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COMMON BUT DIFFERENTIATED RESPONSIBILITY AT WHAT COST?  
INVESTMENT LAW AS A BARRIER TO CLIMATE AMBITION AND ACHIEVING  
ZERO ROUTINE GAS FLARING IN AFRICA

Jenny Hall & Louis Koen

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## ARTICLE

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# 1

## INTRODUCTION

The principle of common but differentiated responsibility (CBDR) has always been a feature of climate negotiations.<sup>1</sup> At its core, the principle aims to achieve substantive equity in international climate law by acknowledging that a global effort is required by all states to address climate change, but that developed states should take the lead and shoulder a larger burden. This is partly so because of developed states' historical contribution to CO<sub>2</sub> emissions, but it also reflects a recognition of the different developmental levels and needs that exist as well as the different capacities of states to respond.

The approach to CBDR has, however, evolved in international climate law in the last three decades. In its current form African states, who are amongst those that are particularly climate vulnerable, are now required to adopt commitments to mitigate climate change that must become more ambitious over time.<sup>2</sup> At the same time, developed states must support these efforts in various ways, including securing financial flows to fund African climate-related responses.

These common but differentiated responsibilities need to be taken seriously as recent reports by United Nations bodies make the climate crisis more visible every year.<sup>3</sup> Even though African states are not the

biggest contributors to the climate problem, it is clear that they cannot be immune from the calls for global action to address the climate trajectory that we are on and which urge governments to 'up their game' and to expand the international legal regime to include new and meaningful, binding rules.<sup>4</sup> However, it is noteworthy that these calls for action have expanded beyond the historical focus of viewing the solution as being intergovernmental co-operation. They have extended to non-state actors, including to transnational corporations (TNCs).

This is significant as TNCs are responsible for emitting nearly a fifth of the world's carbon emissions and they are often responsible for emitting more greenhouse gases than individual states.<sup>5</sup> In addition, certain sectors, and companies within those sectors, emit more than others. This is evidenced by the fact that the top twenty oil, natural gas, and coal companies alone have contributed thirty five per cent of all fossil fuel and cement emissions since 1965.<sup>6</sup> TNCs are therefore major contributors to the climate crisis and need to play their part in the global effort that is required to address climate change. This means that there is a clear need for TNCs to change a business-as-usual approach. However, as Zhang notes, investment by many TNCs is increasingly moving from developed

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1 Pieter Pauw and others, 'Different Perspectives on Differentiated Responsibilities in International Negotiations – A State-of-the-Art Review of the Notion of Common but Differentiated Responsibilities in International Negotiations' (2014) Deutsches Institut für Entwicklungspolitik 1.

2 Isabelle Niang and others, 'Africa' in Vicente R. Barros and others (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* 1199 (CUP 2014).

3 eg Valérie Masson-Delmotte and others, 'IPCC, 2021: Summary for Policymakers' in Valérie Masson-Delmotte and others (eds), *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* 3 (CUP 2021).

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4 eg Valérie Masson-Delmotte and others, 'Global Warming of 1.5 ° C: An IPCC Special Report on the Impacts of Global Warming of 1.5 ° C above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty' (IPCC 2018) and United Nations Environment Programme, *Making Peace with Nature: A Scientific Blueprint to Tackle the Climate, Biodiversity and Pollution Emergencies* (UNEP 2021).

5 Zengkai Zhang and others, 'Embodied Carbon Emissions in the Supply Chains of Multinational Enterprises' (2020) 10 (12) *Nature Climate Change* 1096. See also, Paul Griffin, *CDP Carbon Majors Report* (Climate Accountability Institute 2017); Richard Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers' (2013) 122 *Climatic Change* 1854, points out that almost two-thirds of CO<sub>2</sub> and methane emissions between 1854-2010 are attributable to 90 corporate entities in the energy and cement sectors.

6 Climate Accountability Institute, 'Press release: Update of Carbon Majors 1965-2018' (9 December 2020) <<https://climateaccountability.org/pdf/CAI%20PressRelease%20Dec20.pdf>>.

to developing countries. In principle this can be supported. But as Zhang notes, the effect of this shift is reducing emissions in developed countries and increasing the emission burden on poorer countries and it will likely lead to an increase in emissions overall.<sup>7</sup>

It is therefore important that the mitigation measures which African countries take in responding to climate change address TNCs' contribution to greenhouse gas emissions. One way in which oil-rich African countries can do so is by responding to calls from organisations such as the World Bank and the Climate and Clean Air Coalition - a global partnership of approximately 50 members including UNEP, the World Bank and the European Union - to reduce the flaring of greenhouse gases that are associated with the oil extraction process. Countries such as Angola and Cameroon have already signalled their commitment to stop this gas flaring and in a sense this is a low hanging fruit opportunity for those countries to mitigate their current greenhouse gas emissions. In order to realise this commitment, however, they will undoubtedly need to strengthen their existing legislative frameworks. But where they do so, they can encounter obstacles in international investment law, especially where TNCs declare disputes based on guarantees included in pre-existing bilateral investment treaties (BITs) that Angola and Cameroon have entered into.

The potential for this risk to manifest is not inconsequential as the costs associated with reducing gas flaring are high and energy-related investment disputes have become increasingly prominent in recent years. In this regard, Scherer points out that energy-related cases constitute a significant portion of the caseload of arbitral institutions such as the International Centre for Settlement of Investment Disputes (ICSID) and the International Chamber of Commerce.<sup>8</sup> In the case of ICSID, for example, 44 per cent of cases in 2016 related to energy.<sup>9</sup> Apart from an increased willingness to declare these disputes, the amounts claimed can also be daunting for poorer nations as they often reach billions of US dollars.<sup>10</sup>

An emerging body of literature examines the effects of commonly used international investment tools, such as indirect expropriation and fair and equitable treatment, on countries' environmental measures. However, there is a gap in the literature when it comes to considering the effect of BIT stabilisation clauses.<sup>11</sup> These clauses are relatively scarce in BITs, but merit attention because where they are included in a BIT, they can have significant implications for a country's ability to change its environmental legislation effectively or at all. In essence, these clauses give investors protection against the negative effects of legislative changes, either by exempting the investor from the need to comply with new legislation or by compensating them for the financial burden that they incur.

This article explores the interaction between the requirements of international climate change law and international investment law through the lens of Angola and Cameroon's commitment to stop routine gas flaring in the oil sector and their parallel commitments to ensuring a stable regulatory framework through the inclusion of stabilisation clauses in the BITs that they have entered into with Italy. It begins by outlining the objectives and approach of the climate change regime as a basis for contextualising the two countries' obligations to implement climate mitigation measures and to illustrate the divergence in approach with that of international investment law. It then briefly maps the need and opportunities for stopping gas flaring in Angola and Cameroon before considering the scope and application of the stabilisation clauses which the countries have agreed to. It concludes with several observations regarding the implications that the real and undermining barrier posed by stabilisation clauses presents for realising CBDR and an ambitious climate agenda.

7 Niang (n 2).

8 Maxi Scherer, *International Arbitration in the Energy Sector* 1.04 (OUP 2018).

9 *ibid*

10 *ibid* 1.05.

11 Some research has been published on the effect of stabilisation clauses in contractual relationships between host countries and investors. Stabilisation clauses in BITs differ in that they can be relied on by a far wider range of investors. In some instances, as is explained below, this will include investors who are not directly protected by the BIT which contains the stabilisation clause.

## 2

### REGULATION IN THE GLOBAL INTEREST – CLIMATE LAW AND THE INTERACTION WITH FOREIGN INVESTMENT

Climate change law and international investment law are rooted in different aims, legal nature and character. In the case of the climate change regime all of these have been affected by the difficult and lengthy negotiation processes which have surrounded the development of the legal instruments as governments struggle to find a compromise between their conflicting interests and the global need to give develop an effective climate agenda.<sup>12</sup>

The traditional approach in international environmental law that all sovereign states have equal rights and obligations lies at the heart of these negotiation challenges as the formal stance is not aligned with the reality of the asymmetrical development that has taken place across the globe.<sup>13</sup> The principle of CBDR was introduced to international environmental law, and the climate change regime, to offset this. At its core, CBDR aims to give effect to substantive equality by establishing a differentiation between states. It is arguably best explained in principle 7 of the Rio Declaration which states that:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities.

<sup>12</sup> Benoit Mayer, *The International Law on Climate Change* (CUP 2018) 33.

<sup>13</sup> Christina Voigt & Felipe Ferreira, 'Dynamic Differentiation: The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5 *Transnational Environmental Law* 285, 286.

The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.<sup>14</sup>

Early on in the climate change negotiations CBDR provided a key deadlock breaking mechanism to defining the responsibilities that different states should bear in mitigating climate change in the context of the disparate contribution of developed and developing countries to the problem and the variances in national capacity. As a result, CBDR - with the added phrase 'and respective capabilities' (CBDR-RC) – is reflected as a principle in article 3 of the UNFCCC and as such must guide the implementation of the Convention as well as all actions to give effect to the Convention or to develop further legally binding agreements.<sup>15</sup>

The approach to CBDR-RC has, however, changed as the climate change regime evolved. In the UNFCCC the goal is to achieve the 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.<sup>16</sup> The tangible means for achieving this goal primarily rests with Annex I (developed) states who bear most of the hard law obligations to both mitigate climate change and to provide financial and technological assistance. In the Kyoto Protocol, which was adopted under the UNFCCC, states opted for a top-down approach and binding emission reduction targets were imposed only on Annex I (developed) countries and the European Union.<sup>17</sup>

However, a shift occurred with the adoption of the Paris Agreement in 2015.<sup>18</sup> Rajamani points out that

<sup>14</sup> Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (1992).

<sup>15</sup> UN Framework Convention on Climate Change, New York, 9 May 1992, 1771 UNTS 107, Art. 3.

<sup>16</sup> *ibid* Art. 2.

<sup>17</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, 2303 UNTS 162, Art. 10.

<sup>18</sup> Paris Agreement, Paris, 12 December 2015, UN Doc FCCC/CP/2015/10/Add.1.

consensus on the Agreement's wording was reached, in part, 'by recalibrating the burden-sharing arrangement' and making adjustments to the CBDR-RC principle.<sup>19</sup> In this regard, the Paris Agreement makes the requirements of the UNFCCC goal more explicit as article 2.1 states that the aim is 'holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above preindustrial levels'. In addition two other goals are reflected, namely:

- (a) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and
- (b) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development'.

The centrality of CBDR-RC in giving effect to these aims is emphasised in article 2.2 which states that:

'This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.

The introduction of the wording 'in light of different national circumstances' shows that the Paris Agreement follows a different tact from the UNFCCC and Kyoto Protocol. CBDR-RC, qualified in this way, allows for a more subtle form of differentiation. Rather than the rigid distinction between developed and developing countries reflected in the UNFCCC and Kyoto Protocol, it caters to the fact that the circumstances of developed and developing countries

are not uniform or static.<sup>20</sup> This paved the way for removing the differentiation approach in many of the obligations. Unlike the top-down approach in the Kyoto Protocol, the Paris Agreement is underpinned by a bottom-up approach in which all countries, including developing ones such as Angola and Cameroon, are required to adopt Nationally Determined Contributions (NDCs) in which they set their own emissions reduction targets. Therefore, the CBDR aspect of the Agreement focuses on developing states' different capabilities and the need to support climate efforts rather than reserving emission reductions targets for developed states only.<sup>21</sup>

While the Paris Agreement's legal character was contentious, it is now generally accepted that it is a treaty as contemplated by the Vienna Convention on the Law of Treaties.<sup>22</sup> However, although it is a legally binding treaty when considered as a whole, a feature that the Paris Agreement shares with the other climate instruments is that its architecture comprises a mixture of non-law, soft law, and hard law provisions.<sup>23</sup>

Soft law approaches are visible in some of the CBDR-RC requirements, which previously reflected the categorisation of obligations for developed countries. For example, article 4(4) states that '[d]eveloped country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets'. These soft law provisions may guide countries in their domestication of the Paris Agreement or be persuasive in dispute proceedings, but it is unlikely that they are directly enforceable.<sup>24</sup> The hard law provisions, on the other hand, are. These provisions unambiguously impose mandatory obligations on states and are found in obligations where the expanded approach to the commonality aspect of CBDR-RC are reflected. For example, article 4(2) requires that each Party –

<sup>19</sup> Lavanya Rajamani, 'The Principle of Common but Differentiated Responsibilities and Respective Capabilities in the International Climate Change Regime' in Rosemary Lyster and Robert RM Verchick (eds), *Research Handbook on Climate Disaster Law – Barriers and Opportunities* 46, 51 (Edward Elgar Publishing 2018).

<sup>20</sup> Voigt & Ferreira (n 13) 294.

<sup>21</sup> Paris Agreement (n 18) Art 4.4 and 4.5.

<sup>22</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331. See also Daniel Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25(2) *Review of European Comparative and International Environmental Law* 142, 142.

<sup>23</sup> Brian J Preston, 'The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)' (2020) 33(1) *Journal of Environmental Law* 4 (2020).

<sup>24</sup> *ibid* 4.



irrespective of their development status - 'shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve'.

This combination of non-law, soft law and hard law provisions is a compromise approach which reflects the difficulty in getting consensus that has bedevilled climate change negotiations since they began approximately four decades ago.<sup>25</sup> The reluctance of many states to accept hard law provisions is the reason why a detailed reading of the Paris Agreement reveals that many of the hard law provisions relate to procedure rather than substance or, as Bodansky et al aptly put it, 'obligations of conduct' versus 'obligations of result'.<sup>26</sup> For example, it has been noted that the key means of securing emission reduction is the adoption of NDCs. This hard law obligation relates to the fact that the NDCs must be developed and communicated to the parties and that successive NDCs must also be progressively more ambitious, rather than the obligatory implementation of the NDC or a check that a particular NDC in fact reflects the 'highest possible ambition' that a state can achieve.<sup>27</sup>

The softer approaches which underlie much of the climate regime have drawn criticism regarding the likelihood of them reducing the efficacy and certainty of international legal responses to combatting climate change.<sup>28</sup> Notwithstanding this, even in its current

form, the climate regime has both proactive and reactive implications for foreign direct investment. The proactive implications stem from the fact that the Paris Agreement envisages a role for private investment. As Miles and Lawry-White note, an '[i]ncrease in international investment is not just a consequence of the Paris Agreement, it is a necessary requirement to fulfil its objectives'.<sup>29</sup>

The reactive implications for private investment, which are more relevant for current purposes, arise when states respond to their climate regime commitments and obligations. Because of the soft law aspects of the climate regime, states have flexibility regarding how they domesticate these obligations. Notwithstanding this, the required responses will affect almost all areas of policy and may take different forms – a fact which in itself creates a lack of predictability that runs strongly counter to the objectives of international investment law which strives to secure stability in investment conditions.

An inevitable tool that will be in the mix of the responses by many states, particularly regarding their NDC commitments, will be the passing of legislation that translates the commitments in the NDC into legally enforceable rules that private entities must comply with. Because studies such as those of the Intergovernmental Panel on Climate Change (IPCC) make it clear that operationalising the climate change agenda requires drastic changes and a rapid departure from the business-as-usual approach, it can be anticipated that the climate regime paves the way for these domestic laws to be both stricter and in a state of regulatory flux as each state grapples with finding the optimal balance between effective measures and impacts on a range of sectors in their society.<sup>30</sup> This is particularly so in states which have a limited or an outdated environmental regulatory framework.

Because many of the world's emissions are generated by TNCs, these legislative and policy measures must undoubtedly include the operations of these entities within the landscape of this changing regulatory net.

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25 Peter Lawrence and Daryl Wong, 'Soft Law in the Paris Climate Agreement: Strength or Weakness?' (2017) 26 *Review of European Comparative and International Environmental Law* 276.

26 *ibid* 19.

27 See Mark Roelfsema and others, 'Taking Stock of National Climate Change Policies to Evaluate Implementation of the Paris Agreement' (2020) 11 *Nature Communications*, for the results of an analysis of several G20 countries which shows that NDCs are not ambitious enough and nor are commitments being implemented by many states.

28 See Romain Weikamns and others, 'Transparency Requirements under the Paris Agreement and their (Un)likely Impact on Strengthening the Ambition of Nationally Determined Contributions (NDCs)' (2020) 20(4) *Climate Policy* 511; Lawrence and Wong (n 25) 284; Freya Baetens, 'Combatting Climate Change through the Promotion of Green Investment: From Kyoto to Paris without Regime-specific Dispute Settlement' in Kate Miles (ed), *Research Handbook on Environment and Investment Law* 112 (Edgar Elgar 2019).

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29 Wendy Miles and Merryll Lawry-White, 'Arbitral Institutions and the Enforcement of Climate Change Obligations for the Benefit of all Stakeholders: The Role of ICSID' (2019) 34(1) *ICSID Review* 1, 2.

30 *eg* the IPCC's Fifth Assessment Report (n 4).

However, amongst a steadily rising number of climate change litigation suits which seek to hold corporates accountable, corporates have also raised disputes regarding the reactive implications of the climate change regime which have spawned dispute proceedings under international investment law.<sup>31</sup> Many of these are aimed at resisting measures which states take to address climate change.<sup>32</sup>

In the absence of a dispute mechanism for resolving these disputes in the legally binding climate change instruments, an increasing number of these corporates rely on investor arbitral tribunals. Many of these are illustrative of corporate's public commitments to climate change measures often being tainted by a 'not-in-my-backyard' approach as they challenge a state's ability to implement climate change related legislation where it impacts on foreign investments.<sup>33</sup> Because corporates have been successful in many of these disputes and have had high amounts awarded to them, the mere risk of investment disputes being declared can create a chilling effect and place governments in a difficult position when deciding how to navigate a balance between the need for greater climate ambition with international investment commitments.<sup>34</sup>

# 3

## REDUCING GAS FLARING AS A CLIMATE MITIGATION RESPONSE – THE NEED AND POTENTIAL

One of the non-state actors that needs to fall within the net of countries' climate change responses and which is also often protected by BITs where they operate in Africa, is the oil industry. The oil industry has been, and continues to be, a major contributor to climate change.<sup>35</sup> Part of the reason for this is that oil reserves have large amounts of methane gas, a greenhouse gas that has a far bigger impact on climate change than CO<sub>2</sub>. During the oil extraction process, methane is released. Many companies flare (burn) this methane and convert it to CO<sub>2</sub> which also contributes to climate change.

Flaring has several serious negative health and environmental impacts as has been notoriously demonstrated in the Niger Delta in Nigeria, one of the major sources of global flaring, where it continues despite legislation being passed and court orders that it stop.<sup>36</sup> Flaring also contributes six per cent to global greenhouse gas emissions<sup>37</sup> and is a wasteful use of a natural resource since the methane itself can be used to generate energy, which is often sorely needed by communities adjacent to the flaring activities in instances such as Nigeria. The extent to which flaring wastes resources is starkly illustrated by the World

31 Wendy J Miles and Nicola K Swan, 'Climate Change and Dispute Resolution' (2017) 11(2) *Dispute Resolution International* 117; UN Environment Programme and Columbia Law School Global Climate Change Litigation Report 2020 Status Review 22 (2020).

32 *ibid* 121.

33 *Eg Westmoreland Mining Holdings, LLC v. Canada ICSID* (2019) UNCT/20/3; *RWE AG v. Kingdom of the Netherlands ICSID* (2021) ARB/21/4 and *Uniper SE, Uniper Benelux Holding BV v. Kingdom of the Netherlands ICSID* (2021) ARB/21/22 which relate to government attempts to phase out coal-fired power plants.

34 For example, the German government, which has faced several ICSID claims over its energy laws and offered compensation to all coal-fired power stations, including RWE. Euronews, 'Brussels Probes Germany's •4.35 Billion Coal Plant Pay-off Plan Euronews (2 March 2021) <<https://www.euronews.com/2021/03/02/brussels-probes-germany-s-4-35-billion-coal-plant-pay-off-plan>>.

35 Marco Grasso, 'Oily Politics: A Critical Assessment of the Oil and Gas Industry's Contribution to Climate Change' (2019) 50 *Energy Research & Social Science* 106, 110-1.

36 *Eg United Nations Environment Programme, Environmental Assessment of Ogoniland* (2011); Temi E Ologunorisa, 'A Review of the Effects of Gas Flaring on the Niger Delta Environment' (2001) 8 *International Journal of Sustainable Development & World Ecology* 249; *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others AHRLR 151 (NgHC 2005)*.

37 David Victor and others, 'Introductory Chapter' in O Edenhofer and others (eds) *Climate Change 2014: Mitigation of Climate Change* 111 (CUP 2014).

Bank's finding that the world flares enough gas to power the whole of sub-Saharan African.<sup>38</sup>

Elvidge et al. have indicated that reducing routine flaring would meet 1.86 and 1.46 per cent of unconditional and total NDC reduction targets respectively.<sup>39</sup> However, because flaring is concentrated in certain countries, the effect of stopping or reducing gas flaring in those countries can contribute significantly more to those countries achieving their country specific NDC targets. This is true of Angola and Cameroon where the majority of flaring emissions come from the oil sector. Elvidge et al. indicate that both countries can meet between five to twenty per cent of their unconditional NDC targets by reducing gas flaring, with the percentage for Cameroon being estimated to be fifteen per cent.<sup>40</sup> While they do not give an exact figure for Angola, Angola's own NDC indicates that reducing flaring will contribute to 42.35 and 31.52 per cent of its conditional and unconditional targets respectively.<sup>41</sup>

Both Angola and Cameroon have indicated an intention to reduce gas flaring by including it in their NDCs and by joining the World Bank's 'Zero Routine Flaring by 2030' initiative.<sup>42</sup> The Zero Routine Flaring by 2030 initiative is a partnership between governments, transnational oil producers and the World Bank, which commits to eliminating routine gas flaring by 2030.<sup>43</sup> It requires government partners to adopt laws and regulations to achieve the objective by, for example, prohibiting flaring and stimulating

upstream investment for the utilisation of the methane gas.<sup>44</sup>

Oil company partners, for their part, commit to planning new oil sites without the use of routine gas flaring and to 'seek' to implement 'economically viable solutions' for the elimination of flaring at legacy production sites.<sup>45</sup> However, it must be noted that the initiative does not impose stringent obligations on TNCs because of the aspirational language that is used. TNCs may accordingly rely on the fact that their commitment is qualified by language such as 'economically viable solutions' in the face of the high costs that can be associated with flaring reduction. In these instances where TNCs do not voluntarily partner in the active reduction of flaring, the initiative's success will depend on countries operationalising it by ensuring that legislation is in place to prohibit routine gas flaring, even if this is not explicitly stated in a country's NDC.<sup>46</sup>

While Angola and Cameroon's commitment to eliminating routine gas flaring may be welcomed in its tacit acceptance of the commonality aspect of CBDR-RC, it also highlights the justification for differentiation which the principle encompasses. In this regard, taking the countries' respective capabilities and national circumstances into account means that elimination is only feasible if a substantial portion of the required investment is provided by climate finance or the private sector. Based on the figures Angola provides in its NDC for the cost of reducing gas flaring, its unconditional NDC target would require investment of around \$29.5 billion by 2025 and around \$49 billion by 2030.<sup>47</sup> If not funded by the private sector or climate finance, this figure would require Angola to invest more than ten per cent of its gross domestic product (GDP) each year at a time when the Angolan government is already facing significant fiscal challenges and restrictions on its ability to incur further debt.<sup>48</sup>

38 World Bank Press Release 'Seven Countries Account for Two-thirds of Global Gas Flaring' (28 April 2021).

39 Christopher D Elvidge and others, 'The Potential Role of Natural Gas Flaring in Meeting Greenhouse Gas Mitigation Targets' (2018) 20 *Energy Strategy Reviews* 156, 158.

40 *ibid* 159.

41 Republic of Angola, *Nationally Determined Contribution of Angola* (2021) 48.

42 World Bank, *Global Initiative to Reduce Gas Flaring: 'Zero Routine Flaring by 2030'* <<https://thedocs.worldbank.org/en/doc/a903b5e6456991faf3b5-e079bba0391a-0400072021/related/ZRF-Initiative-text-list-map-102.pdf>>.

43 Elvidge (n 39) 157.

44 World Bank (n 42).

45 *ibid* 1.

46 Elvidge (n 39) 157.

47 Republic of Angola NDC (n 41) 46, 90.

48 See IMF, 2021 Article IV Consultation and Sixth Review Under The Extended Arrangement Under The Extended Fund Facility and Request for a Waiver of Non-observance of a Performance Criterion (2022).

# 4

## WHEN TWO WORLDS COLLIDE – INTERNATIONAL INVESTMENT LAW AND THE CLIMATE AGENDA

Current legislation in Angola and Cameroon arguably does not provide for the aggressive reduction of gas flaring that the countries have committed to.<sup>49</sup> In addition to other mechanisms, such as voluntary partnerships with TNCs, they will need to tighten their existing legislative regimes as part of realising their commitments to reduce gas flaring. Where they do so, they run the risk of bumping up against claims that the legislation violates their international investment law obligations.

In this regard, international investment law rules have an underlying goal that is very different from climate change ones. International investment law regulates the relationship between states and foreign investors and is concerned with the economic rights of individuals rather than society as a whole.<sup>50</sup> Notwithstanding this, foreign direct investment is not regulated by a single body of substantive international law, but rather through the interpretation of BITs which countries have entered into. In somewhat of an

oversimplification, these BITs have their origins in providing capital-exporting nations with the means to protect their nationals when investing in capital importing (host) countries. The number of these BITs has steadily increased since Germany and Pakistan adopted the first BIT in 1959,<sup>51</sup> and there are currently more than 2200 BITs in force.<sup>52</sup>

Angola and Cameroon are parties to several BITs, including with Italy. Both the Agreement between the Government of the Italian Republic and the Government of the Republic of Angola on the Promotion and Protection of Investments (the Angola-Italy BIT) and the Agreement between the Government of the Italian Republic and the Government of the Republic of Cameroon for the Promotion and Reciprocal Protection of Investments (Cameroon-Italy BIT) protect Italian investors in terms of several of the different international law standards such as those relating to indirect expropriation, fair and equitable treatment, and most-favoured nation treatment.<sup>53</sup> But importantly for current purposes, they also provide an avenue for enforcing other obligations that have been agreed to, such as those provided for in the stabilisation clauses, because they contain clauses agreeing to investor-state dispute settlement (ISDS).

### 4.1 The Nature of the Stabilisation Clauses

The aim of the stabilisation clauses in BITs generally is to guarantee an investor a heightened degree of regulatory certainty and protection from regulatory changes. They have been described in the ICSID case of *Total SA v. Argentine Republic* as being:

‘...clauses, which are inserted in state contracts concluded between foreign

49 In Angola Art. 73(1) of the Petroleum Activities Law, Law No. 10/04 technically prohibits routine gas flaring. However, the law contains several exceptions which allow for the routine flaring of gas where this is required to make the project economically viable. See in this respect Art. 73(3)-(6) of the Law and, in respect of gas flaring reporting requirements, Art. 23(1)(b) of the Regulations on Petroleum Operations, Decree No. 1/09. In Cameroon the 1999 Petroleum Code does not address gas flaring, nor does its successor the Petroleum Code, Law No. 2019/008 directly address gas flaring. The Law on the Development of Associated Gas, Law No. 2011/025 does restrict gas flaring, but provides for a range of exemption in sec. 8.

50 Lorenzo Cotula, ‘Property in a Shrinking Planet: Fault Lines in International Human Rights and Investment Law’ (2014) 11(2) *International Journal of Law in Context* 113, 131.

51 Kate Miles, ‘Historical Evolution of Foreign Investment Protection Law’ in Kate Miles *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* 19 (CUP 2013).

52 See <<https://investmentpolicy.unctad.org/international-investment-agreements>>.

53 The Angola-Italy BIT was signed on 10 July 1997 and came into effect on 21 May 2007. The Cameroon-Italy BIT was signed on 29 June 1999 and came into effect on 1 April 2004.

investors and host states with the intended effect of freezing a specific host State's legal framework at a certain date, such that the adoption of any changes in the legal regulatory framework of the investment concerned (even by law of general application and without any discriminatory intent by the host State) would be illegal'.<sup>54</sup>

The stabilisation clause that is contained in article 12(3) of the Angola-Italy BIT provides that:

'Where, after the investment has been made, the laws, regulations, rules or measures of economic policy which, directly or indirectly, apply to investments should be subject to change, shall be applied at the request of the investor, the same treatment applicable at the time the investment was made'.

The equivalent clause in article 10(4) of the Cameroon-Italy BIT is slightly different and provides that:

'If, after the date on which the investment is made, the laws, regulations, rules or economic policy measures which are in force directly or indirectly for investors are to be amended, the same treatment will be applied as that in force at the time the investment is made'.

These clauses impose significant restrictions on the country's ability to regulate in the public interest in a way that applies evenly across the regulated sector. In the context of contractual stabilisation clauses there have been several calls for stabilisation clauses to exclude human rights and environmental legislation because of this consequence.<sup>55</sup> However, neither the

Angola-Italy BIT, nor the Cameroon-Italy BIT, provide for such exclusions and the clauses will accordingly apply to climate change legislative responses. This is clearly problematic in the case of climate change regulatory responses aimed at reducing greenhouse emissions from gas flaring where TNCs protected by stabilisation clauses are the major emitters as it can have a significant impact on the efficacy of the legislation.

#### **4.1.1 The Scope of the Angola-Italy BIT Stabilisation Clause**

The wording in article 12(3) of the Angola-Italy BIT provides protection that is subject to an investor's right of election as it provides that the investor may elect to receive the same treatment that applied to it at the time when the investment was made in the event of any change to the 'laws, regulations, rules or measures of economic policy' that apply to the investment after the date of investment. In other words, the investor may decide whether to accept an obligation to comply with new legislation requiring a reduction in gas flaring, or not. The clause is far-reaching, and it is difficult to think that many TNCs would voluntarily accept more stringent regulatory changes with significant financial implications given the financial costs associated with reducing gas flaring.<sup>56</sup>

The temporal scope of the article clearly extends to all regulatory changes that occur from the date on which the investment has been made. But, in addition, it can also apply to changes made before the BIT entered into force. This is because, like many BITs, article 1(1) of the Angola-Italy BIT represents a partial departure from the customary international law rule against the retrospective application of treaties as it extends the scope of application to pre-existing investments. This means that these investors will also have the right to elect to exclude all subsequent legislative changes, including climate related ones, that occurred after the date of its investment.

The implication of the stabilisation clause is that if Angola adopts stringent anti-flaring laws, it will be

<sup>54</sup> ICSID Case No. ARB/04/01, Decision on Liability (27 December 2010) para 101.

<sup>55</sup> Sotnye Frank, 'Stabilization Clauses in Long-term Investment Contracts in the Energy Sector in Africa' in Miles (ed) (n 28) 341.

<sup>56</sup> Angola has, for example, estimated that a 75 per cent reduction in gas flaring requires an investment of \$30 billion which doubles to \$60 billion if the targeted reduction is around 91 per cent.

optional for TNCs who are protected by the Angola-Italy BIT to elect to comply with that legislation or not - at their discretion. In other words, investors have a right to inform the Angolan government that it must not apply anti-flaring laws to them.<sup>57</sup> This could have serious implications for meeting NDC targets where a substantial amount of flaring in the country is done by TNCs.

If Angola nevertheless attempts to apply new anti-flaring laws to these TNCs, notwithstanding their election not to be bound by them, its conduct will be wrongful in terms of international investment law and the TNC would be able to access ISDS. Nevertheless, investment tribunals generally do not have the power to grant injunctive relief.<sup>58</sup> In instances where tribunals have granted some form of injunctive relief, the order was coupled with an order for compensation if the state did not comply with the order within a certain time period.<sup>59</sup> Because investment tribunals have no way of enforcing an order for injunctive relief there is therefore generally no way of addressing the violation of a stabilisation clause in investment arbitration other than by way of granting compensation. This is illustrated in *Libyan American Oil Company (LIAMCO) v. The Libyan Arab Republic*,<sup>60</sup> one of the earliest cases on stabilisation clauses, where the tribunal held that a state always enjoys permanent sovereignty, and that while a stabilisation clause does not actually prohibit the state from adopting regulations, it gives rise to a duty to compensate the investor where it does so.<sup>61</sup>

If Angola is serious about applying anti-flaring legislation to the entire regulated sector, including those who are protected by the BIT, it therefore does

so at the risk, if an investment dispute is declared, of being required to compensate the investors in a manner which places them in the position they would have been in but for the adoption of the laws. In essence, Angola's commitment to the World Bank initiative and the Paris Agreement will come at a high cost if TNCs resist the legislation which is imposed.

This runs counter to the CBDR-RC approach in the Paris Agreement and has a real potential for undermining its application in Angola. On the one hand, it may stifle Angola's appetite for embracing the commonality aspect where the risk of compensation is unaffordable. On the other hand, it has the potential to thwart the realisation of the differentiation aspect of the principle as, even if climate finance is obtained on the basis of Angola's current capabilities, its impact would be excessively diluted by the fact that any compensation that is payable is for the benefit of the private investor - and for them to use at their discretion rather than being associated with any assurance that it will be deployed toward meeting the needs of the climate agenda.

#### ***4.1.2 The Scope of the Cameroon-Italy BIT Stabilisation Clause***

The stabilisation clause in the Cameroon-Italy BIT is an absolute freezing clause and is even more far-reaching than the one contained in the Angolan treaty because, in terms of the wording in article 10(4), Cameroon is expected by default to exempt investors who are protected by the BIT from any legislative or regulatory changes - irrespective of whether the investor seeks an exemption or not. In other words, whereas the conduct of Angola only becomes internationally wrongful if the investor actively draws on the protection provided by the stabilisation clause and Angola refuses, the mere adoption of anti-flaring legislation by Cameroon is an internationally wrongful act as soon as it that it tries to apply the legislation to a foreign investor after their investment has been made.

The temporal scope of the Cameroon-Italy BIT is also broad like the Angolan one and covers pre-existing investments.<sup>62</sup> Cameroon accordingly faces an even more difficult situation in adopting anti-flaring

<sup>57</sup> Some oil companies operating in Angola have joined the World Bank initiative. However, this is not a barrier to relying on the BIT since the obligations are soft and are qualified by wording such as "economically viable solutions" which in essence creates an 'opt-out' option.

<sup>58</sup> Hans van Houtte and Bridie McAsey, 'Future Damages in Investment Arbitration—A Tribunal with a Crystal Ball?' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* 643 (OUP 2015).

<sup>59</sup> *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015) para 1020.

<sup>60</sup> 4 Yearbook of Commercial Arbitration 177 (1979).

<sup>61</sup> *ibid* paras 203, 206.

<sup>62</sup> Cameroon-Italy BIT, Art. 9.

legislation and making it applicable to foreign investors. Its decision to do so will therefore involve an acceptance of the need to exempt TNCs covered from the BIT from complying with the legislation, or an acceptance of the need to compensate Italian investors in the oil sector. In Cameroon too, therefore, the BIT requirements clash with realising the implementation of the Paris Agreement.

## 4.2 The Expanded Reach of Treat-based Stabilisation Clauses through Most Favoured Nation Treatment Provisions

The discussion above relates to the constraints that Angola and Cameroon face in their ability to regulate gas flaring by Italian investors in the oil sector. In practice, the implications of their Italian BITs are not limited to these investors. This is because both Angola and Cameroon have entered into BITs with countries other than Italy which include a most favoured nation (MFN) clause i.e. one in which Angola or Cameroon guarantee investors the right to receive the most favourable treatment that it has offered to the investors of any third country, including Italy.

Arbitral tribunals have interpreted the scope of these MFN clauses broadly to include substantive standards that are absent from the base treaty.<sup>63</sup> The implication of this is that there can be an exponential expansion of the number of investors who are entitled to rely on the regulatory stabilisation protection which is provided in the Italian BITs because it is common practice for investment tribunals to import provisions from other treaties where these provisions are more favourable to the investor than the one that their own state is a party to.<sup>64</sup> The MFN clause creates an

instantaneous right for an investor i.e. the minute an investor from a third state is granted more favourable treatment the beneficiary of an MFN clause also has a right to receive this more favourable treatment.<sup>65</sup>

The implication of MFN clauses for Angola is that should Angola adopt anti-flaring laws, it will be optional – not only for TNCs who are protected by the Angola-Italy BIT – but also other TNCs who are protected by another BIT which contains a relatively broad MFN clause, to elect to comply with the legislation, or not. Because the Angola-Italy BIT does not have any exceptions to the application of the stabilisation clause on the grounds of public policy issues such as environmental ones, this can significantly expand the implications and reach of the stabilisation clause and further undermine Angola's ability to meet its NDC targets because most flaring in the country is done by TNCs.

The adverse effects of the Angola-Italy BIT stabilisation clause for new anti-flaring legislation are tempered only because several major oil companies operating in its territory may not currently be protected by a BIT. The French oil major Total, for example, is the largest operator in Angola but the Agreement between the Government of the French Republic and the Government of the Republic of Angola on Mutual Encouragement and Protection of Investments has not yet entered into force.<sup>66</sup> Indeed several BITs that Angola signed in the early 2000s have not entered into force as the previous administration expressed concern over investment law's ability to undermine its right to regulate.<sup>67</sup>

The current administration has been much friendlier to ISDS and is currently negotiating a 'Sustainable Investment Facilitation Agreement' with the

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63 eg Patrick Dumberry, 'The Importation of the FET Standard through MFN Clauses: An Empirical Study of BITs' (2016) 32(1) ICSID Review 1.

64 See *Guris Construction and Engineering Inc. and others v. Arab Republic of Syria*, ICC Case No. 21845/ZF/AYZ, Final Award (31 August 2020) para 252 (the Guris case); *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award (30 November 2011) para 11.2.4; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) para 575.

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65 Tony Cole, 'The Boundaries of Most Favoured Nation Treatment in International Investment Law' (2012) 33(3) *Michigan Journal of International Law* 537, 568.

66 UNCTAD, *Investment Agreement Navigator- Angola - France BIT* (2008).

67 UNCTAD, *Investment Agreement Navigator – Angola* <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/5/angola>>.

European Union (EU).<sup>68</sup> This agreement will likely include provisions on investment and sustainable development to preserve the states right to regulate.<sup>69</sup> However, the final wording of any potential MFN clause will be crucial to Angola's right to regulate. If the MFN clause is not excluded altogether or is subject to sufficient limitations in its scope of application by limiting investor's right to import provisions from other BITs into the agreement, it may ultimately undermine the sustainable development clause. The MFN clause could then be used by investors from the EU to import the stabilisation clause in the Angola-Italy BIT into the new agreement.

Like Angola, the extensive reach of protection contained in the Cameroon-Italy stabilisation clause to Italian investors also reaches beyond them to investors of other nationalities. As noted above, Cameroon has entered into several BITs which contain MFN provisions. Except for the BIT that was entered into with Canada,<sup>70</sup> none of these BITs excludes provisions contained in other BITs from the scope of their MFN clauses.<sup>71</sup> In other words, investors who are nationals of any of the countries with whom Cameroon has a BIT, other than Canada, can rely on the treatment that Italian investors are legally entitled

to.<sup>72</sup> The stabilisation clause in the Cameroon-Italy BIT accordingly exposes Cameroon to liability in international investment law if it adopts any regulations requiring foreign oil companies to eliminate routine gas flaring. If it complies with the stabilisation clause, and the MFN clauses entitling other investors to the same treatment, there would be little benefit in Cameroon adopting such legislation because of the percentage of flaring that is done by TNCs – a significant blow to it to achieving the reduction of fifteen per cent of its greenhouse gas emissions.

This position is exacerbated by the finding in *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*,<sup>73</sup> that a freezing stabilisation clause can extend to the judicial interpretation of existing laws if there had been a relatively consistent interpretation of the law.<sup>74</sup> This means that even if Cameroon does not directly adopt laws restricting gas flaring, but that its existing laws - such as the Framework Law on Environmental Management<sup>75</sup> - are interpreted by its courts as restricting flaring, Cameroon's conduct may amount to an internationally wrongful act under the BIT.

The practical implications of how climate action can be undermined by the Cameroon-Italy BIT stabilisation clause and MFN clauses can be illustrated by reference to *Perenco*, the largest operator in Cameroon's oil sector.<sup>76</sup> *Perenco* is an Anglo-French oil company which is headquartered in London.<sup>77</sup> It is also the primary operator in the Rio del Rey basin,

68 EU, EU and Republic of Angola launch negotiations for a first-ever Sustainable Investment Facilitation Agreement (22 June 2021) < [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_3096](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3096)>.

69 The EU negotiating directives indicate that the agreement should include provisions on the 'promotion and enforcement of relevant internationally agreed standards and rules on labour and environment'. These provisions are increasingly being incorporated into modern BITs. However, states frequently pay insufficient attention to the drafting of MFN clauses which could undermine these provisions.

70 The Agreement between Canada and Cameroon excludes BITs that was entered into prior to its entry into force from the scope of its MFN provisions. See the Agreement between Canada and the Republic of Cameroon for the Promotion and Protection of Investments, 3 March 2014, Annex 3, Art. 1.

71 Eg Agreement between the Government of the Republic of Korea and the Government of the Republic of Cameroon for the Promotion and Protection of Investments, 24 December 2013, Art. 3; the Agreement between the Government of the Republic of Cameroon and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, 10 September 1997, Art. 3(1).

72 *Guris* case (n64) para 252.

73 ICSID Case No. ARB/03/28, Award (18 August 2008).

74 *ibid* para 219.

75 Law No. 96/12 of August 5, 1996.

76 Carbon Limits Nigeria, Final Report on O&G Sector in Cameroon and Potential Flare Reduction Projects (2017).

77 The majority of *Perenco*'s shareholders are French, which the company used as a basis to successfully assert French nationality in the case of *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Jurisdiction (30 June 2011) para 3. In the recent case of *ConocoPhillips and Perenco v. Socialist Republic of Vietnam*, UNCITRAL, the company used its incorporation in the UK to assert British nationality to gain protection under a BIT for its operations in Vietnam.



where eighty per cent of all gas flaring in Cameroon is done.<sup>78</sup> If Cameroon follows through on its commitments in terms of the World Bank initiative and NDC references and passes anti-flaring legislation, Perenco can rely on the MFN clause in the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Cameroon for the Promotion and Protection of Investments (Cameroon-UK BIT) to demand the same treatment which Italian investors are entitled to under the Cameroon-Italy BIT.<sup>79</sup>

Exempting Perenco from legislation aimed at eliminating routine flaring on this basis would severely undermine the opportunity for reducing greenhouse gas emissions from flaring in Cameroon, remembering again that such reductions could contribute to Cameroon meeting a significant percentage of its NDC reduction commitments. Furthermore, it is likely that Perenco, which is not a signatory to the World Bank initiative, would not voluntarily accept an obligation to stop routine gas flaring based on its previous exercise in considering projects to reduce gas flaring, including by capturing gas for use in a floating liquefied natural gas (FLNG) vessel in the Rio del Rey basin, where it ultimately decided against the project because of the substantial cost involved in implementing it.<sup>80</sup>

## 5 RECONCILING STABILISATION CLAUSES AND THE CLIMATE CHANGE LEGAL REGIME?

Developed countries such as Italy, by implication, accept the pivotal role that CBDR-RC plays in achieving the climate change agenda based on their ratification of the Paris Agreement. As Rajamani notes, although the ‘principle does not assume the character of a legal

obligation in itself, it is a fundamental part of the conceptual apparatus of the climate change regime such that it forms that basis for the interpretation of existing obligations...’.<sup>81</sup> It is therefore important that the ability to give effect to CBDR-RC not be stifled – whether intentionally or unintentionally. BITs such as those which Italy has entered into with Angola and Cameroon have the potential to do exactly that. The question is whether there is a way of reconciling the climate and international investment regimes in such instances.

Some scholars have attempted to set out interpretative approaches to reconcile the inherent conflict between stabilisation clauses and other international law obligations.<sup>82</sup> Cotula has argued that although tribunals have held that the validity of a stabilisation clause must be determined separately from domestic law, a state has implicitly limited its ability to enter into contracts by assuming certain international obligations under international human rights and environmental law.<sup>83</sup> The state cannot contract out of its international obligations, and consequentially, a stabilisation clause cannot limit genuine host state action aimed at realising human rights and international environmental obligations.<sup>84</sup> The difference between the stabilisation clause in the Angola-Italy BIT and the Cameroon-Italy BIT and the stabilisation clauses discussed by Cotula is that the stabilisation clauses in the former arise from treaties and not through private contracts. Cotula’s implicit limitation argument is less persuasive here as states are free to alter their international law obligation between themselves,<sup>85</sup> something they cannot do contractually with non-state actors.

<sup>78</sup> Carbon Limits Nigeria (n 76) 3.

<sup>79</sup> Art. 3(1) of the Cameroon-UK BIT.

<sup>80</sup> Carbon Limits Nigeria (n 76) 3.

<sup>81</sup> Rajamani (n 19) 49.

<sup>82</sup> Like much of the literature on stabilisation clauses, these arguments have been raised within the context of contractual stabilisation clauses.

<sup>83</sup> Lorenzo Cotula, ‘Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards A Rethink of Stabilization Clauses’ (2008) 1 *The Journal of World Energy Law & Business* 158, 172.

<sup>84</sup> *ibid.*

<sup>85</sup> The authors acknowledge that this power is limited in some instances, for example, where the subsequent agreement will breach a peremptory norm of international law.

Gehne and Brillo also warn that per the *Liamco* case, there is technically no conflict between a stabilisation clause and other obligations that a country has in terms of international law.<sup>86</sup> In line with the *Liamco* interpretation, a stabilisation clause does not strictly prohibit the country's regulation, and instead, it requires compensation where the country does regulate.<sup>87</sup> As noted above, a breach of a stabilisation clause generally gives rise to a duty of compensation rather than an order for the state not to regulate. The fact that, practically speaking, the cost of compensating the investor can inhibit the state's willingness to regulate also does not mean that there is a conflict between the stabilisation clause and any other international law obligation. It has long been recognised that a 'treaty may sometimes frustrate the goals of another treaty without there being any strict incompatibility between their provisions'.<sup>88</sup> Arbitral tribunals are therefore likely to continue following the approach set out in *Liamco* and hold that there is no strict incompatibility between the stabilisation clause and countries' other international law obligations. It goes without saying that this negates the principle of CBDR-RC in that it overlooks the differentiation which is provided for on the basis of financial capabilities and national circumstances.

Scholars such as Dawood have argued that principles of international environmental law such as CBDR-RC should be incorporated into the investment law framework.<sup>89</sup> Dawood argues that this could impose less onerous obligations on developing countries that

would better enable them to regulate the inward flow of investment in a manner that aligns with their specific environmental regulation in mind. Nevertheless, the contemporary investment law framework does not cater for CBDR-RC.<sup>90</sup> Certain clauses, like existing stabilisation clauses, also cannot be reconciled through CBDR-RC given that these clauses inhibit any changes to legislation regardless of the robustness of the regulatory framework at the time of its conclusion. Tienhaara has noted that developing countries are particularly affected as their environmental regulatory frameworks often need more substantial amendments than their developed country counterparts.<sup>91</sup>

Given the inherent challenges in reconciling stabilisation clauses with other international obligations through an interpretative approach, it may be more productive for countries to seek reforms of these clauses within their treaties or, in some instances, by terminating them. However, the unilateral termination of these BITs is not a very effective strategy to avoid liability given the presence of sunset clauses in BITs. These sunset clauses provide continued protection to investors who invested in the host state before the termination of the treaty for a further period of up to twenty years after the termination of the BIT. However, the Angolan and Cameroonian Italian BITs discussed in this contribution have much shorter sunset clauses than most other BITs and generally only protect investors for a further 5-years after the termination date. The Angola-Italy BIT will remain in-force until 2027 and will automatically renew for a further 5-years unless denounced by either of the parties.<sup>92</sup> Should Angola denounce it, existing investments will continue to enjoy protection under the treaty until 2032.<sup>93</sup> If it does not denounce the treaty, the BIT will expire in 2032 and existing investments will continue to enjoy protection under the treaty until 2037.

The Cameroon-Italy BIT has no set expiry date. Still, either party may denounce it by giving the other party one year's notice of its intention to terminate the

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86 Katja Gehne and Romulo Brillo, 'Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment' (2014) NCCR Trade Regulation Working Paper No 2013/46, 4.

87 *ibid.*

88 Xavier Seuba, 'Human Rights and Intellectual Property Law at the Bilateral and Multilateral Levels: Substantive and Operational Aspects' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* 196 (Edward Elgar Publishing 2016).

89 Shamila Dawood, 'The Principle of 'CBDR' in BITs to Promote Sustainable Development Strategies while Combating Environmental Degradation: A Developing Country Perspective' in Clair Gammage and Tonia Novitz (eds), *Sustainable Trade, Investment and Finance: Toward Responsible and Coherent Regulatory Frameworks* 172 (Edward Elgar 2019).

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90 *ibid.* 194.

91 Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* 273 (CUP 2009).

92 Angola-Italy BIT Art. 14(1).

93 *ibid.* 14(2).

agreement.<sup>94</sup> The sunset clause will then grant investors protection for five years after the treaty has been terminated.<sup>95</sup> Effectively, investors will enjoy protection under the Cameroon-Italy BIT for a further six years if Cameroon unilaterally denounces the treaty. Delaying the regulation of routine gas flaring by several years would make it virtually impossible for these states to reach zero routine flaring by 2030. The World Bank has also alluded to this in its statement that gas 'flaring reduction programs and projects can take years to see results, so plans put in place now will not bear fruit until close to 2030'.<sup>96</sup>

Co-operation between states in the termination of treaty-based stabilisation clauses may be more effective. For example, the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union terminates all BITs between EU members and any sunset clauses contained in intra-EU BITs.<sup>97</sup> If this model is followed, the Angola-Italy BIT and the Cameroon-Italy BIT can be terminated together with their sunset clauses. This would offer a better option, particularly because other investors protected by an MFN clause are also permitted to continue relying on the treatment owed to Italian investors for as long as the sunset clause remains effective.<sup>98</sup>

## 6 CONCLUSION

CBDR-RC is as essential to tackling the climate change problem now as it was when the UNFCCC was first negotiated. It is accordingly no small irony that whilst hard and lengthy negotiations have resulted in

developed countries accepting a responsibility to support developing country climate initiatives by providing financial support, amongst others,<sup>99</sup> their own nationals may seek large sums of financial compensation under international investment law where those same initiatives have an economic bearing on their profitability.

The discussion above shows that one of the mechanisms that are included in BITs i.e. stabilisation clauses, can present a virtually guaranteed barrier to Angola and Cameroon adopting climate mitigation and adaptation legislation related to gas flaring that is enforceable against TNCs unless they are prepared to compensate TNCs who do not wish to be bound by it. This is even though those TNCs may be major contributors to greenhouse gas emissions and are therefore precisely those who ought to be held accountable and the focus of such regulation.

This raises several concerns which apply equally to other African countries that have agreed to treaty-based stabilisation clauses and measures aimed at curbing other sources of emissions. First, it is clear that where TNCs draw on the protection provided by stabilisation clauses, it can significantly undermine the realisation of ambitious African NDCs and social equity. Secondly, stabilisation clauses effectively condone a business-as-usual approach and overlook the need for non-state actors to be held accountable for their climate change contributions because they do not take into account, or even disregard, the role that TNCs have played in causing the climate problem and the role that they need to play in addressing it.

Thirdly, stabilisation clauses may have a chilling effect which deters countries from adopting climate change legislation because of the associated compensation implications. Fourthly, because of the magnitude of the compensation, which is associated with honouring stabilisation clauses, where legislation is adopted, the compensation may result in undermining CBDR-RC as the finances that developed states must contribute to the climate effort may be in effect recycled into funding their own national's individual profit motivations without any requirement that this be ultimately expended on the climate agenda.

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<sup>94</sup> Cameroon-Italy BIT Art. 11.

<sup>95</sup> *ibid.*

<sup>96</sup> World Bank, Global Gas Flaring Tracker Report (World Bank 2017) 17.

<sup>97</sup> Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, OJ L 169, 29.5.2020, p. 1-41, Art. 3.

<sup>98</sup> *Guris case* (n 64) para 260.

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<sup>99</sup> *Eg Paris Agreement*, Art 4.5.

In the context of the consequences that unmitigated climate change poses in the era of the Anthropocene, stabilisation clauses that operate for the benefit of individual investors seem self-evidently myopic and self-defeating. Because there is little scope for reconciling stabilisation clauses with the climate agenda, the only effective solution that is in the interests of all may well be for countries such as Angola, Cameroon and Italy to work towards the termination of these clauses as well as their sunset clauses. There may even arguably be an obligation to do so by developed countries if they are to honour article 4.5 of the Paris Agreement which requires support to be provided to developing country Parties, ‘recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions’.

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