CARVE-OUTS – A RESCUE TO THE FAILING PARIS AGREEMENT

Abhimanyu Dharma, B.B.A LL.B. (Hons), O.P. Jindal Global University (Jindal Global Law School)

ABSTRACT

This paper examines international law tensions pertinent to climate action and investment protection. The Paris Agreement compels nations to take Nationally Determined Contributions (NDCs) while combatting climate change, but Investor-State Dispute Settlement (ISDS) often compromises efforts. Investors often sue states, especially oil and gas investors, for their climate policies under Bilateral Investment Treaties, invoking "regulatory chill" and financial burdens on host states. The paper argues that climate carve-outs in investment treaties should be adopted to protect States' space for regulation in climate action, looking at advantages in comparison to the general exception clause and potential risks.

I. Introduction

Long before the international community, envisioned the Paris Agreement a series of ICJ decisions started recognising an international responsibility for "transboundary environment harm."[1] In Corfu Channel, the ICJ stated "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[2] Reaffirming its view, in its Opinion regarding nuclear weapons the ICJ again held that "the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now a part of the corpus of international law relating to the environment"[3] Over time this interpretation turned into a custom of a positive duty on the part of a State to act with due diligence. This duty directs that "States must act with due diligence in order to ensure to the highest possible extent that dangerous activities which are being carried out on their territory or within their jurisdiction do not cause harmful consequences."[4] Although this principle and general responsibility to prevent climate harm did not achieve erga omnes status, over time climate protection became the need of the hour. In 2016, 196 states signed and ratified the Paris Agreement which allowed the parties to individually state their "Nationally Determined Contributions (NDC)", which entails a State's plan on how to reduce/mitigate greenhouse gas emissions. This was seen as a big step in holding the increase in the global average temperature to well below 2°C above pre-industrial levels" and pursuing efforts "to limit the temperature increase to 1.5°C above pre-industrial levels." However, efforts of the global south and capital importing States to live up to their NDCs under the Paris Agreement go in vain. These States are often subject to the might of Investors who seek refugee under a Bilateral Investment Treaty or Investment Chapter of other treaties. When a State purports to oblige with their NDCs through changes in domestic law or policy which affect Investors of the Oil and Gas industry in the host State, situations may arise and Investors can claim compensation under the terms of the treaty related to, expropriation

[1]Jean, M. (2021) 'Customary International Law and the Challenge of Climate Change: How to Deal with the Stagnation of the Paris Agreement? ', *New York University Journal of International Law and Politics*, 54. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3942517.

[2] *United Kingdom of Great Britian and Northern Ireland v. People's Republic of Albania* (1949) *International Court of Justice*. Available at: https://www.icj-cij.org/sites/default/files/case-related/1/001-19491215-JUD-01-00-EN.pdf (Accessed: 10 December 2024).

[3] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) *International Court of Justice* 226, paragraph 29

[4] Dubois, S. (2018) *Climate Change Litigation*, *Oxford Public International Law*. Available at: https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3461.013.3461/law-mpeipro-e3461 (Accessed: 10 December 2024).

(direct/indirect) or the violation of fair and equitable treatment standards, MFN or NT standards through arbitral proceedings. These proceedings are highly cost-intensive and act as an encumbrance for States as they usually result in an Award entitling compensation to the investor and even though post this the State can enact its domestic laws to favour their NDCs, it then involves a huge sum of money to be paid to investors in turn either to satisfy the arbitral award or to compensate the investors beforehand. In the end, states usually end up either paying up or terminating their BITs, termination of BIT is not a problem for developed global north such as the EU's exit from the ECT but for Global South capital-importing countries a decision to either pay money or terminate involves several important economic considerations and States usually end up not following up with their NDCs under the Paris Agreement which pushes the "net carbon zero" deadline of 2050 more further.

II. The Paris Agreement and the host state "regulatory chill"

There lies an underlying risk of an investment treaty inhibiting states from making decisions concerning their domestic laws in favour of climate change mitigation by making such decisions for States costlier. Investment treaties containing Investor-State Dispute Settlement Clauses are one of the main culprits for the same. The ISDS mechanism exists so that Investors aggrieved by the actions of the Host state can bring their claims to an arbitral tribunal which is outside the purview of treaty parties. While ISDS assures investors that the value of their investment in a foreign country will not be eroded because of unjust actions of the host State and assists them in recovering any loss in value of their investment, the mechanism acts as a bottleneck for the entire International Community to achieve their NDCs under the Paris Agreement when an Investor from the Non- Renewable Energy sector raises a claim regarding expropriation or violation of FET standards. Furthermore, claims under ISDS unlike other international law claims are highly enforceable and if states are unable or unwilling to pay awards they are at the helm of Investors and can seize the State's assets in other countries.[5] Hence even if a state can change its policy for climate change mitigation if an ISDS award is made against them it incurs a financial loss and such a loss is especially a burden for global south nations which are developing or underdeveloped.

[5] Bonnitcha, J. (2017) *Assessing the impacts of investment treaties: Overview of the Evidence*, *International Institute for Sustainable Development*. Available at: https://www.iisd.org/system/files/publications/assessing-impacts-investment-treaties.pdf (Accessed: 10 December 2024).
accessed 26 September 2024.

Post the signing of the Paris Agreement, during the year 2022 when states started to act according to their NDCs two cases were filed against the Netherlands under the ISDS mechanism in both cases the Investors RWE AG and Uniper SE. Italy was also held to have violated the ECT and was ordered to pay $190 Million in damages to Rockhopper Italia S.p.A. This trend has been continuous and on analysing statistics[6], a majority of in the range of 25%-28% of cases from 2021 to 2024 heard at ICSID pertain to the Oil, Gas & Mining Sector and around the range 15%- 17% pertain to the Electric Power sector.[7] This increase in ISDS claims against investors also increases the caseloads against States which drag on for a long period and due to that, States usually adopt a 'wait and see' approach before implementing any other climate mitigation measures.[8] An increasing amount of literature related to ISDS claims and climate mitigation points towards the issue of a "regulatory chill" that States face in complying with their other climate treaty obligations on account of ISDS claims. States either drop or delay their climate mitigation plans under threat of ISDS. These regulatory chills limit the International Community's ability to starve off climate change and to keep global warming below 1.5℃ or even 2℃.[9] Evidence of this regulatory chill can be seen in two categories, 1) cases in which the Investors have withdrawn claims after the host states drop or delay their climate action plans. and 2) A mere threat of ISDS from investors.[10] Instances of the former can be seen when TransCanada[11] withdrew its $15 Billion claim against the USA under NAFTA after Trump was elected in 2016 and dropped Obama's climate action objection to granting a construction permit for a pipeline to the investor or when Westmoreland[12] who claimed $357 million for violation of FET standard under NAFTA when Canada decided to initiate a coal-power plant phase-out or when Lana Energy Comp[13] withdrew their claims after the Canadian

[6] World Bank, 'The ICSID Caseload - Statistics | ICSID' (*icsid.worldbank.org*) <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics>

[7] Various ICISD caseload statistic reports. Available at https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics accessed 29 September 2024

[8] Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2017) 7 Transnational Environmental Law 229.

[9] Kyla Tienhaara and others, 'Investor-State Dispute Settlement: Obstructing a Just Energy Transition' (2022) 23 Climate Policy 1 <article: https://doi.org/10.1080/14693062.2022.2153102> accessed 27 September 2024.

[10] Lisa E Sachs, Lise Johnson and Ella Merrill, 'Environmental Injustice: How Treaties Undermine Human Rights Related to the Environment' (*Scholarship Archive*2020) <https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/71/?utm_source=scholarship.law.columbia.edu%2Fsustainable_investment_staffpubs%2F71&utm_medium=PDF&utm_campaign=PDFCoverPages> accessed 27 September 2024.

[11] TransCanada v. United States, Case No. ARB/16/21 (ICSID. 2016), Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of NAFTA

[12] Westmoreland v. Canada (UNCITRAL, 2018)

[13] The Canadian Press, 'Alberta Oil Sands Project Wins Regulator Approval Despite Indigenous Objections,' The Globe and Mail (13 June 2018). https://www.theglobeandmail.com/business/article-alberta-oil-sands-project-wins-regulator-approval-despite-indigenous/ accessed 29 September 2024

government approved their Oil project after unduly delaying it for a long period under the guise of government's environmental policy. In the latter category, Vermillion an Oil and Gas investor in France threatened arbitration under the ECT when a French minister sponsored a law to end fossil fuel extraction.[14] Eventually, this law was passed although its object to ban fossil fuel extraction was hampered and it now allowed the renewal of oil exploitation permits. These cases are some examples of a vast category of ISDS claims where State climate mitigation action is stifled on account of commercial and monetary claims.

While the current state of the regulatory chill is highly concerning, policy space for investment treaties has been developing and various ideas have been thought out by academics and implemented in treaties. Certain examples to foster and aid climate mitigation on the part of States include GATT-styled general exceptions in Investment Treaties or defining obligations of both parties so that "bona fide climate measures would not be found to breach relevant standards" or a more novel approach which is including a carve-out regarding climate change measures within the treaty.[15]

Such a carve-out aims to exclude performance obligations amongst both parties and may even include exclusion from ISDS claims that investors may bring onto host states violating the treaty. The GATT-styled general Article XX exception contains a chapeau which curtails the application of Article XX in case of an arbitrary/discriminative act, or an act disguised as trade restrictions. Then Article XX sets out certain criteria such as public morals, human health etc. which are justifiable exceptions for when a host state may prevent enforcement of their obligations towards the other contracting party.

III. Mismatches in the current ISDS regime – why carve-outs are better than general exceptions.

The current GATT-styled general exceptions in Investment Treaties create more problems than solve, due to complex interpretations by the Tribunal and their inability to exclude all breaches from the purview of the treaty they may not be able to act as a guaranteed defence for host states who take measures for climate action against investors. Furthermore, even the stance of

[14] Vermilion Energy, France, <https ://www.vermilionenergy.com/our-operations/europe/france.cfm> accessed 1 November 2019.
[15] Joshua Paine and Elizabeth Sheargold, 'A Climate Change Carve-out for Investment Treaties' (2023) 26 Journal of International Economic Law <https://academic.oup.com/jiel/article/26/2/285/7071568> accessed 27 September 2024.

the Tribunal may change depending on the wording and drafting of the treaty and they may sometimes also consider general exceptions as a guaranteed counterclaim for host states.[16] To elaborate further it is important to consider the following cases, Burlington[17], Urbaser[18], David Aven[19], and most recently Eco Oro.[20]

To set perspective- Burlington was one of the first cases which addressed the fact that violations of domestic environmental laws by an investor in the host state are enough ground under the BIT for the host state to raise a counterclaim towards their act of expropriation. Following this, in Urbaser, where the investor had alleged expropriation of their water sewage service business under the Argentina-Spain BIT. The Tribunal here held that facets of international law can be invoked to establish investor obligations as "it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law."[21] And they owe environmental obligations towards the host state. Even though the Tribunal did not accept the counterclaim of Ecuador on its merits, they noted that if the act done by the investor "destroyed the enjoyment of human rights" and the environment the negative obligation will be held on the investor not to destroy such enjoyment under International Law.

In David Aven, the Tribunal followed the same line of reasoning and considered Urbaser as a de facto precedent. In this case, Costa Rica contended that under the CAFTA, environmental protection under Chapter XVII superseded investment protection under Chapter X. While not a GATT-styled general exception, Chapter XVII called for the promotion of environmental standards amongst the contracting States and was used as a counterclaim against investor allegations just like a host State would use a GATT-styled general exception as a counterclaim. Here the Tribunal found that the investors had breached customary international law and Chapter XVII environmental protection was a usable ground for a counterclaim by Costa Rica. Even though there was no basis for incorporating the interpretation of principles of international law as the Treaty did not specifically mention anything to that extent, the Tribunal went further in its role as an interpreter and held that since Costa Rica was a party to multilateral

[16] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26
[17] Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5
[18] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26
[19] David R. Aven and Others v. Republic of Costa Rica, ICSID Case No. UNCT/15/3
[20] Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41
[21] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, para 1195

treaties regarding protection of environment and forests and had made domestic laws to that effect, the investor had to oblige with their laws as "erga omnes obligations under the treaty concern general public international law as much as bilateral relations in the FTA."[22]

However, in 2024 the ICISD Tribunal made a ruling in the matter of Eco Oro, where Colombia's counterclaim based on a GATT-styled environmental exception within Article 2201(3) of the Canada-Columbia FTA was denied and they were held to pay compensation to the Investor Eco Oro. The Arbitrators reasoned that the exception clause although allowed states to take measures under Article 2201 subject to the measures being non-arbitrary and non-discriminatory the clause did not preclude investors from claiming compensation for any such measure taken by the host state. Following the ruling Columbia had to pay compensation to the investor.

These cases highlight the problem with general exception clauses which are used as counterclaims by host states, the following are the issues-

1) These clauses vary from treaty to treaty and their interpretation controlled by the VCLT Article 31 depends on their drafting and wording where some Tribunals can interpret them very vastly and some very narrowly.

2) These clauses are framed in a way that they can be only used by host states as counterclaims when an actual dispute arises, while carve-outs beforehand preclude a dispute from the purview of the treaty.

3) These general exceptions may not cover all obligations under the Investment Treat and exclude the application of the exception clause to matters of compensation or FET standards. States negotiating these types of agreements, particularly those in the Global South have very limited negotiating leverage in defining exclusions of such general exception clauses.[23]

[22] Debadatta Bose, 'David Aven v. Costa Rica: The Confluence of Corporations, Public International Law and International Investment Law' (2020) 35 ICSID Review - Foreign Investment Law Journal <https://academic.oup.com/icsidreview/article/35/1-2/20/5879839> accessed 29 September 2024.
[23] Joaquin Matamis, 'Moving from Unequal to Win-Win Partnerships • Stimson Center' (*Stimson Center*3 January 2024) <https://www.stimson.org/2024/moving-from-unequal-to-win-win-partnerships/> accessed 29 September 2024.

IV. Current carve-out regime and Issues

While climate change carve-outs are the latest advent in Investment Treaty jurisprudence only being implemented as the modernization process of the ECT till now, carve-outs on issues such as government procurement, human health[24], tobacco control[25], ISDS[26] and investment screening[27] already exist in certain Investment Treaties/Chapters. Certain treaties also contain treaty-wide industry-specific carve-outs.[28] Based on existing carve-outs, it can be ascertained that their role is to remove certain sectors/measures from the scope and protection of the Investment Treaty be it in terms of Standards of protection or ISDS claims. They are usually different from general exceptions or environmental clauses in various BITs and FTAs and contain language operators such as '. shall not apply to...' or '...exempt from provisions and obligations of the treaty..' usually without any negative chapeau's which the GATT-styled general exceptions usually contain.

Furthermore, the nature of these carve-out clauses does not function as affirmative defences for host states during an ISDS claim, but instead, they eliminate the chances of an investor seeking protection under the Standards of Protection of the Treaty or directly exclude the investor from a specific sector from the ISDS mechanism.

As per Paine and Sheargold, carve-outs as a tool for climate action through IIAs offer two advantages, firstly, they can be applied across all the obligations within the treaty whether it be the Standards of Protection, ISDS mechanism, SSDS mechanism or even something as simple as the definition clause. States can come up with creative carve-outs that can even exclude certain industries from the definition of "Investor" within the treaty blocking their protection under the IIA. Germany and the EU have made progress while working within this investor/Standard of Protection carve-out exclusion area and have aimed to clarify specific aspects of CETA which differentiate investors based on climate change mitigation.[29] The draft

[24] Singapore-Turkey FTA, Article 10(2); Singapore-Sri Lanka FTA, Article 10.13(3); Singapore-Burkina Faso BIT, Article 10(2)
[25] Singapore-Pacific Alliance FTA Chapter IX, Section B (footnotes) Singapore – Turkey FTA, Article 12.14(2); Singapore Myanmar BIT, Article 11(2)
[26] CETA Article 8.2(4)
[27] CPTPP Annexure 9H; Canada- China BIT Annexure D.34(1)
[28] Canada–Serbia BIT, art 18.7; Canada–Hong Kong BIT, art 17(7); 2021 Canada Model FIPA, art 22(6); Greece–UAE BIT, art 1.1(e); Hong Kong–UAE BIT, art 1(d)(v); Japan–UAE BIT
[29] Joshua Paine and Elizabeth Sheargold, 'A Climate Change Carve-out for Investment Treaties' (2023) 26 Journal of International Economic Law <https://academic.oup.com/jiel/article/26/2/285/7071568> accessed 27 September 2024.

interpretative statement suggests that the host state conducting a differential treatment amongst investors for climate mitigation and action purposes will not contravene the FET and non-discrimination standards of the CETA.[30] This interpretation will essentially act as a carve-out which excludes certain investors from the protection of the treaty. However, this upfront attitude of states to exclude an investor from the complete protection of the Treaty has considerable implications on investor confidence and capital import/export and a state attitude such strict as this may even decrease investment by foreign entities which defeats the purpose of the IIA. Additionally, even though such carve-outs will be focused on the Oil, Gas and Energy sectors, they may have spillover effects as new investors from other industries may see a huge legal and political risk in investing in a host state that has an absolute attitude towards their policies. This in turn will hamper the chances of capital-importing countries to meet their economic and sociological development goals.

Paine and Sheargold's second advantage about carve-outs cures the issue of investor confidence through a carve-out which only excludes the ISDS mechanism. These carve-outs work in a manner whereby an investor has protection under the treaty, but he cannot bring their claims forward through the mechanism of ISDS. Technically this does maintain some investor confidence by assuring certain terms such as the FET standards to the investor but takes away their remedy. So, in essence, their right exists but their remedy does not. Several current IIAs use these types of carve-outs to exclude 'tobacco control measures' from the purview of ISDS and are worded as "no claim may be brought under ISDS in respect of a tobacco control measure of a Party."[31] But this remedy taken away from the investor is very specific, in the case of tobacco carve-outs, only measures taken by the host state related to tobacco control cannot be challenged by the investor through ISDS, this entails that a tobacco industry investor may still use the ISDS mechanism where the host state unduly expropriates their investment without reliance on any domestic tobacco control measure. Such an ISDS carve-out maintains the policy and regulatory space for the host state while not largely decreasing investor confidence. Carve-outs concerning Oil, Gas & Energy industries may also exclude the investor's options to use the ISDS mechanism but such a carve-out has to be worded specifically

[30] Draft Decision of the CETA Joint Committee, 'Decision No X/2022 of the CETA Joint Committee on the Interpretation of Certain Terms in Article 8.10, Annex 8-A and Article 8.39', available at https://www.gerechter-welthandel.org/wp-content/ uploads/2022/09/20220905_Draft-Decision-and-Declarations_CETA.pdf (accessed 29 September 2024)

[31] Singapore–Australia FTA Chapter 8, Article 22; e Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Article 29.5

and will only yield a collaborative result if it specifically excludes host state actions in relation to their NDCs under the Paris Agreement from the ISDS mechanism. While still granting the investors a chance to challenge a host state expropriation or violation of FETs through means which are not in relation to their NDC through the ISDS mechanism.

Another issue with carve-outs is in relation to host States abusing them to their content. Lester and Mercurio note that specific blanket carve-out exclusions allow governments to use their regulatory and administrative powers to favour a domestic industry.[32] In cases of tobacco control, a host state may expropriate indirectly an investment through the scope of a carve-out and give no chance to the investor for resolution under ISDS through the carve-out, and since these IIAs do not apply to the host State's domestic investors the State can show bias towards its domestic tobacco industry which abuses the spirit of the IIA.[33] This risk of abuse of the spirit of IIA may be resolved through anti-abuse measures such as including a chapeau before the carve-out which states "…non-discriminatory regulatory measures taken in good faith."[34] As for climate change carve-outs, anti-abuse requirements could include a negative chapeau worded as "…non-discriminatory regulatory measures taken in good faith with respect to the States NDCs under the Paris Agreement or climate treaties…"

V. New Climate carveouts

Considering the above advantages and issues a treaty provision in terms of a climate change carve-out was suggested at the OECDs Annual Conference on Investment Treaties. The carve-out states the following –

> Article 1: Climate Change Measures
>
> 1. No claim may be brought under Article X in respect of a climate change measure. 'Climate change measure' means a [optional: good faith] measure

[32] Simon Lester and Bryan Mercurio, 'Safeguarding Policy Space in Investment Agreements' (Institute of International Economic Law 2017) <https://www.cato.org/sites/cato.org/files/articles/lester-mercurio-iiel-issue-brief-december-2017.pdf> accessed 29 September 2024.
[33] Joshua Paine and Elizabeth Sheargold, 'A Climate Change Carve-out for Investment Treaties' (2023) 26 Journal of International Economic Law <https://academic.oup.com/jiel/article/26/2/285/7071568> accessed 27 September 2024.
[34] The Creative Disrupters, 'Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation' (2018) arts 5.1(3)(d) and (j) https://martinbrauch.files.wordpress.com/2022/04/treaty-on-sustainable-investment-for-climate-changemitigation-and-adaptation.pdf accessed 29 September 2024

of a Party related to reducing or stabilizing greenhouse gas emissions.

2. [Optional: For greater certainty, climate change measures include, but are not limited to: […indicative list of measures…]]

Article 2 relates to procedural mechanisms in relation to addressing disputes if any arise.

Due to the issue of Regulatory chill from ISDS as seen above and various concerns regarding States abusing carve outs and issues related to investor confidence, the suggested carve-out does not preclude claims made by an investor completely and calls for a State-State dispute settlement process.

Under this mechanism, if an investor is aggrieved by the actions of a State firstly when they try to invoke ISDS they will not be entertained by any Tribunal as the suggested Article 1 specifically precludes ISDS claims which investors can bring. At this stage, many of the claims made by investors which are over-zealous in nature fail which protect both the letter and the spirit of the IIA and the host State's regulations and policies specific to the Paris Agreement. To still give the Investor a chance of a fair hearing, Article 2 of the suggested carve-out provides a measure whereby the Environmental Authorities of the Treaty parties jointly determine the claim of an investor. If the authorities deem that a claim brought on by the investor falls within the purview of the suggested Article, the investor is again precluded from pursuing ISDS. Whereas if the authorities jointly deem that the Article 1 carve-out is not applicable, they may refer it to a State-State panel established under the treaty which then eventually decides if the claim is covered by Article 1. If the State-State panel deems that the claim does not fall within the scope of Article 1 then it may allow the investor to pursue an ISDS otherwise the investor again has no recourse to the ISDS mechanism.

However, this procedure has some drawbacks, firstly it does not factor in the scope of State-State dispute settlement (SSDS) by which both parties can screen which claims to litigate and what claims to forgo. Secondly, the procedure also fails to consider the idea of a dispute prevention body which is established within the terms of the treaty.

The resolve the above two shortcomings, inspiration can be drawn from the Brazil-India

Bilateral Investment Treaty (2020)[35], specifically Article 18 and Article 19. The BIT provides an elaborate framework for both dispute resolution and dispute prevention. Article 19 states that, either party, which considers a measure adopted by the other will/will likely constitute a breach of the BIT may invoke this Article and initiate a dispute prevention procedure with the aid of a Joint Committee established in accordance with the terms of the treaty. This Joint Committee will peruse the facts and the measures which a party is willing to take and deliberate its outcomes before even a dispute arises. This method of prevention can be used in climate carve-outs whereby every measure taken by either party will be first referred to a Joint Committee with experts in environmental law and if such a measure is approved there are high chances that no dispute will arise after the measure has been exercised, and even if a dispute occurs the suggested Article 2 procedure still exists to address the grievance of the investor. Furthermore, the treaty should also be worded in a way which mandates the committee to consider facets of the Paris Agreement, NDC contributions of both parties and their general obligations in International Law. This collaborative deliberation between both States through the joint committee may yield to better fulfilment of both party's NDCs under the Paris Agreement as neither one of them would want to digress from the same.

Article 18 of the Brazil-India BIT provides that if the dispute prevention procedure fails and a dispute arises, a State-State Dispute Settlement procedure will be followed in an Arbitration Tribunal. This notion of SSDS completely excludes investors bringing a claim against a sovereign and it rather becomes a claim that a sovereign brings against another sovereign on behalf of their investor. This is beneficial on three grounds, first, it prevents over-zealous claims from investors, second, it allows investors access to better resources as the sovereign is bringing their claim forward, and third, both the parties can make use of their diplomatic ties and instead of following up with an expensive Arbitral Award both the parties may mutually settle on a ground which is both beneficial and to them. This notion of SSDS should also be incorporated into the climate change carve-out framework so that in addition to the above-specified advantages the State parties to the Investment Treaty may also be cognizant of their obligations under the Paris Agreement and would not want to be seen fostering commercial gain at the cost of an important multilateral climate mitigation treaty.

[35] Brazil - India Investment Cooperation and Facilitation Treaty (2020) https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4910/brazil---india-bit-2020- accessed 29 September 2024

VI. Conclusion

The Paris Agreement is a very important multilateral treaty and the fact that 195 states[36] are the parties to it shows that such a treaty and its goals of 'net-carbon zero' and reduction of global temperature levels. The issues with the current BIT and ISDS regimes only lower the chance of the international community meeting these targets, which if not met would cause grave consequences to humanity. The suggested carve-out framework is not only beneficial to the host States but also an equitable measure against investors in the Oil, Gas and Energy sectors as it does not leave them completely remediless. Further taking inspiration from the Brazil-India BIT about the prevention of disputes will not only ease down the regulatory chill that States currently face but will also bring greater transparency to the process and the measures taken by a host state in relation to climate action against the investor. Given the above climate-change carve out's need not always be in a sense of negative covenant and exclude the application of the treaty, they can also be worded to promote green investments where specific clauses can be drafted only for the renewable energy sector and can address a faster compensation and a direct compensation process for the investor in case of breach of the protection of standards with no requirement on the investor to pursue a costly ISDS proceeding.

[36] United Nations Climate Change, 'Paris Agreement - Status of Ratification | UNFCCC' (*UNFCCC*2017) <https://unfccc.int/process/the-paris-agreement/status-of-ratification>.