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Shalanda H. Baker

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Climate Change and International Economic Law

*Shalanda H. Baker**

This Article examines an unexplored issue arising at the intersection of international economic law and international environmental law: How might international economic law adapt to allow states in the Global South, which are disproportionately impacted by the sudden and unforeseen impacts of global climate change, to exit or modify economic relationships that render such states more vulnerable to these negative impacts? This Article begins with an explication of the unique features of international economic law and international environmental law, and argues that the architecture of modern international economic law, which requires a certain degree of environmental stability in order to incentivize private investment, could limit a capital importing state's ability to respond to unforeseen environmental harm resulting from climate change. The limited solutions currently available to a capital importing state facing such circumstances, including breach, denunciation or withdrawal, could pose political, economic, and reputational costs that leave the developing state in the undesirable position of being untethered to the system of international economic law.

*This Article argues that climate change provides a unique opportunity to animate the moribund doctrine of fundamental change of circumstances, *rebus sic stantibus*, to assist states in managing the impacts of climate change within the realm of international economic law. The doctrine, rooted in equity, may provide a basis for exiting an agreement or, perhaps more desirably, renegotiating the agreement. The party invoking the doctrine must illustrate that the*

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changes are unforeseen, the circumstances constitute an essential basis of consent to be bound by the underlying agreement, and the changed circumstances radically transform the party's ability to perform its obligations. Although the International Court of Justice has narrowly interpreted these doctrinal elements in the past, the climate change moment creates the imperative to broaden the scope of the doctrine and bring more flexibility to the current system of international economic law. The framework offered in this Article provides a roadmap for doing so.

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INTRODUCTION

A central tenet of contract law provides that parties to an agreement uniquely understand the essence of their bargain. The circumstances and assumptions of the bargain are generally thought to be static.¹ Where there are unknowns, the parties incorporate contractual provisions to contain these unknown risks.² The parties assume, and hedge, their respective risks based on a generally understood bandwidth of stability and change³ as established by prior practice. When circumstances change fundamentally to produce unanticipated risks, core principles of contract law allow the affected parties to terminate the agreement for inability to perform.

Now consider this: A developing country enters into a bilateral investment treaty, or “BIT,” with a developed country. Pursuant to the treaty, corporate entities from the developed country will be permitted to invest in the developing country in exchange for the right to extract natural resources from the developing country through a series of mining projects. The promise implicit in this agreement is that the investment will bring much-needed capital, technology, and economic development to the developing country. Also implicit in this bargain is the assumption that the water needed to operate the mines will always be available, the weather will remain predictable, and the arable land within the country will remain at its general level. Further, the parties agree that the environmental laws of the country will remain stable to reflect an assumed environmental stasis.⁴ In exchange for financial and technical resources, and pursuant to the investment agreements that will flow from the treaty, the developing country agrees to maintain and enforce its social and environmental laws and regulations at a certain baseline level. The investor could view any deviation from this regulatory ceiling by the developing state as an expropriatory act, thus entitling the investor to compensation. In a dispute regarding the state’s ability to regulate, the investor would likely argue that the regulatory action taken by the state destabilized the overall investment environment that the in-

1. Shalanda H. Baker, *Adaptive Law in the Anthropocene*, 90 CHI-KENT L. REV. 563, 575 (2015) (discussing premises of neoliberal economic development, one of which is a stable investment environment).

2. See Shalanda H. Baker, *Unmasking Project Finance Risk Mitigation, Risk Inducement, and an Invitation to Development Disaster?*, 6 TEX. J. OIL, GAS, & ENERGY L. 273, 310 (2010–11).

3. See generally Robin Kundis Craig, “Stationarity is Dead”—*Long Live Transformation Five Principles for Climate Change Adaptation Law*, 34 HARV. ENVTL. L. REV. 9 (2010) (arguing that our current environmental legal scheme, which relies on a basic assumption of stability, cannot effectively deal with climate change because climate change makes our environment and its processes unstable and unpredictable).

4. See Lorenzo Cotula, *Regulatory Takings, Stabilization Clauses and Sustainable Development* 18 (OECD Global Forum on International Investment VII, Mar. 27–28, 2008), <http://www.oecd.org/investment/globalforum/40311122.pdf>. As Cotula explains, stabilization clauses are quite broad and can include so-called “freezing clauses.” *Id.* at 6. Freezing clauses require the state to “pay compensation if it applies regulatory changes to the investment project.” *Id.* at 9.

vestor relied on when making the initial investment.⁵ Modern international economic law requires that the investor would likely prevail in the event of such a dispute.⁶

Neoliberal economic development, which relies heavily on private actors for development activity, requires a stable and predictable investment environment for private investors.⁷ In the new investment reality, however, where the natural environment is destabilized due to climate change impacts, the overall investment environment is also destabilized because the capital importing state may be unable to maintain its side of the regulatory bargain. International economic law, it seems, must therefore yield to this destabilization and create avenues for states to accommodate the environmental instability brought about by climate change.

This Article addresses the legal questions that arise when the assumptions embedded in neoliberal economic development no longer hold. Namely, this Article asks: What legal avenues does international economic law provide for parties when the assumed environmental circumstances that served as the basis for the bargain drastically and unforeseeably shift? Further, how might international economic law accommodate a country that is unable to comply with its obligations due to the unforeseeable impact that climate change has had on its natural resources?

This Article proceeds in four Parts. Part I examines the projected impacts of climate change on the Global South and discusses how neither international environmental law nor international economic law adequately enables states to respond to climate change. This Part argues that the current international economic legal regime may actually exacerbate the vulnerability caused by global climate change. In light of these limitations, Part II explores options for addressing harmful economic relationships, including material breach, denunciation or unilateral withdrawal, and *rebus sic stantibus*, the doctrine of fundamental change of circumstances. After weighing the pros and cons of each option, the Part concludes that *rebus sic stantibus* might provide the best leverage for states in the Global South to exit or, perhaps more beneficially, modify, existing economic agreements. The doctrine could also provide a useful tool for states attempting to combat climate change without facing international sanctions.

Part III explores the contours of *rebus sic stantibus* as illustrated by the key cases addressing the doctrine. Part IV applies it to international economic

5. Gaetan Verhoosel, *Foreign Direct Investment and Legal Constraints on Domestic Environmental Policies: Striking a "Reasonable" Balance Between Stability and Change*, 29 LAW & POL'Y INT'L BUS. 451, 453 (1998).

6. Cotula, *supra* note 4, at 2 (noting that under "commonly used stabilization clauses, the host government commits itself not to change the regulatory framework in a way that affects the economic equilibrium of the project, and to compensate the investor if it does so," and that this requirement may limit the ability of poor states to adopt more expansive social and environmental regulations).

7. *Id.* at 2; Baker, *supra* note 1, at 575.

law and offers a roadmap for states in the Global South to animate the doctrine. The Part analyzes the doctrine's applicability to the various layers of international economic law, from multilateral agreements to bilateral investment agreements, and—somewhat controversially—concessionary agreements. Part IV concludes with a recommendation to assist states in striking the balance between outright termination of harmful economic relationships and continuing economic relationships that could exacerbate the effects of climate change. This Article argues that *rebus sic stantibus* is a tool that provides developing states with the much-needed moral leverage to renegotiate international investment relationships. With this tool in play, international economic law may begin to yield to the imperatives of resiliency and flexibility to adapt to this time of unprecedented climate destabilization.⁸

I. INTERNATIONAL ECONOMIC LAW AND INTERNATIONAL ENVIRONMENTAL LAW AT ODDS IN THE CLIMATE CHANGE ERA

In the neoliberal era of economic development, which began in the early 1980s and reached a zenith in the 1990s, developing states entered into international investment agreements with developed states hoping to attract much-needed foreign capital.⁹ Although these agreements provided new opportunities for economic development, they also limited states' ability to regulate in the public interest.¹⁰ These limitations have given rise to a number of investment disputes regarding environmental, labor, and health regulations, and, in many ways, set a regulatory ceiling for states seeking to enhance environmental and social conditions.¹¹ This issue is well recognized in the realm of international

8. See generally Melinda Harm Benson & Robin Kundis Craig, *The End of Sustainability*, 27.7 SOC'Y & NAT. RESOURCES: AN INT'L J. 777–82 (2014); Nicholas A. Robinson, *The Resilience Principle*, 5 IUCN ACAD. ENVTL. L. EJOURNAL 19 (2014).

9. See Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037, 1040–41 (2010) (noting that “[m]ost of the [international investment agreements] in force today were drafted in the 1990s by Northern, capital-exporting states that subscribed to a market fundamentalist or ‘neo-liberal’ version of economic liberalism at the time”); David M. Trubek & Alvaro Santos, *The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, Introduction to THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 1–18 (David M. Trubek & Alvaro Santos, eds., 2006) (discussing Third Moment of development).

10. See Trubek & Santos, *supra* note 9, at 2.

11. In a striking study of stabilization clauses conducted by the International Finance Corporation and the United Nations Special Representative of the Secretary-General on Business and Human Rights, researchers found that, for countries outside of the Organisation for Economic Cooperation and Development (OECD), stabilization clauses contained in host-government contracts were drafted to “either insulate investors from having to implement new environmental and social laws or to provide investors with an opportunity to be compensated for compliance with such laws.” JOHN G. RUGGLE, STABILIZATION CLAUSES AND HUMAN RIGHTS, at v (2009), <http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES> (last visited July 16, 2015). For contracts from OECD countries, the opposite was the case. The study found that “[n]one of the contracts . . . offer exemptions from new laws, and they only rarely offer an opportunity for compensation for compliance with the same breadth of social and environmental laws as in non-OECD countries.” *Id.*

economic law. Indeed, as Suzanne A. Spears notes, the question of “how to strike a balance between principles regarding the protection and promotion of foreign investment on the one hand and principles regarding the protection of society and the environment on the other”¹² is “[o]ne of the most important challenges facing the international investment law regime today.”¹³ This question takes on renewed importance in the climate change era, and it provides a useful entry point to understand the climate change problem at the intersection of international economic law and international environmental law.

This Part discusses the ways that climate change exacerbates the preexisting fissures within the regulatory debate. It begins with a discussion of the projected effects of climate change on the Global South (I.A.). This is followed by a discussion of the ways that international environmental law is unlikely to protect vulnerable states from the impacts of climate change (I.B.). The discussion also examines how international economic legal relationships create unique problems for states in the Global South (I.C.). It ends with an illustration of these problems as manifested by the El Salvador-Pacific Rim Mining dispute (I.D.).

A. *Climate Change, Neoliberal Economic Development, and the Global South*

There is scientific consensus that humans’ three hundred year affair with fossil fuels has led to climate change.¹⁴ Due to the release of carbon dioxide and other greenhouse gases into the atmosphere since the dawn of the industrial age, the increase in the planet’s mean temperature will surpass the two-degree Celsius mark and will very likely reach four to six degrees Celsius by 2100.¹⁵ Scientists predict that with a global temperature increase of two degrees Celsius, the planet will experience manageable, if somewhat unpredictable, climate

12. Spears, *supra* note 9, at 1037.

13. *Id.*

14. See *Scientific Consensus Earth’s Climate is Warming*, NAT’L AERONAUTICS & SPACE ADMIN., <http://climate.nasa.gov/scientific-consensus/> (last updated Jan. 14, 2016) (stating that “97 percent or more of actively publishing climate scientists agree: Climate-warming trends over the past century are very likely due to human activities”); but see Gayathri Vaidyanathan, *How to Determine the Scientific Consensus on Global Warming*, SCI. AM. (July 24, 2014), <http://www.scientificamerican.com/article/how-to-determine-the-scientific-consensus-on-global-warming/> (illustrating that the “scientific consensus” on climate change is still controversial and disputed by some).

15. See Ottmar Edenhofer et al., Intergov’tal Panel on Climate Change, *Summary for Policymakers* 8, in CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE (2014), https://www.ipcc.ch/pdf/assessment-report/ar5/wg3/ipcc_wg3_ar5_summary-for-policymakers.pdf (projecting a global average temperature change by 2100 between 3.7 and 4.8 degrees Celsius “[w]ithout additional efforts to reduce GHG emissions beyond those in place today”); World Bank, *Turn Down the Heat Why a 4°C Warmer World Must Be Avoided* ix (Working Paper No. 74455, Nov. 11, 2012), http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/07/17/090224b0828c33e7/1_0/Rendered/PDF/TurnDownTheWorldMustBeAvoided.pdf (illustrating “what the world would be like if it warmed by 4 degrees Celsius”).

variations.¹⁶ At an increase of four to six degrees Celsius, however, the Earth may reach a tipping point with respect to climate.¹⁷ At these higher temperatures, nonlinear, unpredictable patterns prevail, and scientists lose the ability to make any reasonable scientific predictions regarding the climate.¹⁸ Destabilization of existing social, economic, and environmental paradigms is certain.¹⁹

Within the next century, communities around the globe will face a battery of climate change related challenges, including increased rainfall in wet areas;²⁰ increased drought in dry areas;²¹ unpredictable and stronger storm systems;²² coastal flooding and the disappearance of coastal wetlands;²³ and climate-related migration.²⁴ For a host of geographical, political, and economic reasons, the Global South will disproportionately bear the brunt of these challenges.²⁵

A history of neoliberal development policies has left many developing states without the infrastructure or capacity to respond to climate change.²⁶ In the 1980s, developing states seeking development assistance from the World Bank and International Monetary Fund were forced to undergo “structural adjustment,” or the implementation of domestic legal and economic reforms meant to lift trade barriers, spur foreign direct investment, and deregulate state

16. See World Bank, *supra* note 15, at 1 (noting that, if temperatures were to stay below two degrees Celsius, we would be able to prevent “dangerous” climate change).

17. *Id.* at ix. According to the World Bank, “the 4 C scenarios are devastating” and would include:

the inundation of coastal cities; increasing risks for food production potentially leading to higher malnutrition rates; many dry regions becoming dryer, wet regions wetter; unprecedented heat waves in many regions, especially in the tropics; substantially exacerbated water scarcity in many regions; increased frequency of high-intensity tropical cyclones; and irreversible loss of biodiversity, including coral reef systems.

Id.

18. *Id.* (noting that “a 4 C world is so different from the current one that it comes with high uncertainty and new risks that threaten our ability to anticipate and plan for future adaptation needs”).

19. See *id.*

20. See Stephanie P. Ogburn, *Climate Change Is Alerting Rainfall Patterns Worldwide*, SCI. AM. (Nov. 12, 2013), <http://www.scientificamerican.com/article/climate-change-is-altering-rainfall-patterns-worldwide/>. According to a recent study looking at the effects of global climate change on precipitation, climate change will “shift precipitation in two main ways.” *Id.* First, wet places will get wetter and dry places will get drier. *Id.* Second, storm tracks are predicted to change. *Id.*

21. *Id.*

22. *Id.*; see also World Bank, *supra* note 15, at 27.

23. See World Bank, *supra* note 15, at 29–34.

24. *Id.* at 34; see also Maxine Burkett, *In Search of Refuge Pacific Islands, Climate-Induced Migration, and the Legal Frontier*, 98 ASIA PAC. ISSUES 1, 1 (Jan. 2011) (calling for a “reconsideration of existing legal boundaries” in order to address the problem of climate-induced refugees).

25. See generally World Bank, *supra* note 15. This report focuses predominately on the effects of climate change on the Global South, noting that the Global South is particularly vulnerable to the devastating consequences of climate change. *Id.*

26. See Tor Krever, *The Legal Turn in Late Development Theory The Rule of Law and the World Bank’s Development Model*, 52 HARV. INT’L L.J. 287, 299–300 (2011) (“Neoliberal policies not only failed to meet their stated goals of economic development but also exacerbated inequality in much of the developing world.”).

industries to make way for private investment.²⁷ During this period, weakened states in the Global South also began to dismantle their social safety net by limiting access to key social services, such as public housing, health care, and education.²⁸

Free trade, a necessary byproduct of structural adjustment, placed additional strain on the agricultural industries of developing states. The lifting of trade barriers led to an increased export of raw materials by states in the Global South and an influx of cheap manufactured goods and heavily subsidized agricultural products from the Global North.²⁹ Small farmers, unable to compete with the influx of cheap agricultural products, left farmland in droves for urban centers, hoping for greater employment opportunities.³⁰ As a result of these changes, states in the Global South face diminished agricultural capacity and a more limited ability to adapt local farming practices to climate change.³¹ Due to their reliance on importing agricultural products, these states face food insecurity, meaning the population lacks access to “safe and nutritious food to maintain a healthy and active life.”³² The urban centers that absorbed rural mi-

27. *Id.* at 297–99.

28. See Avi Brisman, *Not a Bedtime Story Climate Change, Neoliberalism and the Future of the Arctic*, 22 MICH. ST. INT’L L. REV. 241, 273 (2013) (quoting Henry Giroux and describing neoliberalism as a doctrine that encourages a “market-driven disdain for any form of governance that assume[s] a measure of responsibility for the education, health, and general welfare of the country’s citizens—a near-pathological disdain for community, public values, and the public good”).

29. See Vlad Spanu, *Liberalization of the International Trade and Economic Growth: Implications for Both Developed and Developing Countries* (May 2003) (unpublished manuscript), <http://www.cid.harvard.edu/cidtrade/Papers/Spanu.pdf> (discussing how neoliberalism changed the exports and imports of the Global South).

30. See Carmen G. Gonzalez, *Climate Change, Food Security, and Agrobiodiversity Toward a Just, Resilient, and Sustainable Food System*, 22 FORDHAM ENVTL. L. REV. 493, 502 (2011) (noting that “[f]ood insecurity in the Global South has its origins in colonialism . . . [a]s a consequence of the colonial division of labor, most developing countries entered the world economy as producers of raw materials and consumers of manufactured products”).

31. *Id.* at 493 (explaining that “climate change threatens to wreak havoc on food production by increasing the frequency and severity of extreme weather events, depressing agricultural yields, reducing the productivity of the world’s fisheries, and placing additional pressure on scarce water resources”). Urbanization also reduces the number of individuals with traditional knowledge that could assist with adaptation efforts. See Christopher B. Field et al., Intergov’tal Panel on Climate Change, *Summary for Policymakers*, in CLIMATE CHANGE 2014: IMPACTS, ADAPTION, AND VULNERABILITY 26 (2014), https://ipcc-wg2.gov/AR5/images/uploads/WG2AR5_SPM_FINAL.pdf (noting that “[i]ndigenous, local, and traditional knowledge systems and practices, including indigenous peoples’ holistic view of community and environment, are a major resource for adapting to climate change, but these have not been used consistently in existing adaptation efforts”); see also U.N. HOUSING RIGHTS PROGRAMME, REPORT NO. 8, URBAN INDIGENOUS PEOPLES AND MIGRATION: A REVIEW OF POLICIES, PROGRAMMES AND PRACTICES 30, 51 (2010) (discussing the urbanization of indigenous peoples and the loss of traditional livelihoods), <http://unhabitat.org/books/urban-indigenous-peoples-and-migration-a-review-of-policies-programmes-and-practices/>.

32. Carmen G. Gonzalez, *Trade Liberalization, Food Security and the Environment The Neoliberal Threat to Sustainable Rural Development*, 14 TRANSNAT’L L. & CONTEMP. PROBS. 419, 428 (2004) (quoting the 1996 World Food Summit); see also Gonzalez, *supra* note 30, at 503 (explaining that neoliberal trade policies “undermined food security in the Global South by promoting dependence on im-

grants also lack infrastructure and economic opportunities.³³ Many states in the Global South have to contend with overcrowded urban slums that lack proper sanitation, sewage, and housing.³⁴ Many such slums are coastal and vulnerable to rising sea levels.³⁵ Neoliberal trade policies contribute to these twin dynamics of food insecurity and increased urban poverty in coastal slums prone to flooding.³⁶ Both phenomena deepen the vulnerability of states in the Global South to climate change.³⁷

Climate change magnifies the problems long-associated with neoliberal development. For example, the lifting of restrictions on foreign direct investment limits the ability of Southern states to develop infant industries that might be better able to adapt to state-specific climate change needs.³⁸ Heavy reliance on foreign direct investment further limits the ability of states to increase capacity in science and related industries because of the focus on foreign investment in extractive industries such as oil and mining.³⁹ In light of these existing and foreseeable climate-change risks, Southern states have turned to international environmental law for solutions, but with largely disheartening results.⁴⁰

ported food, devastating the livelihoods of small farmers, and depriving developing countries of the revenues with which to finance economic diversification”).

33. See Teresa Almeida, *Neoliberal Policy and the Growth of Slums*, PROSPECT (May 21, 2012), <http://prospectjournal.org/2012/05/21/neoliberal-policy-and-the-growth-of-slums/> (noting that the “growth of slums was not a wholly organic development” but “one of the results of globalized, neoliberal capitalism” that “emphasized financialization at the cost of productive manufacturing and privatization at the cost of public investment and infrastructure”).

34. See generally Vernon Henderson, *Urbanization in Developing Countries*, 17 WORLD BANK RES. OBSERVER 89 (2007) (describing urban centers, and the problems associated with them, in the Global South).

35. See *What Climate Change Means for Africa, Asia and the Coastal Poor*, WORLD BANK NEWS (June 19, 2013), <http://www.worldbank.org/en/news/feature/2013/06/19/what-climate-change-means-africa-asia-coastal-poor> (explaining that many of the poorest residents of Africa and Asia “are being pushed to the edges of livable land and into the most dangerous zones for climate change”—coastal settlements that “cling to riverbanks and cluster in low-lying areas with poor drainage, few public services, and no protection from storm surges, sea-level rise, and flooding”).

36. See, e.g., Ibidun O. Adelekan, *Vulnerability of Poor Urban Coastal Communities to Climate Change in Lagos, Nigeria* 16 (2009), <http://siteresources.worldbank.org/INTURBANDEVELOPMENT/Resources/336387-1256566800920/6505269-1268260567624/Adelekan.pdf> (arguing that coastal slums in Lagos, Nigeria are particularly vulnerable to climate change due to inadequate infrastructure).

37. The IPCC delivered its findings regarding food security and climate change, and determined that “[a]ll aspects of food security are potentially affected by climate change, including food access.” Field et al., *supra* note 31, at 18; see also Adelekan, *supra* note 36.

38. Karen L. O’Brien & Robin M. Leichenko, *Double Exposure Assessing the Impacts of Climate Change Within the Context of Economic Globalization*, 10 GLOBAL ENVTL. CHANGE 221, 228–29 (2000) (illustrating how the majority of rural Mexican farmers are simultaneously exposed to the negative, synergistic consequences of both climate change and globalization).

39. See SCOTT PEGG, *POVERTY REDUCTION OR POVERTY EXACERBATION?* WORLD BANK GROUP SUPPORT FOR EXTRACTIVE INDUSTRIES IN AFRICA 8–12 (2003), <http://www.oxfamamerica.org/static/oa3/files/poverty-reduction-or-poverty-exacerbation.pdf> (offering evidence that foreign direct investment in African nations with rich extractive resources has actually hindered sustainable development).

40. The United Nations Framework Convention on Climate Change (UNFCCC), adopted in 1994, signaled recognition by the international community that climate change should be subject of international governance. See Jessica L. Noto, Comment, *Creating a Modern Atlantis Recognizing Submerg-*

B. *International Environmental Law Responses to Climate Change*

The key shortcomings of international environmental law quickly emerge: It is a patchwork of domestic law and international law, as well as soft law and hard law. There is no comprehensive international environmental legal regime to regulate the activity of multinational actors who are engaged in activities across multiple jurisdictions. As this subpart addresses, diverse actors such as states, multinational private entities, intergovernmental bodies, like the United Nations, and nongovernmental organizations are currently engaged in various experiments to create a cohesive and uniform system of international environmental law to mitigate trans-boundary and domestic environmental harm; however, no single doctrinal approach defines the whole of international environmental law.⁴¹ Although this problem may commonly surface in modern international law, the lack of a cohesive regime is perhaps even more problematic in international environmental law because it potentially touches upon nearly every major area of governance—migration, security, and natural resources management, to name a few examples.

The diverse approaches to international environmental law include public law, where states enter treaties regarding the environment;⁴² private law, where investors agree to adhere to certain standards dictated by an investment contract;⁴³ and soft law, where multinational private entities, such as banks and corporations, agree to hold themselves to certain nonbinding, voluntary environmental standards.⁴⁴ International efforts to mitigate the impacts of climate change primarily fall into the public law category.

ing States and their People, 62 *BUFF. L. REV.* 747, 749 (2014). Unfortunately, the framework and flexibility mechanisms created by the Convention have done very little to curb global carbon dioxide emissions, and since 1994, the impacts of climate change have moved from the theoretical realm to the experiential realm. See *Overview*, NAT'L CLIMATE ASSESSMENT, <http://nca2014.globalchange.gov/highlights/overview/overview> (last visited Jan. 11, 2016) ("Climate change, once considered an issue for a distant future, has moved firmly into the present."); see also Coral Davenport, *The Marshall Islands Are Disappearing*, *N.Y. TIMES* (Dec. 1, 2015), <http://www.nytimes.com/interactive/2015/12/02/world/The-Marshall-Islands-Are-Disappearing.html> (discussing imminent threats to low-lying islands and potential solutions).

41. See Harro Van Asselt, *Managing the Fragmentation of International Environmental Law Forests at the Intersection of the Climate and Biodiversity Regimes*, 44 *N.Y.U. J. INT'L L. & POL'Y* 1205, 1209 (Summer 2012) (discussing fragmentation in international law and its manifestation in international environmental law as well).

42. See *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 269–72 (David Hunter et al. eds., 4th ed. 2011) ("The subjects of international law are limited primarily to States, rather than firms or individuals" and states "must consent to limit their sovereignty" when making and participating in international law.). The Montreal Protocol is one example of an international environmental treaty and is widely considered successful at halting the depletion of the ozone layer. See *Montreal Protocol on Substances that Deplete the Ozone Layer*, Jan. 1, 1989, 1572 *U.N.T.S.* 3.

43. *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY*, *supra* note 42, at 1291. Foreign direct investment has grown in popularity over the past few decades: "Since the 1980s, over 2000 bilateral investment treaties (BITs) have been signed around the world" in addition to several major regional treaties, such as Chapter 11 of NAFTA. *Id.*

44. *Id.* at 344. Soft law is often considered "more dynamic and democratic than traditional law-making, embracing a broader range of actors (including scientific organizations, academic specialists,

Attempts to mitigate the impacts of climate change through public law have largely failed.⁴⁵ In general, the commons—the oceans, space, and the atmosphere—pose a regulatory problem for international environmental law.⁴⁶ The commons are notoriously difficult to safeguard, with abundant collective action problems and pervasive free riding by noncompliant states.⁴⁷ Climate change magnifies the collective action problems that already plague international environmental law because of the uncertainty regarding its potential impact and the economic benefits derived from inaction.⁴⁸ Geospatiality—the ability to predict climate change outcomes based on a state’s or city’s location within the global geography—also poses a problem to climate change mitigation efforts through public law. As outlined by Rolland, Pimentel, and Ganguy in “Taking Climate Change by Storm: Theorizing Global and Local Policy-Making in Response to Extreme Weather Events,” with climate change, “policy-makers are least able to effectively respond to the challenge of extreme weather events at the scale where scientific knowledge is the most accurate.”⁴⁹ For example, at the global level, scientific certainty regarding the occurrence of extreme weather events is at its highest, while the “[c]ost of actor coordination is high,” and “inertia and free-rider incentives” make “coordination extremely difficult.”⁵⁰ Conversely, at the local level, collective action poses less of an issue, but scientific uncertainty regarding the occurrence of an extreme weather event is at its highest.⁵¹ The numerous failed international efforts to mitigate the flow of greenhouse gases into the atmosphere illustrate this dynamic at the international level.⁵²

NGOs, and industry) and providing a more direct link with the larger society”). *Id.* For an example of a soft law instrument, see THE EQUATOR PRINCIPLES III (2013), http://www.equator-principles.com/resources/equator_principles_III.pdf. The Equator Principles provide “a financial industry benchmark for determining, assessing and managing environmental and social risk in projects.” *Id.*

45. See Ruth Gordon, *The Triumph and Failure of International Law*, 34 N.C. CENT. L. REV. 63, 70–74 (2011) (describing areas in which international law has succeeded and failed and noting that “if tackling ozone depletion was the international community’s greatest environmental achievement, addressing climate change may be its most dire failure, a failure that may have enormous—perhaps devastating—consequences”).

46. See Sumudu Atapattu, *Climate Change, Indigenous Peoples and the Arctic: The Changing Horizon of International Law*, 22 MICH. ST. INT’L L. REV. 377, 405 (2013).

47. See generally COMMITTEE ON THE HUMAN DIMENSIONS OF GLOBAL CHANGE, NATIONAL RESEARCH COUNCIL, *THE DRAMA OF THE COMMONS* (E. Ostrom et al. eds., 2002).

48. See Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 ECOLOGY L.Q. 183, 190 (2005) (describing the collective action problem).

49. Sonia E. Rolland et al., *Taking Climate Change by Storm: Theorizing Global and Local Policy-Making in Response to Extreme Weather Events*, 62 BUFF. L. REV. 933, 935 (2014).

50. *Id.* at 953. Conversely, at the local level, collective action poses less of an issue because there are fewer actors. However, it is also where the lack of scientific certainty regarding the occurrence of an extreme weather event is at its highest. Thus, communities must overcome a fair amount of uncertainty in order to reach consensus regarding climate change action. *Id.* at 966.

51. *Id.* at 953.

52. See William Boyd, *Climate Change, Fragmentation, and the Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage*, 32 U. PA. J. INT’L L. 457, 547–50 (Winter 2010).

On its own, international environmental law has had limited success in remediating the vulnerability of states vis-à-vis climate change.⁵³ When international economic law and international environmental law converge, a few particularly problematic patterns emerge.

C. *Increased Vulnerability vis-à-vis International Economic Law*

With respect to definitions, international economic law is arguably more concrete than international environmental law. International economic law refers to the economic obligations of states vis-à-vis other states and, increasingly, vis-à-vis private parties.⁵⁴ In general, international economic law is divided into two categories: international trade law and international investment law.⁵⁵ Examples of international trade law include trade agreements, such as the General Agreement on Trade and Tariffs (GATT), the World Trade Organization (WTO), the North American Free Trade Agreement (NAFTA), the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), and the Trans-Pacific Partnership. Alternatively, international investment law refers to agreements concerning the treatment of foreign investors within the host country, or BITs; investment provisions contained in NAFTA Chapter 11 and CAFTA-DR Chapter 10; and investment agreements concerning foreign direct investment in specific projects.⁵⁶ Although treaties provide basic guidelines for state to state relationships, international economic law is unique in that it is currently shifting away from public actors performing on the public international stage to private actors performing roles traditionally reserved for states in realms not easily characterized as public or private.⁵⁷

53. Although developing states have long sought aid to assist with adaptation effort, referring to the “climate debt” or “carbon debt” owed to them by developed states, these aid efforts have been largely unsuccessful. See Karin Mickelson, *Beyond a Politics of the Possible? South-North Relations and Climate Justice*, 10 MELB. J. INT’L L. 411, 413 (2009) (referring to efforts by states in the Global South to foreground justice in the current climate change discourse). Other international environmental law efforts, such as REDD and the United Nations Framework Convention on Climate Change clean development mechanism, have also been critiqued. See Michael L. Brown, Note, *Limiting Corrupt Incentives in a Global REDD Regime*, 37 ECOLOGY L.Q. 237, 246 (2010); David Takacs, *Environmental Democracy and Forest Carbon (REDD+)*, 44 ENVTL. L. 71, 99–100 (Winter 2014).

54. See generally M. SORNARAJAH, *THE PURSUIT OF NATIONALIZED PROPERTY* (1986); see also Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INTL L. 1 (2014) (noting that international trade law has transitioned from a law that regulates trade between states to a law that also attempts to regulate investment of private entities).

55. See Wagner, *supra* note 54, at 11–15 (noting distinctions between two bodies of international economic law).

56. See generally *id.* (describing the different trade agreements and investment treaties).

57. See Anthea Roberts, *Clash of Paradigms Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45, 45 (2013) (analogizing the current investment treaty system to the platypus, a strange creature scientists initially struggled to characterize as a bird, mammal, or reptile; and noting that the current system of international investment law “grafts private international law dispute resolution mechanisms onto public international law treaties”); see also Trubek & Santos, *supra* note 9, at 3 (noting that “[i]nvestments by bilateral and multilateral agencies as well as by private foundations reached into the billions” during the neoliberal era).

Neoliberal theory provides the basis for this new reality of international investment law.⁵⁸ Neoliberalism assumes that markets will inherently create the conditions for economic growth and lasting prosperity.⁵⁹ With this free market ideology as a starting point, neoliberalism privileges private actors and induces law reform projects throughout the Global South.⁶⁰ Specifically, the development of private property and contract regimes has made it easier for private actors to engage in investment activity.⁶¹ Given the heavy reliance on private actors for development activity, the predictability of the investment environment also constitutes a core component of neoliberal economic development.⁶²

Conflict arises when the neoliberal approach to economic development meets the need for environmental protection. For example, a “stabilization clause” is a common investment contract provision that requires a host state, the capital receiving country, to keep its current environmental laws and regulations in place throughout the duration of the treaty or contract.⁶³ Investment environment predictability provides the common rationale offered in support of such provisions. While on its face the stabilization clause appears innocuous, it creates a ceiling for environmental regulatory standards; if a host country changes its environmental regulatory regime, it could face economic penalties to compensate the investor for its compliance costs.⁶⁴ Stabilization clauses in

58. See Spears, *supra* note 9, at 1041 (noting that “[b]roadly speaking, neo-liberals do not envision any role for the regulatory state beyond the establishment and protection of property rights”).

59. See Trubek & Santos, *supra* note 9, at 2 (stating that “[n]eoliberal thinkers stressed the primary role of markets in economic growth”).

60. See David M. Trubek, *The “Rule of Law” in Development Assistance Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 74 (noting that there has been a “massive surge in development assistance for law reform projects in developing and transition countries” in the last two decades and that the “World Bank alone reports it has supported 330 ‘rule of law’ projects and spent \$2.9 billion dollars on this sectors since 1990”).

61. See *id.* at 84–85 (explaining that the “guarantees for property rights, enforcement of contract, and protection against arbitrary use of government power and excessive regulation” were key tenets for the rule of law in development assistance); Zachary Elkins et al., *Competing for Capital The Diffusion of Bilateral Investment Treaties, 1960–2000*, Symposium: Public International Law and Economics, 2008 U. ILL. L. REV. 265, 297 (2008).

62. Elkins et al., *supra* note 61, at 297.

63. See generally Paul E. Comeaux & N. Stephen Kinsella, *Reducing Political Risk in Developing Countries Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance*, 15 N.Y.L. SCH. J. INT’L & COMP. L. 1, 23–24 (1994) (noting that a “stabilization clause states that the law in force in the state at a given date—typically, the time the concession takes effect—is the law that will apply to supplement the terms of the contract, regardless of future legislation, decrees, or regulations issued by the government”).

64. See Cotula, *supra* note 4, at 3 (noting the tensions between investor protection and sustainable development); see also Comeaux & Kinsella, *supra* note 63, at 25 (stating that a violation of a stabilization clause by the host country is likely to result in economic damages for the host country). In addition, most international investment agreements include provisions regarding the regulatory taking of investment property. Such provisions have been interpreted broadly to limit changes to the environmental regulatory scheme in the host state that would reduce the investor’s return on investment. These provisions create a disincentive for host governments to enact such laws and undermine the state’s efforts to strengthen environmental protections. See North America Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993).

contracts governing foreign direct investment provide a stark example of the thorny issues that host states face at the intersection of international environmental law and international economic law. The provisions contained in international investment treaties, such as BITs, provide another.

BITs pervade the realm of international investment law and gained prominence during the 1990s, the height of the neoliberal period of development.⁶⁵ BITs make concrete many of the principles embedded in neoliberal economic development. The treaties provide a concrete way for capital-importing states to gain legitimacy and attract foreign investment by promising a stable investment environment.⁶⁶ BITs also give foreign investors parity with sovereign states by giving investors access to rights and remedies negotiated in an agreement (the treaty) to which the investor is not privy.⁶⁷

BITs contain standard “take it or leave it” provisions⁶⁸ and often include terms that allow the investor to bring the host nation into arbitration for infringing on the investor’s rights.⁶⁹ Common investor claims include regulatory takings as a result of the implementation of more stringent labor or environmental standards and expropriation of private investor property.⁷⁰ From an environmental standpoint, such claims are significant because they directly impact the ability of a sovereign government to regulate development projects.⁷¹ Some observers critique these types of provisions, noting that an investor-state dispute inherently subverts traditional principles of international law such as state sovereignty.⁷²

The lack of transparency⁷³ surrounding arbitration proceedings raises additional fairness concerns. Many investment arbitration panels conduct their business privately.⁷⁴ The proceedings are confidential, with limited or no pub-

65. Elkins et al., *supra* note 61, at 269.

66. *See* Cotula, *supra* note 4, at 2–5.

67. *See* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232, 234 (1995).

68. *Id.* at 272.

69. U.S. TRADE REPRESENTATIVE, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY 28 (2012), <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (Article 25 of the 2012 U.S. Model BIT provides that each party consent to arbitration).

70. *See* Metalclad Corp. v. United Mex. States, ICSID Case No. ARB (AF)/97/1, Awards, ¶ 1 (Aug. 30, 2000), 5 ICSID Rep. 212 (2002). In this case, Metalclad bought a landfill site in Mexico, with the goal of developing a hazardous waste landfill. Although the Mexican federal government approved the plan, the local government refused to issue the required permits because of health and environmental concerns. ICSID found for Metalclad and awarded the corporation millions of dollars in damages. *Id.*

71. *See* Cotula, *supra* note 4, at 3–5.

72. *See* Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT’L L. REV. 465, 466–67 (2005) (noting that “[a]lthough states are the loci of power and authority in classical international law, international investment law transfers some of this power and authority to other decision-makers, including investors, arbitral tribunals and foreign courts”).

73. *See id.* at 466 (outlining the sovereignty criticisms of BITs).

74. *See* Cornel Marian, *Balancing Transparency The Value of Administrative Law and Mathews-Balancing to Investment Treaty Arbitrations*, 10 PEPP. DISP. RESOL. L.J. 275, 277 (2010) (explaining that “[a]rbitration is traditionally a confidential process that derives its authority from a contractual obligation between the parties”).

lic access to documents or information regarding the dispute.⁷⁵ The opacity of such proceedings makes it difficult for states to discern the scope of legitimate regulatory activity. Moreover, the investors subject to the decisions of such investment dispute arbitration panels play a role in selecting the arbitrators that hear their dispute.⁷⁶ Since the investors are frequently repeat players in the realm of international investment law, their experience arguably creates an uneven playing field for a state in the Global South that has limited interaction with the arbitration system.⁷⁷ The lack of precedential effect of these proceedings also prevents the establishment of a discourse of international investment law.⁷⁸

The International Centre for Settlement of Investment Disputes (ICSID), part of the World Bank Group, conducts business with more transparency than other arbitration panels.⁷⁹ The public may access its decisions as well as documentation filed in connection with investment disputes.⁸⁰ However, even with this greater transparency, the perception by many developing states is that the playing field is uneven.⁸¹ States in the Global South such as Ecuador, Bolivia, and Venezuela, have responded to this perceived power asymmetry by with-

75. See Paul A. Haslam, *The Evolution of the Foreign Direct Investment Regime in the Americas*, 31 THIRD WORLD Q. 1181, 1195 (2010) (noting that several international investment arbitration institutions, such as ad hoc arbitration conducted under United Nations International Commercial and Trade Law rules, the International Chamber of Commerce and the Stockholm Chamber of Commerce “do not require the public reporting of cases or judgments”); cf. Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1289 (2009) (noting a trend toward increased transparency but no universal embracing of transparency principles in investment tribunals).

76. Under Article 10.19 of the Central America Free Trade Agreement, for example, each disputing party selects an arbitrator, and the parties agree on a third arbitrator. Dominican Republic-Central America-United States Free Trade Agreement art. 10.9, Aug. 5, 2004, <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [hereinafter CAFTA-DR].

77. Andrea K. Bjorklund notes that parties have unsuccessfully challenged the participation of arbitrators on successive arbitration panels involving analogous legal concerns. Bjorklund, *supra* note 75, at 1298–99. In such challenges, the concern is that arbitrators might be biased by their prior service. *Id.* at 1299. When an investor is a frequent participant in investment arbitration and has the freedom to select an arbitrator, a similar bias argument could apply.

78. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1610–11 (2005).

79. See, e.g., INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, BACKGROUND INFORMATION ON THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID) 1 (2015), <https://icsid.worldbank.org/apps/ICSIDWEB/about/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf>.

80. *Id.* at 6 (“Under the ICSID Convention, Rules and Regulations, the Centre publishes information on the registration and termination of cases, along with the procedural details of cases, the subject matter of the dispute, the names of the arbitrators determining the dispute, which party appointed them, the names of counsel for the parties, and the awards or excerpts of awards issued in each case. This information can also be found on the ICSID website.”).

81. Ignacio A. Vincentelli, *The Uncertain Future of ICSID in Latin America*, 16 LAW & BUS. REV. AM. 409, 410 (2010) (noting Bolivia, Venezuela and Ecuador’s hostility toward the ICSID regime).

drawing from the ICSID Convention altogether, raising concerns about its continued vitality.⁸²

Despite these concerns, legal scholars have recently suggested that the current system of international economic law may be evolving to provide developing countries with greater freedom, or policy space, to enact environmental or social welfare regulations.⁸³ In support of this argument, Markus Wagner points to recent changes to the United States Model BIT that indicate increased policy space “with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities.”⁸⁴ Wagner also cites a recent string of arbitration decisions stemming from trade disputes that suggest an expansion of policy space.⁸⁵ However, developing states should temper their optimism about this progress.

Although recent developments in trade law might suggest that there is increased policy flexibility for governments,⁸⁶ it is unclear whether these developments will filter into arrangements under international investment law, which have historically limited states’ abilities to implement social and environmental regulations.⁸⁷ As for international investment law, Suzanne Spears acknowledges that although a “growing number of [international investment agreements] expressly indicate that treaty objectives must [be] pursued in a manner compatible with the principles of sustainable development . . . none of the innovations in new-generation [agreements] actually resolve the tension that will continue to arise between competing policy objectives in investor-state cases.”⁸⁸

Indeed, in comparing the two branches of international economic law—international trade law and international investment law—fundamental differences emerge. Adjudication in the realm of international trade law involves the resolution of disputes between presumably similarly situated WTO members.⁸⁹ Conversely, international investment law pits a powerful investor against a less powerful state⁹⁰ and includes diverse treaty texts, institutions, and configura-

82. Alexis Mourre, *Perspectives of International Arbitration in Latin America*, 17 AM. REV. INT’L ARB. 597, 608 (2006).

83. See Wagner, *supra* note 54, at 26 (noting that one can envision “a further increase in the number of amicus curiae briefs or third-party interventions, especially in cases that concern challenges to a country’s regulatory fabric that other countries may wish to emulate”).

84. *Id.* at 37–38 (citing Article 12.3 of the 2012 U.S. Model Bilateral Investment Treaty).

85. *Id.* at 43–53.

86. See *id.* at 83–84 (explaining that “it is hard to argue that states—especially when a measure has been passed with considerable democratic safeguards—should not be accorded regulatory space”).

87. See generally Cotula, *supra* note 4.

88. Spears, *supra* note 9, at 1067–71.

89. See generally Wagner, *supra* note 54.

90. *Id.* at 34 (noting that “the two fields have, at first sight, distinctly different goals: international investment law has developed as a protective mechanism concerning the investments that individuals or corporations make in a different jurisdiction. International trade law, on the other hand, has developed by reducing tariffs and other barriers to trade by curbing protectionism”). See also Elkins et al., *supra*

tions that have resulted in “unique law-making processes and institutional practices.”⁹¹ This inherent difference begs the question whether convergence might ever be possible in the realm of international investment law. Regardless of the ultimate outcome of this debate, progress toward that end might be rather slow. States with disputes currently languishing in various opaque investment tribunals⁹² may seek more immediate relief from onerous obligations or access to a doctrinal tool that may provide for greater flexibility in managing current investor relationships.

The current international economic legal regime, particularly investment law and its costly corresponding system of conflict resolution, creates a dilemma for states looking to mitigate the effects of climate change. The existing treaty and contract regimes fail to account for the unpredictability of climate change impacts at the local level because they limit the state’s ability to regulate.⁹³ However, states must comply with existing investment treaty and contractual obligations or face economic penalties. The conflict between El Salvador and the Pacific Rim Mining Company illustrates these interlocking issues.

D. *Pacific Rim v. El Salvador*

1. *Economic and Environmental Backdrop*

El Salvador is one of the most impoverished countries in Latin America, with over a third of its inhabitants living in poverty,⁹⁴ as well as one of the most densely populated in the world, with an average of 304 people per square kilometer in 2011.⁹⁵ Upon emerging from a devastating civil war in the early 1990s, El Salvador immediately turned to the neoliberal model of economic development to attract foreign investors.⁹⁶ The country adopted the U.S. dollar

note 61, at 282 (noting that BITs generally involve matching a developed country with a developing country).

91. Diane A. Desierto, *Public Policy in International Investment and Trade Law: Community Expectations and Functional Decision-Making*, 26 FLA. J. INT’L L. 51, 68 (2014).

92. For example, as of March 1, 2014, there were 463 cases pending before ICSID tribunals. INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, THE ICSID CASELOAD—STATISTICS (SPECIAL FOCUS—EUROPEAN UNION) 6, <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Stats%20EU%20Special%20Issue%20-%20Eng.pdf>.

93. See Rolland, *supra* note 49, at 934 (explaining that “while scientific knowledge on the likely occurrence and severity of extreme weather events is improving at the global scale, that knowledge does not translate well into local predictions”).

94. See *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/es.html> (last visited Apr. 10, 2015).

95. *Id.* (noting El Salvador’s position as “the smallest and most densely populated country in Central America”); see also Claire Provost, *El Salvador Groups Accuse Pacific Rim of Assault on Democratic Governance*, THE GUARDIAN (Apr. 10, 2014), <http://www.theguardian.com/global-development/2014/apr/10/el-salvador-pacific-rim-assault-democratic-governance>; *The World Factbook*, *supra* note 94 (noting that with a population of over six million, El Salvador is the 109th most populous country in the world).

96. See WORLD BANK, EL SALVADOR: POVERTY ASSESSMENT, STRENGTHENING SOCIAL POLICY, REPORT NO. 29594-SV, 1 (Dec. 29, 2005), <https://openknowledge.worldbank.org/bitstream/handle/>

as its currency;⁹⁷ privatized and deregulated various industries;⁹⁸ and reformed its investment law to provide extensive protection to foreign investors.⁹⁹ These reforms allowed investors to resort to arbitration pursuant to the ICSID Convention, facilitated by the World Bank, rather than permit domestic courts to resolve conflicts between the government and the investor.¹⁰⁰ In 2003, El Salvador became the first Central American country to adopt CAFTA-DR, a treaty designed to promote and protect private investment in the region.¹⁰¹ The treaty grants extensive protections to private investors, including the right to resort to international tribunals to enforce treaty provisions.¹⁰²

El Salvador is also home to a litany of environmental concerns. It is the second-most deforested country in the Western hemisphere.¹⁰³ An estimated 90 percent of the country's surface water is contaminated due to agricultural and industrial run-off,¹⁰⁴ and around 50 percent of its inhabitants lack access to clean water.¹⁰⁵ Although impoverished, El Salvador is located in the "Gold Belt" of Central America, a band of gold deposits that runs through Guatemala, El Salvador, the southern tip of Honduras, Nicaragua, and the northern border of Costa Rica.¹⁰⁶

Due to its population density and degraded landscape, El Salvador is particularly vulnerable to climate change impacts. According to the fifth report (AR5) of the United Nations Intergovernmental Panel on Climate Change (IPCC), released in 2014, climate change poses a threat to the hydrological sys-

10986/8427/295940SV.pdf?sequence=1; see also *Pac Rim Cayman LLC v. Republic of El Sal.*, ICSID Case No. ARB/09/12, *Pac Rim's Memorial on the Merits*, ¶ 25 (Mar. 29, 2013), <http://www.italaw.com/sites/default/files/case-documents/italaw1425.pdf> (noting that after the "Salvadoran civil war, the State embarked on a legal and economic reform process that was similar to that undertaken by many other countries . . . reforms centered on the privatization of State industries, the attraction of foreign investment and, eventually, dollarization of the economy and participation in the CAFTA").

97. *Pac Rim Cayman LLC*, ICSID Case No. ARB/09/12, *Pac Rim's Memorial on the Merits*, ¶ 25.

98. *Id.*

99. Article 15 of the 1999 Investment Law provides that foreign investors may resort to the World Bank International Centre for the Settlement of Investment Disputes for resolution of disputes between the investor and the state. The law was subsequently amended in August 2013 to require foreign investors to use national courts of El Salvador unless the investor originates from a country with a pre-existing trade agreement with El Salvador. UNITED STATES DEPARTMENT OF STATE, DEPARTMENT OF STATE: 2014 INVESTMENT CLIMATE STATEMENT 6 (June 2014), <http://www.state.gov/documents/organization/227165.pdf> (last visited Aug. 24, 2015).

100. *Id.*

101. See WORLD BANK, *supra* note 96, at 1; see also *The World Factbook*, *supra* note 94.

102. See CAFTA-DR, *supra* note 76, at art. 10.19. Article 10.17 (1) provides that each party to CAFTA-DR "consents to the submission of a claim to arbitration." *Id.* at art. 10.17(1).

103. See Provost, *supra* note 95.

104. *Id.*

105. *Water and Sanitation Initiatives*, ENLACE, <http://www.enlaceonline.org/water-and-sanitation-initiatiiv/> (last visited Apr. 11, 2015) (explaining that "[o]nly 50 [percent] of people [in El Salvador] have access to a local potable water source, and 82 [percent] of the potable water available is heavily contaminated").

106. See Robin Broad & John Cavanagh, *Like Water for Gold in El Salvador*, THE NATION (Aug. 8, 2011), <http://www.thenation.com/article/162009/water-gold-el-salvador#>.

tems in Central and South America.¹⁰⁷ As to specific water-related risks, AR5 indicates that Central and South America face a near term (from the year 2030 to 2040) “medium to high risk” of reduced water availability, increased flooding, and landslides. The projection rises to “high to very high” risk between the years 2080 and 2100 if the global temperature rises two degrees Celsius.¹⁰⁸ If the global temperature increases by four degrees Celsius, the risk for water-related hardship increases to “very high” between the years 2080 and 2100.¹⁰⁹ In places like El Salvador, climate change will “amplify existing climate-related risks and create new risks for natural and human systems” that are “unevenly distributed and are generally greater for disadvantaged people and communities.”¹¹⁰

Against this complex economic and environmental backdrop, Pacific Rim Mining Corporation, a Canadian mining company, began exploratory mining activity in the El Dorado mine, located in the Cabañas region of El Salvador in 2002.¹¹¹ The demographics of the Cabañas region place the community squarely within the paradigm of climate vulnerability. The region contains the highest poverty rates in the country.¹¹² According to Pacific Rim’s analysis of the region, in 2005, “65 percent of the population of Cabañas was poor and 37 percent lived in absolute poverty; the literacy rate was only 30 percent, and 42 percent of the population did not have access to potable water.”¹¹³

The El Dorado gold mine is situated on the Rio Lempa, El Salvador’s longest river and one of its largest and only remaining sources of fresh water.¹¹⁴ Half of the country’s residents rely on the Rio Lempa to provide water for “drinking, farming, fishing, livestock rearing, and hydroelectric power.”¹¹⁵ During Pacific Rim’s exploration phase of the El Dorado mine, several communities relying on the Rio Lempa noticed their wells drying up, and petitioned the government to reject the mine as well as general mining activity in the country.¹¹⁶

107. See Field et al., *supra* note 31, at 7, 24 (a review of studies indicate with high confidence a range of negative impacts to the hydrological systems in Central and South America).

108. *Id.*

109. *Id.*

110. *Id.* at 12, 14.

111. See Broad & Cavanagh *supra* note 106.

112. Pac Rim Cayman LLC v. Republic of El Sal., ICSID Case No. ARB/09/12, Pac Rim’s Memorial on the Merits, ¶ 4 (Mar. 29, 2013).

113. Pac Rim Cayman LLC, ICSID Case No. ARB/09/12, Pac Rim’s Memorial on the Merits, ¶ 144.

114. See Emily Achtenberg, *A Battle for Water, Life, and National Sovereignty*, REVISTA HARVARD REVIEW OF LATIN AMERICA (Winter 2014), <http://revista.drclas.harvard.edu/book/resistance-mining-el-salvador>.

115. *Id.*

116. Broad & Cavanagh, *supra* note 106. One El Salvadorian farmer and organizer, Francisco Pineda, described watching the river near his farm go dry: “This was very strange, as it had never done this before. So we walked up the river to see why, and then I found a pump from Pacific Rim that was pumping water for exploratory wells. All of us began to wonder, if they are using this much water in the

Based on its initial exploratory activities, Pacific Rim estimated that approximately 1.4 million ounces of high-grade gold reserves exist within the mining concession allotted by the government.¹¹⁷ In 2004, Pacific Rim requested an exploitation permit from the government to begin to extract the gold reserves.¹¹⁸ However, after hearing complaints from the local community that the Rio Lempa was drying up, El Salvador denied Pacific Rim's request in 2006.¹¹⁹ In 2008, the country issued a de facto moratorium on any mining in the country.¹²⁰ Later that year, Pacific Rim filed a claim with the World Bank's international investment court, ICSID, alleging that El Salvador's ban on mining was in violation of CAFTA-DR.¹²¹ The ICSID panel determined that El Salvador's domestic law gives the tribunal jurisdiction.¹²² In its memorial to the tribunal, Pacific Rim's experts valued the company's claim for losses at \$314 million,¹²³ approximately half of El Salvador's public education budget.¹²⁴

OceanaGold, an Australian mining company, purchased Pacific Rim mining in November of 2013 and inherited the controversy related to the El Dorado mine.¹²⁵ In its press release regarding the \$10.2 million acquisition, Ocean-

exploration stage, how much will they use if they actually start mining?" *Id.*; see also Provost, *supra* note 95.

117. See Tim Johnson, *El Salvador's Fight Against Gold Mine Will Be Decided in D.C.*, McCLATCHY DC (Oct. 21, 2014), <http://www.mcclatchydc.com/2014/10/21/244144/el-salvadors-fight-against-gold.html>; see also Pac Rim Cayman LLC, ICSID Case No. ARB/09/12, Pac Rim's Memorial on the Merits, ¶ 7.

118. See Provost, *supra* note 95.

119. See Randal C. Archibold, *First a Gold Rush, Then the Lawyers*, N.Y. TIMES (June 25, 2011), http://www.nytimes.com/2011/06/26/world/americas/26mine.html?_r=0; Stella Dawson, *Protestors Back El Salvador for Denying Gold Mining Permit*, REUTERS (Sept. 16, 2014), <http://af.reuters.com/article/worldNews/idAFKBN0HB00J20140916?pageNumber=1&virtualBrandChannel=0>.

120. See Provost, *supra* note 95 (noting that "[s]ince 2008, there has been a de facto moratorium on metal mining, with successive presidents committing not to issue new permits while in office"); see also Johnson, *supra* note 117. A broad-based grassroots movement including political leaders across the political spectrum, the government's human rights office, nongovernmental civil society organizations and the Catholic Church has also actively worked to ensure that the country's gold and other metals remain within the ground. See Provost, *supra* note 95 (stating that over three hundred organizations and civil society groups, politicians from all parties, and the Catholic Church are "speaking out against mining").

121. See Johnson, *supra* note 117. One such claim is that "El Salvador imposed an "illegal and unjustified ban" on metal mining in 2008 in a "gross misuse of authority" that ignored a 1999 investment law under which its predecessor had plowed tens of millions of dollars into exploration." *Id.*; see also Pac Rim Cayman LLC, ICSID Case No. ARB/09/12, Pac Rim's Memorial on the Merits, ¶¶ 5–11.

122. See Provost, *supra* note 95. In 2013, El Salvador amended its domestic law to provide that investment claims originate in local courts rather than international arbitration panels. *Id.*

123. Pac Rim Cayman LLC, ICSID Case No. ARB/09/12, Pac Rim's Memorial on the Merits, ¶ 674.

124. *El Salvador Protecting the Right to Decide*, OXFAM, <http://policy-practice.oxfamamerica.org/work/resource-rights/protecting-the-right-to-decide/> (last visited Nov. 15, 2015).

125. See *OceanaGold Agrees to Acquire Pacific Rim Mining*, REUTERS (Oct. 8, 2013), <http://uk.reuters.com/article/idUSnCCN9hzS5F+1c5+MKW20131008>; see also Press Release, OceanaGold Corp., *OceanaGold Pacific Rim Mining Acquisition 4* (Oct. 2013), <http://www.oceanagold.com/>

aGold cited “the high grade El Dorado gold-silver resource with significant upside potential” as a key asset transferred to the OceanaGold shareholders.¹²⁶

On its face, the dispute over the El Dorado mine raises a suite of issues familiar to observers of international economic law and international development: the vitality of the doctrine of permanent sovereignty over natural resources,¹²⁷ the grant of policy space to developing states to regulate in the public interest,¹²⁸ and the overriding presumption of *pacta sunt servanda* in international law.¹²⁹ In this case, Pacific Rim asserts that El Salvador effectively changed the parameters of its investment by failing to issue a permit to exploit the El Dorado mine and instituting a de facto ban on mining within the country. This action, Pacific Rim argues, was tantamount to expropriation and in contravention of international investment law norms. El Salvador counters that its failure to grant the exploitation permit was within its sovereign authority in order to protect its vulnerable natural resources, namely water. At the root of the conflict, however, lies a much deeper and more troubling issue: the destabilizing effects of climate change on foreign direct investment.

Grassroots activists in the country draw a link between mining and climate risk,¹³⁰ and although the term “climate change” is not explicitly referenced in the legal documentation of the conflict between Pacific Rim and El Salvador, the hydrological strain the country is experiencing is a harbinger of future climate-related environmental pressures that countries like El Salvador will face.

assets/documents/filings/2013-Press-Releases/081013-Pacific-RimOGC-MasterPresFINAL.pdf (providing the details of the acquisition).

126. OceanaGold Corp., *supra* note 125, at 6.

127. Permanent sovereignty over natural resources (PSNR), in its most simplistic form, can be defined as a principle that “declares that both people and nations have a right to exercise sovereignty over natural resources.” Emeka Duruigbo, *Permanent Sovereignty and Peoples’ Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT’L L. REV. 33, 38–39 (2006) (providing an overview of PSNR and its many different interpretations over the decades). The United Nations General Assembly also adopted the principle reflect in G.A. Res 1803 (XVII), Permanent Sovereignty Over Natural Resources (Dec. 14, 1962). Resolution 1803 provides, in part, that “[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.” Paragraph 4 of the Resolution further states:

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest, which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State staking such measures in the exercise of its sovereignty and in accordance with international law.

Id.

128. See Wagner, *supra* note 54, at 13; Spears, *supra* note 9, at 1040.

129. Black’s Law Dictionary defines *pacta sunt servanda* as “[t]he rule that agreements and stipulations, esp. those contained in treaties, must be observed.” BLACK’S LAW DICTIONARY (10th ed. 2014). For a description of the doctrine of *pacta sunt servanda*, see generally Richard Hyland, *Pacta Sunt Servanda A Meditation*, 34 VA. J. INT’L L. 405 (1994).

130. See Achtenberg, *supra* note 114 (noting that The National Roundtable Against Metallic Mining, a coalition of community, environmental, and other civil society organizations, “is pushing the government [to legislate] a permanent ban on metals mining” given that El Salvador “is a world leader in water scarcity, climate risk, and environmental degradation”).

AR5 indicates that given their pre-existing vulnerability and limited infrastructure, states in the Global South will be disproportionately harmed by climate change.¹³¹ This grim reality notwithstanding, the current system of international economic law appears to restrain states' ability to act proactively or even reactively in response to climate change threats.

2. *CSID Arbitration*

From September 15 through September 22, 2014, an ICSID arbitration tribunal reviewed testimony related to the El Salvador-Pacific Rim Mining case.¹³² The tribunal is comprised of three members: President V.V. Veeder of Britain, Arbitrator Brigitte Stern of France, and Arbitrator Guidio Santiago Tawil of Argentina.¹³³ Pacific Rim and El Salvador submitted memorials with disparate views on the mine and El Salvador's decision to deny the exploitation permit. Pacific Rim argued that the right to exploit the mine in the area was an entitlement attached to the exploration permit.¹³⁴ El Salvador's government argued that the Environmental Impact Study (EIS) completed in connection with the exploitation permit was insufficient.¹³⁵ It also cited water concerns as a key rationale for rejecting the permit.¹³⁶ The following subpart outlines the key claims raised by the parties and explores the broader theoretical issues embedded within the arguments.

The essence of Pacific Rim's argument is that El Salvador developed a system of law to encourage foreign direct investment and then "illegitimately swept aside the legal and regulatory regime upon which [Pacific Rim] had relied," ultimately depriving Pacific Rim of the value of its investment.¹³⁷ The company further contends that El Salvador "induced and encouraged Pac[ific] Rim (and its predecessors in the El Dorado Project) to invest millions of dollars in exploration and mine development,"¹³⁸ and that the company "reasonably believed that its mineral rights would be honored and that it would be allowed to exploit the minerals at the El Dorado site for the benefit of both its shareholders and of El Salvador."¹³⁹ Then, Pacific Rim stated, "with the announce-

131. See Field et al., *supra* note 31, at 6.

132. See *Case Details, Pac Rim Cayman LLC v. Republic of El Salvador*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, <https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/09/12&tab=PRD>.

133. See *Pac Rim Cayman LLC v. Republic of El Sal.*, ICSID Case No. ARB/09/12, Jurisdictional Objections (June 1, 2012), <http://www.italaw.com/sites/default/files/case-documents/ita0935.pdf>.

134. See *id.* ¶ 1.8.

135. See *Pac Rim Cayman LLC v. Republic of El Sal.*, ICSID Case No ARB/09/12, Republic of El Salvador's Counter-Memorial on the Merits, ¶ 217 (Jan. 10, 2014), <http://www.italaw.com/sites/default/files/case-documents/italaw3040.pdf>.

136. *Id.* ¶ 3.

137. *Id.*

138. *Pac Rim Cayman LLC v. Republic of El Sal.*, ICSID Case No. ARB/09/12, *Pac Rim's Memorial on the Merits*, ¶ 3 (Mar. 29, 2013).

139. *Id.*

ment of a de facto ban on metallic mining in March 2008, the Executive Branch of the Salvadoran Government illegitimately swept aside the legal and regulatory regime upon which [the company] had relied in developing the El Dorado Project, depriving it of the value of its investments.”¹⁴⁰ The company framed El Salvador’s 1996 mining law as providing for simultaneous exploration and exploitation rights.¹⁴¹ Under this interpretation, once a multiyear exploration license is given, it is “followed immediately by an exploitation concession upon discovery of a mineable deposit.”¹⁴² In a sense, the company argued, the 1996 mining law viewed exploitation as an entitlement. The company acknowledged that the mining law and subsequently adopted environmental law require any mining activity to comply with environmental standards.¹⁴³ Among other requirements, the mining law requires mitigation of harm to the environment or people, proper disposal of waste, and the preparation of an EIS in connection with an application for a mining exploitation concession.¹⁴⁴ Under the mining regulations, the study should:

evaluate and describe the physical-natural, biological, socio-economic and cultural aspects of the area in the area of influence of the project, with the goal of determining the existing conditions and capacity of the environment, analyze the nature, scale and foresee the effects and consequences of carrying out the Project, indicating measures of prediction and control to apply in order to achieve harmony between the development of the mining industry and the environment.¹⁴⁵

The 1998 environmental law further extended the EIS requirement to those seeking an exploration permit.¹⁴⁶

El Salvador argued that Pacific Rim never possessed the right to exploit the mine; the country’s memorial states, “This case is about a Canadian mining company that purchased exploration rights in El Salvador when time was running short to apply for a mining exploitation concession. The company then decided to make a big gamble and failed.”¹⁴⁷ El Salvador asserted that when Pacific Rim arrived in El Salvador in 2002, two of its licenses to explore mining concessions were set to expire in 2005, and the company would be required to

140. *Id.* ¶ 3.

141. *Id.* ¶¶ 49, 51 (referring to the 1922 Mining Code).

142. *Id.* ¶ 51.

143. *Id.* ¶¶ 52, 182 (claiming even that it was Pacific Rim’s “goal” to meet or exceed the “highest international safety and environmental standards”).

144. *See id.* ¶ 52 (noting that the 1996 Mining Law required Pacific Rim and other mining rights holders to conduct their mining activities “in accordance with mining technical and engineering requirements, so as to prevent control, minimize and compensate the negative effects that might be caused to people or the environment”) (internal citations omitted).

145. *Id.* ¶ 56 (citing the 1996 Mining Law).

146. *Id.* ¶ 149 (explaining that the 1998 Environmental Law “established a uniform system for assessing any economic activity performed in El Salvador that might have an environmental impact, as defined by an administrative process . . . for the granting of environmental permits”).

147. *Pac Rim Cayman LLC v. Republic of El Sal.*, ICSID Case No ARB/09/12, Republic of El Salvador’s Counter-Memorial on the Merits, ¶ 1 (Jan. 10, 2014).

complete an application for exploitation that included a feasibility study and other legal documentation to secure an exploitation right.¹⁴⁸ El Salvador claimed that, despite the short timeline the company faced, Pacific Rim elected to take a “gamble” and obtained an exploitation right over a broader swath of land than it was familiar with.¹⁴⁹ By pursuing a broader strategy, the country argued, Pacific Rim was unable to obtain and complete the proper documentation to apply successfully for the exploitation permit. Thus, the gamble failed.¹⁵⁰

El Salvador further argued that the rejection of Pacific Rim’s exploitation permit was well within its authority as a sovereign nation.¹⁵¹ Moreover, the country’s memorial noted, the dire situation with respect to water raised serious questions regarding the wisdom of allowing the mine to progress.¹⁵² As the country’s memorial intimates, Pacific Rim appeared to want to selectively apply El Salvador’s mining laws to its activities.¹⁵³

3. *Water Concerns*

El Salvador’s arguments make clear that concerns over water access and quality are at the heart of the mining controversy. One of the country’s consultants, Dr. Manual Pulgar-Vidal, hired to assess mining activity in El Salvador, concluded:

- El Salvador is a country measuring 21,041 square kilometers with a population of nearly 7 million inhabitants, resulting in one of the highest population densities in Latin America with almost 350 people per square kilometer;
- [T]he population density, acute deforestation, and poor use of water resources inevitably place the country in a situation that is moving toward ‘water stress;’
- [T]he potential of locating mining operations in the area of influence of the Lempa River basin, the country’s most important water source which supplies water for more than a third of the population, creates a risk that could result in contamination, negatively affecting water quality levels.¹⁵⁴

148. *Id.* ¶ 3.

149. *Id.* ¶¶ 1, 3–5.

150. *Id.* ¶ 5.

151. *Id.* ¶ 12.

152. *Id.* ¶ 206 (noting that Pacific Rim’s mining activity could impact the “country’s most important water source which supplies water for more than a third of the population”).

153. *See id.* ¶ 12.

154. *Id.* ¶ 206.

As Hector Barrios, an antimining activist in Cabañas stated, “The struggle here is in defence of life, in defence of water. . . . That’s why we are in conflict with mining companies.”¹⁵⁵ El Salvador estimates that if the El Dorado mine were exploited, the mine would use in one day what a single Salvadoran family would use in twenty years.¹⁵⁶ By comparison, the purported development benefits over the mine’s anticipated 6.2-year life span, which would be a mere 3 percent of the mine’s profits, appear relatively limited.¹⁵⁷

In response to these claims, Pacific Rim offered various assurances. Regarding the potential damage to the water supply in the area surrounding the mine, the company stated that it was “conducting hydrogeologic studies aimed at identifying new sources of ground water for local communities” in order to remediate some of the concerns of farmers during the dry season.¹⁵⁸ Pacific Rim’s expert “repeatedly promised that ‘100 [percent] of the total demand for water by the El Dorado Mine Project . . . would be supplied by the [*sic*] rainwater harvesting,’” thus not “compet[ing] with current use of local water resources.”¹⁵⁹ Moreover, according to Pacific Rim, the water produced by the mine would be treated by a water treatment facility prior to being discharged into a local tributary.¹⁶⁰

El Salvador countered these assertions, stating that the initial EIS provided by the company indicated that the “project will have two water sources: rainwater and ‘[w]ater from underground wells.’ Thus, the assertion that Pacific Rim could rely solely on collected rainwater and would therefore have no negative impact on water supply was new.”¹⁶¹ Further, El Salvador noted, the new information was provided without additional data or analysis.¹⁶²

Even if one accepts Pacific Rim’s assertions regarding its planned use of the region’s water supply as true, it is fair to assume that exploitation would lead to some impact on the watershed and local water supply. These impacts notwithstanding, Pacific Rim’s interpretation of El Salvador’s mining laws requires El Salvador to grant the company’s entitlement to exploit the mine. If the tribunal accepts the company’s rationale, the country would effectively be given a choice to deplete its limited fresh water supply or face extreme economic

155. Provost, *supra* note 95.

156. See Katie Zaunbrecher, *Pac Rim Cayman v. Republic of El Salvador Confronting Free Trade’s Chilling Effect on Environmental Progress in Latin America*, 33 Hous. J. Int’l L. 489, 498 (2011) (quoting Krista Scheffey).

157. See *id.* (noting that “the number of jobs created and filled by Salvadorans will likely be relatively low because of the greater need for technical expertise rather than unskilled labor in modern mining”).

158. *Pac Rim Cayman LLC v. Republic of El Sal.*, ICSID Case No. ARB/09/12, *Pac Rim’s Memorial on the Merits*, ¶ 142 n.280 (Mar. 29, 2013).

159. *Id.* ¶ 286.

160. *Id.*

161. *Pac Rim Cayman LLC v. Republic of El Sal.*, ICSID Case No. ARB/09/12, *Republic of El Salvador’s Counter-Memorial on the Merits*, ¶ 221 (Jan. 10, 2014).

162. *Id.*

penalties. Neither option seems tenable, but the current system of international economic law requires such extreme outcomes.

In many ways, the current dialectic is a classic investment conflict that pits a multinational corporation against a developing country. Climate change, and the disruption it portends, adds a unique dimension to this dialectic. The stakes are tremendous, as a loss for El Salvador would mean either paying the \$314 million in damages or granting Pacific Rim the permit that could deepen the water crisis in the state. But a win for El Salvador would not be costless because the country has already invested significant time, political capital, and resources to defend the case.¹⁶³ Thus, even a victory might ring a bit hollow.¹⁶⁴

Advocates and similarly situated parties on both sides of the dispute are closely watching the case.¹⁶⁵ In a letter to ICSID, international organizations including Oxfam, the Jubilee Debt Campaign, and the International Trade Union Confederation stated that Pacific Rim's claim undermined democratic institutions, "the public interest and regulatory structures in countries of the Global South."¹⁶⁶ Moreover, the claim illustrates that for states the conflict between natural resource development and contract obligations is not only a matter of sovereignty but also a matter of survival.

Indeed, no matter the outcome here the essential conflict—investment or the safeguarding of dwindling natural resources such as water—is one that will be replayed with increasing frequency in the climate change era. As the impacts of climate change become more imminent, El Salvador, and similarly situated states, will face increased resource challenges. Traditional, neoliberal approaches to development may also come under attack or yield to more adaptive approaches to development.¹⁶⁷

In recognition of the need for new development models, grassroots movements in El Salvador and other countries such as Bolivia, Ecuador, and Venezuela are calling for state leaders to reject international economic legal

163. See *Pacific Rim Mining Lawsuit Saga Prolonged; Costs Mount for Company and for People of El Salvador*, MININGWATCH CAN. (June 2, 2012), <http://www.miningwatch.ca/blog/pacific-rim-mining-lawsuit-saga-prolonged-costs-mount-company-and-people-el-salvador> (noting El Salvador has spent millions in public funds for litigation).

164. Money is not the only thing at stake in the conflict. At least three antimining activists have died since the conflict began, and several activists report threats and intimidation from unknown parties. See Lisa Skeen, *Salvadoran Anti-Mining Activists Risk Their Lives by Taking on "Free Trade"*, N. AM. CONGRESS ON LATIN AM., <https://nacla.org/news/salvadoran-anti-mining-activists-risk-their-lives-taking-free-trade> (last visited Jan. 8, 2016).

165. See Provost, *supra* note 95.

166. Letter from Civil Society Organizations to Robert Zoellick, Former President, World Bank, et al. (Dec. 12, 2011), http://www.ips-dc.org/open_letter_to_world_bank_officials_on_pacific_rim-el-salvador_case/; Letter from Meg Kinnear, Secretary-General, Int'l Ctr. for Settlement of Inv. Disputes, et al. to Dr. Jim Yong Kim, President, World Bank Grp. (Dec. 2013), https://www.earthworksaction.org/files/publications/Open_letter_to_the_president_of_the_World_Bank_in_defense_of_El_Salvador_C2%AB_Network_for_Justice_in_Global_Investment.pdf; see also Provost, *supra* note 95 (describing some of the signatories of the letter).

167. See generally Baker, *supra* note 1.

agreements.¹⁶⁸ In some cases, this has meant wholesale rejection of international investment treaties and relationships.¹⁶⁹ In others, it has meant grappling with the question of how to balance the need to build local capacity and safeguard natural resources with the need for development and decades-long reliance on outside investment.¹⁷⁰ The following Part examines the various strategies deployed thus far by developing states to change their positions vis-à-vis international economic law, with varying levels of success. None of the strategies employed to date fully provide the flexibility required during this time of climate-related environmental strain.

II. EXITING INTERNATIONAL ECONOMIC LAW

The El Dorado mine case provides a glimpse into the future. As states in the Global South witness increasing environmental strain resulting from climate change, they face the difficult choice of whether to depart economic relationships that could exacerbate such environmental hardship or comply with these relationships, avoiding economic and political sanctions, but increasing the state's vulnerability to climate change impacts. In general, international law frowns upon unilateral treaty exit.¹⁷¹ Indeed, the overriding principle of international law, *pacta sunt servanda*,¹⁷² requires that agreements be kept. Although certain defenses such as necessity or force majeure exist, states unilaterally seeking to breach the ICSID treaty, multilateral trade and investment agreements, BITs, and investment contracts do not do so without facing the risk of international sanctions or some other economic penalty.¹⁷³ While outright breach is undesirable, a justified exit, rooted in equitable considerations, could allow a state to avoid many of the harmful economic and political sanctions that result from breach, or provide an opening to renegotiate.¹⁷⁴ The following

168. See generally J.F. Hornbeck, CONG. RES. SERV., 98-840, U.S.-LATIN AMERICA TRADE: RECENT TRENDS AND POLICY ISSUES (2011), <https://www.fas.org/sgp/crs/row/98-840.pdf> (explaining that some Latin American countries have resisted trade agreements and treaties with the United States and other countries).

169. See *id.* at Summary (“Some of the largest economies in South America . . . have resisted a region-wide agreement, the Free Trade Areas of the Americas (FTAA), in part because it represented an extension of the same trade model used by the United States in bilateral agreements.”).

170. See *id.*

171. Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1581 (2005) (noting that “[i]nternational law takes a dim view of challenges to this meta norm of adherence. Claims of invalidity, changed circumstances, and other exculpatory doctrines are narrowly construed, with the result that most unilateral deviations are viewed as breaches of a treaty”).

172. See Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 339.

173. See Cotula, *supra* note 4, at 3; cf. Helfer, *supra* note 171, at 1621 (noting that an exit pursuant to the treaty provisions may be viewed favorably within the international community, given that international enforcement of breaches of treaty obligations is weak and compliance with treaty provisions could “signal an intent to ‘play by the rules’”).

174. See Helfer, *supra* note 171, at 1588 (stating that a threat to withdraw can give a “state additional voice, either by increasing its leverage to reshape the treaty to more accurately reflect its interests or those of its domestic constituencies”).

subpart delineates and discusses the various options available to a state seeking to leave economic relationships.

A. *Exit Pathways*

1. *Material Breach*

A rationale that is frequently cited to support a developing state's entry into investment treaties and regional trade agreements is that the agreements buttress the state's credibility with the realm of international law and signal to investors the state's willingness to adhere to a set of predictable rules regarding investment.¹⁷⁵ Breaching an agreement greatly undermines this rationale. Although treaty breach is certainly not unheard of in international law, the political and reputational costs of an outright and unjustified breach by the capital importing state would likely far outweigh any potential gains.

The Vienna Convention on the Law of Treaties contemplates breach. Under article 60, breach of a bilateral treaty entitles the nonbreaching party "to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."¹⁷⁶ In the case of a multilateral treaty, a breach by one of the parties to the treaty entitles the other parties to suspend the treaty, in whole or in part, or terminate the treaty.¹⁷⁷ If a party faces a particular hardship due to the breach, it may suspend the operation of the treaty in whole or in part with respect to the relationship between the affected party and the breaching party.¹⁷⁸ Finally, if the material breach by one party to a multilateral treaty changes the position of every party with respect to the performance of its obligations under the treaty, any nondefaulting party may invoke the breach as a ground for partial or full suspension of the operation of the treaty.¹⁷⁹

For a number of reasons, breach is undesirable. Argentina's recent actions provide a useful example of the tensions surrounding perceived noncompliance with international economic law. The country is a frequent respondent in ICSID cases,¹⁸⁰ and until recently owed millions of dollars stemming from tribunal awards to various investors.¹⁸¹ In the wake of awards against it, Argentina declared that it would not honor any investor awards without a finding regarding the legitimacy of the award in an Argentine court.¹⁸² Although Argentina did not denounce the ICSID Convention, many observers, including capital export-

175. See generally Elkins et al., *supra* note 61.

176. Vienna Convention on the Law of Treaties art. 60, *supra* note 172, 1155 U.N.T.S. at 346.

177. *Id.*

178. *Id.*

179. *Id.*

180. See Julian Bordacahar, *Argentina First Court Ruling Regarding the Enforcement of ICSID Awards*, GLOBAL ARB. NEWS (Oct. 1, 2010), <http://globalarbitrationnews.com/20150818-argentina-first-court-ruling-regarding-the-enforcement-of-icsid-awards/>.

181. See *id.*

182. See Roberts, *supra* note 57, at 52; *Come and Get Me Argentina is Putting International Arbitration to the Test*, THE ECONOMIST, Feb. 18, 2012, <http://www.economist.com/node/21547836>.

ing countries, have interpreted the country's actions as noncompliance with the ICSID Convention, or a breach.¹⁸³ This perceived breach carries a host of reputational, political, and economic costs.¹⁸⁴ Argentina has faced a battery of criticism from investors and capital-exporting countries alike, and its already-fragile standing within the international investment community stands to suffer even more as a result.¹⁸⁵

A capital-importing state seeking to exit or modify its existing relationships within international economic law should see breach as a high-cost exit device that should be deployed only in extreme cases. For many countries, a lower cost exit option is treaty denunciation pursuant to the terms of the treaty or in accordance with the Vienna Convention.¹⁸⁶

2. *Unilateral Withdrawal and Denunciation*

Article 54 of the Vienna Convention provides that a party may withdraw or terminate a treaty in conformity with the treaty's provisions or at any time by consent of all of the parties following consultation of the other contracting parties.¹⁸⁷ Similarly, suspension is permitted in conformity with treaty provisions or with the consent and consultation of the contracting parties.¹⁸⁸ If a party wishes to denounce or withdraw from a treaty containing no provision related to termination, denunciation, or withdrawal, article 56 applies. The text of the Vienna Convention states that the treaty is not "subject to denunciation or withdrawal unless it is clear that the parties intended the possibility of denunciation or withdrawal or such right is implied by the nature of the treaty."¹⁸⁹ The text also requires twelve months' notice by the withdrawing party.¹⁹⁰

Recent examples of denunciation within the international investment law community include the denunciation of the ICSID Convention by Bolivia, Ecuador, and Venezuela.¹⁹¹ The stated reasons for the countries' sequential exits were consistent: the current ICSID system and Northern-dominated system of international investment places States in the Global South at a disadvantage relative to states in the Global North.¹⁹² Although observers have critiqued the

183. See *Come and Get Me*, *supra* note 182.

184. See Bordacahar, *supra* note 180.

185. See *Come and Get Me*, *supra* note 182.

186. See, e.g., Helfer *supra* note 171, at 1588 (distinguishing breach from denunciation or withdrawal pursuant to treaty terms).

187. Vienna Convention on the Law of Treaties art. 54, *supra* note 172, at 344.

188. *Id.* at 345 (Article 57).

189. *Id.* art. 56.

190. *Id.*

191. See Javier Ferrero, *Venezuela Versus the ICSID Convention*, GLOBAL ARB. NEWS (Feb. 24, 2015), <http://globalarbitrationnews.com/venezuela-versus-icsid-convention-20120422/>.

192. Vincentelli, *supra* note 81, at 422, 428 (discussing statements of Ecuador's President Rafael Correa and Bolivia's President Evo Morales); see also Diana Marie Wick, *The Counter-Productivity of ICSID Denunciation and Proposals for Change*, 11 J. INT'L BUS. & L. 239, 267 (2012).

exits as purely political and ideological moves,¹⁹³ the countries orchestrated their exits pursuant to the withdrawal provisions within the ICSID Convention, thus avoiding the ostracizing that would accompany an outright breach.¹⁹⁴

Countries seeking a narrowly tailored exit rooted in morality that avoids many of the reputational, political, and economic costs associated with either breach or denunciation should turn to the doctrine of fundamental change of circumstances, found in article 62 of the Vienna Convention.

3. *Rebus Sic Stantibus*

Although the norm *pacta sunt servanda* is regarded as a *jus cogens* norm in international law,¹⁹⁵ its application is limited by *rebus sic stantibus*, a moral argument that provides that circumstances have fundamentally changed such that treaty obligations have become onerous.¹⁹⁶ Article 62.1 of the Vienna Convention provides that *rebus sic stantibus* “may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.”¹⁹⁷ The Vienna Convention further provides that the party seeking to invoke the doctrine may not invoke it if the treaty relates to the establishment of a boundary, or if the fundamental change is actually the result of a breach of the treaty or another international obligation.¹⁹⁸ Under article 62.3 the doctrine may be invoked as grounds for treaty suspension.¹⁹⁹ Article 62 should be read in conjunction with articles 65 through 68, which delineate the process for state termination of a treaty.²⁰⁰ Part III.B discusses the narrow contours of the doctrine and concludes that it may provide the most efficacious pathway for states to manage climate vulnerability.

B. *Rebus Sic Stantibus: The Optimal Path?*

As Laurence Helfer writes, an exit by a state “in response to changed circumstances—particularly unforeseen external circumstances or those that spe-

193. See Vincentelli, *supra* note 81, at 423 (critiquing Bolivia, Venezuela, and Ecuador’s statements against the investor-state system as ideological and not rooted in empirical evidence concerning the impact of the current international investment regime on states in the Global South).

194. See generally U.N. CONFERENCE ON TRADE & DEV., DENUNCIATION OF THE ICSID CONVENTION AND BITS: IMPACT ON INVESTOR-STATE CLAIMS (2010), http://unctad.org/en/Docs/webdiaeia20106_en.pdf (discussing the effects of Bolivia’s and Ecuador’s withdrawal from ICSID). See also Wick, *supra* note 192, at 265 (discussing Venezuela’s withdrawal from ICSID).

195. SORNARAJAH, *supra* note 54, at 108–09.

196. *Id.* at 109.

197. Vienna Convention on the Law of Treaties art. 62, *supra* note 172, at 331.

198. *Id.*

199. *Id.*

200. Detlev F. Vagts, *Rebus Revisited: Changed Circumstances in Treaty Law*, 43 COLUM. J. TRANSNAT’L L. 459, 471 (2005).

cifically affect the denouncing party—may have very different reputational consequences²⁰¹ than an opportunistic exit or breach. Further, a treaty exit is not analogous to breach, but in the case of a “state that denounces a treaty—unlike a state that breaches one”—such a state is “no longer in the same position to participate as a ‘player’ in future ‘rounds’ of play.”²⁰² Climate change poses a conundrum for states that wish to remain engaged in international economic law. For such states, continued engagement in certain economic relationships could limit their ability to adapt to climate change but, for political reasons, breach might also be untenable.

Although treaty denunciation is one option available to such states, *rebus sic stantibus* could provide a moral basis for exit or renegotiation that is unburdened by the politics of breach or denunciation.²⁰³ Indeed, an exit pursuant to *rebus sic stantibus* could provide states with both the authority to remain engaged in international economic law and moral leverage over the nonexiting party. Moreover, for a state unwilling to exit a treaty, laying a factual foundation for a showing of fundamental change in circumstances could provide an invitation to renegotiate an agreement stemming from the treaty without resorting to a full-fledged exit from the many layers of international economic law.²⁰⁴

As history illustrates, successful application of the doctrine has proven elusive. The next Part discusses the contours and historical limitations to the application of *rebus sic stantibus*. Part IV suggests ways that the doctrine might be applied to modern circumstances to provide much-needed flexibility to international economic law in light of climate change.

III. HISTORICAL APPLICATION OF *REBUS SIC STANTIBUS*

The core argument used by states seeking to exit treaties under the doctrine of *rebus sic stantibus* is that there has been a change in circumstances that “radically transform[s] the parties’ obligations and undermines the premises that were essential to their initial bargain.”²⁰⁵ As noted, the doctrine was codified in the Vienna Convention on the Law of Treaties in 1969, but it has been so narrowly construed that “there has never been a successful assertion of [the doctrine] in a court case and . . . no clear example of its successful use in dip-

201. Helfer, *supra* note 171, at 1627.

202. *Id.* at 1613–14.

203. *Id.* at 1628 (noting that *rebus sic stantibus* could be a way to justify exit rather than be interpreted as an opportunistic move).

204. See generally Aba Kolo & Thomas W. Walde, *Renegotiation and Contract Adaptation in International Investment Projects: Applicable Legal Principles and Industry Practices*, 1 J. WORLD INV. 5 (2000) (stating that long-term economic relationships are commonly renegotiated because circumstances frequently change).

205. Helfer, *supra* note 171, at 1643.

lomatic exchanges.”²⁰⁶ The following two commonly referenced cases reflect the contours of the doctrine.

A. *The Fisheries Jurisdiction Case*

In 1974, just five years after the Vienna Convention was adopted, the International Court of Justice (ICJ) decided the Fisheries Jurisdiction case.²⁰⁷ The dispute involved an agreement between Iceland and the United Kingdom wherein the United Kingdom agreed to Iceland’s claim of twelve miles of exclusive fishing zone around its shores in exchange for a promise to refer any claim of broader fishing zone rights to the ICJ.²⁰⁸ Following the agreement, coastal states began to recognize twelve-mile or wider fishing zones.²⁰⁹ When Iceland began to expand its zone to give its citizens exclusive economic rights to the fish stocks in the expanded zone, the United Kingdom invoked the agreement between the two countries.²¹⁰ Iceland countered with the doctrine of changed circumstances, citing increased pressure on fish stocks in waters surrounding Iceland.²¹¹ The United Kingdom recognized Iceland’s preferential rights in Iceland’s own coastal waters²¹² and pointed to changes within the fishing industry that made protecting fish stocks in waters surrounding the country difficult.²¹³ However, the United Kingdom also argued that its rights to the zone were historical and rooted in the agreement between the two countries.²¹⁴

In hearing the case, the ICJ examined the ability of Iceland to fulfill its remaining obligations under the treaty.²¹⁵ Finding no limitations to the country’s ability to submit to the jurisdictional promise and that the “invocation by Iceland of its ‘vital interests’ [in protecting its fisheries], which were not made the subject of an express reservation to the acceptance of the jurisdictional obligation under” the agreement with the UK,²¹⁶ the ICJ rejected Iceland’s invocation of *rebus sic stantibus*.²¹⁷ In “order that a change of circumstances may give rise to a ground for invoking the termination of a treaty,” the court stated, “it is also necessary that it should have resulted in a radical transformation of

206. *Id.*; Vienna Convention on the Law of Treaties art. 62, *supra* note 172, at 347; *see also* SORNARAJAH, *supra* note 54, at 133 (noting that “the doctrine poses serious dangers to the security of treaties and therefore it is stated in a carefully circumscribed fashion in the law of treaties” and that the ICJ “has been reluctant to use the doctrine as the basis for justifying the termination of treaties”).

207. Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. 3 (July 25).

208. Vagts, *supra* note 200, at 471; Fisheries Jurisdiction, Judgment, ¶ 26.

209. Fisheries Jurisdiction, Judgment, ¶¶ 53, 58.

210. *Id.* ¶¶ 29–30.

211. Fisheries Jurisdiction, Jurisdiction of the Court, ¶ 35.

212. Fisheries Jurisdiction, Judgment, ¶ 26.

213. *Id.* ¶¶ 54–55.

214. *Id.* ¶ 11.

215. Fisheries Jurisdiction, Jurisdiction of the Court, ¶ 36.

216. *Id.* ¶ 38.

217. *Id.* ¶ 43.

the extent of the obligations still to be performed.”²¹⁸ Further, the “change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken.”²¹⁹ As to the threshold question of the court’s jurisdiction in the dispute, the ICJ found that *rebus sic stantibus* should not apply. The court noted:

In respect of the obligations with which the Court is here concerned, this condition [of a radical transformation of the extent of the obligations still to be performed] is wholly unsatisfied; the change of circumstances alleged by Iceland cannot be said to have transformed radically the extent of the jurisdictional obligation The compromissory clause enabled either of the parties to submit to the Court any dispute between them related to an extension of Icelandic fisheries jurisdiction in the waters above its continental shelf beyond the 12-mile limit. The present dispute is exactly of the character anticipated in the [] clause Not only has the jurisdictional obligation not been radically transformed in its extent; it has remained precisely what it was in 1961.²²⁰

Subsequently, Hungary found its efforts to utilize the doctrine similarly unavailing.

B. The Gabčíkovo-Nagymaros Case

In 1977, Hungary and the former Czechoslovakia entered into a treaty involving the development of over eighty hydroelectric projects along the Danube River, which formed the boundary between the two countries and is the second longest river in Europe.²²¹ The plan also involved the construction of a dam to divert water into Czechoslovakia, which would then be used to power a hydroelectric plant.²²² A series of events including Hungary’s increased sensitivity to environmental issues, citizen protests, the break up of the former Soviet Union, and Czechoslovakia’s planned development of its own hydroelectric plant led Hungary to denounce the treaty in 1992.²²³ Subsequently, Czechoslovakia split into the Czech Republic and Slovakia.²²⁴

The ICJ then examined the case Slovakia and Hungary submitted to it. The court evaluated three issues: (1) whether Hungary was “entitled to suspend and subsequently abandon the works on the Nagymaros Project” and the part of the Gabčíkovo Project for which it was responsible; (2) whether the Czech and

218. *Id.*

219. *Id.*

220. *Id.*

221. The agreement provided that the parties would jointly construct and operate a system of locks as a part of a joint investment. Vagts, *supra* note 200, at 473; Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 7, ¶ 15–18 (Sept. 25).

222. Gabčíkovo-Nagymaros Project, Judgment, 1997 I.C.J. Rep. 7, ¶ 18.

223. Vagts, *supra* note 200, at 473; Gabčíkovo-Nagymaros Project, Judgment, 1997 I.C.J. Rep. 7, ¶ 22–24.

224. Gabčíkovo-Nagymaros Project, Judgment, 1997 I.C.J. Rep. 7, ¶ 117.

Slovak Federal Republic were entitled to “proceed to the ‘provisional solution,’” which consisted of damming up the Danube River on Czech land; (3) whether Hungary validly terminated the underlying Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System, entered into in 1977; and (4) liability.²²⁵

Hungary submitted that its termination of the 1977 treaty was lawful based on five arguments: (1) ecological necessity, (2) impossibility of performance, (3) fundamental change of circumstances, (4) Czechoslovakia’s material breach of the treaty, and (5) the development of new norms of international environmental law. The core of Hungary’s changed circumstances argument contained three aspects: changes in the political structure of the states involved in the treaty, changes in the economic dimensions of the planned developments, and changes in international environmental law²²⁶ rendered the state unable to perform its treaty obligations.

The ICJ ultimately rejected Hungary’s assertion of the doctrine of fundamental change in circumstances to justify its denunciation of the treaty.²²⁷ The court stated that the essence of the bargain involved the development of energy projects along the Danube that would also improve navigation and allow for flood control.²²⁸ The political and economic changes subsequent to the treaty agreement did not fundamentally alter the parties’ obligations such that they could not perform their promises.²²⁹ Further, the court noted that the developments in the state of environmental knowledge and environmental law could not be said to have been “completely unforeseen.”²³⁰

The court also noted, “A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty’s conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty.”²³¹ Finally, the court stated that the treaty should incorporate “emerging norms of international law.”²³² Under the general provisions within the treaty, the “awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis” are relevant to the treaty relationship.²³³

225. *Id.* ¶ 13.

226. Gabčíkovo-Nagymaros Project, Judgment, 1997 I.C.J. Rep. 7, ¶¶ 95, 104.

227. *Id.* ¶ 104.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* ¶ 112.

233. *Id.*

C. Status of the Doctrine

What emerges from these two key cases involving *rebus sic stantibus* is a substantial bar to the successful application of the doctrine.²³⁴ In the Fisheries Jurisdiction case, Iceland's desire to expand the country's dominion over its territorial waters due to its interest in the natural resources therein and increased international recognition of a sovereign's broader interest in its territorial waters was insufficient to trigger a change in the jurisdictional rules to which the state had agreed. Similarly, environmental awareness and political disruption did not justify Hungary's exit from its agreement or leave the country unable to perform its treaty obligations. As Detlev F. Vagts notes, "What can be said is that *rebus sic stantibus* will not avail unless the change of circumstances is clearly a drastic change from the circumstances anticipated by the parties."²³⁵ Arguably, such bar notwithstanding, the doctrine is not a dead letter.

In the Hungary case, the ICJ left open the possibility that *rebus sic stantibus* may be applied in certain narrow circumstances. The court rejected Hungary's claim for treaty denunciation based on *rebus sic stantibus*, but there is a possibility that "an unforeseen fundamental change which affects the basis of an agreement could be a ground for renegotiating the agreement."²³⁶ Although the court disagreed with Hungary's assertions that "new developments in the state of environmental knowledge and environmental law" were "completely unforeseen,"²³⁷ it called on the parties to re-examine the effects of the project on the environment and reach a solution consistent with the underlying treaty aims while taking into account recent developments in international environmental law.²³⁸

Based on this jurisprudence, the law arguably allows states affected by climate change to exit or renegotiate international investment agreements utilizing the doctrine of fundamental change of circumstances. Affected states would first argue that the localized effects of climate change were unforeseen at the time the state entered the agreement;²³⁹ and from the time the state entered the agreement international environmental law has evolved to recognize the dire impacts of climate change as well as the necessity of drastic, immediate, state intervention. This evolution of international environmental law militates in favor of the application of the doctrine of fundamental change of circumstances

234. See *id.* ¶ 104 ("The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases."); see also Vagts, *supra* note 200, at 475.

235. Vagts, *supra* note 200, at 475.

236. Kolo & Walde, *supra* note 204, at 39.

237. Gabcikovo-Nagymaros Project, Judgment, 1997 I.C.J. Rep. 7, ¶ 104.

238. *Id.* ¶ 112.

239. *Id.* ¶ 104.

in ways that were not available to the parties in either of the seminal cases.²⁴⁰ Second, the state would argue that such unforeseen climate change effects and the presupposed stability of the environment constituted an essential basis of the state's consent to be bound by the investment agreement.²⁴¹ Third, the changes to the climate radically transform the state's obligations under the agreement.²⁴² The next Part establishes a framework for making these arguments and highlights some of the potential difficulties in pursuing this avenue.

IV. REBUS SIC STANTIBUS APPLIED

Law generally does not mandate a party to renegotiate a bad deal, even where there is a change in circumstances. Indeed, barring a renegotiation provision, a party asked to renegotiate an existing legal agreement can legally refuse to do so.²⁴³ However, there are reasons why a party may agree to renegotiate. As Jeswald Salacuse notes, a party on the favorable side of a transaction may view a state's request for renegotiation as an "express or implied threat[]" of "governmental intervention, expropriation, slow down in performance, or the complete repudiation or cancellation of the contract itself."²⁴⁴ To be sure, in the absence of a renegotiation provision in the agreement, when facing such a threat, a party to an agreement may pursue a legal remedy in court or in arbitration proceedings. However, the cost of pursuing a legal claim to its conclusion may be outweighed by the benefits of renegotiation.²⁴⁵ Thus, a state facing serious ecological harm due to climate change possesses a substantial bargaining chip in *rebus sic stantibus*. If the doctrine is seen as a viable tool for exit, it might actually be used to advance renegotiation. Unlike material breach, withdrawal, or denunciation, *rebus sic stantibus* gives moral weight to a state's argument for modification of an agreement²⁴⁶ and provides a substantive basis on which to implement a flexible response to environmental concerns.

This Part provides the analytical framework for applying *rebus sic stantibus* to justify exit or prompt renegotiation of an agreement rooted in modern international economic law. It begins with an overview of the largely factual climate change arguments concerning the evolution of international environmental law. After overcoming this initial evidentiary hurdle, Part IV.B. delineates the various levels of international economic law at which the doctrine might be applied and addresses certain jurisdictional issues related to the proper forum for application of the doctrine. The Part concludes that the density of in-

240. *See id.* ¶ 112.

241. Vienna Convention on the Law of Treaties art. 62.1(a), *supra* note 172, at 347.

242. *Id.* at 347 (Article 62.1(b)).

243. Jeswald W. Salacuse, *Renegotiating International Project Agreements*, 24 FORDHAM INT'L L.J. 1319, 1335–36 (2001).

244. *Id.* at 1336.

245. *Id.*

246. Helfer, *supra* note 171, at 1628.

vestment treaties limits the applicability of *rebus sic stantibus*, but that the doctrine might provide a basis for renegotiation at the investment agreement level.

A. *Climate Change as a Fundamental Change in Circumstances*

In his article addressing the inadequacy of international water law to relieve parties of treaty obligations, Tim Stephens looks to the International Law Commission (ILC) Commentaries for guidance on the scope of environmental harm envisaged by the Vienna Convention.²⁴⁷ The Commentaries provide that article 61 of the Vienna Convention, concerning the doctrine of impossibility, can be viewed as a companion to article 62, where *rebus sic stantibus* resides.²⁴⁸ As Stephens notes, the cases that fall under article 61 (impossibility) are quite extreme. Indeed, according to the ILC “the type of cases envisaged by [article 61] is the submergence of an island, the drying up of a river or the destruction of a dam or hydro-electric installation indispensable for the execution of a treaty.”²⁴⁹ This “would suggest that only the complete and permanent drying up of a river would allow a state to terminate a water treaty.”²⁵⁰

The extremes contemplated by the ILC may now be apparent in ways not previously seen within the current regime of international economic law. Under the doctrine of fundamental change of circumstances in article 62, if the instability of the environment was “unforeseeable,” stability “constituted an essential basis of the consent of the parties to be bound” by the agreement, and the effect of the environmental instability is radically to transform the extent of the obligations to be performed under the treaty a state may invoke the doctrine.²⁵¹ Moreover, as the ICJ in *Gabcikovo-Nagymaros* stated, new developments in international environmental law should be taken into account when enforcing treaty obligations.²⁵² The following subpart sets forth the arguments in support of this assertion.

1. *Unforeseeability*

In the *Gabcikovo-Nagymaros* case the ICJ makes clear that the fundamental change of circumstances that will serve as the basis for invoking the doctrine must have been unforeseen.²⁵³ Climate change scholars generally point to the 1990 release of the First Assessment Report of the IPCC as the beginning of

247. Tim Stephens, *Reimagining International Water Law*, 71 MD. L. REV. ENDNOTES 20, 35 (2011).

248. *Id.* at 34–36.

249. *Id.* at 35.

250. *Id.*

251. Vienna Convention on the Law of Treaties art. 62, *supra* note 172, at 347.

252. See Cotula, *supra* note 4, at 16 (noting that since the *Gabcikovo-Nagymaros* case, “developments in international law are to be taken into account in the implementation of existing contractual obligations, particularly through the renegotiation of the terms of the contract,” as well as treaty obligations).

253. *Gabcikovo-Nagymaros Project, Judgment*, 1997 I.C.J. Rep. 7, ¶ 104.

broader international awareness of the global problem of climate change.²⁵⁴ Based on this timeline, one might argue that given the wider awareness of climate change since 1990, states seeking to invoke the doctrine of fundamental change of circumstances for agreements entered after 1990 simply lack proper ammunition. In essence, the argument goes, since climate change was a part of the broader international legal discourse at the time the agreement was executed, agreements entered into during this time reflected an implicit acknowledgment of the risks of climate change. For a number of reasons, this position fails.

The argument that climate change and its impacts were foreseeable does not take into account the radical shift in scientific consensus regarding the causes of climate change from 1990 to 2015. In 1990, scientists did not fully link greenhouse gas emissions to climate change.²⁵⁵ The IPCC's Fourth Assessment in 2007 concluded for the first time that the scientific literature showed that "(a) global warming was indeed happening, and (b) anthropogenic emissions were the most likely cause."²⁵⁶ Today, scientists state with substantial certainty that fossil fuel consumption is leading to drastic changes in climate, and that if action is not taken immediately, humans will suffer heretofore unimagined harm. The IPCC's Fifth Assessment makes clear that the "evidence for human influence on the climate system has grown since the IPCC Fourth Assessment Report,"²⁵⁷ adding more force to the claim that the degree of understanding of climate change's potential harm has evolved rapidly over the past half decade.

Additionally, the anticipated changes are not, as once predicted, projected to happen at some time in the distant future.²⁵⁸ They are happening today and in a more drastic fashion than IPCC's First Assessment Report predicted a mere twenty-five years ago.²⁵⁹ Since the report, the scientific community has come to a near unanimous consensus that anthropogenic causes are leading to an increase in global temperatures that will have broad and devastating effects on communities around the globe.²⁶⁰

254. Stephens, *supra* note 247, at 35–36 (noting that in the context of water agreements, applying the "reasoning of the ICJ in the Gabčíkovo-Nagymaros case suggests that because climate change has been of international concern since at least 1990, when the IPCC released its first assessment report, it could not be used as a justification for suspending or terminating a treaty, except in certain cases where the impact on a particular basin was completely unforeseen").

255. See INTERGOV'TAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE: THE IPCC SCIENTIFIC ASSESSMENT (1990): POLICYMAKERS SUMMARY xxix (1990), https://www.ipcc.ch/ipccreports/far/wg_1/ipcc_far_wg_1_spm.pdf (noting that "any changes to date could be masked by natural variability and other (possibly man made) factors, and we do not have a clear picture of these").

256. Rolland, *supra* note 49, at 943 (noting that the import of this "major declaration" for climate science and policy).

257. RAJENDRA K. PACHAURI ET AL., INTERGOV'TAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT 5 (2014), http://ar5-syr.ipcc.ch/ipcc/ipcc/resources/pdf/IPCC_SynthesisReport.pdf.

258. See NAT'L CLIMATE ASSESSMENT, *supra* note 40.

259. See PACHAURI ET AL., *supra* note 257, at 7 (noting that "there are substantially more impacts in recent decades now attributed to climate change").

260. See generally *id.*

Although scientific understanding of the nature of the problem has evolved, the regime of international economic law remains stuck in an antiquated paradigm that fails to incorporate principles that reflect a concern for climate change. Consistent with the principles outlined in the Gabcikovo-Nagymaros case, international law actually requires incorporation of this emerging imperative, as illustrated by the myriad attempts to tackle climate change in international environmental law. The current rigidity of international economic law, as reflected in stabilization clauses, creates a blind spot with respect to climate change.²⁶¹

Parties relying on the “unforeseeability” argument to exit or modify an agreement entered into after 2007 may face increased difficulty making the argument that climate change and its impacts were unforeseeable. States in this situation might rely instead on geospatial arguments; although some climate change harm was known and foreseeable at the time of the agreement, the state may argue that the specific, destabilizing localized impacts of climate change were unforeseeable at the time of the agreement, which leaves room for renegotiation pursuant to *rebus sic stantibus*.

Having addressed the questions of climate change foreseeability, states seeking relief under *rebus sic stantibus* will likely also face the difficult question of causation. Namely, given that many of the states seeking to invoke the doctrine of fundamental change of circumstances will face already diminished environments, they must illustrate that the environmental harm they are experiencing is attributable to climate change.²⁶² Without showing this causal link, states might lack the moral basis on which to request modification of the agreement. Moreover, if climate change is not factored into the agreement modification, the solution might lack the flexibility required to manage the volatility associated with climate change.²⁶³ With this in mind, and given the diffi-

261. Neoliberal economic development and international economic law are based on the assumption of abundant ecological resources and a stable environment. In the climate change era, these assumptions no longer hold. Baker, *supra* note 1, at 575–76. Climate science indicates that the ecological resources on which communities have relied for millennia are diminishing at unprecedented rates. Due to climate change, the physical environment in which development is occurring is more unstable and unpredictable than ever. Thus, preexisting economic relationships, founded on neoliberal principles, also become uncertain and destabilized in the climate change era. Until quite recently, the scope and nature of the problem were unforeseen. *Id.*

262. In evaluating how to attribute causation for damage caused by a hypothetical monsoon in India, Professors Eric Posner and Cass Sunstein note the difficulty of attribution. They note that although “the flooding was more likely than it would otherwise have been, as a result of rising sea levels caused by climate change. . . it might well be impossible to show that greenhouse gas emissions in the United States ‘caused’ the flooding,” but rather, the likelihood of flooding “was also increased by complex natural phenomena that are poorly understood.” Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565, 1597 (2007).

263. A host of authors have begun to press for greater adaptation of law in the climate change era. See, e.g., Alejandro E. Camacho, *Adapting Governance to Climate Change Managing Uncertainty Through a Learning Infrastructure*, 59 EMORY L.J. 1 (2009); Craig, *supra* note 3; Victor B. Flatt, *Adapting Laws for a Changing World A Systemic Approach to Climate Change Adaptation*, 64 FLA. L. REV.

culty of predicting climate impacts at the local level, how do states with already diminished ecological resources link their diminished environmental state to climate change? A return to the El Salvador case helps to answer this question.

As Rolland et al. note, climate prediction models are most accurate at the global scale.²⁶⁴ When modeling at the regional level, climate science becomes less certain, and at the local level even less so.²⁶⁵ El Salvador suffers from decades of environmental degradation. Although AR5 suggests a medium to high risk that Central America will experience hydrological variations over the next century,²⁶⁶ El Salvador might have difficulty drawing a direct link between its current degraded environmental state and climate change.

Given this difficult factual hurdle, countries such as El Salvador could turn to the records, such as environmental impact statements and assessments, collected for specific investments to build the evidentiary record for unpredictable climate change impacts.²⁶⁷ Lenders or governments generally require environmental review documents in connection with the initiation of a development project.²⁶⁸ Depending on the type of project, these documents might include numerical data regarding water levels or other relevant environmental conditions as well as projected impacts the development would have on the environment. Once baseline levels of degradation are established as a result of reviewing these documents, the state, perhaps in cooperation with investors, could conduct new environmental assessments to determine whether the new conditions vary wildly from baseline levels or are inconsistent with predictions or the risk levels that were discussed in initial environmental assessments.²⁶⁹ In the face of inconsistencies or unaccounted-for changes, the state would have a basis for a climate-based *rebus sic stantibus* claim. In this case, illustrating the

269 (2012); Craig Anthony (Tony) Arnold, *Adaptive Watershed Planning and Climate Change*, 5 ENV'T L. & ENERGY L. & POL'Y J. 417 (2010); Baker, *supra* note 1.

264. Rolland, *supra* note 49, at 953; *see also* Robin Kundis Craig & Melinda Harm Benson, *Replacing Sustainability*, 46 AKRON L. REV. 841 (2013).

265. *See* Rolland, *supra* note 49, at 969.

266. *See supra* Part I.

267. For example, Pacific Rim was required to complete an environmental impact statement in connection with its application to exploit the mine. This might be a useful baseline for determining the reasonable expectations of the parties in connection with the impact the investment would have on the environment. *See Pac Rim Cayman LLC v. Republic of El Sal.*, ICSID Case No ARB/09/12, Republic of El Salvador's Counter-Memorial on the Merits, ¶ 169 (Jan. 10, 2014).

268. The World Bank requires project developers to complete an environmental assessment in connection with its projects. The assessment includes an analysis of the "natural environment (air, water, and land); human health and safety; social aspects (involuntary resettlement, indigenous peoples, and physical cultural resources); and transboundary and global environmental aspects." WORLD BANK, OP 4.01 ENVIRONMENTAL ASPECTS (1999), <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contenMDK:20064724~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> (last updated Apr. 2013).

269. *See, e.g.*, Arnold, *supra* note 263 (arguing for adaptive watershed management).

disparate and unpredicted changes from the baseline could help to advance a climate change-based *rebus sic stantibus* claim.²⁷⁰

2. *Stability as a Basis of the Bargain*

The second aspect of the article 62 test for fundamental change in circumstances requires parties to show that the changed circumstances constituted “an essential basis” of the state’s consent.²⁷¹ In the climate change context, the party invoking the doctrine must illustrate that the stability of the environment constituted a basis of the agreement. The theory and practice of neoliberal economic development provide a strong basis for this assertion.

Neoliberal economic development relies on, requires, and assumes that the investment environment is static and stable.²⁷² Indeed, the architecture of international economic law, as reflected in BITs and international trade and investment agreements such as CAFTA-DR, codifies the stability requirement by limiting the ability of states to regulate in the public interest in order to create a predictable investment environment.²⁷³ Climate change dramatically exposes the weaknesses embedded within the neoliberal economic development model. Because of climate change, the environment is *always* changing radically and unpredictably.²⁷⁴ However, the stability provisions embedded in BITs and investment agreements directly cut against states’ ability to adapt to climate change, given the penalties associated with changing environmental standards.²⁷⁵ States could thus convincingly argue that the “essence” of the neoliberal economic development bargain is stability of the regulatory environment. As discussed below, the need to adapt to unforeseen changes due to climate instability radically undermines the state’s ability to honor its bargain.

3. *Radical Transformation of Obligations*

Finally, a party invoking *rebus sic stantibus* must establish that the change in circumstances radically transformed the party’s yet to be performed obligations.²⁷⁶ As noted in the Fisheries Jurisdiction case, the change in circumstances “must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that

270. Without the causation element, the state might still prevail in its *rebus sic stantibus* claim by asserting that the environmental change was so drastic and sudden that the underlying circumstances that formed the basis of the bargain limit its ability to perform. In addition, a claim under article 61, impossibility, might also be available, as a state facing substantially diminished environment may lack the resources needed to perform its treaty obligations. See Stephens, *supra* note 247, at 35.

271. Vienna Convention on the Law of Treaties art. 62.1(a), *supra* note 172, at 347.

272. See Baker, *supra* note 1, at 577.

273. See *supra* Part I.

274. See Craig, *supra* note 3, at 23–27.

275. See Cotula, *supra* note 4, at 5–7.

276. Vienna Convention on the Law of Treaties art. 62(1)(b), *supra* note 172, at 347; Fisheries Jurisdiction (Ger. v. Ice.), Jurisdiction of the Court, 1973 I.C.J. 4, ¶ 43 (Feb. 2).

originally undertaken.²⁷⁷ The destabilization and instability caused by climate change meet these requirements, and they can be distinguished from the circumstances present in either of the two seminal cases addressing the doctrine.

In the Fisheries Jurisdiction case the ICJ declined to find that Iceland's treaty obligations were radically transformed by the changes in international understanding regarding a sovereign's fisheries jurisdiction. The ICJ reached the same conclusion in the Gabčíkovo-Nagymaros case, finding that the political upheaval and changes to the economic system of Czechoslovakia did not radically transform Hungary's treaty obligations. In each case, the court looked to the underlying promise. Iceland's promise related to jurisdiction. The country agreed to submit to the jurisdiction of the ICJ in case of a dispute. The change in international practice did not disturb the country's jurisdictional promise.²⁷⁸ Similarly, Hungary's promise related to development of a series of dam and energy projects related to the Danube. The court found that the changes to the broader political and economic context surrounding the agreement were not linked to the agreement itself and thus Hungary's obligations were not radically transformed.²⁷⁹

With respect to the ICSID Convention, the state's promise is jurisdictional, similar to the one made by Iceland in the Fisheries Jurisdiction case. A state invoking *rebus sic stantibus* to get out of its jurisdictional promise based on climate change may thus find itself in the same predicament as Iceland. At the CAFTA-DR and BIT levels, however, the argument that climate change radically transforms the state's ability to perform its treaty obligations is stronger. In each treaty, the capital-importing state's promise to maintain the stability of the investment environment is radically transformed by the instability and unpredictability climate change introduces to the investment environment. For example, adapting to extreme drought or water scarcity brought about by climate change would require the capital importing state to act quickly to enact the regulatory measures necessary to avert a water-related disaster, which could run afoul of the expropriation provisions contained in article 10.7 of CAFTA-DR and article 6 of the U.S. Model BIT. Contrary to either of the seminal cases, the state's ability to keep its promise to stabilize its investment environment is radically transformed by the change in circumstances.

As to specific investment contracts, such as mining concessions, which could be viewed in light of principles of international law,²⁸⁰ the argument that the ability to perform under the contract is radically transformed by a change in circumstances is even stronger than at the treaty level because the nexus between the subject matter of the contractual agreement (e.g., the mine) and the natural resource (e.g., water) to be regulated is much closer than it would be at

277. Fisheries Jurisdiction, Jurisdiction of the Court, ¶ 43.

278. *Id.*

279. Gabčíkovo-Nagymaros Project, Judgment, 1997 I.C.J. Rep. 7, ¶ 104.

280. See SORNARAJAH, *supra* note 54, at 109.

the treaty level. Although this nexus was lacking in the Gabčíkovo-Nagymaros case, it would be much tighter in this scenario. The state would argue that its promise to allow the mine to advance is radically transformed by the state's unforeseen water scarcity.

The next subpart takes a closer look at how the doctrine might apply to the various levels of international economic law, and it evaluates a few of the problems states might encounter in pursuit of relief.

B. *Scalar Application of Rebus Sic Stantibus*

In light of the new information on climate change, how might states begin to deploy the information consistent with principles of international law? Even if the doctrine of rebus sic stantibus applies, “suspension or termination may not be helpful remedies” because the doctrine allows a state to withdraw completely from the relevant regime without renegotiating the agreement itself.²⁸¹ Where the cost—including political, social, and economic considerations²⁸²—to both parties of ending the economic relationship is outweighed by the benefits of renegotiation, rebus sic stantibus provides a starting place for the conversation. Indeed, the doctrine could provide an opportunity for renegotiation.²⁸³

International economic law involves multiple economic relationships among diverse parties: (1) multiple state parties in multilateral agreements such as ICSID and CAFTA; (2) dyads of states, as reflected in BITs; and (3) investor-state agreements, such as host country agreements, long-term investment agreements, and concessionary agreements.²⁸⁴ States seeking more flexibility in their economic agreements must examine the level at which the fundamental change of circumstances argument could be most effectively applied. Invoking the doctrine at the right level could provide the necessary opening for states to renegotiate agreements and allow for greater flexibility and meaningful climate change adaptation. The following subparts offer analytical entry points for this decision-making process and highlight foreseeable doctrinal, jurisdictional, and practical challenges.

281. Stephens, *supra* note 247, at 36.

282. Salacuse, *supra* note 243, at 1341 (noting that cost and benefit considerations of a project may include political and social factors).

283. This is particularly helpful in cases where the contract lacks a renegotiation provision. See Cotula, *supra* note 4, at 5–7; Klaus Peter Berger, *Renegotiation and Adaption of International Investment Contracts: The Role of Contract Drafters and Arbitrators*, 36 VAND. J. TRANSNAT'L L. 1347, 1355 (2003).

284. See Haslam, *supra* note 75, at 1181 (describing the “spaghetti bowl” of international investment agreements, and noting that in the Americas “foreign direct investment is governed by a multi-layered patchwork of agreements that includes national investment statutes; bilateral investment treaties (BITs); free trade agreements (FTAs); investment rules within sub-regional preferential trading agreements; common markets; and multilateral instruments”).

1. ICSID

As previously discussed, the ICSID Convention has been much maligned by states in the Global South because of the perceived power imbalance between investors and host states and the implicit unfairness within the ICSID arbitration system.²⁸⁵ A state could choose to exit the treaty in order to pursue an alternative forum, such as its domestic legal regime, for settlement of investor-state environmental disputes. Alternatively, a state might elect to modify the treaty, with unanimous consent from contracting states, in an attempt to level the playing field for states in the Global South. As a practical matter, given the number of states that are party to the treaty and the requirement for unanimous approval from contracting states,²⁸⁶ states seeking alternatives to ICSID may choose to exit, rather than seek comprehensive renegotiation of the treaty's terms. Under the exit scenario, a state might deploy *rebus sic stantibus* to limit the political and reputational consequences of withdrawing from the ICSID Convention. However, the doctrine of fundamental change of changed circumstances would likely have both an overly broad and overly narrow application, neither of which would be helpful to climate vulnerable states.²⁸⁷ Moreover, perhaps most relevant, the weight of the climate change argument is weakest at this level because, just as in the Fisheries Jurisdiction case, the state's agreement to submit to the jurisdiction of an investment tribunal is unchanged by the impact of climate change; the state's ability to respond to the requirements of the underlying investment agreement is at issue. The following discussion of the purpose of the ICSID Convention and its applicable provisions regarding denunciation and withdrawal illustrates why *rebus sic stantibus* might be better applied to other relationships within international economic law.

ICSID was established when the Executive Directors of the World Bank adopted the ICSID Convention on October 14, 1966.²⁸⁸ The treaty entered into

285. See, e.g., Mourre, *supra* note 82, at 608 (noting that “there is certainly a growing perception by certain Latin American leaders and public opinion in certain quarters, that the current investment protection system is a sort of modernized version of the nineteenth century’s gunboat diplomacy against national sovereignty, favoring multinational companies that ignore local labor and environmental regulations”); see also Nicolle E. Kownacki, *Prospects for ICSID Arbitration in Post-Denunciation Countries An “Updated” Approach*, 15 UCLA J. INT’L L. & FOREIGN AFF. 529, 544 (2010) (quoting Bolivian Ambassador for Trade and Integration, Pablo Solón, as stating that “the Bolivian Government is withdrawing from ICSID because: 1) it is an unbalanced arbitration tribunal where only multinationals challenge states”).

286. Kate M. Supnik, *Making Amends Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law*, 59 DUKE L.J. 343, 367 (2009) (noting the difficulty of ICSID amendment).

287. Application of *rebus sic stantibus* at this level might be overly broad because it would foreclose the state’s ability to utilize this forum for future disputes, when the state’s immediate goal is to avoid penalty under one investment agreement through renegotiation or exit. Application of the doctrine might be overly narrow because ICSID merely applies to dispute resolution. The treaty does not directly allow a party to renegotiate existing agreements that rely on ICSID for dispute resolution.

288. See INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, *supra* note 79, at 1.

force on the same day with twenty ratifying countries.²⁸⁹ It currently has over one hundred and fifty-nine signatory states, one hundred fifty-one of which have ratified the treaty.²⁹⁰ The purpose of ICSID, as stated in the Preamble of the Convention, is to foster international cooperation for economic development in consideration of the role of private international investment.²⁹¹ ICSID fosters such cooperation by providing “facilities and services to support conciliation and arbitration of international investment disputes” between Contracting States and nationals of other Contracting States.²⁹² Citing the inherent unfairness of the ICSID system, several states—Ecuador, Bolivia, and Venezuela—recently withdrew from the ICSID Convention pursuant to provisions contained within.²⁹³ However, withdrawing from ICSID alone leaves lingering issues for states seeking to exit altogether the system of international economic law, remediate the perceived unfairness within the ICSID system, or modify the underlying structure of international economic law that creates climate vulnerability.

When a party exits the ICSID system of arbitration pursuant to the ICSID Convention, the treaty leaves open the possibility that existing disputes remain live even though the party has denounced the treaty. For example, the treaty allows any contracting state to denounce it by providing written notice to the depositary of the treaty, which shall be effective six months after the depositary receives notice.²⁹⁴ Article 72 of the ICSID Convention explicitly states that the notice of intent to denounce does not affect the rights or obligations of the denouncing state or its nationals arising from the consent to jurisdiction of ICSID prior to receipt of notice by the depositary.²⁹⁵ Thus, denunciation does not extinguish existing disputes between the denouncing state and investors. Further, denouncing ICSID does not shelter states from the arbitration requirements contained in most BITs.²⁹⁶ As Diana Wick notes, the alternatives to ICSID, to which the state might still be subjected, such as ad hoc arbitration tribunals

289. INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, ICSID CONVENTION, REGULATIONS AND RULES at Introduction. (Apr. 10, 2006), <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/intro.htm>.

290. See INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, *supra* note 79, at 1.

291. See INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, *supra* note 289, at Preamble.

292. See INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, *supra* note 79, at 1.

293. See Wick, *supra* note 192, at 241 (2012) (noting Bolivia’s withdrawal in 2006, Ecuador’s withdrawal in 2009, and Venezuela’s withdrawal in 2012; all withdrawals occurred in the face of numerous arbitration cases stemming from investment disputes).

294. See INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, *supra* note 289, at art. 71 (“Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.”).

295. See *id.* at art. 72 (“Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State . . . or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.”).

296. Mourre, *supra* note 82, at 613 (noting that Bolivia’s withdrawal would not cover consent to ICSID arbitration given in a BIT).

formed under the United Nations Commission on International Trade Law (UNCITRAL) rules, may have shortcomings similar to ICSID.²⁹⁷

Whether a party uses the provisions of the ICSID Convention or *rebus sic stantibus* to exit, the same outcome results. Article 65 of the Vienna Convention also requires at least three months' notice for withdrawal.²⁹⁸ Once proper notice is given, article 70 provides that "[u]nless the treaty otherwise provides or the parties otherwise agree," withdrawal pursuant to *rebus sic stantibus* releases the withdrawing party from any obligation of further performance. However, as with the ICSID Convention, withdrawal "[d]oes not affect any right, obligation, or legal situation of the parties created through the execution of the treaty prior to [the party's withdrawal]."²⁹⁹ As such, existing claims of investors would arguably remain in place *vis-à-vis* the former agreements made by the parties. Utilizing *rebus sic stantibus* to withdraw from the ICSID Convention may thus prove unhelpful to remediate immediate climate stress.

Ultimately, although exiting ICSID could prove an attractive option to some states, it may be too extreme of an action for poorer states that lack well-formed alternatives to the current regime of international economic law.³⁰⁰ It may also leave these vulnerable states subject to ad-hoc tribunals that act within an even more opaque legal environment than ICSID. Further, although applying the doctrine of changed circumstances could provide a more solid moral basis upon which to exit ICSID than outright denunciation, application of the doctrine would not yield a different practical result than the existing provisions of the treaty provide. For more useful application of the doctrine, states should look to the other layers of international economic law.

2. CAFTA-DR

CAFTA-DR fits within a genre of free trade agreements, such as NAFTA, known to provide limited policy space to states seeking to regulate in the public interest.³⁰¹ Therefore, a state's ability to remediate its own climate change vulnerability turns on whether outright treaty exit or some type of modification yields more flexibility. As with the ICSID Convention, given the number of countries involved in the agreement, a state seeking to change its status within the economic relationships created by the treaty is unlikely to prevail by invoking *rebus sic stantibus* to press for substantive modification of the treaty (though given that the developing country parties to CAFTA-DR outnumber the United States five to one, the chances may be higher than with the ICSID

297. Wick, *supra* note 192, at 242–43, (2012) (noting that other investor-state arbitration forums contain aspects that “are disadvantageous to states”).

298. Vienna Convention on the Law of Treaties art. 65, *supra* note 172, at 347.

299. *Id.* at 349 (Article 70).

300. See Cotula, *supra* note 4, at 2–3.

301. Haslam, *supra* note 75, at 1185 (indicating that El Salvador is party to six NAFTA-style agreements that provide limited policy flexibility for states to regulate in the public interest).

Convention).³⁰² The following discussion outlines the history and key substantive provisions of CAFTA-DR, including its current withdrawal provisions. The analysis concludes that invoking *rebus sic stantibus* at the next two levels of international economic law—BITs and investment contracts—may prove more beneficial for climate vulnerable developing states.

On August 5, 2004, Costa Rica, El Salvador, Guatemala, Honduras, the Dominican Republic, and the United States signed the CAFTA-DR.³⁰³ The agreement was the first free trade agreement between the United States and a group of developing states³⁰⁴ and was entered into for a number of stated reasons, including to “strengthen the special bonds of friendship and cooperation among” the parties and to “promote regional economic integration.”³⁰⁵ The parties also resolved to “implement [the] Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters.”³⁰⁶

Chapter Ten of CAFTA-DR relates to disputes between investors and states and is a prime candidate for potential modification under the doctrine of fundamental change of circumstances. Chapter Ten mirrors NAFTA’s controversial Chapter Eleven, which has been interpreted to limit states’ environmental regulation,³⁰⁷ by specifically curtailing states’ regulatory authority where environmental regulatory changes affect the investment environment.³⁰⁸

Chapter Ten also provides that an investor may submit to binding international arbitration under the ICSID Additional Facility Rules, as long as at least one party is a party to the ICSID Convention, or under the UNITRAL Arbitration Rules.³⁰⁹ Further, with the exception of confidential business information, it states that there shall be public access to information relating to the investor-state proceedings.³¹⁰ With respect to expropriation, the agreement provides that “except in rare circumstances,” nondiscriminatory regulatory actions aimed at protecting public health and the environment shall not be deemed expropriation.³¹¹ Chapter Seventeen addresses environmental matters, and the United States government interprets the Chapter as being modeled after the North American Agreement on Environmental Cooperation and other recent United States free trade agreements with Jordan, Chile, Singapore, Australia, and Mo-

302. See CAFTA-DR, *supra* note 76, at pmbl.

303. See *id.*

304. *What is the Central American-Dominican Republic Free Trade Agreement (CAFTA-DR)*, U.S. CUSTOMS & BORDER PROT., [https://help.cbp.gov/app/answers/detail/a_id/948/~/what-is-the-central-american-dominican-republic-free-trade-agreement-\(cafta-dr\)](https://help.cbp.gov/app/answers/detail/a_id/948/~/what-is-the-central-american-dominican-republic-free-trade-agreement-(cafta-dr)) (last visited Jan. 10, 2016).

305. CAFTA-DR, *supra* note 76, at pmbl.

306. *Id.*

307. CAFTA-DR, *supra* note 76, at ch. 10; North America Free Trade Agreement, *supra* note 64, at ch. 11.

308. North America Free Trade Agreement, *supra* note 64, at ch. 11.

309. CAFTA-DR, *supra* note 76, at art. 10.16(3).

310. See *id.* at art. 10.21.

311. *Id.* at ch. 10 annex 10-C.

rocco, but going further than these agreements by providing a process for public submissions regarding environmental enforcement.³¹²

Regarding withdrawal, article 22.7 establishes procedures for withdrawing from the agreement.³¹³ The article provides that any party may withdraw upon providing written notice of withdrawal to the Depositary of the agreement, who is the General Secretariat of the Organization of American States.³¹⁴ Withdrawal shall take effect six months after the provision of notice, or pursuant to a separate agreement among the parties.³¹⁵ As with ICSID, withdrawal from CAFTA-DR is unlikely to extinguish existing investor claims. As such, exiting CAFTA-DR, either under Chapter 22 or by invoking *rebus sic stantibus*, would yield few benefits for the climate vulnerable state.

States seeking to remain tethered to the system of international economic law while expanding the policy space available to adapt to climate change might use *rebus sic stantibus* at the BIT level in ways not available under ICSID or CAFTA-DR.

3. BITs

Given the dyadic nature of BITs, one might presume they would lend themselves to modification more readily than either ICSID or CAFTA-DR. However, BITs suffer from the same rigidity found in multilateral treaties, making modification difficult for the capital-importing state. Moreover, even if a state decided to exit, the survival clauses embedded in most BITs would not remediate the climate vulnerability facing the state *vis-à-vis* investment contracts. The following subpart provides a brief overview of BITs and discusses the futility of utilizing *rebus sic stantibus* at this level of international economic law.

BITs began in the early 1960s, proliferated in the 1990s, and number in the thousands today.³¹⁶ They provide the legal architecture for foreign direct investment (FDI).³¹⁷ Although, as Elkins et al. note, there are generally no multilateral rules for FDI, most BITs address “four substantive areas: FDI admission, FDI treatment, FDI expropriation, and the settlement of disputes”³¹⁸ Many capital-exporting countries such as the United States also have a model

312. *See id.* at ch. 17.

313. *Id.* at art. 22.7.

314. *Id.*

315. *Id.*

316. Wick, *supra* note 192, at 252; *see also* Desierto *supra* note 91, at 86 (discussing “three generations” of BITs: first generation BITs were entered between 1959 and 1969 between the capital exporting developed North and the capital importing developing South; second generation BITs were entered between 1969 and 2003 and include more uniformity, including standard clauses regarding investor-state arbitration; and third generation BITs explicitly clarify and acknowledge the state’s right and duty to regulate in the public interest).

317. *See generally* Elkins et al., *supra* note 61.

318. *Id.* at 266.

BIT which could serve as a “prototype to begin negotiations”³¹⁹ or serve as a “take it or leave it offer”³²⁰ for capital-importing states. The 2012 U.S. Model Bilateral Investment Treaty contains features common across BITs: (1) national treatment, in which each party accords the same treatment to outside investors as it would domestic entities; (2) most-favored nation treatment, which provides the investor treatment no less favorable than that given to nonparty investors; (3) minimum standard of treatment under customary international law; and (4) compensation for expropriation.³²¹

The 2012 U.S. Model BIT provision regarding expropriation and compensation crystallizes the stabilizing aspects of the BIT, providing, in article 6, that “[n]either party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization . . . except . . . for a public purpose.”³²² Further, in Annex B of the U.S. Model BIT, regarding the definition of expropriation, the document provides that a state does not commit indirect, or regulatory, expropriation when engaging in “non-discriminatory regulatory actions . . . designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment.”³²³ According to the guidance provided in the U.S. Model BIT, only in rare circumstances will such action be deemed expropriative.³²⁴

States seeking remediation for climate vulnerability might seek to amend the article 6 provisions and clarify Annex B to expand the policy space available to states in specific cases or projects that may impact natural resources disproportionately. More specifically, states might seek to insert language that carves out climate-related harm rendering a project impractical or in need of significant modification to move forward. Under the current Model BIT provisions, such actions by the state could give rise to a claim for expropriation. Modification of this provision to allow for greater flexibility would be essential for climate vulnerable states, but the rise of the “Model BIT” makes it difficult to contemplate whether a capital-importing state would actually have leverage to effectuate this change.³²⁵

Regarding invocation of *rebus sic stantibus* to withdraw from BITs, the underlying power asymmetry and environmental degradation would likely per-

319. Wick, *supra* note 192, at 252–53.

320. Elkins et al., *supra* note 61, at 272 (“By the late 1980s, most analysts would agree that governments in countries home to large multinational corporations (MNCs) had nearly converged on a single treaty model” which “developing countries could . . . opt “to take it or to leave it.” Many opted for the former.)

321. U.S. TRADE REPRESENTATIVE, *supra* note 69, at 7–9 (Articles 3–6).

322. *Id.* at 8–9 (Article 6).

323. *Id.* at 41 (Annex B).

324. *Id.*

325. Elkins et al., *supra* note 61, at 276–77 (noting that host countries “are price takers with respect to the terms of [BITs],” and essentially, “each home country has market power over the terms that will govern investment by its locals”); *cf.* Wick, *supra* note 192, at 288–90 (arguing that BIT amendment should be contemplated by states in lieu of ICSID withdrawal).

sist long after the agreement is terminated. Many BITs include so-called survival clauses that leave many of the BIT's provisions intact even after the state has denounced the treaty.³²⁶ For example, the U.S. 2012 Model BIT exit provision provides that a party may terminate the treaty "at the end of the initial ten-year period or at any time thereafter by giving one year's written notice to the other Party."³²⁷ Further, pursuant to the agreement, the BIT's articles shall "continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those articles extend to the establishment or acquisition of covered instruments."³²⁸ As discussed above, given that article 70, section 1(b) of the Vienna Convention provides that withdrawal from the treaty does not "affect any right, obligation, or legal situation of the parties created through the execution of the treaty prior to its termination,"³²⁹ the survival clauses of most BITs would, for lack of a better word, survive.

The foregoing analysis of the ICSID Convention, CAFTA, and BITs illustrates the density of international economic law. The brilliance of its architecture provides impenetrable layers of public international law protection for private investors, making exit at one level inapposite for the capital-importing state to remediate climate vulnerability, and renegotiation unfeasible.³³⁰ This legal and governance architecture yields the most at its lowest level. The most promising level for application of the doctrine of changed circumstances in light of climate change is at the FDI agreement level, although applying *rebus sic stantibus* at this level of international economic law is not without significant challenges or controversy.

4. *Host State Agreements and Concession Agreements*

A genuine question exists as to whether a party to a FDI agreement, such as a concession agreement or host country agreement, might also invoke the *rebus sic stantibus* doctrine.³³¹ Sornarajah argues that even if the doctrine is narrowly applied with respect to state treaty obligations *vis-à-vis* other states, "there is a strong case for the doctrine being applied with full force"³³² because of the impact that foreign investment agreements have on the economies of developing states. Moreover, where the private foreign investor's only motives

326. Wick, *supra* note 192, at 248 (noting that most BITs contain survival clauses that allow investors protection for at least ten years after denunciation); Haslam, *supra* note 75, at 1187 (noting that even after repudiation, BITs remain in force for ten to twenty years).

327. U.S. TRADE REPRESENTATIVE, *supra* note 69, at 26, 29 (articles 22.2 and 26).

328. *Id.* at 26, 29 (Articles 22.3 and 26).

329. Vienna Convention on the Law of Treaties art. 70, *supra* note 172, at 349.

330. See generally Anna T. Katselas, *Exit, Voice, and Loyalty in Investment Treaty Arbitration*, 93 NEB. L. REV. 313 (2014) (noting that, at the outset, capital-importing states did not contemplate the low exit, low voice structure of international investment law).

331. See SORNARAJAH, *supra* note 54, at 109 ("The question is whether the principle which applies to agreements between sovereign States could be extended to foreign investment agreements between a State and an alien corporation.")

332. *Id.* at 133.

are profit, the state has broader economic and developmental goals, which lends force to the argument that the doctrine should apply to such investment agreements.³³³ Further, as Kolo and Walde note:

it has also been argued that where the agreement is between a government and a foreign investor for the exploitation of the host state's natural resources, the concept of sanctity of contract is overridden by the principle of permanent sovereignty over natural resources which allows a host state to unilaterally cancel or amend the contract."³³⁴ Indeed, Sornarajah posits that "it would not be a sound policy to require that a State should sacrifice its economic interests so that the foreign corporation's interests may be preserved."³³⁵

Assuming the controversial position that the doctrine of changed circumstances applies to FDI agreements,³³⁶ the tool could be the most effective pathway to climate relief. The historical treatment of long-term investment contracts³³⁷ under international law and their ubiquity in the realm of modern international economic law supports this position. Renegotiation and flexibility are hallmarks of international business.³³⁸ Modification would be consistent with international practice and could provide a less destabilizing approach than a wholesale treaty exit.

By utilizing *rebus sic stantibus* at the investment contract level states might be better able to disrupt the stabilization clauses contained in investment

333. *Id.*

334. Kolo & Walde, *supra* note 204, at 9–10 (noting further that the view that states could utilize the principle of permanent sovereignty over natural resources was more prevalent in the late 1960s and 1970s when states were emerging from conflict and less experienced in the realm of international investment activity; now, the authors argue, this should no longer be the case, as states are now more sophisticated repeat players in the international investment arena. They state, "He who goes to the market place must accept to play by the rules of the game!").

335. SORNARAJAH, *supra* note 54, at 135.

336. *Id.* at 133 (noting that scholars have advanced arguments that foreign investment agreements should be subject to *rebus sic stantibus*).

337. Applying the doctrine of fundamental change of circumstances at the investment contract level would mirror the hardship principles contained in the UNIDROIT Principles of International Commercial Contracts, generally seen as a reflection of the rules and principles of international contract law. See Berger, *supra* note 283, at 1350–51. Article 6.2.2, Definition of Hardship, provides that:

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because of the cost of a party's performance has increased or because the value of the performance a party received has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.

International Institute for the Unification of Private Law, Principles of International Commercial Contracts 146–51 (1994), 34 I.L.M. 1067 (1995).

338. Kolo & Walde, *supra* note 204, at 6; Salacuse, *supra* note 243, at 1319 (noting that parties to international project contracts often end up renegotiating agreements, and further citing the renegotiation of mineral and petroleum agreements in the 1960s and 1970s "in the face of threatened host country nationalizations and expropriations" and loan restructurings following the debt crises of the 1980s facing developing countries as key examples of renegotiations in the realm of international business).

agreements. They could argue that stabilization clauses should not apply with respect to environmental and climate change regulation. Alternatively, states could request renegotiation of the investment contract altogether with the goal of embedding principles of adaptive management into the subsequent agreement. Klaus Peter Berger suggests that such flexibility is a matter of careful drafting, and renegotiation clauses should be written into the language of the contract to allow for renegotiation when circumstances change.³³⁹ In the climate change era, this type of flexibility should be required in any investment contract.

If states elect to utilize the fundamental change of circumstances doctrine to modify investment contracts, a jurisdictional puzzle emerges. Although, as Sornarajah suggests, it is clear that principles of international law should trickle down to the level of FDI agreements, and the ICJ has stated that the Vienna Convention is a reflection of customary international law.³⁴⁰ But, a genuine question remains as to where states might most effectively assert this right vis-à-vis an investor who is not subject to international law. Specifically, should states present the claim in arbitration or to the ICJ?

The posture of the controversy is awkward: A sovereign state seeks declaratory relief, asserting that the impacts of climate change within its territory were unforeseen when the state entered into the agreement with the foreign investor, and the impacts of climate change have radically transformed the state's ability to perform the contract. Although the ICJ's jurisdiction is generally reserved for matters involving controversies between states, the court has occasionally considered the rights of investors, although only when the state has asserted the right to protect its domestic entity.³⁴¹ The court might agree to hear the claim due to the potentially widespread application of the rule to many developing states affected by climate change, and because the controversy concerning the investment contract is derivative of a bilateral agreement between sovereigns.³⁴² This widespread applicability notwithstanding, however, the claim of the developing state would need to be asserted vis-à-vis the capital exporting country, not the investor.³⁴³ The broader applicability and the unilateral nature of the claim weigh against invoking the arbitration provisions within the investment agreement or the investment treaty on which the agreement is based. Given the ICJ's prior adjudication involving *rebus sic stantibus* and the

339. Berger, *supra* note 283, at 1361.

340. Fisheries Jurisdiction (Ger. v. Ice.), Jurisdiction of the Court, 1973 I.C.J. 4, ¶ 36 (Feb. 2).

341. Wick, *supra* note 192, at 250–51 (discussing the Barcelona Traction case and noting the ICJ's consideration of investment disputes); see also Statute of the International Court of Justice art. 34, http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf (limiting the court's jurisdiction to state parties).

342. Cf. Alain Pellet, 2013 *Lalive Lecture The Case Law of the ICJ in Investment Arbitration*, 28 ICSID REV. 223, 225 (2013) (noting that the International Court of Justice has observed that the rights of investors and shareholders, and related disputes, are “essentially governed by bilateral or multilateral agreements for the protection of foreign investments,” such as bilateral investment treaties (BITs) or the ICSID Convention, “and also by contracts between States and foreign investors”).

343. See Statute of the International Court of Justice, *supra* note 341, at art. 34.

global impact of its decisions, pursuing declaratory relief through the ICJ might be more attractive than pursuing such relief at the arbitration setting. However, overcoming the mandatory arbitration provisions embedded within the investment agreement and BIT on which it is based could prove difficult.

In light of such jurisdictional limitations and the arbitration requirements contained in international economic relationships, states might choose to obtain a decision from an ICSID tribunal or another investment tribunal.³⁴⁴ For a host of reasons, mostly rooted in efficiency, this approach may also raise concerns. For example, if the state seeks declaratory relief in the investment tribunal setting, the lack of precedential effect may produce additional costs for subsequent states seeking such relief.³⁴⁵ Moreover, the decision might not be recognized outside the tribunal. As Alain Pellet notes, the “ICJ simply does not refer to ICSID decisions or awards,”³⁴⁶ which could further complicate the landscape of *rebus* application as a basis for renegotiation. Such issues notwithstanding, once a state establishes the factual foundation for a *rebus sic stantibus* contractual claim, other states will presumably follow. The costs of pursuing this pathway, either at the ICJ with respect to a treaty or in an arbitration tribunal concerning an investment contract, would then decline.³⁴⁷

CONCLUSION

This Article establishes the legal framework for the modification of agreements arising from international economic law due to climate change and pursuant to the doctrine of *rebus sic stantibus*. Despite this effort, a real question remains as to whether reanimation of the doctrine in any way resolves the climate change issues facing states in the Global South or, perhaps more fundamentally, whether developing states would find any of the options discussed in this Article realistic or appealing. In an attempt to resolve these concerns, this discussion revisits the two IEL doctrines—international economic law and international environmental law.

Climate change exposes the gap at the intersection of international economic law and international environmental law, but it may also provide a

344. The nature of the claim suggested here would appear to fit within the contemplated meaning of “dispute” under ICSID. *See* Berger, *supra* note 283, at 1374–75 (arguing for broad interpretation of “dispute” within the investment tribunal setting, and referring to the commentary to the ICSID Convention, which states, among other things, that “the dispute must concern the existence or scope of a legal right or obligation”).

345. Pellet, *supra* note 342, at 223–24 (stating that “there may be some doubt about the existence of ‘ICSID jurisprudence’” and a “jurisprudential mess” exists with respect to various provisional measures in investment law; further, the rule of *stare decisis* does not bind either the ICJ or ICSID tribunals); *see also* Desierto, *supra* note 91, at 107 (noting that investment arbitral tribunals “usually observe a sense of precedent” but it is “not formally required of them within the terms of their arbitral function or mandate”).

346. Pellet, *supra* note 342, at 225.

347. *Id.* at 227 (noting that the approach taken by ICSID tribunals in many cases leads to the application of prior decisions when cases are consistent).

meaningful opportunity for convergence. As discussed in Part I, the stability required by the current international economic law system limits the ability of developing states to adapt to the unforeseen impacts of climate change. Moreover, the structure of international economic law may actively operate to render these states more vulnerable to climate impacts. International environmental law has not yet remedied these shortcomings.

In light of these gaps in the laws of international development, developing countries face a range of options. States may do nothing to change their agreements based on international economic law, and they can continue to triage the impacts of climate change with the hope that the net gains from economic development outweigh its potential harms. Most states remain locked in this purgatory of development, unwilling or unable to disrupt existing economic relationships due to the political and economic penalties associated with disruption. States may also exit international economic law, a strategy that certain states have already deployed with varying degrees of success, but in the face of much scrutiny and lingering liability.

The roadmap offered in this Article attempts to strike a middle ground. It neither adopts the *status quo ante* nor argues for a wholesale exit from the existing regime of international economic law. Rather, it offers a pathway for developing countries to remain engaged in the system of international economic law and animate an under-utilized principle of international law—*rebus sic stantibus*—to manage the volatility posed by climate change.

The analytical framework offered here might be used in myriad ways. For the states that forsake the middle road and instead choose to invoke *rebus sic stantibus* to justify exit, the analytical framework offered in this Article might provide a more “costless” option than denunciation or breach of international economic agreements. For those developing states that want to maintain their status as legitimate players and remain eligible for future “rounds of play,” but also maintain policy space to adapt to the harms of climate change, the principles outlined in this Article may be of more assistance.

No matter how the tools discussed here are utilized, climate change promises an era of instability, unpredictability, and chaos not previously contemplated by international economic law. International law offers a tool to manage this chaos, but the doctrine of fundamental change of circumstances has been relegated to the annals of history and dismissed as a dead letter. Climate change breathes new life into the doctrine, thereby providing a pathway for stability and flexibility in this unprecedented development era. International economic law must yield to the imperative of climate change adaptation or it may break.