production capacity. Continued coverage of investments in carbon-based energy sectors in BITs and MIAs will facilitate more countries' having adequate grid stability and a responsible mix of energy sources in the future.

*Third*, certain studies that claim that fossil fuel extraction would not be economical if investors were made to pay for the "social costs" of pollution fail to engage with the historic social and economic benefits of fossil fuel extraction, production, and use. It is not widely disputed that the discovery of coal and oil extraction, refining, and production technologies in Western Europe and the United States beginning in the mid-19$^{th}$ century triggered the Industrial Revolution and spurred exponential increases in the standards of living for people across the West over the last two and a half centuries. Most countries in the Global South will not want to completely forfeit their "right to development" using fossil fuels and it is not reasonable to expect them to do so. Encouraging development of carbon-based energy in low and middle-income economies through continued investment treaty protection for oil and gas investments may also catalyze faster industrialization and growth in these countries, eventually lowering birthrates and reducing stress on the world's environment and biodiversity from high human population density. Policymakers in both OECD and non-OECD Member States should have these short-term and long-term trade-offs between economic growth and environmental protection in mind when negotiating new BITs and MIAs or renegotiating old ones, especially with middle or low-income countries.

*Fourth*, there are other, more balanced ways for host States and the international arbitration community to properly account for the "social costs" of fossil fuel pollution. For brevity, this comment will not discuss such options in detail, but proposals to expand the "applicable law" provision of BITs and MIAs to obligate or encourage tribunals to consider a State's environmental treaty obligations or allowing tribunals during the quantum phase to analyse whether investors have complied with best environmental practices as outlined in soft law instruments such as the OECD Guidelines on Multinational Enterprises and reduce damages accordingly if they have not, are worthy of consideration. Tribunals could also be encouraged to rely upon provisions within existing treaties, such as Articles 19 and 24 of the ECT, which contain "exceptions" for regulatory measures pertaining to "Environmental Aspects" or which are "necessary to protection human, animal, or plant life or health," with greater frequency and robustness.

*Fifth* and finally, in light of recent events in Eastern Europe, "pulling the rug" of investment treaty protection out from under foreign fossil fuel investors would be imprudent for reasons of national security, especially for the OECD's European Member States. Currently, many of the OECD's European Member States are highly dependent on natural gas imports from the Russian Federation. Countries such as Italy, Austria, Hungary, and Lithuania supply

approximately 1/3 of their electricity grids through pipeline deliveries of (mostly) Russian natural gas and other States such as Germany, Finland, Romania, Slovakia, Latvia, and others have just a slightly smaller level of dependency.[5] Russia has now deployed European States' natural gas reliance as a shield blocking Western efforts to deter its aggressive war in Ukraine in violation of Article 2(4) of the UN Charter. Given the increased importance on ending dependence on rogue or unfriendly States, European countries may wish to ensure that all domestic energy options remain on the table. Continued investment protection for most (if not all) investments in the hydrocarbons sector will facilitate this flexibility in policymaking.

## III. THE INCLUSION OF BROADER AND MORE FLEXIBLE AMICUS CURIAE PROVISIONS SHOULD BE STRONGLY CONSIDERED BY INVESTMENT TREATY NEGOTIATORS

### A. POSSIBLE PROVISIONS

*"The Tribunal may allow the submission of amicus curiae, subject to the comments of the parties on whether such submissions are relevant and helpful to the resolution of a material factual or legal issue in dispute.*

*The Tribunal may also allow amicus curiae to participate in the oral Hearing(s) and/or cross-examination if the Tribunal considers it prudent and necessary and after taking into consideration the views of the parties on this subject."*[6]

### B. COMMENTARY

Environmental and climate change-related disputes may implicate the energy transition and issues of the broader public interest, including environmental protection, economic development, and taxation. Consequently, such disputes may involve and require expert analysis, including complicated environmental impact studies, risk assessments, and other multi-dimensional policy analyses. In light of the fact that investment arbitration tribunals may not be in the best position to adequately consider broad public policy issues concerning sustainable development, environmental law, and human rights, *amicus curiae* submissions could assist tribunals by providing specialized perspectives, expertise, and arguments that are distinct from those of the parties to the dispute. The inclusion of more robust *amicus curiae* procedural provisions in future BITs and MIAs may even advance the public interest by alleviating civil society concerns over investor-State dispute settlement (ISDS)'s compatibility with the goals of the energy transition.

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[5] Arjun Sreekumar, *Which country relies most heavily on Russian gas?*, USA TODAY, 31 Aug. 2014, *available at* https://www.usatoday.com/story/money/business/2014/08/31/which-country-depends-most-heavily-on-russian-gas/14758961/; Aisha Majid, *How Europe is Dependent on Russian Gas*, The NEW STATESMAN, 22 Feb. 2022, *available at* https://www.newstatesman.com/chart-of-the-day/2022/02/how-europe-is-dependent-on-russian-gas.

[6] The authors note that particularly paragraph 1 of this suggested provision resembles Articles 4 and 5 of the UNCITRAL Transparency Rules.

Currently, the vast majority of existing international investment treaties, with a few exceptions (*i.e.,* BITs or MIAs based on the most recent U.S. Model BITs, the ICSID Arbitration Rules,[7] and UNCITRAL Transparency Rules[8]), do not contain advance consent to the *amici* participation. Lack of explicit provisions authorizing *amici* participation may result in the reluctance of tribunals' accepting submissions from such parties.

In recent years, the tide has begun to turn somewhat and leading OECD Member States have begun to warm towards the idea of having express provisions authorizing *amici* submissions included in their newly negotiated investment treaties. States including Canada, the United States, and Norway now include suggested provisions affording *amici* direct procedural rights in their model BITs. Despite countervailing issues of confidentiality, costs, and political pressure (*see e.g.*, the European Commission's intervention to assert the *intra*-EU objection on behalf of Respondent States in BIT and ECT arbitrations),[9] future BITs and MIAs may even benefit from providing *amici* access to certain evidentiary materials and the written and oral pleadings (perhaps on the condition of parties' consent and/or at the tribunal's discretion). If at least partial access to these materials is not provided, it may be more difficult for *amici* to prepare insightful and relevant submissions which would allow for efficient analysis and resolution of their concerns by the parties and the tribunal. Allowing *amici*, especially reputed NGOs or civil society actors from the host State, to participate directly in either written or oral form in proceedings may increase public confidence in ISDS. *Amici* participation may also facilitate the enforcement of the tribunal's award in certain jurisdictions where courts may be particularly attentive to negative public sentiment (notwithstanding a State's obligations to treat arbitral awards as equivalent to domestic court judgments or otherwise final and binding).

It must also be noted that the granting of *amici* certain procedural rights of participation in investment treaty disputes should not come without proper limitations and careful oversight by the tribunal, which should remain attentive to its duties of efficient dispute resolution and equality of the parties. Costs and fees incurred by *amici* could be controlled by tribunals' setting strict page limits and briefing rounds; additionally, tribunals may order *amici* to limit their submissions to facts and legal issues *directly* pertaining to the parties' dispute.

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[7] ICSID Arbitration Rules, Art. 37.

[8] UNCITRAL Transparency Rules, Arts. 4 and 5.

[9] *See e.g. Electrabel v. Hungary*, Decision on Jurisdiction, ICSID Case No. ARB/07/19, Applicable Law, and Liability, 30 Nov. 2012; *Anglia Auto Accessories Ltd. v. Czech Republic*, SCC Arb. No. 2014/181, Final Award, 10 Mar. 2017, paras 113 *et seq.*; *Eiser Infra. Ltd. & Energia Solar Lux. S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017; *Novenergia II – Energy & Env't. (SCA), SICAR v. Kingdom of Spain*, SCC Arb. No. 2015/063, Final Award, 15 Feb. 2018; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018; *Cube Infrastructure Fund SICAV et al v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision Concerning the European Commission's Application for Leave to Intervene as a Non-Disputing Party, 2 Apr. 2020.

## IV. EFFORTS SHOULD BE UNDERTAKEN TO HARMONIZE FUTURE BITS & MIAS WITH THE GOALS OF UN SDGS

### A. RECOMMENDATION

The UN SDGs should be explicitly incorporated in future BITs and MIAs.

### B. POSSIBLE PROVISION

*"The obligations of this treaty should be interpreted with a view to facilitate trade and investment between the Contracting Parties in all sectors, while at the same time ensuring that investments are made in compatibility with the Contracting Parties' nationally determined contributions under the Paris Agreement (and other relevant UNFCCC-related obligations)*[10] *and the United Nations Sustainable Development Goals."*

### C. COMMENTARY

The UN SDGs are multi-dimensional in nature, and each individual goal is strongly intertwined with the others as well as to climate change mitigation efforts, international environmental law, and consequently, ISDS.[11] In order to eliminate redundancies and reconcile conflicts between these regimes, international investment treaties and the SDGs should harmonize their methodological approaches.

Interaction between international investment law and the SDGs is a relatively new phenomenon and the legal framework is still developing. For instance, the European Commission's newly proposed Directive on Corporate Sustainability Due Diligence targets investment financing and would prohibit all investment and trade activities with non-EU suppliers that are not compatible with the EU sustainable development and climate change standards (which are in line with and inspired by the SDGs).[12]

Outside the EU, other countries as well are implementing the SDGs through changes in their domestic law. As a result, States may face challenges when trying to comply with their obligations under their BITs and MIAs and their own domestic/international law obligations based on the SDGs. Indeed, the current generation BITs and MIAs do not include any direct reference or explicit provision on the SDGs, leaving tribunals with the difficult task of trying to reconcile States' environmental law obligations and "right to regulate" defenses with the rights of investors under investment treaties.

Two solutions to this very 21st century problem may be considered. *First*, newly negotiated investment treaties may include special provisions regarding the SDGs and describe the scope of States' corresponding "right to regulate" to achieve the aims of the SDGs and other related

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[10] The United Nations Framework Convention on Climate Change. The 2015 Paris Agreement is the latest international treaty resulting from the UNFCCC's annual Conference of the Parties (COPs).

[11] OECD, OECD and the Sustainable Development Goals: Delivering on universal goals and targets, *available at* https://www.oecd.org/dac/sustainable-development-goals.htm.

[12] European Commission, Proposal for a Directive on Corporate sustainability due diligence, 23 Feb. 2022, *available at* https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en.

environmental law obligations. *Second*, and more drastically, States may decide to create a "new" dispute settlement system for assessing the limits of States' "right to regulate" in accordance with the SDGs and their corresponding domestic and international environmental law obligations. The establishment of "specialized chambers" within current ISDS institutions, such as ICSID or the PCA, may be the most efficient option if States select this second strategy as their preferred method of reconciling the current investment treaty regime with the SDGs and the broader goals of the energy transition.

## V. NON-REGRESSION PROVISIONS SHOULD BE CONSIDERED TO ENSURE THAT FUTURE BITS & MIAS DO NOT DEGRADE STATES' COMMITMENTS UNDER INTERNATIONAL ENVIRONMENTAL LAW

### A. POSSIBLE PROVISIONS

**Provision 1 – Non regression of environmental standards**

> "*Each Party shall not relax, waive, offer to relax, or otherwise derogate from, environmental or climate change measures, in a manner that weakens or reduces the protections afforded therein.*"

**Provision 2 – Breach of non-regression provision**

> " *An Investor may also initiate arbitration proceedings in case the investor has incurred loss or damage by reason of, or arising out of, an alleged breach of the non-regression provision by another Contracting Party*."

### B. COMMENTARY

"Environmental or climate change measures" means any law, regulation, policy or instrument, or provision thereof, the primary purpose or effect of which is the protection of the environment or combatting climate change.

Regression from environmental measures and climate change commitments is a phenomenon that we have seen in multiple jurisdictions over the past few years, despite the fact that States have made (and continue to increasingly make) commitments at the international level[13] to meet the goals of the SDGs and facilitate the energy transition. Non-regression provisions ensure that States continue to maintain or move forward in those commitments.

There have been proposals for the inclusion of "right to regulate" provisions, or even "carve out" provisions for measures relating to environmental protection and sustainable

[13] *E.g.*, the Kyoto Protocol and currently the Paris Agreement.

development.[14] The risk in these kinds of provisions (depending on how they are drafted) is that they allow States to regulate environmental matters in a manner that may weaken previous commitments to environmental protection or measures to counter climate change.

The non-regression provision aims to promote sustainable development and ensure that countries maintain or continue moving forward in their environmental commitments, and to prevent States from weakening their environmental commitments. The first MIAs to introduce non-regression provisions (such as the NAFTA) included references to the fact that regressions were done in order to encourage investment.[15] Many BITs and MIAs still contain similar language, which limits the effect of the clause to conduct that is carried out to create a competitive advantage and attract investment by reducing environmental requirements. However, including this kind of vague and imprecise language can be problematic given that proving that a State's measure was done with that particular purpose may not always be possible. In certain circumstances, attracting new investment may not be the motivation behind the regression measures, but rather a specific political agenda.

The phrase "in a manner that weakens or reduces the protections," is intended to account for the fact that a mere "waiver" or "derogation" from an existing regulation may not always mean reduced environmental protection. Certain measures may be intended to account for design errors in the original regulatory framework, or unforeseen developments in the science related to environmental protection, and therefore including this language would allow tribunals to weigh these different considerations, rather than simply look at whether a derogation has occurred. This language does not appear to be present in the vast majority of MIAs or BITs that nevertheless contain non-regression provisions, which may result in very rigid interpretations against States that are out of line with the original intention of these provisions.

## VI. ENVIRONMENTAL IMPACT ASSESSMENT STANDARDS AND OBLIGATIONS SHOULD BE INCORPORATED INTO BITS AND MIAS

### A. RECOMMENDATION

Existing and future BITs and MIAs should be negotiated or drafted to include explicit standards regarding the Environmental Impact Assessments (EIA or EIAs) to be conducted prior to the investor's making of its investment into the host State. Provisions on EIAs should also encourage public participation and require public disclosure of certain documents and analyses produced or contained within the EIA.

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[14] *See, e.g.,* Article 391 of the UK-EU Trade and Cooperation Agreement; EU text proposal for the modernization of the ECT, p. 4, new article on "Regulatory Measures", *available at* https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf.

[15] *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), Art. 1114(2), *available at* https://www.trade.gov/north-american-free-trade-agreement-nafta ("The Parties recognize that it is inappropriate to encourage investment by relaxing… environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment of an investor…").

### B. COMMENTARY

The issue of EIAs and whether investors and/or host States are required to produce them prior to the investor's making of an investment is often overlooked in the drafting of BITs and MIAs. Usually, the investor's duty to conduct an EIA stems from an obligation in the relevant investment treaty that any covered investment is required to be made in conformity with the national law of the host State. Many national laws require the production of an EIA by the investor and its consideration and approval by the State's regulatory bodies in order for the investor to be permitted to make and develop its investment into any environmentally sensitive industry.

The role and usefulness of EIAs in facilitating the energy transition and combating climate change should not be overlooked. In academia, EIAs are considered "integral component[s] of sound decision making."[16] Likewise, investment treaty tribunals have opined that EIAs constitute meaningful requirements[17] that "will inevitably be of great relevance for many kinds of major investments in modern times."[18] In order for this potential to be realized and for EIAs to better help reconcile ISDS with the goals of the SDGs and the energy transition, EIAs should assume a more prominent and explicit place in future BITs and MIAs. This can be achieved in several ways.

*First*, EIAs should be mentioned, explicitly, in BITs and MIAs and not left out of the text of the treaties to defer to applicable national law on this issue. Provisions on EIAs should delineate clear standards and may thus serve as "gap-fillers," especially in lower-income countries that have less-developed and robust environmental regulations regarding EIAs.[19] The recent draft put forward by the EU in its text proposals for the modernization of the ECT is useful to consider here: notably, the original text of the ECT, which was drafted in the mid-1990s and came into force in 1998, does not mention anything about EIAs. Currently, and in line with the majority of BITs and other MIAs, the Commentary to the ECT explains that "it is for each Contracting Party to decide the extent to which the assessment and monitoring of Environmental Impacts should be subject to legal requirements, […] and the appropriate procedures to be followed."[20]

The EU has proposed a new provision (Article 19(j)) on this topic. The provision begins with the requirement that:

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[16] Valentina S. Vadi, 'Environmental Impact Assessment in Investment Disputes: Method, Governance and Jurisprudence', POLISH YEARBOOK OF INT'L L. XXX (2010) 169, 170.

[17] *See e.g.*, *Cortec Mining v. Kenya*, ICSID Case No. ARB/15/29, Award, 22 Oct. 2018.

[18] *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 Mar. 2015, para. 597.

[19] EU text proposal for the modernization of the ECT, p. 4, new article on "Regulatory Measures", *available at:* https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf.

[20] ECT Secretariat, 'The International Energy Charter, Consolidated Energy Charter Treaty with Related Documents, Last Updated: 15 January 2016' *available at* https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf.

> *"(1) Each Contracting Party shall ensure in its legislation that an environmental impact assessment is carried out prior to granting authorisation for a project.*"

The EU proposal then goes a step further by proposing explicit minimum standards:

> "*(2) The environmental impact assessment shall identify and assess as appropriate the significant effects of the project on (a) population and human health; (b) biodiversity; (c) land, soil, water, air and climate; and (d) cultural heritage and landscape, including the expected effects deriving from the vulnerability of the project to risks of major accidents and/or disasters that are relevant to the project concerned.*"

This is a forward-thinking proposal should be considered by future drafters and negotiators of MIAs and BITs as it gives more meaning to the "E" of an EIA, and prevents the investor from potentially basing its defense on narrow and inadequate environmental standards in the host State's domestic law. It is encouraging that the mandatory production by the investor of an EIA in a remodeled ECT (if such negotiations actually come to fruition) is reportedly one of the least contentious areas of the ECT Contracting States' current discussions[21] -- notwithstanding the EU's more elaborate proposals on how EIAs should be specifically conducted, a subject on which many Contracting States will likely have differing views.

*Second* and alternatively, if States cannot agree on the precise wording of the EIA provision in future BITs or MIAs, they should nevertheless consider including an explicit clause which would stipulate that:

> "The investment shall comply with an environmental assessment screening and assessment processes, as required by the laws of the host State for such an investment or the laws of the home State for such an investment, *whichever is more rigorous in relation to the investment in question*."[22]

Such a clause would require application of whichever Contracting State's relevant environmental laws are more rigorous and would prevent the investor from taking undue advantage of a host State's underdeveloped environmental protection standards.

*Third*, future provisions on EIAs as embedded in BITs and MIAs should encourage public participation and require public disclosure of certain documents during the EIA process. Meaningful participation by civil society in the EIA process can ensure that issues of public concern and interest that would otherwise be ignored or lightly touched upon by the parties are put at the forefront of regulators' (and perhaps eventually, the tribunal's) decision making

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[21] *See e.g.*, ECT, Public Communication on the fifth negotiation round of the Modernisation of the ECT, 4 June 2021, *available at* https://www.energycharter.org/fileadmin/DocumentsMedia/News/Public_Communication_in_English.pdf ; European Commission, Fifth negotiation round to modernise the Energy Charter Treaty, 4 June 2021, *available at* https://trade.ec.europa.eu/doclib/press/index.cfm?id=2273.

[22] Similar wording can be found in newer generation MIAs and BITs such as the Morocco-Nigeria BIT (2016), Article 14 as well as the South African Development Community (SADC) Model BIT (2012), Article. 13.

process.[23] Indeed, public participation in the EIA process is already enshrined in certain MIAs and BITs. The EU has also included such a reform in its proposal for the ECT negotiations, which would allow NGOs' participation in the EIA process and grant public access to information on the regulator's decision-making process after the EIA is concluded (Articles 19(j)(3) and (4)).

## VII. CONCLUSION

As the Intergovernmental Panel on Climate Change (IPCC) reiterated in its 2021 Report, climate change poses extraordinary risks to humanity's current way of life. Regrettably, today some governments are being sued for doing "too little" to protect the environment (climate-change litigation mostly under civil law instruments), whilst others are sued for doing "too much." One of the most effective ways for States to bring their relationships with foreign investors in line with their environmental obligations is to reform how their investment treaties are drafted. As the world undergoes the energy transition, States must adapt to new realities within existing legal frameworks.

As this submission has demonstrated, there is profound need for reform of international investment treaties – a reform that does not, however, require an overturn of the whole system. For example, the existing legal frameworks concerning certain fossil fuels investments[24] should remain largely untouched as they continue to facilitate economic development, especially in low-income countries, and can be used to bridge the transition between fossil fuels and renewables.

Instead, as has been proposed here, negotiators of future BITs and MIAs should incorporate precise and detailed provisions when it comes to environmental protection. Such clauses, whether relating to an *amicus curiae* procedural mechanism, the SDGs, non-regression or EIAs, would provide for greater clarity for both host States and investors—and ease the burden of tribunals pulled in opposite directions during analysis of the so-called "right to regulate" and environmental protection with investors' substantive rights.

Precision and clarity in newly negotiated or revised investment treaties would provide guidance for arbitrators deciding not only procedural matters (*e.g.*, whether and how to allow *amicus curiae* submissions) but also the legitimacy and scope of an investor's expectations at the time the investment is made.

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[23] *See e.g.*, David Collins, 'Public Participation in Environmental Impact Assessments for Foreign Investment Projects: a Canadian Perspective' in: De Brabandere *et al* (eds), *Public Participation and Foreign Investment Law* (Brill 2021), 235 *et seq*. An example of this participation would be participation of indigenous peoples in the EIAs regarding projects on their land (for example vis-à-vis mining). Such matters have come before investment treaty tribunals as an issue of factual relevance, especially in Latin American mining disputes. *See e.g., Bear Creek Mining Corporation v. Peru,* ICSID Case No. ARB/14/21, Award, 30 Nov. 2017, paras 208, 258.

[24] *See supra* Section II.

Overall, this submission highlighted how redrafting some of the standard investment treaty procedural mechanisms and substantive standards, even in very minor ways, would ensure that States have the necessary policy space to take measures to address climate change and facilitate the energy transition without incurring significant liability in investment treaty arbitration. The proposed changes would also benefit the investor by providing clearer standards and managing their expectations.

Reform of ISDS to align with the goals of the SDGs and the energy transition is not a zero-sum game, but rather an opportunity to build a more equitable, transparent, and trusted international economic and adjudicatory system based on shared prosperity for all.