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This paper by two academic contributors to the 2022 OECD public consultation (Joshua Paine and Elizabeth Sheargold) has further developed their proposals for a climate policy carve-out for investment treaties. The authors will present the paper and it will be discussed in the fourth session of the Conference.

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Carving-out climate action from investor–State dispute settlement (ISDS): Suggested treaty language and commentary

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This proposal builds on, and draws from, a published article: Joshua Paine and Elizabeth Sheargold, 'A Climate Change Carve-Out for Investment Treaties' (2023) 26 Journal of International Economic Law 285 https://doi.org/10.1093/jiel/jgad011 (available open access / free of charge).

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A. Introduction

1. In recent years there have been an increasing number of investor–State arbitrations concerning climate change related measures, such as the denial of permits for new fossil fuel extraction or exploration projects[1] or the phase-out of existing fossil fuel-based electricity generation.[2]

2. These and other potential investor–State challenges threaten to cost host States billions in damages, adding additional cost to climate change policies. In addition to the need to protect policy space from a host State perspective, the potential for 'regulatory chill', or the risk of investor–State dispute settlement (ISDS) claims creating a disincentive to States adopting climate change measures, has global ramifications.

3. In this paper we propose treaty provisions that would create a carve-out from ISDS for measures related to the reduction of greenhouse gas emissions.[3] This carve-out would be accompanied by a procedural mechanism that refers the application of the carve-out to the treaty parties' environmental authorities, or if those authorities are unable to agree, to a State–State dispute settlement panel which includes a majority of members with climate-related expertise. This carve-out would provide a means of resolving investor challenges to climate measures relatively quickly, without requiring litigation of the case on its merits, and ensures that States retain control over the application of the carve-out. At the same time, our proposal includes safeguards that should minimise the potential for abuse of the carve-out – not featuring any potential for unilateral invocation by the host State – and allows for recourse to State–State dispute settlement to challenge any protectionist or unfair measures.

4. The ISDS carve-out we propose in this paper is not an alternative to other treaty drafting approaches that would vary investment protection benefits for different investments, such as emissions-intensive sectors like fossil fuels. The carve-out proposed here is based on the purpose of the covered measures, and can be used in conjunction with sectoral approaches, as the two methods of aligning investment treaties with the Paris Agreement and Net Zero are complementary. For example, an investment treaty may exclude treaty coverage for new fossil fuel investments, while also including an ISDS carve-out for measures that have the purpose of reducing greenhouse gas emissions, which would safeguard policy space for States to enact policies in relation to existing fossil fuel investments as well as investments in other sectors.

5. Once States have settled on a preferred model for a climate carve-out, there are feasible legal options for applying the carve-out to the large body of existing International Investment Agreements (IIAs). States in favour of a climate carve-out could conclude a subsequent plurilateral treaty that modifies IIAs where both parties to an IIA are parties to the plurilateral opt-in agreement. This approach has been proposed for applying ISDS reforms agreed in UNCITRAL Working Group III

[1] See, eg, *Rockhopper Italia S.p.A. v Italy*, ICSID Case No. ARB/17/14, Award (23 August 2022); *Lone Pine Resources Inc v Canada*, ICSID Case No. UNCT/15/2, Award (21 November 2022); *Ruby River Capital LLC v Canada*, ICSID Case No. ARB/23/5 (Request for Arbitration, 17 February 2023) (note that this case concerns an LNG facility which the investor claims would have been carbon-neutral and could have contributed to climate change mitigation); *Zeph Investments Pte Ltd v Australia*, Notice of Intention to Commence Arbitration (20 October 2023) (this arbitration is brought under the Singapore–Australia Free Trade Agreement (FTA) and concerns a proposed coal mine located in Queensland; reportedly another arbitration has been initiated under the Australia–New Zealand–ASEAN FTA, but documents in that case are not yet public).

[2] See, eg, *Westmoreland Mining Holdings LLC v Canada*, ICSID Case No. UNCT/20/3, Final Award (31 January 2022) (Respondent successful on jurisdictional grounds); *Westmoreland Coal Company v Canada*, ICSID Case No. UNCT/23/2 (case pending, concerns same measures as *Westmoreland Mining Holdings v Canada*); *Uniper SE v the Netherlands*, ICSID Case No. ARB/21/22, Claimants' Memorial (20 May 2022) (case subsequently discontinued); *RWE AG v the Netherlands*, ICSID Case No. ARB/21/4, Claimants' Memorial (18 December 2021) (case subsequently discontinued).

[3] This proposal builds on, and draws significantly from, an earlier published article: Joshua Paine and Elizabeth Sheargold, 'A Climate Change Carve-Out for Investment Treaties' (2023) 26 Journal of International Economic Law 285.

to existing IIAs,[4] and has already been successfully used by the the Mauritius Convention,[5] and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, which modifies the tax treaties it covers.[6] The opt-in treaty could contain the carve-out, the process to govern its application (as proposed below), and provisions that address its relationship with existing IIAs.[7] Our proposal is drafted in a format so that it could be applied to existing IIAs in this manner (i.e., via a plurilateral opt-in agreement that would modify the IIAs to which the plurilateral agreement applies). Alternatively, our proposal could easily be adopted as an amendment to existing IIAs or incorporated into new IIAs.[8]

[4] Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap', Center for International Dispute Settlement Report (3 June 2016), at [222]–[234] https://www.cids.ch/images/Documents/CIDS_First_Report_ISDS_2015.pdf (visited 12 February 2023). See also UNCITRAL Working Group III, 'Possible reform of investor-State dispute settlement (ISDS): Multilateral instrument on ISDS reform', Note by the Secretariat, A/CN.9/WG.III/WP.194, 16 January 2020, [23]–[30]; 'Possible reform of investor-State dispute settlement (ISDS): Multilateral instrument on ISDS reform', Note by the Secretariat, A/CN.9/WG.III/WP.221, 22 July 2022, [36]–[39].

[5] Kaufmann-Kohler and Potestà (n 4) [225].

[6] Wolfgang Alschner, 'The OECD Multilateral Tax Instrument: A Model for Reforming the International Investment Regime?', 45 Brooklyn Journal of International Law 1 (2019), at 47–48. See generally OECD, 'Developing a Multilateral Instrument to Modify Bilateral Tax Treaties', Action 15 – 2015 Final Report, Annex A, at 31–37.

[7] See examples discussed in OECD (n 6) at 32–35. See also A/CN.9/WG.III/WP.194 (n 4) [31]; A/CN.9/WG.III/WP.221 (n 4) [42]–[47].

[8] Amendment of existing treaties would require satisfying the provisions on amendment in the relevant IIA. Many newer IIAs require that amendments are approved in accordance with the relevant domestic procedures of each Party to enter into force: see eg US–Singapore FTA art 21.8; Korea–US FTA art 24.2; CETA art 30.2(1); EU-Singapore IPA art 4.3(1); Turkey–Uzbekistan BIT art 13(4); Singapore–Indonesia BIT art 44(2). China–Turkey BIT art 12(3); Finland–Indonesia BIT art 15(2).

B. Suggested Treaty Provisions

Article 1: Climate Change Measures

1. No claim may be brought under Article X in respect of a climate change measure. 'Climate change measure' means a [optional: good faith] measure of a Party related to reducing or stabilizing greenhouse gas emissions.
2. [Optional: For greater certainty, climate change measures include, but are not limited to: […indicative list of measures…]].

Article 2: Procedural Mechanism

1. If an investor submits a claim under Article X, which the Respondent views as covered by Article 1, the Respondent may submit in writing to the Environmental Authorities of the Party of the Claimant a request for a joint determination by the Environmental Authorities of the Respondent and the Party of the Claimant on the issue of whether and to what extent Article 1 applies to the claim. Any such request must be made no later than the date that the Tribunal under Article X fixes for the Respondent to submit its principal submission on the merits, such as the counter-memorial, or in the case of an amendment to the notice of arbitration, the date that the Tribunal fixes for the Respondent to submit its response to the amendment. The Respondent shall promptly provide the Tribunal, if constituted, a copy of the request for joint determination. The Tribunal shall proceed to hear the claim only as provided for in this Article.
2. The Environmental Authorities of the Respondent and the Party of the Claimant shall hold consultations and attempt in good faith to make a joint determination regarding whether and to what extent Article 1 applies to the claim. Where the Environmental Authorities reach a joint determination that Article 1 applies to the claim or if they cannot reach a joint determination, they shall promptly notify in writing the disputing parties, the non-disputing Party/Parties, and, if constituted, the Tribunal under Article X. Where the Environmental Authorities conclude that Article 1 applies to only a part of the claim, the notification shall specify this.
3. If the Environmental Authorities referred to in paragraph 2 have not made a joint determination within 120 days of the date of receipt of the Respondent's written request for a determination under paragraph 1, the Respondent or the Party of the Claimant may request the establishment of a Panel under Article Y to determine whether and to what extent Article 1 applies to the claim.
4. Where no joint determination is reached pursuant to paragraph 2 and no request for the establishment of a Panel under paragraph 3 has been made within 10 days of the expiration of the 120 day period referred to in paragraph 3, the claim may proceed through the procedure established under Article X.
5. If the Respondent or the Party of the Claimant requests that a Panel be established pursuant to paragraph 3, the procedure shall follow the procedure for State–State dispute settlement set out in Article Y *mutatis mutandis*, with the following modifications:
    a. A majority of Panel members shall have recognised expertise in climate change law or policy. Any dispute about whether a proposed Panel member meets this requirement shall be settled by the appointing authority.
    b. The procedure shall have a limit of 120 days, beginning on the day the Panel is constituted under Article Y.
    c. The Panel shall conclude its procedure by issuing a decision that establishes whether and to what extent Article 1 applies to the claim. The Panel shall transmit its decision to the disputing parties, the non-disputing Party/Parties, and to the Tribunal, if constituted, under Article X.
6. If the Environmental Authorities pursuant to paragraph 2, or the Panel under paragraph 5(c), determine that Article 1 applies to all parts of the claim in their entirety, the Claimant is deemed

to have withdrawn its claim and to have discontinued the proceeding [optional: with prejudice]. The Tribunal, if constituted, shall take note of the discontinuance of the claim in an order. For greater certainty, the Tribunal constituted under Article X shall not have authority to proceed with any part of the claim that is deemed to be withdrawn and discontinued pursuant to this paragraph.

7. If the Environmental Authorities pursuant to paragraph 2, or the Panel under paragraph 5(c), determine that Article 1 applies only to a part of the claim, the Claimant is deemed to have withdrawn that part of the claim and to have discontinued that part of the proceeding [optional: with prejudice]. The Tribunal, if constituted, shall take note of the discontinuance of that part of the claim in an order. For greater certainty, the Tribunal constituted under Article X shall not have authority to continue hearing that part of the claim that is deemed to be withdrawn and discontinued pursuant to this paragraph.
8. Where the Environmental Authorities pursuant to paragraph 2, or the Panel under paragraph 5(c), determine that Article 1 only applies to part of the claim, the parts of the claim not covered by Article 1 may continue to be pursued by the Claimant in the procedure established under Article X.
9. Where the Environmental Authorities pursuant to paragraph 2, or Panel under paragraph 5(c), determine that Article 1 does not apply to any part of the claim, the claim may continue to be pursued by the Claimant in the procedure established under Article X.
10. During the consultations under paragraph 2, the period specified in paragraph 4, and the period for any State–State Panel proceedings in paragraph 5(b), any Tribunal established under Article X in relation to the dispute shall suspend its proceedings.

Definitions:

For the purposes of this provision:

a. 'Article X' means the provision(s) of a Covered IIA providing for investor–State arbitration.

b. 'Article Y' means the provision(s) of a Covered IIA providing for State–State Dispute Settlement.

c. 'Environmental Authorities' means for each Party the authority designated for that Party in Annex B.

d. The terms 'Claimant', 'Respondent', 'disputing parties', 'non-disputing Party/Parties' and 'Tribunal' have the same meaning as in Article X. 'Panel' means a State–State dispute settlement panel or tribunal established under Article Y.

e. 'Covered IIA' means an International Investment Agreement listed in Annex A to which this plurilateral agreement applies.

C. Commentary on the scope of the carve-out (Article 1)

1. The proposed carve-out would prevent ISDS claims being brought in respect of a 'climate change measure.'[9]

a) Measures covered

2. A 'climate change measure' is defined as a measure 'related to reducing or stabilizing greenhouse gas emissions.' This simple definition ensures that the carve-out is broad enough to cover climate change measures taken in relation to any sectors or industries, and is flexible enough to cover future climate change policies that may not yet have been envisioned.

3. Some other suggestions for a climate change carve-out or exception for investment treaties have defined the scope of climate change measures by reference to the UNFCCC and/or the Paris Agreement.[10] We have avoided referring to the UNFCCC or other climate-related treaties in proposed Article 1, because defining the scope of climate change measures by reference to other treaty obligations introduces ambiguity and complexity about the scope of the carve-out. In addition, referring to specific treaties creates the risk that if new climate-related treaties are adopted in future, the climate carve-out from ISDS would become outdated.

4. The optional Article 1(2) could be used to include an indicative (but not exhaustive) list of measures that would fall within the scope of the carve-out. If included in the agreement, the list must be of measures that States have adopted or will likely adopt to address climate change (rather than a list of sectors to be regulated). This list could include those measures that have already been the subject of prominent investor–State arbitrations, such as the denial or revocation of permits required for fossil fuel exploration or extraction and phase outs of fossil fuel powered electricity generation, as well as measures requiring transition to low-carbon production for, or total phase out of, other emissions-intensive industries such as transportation, manufacturing, metals, chemicals or waste management. The inclusion of an indicative, non-exhaustive list would provide greater certainty about the scope of the carve-out, which is beneficial to States and investors, without actually limiting the carve-out to just the listed measures.

b) Nexus requirement

5. The definition of climate change measures we have adopted in Article 1(1) includes any measures 'related to' the aim of reducing or stabilising greenhouse gas emissions. This language in based on Article XX(g) of the General Agreement on Tariffs and Trade (GATT), which covers measures 'relating to' the conservation of exhaustible natural resources.[11] This nexus requirement has been

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[9] The form of the carve-out is similar to the ISDS carve-out for tobacco control measures found in the Singapore–Australia FTA: Singapore–Australia FTA (as amended in 2016), Chapter 8, Article 22. See also New Zealand–Singapore CEPA (as amended) art 7.14(3).

[10] See, eg, Gus Van Harten, *An ISDS Carve-Out to Support Action on Climate Change*, Osgoode Legal Studies Research Paper No. 38 (2015), at 1; European Parliament, Resolution on Towards a New International Climate Agreement in Paris, 2015/2112(INI), 14 October 2015, at para 80; Submission to the Organisation for Economic Co-operation and Development on Investment Agreements and Climate Change Contributed by the Center for International Environmental Law (CIEL), ClientEarth, and the International Institute for Sustainable Development (IISD) (March 2022), at para 44 https://www.iisd.org/system/files/2022-03/investment-consultation-V3.pdf (visited 7 February 2024); The Creative Disrupters, 'Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation' (2018) art 5.1(3)(j) https://martinbrauch.files.wordpress.com/2022/04/treaty-on-sustainable-investment-for-climate-change-mitigation-and-adaptation.pdf (visited 7 February 2024).

[11] This language has also been incorporated in general exceptions in many investment treaties, including investment chapters of FTAs and bilateral investment treaties. See, eg, CETA art 28.3.1 (incorporating GATT Article XX(g) in relation to some investment obligations); Australia–Hong Kong Investment Agreement, art 18.1.5; EU–Vietnam Investment Protection Agreement, art 4.6(c); UK–New Zealand FTA, art 32.1.3; UK–Iceland, Lichtenstein and Norway FTA, art 14.1(3)(a)–(c); Turkey–Uruguay BIT (signed 2023, not yet entered into force), art 7.1(b).

interpreted to require 'a close and genuine relationship of ends and means' between the measure and its objective.[12] Adopting this nexus requirement ensures that the carve-out will only apply to measures that are capable of contributing to climate change mitigation, but without imposing the more demanding requirements of necessity tests.[13]

c) Safeguarding against abuse of the carve-out

6. Opponents of the inclusion of carve-outs in IIAs often suggest that there is a risk that the carve-out could be abused by States, who may use it to enable unfair treatment of foreign investors[14] or may invoke it frivolously as a stalling tactic in an ISDS proceeding. As a starting point, it is important to note that the carve-out from ISDS we propose could not be invoked unilaterally by a Respondent State in any circumstances; rather, for the carve-out to apply, either the home State's designated Environmental Authorities must agree that the relevant claim is covered by the carve-out, or the State–State Panel, constituted pursuant to Article 2(5), must find that the carve-out applies (Article 2(6) and (7)). The inclusion of time limits in the procedural mechanism to determine the application of the carve-out reduces the potential harm of a Respondent State invoking the carve-out simply to delay an ISDS proceeding.
7. To determine the application of the carve-out, the designated Environmental Authorities or the State–State Panel will have to determine whether the measure at issue is a climate change measure. As noted above, including the requirement that a measure must be 'related to' the reduction or stabilisation of greenhouse gas emissions to fall within the scope of the carve-out should remove the risk of the carve-out being abused, because only a measure that has a genuine relationship with the goal of climate change mitigation would fall within the scope of the carve-out.
8. However, any concern that there is still potential for abuse of the carve-out could be addressed by including an additional requirement in Article 1(1) that climate change measures must be adopted in 'good faith.' The obligation of good faith would mean that the carve-out could not be used 'as a means to circumvent' the host State's obligations under the IIA.[15]
9. In addition to these safeguards that are built into the carve-out, the risk of abuse of the carve-out is also mitigated by the availability of State–State dispute settlement. Even if a host State successfully invokes the ISDS carve-out, the home State of an aggrieved investor(s) would still have the option of initiating a State–State dispute under the usual procedures to determine if the relevant measure complied with the treaty's substantive investment protections. While State–State disputes under IIAs are rare and we do not expect they would be frequent, the ability to have recourse to this avenue if necessary alleviates the risk of the ISDS carve-out for climate change measures being used as a shield for protectionism or unfair treatment of foreign investors.

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[12] WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, paras 135–37, 141–42; WTO Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, adopted 29 August 2014, para 5.90; WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 18–19.

[13] See eg Andrew D Mitchell and Caroline Henckels, 'Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law', 14 Chicago Journal of International Law 93 (2013).

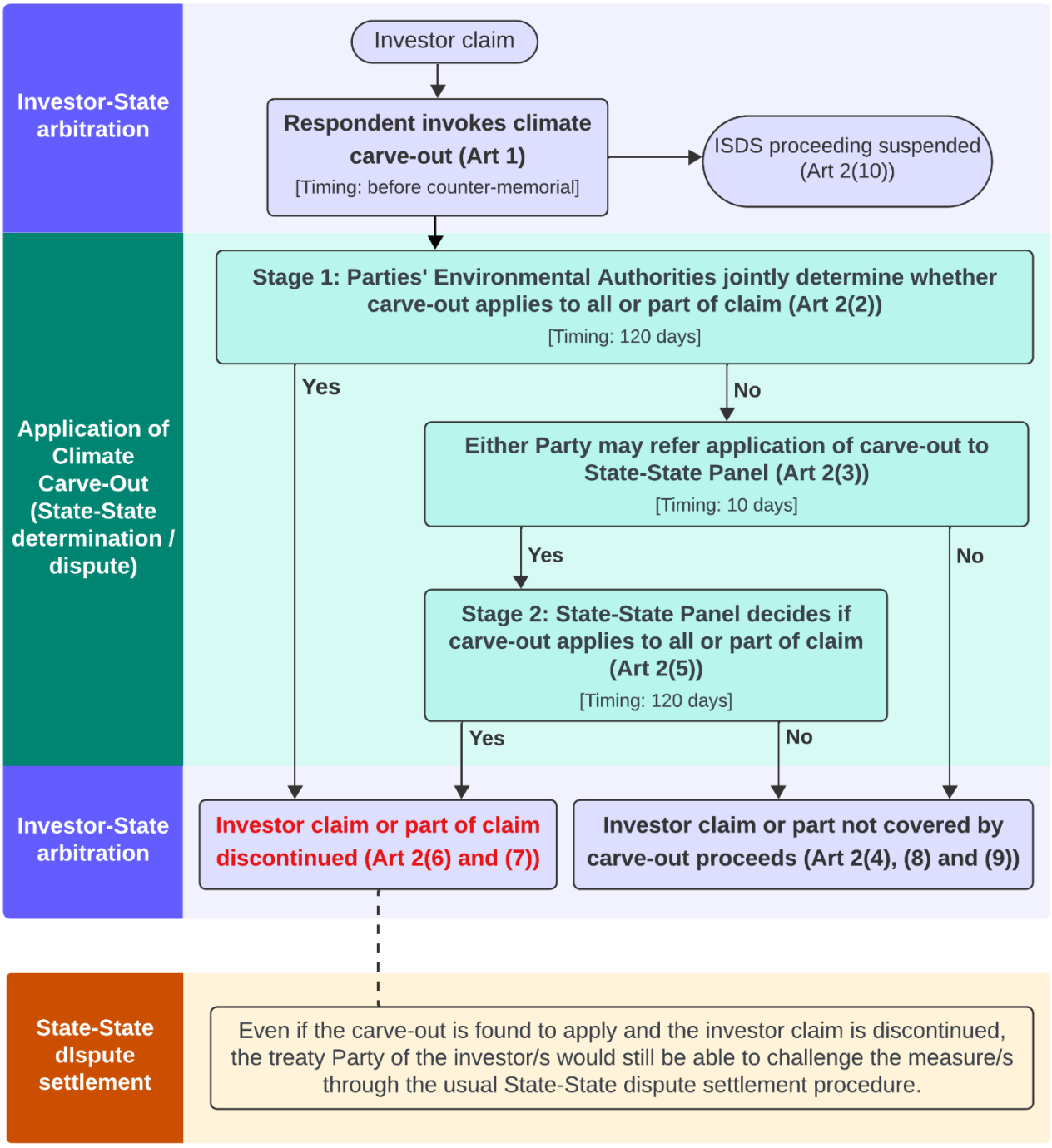
[14] See, eg Simon Lester and Bryan Mercurio, 'Safeguarding Policy Space in Investment Agreements', IIEL Issue Brief 12/2017, at 8, https://www.cato.org/sites/cato.org/files/articles/lester-mercurio-iiel-issue-brief-december-2017.pdf (visited 12 February 2023).

[15] WTO Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, adopted 26 April 2019, para. 7.133.

D. Commentary on the procedural mechanism (Article 2)

10. The following diagram provides an overview of the carve-out's procedural mechanism:

Figure 1: Diagram of procedural mechanism



11. The procedure established in Article 2 is broadly adapted from the procedure used in certain IIAs for determining the application to investor–State claims of exceptions for prudential measures and for monetary policy measures and related credit policies or exchange rate policies.[16] The key features of this procedure are that: (1) it provides the treaty parties with control over the application of the carve-out; (2) it allows for any claims made by investors relating to climate change measures

[16] See eg CPTPP art 11.22; NAFTA art 1415; DR–CAFTA art 12.19; Australia–Hong Kong Investment Agreement, art 25; Canada–Hong Kong BIT art 22; Singapore–Australia FTA, ch 9, art 22.

to be resolved relatively quickly, as a preliminary matter before litigating the merits of the claim; and (3) it ensures that any decision-makers determining the application of the carve-out have climate-related expertise.

12. The Definitions section establishes the relationship between the suggested treaty provisions and existing IIAs. As noted above, our proposal is drafted in a form that it could be incorporated into a plurilateral agreement that would modify numerous existing IIAs, and a list of these Covered IIAs would be included in Annex A to the plurilateral agreement. Hence 'Article X' is a placeholder for the provisions of the relevant Covered IIA that provide for investor–State arbitration and 'Article Y' a placeholder for the provision(s) providing for State–State dispute settlement. The terms 'Claimant', 'Respondent', 'disputing parties', 'non-disputing Party/Parties' and 'Tribunal' have the same meaning as in the provision(s) of the relevant IIA providing for investor–State arbitration. The 'Environmental Authorities' of all Parties to the plurilateral agreement are to be designated in advance in Annex B.

13. Article 2(1) first sentence provides that where an investor submits an investor–State claim which the Respondent views as covered by the carve-out in Article 1, the Respondent may request a joint determination of the Environmental Authorities of the Respondent and the Party of the Claimant on whether to and what extent the carve-out in Article 1 applies to the claim. The reason for providing for a referral to, and joint determination by, the designated Environmental Authorities of the Respondent and the Party of the Claimant is that they are likely to have subject-specific expertise relevant to determining the carve-out's application, and in some States may be relatively independent.[17]

14. Article 2(1) second sentence establishes a time limit for such a request, ordinarily no later than the date the investor–State Tribunal fixes for the Respondent to make its principal submission on the merits. The rationale for this time limit is that until the Respondent State has seen the investor's claim pleaded in full, eg in the Claimant's memorial, it may be difficult to for the Respondent to determine whether it views the claim as covered by Article 1.

15. Article 2(1) third sentence establishes that the Respondent shall provide the investor–State Tribunal, if constituted, a copy of the request for joint determination. The fourth sentence clarifies that the investor–State Tribunal may only continue with the proceeding as provided for in Article 2 (see generally Article 2(3)–(10)).

16. Article 2(2) first sentence establishes that where a request is made for a joint determination pursuant to Article 2(1), the Environmental Authorities of the Respondent and the Party of the Claimant have an obligation to consult and attempt in good faith to make a joint determination regarding whether and to what extent Article 1 applies to the claim.

17. Article 2(2) second sentence establishes a notification requirement where the Environmental Authorities reach a joint determination that Article 1 applies to the claim, or where they cannot reach a joint determination. In either scenario, the Environmental Authorities are to notify in writing the disputing parties, the non-disputing Party/Parties, and, if constituted, the investor–State Tribunal hearing the claim. The final sentence establishes that where the Environmental Authorities determine that the carve-out only applies to a part of the claim, the written notification shall specify this.

18. Article 2(3) provides that where no joint determination has been made by the Environmental Authorities within 120 days of the Respondent's request for a joint determination under Article 2(1), either the Respondent or the Party of the Claimant can request the establishment of a State–State Panel to determine whether and to what extent Article 1 applies to the claim. The suggested period

[17] Anne van Aaken, 'Delegating Interpretative Authority in Investment Treaties: The Case of Joint Administrative Commissions' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff 2015) 28–29, 37–39.

of 120 days for consultations is taken from certain financial services carve-outs.[18] However, the precise period could be adjusted, eg if a longer period would be desired given the sensitivity of determining whether a claim is covered by Article 1, or a shorter period to avoid slowing down the ISDS procedure.

19. Article 2(4) clarifies that where no joint determination is made by the Environmental Authorities pursuant to Article 2(2), and no request for the establishment of a State–State panel is made within 10 days of the expiration of the 120-day period referred to in Article 2(3), the claim can proceed through the investor–State arbitration procedure provided for in the relevant IIA.

20. Article 2(5) provides for certain modifications to the usual procedure for State–State dispute settlement under the relevant IIA where the Respondent or the Party of the Claimant requests the establishment of a Panel under Article 2(3) to determine whether and to what extent the carve-out applies to the investor's claim. Article 2(5)(a) establishes that a majority of members of the State–State Panel must have recognised expertise in climate change law and policy. Disputes about whether this requirement is fulfilled are to be settled by the appointing authority. Article 2(5)(b) establishes a time limit for the State–State procedure of 120 days, beginning on the day the Panel is constituted. Article 2(5)(c) provides that the State–State Panel shall conclude its procedure by issuing a decision that establishes whether and to what extent the carve-out in Article 1 applies to the investor's claim. The Panel's decision is to be transmitted to the disputing parties, the non-disputing Party/Parties, and to the investor–State Tribunal hearing the claim, if constituted.

21. Article 2(6) first sentence establishes the legal consequences where the Environmental Authorities jointly (pursuant to Article 2(2)) or the State–State Panel (under Article 2(5)(c)), determine that Article 1 applies to all parts of the investor's claim. In short, the Claimant is deemed to have withdrawn its claim and discontinued the investor–State proceeding. The bracketed language 'with prejudice' only appears in the 2021 Canada Model FIPA (art 45(5)–(6)) and the recently signed Canada–Ukraine Modernized FTA (art 20.24(5)–(6)). It appears that this language attempts to make explicit that the discontinued claim cannot be re-submitted to ISDS proceedings. The second sentence provides that the investor–State Tribunal constituted to hear the claim shall take note of this discontinuance in an order. The third sentence clarifies that where such deemed withdrawal and discontinuance occurs, the investor–State Tribunal does not have authority to proceed with any part of the claim.

22. Article 2(7) addresses the consequences where the Environmental Authorities jointly, or the State–State Panel, determine that the carve-out in Article 1 applies to only a part of the investor's claim. Where this occurs, the investor is deemed to have withdrawn and discontinued the part of the claim determined to be covered by Article 1. Regarding the bracketed language 'with prejudice', see the commentary to Article 2(6) first sentence (above point 21). Again, the investor–State tribunal constituted to hear the claim is to take notice of the discontinuance in an order (second sentence). The third sentence clarifies that an investor–State Tribunal does not have authority to continue hearing a part of the claim that has been deemed to be withdrawn and discontinued pursuant to the first sentence. It would be possible to combine Article 2(6) and (7) into one paragraph, however they have been separated out for clarity and ease of reading.

23. Article 2(8) clarifies that where it has been determined that the carve-out in Article 1 only applies to part of the investor's claim – either by the Environmental Authorities jointly under Article 2(2) or by the State–State Panel under Article 2(5)(c) – the parts of the claim not covered by Article 1 may continue to be pursued through the investor–State arbitration procedure provided for in the relevant IIA.

24. Article 2(9) clarifies the consequences where either the Environmental Authorities jointly under Article 2(2), or the State–State Panel under Article 2(5)(c), determine that no part of the claim is

[18] See eg CPTPP art 11.22(2)(c); Singapore–Australia FTA art 22(2)(c); Australia–Hong Kong Investment Agreement, art 25(2)(c).

covered by Article 1 – namely, the entire claim may continue to be pursued through investor–State arbitration. It would be possible to combine Article 2(8) and (9) into a single paragraph but they have been separated for ease of reading.

25. Article 2(10) creates an obligation of an investor–State Tribunal to suspend its proceedings during any of the periods in which the application of the carve-out is being determined: namely during consultations under Article 2(2) (which have a 120-day time limit under paragraph 3), the period specified in Article 2(4) as the time limit for a request for the establishment of a State–State Panel (within 10 days of the expiration of the 120-day period in Article 2(3)), or the 120-day period under Article 2(5)(b) in which a State–State Panel is determining whether Article 1 applies. The purpose of this suspension of the ISDS proceedings is twofold: to prevent States having to continue to defend an ISDS claim that is eventually found to be covered by the carve-out in Article 1; and to enable the Respondent State to focus its resources on the consultations or State–State Panel proceeding concerning the application of the carve-out.

E. Impact of the carve-out on the interpretation of other treaty provisions

26. A concern that is often raised with proposals for reform or new drafting in IIAs is that the inclusion of the new provision may impact on the interpretation of other provisions in that or other IIAs. For example, commentators have warned that the inclusion of general exceptions in IIAs may lead to a narrower interpretation of substantive obligations,[19] or that the inclusion of annexes clarifying the scope of indirect expropriation in new treaties may influence how tribunals interpret the expropriation obligation in older treaties that do not include a similar annex.[20]

27. One drafting technique that may be used to minimise the risk of new treaty language inadvertently impacting the interpretation of other provisions is for the provision to the be prefaced with a phrase such as 'for greater certainty…'. This kind of preface makes it clear that the new provision does not mark a substantive change from earlier treaties and is instead clarifying the approach which tribunals should follow. For example, a footnote to the non-discrimination obligations in the CPTPP states that: 'For greater certainty, whether treatment is accorded in "like circumstances" … depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.'[21] A Drafter's Note accompanying the treaty text clarifies that the footnote directs tribunals to following an 'existing approach' that had been taken by various NAFTA Chapter 11 tribunals, rather than the footnote signalling a new or changed approach to non-discrimination obligations.[22] In our view, it does not make sense for an ISDS carve-out for climate change measures to be prefaced by a phrase such as 'for greater certainty…', because the carve-out is a new provision rather than a clarification of how an existing provision should be interpreted.

28. Some may argue that the inclusion of an ISDS carve-out for climate change measures would signal that the treaty parties believe that the measures would likely violate existing investment treaty standards. This argument suggests that the carve-out would not be necessary unless the treaty parties believed that their climate change measures would otherwise be inconsistent with investor

[19] See Caroline Henckels, 'Should Investment Treaties Contain Public Policy Exceptions?' (2018) 59 Boston College Law Review 2825, 2835–2836; Céline Lévesque, 'The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy' in Roberto Echandi and Pierre Sauve (eds), *Prospects in International Investment Law and Policy* (Cambridge University Press 2013) 366–367. This approach was adopted by *Bear Creek Mining Corporation v Republic of Peru* (ICSID Case No. ARB/14/21), Award (30 November 2017), para. 473.

[20] See Federico Ortino, 'Defining Indirect Expropriation: The Transatlantic Trade and Investment Partnership and the (Elusive) Search for "Greater Certainty"' (2016) 43 Legal Issues of Economic Integration 351, 354.

[21] CPTPP Chapter 9 (Investment), footnote 14.

[22] See Drafters' Note on Interpretation of "In Like Circumstances" Under Article 9.4 (National Treatment) and Article 9.5 (Most–Favoured–Nation Treatment) of the TPP (5 November 2015).

protections. In our view, the inclusion of an ISDS carve-out should not be taken as a signal that the measures would otherwise violate treaty standards. This risk has not arisen in practice with the use of carve-outs in other policy areas, such as taxation or financial services regulation. Our proposed carve-out is only from ISDS and not from the scope of the entire treaty, which means that the provision should not be interpreted to suggest anything about the consistency of measures with substantive investor protections. Moreover, the carve-out isn't a defence that can be relied upon to justify a measure that has been found to be inconsistent with the treaty. Instead, the carve-out goes to the jurisdiction of an investor–State tribunal and removes the question of the carve-out's application to an investor claim from the delegation of interpretative authority given to ISDS tribunals.[23] One of its key benefits is that it can allow quicker resolution of disputes, and channels the question of the carve-out's application to decision-makers with climate-relevant expertise (either the Parties' designated Environmental Authorities or the State–State Panel that includes a requirement for a majority of members to have climate-related expertise). This procedural mechanism means that the carve-out serves a purpose even if the host State would eventually prevail in an investor–State arbitration.

29. However, to minimise the risk of a carve-out for climate change measures being interpreted as support for the view that these measures would otherwise violate IIAs, the climate carve-out could be accompanied by a note stating that it is without prejudice to the policy space that States already enjoy under investment treaty standards, exceptions or related provisions.[24] For example, Article 14.21.1 of the Indonesia–Australia Comprehensive Economic Partnership Agreement prefaces a short list of ISDS carve-outs (including a carve-out for measures that are 'designed and implemented to protect or promote public health') with: 'Without prejudice to the scope of any applicable exceptions, non-conforming measures, principles of international law or the disputing Party's ability to rely upon such exceptions, non-conforming measures or principles of international law during the proceedings, no claim may be brought under this Section…'.

[23] See van Aaken (n 17) 43.

[24] On the potential scope of this policy space in relation to climate change measures, see eg Oliver Hailes 'The Customary Duty to Prevent Unabated Fossil Fuel Production: A Tipping Point for Energy Investment Arbitration?' (2023) 20(1) Transnational Dispute Management, at 28–36 (interpreting the fair and equitable treatment standard, in relation to climate mitigation measures, in light of states' customary international law duty to prevent significant environmental harm).