INVESTOR-STATE DISPUTE SETTLEMENT: A NEW FOREFRONT FOR THE FIGHT AGAINST CLIMATE-CHANGE

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Introduction

The balance of power in the thousands of international investment treaties ["**IIAs**"] and bilateral investment treaties ["**BITs**"] entered into globally remains historically asymmetrical,[1] wherein investors vindicate their rights time and again while discouraging proactive domestic regulation. One such area of tussle that is becoming increasingly prevalent is a result of the proliferation of stricter environmental regulations in States all over the world.[2] The investor-centric rights in investment treaties and the wilful forfeiture of power by the States[3] has led to an eruption of many cases that place environmental law-making and investor's right to unhindered operation at loggerheads. As a result, the investor-state dispute settlement ["**ISDS**"] platforms, that are entrusted with adjudicating disputes arising from the abovementioned treaties, face a new dilemma. Here it is now expected to appraise the rights attached to an investment vis-a-vis environmental regulations that are working for the larger good of the people.

So far, this conflict has been dealt with very underdeveloped jurisprudence, as the private investors and States in the ISDS regime struggle to find middle ground. However, with worsening climate-change effects, the problem will only exacerbate in the future and hence, a thorough understanding of the cases decided so far is critical to suggest long-term environmental policy design. Thus, the authors aim to look at the possible market shifts heralded in recent cases and suggest consistent and long-term policy instruments that can enable environmental conservation, while fostering foreign investment. The article also explores the Indian Investment Treaty regime and the ISDS claims brought against India pertaining to climate change.

ISDS Regime and the Growing Implications of Climate Change Policies

[1] Andra K Biorklund, 'The Necessity of Sustainable Development', in Marie-Claire Cordonier Segger and Markus W Gehring (eds), *Sustainable Development in World Investment* (Kluwer Law Arbitration 2011)

[2] Jorge Viñuales, "Foreign Investment and the Environment in International Law" (2012) CUP; Kate Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar 2019); Kyla Tienhaara, *The Expro- priation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (CUP 2009); Tamara Slater, 'Investor-State Arbitration and Domestic Environmental Protection' (2015) Washington University Global Studies Review 14, 131

[3] Stephanie Bijlmakers, 'Effects of Foreign Direct Investment Arbitration on a State's Regulatory Autonomy Involving the Public Interest', (2012) American Review of International Arbitration 245, 249

Till date, there is a decentralised web of 3,300 IIAs governing the transnational currents of foreign direct investment ["**FDI**"] worldwide.[4] The crux of these treaties is to extend protection to investors of one contracting country in the jurisdiction of another contracting country or the Host-State. It seeks to minimise foreign investment risk and prevent instances of unlawful government action by establishing an international arbitration regime, or ISDS, where Host-States may be ordered to grant compensation. By and large, these treaties seek to foster domestic economies of capital-importing countries by promoting foreign investment.

Although IIAs impose a set of obligations on the investors as well as Host-States, the former accrues most of the rights specified, and the latter takes the strain of stricter and more general, all-encompassing obligations that have been argued to result in unequal footing of the parties.[5] The Host-States are hence prohibited from expropriating the assets of foreign investors either directly, say by outrightly seizing investments, or indirectly, wherein the Host-State effectuates a substantive depreciation of the value of the investment by one or a series of actions or inactions. IIAs also afford unequivocal "*fair and equitable treatment*" to the investors by ensuring that the Host-State provides due process, adopts proportionate measures, and refrain from frustrating the legitimate expectations of the investors. In addition to this, the Host-States are also bound to make sure the investors are not discriminated against, not just by the government apparatus but also investors from third countries and the nationals of the Host-State. The contractual breach of these obligations is not just a legal squabble but a treaty violation by virtue of certain "umbrella clauses" in IIAs. These clauses oblige Host-States to honour any agreement or undertaking entered into with the investors of the counter-State.

The alleged breach of the code of conduct imposed by IIAs allows the private investors to sue Host-States in any of the ad-hoc international arbitral tribunals that make up the ISDS regime. These tribunals are generally established within the well-known international frameworks such as the World Bank International Centre for Settlement of Investment Disputes ["**ICSID**"], the International Chamber of Commerce ["**ICC**"], the Stockholm Chamber of Commerce, and the Permanent Court of Arbitration. The ISDS mechanism consists of one arbitrator appointed by each party and the third arbitrator jointly appointed by both parties and they have the power to pass international awards that can be directly enforced on either party.

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[4] 'International Investment Agreements Navigator' (*UNCTAD Investment Policy Hub*) <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 12 February 2022

[5] Yaraslau Kryvoi, 'Counterclaims in investor-state arbitration' (2012) Minnesota Journal of International Law, 216, 252

Investors have the right to challenge a vast range of domestic regulations enacted by the Host-State, starting from interference or termination of contracts, delay in issuance or re-issuance of licences as well as their abrupt revocation, ban of certain products for import or export, imposing selective tax such as the one on capital-gains, nationalisation of investment, subsidisation of substitute products, etc. A relatively recent addition to these grounds is environmental regulations introduced, amended or nullified to achieve the climate goals of the country.

Within the IIA apparatus, the States' right to regulate and its friction with the investors' rights has only been materialised as the issue of increasing environmental regulations permeates the matters recently brought before the ISDS platform. Before delving into the central premise of this discussion, it must be acknowledged that IIAs are legal instruments to foster economic growth and increase FDI, and not corrective remedies to promote action for climate change.[6] However, the social and environmental impacts of FDI are greater than ever, and it cannot be restricted as a calculation in the GDP of a country. The hackneyed notion of FDI being inherently good and acting as a harbinger of sustainability for the Host-State has to be rebutted as there have been many incidents where investors had opposed better environmental laws when they were in conflict with their environmental interests.[7] This conflict will only become worse as scientific advancement, public pressure groups, and improved caution against climate change will lead to stringent environmental regulatory frameworks around the globe.[8]

ISDS as a Platform for Climate Litigation

At the outset, it can be generally claimed that the already competing interests of investors and States have only been worsened with the onset of rigorous climate change action. Since the ISDS regime is the only platform that has the jurisdiction to arbitrate on the issues arising in any IIA, the agitation against global warming has reached its threshold and prominent scholars are urging the extension of its jurisdiction.[9] Currently, ISDS has been noted to impact "climate action, protection of water resources, environmental impact assessments, and communities' rights to

[6] Rosalien Diepeveen and Yulia Levashova, 'Bridging the gap between international investment law and the environment' (2014) Utrecht Journal of International & European Law 145, 151
[7] *Stephanie Bijlmakers*, (n 3).
[8] ibid 39.
[9] Kate M. Supnik, 'Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law' (2009) Duke Law Journal 343, 355; Frank Garcia, 'Reforming the International Investment Regime: Lessons from International Trade Law' (2015) Journal of International Economic Law 861, 862

representation and access to justice."[10] It does so by actively protecting FDI that involves mining, fossil fuels or any production that is environmentally harmful.[11]

It is impertinent to understand at this stage that the ISDS frameworks never encroach on the law-making decisions of the State and, hence, it cannot modify, nullify or amend a domestic regulation.[12] However, the monetary compensation, a path chosen more often than not, is so grandiose that it has the power to deter States from making better environmental regulatory frameworks and can be indirectly impinging on the Host-States sovereignty.[13] Mostly, developed countries have borne the brunt of the off-balance distribution of power with the foreign investors of developed countries as they pay large compensations to wealthy companies.[14] This will indubitably aggravate the economic inequality in countries. Hence, such ISDS claims can have a "chilling effect" on the making of pro-environment laws as States become apprehensive of phasing out harmful activities.[15]

To simplify, there are majorly three types of climate-change related cases that have been recently seen on the ISDS platform. Firstly, there are cases where permissions were revoked or not granted due to environmental concerns. For instance, the ISDS platform has granted awards to investors numerous times due to unfavourable EIAs in cases like *Bilcon v. Canada*,[16] *Bear Creek v. Peru*,[17] *Copper Mesa v. Ecuador*,[18] and *Tethyan Copper v. Pakistan*.[19] In *Copper Mesa v. Ecuador*, the Ecuadorian government sued Copper Mesa Mining as well as the Toronto Stock Exchange in a Canadian court in 2009 for injuries they received from a private security service hired by Copper Mesa Mining that openly opposed the mining. Protest violence worsened, and the Ecuadorian government cancelled Copper Mesa's permission for not adequately consulting the local population. After the action in Canada was rejected for lack of jurisdiction Copper Mesa sued the Ecuadorian government in ISDS, claiming that the cancellation of the permit breached treaty conditions. Copper Mesa was

[10] Lisa Sachs, 'Environmental Injustice: How Treaties Undermine the Right to a Healthy Environment' (*Kluwer Arbitration Blog*, 3 November 2019) < http://arbitrationblog.kluwerarbitration.com/2019/11/13/environmental-injustice-how-treaties-undermine-the-right-to-a-healthy-environment/> accessed 13 February 2022
[11] ibid.
[12] Patrick Thieffry, *Chapter 20 International Arbitration of Climate-Related Disputes: Prospects for Alternative Dispute Resolution* (Brill 2021)
[13] Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2017) CUP 229, 250
[14] Joseph E Stiglitz, 'Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities' (2008) 23 American University international Law Review 451, 479; Frank Garcia, 'Reforming the International Investment Regime: Lessons from International Trade Law' (2015) Journal of International Economic Law 861, 862
[15] *Kyla Tienhaara*, (n 13).
[16] *Clayton and Bilcon of Delaware Inc. v. Government of Canada* (2009) PCA Case No 2009-04, Award, UNCITRAL.
[17] *Bear Creek Mining Corporation v Republic of Peru* (2017) Case No ARB/14/21, Award, ICSID
[18] *Copper Mesa Mining Corp. v. Republic of Ecuador* (2012) PCA No. 2012-2, UNICITRAL
[19] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* (2019) Case No. ARB/12/1, ICSID

still awarded compensation worth $19 million. The case of *TransCanada v. USA*[20] is also worth noting where the Obama Administration refused to give the Presidential Permit to the Keystone XL oil pipeline. However, the case was revoked after the Trump Administration granted the approval.

The second set of cases are usually to challenge the cancellation of incentive schemes originally brought in to foster the renewable energy sector but then revoked once the market became competitive. Cases like *PV Investors v. Spain*[21] and *Eskosol v. Italy*[22] prove the same. The third type of cases are investors calling into question the climate change policies that can depreciate the value of the investment as it will become obsolete as opposed to the proposed sustainable alternatives. For example, the Dutch government's policy to phase-out coal plants by 2030 was challenged in *RWE v. Netherlands*[23] and *Uniper v. Netherlands*[24] and the Canadian government's decision to impose a moratorium on hydrocarbon exploration in Quebec and Alberta was challenged in *Westmoreland v. Canada*[25] and *Lone Pine v. Canada*.[26]

A new classification of cases consisting of counterclaims has also come up. However, these are limited by the clauses of IIAs, meaning the arbitral procedure and whether the claim has substantive consonance with the law in the treaty is taken into consideration. In the case of *Burlington v. Ecuador*,[27] the ICSID tribunal ordered an award of US$41 million to Ecuador after the latter brought a counterclaim against Burlington, offsetting the compensation of US$379 million received by Burlington in the original case. In *Perenco v. Ecuador*, the ICSID tribunal again favoured environmental concerns by stating in an interim decision that "*when choosing between certain disputed (but reasonable) interpretations of the Ecuadorian regulatory regime, the interpretation which most favours the protection of the environment is to be preferred.*"[28]

There is a dire need to find long-term policy instruments that incorporate climate-change concerns in BITs and IIAs. The same has now slowly crept under the ambit of international investment law.

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[20] *TransCanada Corporation and TransCanada PipeLines Limited v United States of America (I)* (2016) Case No ARB/16/21, ICSID
[21] *PV Investors v Spain* PCA Case No 2012-14, UNCITRAL
[22] *Eskosol v Italy* (2015) Case No ARB/15/50, ICSID
[23] *RWE v Kingdom of the Netherlands* (2021) Case No ARB/21/4, ICSID
[24] *Uniper v Netherlands* (2021) Case No ARB/21/22, ICSID
[25] *Westmoreland v Canada* (2019) Case No UNCT/20/3, ICSID
[26] *Lone Pine v Canada* (2013) Case No UNCT/15/2, ICSID
[27] *Burlington Resources Inc v Republic of Ecuador* (2017) Case No ARB/08/5, ICSID
[28] *Perenco Ecuador Limited v Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (Petroecuador)* (2022) Case No ARB/08/6, Interim Decision on the Environmental Counterclaim, ICSID

The recent report by the International Chamber of Commerce[29] is an instance of an international framework not only expounding on the arbitrability of climate-change related disputes but also confirming its own procedures are equipped to arbitrate the same. These cases point towards a major shift in not only the priorities of arbitration tribunals all around the world, but also the real risk of diverting resources that could be used for sustainable purposes. The undercurrent of climate litigation pervading arbitration will soon tangibly change markets as FDI all around the world will find a new route, in terms of Host-states and the ventures adopted, in the face of stricter environmental regulations. It is then impertinent for the ICSID regime to keep up with the same and prioritise not just more investment but more sustainability.

The Position in India: Policy-instruments for the Future

India is the seventh most affected country by climate change in 2019.[30] As a signatory of the Paris Convention, India has also committed to bringing down its carbon emissions by 1 billion from now onwards till 2030.[31] Further, it has committed to achieving the net-zero target by 2070.[32] India has demonstrated its commitment to achieving its climate policy goals by imposing taxes, eliminating subsidies, and enacting new rules.[33] However, experience suggests such measures run the risk of ISDS claims.

India & BITs

India signed its first BIT with the UK in 1994. Since then, India has entered into around 84 generally investor-friendly BITs with countries like the UK, France, Germany, Australia, China, Malaysia, Thailand, Mexico, Russia, Egypt, Saudi Arabia, the United Arab Emirates ["**UAE**"], Turkey, and others. Many commentators argue that this enthusiasm with BITs was the "erroneous" assumption that BITs effectively balance investment protection with their right to exercise sovereign powers.[34] This assumption was further supported by the fact that India's actions

[29] ICC Commission Report, 'Resolving Climate Change Related Disputes through Arbitration and ADR' (*International Court of Arbitration*, November 2019) <https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf> accessed 14 February 2022

[30] 'Global Climate Risk Index 2021' (*Germanwatch*, 25 Jan 2021) <https://www.germanwatch.org/en/19777> accessed 20 March 2021

[31] Sunita Narain, 'India's new climate targets: Bold, ambitious and a challenge for the world' (*DownToEarth*, 2 November 2021) <https://www.downtoearth.org.in/blog/climate-change/india-s-new-climate-targets-bold-ambitious-and-a-challenge-for-the-world-80022> accessed 20 March 2021

[32] ibid.

[33] Brooke Skartvedt Güven and Lise Johnson, 'International Investment Agreements: Impacts on Climate Change Policies in India, China and Beyond' in *Trade in the Balance: Reconciling Trade and Climate Policy* (Trustees of Boston University 2016)

[34] Sujay Mehdudia, 'Move to rework bilateral treatie' *The Hindu* (Delhi, 15 May 2012)

were rarely challenged till 2012.[35] However, this "*erroneous*" assumption changed post-2012 with the rise of a series of investor claims against the Indian government. This eventually led to India terminating a majority of its BITs and the new draft BIT, which generally is said to limit the rights of the investors to bring claims.[36] Many of these treaties continue to be in force because of sunset clauses commonly found in these treaties.[37]

Climate Change Related Claims Against India

India has not been subject to many ISDS claims relevant to the subject. However, there have been instances where claims have been brought against government decisions surrounding environmental considerations.

The Dabhol Power Company ["**DPC**"] was set up in Maharashtra to manage and operate a gas-powered power plant.[38] There were widespread protests against the project. After the change of governments in the State, the project was eventually halted. The State Government's decision to stop the project led to a series of treaty claims against the Government of India.[39] The disputes were later settled in 2010.

Anrak Aluminium is a more recent such case.[40] Anrak Aluminum Ltd, incorporated in Andra Pradesh, set up an alumina and aluminium refinery. Ras-Al-Khaimah Investment Authority ["**RAKIA**"] was an investor in Anrak, which was promised bauxite by the authorities for the proposed smelting unit. However, the authorities cancelled the supply agreement by government order because of public agitation.[41] RAKIA brought claims against the government for non-

[35] Vyoma Jha, India's Twin Concerns Over Energy Security And Climate Change: Revisiting India's Investment Treaties Through A Sustainable Development Lens (2013) 5(1) Trade L & Dev 109

[36] 'Model Text for the Indian Bilateral Investment Treaty' (*Department of Economic Affairs*, 2015) <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> accessed 20 March 2021

[37] Stephanie Triefus, 'Climate change and international investment law – a dangerous mix?' (*ILA Reporter*, 6 March 2021) <https://ilareporter.org.au/2021/03/climate-change-and-international-investment-law-a-dangerous-mix-stephanie-triefus/> accessed 20 March 2021

[38] P Kundra, 'Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons' (2008) 41 Vand J Transnat'l L 908

[39] Jarrod Hepburn, 'Looking Back: Dabhol Power Plant Saga Led To Numerous Commercial, Investment Treaty And Inter-State Arbitrations, And Perhaps Foreshadowed India's Later Concerns Over Bits' (*IA Reporter,* 11 September 2019) <https://www.iareporter.com/articles/looking-back-dabhol-power-plant-saga-led-to-numerous-commercial-investment-treaty-and-inter-state-arbitrations-and-perhaps-foreshadowed-indias-later-concerns-over-bits/> accessed 20 March 2021

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[41] Ajoy K Das, 'UAE serves arbitration notice to India for failure to offer bauxite' (*ISDS Plaform,* 12 January 2017) <https://www.isds.bilaterals.org/?uae-serves-arbitration-notice-to&lang=es> accessed 20 March 2021

fulfilment and subsequent cancellation of the bauxite concession under the India-UAE BIT.[42] The dispute is still pending.[43]

The Model BIT (2016)

The government in 2016 terminated all existing BITs and announced its decision to adopt the New Model BIT.[44] The New Model BIT is contrastingly different from its predecessor. While the preceding BITs essentially had a very pro-investor approach, the Model BIT (2016) limited the scope to challenge the State's decision. The Model BIT did away with the MFN and Fair and Equitable Treatment Clauses. It also adopted a much narrower definition of investment.

More importantly, the Model BIT has a separate chapter on general exceptions. Among other exceptions, it also contains protection of human, animal, or plant life or health, protection, and conservation of the environment as an exception clause. This allows the host state to make policy decisions concerning climate change issues without the risk of a hefty treaty claim.

However, the Model BIT could benefit from an explicit mention of sustainable development goals and differentiation between sustainable and unsustainable.[45] It could encourage investors to differentiate between sustainable and unsustainable investments to focus on the growth of renewable energy investments by giving the former more protection than the latter.[46] Further, the current radical approach in the Model BIT to almost disallow investor claims disincentivises both sustainable and unsustainable investments equally. This could be replaced with a more investor-friendly system that promotes sustainable investment.

Conclusion and Suggested Reforms

Theoretically, IIAs and BITs are supposed to increase the foreign investment in the host state by reducing political and regulatory risk,[47] by ensuring consistency and stability in the host state's policy. The host states can benefit from such treaties in the form of increased foreign investment

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[42] Shalini Bhutani, 'Minefields in investment relations' (*ISDS Plaform,* 8 July 2017) <http://www.isds.bilaterals.org/?minefields-in-investment-relations&lang=fr> accessed 20 March 2021

[43] 'Rakia v India' (*Investment Dispute Settlement Navigator*) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/767/rakia-v-india> accessed 20 March 2021

[44] 'Model Text for the Indian Bilateral Investment Treaty' (*Department of Economic Affairs*, 2015) <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> accessed 20 March 2021

[45] Sofia D Murard, 'The Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation: A model to steer international law toward renewable energy investments and the low-carbon transition' (*Investment Treaty News*, 20 June 2020) <https://www.iisd.org/itn/en/2020/06/20/the-treaty-on-sustainable-investment-for-climate-change-mitigation-and-adaptation-a-model-to-steer-international-law-toward-renewable-energy-investments-and-the-low-carbon-transition-sofia-murard/> accessed 20 March 2021

[46] ibid.

[47] Joachim Pohl, 'Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence' (2018) OECD Working Papers on International Investment, 36

while at the same time achieving climate targets if the supposedly at "loggerheads" objectives of the climate change policy and investment treaties are reconciled in a manner to promote low carbon investments and disincentivise high carbon investments. Many recent treaties, including the Model Indian BIT, that are "climate-blind" [48] fail to address this problem in a balanced manner. The solution does not lie in going towards a protectionist regime, which offers the investors little or no protection. Instead, the investment treaty regime must distinguish between a low carbon generating investment and a high carbon generating investment and offer them a differing level of protection. The consistency and stability that the investment treaties provide can help increase climate-friendly investment. For example, some authors contend that the 36% dip seen in renewable energy investments in European Markets could have been avoided with a more consistent and stable policy.[49] The investment protections can be altered to ensure well-designed policies and regulatory stability are encouraged, and host countries are discouraged from drastically modifying the policy initially provided.

However, radically renegotiating all the existing investment treaties might not be the best way to solve this problem. That might only create havoc and instability in the market and further diminish the trust in investment treaties.

It is suggested that there should be distinct approaches to this issue in its different aspects. First, for existing treaties, integration of climate law norms by ISDS tribunals. Second, for new treaties, explicitly distinguishing unsustainable (high carbon) and sustainable (low carbon) investments and conferring them with differing levels of protection.

Integration of Climate Law norms by ISDS tribunals

There are a large number of IIAs and BITs which are climate-blind, therefore, do not distinguish between sustainable and unsustainable investments.[50] The ISDS tribunals, in such cases, can interpret the clauses in light of the climate change imperative.

[48] Paul Barker, 'Sustainable Investment, Deep Decarbonization, and Investor-State Dispute Settlement: The Failure to Align The Investment Treaty System With Climate Change Law & Policy?' (2021) <https://www-cdn.law.stanford.edu/wp-content/uploads/2021/05/Gould-Blog-Sustainable-Investment-Decarbonization-and-ISDS-_-final.pdf> accessed 20 March 2021

[49] Martijn Wilder and Lauren Drake, 'Setting up the International Mitigation Regime: Contents and Consequences' in *The Oxford Handbook of International Climate Change* (OUP 2016)

[50] Wendy Miles and Merryl Lawry-White, 'Arbitral Institutions and the Enforcement of Climate Change Obligations for the Benefit of all Stakeholders: The Role of ICSID' (2019) 34 Foreign Investment Law Journal 1.

Investment Agreements fall within and are governed by the larger sphere of International Law.[51] Therefore, the tribunals can employ interpretative tools that provide the scope to consider norms outside the immediate treaty. Article 31(3)(c) of the Vienna Convention on the Law of Treaties similarly states "any relevant rules of international law applicable in the relations between the parties" shall be taken into consideration while interpreting.[52] The tribunal in *Micula v. Romania* also held that investment treaties must be read, giving due regard to the State's other treaties.[53] The tribunal in *Mox Plant v. Ireland* also found that while interpreting the treaty, if the provision produces inconsistent results with contemporary international law, there must be actualisation and contemporisation of the international instrument concluded in an earlier period.[54] It was in line with this jurisprudence of considering the contemporary elements of International Law the tribunal in *Iron Rhine* applied the principle of Sustainable Development.[55]

Further, another avenue to climate change imperative while interpreting investment treaties is International Public Policy.[56] In *World Duty-Free v. Kenya,* the tribunal refused to uphold claims based on contracts obtained by corruption, as corruption goes against International Public Policy.[57] Other tribunals have also taken similar positions.[58]

International and national norms, regulations, and standards are progressive, including climate commitments. Their importance in international tribunals is undeniable. As a result, they are essential in defining other conceptions of public policy, such as deciding the scope of regulatory authorities, investor expectations (even when due diligence is used), and what it means to protect and develop.[59]

Integrating Climate Change Imperative in the Treaty

It is desirable that the new investment treaties explicitly distinguish between an investment that generates low carbon from that of a high carbon investment. While a high carbon investment will

[51] Benedict Kingsbury and Stephan Schill, 'Investor–State Arbitration as Governance' in Albert Jan van den Berg (ed), *50 Years of the New York Convention* (Kluwer 2009) 7

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[53] Ioan Micula, Viorel Micula, SC European Food SA SC Starmill SRL and SC Multipack SRL v Romania, ICSID Case No ARB/05/20, Final Award (11 December 2013) para 326

[54] Ireland v United Kingdom ECLI:EU: C2006:345 (Mox Plant v Ireland).

[55] Iron Rhine Arbitration (Belgium/Netherlands)

[56] *Wendy Miles*, (n 1).

[57] World Duty Free Company Limited v Republic of Kenya, ICSID Case No ARB/00/7, Award (4 October 2006) para 181

[58] Grand River Enterprises Six Nations, Ltd and others v United States of America (12 January 2011) paras 186–87; Philip Morris Brands Sa`rl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay, ICSID Case No ARB/10/7 (formerly FTR Holding SA, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay), Award (8 July 2016) paras 429–30

[59] *Wendy Miles*, (n 1).

be subject to a much stronger regulatory review, a low carbon investment can be given greater protection and lesser regulatory review. The Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation, winner of the Stockholm Treaty Lab Prize, provided a clear distinction between sustainable and unsustainable sectors, which will be annexed to the treaty itself.

However, states have also adopted other routes to integrate climate change goals in the Investment Treaty in recent years. One such approach is adding goals like "protection of the environment"[60] or "sustainable development"[61] in the treaty's preamble, which can provide context to the tribunal in a much more explicit fashion than discussed in the previous section.

Another interesting approach is qualifying the definition of investment and building in protection in the definition itself. Costa Rica–Netherlands IIA adopts such a formulation that clarifies that investments include investments made following laws in regulation, including the law and regulation on the environment.[62] Therefore, this makes it a question of jurisdiction, any claim for the investment made not per environmental laws cannot be brought. Some treaties also take other routes, including providing CSR or adding goals like cooperation in addressing climate change concerns.[63]

However, such measures still leave ambiguity for the tribunals to interpret, which can cause instability or confusion questions like concerning whether all investments are protected or not, and which policy measure is justified. This ambiguity can be done away with an explicit distinction between sustainable and unsustainable investments.

[60] Agreement on Free Trade and Economic Partnership between the Swiss Confederation and Japan (signed 19 February 2009; entered into force 1 September 2009) (Japan–Swiss Confederation IIA).
[61] Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (signed 9 September 2012, entered into force 1 October 2014) (Canada–China BIT)
[62] Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Costa Rica (with Protocol) 2238 UNTS 139 (21 May 1999, entered into force on 1 July 2001) (Costa Rica–Netherlands IIA) art 10
[63] *Wendy Miles*, (n 1).