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COMPLIANCE WITH CLIMATE CHANGE STANDARDS AS A JUSTIFICATION TO VIOLATIONS OF INTERNATIONAL INVESTMENT TREATY OBLIGATIONS—AN ANALYSIS

by Marcus Liew

I. INTRODUCTION

Climate change has come to the fore as a genuine global concern worthy of serious attention. Given its global nature, international investment law cannot escape from this circumstance. The United Nations International Panel on Climate Change (IPCC), responsible for assessing climate change,[1] recently affirmed that evidence of the climate system[2] warming is unequivocal.[3] With the increase in global warming comes "severe, pervasive and irreversible impacts for people and ecosystems."[4] Suffice to say, climate change requires urgent consideration. Nevertheless, attitudes towards climate change have been lukewarm at best—the recent UN Emissions Gap Report 2019 findings paint a bleak picture in this regard: countries have collectively failed to stop the growth in global greenhouse gas emissions despite their political commitments, and the 1.5°C goal of the Paris

[1] The IPCC provides policymakers with regular assessments of the scientific basis of climate change, its impacts and future risks, and options for adaptation and mitigation. Intergovernmental Panel on Climate Change, IPCC Factsheet: What is the IPCC? (August 30, 2013), https://www.ipcc.ch/site/assets/uploads/2018/02/FS_ what_ ipcc.pdf.

[2] United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107, art (1)(3) (defining "climate system" as "the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions") [hereinafter "UNFCCC"].

[3] IPCC, *Climate Change 2014: Synthesis Rep., Summary for Policymakers* (2014), at 2, 4-5, 10, https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf [hereinafter "IPCC SPM"].

[4] *Id.* at 8.

Agreement is nearly slipping out of reach.[1] As Professor Tommy Koh states: "the majority are ignorant. The threat of climate change is like an invisible enemy. It is not like a meteorite heading towards earth. The earth is warming slowly but progressively. We are like the proverbial frog in a pot of boiling water."[2]

The international investment regime is no different. Historically, international investment agreements were promulgated without regard to the amorphous concepts of climate change. However, even with increasing recognition of climate change concerns as a global community interest, international investment law has been slow to respond to this shift. Many investors still prioritize economic output and turn a blind eye to climate action imperatives.

Hence, states and the international investment regime are critical in addressing the global issue of climate change. Providing states with climate change standards as a justification to violations of investment treaty obligations might provide the catalyst for change. While climate change and foreign direct investments are currently dealt with under separate fields of international law,[3] it is undeniable that both are inextricably linked—especially since states and Bilateral Investment Treaties (BITs) recognise the supremacy of international law in investment disputes.[4] But how can the interest of climate change be enforced in the international investment setting, as a justification to violations of international investment treaty obligations?

This paper proceeds as follows: Part II begins with presenting climate change as a global community interest. Part III reviews the status of climate change recognition in international investment jurisprudence. Part IV concludes by discussing the implication of the jurisprudence and potential avenues for climate change standards

[1] United Nations Environment Programme, *Emissions Gap Report 2019* (November 2019), Forward, https://wedocs.unep.org/bitstream/handle/20.500.11822/30797/EGR2019.pdf?seq uence=1& isAllowed=y.

[2] Tommy Koh, *Foreword*, *in* CRUCIAL ISSUES IN CLIMATE CHANGE AND THE KYOTO PROTOCOL, ASIA AND THE WORLD (Kheng L. Koh et al. eds., 2009).

[3] Valentina Vadi, *Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals?*, 48 VAND. J. OF TRANSNAT'L L., 1285, 1343 (2015).

[4] Vienna Convention on the Law of Treaties, May 23, 1969, Arts. 27, 31, 1155 U.N.T.S. 331 [hereinafter "VCLT"].

to operate as justifications to violations of international investment treaty obligations.

II. DEFINING CLIMATE CHANGE AS A GLOBAL COMMUNITY INTEREST

B. *Climate Change and International Standards*

Adopting the United Nations Framework Convention on Climate Change's ("UNFCCC") definition, "climate change" means "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods."[5]

Standards for climate change[6] have been set forth in, *inter alia*, the UNFCCC, the Kyoto Protocol[7] and the Paris Agreement.[8] These instruments strive to achieve safe concentrations of atmospheric greenhouse gases via mitigation and to "make finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development."[9] Notably, the Paris Agreement obliges parties to engage in environmental adaptation planning and implementation, recognizing it as a "global challenge."[10]

C. *Defining the "Global Community Interest"*

By its very definition, an essential characteristic of the global community interest is that the interest transcends the interests of individual states and parallels the global needs and hopes of all humanity.[11] Furthermore, what sets global community interests apart from other interests are, first, the significance of the values at stake

[5] UNFCCC, *supra* note 2, at art. 1(2).

[6] Given the broad ambit of the definition of climate change standards, international environmental standards and obligations (which are referred to subsequently in this paper) necessarily fall within this ambit as well.

[7] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162 [hereinafter "Kyoto Protocol"].

[8] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter "The Paris Agreement"].

[9] *Id.* at art. 2; UNFCCC, *supra* note 2; Kyoto Protocol, *supra* note 11, Preamble.

[10] The Paris Agreement, *supra* note 12, at art. 7(2).

[11] WOLFGANG BENEDEK, ET AL., THE COMMON INTEREST IN INTERNATIONAL LAW 17 (2014).

and, second, the need for collective action.[12] Particularly, concerning the need for collective action, global community interests require "collective action in response; no single state can resolve the problems they pose or receive all the benefits they provide."[13]

D. *Climate Change as a "Global Community Interest"*

Taking the definitions above, climate change falls squarely within the global community interest. Climate change and its ramifications (loss of biodiversity, increase in climate related calamities, etc.) do not only affect individual states, but also concern the global community. The climate, biodiversity, and in fact the entire world forms an interdependent ecological system which can only be protected at the global level.[14] This requires active cooperation and a joint effort among states to address climate change.

Climate change was first recognized as a global community interest in the 1972 Stockholm Declaration to the Human Environment—"to defend and improve *the human environment* for present and future generations has become an *imperative goal for mankind*."[15] Additionally, Principle 1 to the Stockholm Declaration emphasized that "man has the fundamental right to . . . adequate conditions of life, in an environment of quality."[16] Subsequently, climate change was expressly recognised as a "common concern of mankind" in the 1988 General Assembly Resolution 43/53[17] and has been continually recognized in other international instruments, including the

[12] CLAIRE BUGGENHOUDT, COMMON INTERESTS IN INTERNATIONAL LITIGATION, A CASE STUDY ON NATURAL RESOURCE EXPLOITATION DISPUTES 19 (2017); Dinah Shelton, *Common Concern of Humanity*, 1 IUSTUM AEQUUM SALUTARE 33, 33–35 (2009).

[13] BENEDEK, ET AL., *supra* note 15, at 17.

[14] *Id.* at 33–34.

[15] United Nations Conference on the Human Environment, *Stockholm Declaration*, ¶ 6, UN Doc. A/CONF.48/14/Rev. 1 (June 16, 1972) [hereinafter "*Stockholm Declaration*"]. This was also echoed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora dated March 3, 1973.

[16] *Id.* at Principle 1.

[17] G.A. Res. 43/53, Protection of Global Climate for Present and Future Generations of Mankind, ¶ 1 (Dec. 6, 1988).

UNFCCC,[18] the Convention on Biological Diversity and the 1992 Rio Declaration.[19] Furthermore, virtually all states acknowledge the global importance of climate change. This is evinced through the widespread acceptance and ratification of international treaties concerning climate change, for example, 197 parties joined the UNFCCC, 181 parties joined the Paris Agreement, and 192 parties joined the Kyoto Protocol. Hence, it is undisputed that climate change falls within the ambit of a global community interest.

Climate change as a global community interest is relevant in international investment law. International investment jurisprudence has supported the application of general community interests as potential justifications against investor rights and infringements.[20] This community interest cannot be confined to the domestic sphere, but must necessarily be that of global nature, encapsulating both the collective and individual interests of humans. Indeed, climate change considerations should precede investment protection as an important value of the international community in the hierarchy of international norms. Such community values ascribe precedence in international law as reflected by the notion of *jus cogens* in international law. Given the imperative and urgent necessities to humanity and the international community presented by climate change, this paper advances the notion that confronting climate change should take precedence over investment protection.

III. THE STATE OF CLIMATE CHANGE RECOGNITION IN INTERNATIONAL INVESTMENT JURISPRUDENCE: A REVIEW

The interaction between investment treaties and international environmental

[18] UNFCCC, *supra* note 2, at Preamble.

[19] United Nations Convention on Biological Diversity, June 5, 1992, Preamble, 1760 U.N.T.S. 79, 31 I.L.M. 818; United Nations Conference on Environment and Development, *Rio Declaration*, U.N. Doc. A/CONF.151/26 (Vol. 1) (Aug. 12, 1992).

[20] *See generally* JORGE E. VINUALES ET AL., THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 329 (2014); Methanex Corp. v. United States of America, UNCITRAL, Final Award (Aug. 2, 2005); Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award (Mar. 17, 2006); Marvin Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002).

instruments have been occasionally, but unsatisfactorily, examined in investment awards. Given that there is no explicit rule dealing with the interaction between different international instruments in international investment, this section scrutinizes relevant investment awards to examine how tribunals have dealt with global community interests pertaining to the environment. The underlying thread in the jurisprudence is an indication of a marked shift in emphasis from *Santa Elena v. Costa Rica*,[21] which gave precedence to investment protection, to more recent cases which have emphasized environmental protection.

A progressive change can be witnessed from the awards in *Santa Elena* and *Metalclad*, both decided in 2000. From an inflexible attitude of investment protection and general apprehension towards the application of international environmental instruments, concern towards the protection of the environment as a precedent interest began to emerge in successive cases. These cases are in line with the changing attitude of states in the development of investment treaties, which began to recognize sustainable development as the principal aim of investment treaties and providing for defenses based on the protection of environment and human rights.[22]

A. *Initial Hesitance towards Recognition of International Environmental Obligations*

In *Santa Elena*, the Claimant, CDSE, was formed for the purpose of purchasing Santa Elena to develop it as a tourist resort and residential community.[23] A majority of the CDSE shareholders were US citizens. Upon acquiring the property, CDSE proceeded to design a land development program and undertook various financial analyses of the property.[24] The Respondent, the Costa Rican Government, subsequently expropriated the property because of conservation objectives, *i.e.*,

[21] Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Award (Feb. 17, 2000).

[22] MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 265–77 (4th ed. 2017).

[23] *Santa Elena*, Award, ¶ 16.

[24] *Id.*

conserving flora and fauna and protecting spawning grounds for sea turtles.[25] CDSE's property was required to meet this objective. While CDSE did not object to the expropriation, it disputed the amount of compensation to be rendered.[26]

What is pertinent is that the *Santa Elena* award addressed the conflict between the obligation to compensate in the event of expropriation and the international non-investment obligations which motivated this expropriation. In dealing with this question, the tribunal stated:[27]

> While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the property was taken for this reason does not affect either the nature or the measure of compensation to be paid for the taking. That is, *the purpose of protecting the environment for which the property was taken does not alter the legal character of the taking* for which adequate compensation must be paid. *The international source of the obligation to protect the environment makes no difference.*

The tribunal in *Santa Elena* found that the motivation behind the expropriation of property did not affect the expropriatory nature of the taking and compensation was still due. As such, the international non-investment obligation concerning the environment[28] was immaterial and the tribunal declined to analyse the international legal obligation to preserve the ecology of the Santa Elena site.[29] The tribunal further added that: "where property is expropriated, *even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.*"[30]

Hence, the *Santa Elena* tribunal deemed non-investment instruments and international non-investment obligations as *irrelevant* in determining if there had

[25] *Id.* ¶ 18.

[26] *Id.* ¶¶ 15–21.

[27] *Id.* ¶ 71 (emphasis added).

[28] Inferred to be the obligations under the Convention on Biological Diversity. *See* United Nations Convention on Biological Diversity, *supra* note 23.

[29] *Santa Elena*, ¶ 71 n.32.

[30] *Id.* ¶ 72 (emphasis added).

been a violation to treaty provisions. This categorical approach, however, might not be an accurate representation of the current state of international investment law, given the increasing recognition of the state's right to regulate.[31]

A similar attitude was adopted in *Metalclad v. Mexico*.[32] *Metalclad* concerned waste disposal and the operation of a waste landfill. In 1993, Metalclad, a US corporation, had purchased a Mexican company, COTERIN, together with its permits, in order to build and operate a site as a hazardous waste landfill.[33] Early in 1995, although the waste landfill raised some concerns, authorities concluded that the area was fit for a hazardous waste landfill.[34] However, after completing construction of the landfill, demonstrators blocked entry to the site, preventing Metalclad from opening the landfill. After months of negotiation, Metalclad and Mexico came to an agreement for the operation of the landfill.[35] Nevertheless, the municipal government denied Metalclad the operation permit and subsequently issued an Ecological Decree declaring a "Natural Area" to protect a rare cactus. This Natural Area included the area of the landfill.[36] Metalclad instituted arbitration alleging violations of NAFTA Arts. 1105 (Fair and Equitable Treatment) and 1110 (Expropriation).

Here, the tribunal did not even take into consideration the environmental and health consequences pointed out by the Respondent, much less contemplate the applicability of international climate change instruments. This was despite the Respondent referencing several instruments such as the North American Agreement on Environmental Cooperation which emphasizes environmental protection and the importance of public participation in conserving the environment.[37] In fact, given that *Metalclad* concerned the preservation of endemic species and a rare cactus, the

[31] United Nations Convention on Biological Diversity, *supra* note 23.

[32] Metalclad Corp. v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).

[33] *Id.* ¶ 30.

[34] *Id.* ¶ 44.

[35] *Id.* ¶ 47.

[36] *Id.* ¶ 59.

[37] *Metalclad*, Respondent's Counter Memorial (May 22, 1998).

tribunal could have addressed the relevance of the Convention on Biological Diversity. Unfortunately, the tribunal missed out on this opportunity to clarify the interaction between treaty obligations and international non-investment obligations.

In stark juxtaposition, the tribunal read in a (controversial) transparency element into NAFTA Art. 1105.[38] Transparency was only vaguely mentioned in NAFTA Art. 102(1), yet the tribunal willingly applied the transparency requirement without regard for the ecological and environmental concerns arising out of the site, eventually finding that Mexico had breached both the NAFTA FET and expropriation clauses.[39]

In summary, the findings in *Metalclad* are similar to the result in *Santa Elena*: international non-investment obligations concerning climate change were categorically not taken into consideration in the legal matrix. However, the tribunal was more than willing to consider pro-investor aspects such as transparency. This is perhaps symptomatic of the more conservative approach that tribunals adopt when applying other international instruments in investment disputes due to multiple reasons, *inter alia*, the difference between the two branches of international law (environmental law vs. investment law) resulting in general reluctance of arbitrators to enter the international environmental law sphere.

B. *The Beginning of a Shift in Perspective—S.D. Myers v. Canada*

A shift in perspective began to appear in *S.D. Myers v. Canada*, also a NAFTA award made in the year 2000.[40] The *S.D. Myers* award remains as the most important decision that addressed the applicability of international environmental instruments in investment disputes.

The Claimant, S.D. Myers, was a US company incorporated in Ohio[41] and specialized in PCB remediation.[42] Given its highly toxic nature and the difficulty of

[38] *Metalclad*, Award, ¶ 99.

[39] *Id.* ¶¶ 101, 112.

[40] S.D. Myers, Inc. v. Govt. of Canada, UNCITRAL, Partial Award (Nov. 13, 2000).

[41] S.D. Myers was located approximately 100 km south of the US/Canada border.

[42] *S.D. Myers*, Partial Award, ¶ 94 ("The term 'PCB' is an abbreviation for a synthetic chemical compound known as polychlorinated biphenyl. This compound consists of chlorine, carbon and hydrogen and has a combination of properties that provide an inert, fire-resistant and

properly disposing PCB, the US and Canada banned export and future production of PCBs following the 1973 OECD Council Decision to limit PCBs.[43] In 1986, Canada and the US entered into the Transboundary Agreement, which contemplated the possibility of cross-border activity recognizing the close trading relationship and the common border between the US and Canada engender opportunities for a generator of hazardous waste to benefit from using the nearest appropriate disposal facility.[44]

In 1989, Canada acceded to the Basel Convention,[45] which gave rise to certain environmental obligations that parties had to undertake.[46] Canada subsequently made statements emphasizing that the "handling of PCBs should be *done in Canada by Canadians*."[47] In 1990, S.D. Myers began its efforts to obtain the necessary approvals to import equipment containing PCB wastes into the US from Canada. However, in 1996, a successful lobbying campaign by the Canadian PCB disposal industry saw Canadian authorities banning the export of PCB for waste disposal. The

insulating material. This makes the compound suitable for insulation. PCBs were used mainly in electrical equipment and to a lesser extent in other products. PCBs biodegrade slowly and remain in the environment for a long time. To eliminate them from the environment, PCBs must be disposed of through either a process of thermal destruction at high temperatures or by chemical processing. Landfilling is also used as a means of disposal, but this method merely contains the material in a relatively safe manner and does not result in the removal of the substance from the environment.").

[43] *Id.* ¶ 99.

[44] *Id.* ¶ 103.

[45] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, March 22, 1989.

[46] *S.D. Myers*, Partial Award ¶¶ 106–07 ("State parties to the Basel Convention accept the obligation to ensure that hazardous wastes are managed in an environmentally sound manner. The Basel Convention establishes rules and procedures to govern the transboundary movement of hazardous wastes and their disposal. Amongst other things, it prohibits the export and import of hazardous wastes from and to states that are not party to the Basel Convention (Article 4(5)), unless such movement is subject to bilateral, multilateral or regional agreements or arrangements whose provisions are not less stringent that those of the Basel Convention (Article 11). The Basel Convention also requires appropriate measures to ensure the availability of adequate disposal facilities for the environmentally sound management of hazardous wastes that are located within it (Article 4(2)(b)). It also requires that the transboundary movement of hazardous wastes be reduced to the minimum consistent with the environmentally sound and efficient management of such wastes and be conducted in a manner that will protect human health and the environment (Article 4(2)(d)).").

[47] *Id.* ¶ 116.

common border with the US for cross-border movement of PCBs was shut for 16 months.[48]

S.D. Myers commenced arbitration alleging Canada violated its NAFTA Chapter 11 obligations. In response, Canada argued that its obligations under separate international instruments, namely the Basel Convention and the Transboundary Agreement, justified its conduct and these international obligations prevailed over Chapter 11 obligations.[49] Canada highlighted that such international agreements expressed the common intention of parties, and the fact that the NAFTA parties included Art. 104(c) was an indication that parties intended to comply with their obligations under the Basel Convention.[50]

Although the tribunal eventually concluded that there was no legitimate environmental reason for introducing the ban,[51] what is prominent in this case was that the tribunal addressed the applicability of international environmental instruments within the NAFTA framework and found these instruments to be applicable.

Referencing NAFTA Arts. 102(2) and 1131(1), the tribunal proceeded to apply the "applicable rules of international law"—in this regard, the first port of call is the Vienna Convention on the Law of Treaties ("VCLT").[52] Accordingly, the tribunal found international instruments were *relevant* to the analysis and addressed the Basel Convention and its potential inconsistencies with NAFTA Chapter 11. The tribunal noted that NAFTA Art. 104[53] dealt specifically with reconciling inconsistencies, and in

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[48] *Id.* ¶¶ 118–27.

[49] *Id.* ¶ 150.

[50] *S.D. Myers*, Respondent Counter-Memorial (Oct. 5, 1999).

[51] *S.D. Myers*, Partial Award, ¶ 195. The complete PCB export ban was unnecessary to fulfil its obligations under the Basel Convention and that Canada had been discriminatory.

[52] *Id.* ¶¶ 197–200.

[53] North American Free Trade Agreement, Jan. 1, 1994, art. 104 provides in relevant part:

Article 104: Relation to Environmental and Conservation Agreements

1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:

(a) the Convention on International Trade in Endangered Species. . .

the case of inconsistencies between Chapter 11 and the Basel Convention, a party *can* rely on its obligations under the Basel Convention as a justification for violations of international investment obligations.[54] In recognizing this, the tribunal implicitly recognized the importance of environmental protection as a public interest.

Understandably, the obligations under an international instrument[55] do not provide an absolute blanket justification to violate investment obligations under NAFTA. Certain requirements must be fulfilled: where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade.[56] On the facts of this case, Canada did not meet this standard because the complete PCB ban was unnecessary and inconsistent with open trade.

S.D. Myers marks a shift in perspective concerning the applicability of international environmental agreements in investment disputes. Notwithstanding the fact that the State was unable to make out its justification, the tribunal acknowledged the importance of environmental concerns and affirmed that the NAFTA regime provided that international environmental agreements could be a justification to exculpate states of their obligation under Chapter 11 of NAFTA. Notably, these justifications are not absolute, but if the requirements are met, a host state can claim compliance with international environmental instruments as a defense to violations of investment obligations.

Admittedly, the tribunal only reached such a conclusion because of the specificities of NAFTA, which contains express provisions dealing with the interaction between international environmental treaties and NAFTA. However, this recognition

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(b) the Montreal Protocol on Substances that Deplete the Ozone Layer. . .

(c) the Basel Convention on the Control of Transboundary Movements of

Hazardous Wastes and Their Disposal. . .

such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

[54] S.D. *Myers*, Partial Award, ¶ 214.

[55] In this case, the Basel Convention.

[56] *Id.* ¶ 221.

could influence other investment tribunals—even outside of NAFTA—in the future.

C. *The Change from Inflexible Investment Protection to Increased Recognition of Environmental Interests*

Following the awards issued in 2000, *Methanex v. United States of America* (2004) rediscovered the rule that a regulatory expropriation is non-compensable.[57] Since then, the exploration of the extent of the police powers of a state has become significant both in awards as well as the literature on the subject.[58] Though it is acknowledged that drawing a definite line between a compensable and non-compensable regulatory taking is difficult, environmental concerns have become a matter of such public interest, as evinced in the rapid developments in international law (as the effects of climate change came to be felt),[59] that it has come to be reflected in international investment law as well. This recognition of climate change as a community interest was reflected in the emergence of the so-called "balanced" treaties which sought to accommodate within investment treaty objectives not merely investment protection, but goals of sustainable development and the preservation of regulatory space for the state to act in the public interest.[60] Consequently, it has become increasingly difficult for tribunals to exclude environmental issues, or other matters relating to the public interest. Climate change goes beyond the community interest of a single state. It implicates the interest of the whole of humanity.

It is against this backdrop that there have been several cases between 2004 and 2017 in which there was an articulation of environmental concerns. In *Chemtura Corporation v. Canada* (2010),[61] the prevention of the use of dangerous pesticides was

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[57] *Methanex*, Final Award, ¶ 15.

[58] *See* Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID REV. F.I.L.J. 26 (2005); KATIA YANNACA-SMALL, *Indirect Expropriation and the Right to Regulate: How to Draw the Line?*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES (Katia Yannaca-Small ed., 1st ed. 2010).

[59] *See, e.g.*, KOH KHENG-LIAN ET AL., CRUCIAL ISSUES IN CLIMATE CHANGE AND THE KYOTO PROTOCOL, ASIA AND THE WORLD (2010).

[60] Sornarajah, *supra* note 26, at 265-77.

[61] Chemtura Corp. v. Govt. of Canada, UNCITRAL/NAFTA, Award (Aug. 2, 2010).

held to be a regulatory measure that needed no compensation.[62] In *Philip Morris v. Australia* (2012),[63] the argument was that a slew of WHO materials indicated that the ban on cigarette advertising promoted the community interest of health.[64] These awards prepare a foundational base for the acceptance of obligations contained in treaties on environmental protection and parallels the significance that arbitral tribunals increasingly exhibit willingness to take into account the existence of multilateral treaties which a state may be party to (especially if it concerns a community interest) in order to give precedence to the specific community interest.[65] It culminates into the recent award of *Burlington v. Ecuador* (2017).[66]

In *Burlington*, Burlington Resources, a US corporation, obtained licenses from Ecuador to explore and exploit hydrocarbons in the Ecuadorian Amazon. These licenses included choice-of-law provisions in favor of Ecuadorian law.[67] Following an increase in oil prices, Ecuador, wanting to benefit from this increase, invited Burlington to renegotiate. Following a breakdown in renegotiations, Ecuador amended the oil and gas laws to increase the tax obtained from exploitation of hydrocarbons. This tax was increased to 99% in 2006.[68] Burlington commenced arbitration contending that the increased tax and subsequent termination of the licenses were expropriatory.

The tribunal found that Ecuador's measures substantially deprived Burlington of its investment and hence were expropriatory. However, it is crucial to note that the tribunal *also* found Burlington liable for environmental harm under Ecuador's

[62] *Id.* ¶ 266.

[63] Philip Morris Asia Ltd. v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, Australia's Response to the Notice of Arbitration (Dec. 21, 2011).

[64] *Id.* ¶ 5.

[65] *See* S.D. *Myers*, Partial Award; Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability (Dec. 14, 2012); Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016).

[66] *Burlington Resources*, Decision on Ecuador's Counterclaims (Feb. 7, 2017).

[67] *Burlington Resources*, Decision on Liability, ¶ 20.

[68] *Id.* ¶ 37.

counterclaim. The tribunal stated that Ecuador, in its 2008 Amendments, had extensively incorporated international environmental norms into its domestic legal order.[69] The tribunal observed that Ecuadorian law was brought in line with international norms to ensure that Ecuador could fulfil its obligations concerning hydrocarbon exploitation.[70] Notably, the Ecuadorian legal framework recognized climate change as a global community interest—Art. 250 of Ecuador's constitution insists on the conservation of the ecosystem as it is "*necessary for the planet's environmental equilibrium.*"[71] Chapter II expressly highlights "*mitigation of climate change*" and "biodiversity conservation" as fundamental international environmental principles, which are relevant to the public interest.[72] Ultimately, the incorporation of international environmental norms into Ecuador's domestic legal order represented a broader effort to ensure compliance with Ecuador's international treaty obligations.[73]

Although the tribunal stopped short of expressly pronouncing that Burlington was subject to international climate change standards, the tribunal found Burlington liable for the environmental harm under Ecuador's domestic laws. The tribunal held that this environmental harm was "defined by reference to the regulatory criteria" of the domestic regime and Ecuador's regulatory framework encapsulated international environmental standards.[74] This decision is remarkable because the tribunal was willing to sustain the State's counterclaim in recognition of the State's prerogative to enforce environmental obligations against an investor to ensure compliance with the State's own obligations under international environmental instruments. This is a

[69] *Id.* ¶ 195. Notably, Ecuador had ratified the UNFCCC in 1993 and ratified the Kyoto Protocol in Jan, 2000 prior to the dispute.

[70] *Id.* ¶¶ 195–216; Anagha Sundararajan, *Environmental Counterclaims, Enforcing International Environmental Law Through Investor-State Arbitration* 24, SALZBURG GLOBAL SEMINAR, https://www.salzburgglobal.org/fileadmin/user_upload/Documents/Anagha_Sundararajan__Environmental_Counterclaims.pdf.

[71] *Burlington*, Decision on Liability, ¶ 202.

[72] *Id.* ¶¶ 206–15.

[73] Sundararajan, *supra* note 74, at 25.

[74] *Burlington*, Decision on Liability, ¶ 291.

marked shift towards recognizing the applicability of international environmental norms or climate change standards as justifications for violations of investment obligations.

Another case worthy of mentioning is *Cortec Mining v Kenya* (2018).[75] In a similar vein, the tribunal in *Cortec Mining* analyzed the definition of a protected "investment" under the Kenya-United Kingdom BIT and decisively read in the requirement that a protected investment required compliance with domestic environmental legislation.[76] In adopting this approach, the tribunal undertook a thorough examination of the environmental regulations that the Claimants defaulted on and found that these imposed obligations of fundamental importance for environmental protection in the area in question (*i.e.*, Mrima Hill).[77] Mrima Hill was gazetted and protected as a forest and nature reserve and an environmental impact assessment approval (which the Claimants failed to procure) was mandated under Kenya's environmental legislation.[78] The tribunal expressly recognized that environmental protection was a significant interest of the State, and concluded that the Claimants' failure to comply with Kenya's environmental legislation warranted the proportionate response of a denial of treaty protection under the BIT.[79]

D. *Recognition of International Human Right Instruments in International Investment Jurisprudence*

The recognition of other international human rights instruments serve to bolster the applicability of climate change standards within the international investment framework for two main reasons: (1) not only are the principles behind the applicability of international human right instruments transposable onto the issue of whether an international environmental instrument is applicable; (2) more importantly, these human rights standards have relevance to climate change being

[75] Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29, Award (Oct. 22, 2018).

[76] *Id.* ¶ 365.

[77] *Id.* ¶¶ 345-46.

[78] *Id.* ¶ 345.

[79] *Id.* ¶¶ 352, 365.

destructive of human life and other essential needs of human life, like water and air, and implicate human rights values. As such, the findings in the recent 2016 *Urbaser v. Argentina* award[80] are significant.

Urbaser is an important case where international human right obligations were acknowledged as, in principle, capable of binding an investor. *Urbaser* concerned a concession which had been granted to the Claimant for water and sewage services to be provided in Greater Buenos Aires in early 2000.[81] When the 2001 Argentina economic crisis struck, Argentina's emergency measures resulted in economic losses to the Claimant's concession, cumulating into the termination of the concession in 2006. The Claimant commenced arbitration alleging violations of the Spain-Argentina BIT.[82] Argentina counterclaimed, alleging that the Claimant had failed to provide necessary investment into the concession, thus violating its obligations under international law based on the human right to water.[83]

In a positive step towards recognizing international non-investment standards as justifications, the tribunal held that investors *could be bound by obligations under international law instruments* and general international law.[84] The tribunal rejected the Claimant's contention that guaranteeing the human right to water is a duty that may be borne solely by states, and never by private companies.[85] Instead, it found that the law had moved past the position that only states could be subjected to international law. The modern conception was that investors could be subject to international law obligations as a corollary to the acceptance of investors being able to invoke rights under international law, for example, under BITs.[86]

[80] *Urbaser*, Award.

[81] *Id.* ¶ 34.

[82] *Id.*

[83] *Id.* ¶ 36.

[84] *Id.* ¶ 1195.

[85] *Id.* ¶ 1193.

[86] *Id.* ¶¶ 1194–95.

The tribunal went on to refer to the 1948 Universal Declaration of Human Rights[87] and the 1966 International Covenant on Economic, Social and Cultural Rights[88] as potential international human right obligations that investors owed concerning the right to water.[89] The tribunal rightly referred to VCLT Art. 31(3)(c) which indicates that "any relevant rules of international law applicable to the relations between the parties" is to be taken into account.[90] The BIT cannot be interpreted and applied in a vacuum. The tribunal must certainly be mindful of the BIT's special purpose as a treaty promoting foreign investments, but it cannot do so without considering the relevant rules of international law. The BIT must be construed in harmony with other rules of international law of which it forms a part, including those relating to human rights.[91] Appositely, it stated that the global community interest, such as the human right to water, is an obligation "on *all* parts, public and private parties, not to engage in activity aimed at destroying such rights."[92]

The *Urbaser* case opens the possibility for states to subject investors to obligations arising from international environmental treaties via the same principles. While this approach is promising, this route might be hampered by the fact that most international environmental treaties do not confer legal obligations enforceable upon private actors. Often, international environmental treaties require states to operationalize these principles in their domestic legal framework in the form of legislation. Hence, it is difficult to enforce a right in these international environmental instruments on investors as it is unlikely that they give rise to any obligations on the investors' part.[93]

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[87] G.A. Res. 217 (III) A, Universal Declaration on Human Rights (Dec. 12, 1948).

[88] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 6 I.L.M. 360, 993 U.N.T.S. 3.

[89] *Urbaser*, Award, ¶ 1196–97; Edward Guntrip, *Urbaser v. Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?*, EUR. J. OF INT. L. (2017).

[90] *Urbaser*, Award, ¶ 1200.

[91] *Id.*

[92] *Id.* ¶ 1199 (emphasis added).

[93] Kate Parlett & Sara Ewad, Protection of the environment in investment arbitration–A Double Edged Sword, KLUWER ARB. BLOG, Aug. 22, 2017, http://arbitrationblog.kluwerarbitration.com

IV. THE WAY FORWARD? AN ANALYSIS OF THE CASES AND POTENTIAL AVENUES FOR CLIMATE CHANGE STANDARDS TO OPERATE AS JUSTIFICATIONS

Preliminarily, a large majority of international investment tribunals still do not refer to international climate instruments, which demonstrates skepticism towards referring to international non-investment treaties or obligations within the international investment framework.[94] However, such a view is changing because of dramatic changes taking place in the field. The argument that is advanced in this paper is that climate change is a global phenomenon—given that a state can take regulatory action with respect to a domestic situation concerning environmental protection, *a fortiori*, even greater heed must be given to the prevention of climate change as it implicates global interests.

Newer awards show a definite shift towards recognizing the applicability of international environmental obligations and climate change standards when tribunals are faced with such arguments. Previously, tribunals declined to address the potential relevance of international environmental treaties even when the opportunity was presented for them to do so. As seen in *Santa Elena* and *Metalclad*, the tribunals considered the international environmental treaties and obligations irrelevant to the legal analysis of whether the investment treaty had been violated even though the Convention on Biological Diversity could have been applicable. However, with *S.D. Myers* and the advent of the recent awards in *Burlington*, *Cortec Mining*, and *Urbaser*, the tribunals did not hesitate to consider the applicability and effect of the international non-investment obligation. In light of the shifting attitude towards recognizing climate change obligations within the international investment framework, this paper enunciates several avenues in which international environmental obligations and even more so, climate change standards, could operate as independent investment treaty violations.

This view is advanced first on the ethical consideration that climate change presents such a human catastrophe that it must be given greater prominence than

/2017/08/22/protection-environment-investment-arbitration-double-edged-sword/.

[94] ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW 259 (2012).

investment protection which serves only the immediate interests of foreign investors. As a corollary, it is also on ethical grounds that climate change needs to be given greater prominence than environmental protection within a state as such environmental disasters within a state also implicate climate change.

Second, the existence of legal arguments as enunciated in cases such as *Burlington* and *Urbaser* substantiates these ethical considerations. It is but a small step to take that the reasoning in these awards should be extended to cover issues of climate change. However, more needs to be done to establish climate change as preceding investment protection by, at its highest, making it an independent factor that must be elevated in the hierarchy of precedence of norms to the highest position displacing investment protection as a value by far.

A. *Climate Change as an Independent Justification against Investment Treaty Violations*

1. Express Treaty Provisions

The most direct way for climate change standards to operate as justifications would be for states to (a) expressly provide for treaty provisions concerning climate change, or (b) draft treaty provisions which explicitly set out the relationship between the investment treaty and other international environmental instruments. Given that text of the treaty is the first port of call when interpreting a treaty provision, express provisions would empower tribunals to apply climate change standards as justifications and would encourage states to raise such arguments in favor of the global community interest.

(i) Treaties with Express Provisions Concerning Climate Change

Currently, the way in which treaties address climate change is patently inadequate for it to form an independent justification for violating treaty provisions.[95] In most treaties that contemplate climate change, it is often expressed only in the preamble of the treaty. For example, the Canadian Model

Foreign Investment Promotion and Protection Agreement ("FIPA") emphasizes the

[95] Markus W. Gehring & Avidan Kent, *International Investment Agreements and the Emerging Green Economy: Rising to the Challenge*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONALIST PERSPECTIVES (Freya Baetens ed., 2013).

"promotion of sustainable development"[96] and the 2009 Japan-Switzerland Free Trade Agreement (FTA) encourages the promotion of objectives dealing with climate change.

Certain treaties such as the 2004 US Model BIT do not address climate change, but state that parties are "desiring to achieve these objectives in a manner consistent with the protection of . . . the environment."[97] The Energy Charter Treaty addresses climate change explicitly, but only as "recalling the [UNFCCC], the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international agreements with energy-related aspects."[98] However, these, at best, provide context in interpreting the provisions of the treaty, but do not carve out a justification or defense for the state.

Nevertheless, as the practice of "balanced" investment treaties evolve, stronger statements on environmental protection, human rights and climate change could be expected, as evinced by the following examples.

First, the new 2018 Netherlands Draft Model BIT refers to sustainable development not only in its Preamble but has a whole article devoted to it.[99] Furthermore, Art. 7 refers to international standards on corporate responsibility. These standards also require a foreign investor to act in conformity with conventions that contain references to environmental protection.[100]

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[96] Canada 2004 Model Foreign Investment Promotion and Protection Agreement, www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index .aspx.

[97] Gehring & Kent, *supra* note 99, at 203.

[98] Energy Charter Treaty, Dec. 17, 1994, Preamble.

[99] 2018 Netherlands Draft Model BIT, art. 6(5) ("Within the scope and application of this Agreement, the Contracting Parties reaffirm their obligations under the multilateral agreements in the field of environmental protection, labor standards and the protection of human rights to which they are party, such as the Paris Agreement, the fundamental ILO Conventions and the Universal Declaration of Human Rights. Furthermore, each Contracting Party shall continue to make sustained efforts towards ratifying the fundamental ILO Conventions that it has not yet ratified.").

[100] *Id.* at art. 7 ("The Contracting Parties reaffirm the importance of each Contracting Party to encourage investors operating within its territory or subject to its jurisdiction to voluntarily *incorporate into their internal policies those internationally recognized standards*, guidelines and principles of corporate social responsibility that have been endorsed or are supported by

Second, the Singapore-Indonesia BIT,[101] which came into force in 2021, affirms the parties' right to regulate environmental concerns.[102] Art. 11(2) also expressly confirms that regulating through the modification of laws, even if it negatively affects the investment, would not amount to a breach of the BIT.[103]

Third, the draft Pan-African Investment Code provides an entire article (Art. 37) on the environment and discourages member states from relaxing or waiving compliance with domestic environmental legislation for investments. Art. 37 also mandates investors to comply with environmental legislation, and to "perform their activities, protect the environment and where such activities cause damages to the environment, take reasonable steps to restore it as far as possible".[104]

Finally, the Morocco-Nigeria BIT,[105] signed in 2016, acknowledges the applicability of domestic environmental law, policies and multilateral environmental agreements (which includes climate change agreements) in the state's right to regulate.[106] Investors are also obliged to adhere to environmental legislation, which would include environmental assessment screenings and assessment processes.[107] Art. 4(4) also establishes a Joint Committee to monitor the implementation and execution of the BIT, which would operate to ensure that investors comply with their environmental and climate change obligations under the BIT.

In any event, to effectively operationalize climate change in an express provision,

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that Party, such as the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, and the Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and business.").

[101] Agreement Between the Government of the Republic of Singapore and the Government of the Republic of Indonesia for the Promotion and Protection of Investments, Nov. 10, 2018 (entered into force on March 9, 2021).

[102] *Id.* at art. 11(1).

[103] *Id.* at art. 11(2).

[104] African Union Commission, *Draft Pan-African Investment Code*, AU/STC/FMEPI/EXP/18(II) (26 March 2016).

[105] Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, Dec. 3, 2016.

[106] *Id.* at art. 13.

[107] *Id.* at art. 14.

climate change would have to appear as an exception in an international agreement. Perhaps it could be incorporated within the general exception provision which is modelled after Art. XX of the General Agreements on Tariffs and Trade (GATT), which would place climate change as an exception to the IIA's expropriation or treatment standard provisions. A modern example of this is reflected in Art. 32 of the 2018 Indian Model BIT,[108] which provides for protecting and conserving the environment as an exception.[109]

Another method would be to include climate change within non-precluded measures ("NPMs"). NPMs are designed to exclude certain areas from the ambit of treaty obligations. With reference to the Germany-Bangladesh BIT, an NPM with climate change would look something like: "measures that must be taken for reasons of climate change, public health or morality shall not be deemed expropriatory within the meaning of Article X."[110]

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[108] The general exception provision in the Indian Model Treaty is as follows:

> Art. 32 General Exceptions:
>
> 32.1 Nothing in this Treaty shall be construed to prevent the adoption or enforcement by a Party of measures of general applicability applied on a non- discriminatory basis that are necessary to:
>
> (i) protect public morals or maintaining public order;
>
> (ii) protect human, animal or plant life or health;
>
> (iii) ensure compliance with law and regulations that are not inconsistent with the provisions of this Agreement;
>
> (iv) protect and conserve the environment, including all living and non-living natural resources;
>
> (v) protect national treasures or monuments of artistic, cultural, historic or archaeological value.

[109] For examples and detailed discussion, see Andrew Newcombe, *General Exceptions in International Investment Agreements*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 358 (Cordonier Segger et al. eds., 2010); *see also* The Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018.

[110] *See*, *e.g.*, Agreement between the Federal Republic of Germany and the People's Republic of Bangladesh concerning the Promotion and Reciprocal Protection of Investments, May 6, 1981, art. 2; Treaty Between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments, Oct. 27, 1982, art. X.

(ii) Treaty Provisions Which Explicitly Set Out the Relationship between the Investment Treaty and Other International Environmental Instruments

Another method for climate change to feature in investment treaties is for there to be explicit rules and provisions on the relationship between the investment treaty and other relevant international environmental instruments, and an apt example of this would be NAFTA Arts. 103 and 104 as seen in *S.D. Myers*.[111] Indeed, this rule is encapsulated under VCLT Art. 30 which provides that if two treaties address similar subject-matters, and the parties have expressed their preference that one treaty is subject to the other, VCLT Art. 30(2)[112] provides that the normative order as specified by the contracting parties is to be adhered to.[113] NAFTA Art. 104 evinces the parties' intention concerning the relationship between the NAFTA treaty and other international environmental agreements:

> Article 104: Relation to Environmental and Conservation Agreements
>
> 1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:
>
> a) The Convention on International Trade in Endangered Species of Wild Fauna and Flora . . .
>
> b) the Montreal Protocol on Substances that Deplete the Ozone Layer . . .
>
> c) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. . . .
>
> Such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

Such an explicit detailing of the relationship between the investment treaty and

[111] *See* above III.B.

[112] VCLT, *supra* note 8, at art. 30(2) ("When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.").

[113] Moshe Hirsch, *Interactions between Investment and Non-Investment Obligations*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 5 (Peter Muchlinski et al. eds., 2008).

international environmental treaties (which encompass climate change standards) would leave little doubt as to when certain obligations would prevail over others.

2. Climate Change as *Jus Cogen* Norms Which Trump Investment Treaty Provisions

Preliminarily, it would be appropriate to address the public international law principles on dealing with conflicting international rules. At the outset, not all international investment obligations and international climate change obligations are contradictory–they could in fact complement each other,[114] and the discussion below will examine how climate change standards can be interpreted under investment treaty obligations.[115] However, when obligations are contradictory, and there are no provisions governing the hierarchy in the IIA, public international law has developed a body of rules that regulate inconsistencies among international legal rules.[116] Two such rules are relevant in this analysis which could potentially be invoked by parties in future investment disputes to bring in climate change standards.

(i) *Jus Cogen* Norms Prevail over Other Rules of International Law

It is a trite rule that *jus cogen* norms prevail over all other rules of international law if inconsistent.[117] VCLT Art. 53 codifies this rule,[118] which has been confirmed by

[114] *Id.* at 1–22 ("Hirsch points out that legal rules deriving from investment and non-investment international fields can reinforce each other. International tribunals may in some cases interpret international investment treaties' obligations in the light of non-investment treaties. In Hirsch's view, even where investment and non-investment rules are clearly inconsistent, this conflict may lead not only to a normative determination of which rule prevails, but additional legal consequences of such incompatibility can be reflected in the remedies determination or the burden of proof"); M. Feigerlova and A. L. Maltais, *Obligations Undertaken by States under International Conventions for the Protection of Cultural Rights and the Environment, to What Extent they Constitute a Limitation to Investor's Rights under Bilateral or Multilateral Investment Treaties and Investment Contracts?*, TRADE AND INVESTMENT LAW CLINIC, THE GRADUATE INSTITUTE CENTRE FOR TRADE AND ECONOMIC INTEGRATION (2012).

[115] *See* below Section IV.B.

[116] Hirsch, *supra* note 117, at 3; Feigerlova & Maltais, *supra* note 118, at 23.

[117] VCLT, *supra* note 8, at art. 53; OPPENHEIM'S INTERNATIONAL LAW 8 (Robert Jennings & Arthur Watts eds., 1996).

[118] VCLT, *supra* note 8, at art. 53 ("TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ('JUS COGENS') . . . A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no

multiple international courts and tribunals.[119] However, beyond the minimum accepted core[120] there is no clear consensus on which norms qualify as *jus cogens*.[121] As posited by Dr. Uhlmann, a *jus cogen* norm must have the following four characteristics:[122]

> [F]irst, the object and purpose of the norm must be the protection of a state community interest. Second, the norm must have a foundation in morality. Third, the norm must be of an absolute nature. Fourth, the vast majority of states must agree to the peremptory nature of the international norm.

International environmental protection was first mentioned as potentially *jus cogens* in the Advisory Opinion of the ICJ on the legality of nuclear weapons.[123] Judge Weeramantry (in his dissenting opinion) stated that state obligations concerning the environment "may range from obligations *erga omnes*, through obligations which are in the nature of *jus cogens*, all the way up to the level of international crime."[124] This view has been echoed by several other academics.[125] Climate change compliance (as

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derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").

[119] *See*, *e.g.*, Case T-253/02, Ayadi v. Council of the European Union, 2006 E.C.R. II-02139, ¶¶ 116, 146; Case T-315/01, Kadi v. Council of European Union, 2005 E.C.R. II-03649, ¶¶ 226, 230 (". . . jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible. . . . International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of jus cogens. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.").

[120] The minimum accepted core includes prohibitions of genocide, aggression, and slavery.

[121] SIOBHAN MCINERNEY-LANKFORD ET AL., HUMAN RIGHTS AND CLIMATE CHANGE, A REVIEW OF THE INTERNATIONAL LEGAL DIMENSIONS 23 (2011).

[122] Eva M. Kornicker Uhlmann, *State Community Interests, Jus Cogens and Protection of the Global Environment: Developing Criteria for Peremptory Norms*, 11 GEO. INT'L ENVTL. L. REV. 101, 104 (1998).

[123] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) (Weeramantry, J., dissenting).

[124] *Id.* at 78.

[125] Jutta Brunnee, *Common Interest—Echoes From an Empty Shell?, Some Thoughts on Common Interest and International Environmental Law*, 49 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 791 (1989); LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS (1988); Uhlmann, *supra*

characterized by Dr. Uhlmann as the "general prohibition of causing or not preventing environmental damage that threatens the international community")[126] ticks all the four characteristics of a *jus cogen* norm.

First, as enunciated above, climate change is undoubtedly a global community interest.

Second, climate change compliance is necessary for "the permanent preservation of a sound environment for future generations which has a foundation in morality."[127]

Third, the most convincing indication that the general norm of prohibiting environmental damage that implicates the international community is of an absolute character is encapsulated in the ILC Draft Articles on State Responsibility.[128] The Commission categorized "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere" as an international crime.[129] Despite the unclear relationship between international crimes and *jus cogens*, it is widely recognized that "an obligation whose breach is considered an international crime will usually be of a peremptory character."[130] Furthermore, climate change and the preservation of biological diversity has been declared as common concerns of mankind.

Fourth, consent is difficult to derive from state practice but can be evinced through the widespread ratification of the UNFCCC, Kyoto Protocol and Paris Agreement.[131] Hence, it is arguable that the general prohibition of causing or not preventing environmental damage that threatens the international community

note 126, at 115.

[126] Uhlmann, *supra* note 126, at 122.

[127] *Id.* at 118.

[128] Report of the International Law Commission, chapter IV.E.1, U.N. Doc. A/56/10 (November 2001), Supplement No. 10 (A/56/10).

[129] *Id.* at 113 n.651.

[130] Uhlmann, *supra* note 126, at 123.

[131] As highlighted above, 197 parties joined the UNFCCC, 181 parties joined the Paris Agreement and 192 parties joined the Kyoto Protocol.

(which necessitates compliance with climate change standards), is a *jus cogen* norm and should prevail over investment treaty provisions.

(ii) In the Absence of *Jus Cogen* Norms, the UN Charter Prevails

In the absence of *jus cogen* norms, the UN Charter's provisions prevail over inconsistencies in other treaties. Given that the UN Charter provides for certain human rights, compliance with climate change can be subsumed under a fundamental human right, that of the right to life. The right to life is protected under every international human rights convention. It guarantees not only the right for one to not be arbitrarily deprived of life, but also requires states to provide a fundamental level of environmental protection.[132]

3. Direct Application of Climate Change Standards in International Investment Disputes

International environmental instruments and the relevant climate change standards can be directly applicable in investment disputes in three ways. First, they are within the parties' choice of law.[133] Choice of law clauses often include applicable rules or norms of international law or host state law, and climate change standards could thus form part of these laws. Second, even without parties providing for a choice of law clause, Art. 42(1) of the ICSID Convention provides as a default that the tribunal "shall apply . . . such rules of international law as may be applicable."[134] Third, it has been argued by Professor Dupuy that even without a reference to international law, an arbitrator can refer to the obligations the state owes under international law through principles of transnational public policy.[135]

Although no known tribunal has directly applied international climate change obligations, with the advent of cases such as *Urbaser* and *Burlington*, it can be argued

[132] Uhlmann, *supra* note 126, at 135.

[133] Feigerlova & Maltais, *supra* note 118, at 22.

[134] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, art. 42(1), 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159.

[135] Pierre-Marie Dupuy, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 25 (Pierre-Marie Dupuy et al. eds., 2009).

that on principle, investors could be subject to the obligations under international environmental treaties which the state is party to.

However, this could prove challenging given that most international environmental treaties do not provide for obligations directly imposed on non-state actors. Rather, international environmental treaties oblige states to establish a domestic regulatory framework to operationalize such climate change standards.[136] Take for example, the UNFCCC, which encapsulates a state's environmental and climate change obligations. The UNFCCC states that parties "should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects" and to "formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change."[137] Given that the obligations are only placed on the states, it is difficult to directly implicate the investor in relation to compliance with climate change standards.

B. *Climate Change Standards as a Justification within the Interpretation of International Investment Treaty Provisions*

International environmental instruments and climate change standards could be considered within the investment legal framework by interpreting the IIA provisions (which the investor's claims are based on) in light of international climate change instruments and obligations. This systemic integration[138] of climate change standards is justified under VCLT Art. 31(3)(c), which mandates that "*any relevant rules of international law applicable in the relations between the parties*" shall be taken into account when interpreting a treaty provision. As such, the investment treaty is not a self-contained regime, but must be integrated with the international law framework.[139] For climate change standards to qualify under Art. 31(3)(c), two elements must be fulfilled: (1) it must be a relevant rule, and (2) the rule must be

[136] Parlett & Ewad, *supra* note 97.

[137] UNFCCC, *supra* note 2, at arts. 3(3) and 4(1)(b).

[138] UNFCCC, *supra* note 2, at art. 4.

[139] Feigerlova & Maltais, *supra* note 118, at 30.

applicable in the relations between the parties.

Element (1) is relatively uncontentious, the UNFCCC, Kyoto Protocol and Paris Agreement are treaties which form "rules of international law" and their widespread ratification emphasizes their relevance. Concerning element (2), in the context of investment disputes, the scenario is slightly complex given that parties to the external treaty will be different than the parties in the dispute because one party will always be a non-state actor. Hence, concerning BITs, state parties to the underlying BIT are to be taken as the parties in the determination of whether a rule is applicable between the parties under VCLT Art. 31(3)(c).[140] As such, climate change standards must be factored into the interpretation of treaty provisions if both states to the BIT are parties to the relevant international environment treaty.

If, however, one state is a party to the external treaty, while the other state is not, it is submitted that the fact that the duty to comply with climate change standards is an *erga omnes* obligation[141] would make the obligation to comply with climate change standards applicable to all states regardless of a treaty.

Hence, the next question is: what weight should be accorded to the compliance with climate change standards in the interpretive process of IIA provisions? The following sections examine possible avenues that climate change standards can feature to protect both the climate as well as investors.

1. Expropriation

Expropriation of an investor's property is not permitted under international law. An expropriation is only lawful if it is (1) made for a public purpose, (2) in accordance with due process, (3) in a non-arbitrary and non-discriminatory manner and (4) on payment of prompt, adequate and effective compensation.[142] It is not unimaginable

[140] Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 990 (Christina Binder et al. eds., 2009); Feigerlova & Maltais, *supra* note 118, at 30.

[141] *See* IV.A.1.b above for *jus cogens* analysis; *see also* MCINERNEY-LANKFORD ET AL., *supra* note 125, at 255.

[142] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 90 (2012).

that measures implemented by the state to comply with climate change obligations could result in potentially expropriatory effects to the investor. For example, in the *Santa Elena* and *Metalclad* cases, the revocation and denial of permits were viewed as expropriatory as it substantially deprived investors of their investment. Nevertheless, there are three possible avenues in which climate change instruments may have an impact on the expropriation analysis.

First, highlighting an obligation to comply with international climate change treaties before tribunals would legitimize a state's measures. If the motivation behind a measure taken by the state was for the global community interest concerning climate change, it would confirm that the measure was made for a public purpose, fulfilling the first requirement for a lawful expropriation. Indeed, in *Southern Pacific Properties v. Egypt*, the exercise of the State's right in compliance with its obligations under the UNESCO Convention was found to be "exercised for a public purpose, namely, the preservation and protection of antiquities in the area."[143]

Second, international environmental and climate change obligations could aid the tribunal in finding that the state's measure was a legitimate, non-compensable regulatory measure under the police powers doctrine. The police powers doctrine operates as an exception to expropriation under customary international law—the host state is absolved from its obligation to compensate where economic injury results from a legitimate regulatory measure which is not discriminatory, in accordance with due process, and proportionate.[144] The *Methanex* award[145] is apposite in that the tribunal found that the environmental measures were bona fide regulatory measures that did not require compensation.[146] The presence of

[143] Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award, ¶ 158 (May 20, 1992).

[144] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, ¶ 262 (Mar. 17, 2006); JORGE E. VINUALES ET AL., THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 329 (2014).

[145] Methanex v. United States, UNCITRAL, Final Award on Jurisdiction and the Merits, ¶ 15 (Aug. 3, 2005).

[146] *Id.* ("For reasons elaborated here and earlier in this Award, the tribunal concludes that the California ban was made for a public purpose, was non-discriminatory and was accomplished with due process. Hence, Methanex's central claim under Article 1110(1) of expropriation under

international climate change obligations, and the fact that it is a global community interest may ultimately swing the tribunal in finding that it was a legitimate non-compensable regulatory measure and not a compensable expropriation.

Third, concerning the requirement of non-discrimination, climate change obligations may be employed by the state to show why two investors were not in "like circumstances." Generally, a measure is discriminatory if two investors in "like circumstances" are treated in inequivalent manners—the purpose of the measure is important in determining if the investors were in "like circumstances."[147] Hence, if the purpose of the measure was for environmental or climate change reasons, an investor would not be in like circumstances with another investor that did not engage such climate change concerns. In *Parkerings v. Lithuania*,[148] the tribunal rejected the Claimant's allegation that it had been discriminated against because the comparative circumstances were different. Instead, the tribunal concluded that the State had "legitimate grounds to distinguish between the projects" due to "historical and archaeological preservation and environmental protection."[149] Hence, the fact that the site was protected for environmental reasons was decisive in finding that there had been no discrimination.

2. Fair and Equitable Treatment

The fair and equitable treatment standard has not been exhaustively defined, but international investment jurisprudence has generally recognized that it comprises that of legitimate expectations of the investor.[150] The fact that a state is party to an

one of the three forms of action in that provision fails. From the standpoint of international law, the California ban was a lawful regulation and not an expropriation.").

[147] Dr. A F.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law or Foreign Investment: An Overview*, J. OF TRANSNAT'L L. & POL'Y 59 (1998).

[148] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (Sept. 11, 2007).

[149] *Id.* ¶ 396.

[150] *See, e.g.*, Saluka v. Czech Republic, UNCITRAL, Partial Award (Mar. 17, 2006); El Paso v. Argentina, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011); Occidental v. Ecuador 2011, UNCITRAL, Award (July 1, 2004); Bilcon of Delaware et al v. Govt. of Canada, PCA Case No. 2009-04, Award (Jan. 10, 2019).

international environmental treaty or has enacted domestic laws in accordance with its international obligations would play a pivotal role in determining the investor's legitimate expectations.

Taking the UNFCCC as an example, if a state is party to the UNFCCC, an investor should not expect climate change measures to remain stagnant in the state. After all, parties to the UNFCCC are obliged to "anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects."[151] Conversely, the investor should expect regulations and restrictions to be adopted in compliance with the state's commitment pursuant to the UNFCCC. For example, in *Methanex*, the tribunal found that environmental regulations had been foreseeable by the investor.[152] Hence, it is submitted that the investor, being aware of the possibility of the state taking action to reduce harmful environmental impacts and enforcing measures necessary to protect the climate, cannot allege that it had legitimate expectations that the state would not interfere in such a way with its investment. Rather, the regulatory measures by the state would come as no surprise to the claimant and as a result, no legitimate expectations can arise.

3. Counterclaims

Notwithstanding the debate as to whether counterclaims are possible under BITs (which is outside the purview of this paper), counterclaims may operate as a mechanism for states to enforce its international environmental obligations on investors. While not a justification to treaty violations *per se*, the fact that states have the opportunity to counterclaim acts to alleviate the compensation due to the investor and the practical effect of counterclaiming might be similar to justifying a treaty violation, *i.e.*, that on balance the state does not suffer monetary loss.

Given the advent of *Burlington* and *Urbaser*, tribunals seem more willing to find that investors are obligated to adhere to certain norms or standards at international law or encapsulated in the domestic framework. Both tribunals stated that the investors were liable for environmental harm under the domestic framework

[151] UNFCCC, *supra* note 2, arts. 3(1) & (3).

[152] *Methanex*, Award.

designed to fulfil a state's obligation to comply with its international treaty obligations.[153] Essentially, both tribunals found the investors liable for their failure to comply with international standards, even though it was not explicitly stated.

In the same vein, if tribunals express willingness to award states compensation, it could provide the impetus to encourage investors to comply with international climate change standards. If investors are cognizant that they could potentially be liable for environmental harm, they are more likely to prioritize environmental protection in their investments. Minimally, investors would be incentivized to adhere to domestic climate change regulations which would allow states to implement regulations in compliance with their international environmental obligations.[154]

4. Specific Scenario: Investment Contracts

Generally, the presence of an investment contract between the state and the investor does not preclude the infringement of the investor's rights when made on legitimate grounds such as compliance with climate change (as this paper argues). Indeed, this seems to be the case in *Southern Pacific Properties*, where the tribunal found that the same analysis was applicable regardless of the presence or absence of a contract: measures taken by the state to safeguard cultural heritage are still legitimate in the presence of an investor contract that is breached by the state, provided that such measures are proportionate and non-discriminatory.[155]

However, it is important to note that if a stabilization clause is present, this might prevent a state from raising its obligations to comply with climate change standards as a potential justification to infringements on investor rights. A stabilization clause usually freezes the law applicable to the contract as that when the investor invested in the state—this would exempt investors from regulatory change including the undertaking of new international obligations such as compliance with climate change standards.[156] However, compliance with climate change might still operate despite

[153] *See* above at Section III.C.

[154] Sundararajan, *supra* note 74.

[155] *Southern Pacific Properties*, Award; Feigerlova & Maltais, *supra* note 118, at 32.

[156] Katja Gehne & Romulo Brillo, *Stabilization Clauses in International Investment Law: Beyond*

the presence of a stabilization clause—movements against the position that a stabilization clause freezes the law are visible in the literature generated during the discussions on the Ruggie Report on Business Ethics where contrary ideas were floated.[157]

V. CONCLUSION

While recognition of compliance with climate change standards as a justification is still in its formative stages, recent investment jurisprudence, culminating into *Burlington* and *Urbaser* has evinced a definite shift towards giving greater weight to global community interests as encapsulated within international non-investment instruments. The changing attitude in both tribunals and states hint towards a positive trend towards recognizing the prominence that climate change should be accorded over investment protection. This could not be timelier, given the potentially catastrophic outcomes if climate change is ignored, which would implicate all of humanity.

As this paper has explored, several promising avenues are present for states and tribunals to recognize climate change standards as justifications to investment treaty violations. To recapitulate, these avenues include:

1. Express provision of treaty provisions concerning climate change or to draft treaty provisions which explicitly set out the relationship between the investment treaty and other international climate change standards.
2. Climate change as *jus cogen* norms which trump investment treaty provisions and hence is a justification to investment treaty violations.
3. The direct application of climate change standards in international investment disputes by parties and the tribunal.
4. Climate change as a justification to expropriation: (a) an obligation to comply with international climate change treaties would legitimize a state's

Balancing and FET, INST. OF ECON. L., TRANSNAT'L ECON. L. RES. CTR. GER., March 2017, at 7.

[157] *See generally* ANDREA SHEMBERG, STABILIZATION CLAUSES AND HUMAN RIGHTS (2008), https://www.ifc.org/wps/wcm/connect/0883d81a-e00a-4551-b2b9-46641e5a9bba/Stabilization %2BPaper.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-0883d81a-e00a-4551-b2b9-46641e5 a9bba-jqeww2e.

expropriatory measure; (b) climate change obligations could aid the tribunal in finding that the state's measure was a legitimate, non-compensable regulatory measure under the police powers doctrine and; (c) climate change obligations may be employed by the state to show why two investors are not in "like circumstances."

5. Climate change obligations provide reason that regulatory measures by a state would be expected by the claimant and hence no legitimate expectations can arise under the fair and equitable treatment standard.
6. Counterclaims may operate as a mechanism for states to enforce their international environmental obligations against investors.

Expectantly, these avenues would shed more light on climate change in the international investment regime and provide greater improvements to *both* the legal and environmental climate in the years to come.

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