Chapter 20
Climate Change, Trade, and Investment Law: What Difference Would a Real Responsibility to Protect Make?

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Abstract While scholars and most international policymakers agree that steps should be taken to counter rising temperatures, fierce disagreement remains among states on the precise measures to be taken to achieve this goal and some governments worry about remaining in compliance with their already existing international treaty obligations. Although the literature on technical compatibility of WTO rules and investment treaty provisions with measures to foster low-carbon economies has established that there is room in the international economic law system for taking climate protecting measures, all too often, governments lack the political will to act. This chapter takes up the question of whether a state *must* take any measures to prevent climate change or to respond to its threats, and if so what this positive duty of prevention and response means for IEL regimes.

Keywords Climate change • Low-carbon economy • Responsibility to protect • Sustainable development • Positive duties

1 Introduction

Discussions of international economic law's relationship to environment, resources, and energy are fraught with controversy. The finiteness of the planet's natural assets; the unequal distribution of mineral deposits; the existential need for fuel; and the threat that human productivity poses to the integrity of our ecosystems are inevitable aspects of any trade and investment law debate that addresses how the legal interacts with the physical in today's global economy. But the particular trade and investment law questions raised by climate change are even more prone to debate given the poorly understood mechanisms causing the altered climate and its widespread and serious consequences. While scholars and most international

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policymakers agree that steps should be taken to counter rising temperatures, disagreement remains fierce among states on the precise measures that may be taken and the extent to which governments can support particular economic activities and suppress others without violating their international economic law (IEL) treaty obligations.

Much has been written about the technical compatibility of WTO rules with measures to foster low-carbon economies.[1] The literature addressing investment and climate change has also begun to appear, analyzing what protection can be assured for investors who may have impacts on greenhouse gas emission levels.[2] These analyses are important for establishing the compatibility of individual economic policies with the multilateral legal frameworks now in place, for governments will rarely choose to violate their existing international treaty obligations if they can avoid doing so. This is particularly true for the IEL obligations, where illegality can be effectively sanctioned. Where governments are assured of IEL-complicity, they can go ahead and regulate.

Yet, the slowness of political leaders to agree on binding rules on climate change mitigation suggests that some administrations consider lowering the risks of climate change to be a bigger threat to their own political viability than the long-term benefits to the international community would warrant.[3] It is the political-economic reality of short-term politics, not the potential of violating IEL treaties, that stands in the way of a determined pursuit of the low-carbon society. Governments are

[1]E.g., Panagiotis Demlimatsis, ed., Research Handbook on Climate Change and Trade Law (Edward Elgar, forthcoming); Jeffery Atik, Inventing Trade Remedies in Response to Climate Change, 18 Sw. J. Int'l L. 53 (2011); Bradly J. Condon and Tapen Sinha, The Role of Climate Change in Global Economic Governance 52–91 (Oxford Univ. Press, 2013); Thomas Cottier and Nashina Shariff, International Trade and Climate Change in: Geert Van Calster and Denise Prévost, eds., Research Handbook on Environment, Health and the WTO (Edward Elgar, 2013); Andrew Green, Climate Change, Regulatory Policy and the WTO: How Constraining are Trade Rules? 8:1 J. Int'l Econ. L. 143 (2005); Joost Pauwelyn, Carbon Leakage Measures and Border Tax Adjustments under WTO Law in: Geert Van Calster and Denise Prévost, eds., Research Handbook on Environment, Health and the WTO (Edward Elgar, 2013); Chris Wold, Don Gourlie, and Amelia Schlusser, Climate Change, International Trade, and Response Measures: Options for Mitigating Climate Change Without Harming Developing Country Economies, 46 Geo. Wash. Int'l L. Rev. 531 (2014).

[2]E.g., Lisa Bennett, Are Tradable Carbon Emissions Credits Investments? Characterization and Ramifications Under International Investment Law, 85 NYU L. Rev. 1581 (2010); Anatole Boute, Combating Climate Change Through Investment Arbitration, 35 Fordham Int'l L. J. 613 (2012); Condon and Sinha, supra n. 1, 92–129; Daniel M. Firger and Michael B. Gerrard, Harmonizing Climate Change Policy and International Investment Law: Threats, Challenges and Opportunities in: Karl P. Sauvant, ed., YB on Int'l Investment L & Pol'y 2010–2011 (New York: Oxford Univ. Press, 2012); Kate Miles, Arbitrating Climate Change: Regulatory Regimes and Investor-State Disputes, 1 Climate L. 63 (2010).

[3]See generally, Lord Gibbens, The Politics of Climate Change 2014: What Cause for Hope? (http://www.lse.ac.uk/GranthamInstitute/event/the-politics-of-climate-change-2014-what-cause-for-hope/) (talk given at the London School of Economics setting out why there is so little positive action being taken by governments to slow the accumulation of greenhouse gas emissions despite the growth in scientific evidence of climate change).

unwilling to sacrifice economic growth and competitiveness (often only for the good of distant strangers or future generations) when determining climate-impacting policies. All too often, it is the value of a stable climate that loses in such balancing of interests.

If, then, the IEL community wants to look seriously at the relationship between climate change and trade or investment rules, it cannot ignore the equally important question of whether a state *must* take any measures to prevent climate change or to respond to its threats, and if so what this positive duty of prevention and response means for IEL regimes. This paper takes up these questions.

I have argued elsewhere that there is a concept that could be seen as requiring states to take positive steps to reduce their emission of greenhouse gases as a preventative measure.[4] That is the concept of what I call the strong Responsibility to Protect (R2P*). This stronger version of the state's obligation to respond to serious threats extends the scope of Responsibility to Protect (R2P) as it has been defined by the UN by taking the idea of human security more seriously – both in its realization that: (1) dangers to individuals originate not only from horrific mass crimes but also from natural or human-induced catastrophes; and in (2) its mandate requiring positive action by states to address situations where suffering is likely, is occurring, or has occurred. The implications of R2P* for the WTO system, I suggest, are such as to remove the discretion Members have in implementing trade liberalizing measures to promote climate friendliness.[5] Moreover, the strong duties of R2P*could even be interpreted to require taking climate-change mitigating actions that violate specific WTO rules if the benefit of such actions to human security outweigh the benefits that arise from adhering to *pacta sunt servanda* in a particular case.

The present paper will take up the R2P* idea and apply it to investment law. Sharing the background belief in the benefits of economic growth and liberalization's contribution to that growth, investment law rules are distinguishable from trade rules in their protection of individual investors.[6] Looking at an individual's advantages rather than a nation's shifts the balance of interests that states are called to consider in IEL. Nonetheless, the normative effect of R2P*'s call for active protection of the population's welfare remains.

Section 2 briefly sketches out the concept of climate change as an issue for states' responsibility to protect the world's populations. Section 3 assesses investment law as a regime of positive state duties. Section 4 looks at how R2P* would alter the investment law obligations of states. Section 5 concludes.

[4]Krista Nadakavukaren Schefer and Pablo Arnaiz, Duties to Protect, Climate Change, and Trade in: Panagiotis Delimatsis, ed., Research Handbook on Climate Change and Trade Law (Edward Elgar, *forthcoming*).

[5]Nadakavukaren/Arnaiz, supra n. 4.

[6]Nadakavukaren/Arnaiz, supra n. 4.

2 Climate Change as an Issue for R2P*

Addressing the truly global phenomenon of climate change has become one of the world's most pressing challenges. Placed as Goal 13 in the UN's Sustainable Development Goals (the follow-up to the Millennium Development Goals), climate change is officially a global matter of concern.[7] States have accepted the anthropogenic nature of climate change. Governments recognize that climate change will have disastrous consequences for some populations. The United Nations (UN) has warned of extreme weather, food shortages, flooding, and disease. Moreover, many of those populations who are most likely to face disadvantageous changes in the local environment are those who have the least resources with which to adapt to these changes. As a result, state leaders have agreed to cooperate on negotiating about obligations to reduce greenhouse gas emissions in the future. And yet, states have been slow to accept binding obligations to actually *do* anything about the continued rise in atmospheric temperatures.[8]

The core problem with accepting obligations to reduce climate change is the fundamental political unwillingness of individual governments to commit to actions that will be costly and/or which will reduce the competitiveness of domestic industries. On the national and local level, this is as true as it is on the international level, although the justification voiced for "bystanding" may differ.[9] A study of climate change inactivity in the United States explains the political situation there:

> . . . local 'carbon management' efforts are being constrained by the absence of effective federal government action. Such ineffectiveness or 'bystanding' is not accidental. For the American conservative movement, 'non-decision making' (rather than overt resistance) is the primary climate change strategy, while more broadly a deliberately noninterventionist response aligns with the still-dominant political philosophies of neoliberalism, ecological modernization, and free-market environmentalism.[10]

Internationally, resistance may be voiced as to the "unfair" nature of having to accept the costs of action – either because that particular state did not contribute to

[7]The Sustainable Development Goals are found in the Report of the Open Working Group on Sustainable Development Goals. See A/68/970, 12 August 2014. The General Assembly acknowledged the Report and declared that it will be "the basis for integrating sustainable development goals into the post-2015 development agenda". UNGA, Draft resolution submitted by the President of the General Assembly, A/68/L.61, 8 September 2014.

[8]The Framework Convention on Climate Change's COP 20 in Lima resulted in a "Call for climate action" which contains an annexed draft text of a binding agreement to address climate change. Decision-/CP.20. That the Call is hortatory and distinctly non-committal (noting, for example, in paragraph 8 that "arrangements specified in this decision in relation to intended nationally determined contributions (INDCs) are without prejudice to the legal nature and content"), the openness of the draft agreement text also underlines the lack of governmental will to act decisively.

[9]Lauren Rickards, John Wiseman, and Yoshi Kashima, Barriers to effective climate change mitigation: the case of senior government and business decision makers, WIREs Clim Change 2014, doi: 10.1002/wcc.305 (viewed 27 January 2014).

[10]Rickards, Wiseman, and Kashima at p. 2 (footnotes omitted).

the current high levels of greenhouse gases (GHGs) in the atmosphere or alternatively because the state does not want to burden itself while current (or future) GHG emitters continue to profit from not being bound to reductions. Yet, it is important to recognize the similarity to the non-decision making attitude taken by some national political parties, for here, too, the resistance is not fundamentally a fear of acting illegally in taking on such duties. Rather, it is an unwillingness to actively pursue the goal of GHG reduction.

Political unwillingness is a widespread challenge to ensuring the well-being of a community. Where individual interests are not served, members will rarely act in the community interest without moral or legal pressure to do so. Indeed, where individual interests are likely to be *harmed* by protection of the common good, even substantial moral pressure may fail to outweigh a legally permissible preference for inaction. In the climate context, the failure to act is pointed to as an example of the "ecological paradox", or "'the curious simultaneity of an unprecedented recognition of the urgency for radical ecological political change, on the one hand, and an equally *unprecedented unwillingness* and inability *to perform such change*, on the other'".[11]

This paradox of recognizing the "urgency for ... change" while demonstrating an "unwillingness ... to perform such change" is precisely the problem that the quasi-legal concept of Responsibility to Protect was originally designed to overcome. In the case of Responsibility to Protect (R2P), the paradox was humanitarian. When, in 1994, the international community watched the ethnic tensions in Rwanda escalate into a brutal massacre of the Tutsi population, it recognized the genocidal potential – the legal prerequisite for humanitarian intervention. As the genocide materialized, and with it the legal justification for intervention, the UN and the world's most powerful governments continued to do nothing. The right to intervene, it was clear, was not sufficient to rescue the 500,000 Rwandans facing brutality of the highest order from their own government. Unwillingness to make use of the right to intervene was the barrier to humanitarian rescue, not illegality.

In the aftermath of Rwanda, the International Commission on Intervention and State Sovereignty (ICISS) was formed to examine when the moral legitimacy of humanitarian intervention makes changes the legal nature of intervention from being a violation of a fundamental principle of international law (the principle of territorial sovereignty) into a duty owed to the suffering population. The ICISS members submitted their work-product in the form of a report titled "The Responsibility to Protect".[12] The title was chosen carefully – the specific phrase "responsibility to protect" was intended to emphasize that the concept was to be a paradigm shift away from the contemporary view of sovereignty as rights, to a new view of sovereignty: sovereignty as responsibility.[13]

[11]Id. (citing I. Blühdorn, The politics of unsustainability: COP15, post-ecologism, and the ecological paradox. O*rgan Environ* 2011, 24:34–53).

[12]ICISS, The Responsibility to Protect (Ottawa: International Development Research Center, 2001).

[13]ICISS, The Responsibility to Protect, supra n. 12, paras. 2.28–2.33.

An obligation of protection under the R2P framework includes three duties – the duty to prevent the realization of the threat, the duty to protect from the effects of the threat, and the duty to rebuild lives after the threat has ceased to exist.[14] As set forth by ICISS, these duties have two other aspects of particular importance. First, each state has such responsibilities toward its own population. Where the state itself is unable or unwilling to supply the requisite protection, the international community has a responsibility to provide it.[15] There has been much written about the precise definition of this secondary obligation of the international community, but the primary focus must be on the fact that R2P demands *action* be taken to protect populations. The question of *who* provides the protection is secondary to this. It is the needs of the sufferers that is paramount to the fulfilling of R2P's conceptual goals. There is therefore no option of relying on a sovereign right to remain passive in the face of massive human suffering.

Second, the scope of threats to which R2P applies is determined by what one considers to be the focus of the principle. While later concretizations of R2P by the UN have limited the scope of the duty for action to the four discrete situations of genocide, crimes against humanity, war crimes, or ethnic cleansing,[16] the original view was more expansive. Taking the centrality of human suffering as a focal point, the ICISS conception would have founded legal duties to protect and rescue populations on a variety of threats – natural as well as manmade. Where an epidemic or a failed harvest or even severe impoverishment threatens a large number of people, a victim's-centered concept such as R2P could not logically be excluded.[17]

Nevertheless, the Secretary General's 2009 report on R2P implementation explicitly denies the extension of R2P to contexts of suffering other than the four crimes listed above[18] and the General Assembly's text does so implicitly.[19] The UN thereby stripped the concept of its potential to fundamentally alter international law.[20] An expansive R2P – what I call R2P* (to distinguish it from the

[14]See Henry Shue, Basic Rights, 2d ed. 52 (Princeton: Princeton Univ. Press, 1980).

[15]Dederer calls these two aspects (along with two additional elements) "cornerstones" of R2P. Hans-Georg Dederer, 'Responsibility to Protect' and 'Functional Sovereignty' in: Peter Hilpold, ed., Responsibility to Protect (R2P): A New Paradigm of International Law? 156–183, 162–163 (Leiden/Boston: Brill/Nijhoff, 2015).

[16]See UN General Assembly Resolution A/60/L.1, para. 138 (15 September 2005); Report of the Secretary-General, Implementing the responsibility to protect, A/63/677, para. 10 (b) (12 January 2009).

[17]One may want to limit the duties to act so as to exclude the legality of taking military action in particular contexts.

[18]Report of the Secretary-General, Implementing the responsibility to protect, A/63/677 (12 January 2009).

[19]UN General Assembly Resolution A/60/L.1, para. 138 (15 September 2005) ("Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity").

[20]There are many who would argue that R2P must remain narrowly focused to be effective as a motivator for action in those cases in which it was intended. See, e.g., Alex J. Bellamy, The

conventionally accepted version set forth in the 2009 Report) – however, would restore this potential and its impact on climate change discussions would be game-changing.

2.1 R2P*

My concept of R2P*emphasizes the four paradigmatic aspects of responsibility to protect: the obligatory nature of the duties; the call for positive action to be taken in response to risks; the extraterritorial reach of the duties; and its inclusion of any serious threat to human security within its scope. Developed more fully elsewhere, the stronger version of R2P would eliminate the option of ignoring impending catastrophes from the possible legal responses to such threats even when the at-risk population is located abroad and the cause of the damage cannot be attributed to the potential rescuer.[21]

2.2 Climate Change as an Issue for R2P*

As is well-documented, climate change threatens certain populations with severe suffering.[22] From loss of shelter and loss of livelihood to loss of life, the predicted effects will be significant. As a result, the expectation that actions will be needed to effectuate the protection of these populations can therefore be assumed. Moreover, the effects of climate change will be unevenly distributed, with certain populations unharmed by, and some even benefitting from, the changes. Yet, because predictions are that some of the world's weakest economies will be the most negatively affected, we can also assume that for some populations who suffer most, the governments will not be in a position to protect them.[23] Thus, the obligation to take steps to prevent suffering and to assist the victims during and after adverse climate events will fall upon the international community.

Responsibility to Protect: A Wide or Narrow Conception? in: Hilpold, ed., The Responsibility to Protect (R2P), supra n. 15, 38–59, 49–51 (supporting his arguments with citations to Gareth Evans, Ramesh Thakur, Eli Stamnes, and others).

[21]Nadakavukaren Schefer/Arnaiz, supra n. 4.

[22]See generally, IPCC, *Climate Change 2014*: *Impacts*, *Adaptation*, *and Vulnerability*. *Part A*: *Global and Sectoral Aspects*. *Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge/New York: Cambridge University Press, 2014) [Field, C.B., V.R. Barros, D.J. Dokken, K.J. Mach, M.D. Mastrandrea, T.E. Bilir, M. Chatterjee, K.L. Ebi, Y.O. Estrada, R.C. Genova, B. Girma, E.S. Kissel, A.N. Levy, S. MacCracken, P.R. Mastrandrea, and L.L. White (eds.)] (www.ipcc.ch/report/ar5/wg2/).

[23]IPCC, 2014: Summary for policymakers. In: *Climate Change 2014*, *supra* n. 22, pp. 1–32, at 6.

R2P* does not rely on taking military action. In fact, most of the obligatory actions that would ever be required for the prevention of (or relief from) human suffering will be in the form of non-military interventions. This is true of climate change hazards, where the actions to be taken will include promulgating regulations, designing policy initiatives, arranging for technology transfers, assisting in the construction of infrastructure, and educating communities in how to adapt to the ecosystem changes that will take (or have taken) place.[24]

Currently, preventative actions are the most relevant ones, and these include both incentivizing low-carbon lifestyles and discouraging high-emission activities. Either type will implicate policies that fall within the scope of investment laws. I turn now to the interaction of investment law and R2P*.

3 Investment Law as a Regime of Positive Duties of States

International investment law determines the protections a government owes to a foreign investor within its jurisdiction. Unlike most areas of international law, it is centered on the relationship between the "host" government and the individual "investor" rather than between two or more states. While the "home" state of the investor was traditionally important as a vessel through which an aggrieved investor could pursue its host, today the home state's role is more diffuse given the wide availability of investors to benefit from investor-state dispute settlement mechanisms found in international investment agreements (IIAs).

One characteristic of investment law is its emphasis on the host state's obligations to actively protect the investor. Governmental restraint is not sufficient to fulfil the obligations IIAs place on hosts, for like human rights, the duties of the host extend from the (mainly passive) recognition of the investor's rights to control her investment to the protection of those rights against threats from third persons and to the affording of restitution should violations to the rights occur. The state, for example, may not expropriate an investor unless it compensates that investor for the value of the taken property. The state must also act so as to ensure the investor enjoys a minimum standard of "fair and equitable" treatment – by issuing information, holding hearings, writing reasoned decisions, and generally maintaining a functioning administration. Most explicitly, full protection and security provisions demand that the host exercise due diligence in protecting the investor and the investment from damage by third persons. This could involve monitoring public sentiment, meditating conflicts, or sending security forces to prevent or halt violent

[24]E.g., IPCC, 2014: Summary, supra n. 22 at 23. Interestingly, even authors who deny the need for governments to focus on climate change as a priority suggest active responses to ensure the effects are minimal in comparison to the offsetting economic growth effects. See Indur M. Goklany, What to Do About Climate Change: Executive Summary, Policy Analysis No. 609, 5 February 2008, 22 (calling for states to strengthen "technologies, human capital, and institutions", implement mitigation measures, and increase scientific knowledge and understanding).

protests from damaging the investor or her property. These standard duties, found in nearly all IIAs, cannot be fulfilled merely by the host refraining from acting – there is a positive action component that is significant.

The same cannot be said about the relationship between the home state and the investor. The only treaty-based obligation facing the home state is a negative duty to refrain from offering the investor diplomatic protection when ISDS mechanisms are initiated.

Being a regime that mainly governs the relationship between a private person, his property, and a foreign government, the structural scope of any inquiries into how investment law relates to climate change is fairly limited. Climate change regulations' impacts on domestic investors, for example, do not fall within the scope of IIAs. Thus, there is no analysis that needs to be done on home states' treatment of their own investors' domestic activities. Neither, however, do the home state's regulations of its investors' foreign activities fall within the realm of investment law. While a government's requirement that any domiciled corporation reduce its global carbon footprint could have effects on the company's foreign investments, that legal relationship is not one subject to IIAs but rather to corporate law (although there may be general international law implications vis-à-vis the host state due to the extraterritorial regulation).

The activities that interest us, then, are those of a government's regulation of foreigners' property as regards climate change. The international investment law protections will apply as fully to such regulations as they would to any other regulations. Yet, the investment law system's attitude to climate change itself is ambivalent.[25]

The protections offered the investor in an IIA do not distinguish among types of investment, the processes employed by the investment, or the impacts of the investment. As long as a foreign "investment" exists, protections apply. (The debates as to whether a project must benefit the host state to be considered an investment have largely died down.[26]) Whether the investment aims to increase the production of solar cells or to mine for brown coal, the compatibility of any regulatory measures applying to these activities with an IIA will depend solely on the impacts of the regulation on the particular investor. The system, in other words,

[25]Miles agrees, writing "investment law does not make moral judgements". Kate Miles, Arbitrating Climate Change: Regulatory Regimes and Investor-State Disputes, 1 Climate L. 63, 66 (2010).

[26]Compare the tribunal decisions upholding a requirement of contribution to host state development in: *Joy Mining Machinery Limited v. Egypt* (ICSID Case No. ARB/03/11, Decision on Jurisdiction of 23 July 2001), para 53; *Jan de Nul N.V. v. Egypt* (ICSID Case No. ARB/04/13, Decision on Jurisdiction of 16 June 2006), para 91; *Helnan International Hotels A/S v. Egypt* (ICSID Case No. ARB/05/19, Decision on Jurisdiction of 17 October 2006), para 77; *Malaysian Historical Salvors Sdn Bhd v. Malaysia* (ICSID Case No. ARB/05/10, Award on Jurisdiction of 17 May 2007), paras 73–74 with those that deny the existence of such a contribution: *Patrick Mitchell v. Democratic Republic of Congo* (ICSID Case No. ARB/99/7, Decision on Annulment of 1 November 2006), para 33; *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria* (ICSID Case No. ARB/05/3, Decision of 12 July 2006) para 73(iv).

protects economic activity. Investment law is not designed to protect individuals from the effects of climate change.

The system, however, can evolve to better reflect contemporary concerns. Given that climate change is a concern of tremendous global prominence, one could imagine that new IIAs and the interpretation of old IIAs will begin to consider aspects of the impacts of global warming. What would change if R2P* were added to the investment law regime?

4 Adding R2P* to the Investment Law Regime

If the investment law system were to recognize a responsibility of states to prevent human severe suffering, to protect against it, and to rebuild should severe suffering occur despite all earlier efforts, the protections offered to investors would not disappear. Rather, by recognizing R2P* the investment system would add a *normative layer that would shift the existing obligations toward a goal of climate-stabilization*. That is, the system would be subject to a primary value of actively protecting human security – an interest that would determine what a state must do with its investment policy as much as it would determine what it may not do. The key elements of R2P* – mandatory duties of positive action for protection of human security wherever it is seriously threatened – would underlie investment policies just as they would underlie all other governmental policies to ensure the well-being of populations.

The normativity imposed by R2P*'s inclusion of the victim-centered view of security would dictate that investments that aim to increase human security would continue to enjoy all of the protections granted in conventional IIAs – and indeed, perhaps be eligible for even greater protections. Investments that threaten to increase climatic insecurity, on the other hand, not only would be ineligible for protection, but hosts may even be obliged to actively prevent their continued existence.

What does the normative shift mean for individual investment protections? One can hypothesize about the specific changes required by considering the effects of R2P* on various provisions of the typical IIA and on additional duties that would fall upon host governments.

4.1 Definition of Investment

One element of an IIA to discuss is the definition of "investment" and "investor". Whereas today's IIAs define their scope through broad views of what should count as an "investment", focusing largely on conceptions of property, risk, and duration, a climate-sensitive view would be narrower. States subject to R2P* would be required to attempt to limit their promises of protection to those activities that do

not contribute to the risks of climate change. Thus, it would be not only their right, but their duty to define "investment" so as to exclude high carbon emitting assets. At the same time, because states would be obliged to pursue low-carbon economies, they must offer full protection to investments that encourage lower emissions levels or assist in the resilience of local communities. Among other results, it would no longer be permissible to exclude conservation activities from the scope of their treaties. Thus, unincorporated entities such as NGOs specialized in climate change would need to be included in the definition of investor – something that is not available in bilateral investment treaties that limit protection to incorporated entities.

4.2 Expropriation

The right to expropriate would also need to take into account the normative value of human security. The main alteration of practice here would be that the host's right to expropriate would become a duty to do so if an investment is found to be damaging to the climate. The host's currently available policy space for allowing high emissions would therefore disappear. The compensation requirements, however, would not necessarily be affected by R2P*. The duty to stop investors from harming others does not necessarily lead to a prohibition on paying them for their lost profits. If, however, a government can foresee a high number of expropriations, it may have to negotiate about the level of required compensation to ensure that it remains both within the bounds of legality and solvency. Given the equal duties of R2P* on all states, treaty negotiations ought to lead to mutually acceptable levels of required compensation being set forth in IIAs.

An illustration of an expropriatory action where R2P* would make a difference would be one in which a host has a carbon emissions trading scheme in place which is failing to reduce emissions because of a low permit price. The host's duty to protect its population would require it to (inter alia) spur emissions reductions, which it could do by either halting the trading scheme and regulating maximum emissions directly or by taking steps to increase the price of permits through a premature retirement of existing certificates. If it were to choose the less radical second option, any foreign investor would have a plausible claim of expropriation against the host unless compensation was forthcoming. This does not look much different – from the investment law aspect – than it would without R2P* – because R2P* does not demand that states *not* pay compensation. The difference arises if the state is unable to pay the requisite compensation, because in this case, R2P* continues to require the expropriation. The host no longer has the option of not expropriating even though the expropriation is going to be illegal without the offer of compensation. R2P* will in essence require the state to choose the higher norm of human security over the norm of investment protection.

But the effects on investment law will not always be detrimental to the investor's interests. For investments in renewable energy or low-carbon technologies, the

normative working of R2P* will lead to a reinforced protection. Not only would R2P* in such cases maintain any compensation requirement, it may even result in the host's losing its "right" to expropriate given that the government would have a (normatively higher) obligation to promote climate-friendly activities.

4.3 FET

The normative effect of R2P* would also be detectable in the fair and equitable treatment (FET) provisions. While the customary and treaty requirements of fairness to investors would continue to function as a guarantor of good governance, the concept of what is "good" would inevitably be conceived of as including efforts to protect populations from threats of global warming. As a result, a R2P*-based commitment to climate change prevention/mitigation would ensure the host's immunity from charges of legitimate expectations of benefits from climate-damaging investments. Again, however, it would simultaneously offer particularly strong protection to investments that aim to lower emissions or assist the population's resilience to changes.

A major change to current state practice would be the host's positive obligation to enforce its existing environmental laws as a critical aspect of protecting the legitimate expectations of investors in clean technologies and green services. In this respect, R2P* would extend FET protections beyond what is accepted today as the minimum standard of treatment.[27] They may also extend beyond what is generally viewed as the level of treatment expected under autonomous standards – behaviors that are non-arbitrariness, non-discriminatory, intransparent, taken in bad faith, or against the investor's legitimate expectations.[28] Thus, if a host passes legislation that requires transportation companies to offset a portion of their vehicles' GHG emissions with the planting of trees but fails to act against companies who do not, an injured investor (perhaps the owner of a nursery) would have a legitimate grounds for complaint on the basis of a violation of its right to FET.[29]

[27]The *Neer* standard is widely cited as reflecting the international minimum standard of treatment that a foreign investor can expect. Under Neer, the state should not act in a way that amounts "to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".L.F.H. Neer and Pauline Neer (USA) v. United Mexican States, 4 R.I.A.A. 60, para. 4 (October 15, 1926).

[28]The tribunal in Gold Reserve v. Venezuela contains a thorough overview of the arbitration jurisprudence on the standard to be applied to autonomous FET provisions. ICSID Case No. ARB (AF)/09/1 paras. 564–576 (22 September 2014).

[29]See Energo-Zelena and Zelena v. Republic of Serbia, ICSID (Energo-Zelena complains of Serbias "systematic omissions to enforce" its legislation to the company's detriment). An interesting further result of R2P* may be that specific performance would have to be included in the remedy.

Another more fundamental addition to the catalogue of FET duties arising from R2P* could be a requirement of legislative consistency. Because the R2P* duty to address climate change is comprehensive, an investor facing restrictions on its own activities may have a legitimate claim of the host's violation of FET if the government has fostered other carbon-intensive activities or even if it has simply failed to regulate such activities without good cause. While over-demandingness is a warranted criticism of R2P in any form, where central aspects of a threat are not regulated by a state, it must be considered as having failed to fulfil its duties of R2P*. The instrument of FET could be a vehicle to address this in the investment context.

4.4 Market Access

Finally, IIA parties would face an obligation to address market access rights of investors with the same normative perspective of R2P*. Under customary law, states have the right to admit or refuse access to foreign investment at will. Some IIAs (particularly those embedded within free trade agreements) now include rights of market access to treaty partner investors, but these are still the exception. The customary discretion in admitting investments, however, would change with R2P*.

If faced with a duty to prevent climate change, states would lose their rights both to offer access to their markets by climate change enhancing entities as well as their right to refuse access by investors intent on lowering GHG levels or mitigating the impacts of change. Again, because the fundamental idea behind R2P* is to require action where there is no political will for it, the discretion currently permitted governments to ignore the security of populations will be curtailed. As in the other elements of investment law, however, this reduction of discretion is based on the normative framework of population-wide human security rather than on investor protection. Thus, it does not exclude investor protection – it in fact supports it – where the investment in question also fosters this security.

5 Conclusion

The international investment law system's relationship to environmental issues is complex but ultimately ambiguous. This is true for questions surrounding the extraction and use of natural resources as well as the regulation of greenhouse gases and the corresponding problems of climate change. Investment law's protection of investors is unconcerned about which investors and which investments are protected, it protects each and all under the assumption that each is equally beneficial to global well-being.

The rise of the idea of sovereignty as responsibility questions this assumption. Its distinctive normative framework imposes an obligation to act for the good of

individuals on states that cannot be ignored on the grounds of political unpalatability or even, according to some versions, illegality.

R2P's limitation of scope hinders its application to many of the world's problems that are causing severe suffering. The logic of sovereign responsibility to act, however, is not inherently so restricted. Covering the concerns of climate change by virtue of global warming's potential to gravely threaten the world's populations, R2P* demands that governments place the protection of their populations before the protection of investors' economic interests. It therefore comes into direct contact with investment law, overlaying it with a normative framework within which investment protections continue to apply only insofar as those protections also protect host populations from the adverse effects of climate change.

References

Atik, J. (2011). Inventing trade remedies in response to climate change. *Southwestern Journal International Law, 18*, 53.

Bellamy, A. J. (2013). The responsibility to protect: A wide or narrow conception? In P. Hilpold (Ed.), *The responsibility to protect (R2P)* (pp. 35–57). Leiden: Brill Nijhoff.

Bennett, L. (2010). Are tradable carbon emissions credits investments? Characterization and ramifications under international investment law. *NYU Law Review, 85*, 1581–1617.

Blühdorn, I. (2011). The politics of unsustainability: COP15, post-ecologism, and the ecological paradox. *Organizations Environment, 24*, 34–53.

Boute, A. (2012). Combating climate change through investment arbitration. *Fordham International Law Journal, 35*, 613.

Condon, B. J., & Sinha, T. (2013). *The role of climate change in global economic governance*. Oxford: Oxford University Press.

Cottier, T., & Shariff, N. (2013). International trade and climate change. In G. Van Calster & D. Prévost (Eds.), *Research handbook on environment, health and the WTO*. Cheltenham: Edward Elgar.

Firger, D. M., & Gerrard, M. B. (2012). Harmonizing climate change policy and international investment law: Threats, challenges and opportunities. In K. P. Sauvant (Ed.), *Yearbook on international investment law & policy 2010-11*. New York: Oxford University Press.

Gibbens, L. (2014). *The politics of climate change 2014: What cause for hope*? http://www.lse.ac.uk/GranthamInstitute/event/the-politics-of-climate-change-2014-what-cause-for-hope/.

Goklany, I. M. (2008, February 5). What to do about climate change: Executive summary. *Policy Analysis*, (No. 609).

Green, A. (2005). Climate change, regulatory policy and the WTO: How constraining are trade rules? *Journal of International Economic Law, 8*(1), 143–189.

IPCC. (2014). *Climate change 2014: Impacts, adaptation, and vulnerability*. Cambridge/New York: Cambridge University Press. www.ipcc.ch/report/ar5/wg2/.

Miles, K. (2010). Arbitrating climate change: Regulatory regimes and investor-state disputes. *Climate Law, 1*(1), 63–92.

Pauwelyn, J. (2013). Carbon leakage measures and border tax adjustments under WTO law. In G. Van Calster & D. Prévost (Eds.), *Research handbook on environment, health and the WTO*. Cheltenham: Edward Elgar.

Rickards, L., Wiseman, J., & Kashima, Y. (2014). Barriers to effective climate change mitigation: The case of senior government and business decision makers. *WIREs Clim Change*, doi:10.1002/wcc.305. Accessed 27 Jan 2014.

Shue, H. (1980). *Basic rights: Subsistence, affluence, and U.S. foreign policy* (2dth ed.). Princeton: Princeton University Press.

Wold, C., Gourlie, D., & Schlusser, A. (2014). Climate change, international trade, and response measures: Options for mitigating climate change without harming developing country economies. *George Washington International Law Review, 46*, 531.