

Tackling The Conundrum; Climate Change And Stabilization Under Fair And Equitable Treatment

Ian Mwiti Mathenge

Abstract: *Climate change is a lethal, global, and imminent problem with a capacity to disrupt the orthodox areas of international law including international investment law. This project examines the conflict between the standard of a stable legal environment under fair and equitable treatment (FET) in international investment law and climate change action. It argues that FET is a broad standard, asymmetrically applied to provide stability to foreign investments, which will clash with climate change policies. The paper calls for viewing climate change as an emergency which has the implication of elevating its international law obligations above the ordinary ones. It explores FET's standard of legitimate expectation and argues for its reorientation to context-sensitivity. The piece proposes "the malleable thesis" as an alternative project on how tribunals should approach legitimate expectations. To solve the conflict, the project makes a normative case for erga omnes climate change obligations based on treaties language and nature of climate change. Through a novel argument on the effect of erga omnes, the piece argues that international investment law should "cede way" to climate change in case of a conflict. The paper asks a bonus question of who should decide investment disputes related to climate change, and it concludes that there are severe concerns about tribunals deciding these cases. However, tribunals may decide climate change cases if they have a "Damascus moment" characterized by a radical shift from investor exclusive adjudication to deference to public interest.*

1 Introduction

Climate change is the greatest catastrophe of our century, often described in eschatological terms. It is what “war” was for the 20th century, characterized by maiming and killing masses at the gruesome hands of armed conflict. The 20th century has acquired names such as bloody century, ¹genocide century, ²age of genocide, ³most violent century ⁴and others calling it the 20th-century DEMOCIDE, ⁵which is a combination of genocide and mass murder. War claimed 187 million people in the 20th century to earn the first place as the doomed century for humankind. ⁶Climate change promises a devastating 21st century, with reports showing that it will claim 83 million people by 2100 and cause enormous damage. ⁷According to a study called the mortality cost of carbon, the number of deaths that will occur is wholly dependent on the effort to reduce greenhouse gases (GHG). ⁸Each year more than 5 million people die because of climate change, with these numbers expected to rise. ⁹The effects of climate change are horrifying, and they include sky rocketing sea levels, which poses a danger to small island states. Wildfires, hurricanes, flooding, drought, and extreme heat are other effects of climate change. The 2022 Intergovernmental Panel on Climate Change (IPCC) report paints an atrocious picture by concluding that “if global warming exceeds 1.5 degree Celsius ... many human and natural systems will face additional severe risks”. ¹⁰To avert or mitigate this crisis, states must act aggressively to cut GHG emissions. Yet, international investment law is working against the goal of reducing GHG.

Armed with over 3,000 bilateral investment treaties (BITs) and other numerous international investment agreements (IIAs), foreign investors have launched a scathing attack on climate change action. ¹¹In 2021 RWE and Uniper, two German companies,

¹ Mark Levene, *Why Is the Twentieth Century the Century of Genocide*, 11 J World Hist 305, 305(2000).

² *Id.*

³ Roger Smith, *Human Destructiveness and Politics: The Twentieth Century as an Age of Genocide*, In Isidor Wallimann and Genocide and The Modern Age: Etiology and Case Studies of Mass Death 21, 21 (Michael N. Dobkowski, Eds, 1987).

⁴ Richard Harwood, *Death In The 20th Century* Washington Post (April 27, 1995) <https://www.washingtonpost.com/archive/opinions/1995/04/27/death-in-the-20th-century/D3f6e534-Fd22-4156-863d-490e143a2e3b/>.

⁵ Rummel Rudolph, *20th-Century Democide*, Publicado En Internet (April 10th 2022) <http://hawaii.edu/powerkills/DBG.CHAP1.HTM>.

⁶ Levene, Mark *Supra*1, 305.

⁷ Bressler Daniel, *The Mortality Cost of Carbon* 12 Nat. Commun 1, 5 (2021).

⁸ *Id.*

⁹ Zhao, Qi, Et Al Global, Regional, And National Burden of Mortality Associated with Non-Optimal Ambient Temperatures from 2000 To 2019: A Three-Stage Modeling Study 5.7 The Lancet Planetary Health 415, 425 (2021).

¹⁰ The Intergovernmental Panel On Climate Change Climate Change 2022 Impacts, Adaptation and Vulnerability Working Group II Contribution to The Sixth Assessment Report of the Intergovernmental Panel On Climate Change 1, 3-96(2022).

¹¹ Stuart Braun, *Multi-Billion Euro Lawsuits Derail Climate Action*, DW (April 19 2022) <https://www.dw.com/en/energy-charter-treaty-ect-coal-fossil-fuels-climate-environment-uniper-rwe/a-57221166> 19.04.2021 DW.

challenged the Dutch government's plans to phase out coal by 2030 in line with the global push to reduce GHG.

¹²Rockhopper which is a UK company has challenged Italy's ban on drilling within 12 miles of the coast. Westmoreland and Lone Pine companies are suing Canada disputing the ban on hydrocarbon exploration. TransCanada, a Canadian company, has sued US for failure to grant permits for the Keystone XL pipeline project. Ascent Resources has instituted a case against Slovenia challenging the Environmental Impact Assessment (EIA) requirement for fracking activities. These fossil fuel companies are using international investment law to claim over \$ 18 billion for climate change related policy changes.

International investment law has adopted nebulous standards such as fair and equitable treatment (FET) to advance investor interests. ¹³FET has been the single most relied upon standard as a path to unrestricted incorporation of investors' rights. ¹⁴Investors relish FET's principles of legitimate expectation and provision of a stable legal environment because they impose stability akin to stabilization clauses. They limit the power of the state to regulate in public interest by imposing a legal freeze. These standards have led to an aggressive elevation of investor rights creating an inward-looking area of international law. Through lopsided guarantees, this regime has consolidated power in favor of investors. Even the most altruistic of states' policies have been challenged successfully. ¹⁵This insular preferment for investor rights has slowed down climate change action for fear of international investment cases.

This project interrogates the tension between the standard of a stable legal environment under FET and climate change policy. It proceeds on the premise that based on how international investment law has evolved primarily through tribunal decisions, this regime will conflict with climate action. ¹⁶Investor-state tribunals such as in *Eco Oro v Colombia* ¹⁷have found a violation even where the state acted to protect the environment. This finding is bolstered by numerous cases establishing a stable legal environment, such as *Occidental v Ecuador*. ¹⁸These tribunals have ignored the

¹² Di Salvatore Nathalie & Lukas Schaugg, *Despite Consensus On The ECT's Incompatibility With The Global Climate Agenda, Claims That It Is Well-Suited For The Clean Energy Transition Persist*, (April 14 2022) <https://www.isd.org/Int/En/2021/10/08/Malgre-Le-Consensus-Quant-A-Lincompatibilite-Du-Tce-Avec-Lagenda-Climatique-Mondial-Les-Arguments-Selon-Lesquels-Il-Est-Approprié-Pour-La-Transition-Vers-Une-Energie-Propre-Persiste-Lea-Di-Salvatore-N/>.

¹³ United Nations Conference On Trade And Development, *Fair And Equitable Treatment UNCTAD Series On Issues In International Investment Agreements II*, 1,1 (2012) https://unctad.org/System/Files/Official-Document/Unctaddiaeia2011d5_En.Pdf.

¹⁴ Cliffe Dekker, *Substantive Rights: Fair and Equitable Treatment Standard Under International Investment Agreements*, Lexology 1[2018].

¹⁵ Bronfman Marcela Klein, *Fair and Equitable Treatment: An Evolving Standard*, 10 Max Planck Yearbook of United Nations Law 609, 617 (2006).

¹⁶ Wilensky Meredith, *Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures Under the Trans-Pacific Partnership* 45 *Envtl. L. Rep. News & Analysis* 10683, 1085 (2015).

¹⁷ *Eco Oro Minerals Corp. V. The Republic of Colombia*, ICSID Case No. ARB/16/4.1

¹⁸ *Occidental Exploration & Production Co. V. The Republic of Ecuador*, UNCITRAL, LCIA Case UN 3467, Final Award, 91 (July 1, 2004).

purpose of legal change by insisting that the investor must be compensated no matter the reason for changing the law. For example, in *Eco Oro and Santa Elena, S.A. v. Republic of Costa Rica*¹⁹ the tribunals were explicit that the noblest reasons such as protection of environment do not excuse the state from compensating the investor. The imposition of a stable legal environment and obligation to compensate investors will create a chilling effect. Yet, climate change action requires significant and urgent policy changes to phase out coal and other sources of GHG. This research explores how we should think about this problem, what is the solution, and who can find the solution. Based on current tribunal practices, international investments law has failed to navigate through states right to regulate causing a huge backlash.

It is not ingenious to claim that international investment law faces considerable backlash.²⁰ While there has been debate on how to respond to the backlash, its existence is axiomatic. Several proposals have been advanced on curbing the backlash.²¹ Depending on what one perceives as the problem, some have argued for reforms, others for renegotiation of IIAs, and others have called for abolishing the system. While this research situates itself in the reform agenda, it concentrates on transforming doctrine and adjudication. This project turns to general international law to construct a comprehensive analysis and solutions to essential doctrinal questions affecting international investment law. Unlike other proposals which concentrate on binary questions,²² this research constructs a nuanced doctrinal view.

This piece is grounded on general international law and legal theory. Although international law has not offered a perfect forum for engagement with major global emergencies, the language of emergency has galvanizing effect. Emergency offers a solution to the problem of conflicting obligations by giving a basis for elevation of some commitments. The project rejects the nihilist response to investor-state dispute resolution, which permeates most critiques of this regime. Instead, it is a practical inquiry into solutions of the structural problems facing international investment law. While the paper takes note of recent debates on climate change and *erga omnes*, it disagrees with International Law Commission (ILC) conservatism on the connection between climate change and *erga omnes*. By viewing international law as a value landed system, the piece uses the language of international obligations to create a hierarchy which will assist in resolving questions of conflicting obligations. The research examines recent development in international law such as CoP27, ILC report on preemptory norms and Germany withdrawal from Energy Charter Treaty to cement its case for the pervasive climate change disillusionment in international law.

¹⁹ *Compañía Del Desarrollo De Santa Elena, S.A. V. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, 212/387 Final Award (February 17, 2000) Para 17.

²⁰ Thomas Dietz, Marius Dotzauer & Edward S. Cohen, *The Legitimacy Crisis of Investor-State Arbitration and The New EU Investment Court System*, 26:4 Rev. Int. Political Econ 749, 750 (2019).

²¹ Brauch Martin, *Should The European Union Fix, Leave or Kill the Energy Charter Treaty*, 1, 3 (2021).

²² Olabisi Akinkugbe, *Africanization and The Reform of International Investment Law*, 53:1 Case W Res J Intl L 7, 12(2021).

Part, one offers an overview of the paper by situating the research problem within the current debate on climate change and international investment law. It also discusses why based on ongoing investment cases this problem is topical. In part two, the piece argues that FET is formulated in broad terms, applied in a one-sided way, which makes the standard a perfect vehicle to impose a stable legal environment. The paper contends that constraining FET in the new generation treaties has been ineffective because they operate in an environment with an embedded view of FET. It also posits that although tribunals have recognized FET as a standard, they have applied it as a categorical rule that operates without an exception. The third part discusses international law climate change obligations through the lenses of emergency. This part is supposed to map some of the climate change obligations that will conflict with FET and offer a basis for the framework of emergency which is a common theme in the paper. The basic idea here is that emergency offers a basis for elevation of climate change obligations.

In part four, the piece highlights the conflict between FET's standards of legitimate expectation and stabilization with climate change. It considers the fractures in international law as manifested by climate change and international investment law. The project discusses fossil fuels cases against climate change and concludes international investment law will offer a perfect avenue for this industry to challenge climate change. It reviews FET's main guarantee of legitimate expectation through "malleable thesis" which is exemplified by qualifications embodied in legitimate assurances. It argues for adoption of context-specific approach to interpreting stability and legitimate expectation. Part five makes a case for climate change *erga omnes* obligations based on language of climate change treaties and its nature. The paper addresses unexplored question of the effect of *erga omnes* obligations on treaty. It makes a novel argument that for an ordinary treaty to "cede way" for *erga omnes* if they conflict. Through what it calls treaty "obligation excuse" the tribunals have a basis to absolve state non-compliance with ordinary treaty obligation. Although the piece concedes that it is only *jus cogens* norms which have capacity of invalidating treaty obligations, *erga omnes* obligations offer a way out without invalidation. In part six, the piece argues that there are serious concerns on tribunals deciding climate change cases unless they drastically transform through what the paper calls "Damascus moment". The "Damascus Moment" entails centralizing and elevating public interest in cases involving the state right to regulate.

2 Fair And Equitable Treatment As An Ambiguous, And Asymmetrical Gateway To Stability

FET has received considerable attention because of the pivotal place it occupies in international investment law. It has emerged as one of the forefront standards in investor-state arbitration to be the most relied upon.²³Nearly all IIAs contain FET as one of the core guarantees to foreign investors.²⁴Despite the sacred place that FET occupies in international investment law, it is fiercely contested to a point of significantly contributing to the backlash of the entire regime. This contest raises the question of why this standard is this controversial.

This part argues that FET is often formulated in broad terms with ambiguous phraseology that are subject to undisciplined interpretation by tribunals. Although initially, well-intentioned FET has offered a gateway for tribunals to interpret it incorporating their sense of fairness beyond what states negotiated.²⁵This standard has mutated to be an absolute and lopsided guarantee to foreign investors. Indeed, FET has become a pathway to stability akin to stabilization clauses, notwithstanding states did not agree to such clauses.

Although the critique of FET is not new, the contribution of this piece is a holistic examination of FET assessing the contribution of modern BITs. The other major contribution of this project is that it provides a coherent critical review of the underpinnings of FET. This wholesome discussion of FET reveals that it suffers from three major problems that make the standard antithetical to climate change. First, FET is an ambiguous standard. Second, FET has been interpreted to offer a stable legal environment that will impede climate action. Third, although tribunals have not classified FET expressly, as a rule, they have applied it as an absolute rule.

The importance of this comprehensive review is that FET is the primary standard that investors are likely to deploy in attacking climate change policy. This standard offers a perfect cover for imposition of the investor centered interpretation of international investment law. No matter how states strive to limit the scope of FET, tribunals treat it as a rule that does not allow for balancing of competing interest.²⁶This part engages with works of prolific legal philosophers on the debate between a rule and a standard to establish that although tribunals have not characterized FET as a rule, they have approached it as such. This section offers a background for the discussions on how FET will limit climate change action.

²³ Cliffe Dekker Supra 14.

²⁴ Tarald Laudal Berge, *Dispute by Design? Legalization, Backlash, And The Drafting of Investment Agreements*, 64.4 Int Stud Q, 919, 924(2020).

²⁵ Boone Barrera Enrique, *The Case for Removing the Fair and Equitable Treatment Standard from NAFTA*, 128 CIGI Paper 1, 3-6(2017).

²⁶ Boone Barrera, Enrique Supra 25, 3.

2.1 General Overview and the Relevance of Fair and Equitable Treatment

FET has been touted as a core standard to protect foreign investors.²⁷ Since 2000 when FET was activated, it has become a favorite guarantee for investors and tribunals. Yet, this standard is a stumbling block to states right to regulate in public interest. The basic FET's formulation in most treaties is that "each contracting party shall accord the investor of the other party a fair and equitable treatment." This part gives examples of how tribunals have applied FET to contextualize and offer justification for discussing this standard.

FET is an unsettled standard that is used to challenge states power to regulate for varied reasons. The unequivocal nature of FET demonstrates that it is crucial to examine how it has been deployed to stop states from regulating in public interest. For example, in *Bilcon*²⁸ the tribunal was asked to examine whether FET was violated where Canada had included destruction of "community core values" as part of Environmental Impact Assessment. The project was going to adversely affect the community's environment and way of life. The reasoning of Canada was that the mining quarries were not compatible with community core values. The tribunal found that Canada had violated FET by including community values which it thought was an arbitrary consideration.

FET establishes a low threshold for its violation making it an easy standard for foreign investors to meet. What states need to do is act inconsistently or make a slight mistake and they will have violated FET. In *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*²⁹ it was held that the approval of the investment by the Foreign Investment Commission alone sufficed to give an investor legitimate expectation. This is even though the relevant ministry had refused to change the zone of the land based on existing urban policy. The government advised the investor to build the estate in other areas in Chile. In rejecting the State's position, the tribunal held that the government of Chile had violated FET because government agencies had contradicted themselves. Although Chile raised the defense of due diligence arguing the investor ought to have known about the country's urban laws and policy. The tribunals did not address the negligence of the investor.

In *Metalclad Corporation v. The United Mexican States*,³⁰ the tribunal held that the government of Mexico violated FET when the municipality refused to grant permit for the landfill for hazardous waste materials.

²⁷ Swisslion DOO Skopje V. Former Yugoslav Republic of Maced., ICSID Case No. ARB/09/16 award, Para 273 (July 6, 2012).

²⁸ William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. V. Government of Canada, PCA Case No. 2009-04- 17 March 2015 Award On Liability.

²⁹ MTD Equity Sdn. Bhd. And MTD Chile S.A. V. Chile, ICSID Case No. ARB/01/07.

³⁰ Metalclad Corporation V. The United Mexican States, ICSID Case No. ARB(AF)/97/1.

The local authority had acted to protect the local water and environment from contamination. However, the tribunal held that the purpose of the decree was irrelevant when examining how the investor has been treated.

FET is one of the vital substantives guarantees in international investment law. Most investment cases use this standard to challenge state power to regulate because of low threshold of establishing a violation and ambiguous formulation. It has several principles which are equally broad which make it “the go to standard” for many investors. The basic assumption of this part is that there is a huge problem with FET which will make it run counter climate change like it has impeded environmental and other social policies.

2.2 The Meaning of Fair and Equitable Treatment

There is no single agreed definition of FET. Where tribunals have been confronted with discerning the meaning of FET, they have resulted to the dictionary by disjointedly defining fair and equitable.³¹ In some cases, tribunals have attempted to define fair and equitable by using their synonyms.³² However, the challenge is that what is fair has the same meaning as equitable in the ordinary language, giving the impression that the phrase fair and equitable is redundant. Dolzer argues that the word fair and the word equitable have overlapping meanings.³³ The tribunal in *Saluka v Czech Republic*³⁴ acknowledge the difficult task of defining FET using ordinary language by stating that “[t]he ordinary meaning of the fair and equitable treatment standard can only be defined by terms of almost equal vagueness.” Additionally, the words fair and equitable taken separately on their dictionary meaning are broad, which is unhelpful in understanding FET.³⁵

The exact scope and meaning of FET are shaped by how, the concept is entrenched in treaties. There are two approaches to enshrining FET, first, providing FET as part of the minimum standard of treatment (MST) or as an autonomous treaty standard.³⁶ FET as an independent standard usually goes beyond FET as MST standard. The MST is the floor and entitles the investor to the protection as allowed by customary international law. Although it is essential to point out that this standard has evolved beyond the traditional *Neer case* standard,³⁷ it remains lower than the autonomous treaty guarantee³⁸.

³¹ *Eco Oro V Colombia* Para 759 Oxford and Black's Law Dictionary.

³² *Suez, Sociedad General De Aguas De Barcelona SA, And Vivendi Universal SA V. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision On Liability (30 July 2010) Paras. 212-213.

³³ Dolzer Rudolf, Fair and Equitable Treatment: A Key Standard in Investment Treaties, 39 *Int'l Law*. 87, 91 (2005).

³⁴ *Saluka Investments BV V Czech Republic*, Partial Award, ICGJ 368 (PCA 2006), 17th March 2006 Para 297.

³⁵ Boone Barrera, Enrique Supra 25.

³⁶ United Nations Conference on Trade and Development Supra 13, 44.

³⁷ Schwebel Stephen, Is Neer Far from Fair and Equitable? 27.4 *Arbitr. Int.* 555, 555 (2011).

³⁸ *L. F. H. Neer V. United Mexican States Award*, IV RIAA 60 (October 15, 1926).

In practice, the distinction between MST and autonomous FET is blurred because tribunals have resulted in interpreting FET based on broad dictionary words.³⁹ For example, the Tribunal in *Eco Oro* used the dictionary meaning of FET after establishing that the Canada-Colombia IIAs provided for FET as part of MST under customary international law. Article 31 of the Vienna Convention on the Law of Treaties (VCLT) is usually the justification that tribunals provide for interpreting treaties based on their ordinary meaning. What tribunals forget is that the ordinary meaning is to be interpreted in its context. In the case of FET as part of MST, the context is defined by the MST standard, which limits the broad FET. To unleash expansive words in interpreting FET under MST leaves no serious distinction between FET as autonomous standard and MST.⁴⁰

Some tribunals have been quick to characterize FET as a rule of customary international law without evidence. For instance, Prof Philippe Sands dissent in *Eco Oro v Colombia* captures the difference between FET as MST and as a customary international law standard which requires evidence of *opinion juris* and state practice.⁴¹ To fundamentally shift from MST standard in *Neer* case would be recreating a new standard away from what the treaty envisioned. As correctly expressed in *Glamis Gold, Ltd v United States of America*,⁴² the MST standard under *Neer* has not changed fundamentally to acquire the ordinary FET meaning. This is because MST standard prohibits conduct that is considered as the most deplorable in international law as demonstrated by phrases such as “egregious and shocking or offends judicial propriety.”⁴³

In *Waste Management II*⁴⁴ the tribunal described FET from the negative by listing what might be deemed as violating it. It started by stating that the conduct must be attributable to the state and harm the claimant. The tribunal went on to list conduct such as “arbitrary, grossly unfair, unjust or idiosyncratic, discriminatory and exposes the claimant to sectional or racial prejudice or involves a lack of due process leading to an outcome, which offends judicial propriety.”⁴⁵ This standard guards against discrimination and arbitrary interference with foreign investments. FET gives several broad duties to states that can be termed as catch-all obligations ranging from reasonableness, consistency, transparency, and due process.⁴⁶ The Tribunal in

³⁹ Pope & Talbot V. The Government of Canada, Interim Award, 22 (NAFTA Arbitration Panel) (June 26, 2000) Par 118.

⁴⁰ MTD V. Chile MTD Equity Sdn. Bhd. And MTD Chile S.A. V. Chile (ICSID Case No. ARB/01/7) Award Dated 25 May 2004 Para. 113.

⁴¹ *Eco Oro Minerals Corp. V. Republic of Colombia*, ICSID Case No. ARB/16/41 Philip Sands Dissent Para 7

⁴² *Glamis Gold, Ltd V United States of America*, UNCITRAL, Award (8 June 2009) (Exhibit CL-59), Para 21

⁴³ *Id* 616 and 627.

⁴⁴ *Waste Management, Inc. V. The United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award (April 30, 2004).

⁴⁵ *Id* at 98.

⁴⁶ *Saluka Investments B.V. V. The Czech Republic*, Partial Award. 17 Mar 2006 Para 288.

Loewen Group Inc. and Raymond L. Loewen v. the United States of America held that FET could be violated by states acting in bad faith.⁴⁷

The difficulty in defining FET is not a justification for tribunals to take the easy way out of interpreting FET to mean all guarantees for the investor. Enrique has described the problem as “FET principle itself has no fixed meaning and was developed by arbitral tribunals.”⁴⁸ Tribunals have developed FET as unchecked standard which operates as a free ride for investors. Despite this malleability when incorporating investor entitlements, tribunals have been rigid when asked to balance FET with state right to regulate in public interest. This asymmetrical interpretation of FET has defined international investment law as investor-centered regime.

The most prominent FET standards are legitimate expectation and provision of a stable legal environment.⁴⁹ These obligations are the mainstay of stability under FET. Under legitimate expectation the investor is guaranteed that states will honor their commitments. The state must have given a specific and reasonable representation expressly or impliedly, which the investor relies upon. An investor expects the state will provide a stable business legal environment that is predictable. Like FET, the contours of legitimate expectation and stability are not clearly delineated.

2.3 Fair and Equitable Treatment as an Ambiguous Standard

Different treaties stipulate FET distinctly depending on the generation of the Treaty. The old generation treaties enumerate states’ obligations to provide for a fair and equitable treatment to investors. As concerns arose on the exact scope and meaning of such an ambiguous statement, states have sought to offer some guidance. However, FET under the modern treaties has not deviated significantly from the old treaties.⁵⁰ Additionally, the new formulations are being applied in an environment that has an engrained view on what is the scope of FET.⁵¹ The Tribunal in *Eco Oro v Colombia* is quintessential example of the old mentality on FET being applied in the new generation treaties. Indeed, this underscores how the new generation treaties operate in an environment that has an entrenched worldview about FET as an open-ended standard that can be used to import whatever guarantees that tribunals finds appropriate. The implication of this is that even the modern treaties, which this piece considers as worded relatively ambiguous, ends up as grossly ambiguous.

⁴⁷ The Loewen Group Inc. And Raymond L. Loewen V. The United States of America, ICSID Case No. ARB (AF)98/3, Award (June 26, 2003) Para 132.

⁴⁸ Boone Barrera, Enrique Supra 25, 10.

⁴⁹ Eiser Infrastructure Limited and Energía Solar Luxembourg S.À R.L. V. Kingdom of Spain, ICSID, Case No. ARB/13/36, Final Award, 4 May 2017, Para 382.

⁵⁰ Enrique Boone Barrera Supra 25, 8.

⁵¹ *Id.*

The old regime of investment treaties provides for FET in the most generous terms.⁵² This regime includes all investment agreements covering 1959 to early 2000s, which usually did not contain concerns such as the environment. These treaties use a simple phrase asking states to offer fair and equitable treatment to the investments. The questions then arise of what is fair and what is equitable? Similarly, what threshold of violations amounts to a breach of FET? What acts can be termed as violating FET? Is fairness a relative standard, or is it an absolute standard entitled to an investor only? Fair to who? This ambiguity is compounded by the inherent wide scope of the words fair and equitable, which are subject to contested interpretation.

The Energy Charter Treaty is a good example of the old generation treaties that provides that state parties are required to guarantee fair and equitable treatment. Article 10(1) of the Charter decrees that there is a “commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.”⁵³ The Nigeria and United Kingdom BIT⁵⁴ provides that “[i]nvestments of nationals or companies of each Contracting Party shall at all times accorded fair and equitable treatment.”⁵⁵ Similarly, Article 9 of Netherland Model BIT provides that “[e]ach Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party.”⁵⁶ These examples demonstrate that old treaties provide for fair and equitable treatment in generic terms.

When concerns started to arise on FET impeding the right of states to regulate in public interest nations such as United States incorporated these concerns in their new generation treaties. United States has entered into 20 Free Trade Agreements (FTAs) detailing FET.⁵⁷ These agreements are with Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, and Singapore.⁵⁸ Article 11.5 of the FTAs provides for “customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.”⁵⁹ The FTAs limit FET to what is enumerated in treaties. These treaties go along to list what FET includes, with a focus on due process in accessing justice.

⁵² Echeverri Javier, *Some Philosophical Questions to Understand the Role of Arbitrators Through the Notion of Fair and Equitable Treatment*, 24.1 *Estud. Socio-Jurid* 13, 15 (2022).

⁵³ Energy Charter Treaty 2080 UNTS 100.

⁵⁴ Agreement Between The Government Of The Federal Republic Of Nigeria And The Government Of The United Kingdom Of Great Britain And Northern Ireland For The Promotion And Protection Of Investments Em 1661 Abuja, 11 December 1990 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2110/download>.

⁵⁵ *Id.*

⁵⁶ Netherlands Model Investment Agreement 22 March 2019.

⁵⁷ Office of The United States, Trade Representative *Free Trade Agreements* (April 10 2022) <https://ustr.gov/trade-agreements/free-trade-agreements>.

⁵⁸ *Id.*

⁵⁹ United States Model Free Trade Agreements.

However, despite the enumeration of what FET means, FTAs' use of the word "includes" demonstrates that the list is not exhaustive.⁶⁰ This word undermines the intention of limiting the scope of FET. However, it is important to also acknowledge that an exhaustive list has a downside of having under-inclusive treaty.⁶¹ Second, this standard which is found in some of the modern treaties operates in an environment that has an entrenched view of FET as a catchall standard. This was experienced in the above case of *Eco Oro*, where despite the Canada and Colombia FTA providing that FET should not be applied beyond the customary international law MST standard, the tribunal disregarded the qualification.⁶²

The ambiguity of FET gives tribunals an opportunity to lower international investment law standards. This impedes state action because states do not know beforehand what behavior will amount to a breach of FET. The consequence of this is what Schill describes as "the standard acts as a malleable tool of ex post facto control of host states' measures based on the arbitrators' personal conviction and understanding about what is fair and equitable."⁶³ This was seen in the case of *CMS v Argentina* where the tribunal used the preamble to incorporate stability in FET. This was notwithstanding the lack of a guarantee of stability in the US—Argentina BIT (1991), which provided that "[i]nvestments shall at all times be accorded fair and equitable treatment...". The tribunal stated that even good-faith noble measures could violate FET since the purpose of the change of legal regime is not a consideration in assessing what is fair and equitable.⁶⁴

2.4 Fair and Equitable Treatment as a Gateway to a Stable Legal Environment

Stability has been a cornerstone of international investment law's guarantees to an investment.⁶⁵ Based on stability, the host state promises not to alter the business or legal environment significantly to the detriment of the foreign investor. While this guarantee looks conventional, it has been a source of enormous conflict. This conflict has been manifested through the tension between the change of legal regime for public interest and the provision of a constant business environment. Stability finds its way into international investment law in two ways.⁶⁶ The first is the adoption of stabilization clauses either in concessional agreements or national legislation. It is worth pointing out that stabilization clauses are on the decline. The second, which is more controversial, is importing the concept of stabilization under FET. This piece will examine in detail stabilization under FET.

⁶⁰ *Bharat Cooperative Bank (Mumbai) Ltd. V. Employees Union* (2007) 4 SCC 685.

⁶¹ *Id.*

⁶² *Eco Oro Minerals Corp. V. Republic of Colombia*, ICSID Case No. ARB/16/41 Para 755.

⁶³ Schill, *Stephan International Investment Law and Comparative Public Law* 157 (2010).

⁶⁴ *Id.* 280.

⁶⁵ Ortino Federico, *The Obligation of Regulatory Stability in The Fair and Equitable Treatment Standard: How Far Have We Come?* 21.4 *J. Int. Econ. Law* 845, 846-848 (2018).

⁶⁶ *Id.*

The second, which is more controversial, is importing the concept of stabilization under FET. This piece will examine in detail stabilization under FET.

While it is not clear from the formulation of FET that stabilization is part of its guarantee, in practice, it has been interpreted as a source of stability.⁶⁷ Many tribunals and scholars acknowledge that FET is linked to stabilization. For instance, Kopar states that “[i]t is true that there is an ever-growing arbitral practice that strengthens the link between the FET standard and the stability guarantee, insofar as some scholars view the FET standard as a new form of stability guarantee based on a treaty.”⁶⁸ The question then is what the contours of FET stabilization in the absence of a stabilization clause is. For a clear understanding of stabilization, it is important to distinguish stabilization clauses and general stability under FET.

Stabilization clauses are stipulations found in investments agreements and legislation limiting the host states’ power to change the legal regime during the life of a project or for a specified time.⁶⁹ These clauses can be classified as either freezing, economic equilibrium, or hybrid clauses.⁷⁰ Freezing stabilization clauses suspend the change of legal regime that has the potential of affecting the investment. The aim of these clauses is to ensure that the legal regime that operated at the time of the establishment of the business remains in place. The economic equilibrium guarantees the investors the right to compensation for the costs of complying with the changes in the law. The hybrid clauses combine characteristics of freezing clauses and the economic equilibrium.⁷¹ This operates through the guarantee that in cases of changes in the legal regime, the investor will be restored to the same position as before the changes of the law.

FET guarantees stabilization through two standards of legitimate expectation and a stable business and legal environment.⁷² Unlike stabilization clauses, stabilization under FET is expansive and lacks the delineation of its meaning. Most stabilization clauses have a specified period in which they operate, but FET’s stabilization applies as a perpetual standard. To some, the idea of stability reinforces the object of international investments law as a guarantor of the rule of law and fairness.⁷³ This piece will examine in detail the idea of stabilization when dealing with climate change and see how tribunals have interpreted these standards.

The common finding in cases dealing with stabilization has been that the purpose of change of the law is immaterial in determining the liability of the state.

⁶⁷ *Id.*

⁶⁸ Kopar Rahm, Stability in International Energy Investments. In *Stability and Legitimate Expectations in International Energy Investments*, 51–92 (2021).

⁶⁹ Frank Sotonye, *Stabilization Clauses and Sustainable Development in Developing Countries* 10-26(2014) (Ph.D. dissertation University of Nottingham).

⁷⁰ *Id.*

⁷¹ *Id.* at 26.

⁷² Henckels, Caroline Proportionality and The Standard of Review in Fair and Equitable Treatment Claims: Balancing Stability and Consistency with The Public Interest 3 *Society of International Economic Law (SIEL) Biennial Global Conference* 3(2012).

⁷³ *Id.*

The Tribunal in *Enron V Argentina*⁷⁴ found that the state had violated FET by changing its law. This finding was made despite the grounds for changing the law being legitimate because of the economic crisis. The tribunal expressed itself as follows: -

It is clear that the 'stable legal framework' that induced the investment is no longer in place Even assuming that the Respondent was guided by the best of intentions, which the tribunal has no reason to doubt, there is here an objective breach of the fair and equitable treatment due under the Treaty⁷⁵.

Based on tribunals practice, FET can be described as the new stabilization clauses.⁷⁶ This ubiquitous standard has become a pathway to import stabilization of legal regime where states did not agree to a stabilization clause⁷⁷.

2.5 The Problem of Interpreting Fair and Equitable Treatment as a Strict Rule as Opposed to a Standard

Tribunals have applied FET as a rigid rule that operates without any exceptions or context. While most tribunals have not expressly categorized FET as a rule, they have applied it that way.⁷⁸ It is not enough for tribunals to call FET a standard or a principle because what matters in cases is the application and not labeling. This part argues that applying FET as an invariable rule undermines the ability of this standard to balance competing interests. The implication of a lack of balance is that tribunals end up deciding cases absent legitimate states' considerations. This conceptualization undermines the climate change agenda because of the need to balance the issue of stabilization and policy change to curb global warming.

The skewed application of FET as a rule that operates without exceptions has undermined the state's power to regulate in public interest.⁷⁹ Tribunals have disregarded whether the state acted in good faith to pursue a legitimate national goal.⁸⁰ For instance, in *Azurix v. Argentina*,⁸¹ the tribunal found a violation of FET where the state lowered water prices to ensure affordability and access. This change in water prices arose after serious concerns from the members of the public on how the water prices were hindering enjoyment of their right to water. The tribunal faulted the state for changing the water policy. It refused to recognize the importance of water for the public and balance between the rights of the investor and the obligations of the state to the public.

⁷⁴Enron Corporation and Ponderosa Assets, L.P. V. Argentine Republic, ICSID Case No. ARB/01/3

⁷⁵In 267 And 268.

⁷⁶Merrill & Ring Forestry L.P. V. Canada, Award, 31 March 2010, UNCITRAL Para. 232.

⁷⁷*Id.*

⁷⁸Windstream Energy Llc V Canada, Award, 27 September 2016, UNCITRAL, Para 380.

⁷⁹Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 Santa Clara J. Int'l L. 7, 27 (2014)

⁸⁰*Id.*

⁸¹Azurix Corp. V. The Argentine Republic, ICSID Case No. ARB/01/12.

While responding to Hart, Dworkin argued that Hart's view of law as a union of primary and secondary rules missed a fundamental part of the legal system.⁸² According to Dworkin, the distinction between rules and principles is logical. This distinction signifies convergence in obligation and difference in the character of duties. Dworkin then stated that "rules are applicable in an all-or-nothing fashion. If the facts are given, and the rule is valid, the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."⁸³ If accepted as valid, a rule must apply in a particular situation in a binding manner. They control the decision in a definite way by decreeing what must follow if the basic premise is established. This piece highlights the case for FET as a principle instead of a rule.

The meaning of FET has broad terms and concepts which are non-categorical.⁸⁴ For example, FET has been described as placing an obligation of reasonableness, non-arbitrariness, justness, and non-discriminatory.⁸⁵ These standards are malleable, and they invite some relativity in their examination. They are not categorical rules but are flexible standards that should be examined by looking at the case in totality.⁸⁶ For instance, reasonableness cannot be assessed without looking at the context of the dispute. It follows FET is not meant to apply in an all or nothing fashion.

FET offers an overarching standard that has sub-standards ingrained in it.⁸⁷ It represents what this research refers to as "the meta-principle" since it contains main guiding obligations. This principle acts as the broader principle which operates as the benchmark for examining other minor principles. For instance, under FET, one will find the obligation to adhere to legitimate expectations and provide a stable business environment. These principles are independent of each other, but they indicate how the investor should be treated. Therefore, FET represents an overall goal of various principles which should be realized to guarantee the overarching investor's rights.

The advantage of looking at FET as a principle instead of a rule is that tribunals will have leeway to balance this broad standard with other competing interests.⁸⁸ Duncan Kennedy argues in his seminal work that a rule is limited since it does not address substantive justice.⁸⁹ This is because the law tends to be indeterminate, and it is difficult to maintain a highly formal legal system.

⁸² Williams Michael, Assessment of The Dworkin-Hart Debate 13 (2005) (Masters Dissertation).

⁸³ Dworkin Ronald, The Model of Rule, 35 U Chi L. Rev, 14,25 (1967).

⁸⁴ Global Telecom Holding SAE V. Canada, ICSID Case No. A.R.B./16/16, Award (27 March 2020), Para. 561.

⁸⁵ MTD. Equity Sdn. Bhd. And MTD. Chile SA V. The Republic of Chile, ICSID Case No. A.R.B./01/7, Award (May 25, 2004) Par 11.

⁸⁶ Gold Reserve Inc. V. Bolivarian Republic of Venezuela, ICSID Case No. A.R.B. (AF)/09/1, Award (22 September 2014) Para. 566.

⁸⁷ Electrabel SA V. The Republic of Hungary, ICSID Case No. A.R.B./07/19, Decision On Jurisdiction, Applicable Law and Liability, November 30, 2012 Para. 7.74.

⁸⁸ Islam Rumana, *Proportionality as A Tool for Balancing Competing Interests in Investment Disputes: Fair and Equitable Treatment (FET) Standard in Context*, 1 Jahangirnagar Univ. JL. 119, 121 (2013).

⁸⁹ Kennedy Duncan, A Critique of Adjudication 1700 (2009).

Even in a situation where we might think that the rule is settled, a situation that requires balancing might arise. Duncan Kennedy in referencing standards like good faith; he argues they represent the open texture of the law.⁹⁰The implication of this argument is that FET should be viewed as a standard guaranteeing justice.

FET as a rule would require perfect states conduct by imposing obligations such as acting consistently and coherently.⁹¹However, standards allow for margin of error by examining what offends the general principles instead of trivial details. Tribunals can look at the goals of the state action and whether it amounts to gross violation of investor rights.⁹²The other advantage is that tribunals avoid absurd decisions that categorical rules can present.⁹³Lastly, if they view FET as a principle, they will seek justice in the case, which is not one-sided.⁹⁴

In sum, FET has become one of the most invoked standards in investor-state arbitration. Despite the importance of this standard, it portends several challenges which undermine its effectiveness in balancing competing interests. This part has demonstrated that FET is an ambiguous standard that has been used by arbitrators to import their sense of fairness which is one-sided. Although the modern treaties have attempted to clarify FET, this has been clipped by the deep-rooted culture of viewing FET as a broad standard that permeates the entire investment regime. This is compounded using non-exhaustive words such as “includes” in enumerating the meaning of FET giving arbitrators leeway in importing the traditional view of FET. The ambiguity has given arbitrators a path to import stability into investments, even absent stabilization clauses.

3 International Law Obligations Relating To Climate Change In The Context Of Emergency

The world is in the midst of unparalleled climate change crisis. The crisis is lethal, worldwide, and irreversible. Climate change has already struck hard causing extreme weather, droughts, rising sea levels, flooding, 955 million deaths per year 96 and estimated 83 Million deaths by 2100. 97Consequently, Intergovernmental Panel on Climate Change(IPCC) has proclaimed that “limiting global warming to 1.5o C would require rapid far-reaching and unprecedented changes in all aspects of the society.”

⁹⁰ *Id.*

⁹¹ Arato Julian, *The Private Law Critique of International Investment Law*, 113.1 *Am. J. Int. Law* 1, 14-19 (2019).

⁹² *Id.* 21.

⁹³ *Id.* 20.

⁹⁴ *Id.* 25.

⁹⁵ Melissa Denchak, *Flooding and Climate Change: Everything You Need to Know*, NRDC (April 10, 2019)

⁹⁶ Laura Millan, *Climate Change Linked to 5 Million Deaths a Year, New Study Show*, Bloomberg (July 7, 2021, 6:30 PM EDT).

⁹⁷ Disha Shetty, *Climate Change Would Cause 83 Million Excess Deaths By 2100* (April 1 2022) <https://www.Forbes.com/Sites/Dishashetty/2021/07/30/Climate-Change-Would-Cause-83-Million-Excess-Deaths-By-2100/?Sh=45c7cf4845c4>.

⁹⁸The race to net zero has been bumpy but with concrete policy change and implementation this goal is achievable. States have created alliances committing to phasing out fossil fuel and other sources of GHG. In the just concluded COP26, 74 states have committed to net zero by midcentury.⁹⁹

States have adopted the language of international law to curb global warming.¹⁰⁰ Yet, international law is such an amorphous subject with contradictory obligations arising from its fragmentation. International investment law has embraced protection of foreign investments as its primary objective. This protection has been pursued without a sense of the wider context of international law. Conversely, climate change has adopted the reduction of GHG and the match to net zero as its primary objective. At the same time, climate change action has taken a global outlook through the prism of international law. To coordinate internationally, states have entered treaties such as the United Nations Framework Convention on Climate Change (UNFCCC) and Paris Agreement on Climate Change 2015. Indeed, climate change is one of the areas that is so reliant to international law and politics because of the global nature of global warming. GHG knows no boundaries nor does climate system.

The recent concluded UN Climate Summit in Egypt dubbed CoP27 demonstrates the weakness of relying on international law and politics to tackle a serious problem like climate change. While some have decried that the world is in the “highway to hell”,¹⁰¹ opinion on CoP27 remains divided, some say that “the 1.5C climate goal died at CoP27”,¹⁰² other have argued that CoP27 has achieved “Historical Win”,¹⁰³ and others concluding it is “flawed though still consequential”.¹⁰⁴ Whatever way one view CoP27, what emerged from the summit is that countries are pushing back expressly or by conduct against reduction of GHG. For example, Saudi Arabia is reported to have laid its case by stating that “we should not target sources of energy; we should focus on emissions. We should not mention fossil fuels.”

⁹⁸ The Intergovernmental Panel On Climate Change, *Summary for Policymakers of IPCC Special Report On Global Warming of 1.5°C Approved by Governments* (8 October 2018) https://www.ipcc.ch/site/assets/uploads/2018/11/Pr_181008_P48_Spm_En.Pdf.

⁹⁹ Clea Schumer, *How National Net-Zero Targets Stack Up After The COP26 Climate Summit* (November 18, 2021) <https://www.wri.org/insights/how-countries-net-zero-targets-stack-up-cop26>.

¹⁰⁰ Ruppel Oliver, Christian Roschmann, and Katharina Ruppel, *Climate Change: International Law and Global Governance* 9,10-13(Baden: Nomos 2013).

¹⁰¹ Sharon Kimathi, *Sustainable Switch: COP27 warned ‘We are on a highway to climate hell’* (November 17, 2022) <https://www.reuters.com/business/cop/sustainable-switch-cop27-warned-we-are-highway-climate-hell-2022-11-07/>

¹⁰² Damian Carrington, *the 1.5C climate goal died at Cop27 – but hope must not* (November 20, 2022) <https://www.theguardian.com/environment/2022/nov/20/cop27-summit-climate-crisis-global-heating-fossil-fuel-industry>

¹⁰³ Zack Colman, Karl Mathiesen, *COP27 Summit Yields ‘Historic Win’ for Climate Reparations but Falls Short on Emissions Reductions* (November 21, 2022) <https://www.scientificamerican.com/article/cop27-summit-yields-historic-win-for-climate-reparations-but-falls-short-on-emissions-reductions/>

¹⁰⁴ Covington Alert *COP27: A Flawed Though Still Consequential Climate Summit* (November 23, 2022,) <https://www.cov.com/en/news-and-insights/insights/2022/11/cop27-a-flawed-though-still-consequential-climate-summit>

¹⁰⁵Senegal's president has retorted on exploitation of fossil fuels" Why not? Why should Africa not do this?" ¹⁰⁶In addition to some states being spokespersons to the fossil industries, over 636 fossil fuel lobbyists were in Cop27. ¹⁰⁷The contested space of international law and politics demonstrate that although international law offers an important avenue for discourse it is limited because of varying interests of different states.

The framework of international law is inescapable for climate change action. This framework has numerous benefits including the availability of developed doctrines such as due diligence and no harm principle to supplement climate regime. ¹⁰⁸At the same time, climate change has an inherent emergency which calls for its relooking in the prism of crisis. Amid the catastrophe of the century, international law must adopt emergency as the structure of approaching climate change. This part argues that international law response to climate change needs to adopt an emergency framework. The emergency framework will influence how international law relating to climate change including investment law will be interpreted and implemented. It also shapes how states respond to climate change by elevating it to a priority.

3.1 International Law Norms Relating to Global Climate Change Emergency

States' climate change obligations are broad and often not expressed in precise terms. While there is no doubt that states have obligations toward climate, pinning down the scope of these responsibilities into actionable duties remains an uphill task. These obligations are spread throughout the numerous international instruments dealing with climate change. Climate change has international environmental law grounding that reinforces its ubiquitous obligations. Yet, international environmental law is not designed for an emergency. In this part, I look at how basic international environmental law obligations can be reoriented to deal with climate change as an emergency.

¹⁰⁵ Fiona Harvey et alia Cop27 first week roundup: powerful dispatches, muted protest, little cash (November 12, 2022)<https://www.theguardian.com/environment/2022/nov/12/cop27-first-week-roundup-powerful-dispatches-muted-protest-little-cash>

¹⁰⁶ Ruth Michaelson Cop27 first week roundup: powerful dispatches, muted protest, little cash+ (10 November 2022) <https://www.theguardian.com/environment/2022/nov/12/cop27-first-week-roundup-powerful-dispatches-muted-protest-little-cash>

¹⁰⁷ Ruth Michaelson 'Explosion' in number of fossil fuel lobbyists at Cop27 climate summit(November 10, 2022) <https://www.theguardian.com/environment/2022/nov/10/big-rise-in-number-of-fossil-fuel-lobbyists-at-cop27-climate-summit>

¹⁰⁸ Mayer Benoit, The Relevance of the No-Harm Principle to Climate Change Law and Politic, 19 Asia Pac. J. Environ. Law 79, 93 (2016).

3.1.1 The Obligation to Prevent and Not to Cause Excessive Emission of GHG Under the No-Harm and Precautionary Principle

States sovereignty is not a *carte blanche* to act unabated without considering how its actions or omissions might injure neighboring countries.¹⁰⁹ To ensure the responsible use of states' territorial areas, the no harm principles require states not to cause transboundary harm. The articulation of the no harm rules was made in the early case of Trail Smelter Arbitration. The tribunal stated that the state has no "right to use or permit the use of its territory in such a manner as to cause injury fumes in or to the territory of another."¹¹⁰ Yet, the traditional no-harm principle can prove unhelpful for a large-scale problem and an emergency like climate change.

Climate change is complicated and interconnected, which means that the actions of one state are likely to have a transboundary effect.¹¹¹ Indeed, the atmosphere does contain territorial boundaries. This means that the no-harm principle must be viewed in the context of climate change. One character that defines climate change is emergency due to its disruptive nature. Although the no-harm principle requires hard evidence and severity of transboundary injury, the emergency framework calls for tailoring of this principle in favor of climate change. This obligation calls for the presumption of transboundary harm regarding climate change if a state does not take reasonable measures to reduce its GHG. Admittedly, the question of causation has been a contested issue in climate change discourse. However, recent studies show that there is a link between GHG emissions and climate change¹¹².

States' obligations under no harm principles require both obligations of not injuring and preventing the harm.¹¹³ The no-harm rule imposes both a negative and positive duty.¹¹⁴ The negative obligation is for the state not to injure the neighboring country. The positive is for the state to exercise due diligence, which means adopting measures to prevent the harm. The conception of climate change as an emergency requires heightened due diligence. An emergency requires concerted effort to eliminate it. The state is then required to enact laws and policies to ensure that third parties within their territory do not cause injury to neighboring countries.

¹⁰⁹ Arya Neil, *Do No Harm: Towards A Hippocratic Standard for International Civilization*, Acad. 1,1 (2016)

¹¹⁰ Trail Smelter (U.S. V Canada), 3 R.I.A.A. 1907, 1965 (1938, 1941).

¹¹¹ Mayer, Benoit Supra 101, 27.

¹¹² Stips, Macias Coughlan. Et Al, *On the Causal Structure Between CO2 and Global Temperature* 6 Sci Rep 1,1 (2016). <https://doi.org/10.1038/Srep21691>.

¹¹³ Jervan Marte *the Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to The Development of the No-Harm Rule*, 1,55 (14-17 Pluricourts Research Paper 2014).

¹¹⁴ *Id* 49.

Additionally, due diligence obligations can complement usual climate change obligations by grounding state responsibility to enforce and monitor emission of GHG.¹¹⁵ For instance, a due diligence obligation entails the duty to conduct an Environmental Impact Assessment (EIA). By now countries should have adopted the climate change impact assessment, which includes assessing the GHG effect of defined projects.

The advantage of the adoption of the no-harm principle in the climate change context is that compared to usual climate change obligations, this principle has acquired the status of customary international law rule.¹¹⁶ The signaling of the no-harm principle as a rule of customary international law was made by the ICJ in the *Corfu Channel case*.¹¹⁷ Although the ICJ did not state that it was dealing directly with the no-harm principle, the import of its findings and articulation led to the conclusion that the court was dealing with this principle. The court stated that states are “under an obligation not to allow its territory knowingly to be used for acts contrary to the rights of other States.”¹¹⁸ The ICJ in *Corfu Channel* referred to the obligation not to harm the neighbor in general terms and without characterizing it as customary. In *Pulp Mills Case*, the ICJ, while quoting the *Corfu Channel case*, expressly acknowledged that the no-harm principle is a customary international law rule.¹¹⁹ It is essential to note that the court did not use the word no harm but the principle of prevention. However, the essence of the court’s formulation remains the same as the no-harm principle.

The invocation of the no-harm principle will present some difficulty because of the complexity of climate change. One complexity is being experienced in the standard of proof, and the causation threshold.¹²⁰ Even more importantly, the attribution of the harm to the state will be a challenge due to causation and delayed effect problems.¹²¹ The proposed threshold is significant harm caused by the lack of reasonable measures to prevent climate change.¹²² Nevertheless establishing violation of the obligation of states not to harm other states will be difficult. The only solution to these hurdles is the adoption of broad presumptions based on international acceptable levels of GHG. To the minimum, states should adopt measures to reduce the emission of GHG gases and have a system of monitoring the implementation of these measures.

¹¹⁵ *Id* 56.

¹¹⁶ Mayer, Benoit Supra 101, 93.

¹¹⁷ *Corfu Channel, United Kingdom V Albania, Judgment, Merits, ICJ GL No 1, [1949] ICJ Rep 4, ICGJ 199 (ICJ 1949), 9th April 1949, United Nations [UN]; International Court of Justice [ICJ].*

¹¹⁸ *The Corfu Channel Case, The United Kingdom V. Albania, ICJ Rep. (1949) P 22.*

¹¹⁹ *The Case Concerning Pulp Mills On the River Uruguay, Argentina V. Uruguay, ICJ Rep. (2010).*

¹²⁰ Mayer, Benoit Supra 101, 92.

¹²¹ *Id.*

¹²² Mayer, Benoit Supra 101, 81.

3.1.2 International Law Obligations in the Context of Climate Global Emergency

Global climate change regime is operating in the shaky ground of international law. Climate change has infiltrated international law in unrivaled way significantly altering states slow-paced approach to international affairs. Yet, international law is highly contested subject with politics and interests taking center stage. Climate change is therefore facing the double problems of the weaknesses of international law and the contestation of climate change obligations. Despite these complexities and challenges, climate change has turned to international law for an answer. Can international law match the occasion of coordinating interests and providing a platform for global response in times of this emergency? How should international law obligations be viewed? What is the importance of shift in the conceptualization of international law obligation? This part seeks to engage with these puzzling questions to offer a solution on the cooperation's of international law in the age of the unprecedented crisis.

The recent IPCC report has described climate change in almost eschatological terms.¹²³ This picture of end of reality has been painted in the entire globe and across regions. The report has concluded that climate change has caused “widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability.”¹²⁴ The damage has been brutal on human life, the ocean life and entire ecosystem. It has had an impact on the physical health, livelihood, and precipitated humanitarian catastrophe. The bottom line is that it is not business as usual. How then should international law obligations be viewed in this era of climate change.

Climate change is global, destabilizing, and imminent threat to human life which requires decisive response from international law. With the rise of the sea level, the mass deaths of human being and threat to life in the entire ecosystem, climate change is an emergency.¹²⁵ The language of emergency is not strange in international law. The Human Rights Committee in its General Comment on article 4 of International Covenant on Political and Civil Rights places two conditions for public emergency.¹²⁶ First an emergency must threaten the life of a nation and second is official proclamation. Although meant for a different regime, the threat to the life of a nation emerges as the core element of public emergency. The impact of climate change reveal that it fits the threat to the entire humanity not only a single nation.

¹²³ The Intergovernmental Panel, On *Climate Change Climate Change 2022 Impacts, Adaptation and Vulnerability Working Group II Contribution to The Sixth Assessment Report of the Intergovernmental Panel On Climate Change* 1, 3-96(2022).

¹²⁴ *Id* 7.

¹²⁵ *Id* 42.

¹²⁶ UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations During a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11.

The conceptualization of climate change as an emergency will affect the interpretation and implementation of its obligations. These climate change obligations will have two impacts. The first is to reorient other international law obligations to align them with the climate change emergency. Emergency destabilizes the status quo by demanding its elevation and acute attention.¹²⁷ Second, emergency demands more than the ordinary conduct to alleviate its conditions. Almost all situations of emergency cause suffering which require a swift and imminent response. Rhetorically emergency has a way of galvanizing people around a course.

When dealing with climate change in the age of its emergency, it is important to resist inertia or indifference. The sources of the inertia are likely to manifest themselves in two ways. First, the parochial view of fragmented areas of international law.¹²⁸ The danger of this parochialism is that it blinds the emergency by adopting the view that it is the responsibility of another international law regime to deal with climate change. For instance, tribunals might argue that it is the responsibility of states to deal with climate change through the international climate change law. Second, the proclivity to think of climate change from one's own experience only. This view is what might be called as the lack of empathy while dealing with climate change related disputes. Although climate change affects the universe it has different direct impact to different places. It is tempting to treat climate change based on our own surrounding which is dictated by our locality. The effect of climate change might vary due to different resilient levels and adaptation mechanism.

This part has argued for the reorientation of conceptualization of climate change in the age of its emergency. It has argued that climate change must be viewed as an emergency which has implications on how states respond and how its obligations are mediated with other international obligations. Climate change has all elements of an international emergency such as it is posing an imminent threat to humanity as a whole, it has destabilizing effect to international order and lastly it has a global effect.

4 The Conflict Between Climate Change And Stabilization Under Fair And Equitable Treatment

The core question in this project is mapping the potential conflict between climate change and international investments law standards, particularly stabilization under FET. Before delving into addressing the conflict, it is vital to ask whether a conflict exists, or it is imaginary. States' obligations towards climate change demand alignment of previous international commitments.

¹²⁷ Julian Izzo, *Human Rights And Security In Public Emergencies* 1,1 (April , 5 2022) <https://www.E-Ir.Info/Pdf/94411>.

¹²⁸ Van Asselt, Harro, Francesco Sindico, And Michael A. Mehling, *Global Climate Change and The Fragmentation of International Law*, 30.4 *Law. & Pol'y*, 423, 434 (2008).

This alignment involves changes in law and policy to advance a climate change agenda. Understandably, global climate change action has gained traction recently.¹²⁹ As a corollary, one expects a corresponding change in the legal regime to reflect the shift in international commitments. These changes are a source of potential conflict between states' interventions to realize climate change obligations and investors' rights.

There are two approaches to answering whether a conflict exists between climate change and investors' guarantees. The first approach posits that there is no conflict between international investment law and climate change.¹³⁰ This approach relies heavily on the text of both regimes to argue that international texts on climate change do not require a change of law. International climate change treaties provide for broad mandate without specifying how to realize it. This means that states have alternatives ways of achieving the climate change targets. This approach was adopted in the progressive decision of *Suez and Vivendi Universal S.A. v The Argentine Republic*¹³¹ where the tribunal stated that "Argentina is subject to both international obligations, i.e. human rights and [investment] treaty obligations and must respect both of them equally. Argentina's human rights obligations and its investment treaties obligations are not inconsistent, contradictory, or mutually exclusive." Thus, the purported conflict is imaginary and, in some cases, self-created. Under this approach, the underlying philosophy is that the state is a rational actor with choices to realize international obligations without altering previous ones.

The second approach which this research adopts is that the conflict exists out of the implementation, and interpretation of international obligations.¹³² The conflict manifests itself through legislation targeting specific sectors with the highest carbon footprint, such as the fossil fuel industry. The other way is through general legislation that embraces broad policy change to implement climate change. This way, the foreign investor is caught up in the non-discriminatory regulation. Despite the non-discriminatory nature of the rule, the investors' guarantees are adversely affected.¹³³ To buttress that the conflict between the two regimes exists, fossil fuel companies are challenging climate change action of several states claiming the violation of international investment law. This part engages with over \$ 18 billion worth cases that have been instituted against governments challenging climate change policies. It argues that the fossil fuel industry is likely to experience unprecedented levels of stranded assets because of climate change policies. It also engages the standards of legitimate expectation and a stable legal environment.

¹²⁹ Rinawati Fitria, Katharina Stein, And André Lindner, *Climate Change Impacts On Biodiversity—The Setting of a Lingering Global Crisis*, 5 Diversity 114, 115-116 (2013).

¹³⁰ Boute Anatole, *Combating Climate Change Through Investment Arbitration*, 35 Fordham. Int'l. LJ. 613, 653 (2011).

¹³¹ *Suez, Sociedad General De Aguas De Barcelona, S.A. And Vivendi Universal, S.A. V. Argentine Republic*, (ICSID Case No. ARB/03/19 Decision On Liability - 30 July 2010).

¹³² Condon Bradley, *Climate Change and International Investment Agreements*, 14.2 Chin. J. Int. Law 305,308 (2015).

¹³³ *Id*

Through what this research calls the “malleable thesis” this paper argues that legitimate expectation contains qualifications which reveal that it is a context sensitive guarantee.

4.1 Signs of a Fractured International Law Regime; Climate Change and International Investment Law

The implications of the match to net-zero will have serious casualties in the fossil fuel industry. Consequently, the fossil fuel industry has launched a serious attack on climate change action with a surge of investor-state cases being experienced. France bans on exploration of oil was thwarted by a threat from Vermilion, a Canadian company.¹³⁴Cases have been instituted at ICSID challenging climate change action against US, Netherlands, Italy, and Slovenia for over \$ 18 billion claiming breach of FET and legitimate expectation.¹³⁵Governments are being hampered from implementing ambitious climate change obligations because of the investor-state cases. In fact, the New Zealand minister of Climate Change decried that climate goals “would have run afoul of investor-state settlements.”¹³⁶Yet, these grossly conflicted regimes operate within the auspices of international law. This sub-part goes into details to examine this conflict using ongoing cases.

4.1.1 Climate Change and International Investments in Fossil Fuels; A Potential Tension

The fossil fuels industry poses the most significant challenge to climate change action. Increasingly, it is becoming clear that fossil fuel phase-out is inevitable.¹³⁷Domestically, governments are facing huge pressure from civil society to get rid of fossil fuels. For instance, in USA Center for Biological Diversity has mounted pressure on the US government to phase out fossil fuels exploration in public lands.¹³⁸At the international level, states are building alliances to match toward net-zero.

¹³⁴ ISDS Platform, *Vermilion Vs. France: Blocking Climate Change Laws With ISDS Threats* (April, 20 2022) <https://www.isds.bilaterals.org/?vermilion-vs-france-blocking>

¹³⁵ Matteo Fermiglia, Catherine Higham, Korey Silverman-Roati And Joana Setzer, *Investor-State Dispute Settlement As A New Avenue For Climate Change Litigation*, Columbia Climate Law Blog (March 13 2022) <https://blogs.law.columbia.edu/climatechange/2021/06/02/investor-state-dispute-settlement-as-a-new-avenue-for-climate-change-litigation/> .

¹³⁶ Elizabeth Meager, *Cop26 Targets Pushed Back Under Threat Of Being Sued*, Capital Monitor (March 13 2022) <https://capitalmonitor.ai/institution/government/cop26-ambitions-at-risk-from-energy-charter-treaty-lawsuits/> .

¹³⁷ UN Climate Change News, *UN Chief Calls For Immediate Global Action To Phase Out Coal* (March 12 2022) <https://unfccc.int/news/un-chief-calls-for-immediate-global-action-to-phase-out-coal>.

¹³⁸ Center for Biological Diversity, *Legal Petition Calls On Biden to Phase Out Federal Oil, Gas by 2035* (March 10 2022) <https://biologicaldiversity.org/w/news/press-releases/legal-petition-calls-on-biden-to-phase-out-federal-oil-gas-by-2035-2022-01-19/>.

For example, in the just concluded COP26, Costa Rica and Denmark governments launched the Beyond Oil and Gas Alliance (BOGA), which aims at assisting in the phase-out of oil and gas production.¹³⁹BOGA brings together countries such as France, Denmark, Costa Rica, Sweden, Wales, Greenland as core members and New Zealand, Portugal, and the state of California as its associate members. At the same time, Italy, Finland, and Luxembourg have registered as friends of this alliance. Again, in COP26, 28 states became members of Powering Past Coal Alliance, a 190-member alliance working on getting rid of coal.¹⁴⁰One of the achievements of COP26 was the declaration by 40 states that they commit to phasing out coal.¹⁴¹The efforts to decarbonize means that the states policy on climate change will significantly shift, rendering most fossil fuel investments useless. While the sincerity of these commitments remains to be seen, some countries have started to implement de-carbonization measures painting a gloomy picture for investors. This part discusses the effect of phasing out fossil fuels on international investors.

4.1.2 The Effect of Climate Change Action for The Fossil Fuel Industry

The journey to net-zero is bumpy, but it appears to be gaining traction across the universe. The European Union and 44 other countries, which make up 70 percent of the global emission, have adopted a net-zero target by 2050.¹⁴²This net-zero campaign requires a concerted effort to face-out fossil fuels and other sources of GHG. In COP26, the United States, Canada, and 18 other countries took a decisive stand to stop funding fossils fuel projects overseas using public funds.¹⁴³The implication of these efforts has been captured by Mercure and others in the following terms “[I] arge quantities of fossil fuel reserves and resources are likely to become ‘unburnable’ or stranded if countries around the world implement climate policies effectively.”¹⁴⁴ Even more gross for the fossil fuel industry is the finding that half of the fossil fuel properties will have no value by 2030.¹⁴⁵ The value of the stranded assets has been estimated at \$11 trillion -\$14 trillion.

¹³⁹ Beyond Oil & Gas Alliance, Redefining Climate Leadership (March 13th 2022) <https://Beyondoilandgasalliance.Com/> .

¹⁴⁰ Erika Lennon, Nikki Reisch and Sebastien Duyck, False Solutions Prevail Over Real Ambition at COP26 (March 10th 2022) <https://Cz.Boell.Org/En/2021/12/16/False-Solutions-Prevail-Over-Real-Ambition-Cop26-0>.

¹⁴¹ *Id.*

¹⁴² International Energy Agency, Net-Zero by 2050 A Roadmap for The Global Energy Sector 32 (10 March 2022)

¹⁴³ Kate Abnett and Simon Jessop, U.S Canada Among 20 Countries To Commit To Stop Financing Fossil Fuels Abroad (March 12, 2022) <https://Www.Reuters.Com/Business/Cop/19-Countries-Plan-Cop26-Deal-End-Financing-Fossil-Fuels-Abroad-Sources-2021-11-03/> .

¹⁴⁴ Mercure Salas Et Al, Reframing Incentives For Climate Policy Action, 6 Nat. Energy. 1133,1133 (2021).

¹⁴⁵ *Id.*

¹⁴⁶The cost of avoiding catastrophic climate change is going to be extremely high for investors. Approximately 60 to 80 percent of publicly listed fossil fuels reserve should be declared unburnable if devastating climate change consequences are to be avoided.¹⁴⁷For the next 20 years, the estimated costs of this declaration of unburnable fossil fuel are \$ 28 trillion. ¹⁴⁸The implication of climate change action will have dire consequences for investments in fossil fuels industries.

Climate stranded assets occur where the value of fossil fuel assets depreciates or losses value completely due to climate change action. ¹⁴⁹Although stranded assets are not a phenomenon that is found in climate change only, the implementation of climate change mitigation measures is expected to have the highest level of fossil fuel losses. The implication of phasing out of fossil fuel is that most coal, oil, and gas reserves will be rendered valueless. Kyla Tienhaara observes that key assets such as oil reserves predominantly found in Venezuela, Canada, Russia, and the Middle East will lose value. ¹⁵⁰The majority of coal reserves are in U.S., Russia, Turkmenistan, Iran, Qatar, China, Australia, and India. ¹⁵¹The Global Energy Monitor (GEM) tracks around 2793 gas pipelines, with Italy proposing to have Adriatica Pipeline as an additional mode of transportation and Bulgaria proposing the Valchi Dol–Preselka Replacement Pipeline.¹⁵²By 2022 March, the GEM had tracked 108 countries for having new coal plants. ¹⁵³Additionally, GEM tracked 13,412 coal units and 2 107 plant owners. ¹⁵⁴Coal mines are also on the rise, with 67 countries having large reserves, 3,019 coal mines, and 7.1 billion tons of coal extracted per year. ¹⁵⁵The oil and gas industry and production total to around 29,014, plants. ¹⁵⁶More than 5183 sites are either discovered or operating. Foreign investors feature heavily on GEM data as the owners of the oil and gas plants. Yet, going by the international climate commitments these fossil fuels operations will be short-lived.

¹⁴⁶ Jonathan Watts, Ashley Kirk, Niamh Mcintyre, Pablo Gutiérrez And Niko Kommenda, *Half World's Fossil Fuel Assets Could Become Worthless By 2036 In Net Zero Transition*, The Guardian (March 10 2022) <https://www.theguardian.com/environment/ng-interactive/2021/nov/04/fossil-fuel-assets-worthless-2036-net-zero-transition>.

¹⁴⁷ Ben Caldecott, Elizabeth Harnett, Theodor Cojoianu, Irem Kok, And Alexander Pfeiffer *Stranded Assets: A Climate Risk Challenge X*(Inter American Bank 2016) .

¹⁴⁸ *Id* 10.

¹⁴⁹ *Id* 5.

¹⁵⁰ Tienhaara, Kyla, And Lorenzo Cotula. *Raising The Cost of Climate Action Investor-State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets* 9(International Institute for Environment and Development 2020).

¹⁵¹ BP, *Statistical Review of World Energy* 46(70th Edition 2021).

¹⁵² Global Energy Monitor *Global Fossil Infrastructure Tracker* (March 14 2021)<https://Globalenergymonitor.Org/Projects/Global-Fossil-Infrastructure-Tracker/>.

¹⁵³ Global Energy Monitor *Global Coal Plants Tracker* (March 14 2021) <https://Globalenergymonitor.Org/Projects/Global-Coal-Plant-Tracker/> .

¹⁵⁴ *Id*.

¹⁵⁵Global Energy Monitor *Global Coal Mine Tracker* (March 14 2021) <https://Globalenergymonitor.Org/Projects/Global-Coal-Mine-Tracker/>

¹⁵⁶ Global Energy Monitor *Global Oil And Gas Extraction Tracker* (March 14 2021) <https://Globalenergymonitor.Org/Projects/Global-Oil-Gas-Extraction-Tracker/>.

Carbon Tracker has warned investors of gloomy days in oil and gas industry based on the International Energy Agency (IEA) report that there should be no new investments to achieve the climate change targets.¹⁵⁷ Additionally, it is expected that the production levels will fall, leading to oil and gas companies to cut their revenues drastically. Of course, the demise of fossil fuel industry is not as easy as this research puts because there are so many complications relating to transition. Nevertheless, it is projected that the production of fossil fuels will drop by 80 percent for shale companies.¹⁵⁸ The strive for net-zero will have an effect beyond the fossil fuel companies to cover the motor vehicle manufacturers and other related companies.¹⁵⁹ This will leave \$ 11 trillion to \$ 14 trillion stranded assets.¹⁶⁰ The fossil fuels reserves will lose approximately 50 percent, which translates to \$ 12.9-17.2 trillion.¹⁶¹ The study shows that 68 percent-77 percent of loss will be in oil only and 90 percent will both oil and gas.¹⁶² The estimates of stranded capital losses is around \$303- 364 billion, which translates to 33 percent- 39 percent of fossil fuel.¹⁶³ It is projected that in one or two years from 2021, the stranded capital will be between \$ 539 to \$ 908 billion.¹⁶⁴

The IEA's finding that investments in fossil fuels must stop poses difficult questions on the relationship between international climate change and investment law.¹⁶⁵ States have no option rather than scrap the exploration and production of fossil fuels which portends a disaster for fossil fuels companies and their investments. The increased effects of climate change have been a pressure point for states to act quickly and decisively. The situation for the fossil fuel industry has also been exacerbated by growing alliances committing to eliminating dirty energy. The daunting issue will be how to navigate these hard questions of investor rights and climate change.

¹⁵⁷ Carbon Tracker, *Adapt To Survive: Why Oil Companies Must Plan For Net-Zero And Avoid Stranded Assets* (March 14 2021) <https://Carbontracker.Org/Reports/Adapt-To-Survive/> .

¹⁵⁸ *Id.*

¹⁵⁹ Jean Eaglesham And Vipal Monga, *Trillions In Assets May Be Left Stranded As Companies Address Climate Change* Wall Street Journal(March 14 2021) <https://www.wsj.com/articles/trillions-in-assets-may-be-left-stranded-as-companies-address-climate-change-11637416980> .

¹⁶⁰ Jonathan Watts, Ashley Kirk, Niamh Mcintyre, Pablo Gutiérrez And Niko Kommenda *Half The World's Fossil Fuel Assets Could Become Worthless By 2036 In A Net-Zero Transition* (March 14 2021) <https://www.theguardian.com/environment/ng-interactive/2021/nov/04/fossil-fuel-assets-worthless-2036-net-zero-transition> .

¹⁶¹ Tyler Hansen, *Stranded Assets and Reduced Profits: Analyzing The Economic Underpinnings of the Fossil Fuel Industry's Resistance to Climate Stabilization*, 158 *Renew Sust. Energ. Rev.* 5(2022).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ International Energy Agency, *Global Energy Review 2021 Assessing The Effects of Economic Recoveries On Global Energy Demand and CO2 Emissions in 2021* 11(2021).

4.1.3 International Investment Law as A Tool for Attacking Climate Change Action

The fossil fuel industry is not just watching as the world takes major steps to achieve net-zero. Treaties such as the ECT are offering an avenue for investors to sue states claiming a breach of the stable legal environment. Several corporations have instituted cases against countries for phasing out coal and other climate related changes. The pressure from fossil fuel companies suing under ECT and other IIAs has stirred a debate on the future of these treaties.¹⁶⁶This pressure comes in the wake of the studies revealing that a fifth of investor-state cases has been instituted by fossil companies.¹⁶⁷The most daunting issue has been that even the mere threat of these multi-billion cases is enough to deter states from adopting climate change policy.¹⁶⁸This part uses ongoing cases to demonstrate how investor-state dispute resolution interacts with climate change.

Ascent Resources, a U.K. company, is suing Slovenia for \$ 118,000,000, challenging an environment assessment requirement.¹⁶⁹There are several environmental concerns about the effect of fracking in this project.¹⁷⁰These concerns range from the destruction of ecology to adverse effects on the Mura River, a water resource to emission of GHG. According to the notice of intent to sue, the claim hinges on FET, which claimant describes as “Slovenia’s guarantee that the investments would be accorded fair and equitable treatment Article 2(2) of the BIT and Article 10(1) of the ECT”).¹⁷¹The other dimension of this case is that the community that bears the burden of environmental pollution and climate change petitioned the authorities against this project. The Slovenia government is showing signs of backtracking against the decision to stop fracking.¹⁷²In January 2022, the government passed a law permitting restricted fracking, which shows the power of investors-state dispute resolution mechanism.¹⁷³

¹⁶⁶ Dietrich Brauch, Should The European Union Fix, Leave or Kill the Energy Charter Treaty? Should The European Union Fix, Leave or Kill the Energy Charter Treaty 3(Columbia Center On Sustainable Investment 2021)

¹⁶⁷ Lea Di Salvatore, Rising Trend in Investment Arbitrations Threatens to Undermine Critical Climate Measures Iii (IISD Report 2021).

¹⁶⁸ Kyla Tienhaara, Regulatory Chill in A Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement, *Transnatl. Environ. Law.* 229, 232 (2017).

¹⁶⁹ Joe Lo, Fracking Company Sues Slovenia Over ‘Unreasonable’ Environmental Protections, *Climate Hone News* (March 15 2022) <https://www.Climatechangenews.Com/2020/09/09/Fracking-Company-Sues-Slovenia-Unreasonable-Environmental-Protections/>.

¹⁷⁰ Corporate Europe Observatory, How The Energy Charter Treaty Could Facilitate a Toxic Fracking Project in Slovenia (March 15, 2022) <https://Corporateeurope.Org/En/2021/06/How-Energy-Charter-Treaty-Could-Faciliate-Toxic-Fracking-Project-Slovenia>.

¹⁷¹ Enyo Law, Treaty Claims Against The Republic Of Slovenia By Ascent Resources Plc And Ascent Slovenia Ltd (March 14 2022) <https://www.Italaw.Com/Sites/Default/Files/Case-Documents/Italaw11654.Pdf>.

¹⁷² Business & Human Rights Resource Centre, U.K. Company Ascent Resources Threatens Slovenia With Legal Action Using Energy Charter Treaty (April, 5 2022) <https://www.Business-Humanrights.Org/En/Latest-News/Uk-Company-Ascent-Resources-Threatens-Slovenia-With-Legal-Action-Using-Energy-Charter-Treaty/>.

¹⁷³ Total Slovenia News, Govt Amends Mining Act To Allow Low-Volume Fracking In Petišovci (April, 5 2022) <https://www.Total-Slovenia-News.Com/Politics/9453-Govt-Amends-Mining-Act-To-Allow-Low-Volume-In-Petisovci>.

Foreign investors have also challenged the plans by some governments to phase out coal. RWE, a Germany-based company has sued Netherlands for \$ 1,652,000,000, challenging the plan by the Dutch government to phase out coal by 2030.¹⁷⁴ The case of *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*¹⁷⁵ is ongoing, with the latest news being the issuance of a procedural order on objection to jurisdiction. Similarly, Uniper, also a Germany-based company, has instituted a case for \$ 1,062,000,000 challenging the Netherlands' coal phase-out. The tribunal, on March 3, 2022, also issued a procedural order in the case of *Uniper SE, Uniper Benelux Holding B.V., and Uniper Benelux N.V. v. Kingdom of the Netherlands*¹⁷⁶ directing how the case will proceed.¹⁷⁷ These two cases claim that the plan to phase out coal does not consider the plant owners' investments rights.¹⁷⁸ The primary legal argument is FET and legitimate expectation that the legal environment will not drastically change over the course of the investments.

A Canadian company TransCanada is suing the U.S. for \$ 15 billion, claiming that it has suffered a loss due to the denial of a permit for the Keystone XL Pipeline project.¹⁷⁹ The Obama administration refused to grant the company permit claiming that the project undermines the U.S. global leadership on climate change. This project would have heightened the fossil fuel activities by transporting 800,000 barrels of crude oil from Canada to Texas.¹⁸⁰ The Department of States estimates that the project would have contributed to 17 percent more CO2 than another average barrel in different areas.¹⁸¹ When Trump came to power he authorized a 1,200-mile pipeline to proceed under this project.¹⁸² However, the US President Joe Biden has canceled the permit, which has led the investor to institute the case claiming breach of North American Free Trade Agreement (NAFTA). Rockhopper Exploration, a U.K.- based company, has sued Italy for refusal to grant a permit for drilling on the Adriatic coast.

¹⁷⁴ Friends Of The Earth Europe, *Coal Company Sues Netherlands For €1.4 Billion For Coal Phase Out* (April 5 2022) <https://friendsoftheearth.eu/press-release/coal-company-sues-netherlands-for-1-4-billion/> .

¹⁷⁵ *RWE AG and RWE Eemshaven Holding II BV V. Kingdom of The Netherlands* (ICSID Case No. ARB/21/4).

¹⁷⁶ *Uniper SE, Uniper Benelux Holding B.V., And Uniper Benelux N.V. V. Kingdom of The Netherlands* (ICSID Case No. ARB/21/22).

¹⁷⁷ International Centre for Settlement of Investment Disputes *Uniper SE, Uniper Benelux Holding B.V. And Uniper Benelux N.V. V. Kingdom Of The Netherlands* (ICSID Case No. ARB/21/22) (April, 5 2022) <https://icsid.worldbank.org/Cases/Case-Database/Case-Detail?Caseno=ARB/21/22> .

¹⁷⁸ Stan Putter, *The Netherlands Coal Phase-Out And The Resulting (RWE And Uniper) ICSID Arbitrations* Kluwer Arbitration Blog (April 5 2022) <http://arbitrationblog.kluwerarbitration.com/2021/08/24/the-netherlands-coal-phase-out-and-the-resulting-rwe-and-uniper-icsid-arbitrations/> .

¹⁷⁹ Ian Austen, *TransCanada Seeks \$15 Billion from U.S. Over Keystone XL Pipeline* New York Times (April, 10 2022) <https://www.nytimes.com/2016/01/07/business/international/transcanada-to-sue-us-for-blocking-keystone-xl-pipeline.html> .

¹⁸⁰ Bobby Magill, *Climate Central On January 7, 2016, U.S. Sued For Killing Keystone XL Pipeline*, Scientific American (April 5 2022) <https://www.scientificamerican.com/article/u-s-sued-for-killing-keystone-xl-pipeline/> .

¹⁸¹ *Id.*

¹⁸² Celine Castronuovo, *Company Behind Keystone XL Seeks \$15B In Damages From US* The Hill (April 5 2022) <https://thehill.com/policy/energy-environment/561535-company-behind-keystone-xl-seeks-15b-in-damages-from-us/> .

¹⁸³The Italian government banned all new oil and gas drilling near the coast amidst protests on environmental concerns. The company is asking for \$ 275 million, yet it had only spent 29 percent of the money. ¹⁸⁴The main claim in *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. the Italian Republic* ¹⁸⁵is that Italy has breached the FET standard under ECT. ¹⁸⁶The claimant challenges Italy for failure to accord it a fair and equitable treatment that requires that a foreign investor's legitimate expectation be upheld.

In only five cases, fossil fuel companies are asking for over \$ 18 billion as compensation for government action to realize the climate change agenda. The foreign investors' claims are totaling to the same as the net annual climate funding promised to the developing countries. ¹⁸⁷It is not surprising that fossil fuel companies find the investor-state regime favorable to their interests. Currently, about 231 investor-state cases totaling to approximately 20 percent of all reported cases have been instituted by fossil fuel companies. ¹⁸⁸This trend will intensify as many countries take decisive steps to phase out fossil fuels. These cases raise the question of how the international investment law and climate change regime will interact with each other.

4.2 Tension Between Investor's Legitimate Expectations and Climate Change Obligations

Legitimate expectation has become one of the most preeminent principles in international investment law. Nearly all FET cases invoke legitimate expectations due to its perverse nature. ¹⁸⁹What has, however, brought considerable debate on this doctrine is its use to import stabilization. Providing a stable legal environment is a crucial guarantee for long-term investment. Most of these projects are capital intensive; hence, they require business and legal environment stability. ¹⁹⁰Questions of legitimate expectations are likely to play out in challenges against

¹⁸³ *Rockhopper V. Italy* ICSID Case No. ARB/17/14 [Http://Climatecasechart.Com/Climate-Change-Litigation/Non-Us-Case/Rockhopper-V-Italy/](http://Climatecasechart.Com/Climate-Change-Litigation/Non-Us-Case/Rockhopper-V-Italy/).

¹⁸⁴ Yamina Saheb, *How Shadow Courts Threaten The Climate*, New Internationalist (April 10 2022) [Https://Newint.Org/Features/2021/06/08/Long-Read-Shadow-Courts](https://Newint.Org/Features/2021/06/08/Long-Read-Shadow-Courts) .

¹⁸⁵ (ICSID Case No. ARB/17/14).

¹⁸⁶ Danilo Ruggiero, *Rockhopper Vs. Italy: Weighing Legitimate Expectations Up Against Investor's Due Diligence In M&A Deals* Kluger Arbitration Blog (April 10 2022) <http://Arbitrationblog.Kluwerarbitration.Com/2018/01/27/Rockhopper-Vs-Italy-Weighing-Legitimate-Expectations-Investors-Due-Diligence-Ma-Deals/> .

¹⁸⁷ Global Justice Now, *Corporate Courts Vs. The Climate How The Fossil Fuel Industry Is Deterring Climate Action Through Secret Tribunals* (April 10, 2022) [Https://www.Globaljustice.Org.Uk/Wp-Content/Uploads/2021/09/GJN_Corporatecourtsvsclimatebriefing_Sept2021.Pdf](https://www.Globaljustice.Org.Uk/Wp-Content/Uploads/2021/09/GJN_Corporatecourtsvsclimatebriefing_Sept2021.Pdf) .

¹⁸⁸ International Institute For Sustainable Development, *Rising Trend In Investment Arbitrations Threatens To Undermine Critical Climate Measures* (April 10 2022) [Https://www.Iisd.Org/Press/Investment-Arbitrations-Threaten-Climate-Action](https://www.Iisd.Org/Press/Investment-Arbitrations-Threaten-Climate-Action) .

¹⁸⁹ Teerawat Wongkaew, *Protection of Legitimate Expectation in Investment Treaty Arbitration*3(2019).

¹⁹⁰ Ivar Alvik, *The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as A Problem of Legitimacy*, 31 Eur. J. Int. Law 289–308 (2020).

climate change regulations. This potential conflict raises questions of the scope of legitimate expectation. This part argues that legitimate expectation is one of the broad principles that will conflict with climate change obligations. However, climate change is inherently an evolving public interest issue; hence an investor should reasonably expect the legal regime will change.¹⁹¹ The onus belongs to the investor to conduct due diligence in line with the evolving investment practices of using climate change as a risk factor. Additionally, legitimate expectation is an indeterminate concept with so many qualifications that allow for considering context.

Traditionally, legitimate expectation was a principle to protect citizens against abuse of discretion.¹⁹² The foundation of this principle was the need for consistency and trust in the government pronouncements.¹⁹³ The government's representation was binding if relied upon by an individual. This is the rule of law foundation of legitimate expectation. The other aspect of legitimate expectation was to protect against unfair treatment of citizens. The government is presumed to be the overbearing party in its interactions with individuals. Legitimate expectation acts as a balancing factor against taking away accrued rights.

Despite the importance of the doctrine of legitimate expectation, it is subject to numerous caveats.¹⁹⁴ These caveats range from using the concept of reasonableness to limit what is legitimate. Other principles that have arisen are the legality of promise and reliance. What these qualifications reveal is that legitimate expectation is a contextual dependent doctrine. Additionally, the qualifications are ambiguous and broad. For instance, the meaning of reasonableness of the expectation is not settled. This has been exacerbated by the tribunal's recognition that implicit representations can give rise to legitimate expectations.¹⁹⁵ The caveats and the allowance of implicit representations have made legitimate expectations nebulous guarantees. This what this research calls the "malleable thesis" of legitimate expectations.

4.2.1 The Sources of Legitimate Expectation

The categorization of legitimate expectations has taken different shapes. There is a classification based on sources touching on treaty-founded legitimate expectation and contract-based. On the other hand, there is legitimate expectations under FET and other specific promises made by the state. This part examines the sources of legitimate expectation to lay a background on this important standard.

¹⁹¹ Bulkeley Harriet and Peter Newell, *Governing Climate Change* 68 (2015).

¹⁹² Ahmed Farrah and Adam Perry, *The Coherence of the Doctrine of Legitimate Expectations*, 73 *Camb. Law J.* 61, 63 (2014).

¹⁹³ *Id.*

¹⁹⁴ Lo, Mao-Wei, *Legitimate Expectations in A Time of Pandemic: The Host State's COVID-19 Measures, Its Obligations and Possible Defenses Under International Investment Agreements*, 13 *Contemp. Asia Arb. J.* 13 249, 254(2020).

¹⁹⁵ Total, S.A V Argentina, ICSID Case No ARB/04/1 Para 120.

Tribunals have offered conflicting positions on contract-based legitimate expectations. For instance, the tribunal in *Continental Casualty v Argentina*¹⁹⁶ observed that the obligations arising out of contractual commitments should be taken seriously in establishing a legitimate expectation. This was captured in *Total SA v Argentina*¹⁹⁷ which held that if the state has promised an investor through a contract or stabilization clauses to provide a particular guarantee, the investor has a legitimate expectation. However, in *Parking v Lithuania*¹⁹⁸ the tribunal stated that a contractual promise is not necessarily a legitimate expectation under international law. This was also stated in *Haester v Ghana*¹⁹⁹ where the tribunal stated that a contractual right does give rise to a legitimate obligation under FET.

Despite the differing awards, the contractually backed legitimate expectations offer the most explicit commitments to the investor. In *Texaco v Libya*²⁰⁰ the tribunal recognized the validity of stabilization clauses as a contractual guarantee for the protection of the investment. Similarly, in *Revere Copper & Brass, Inc. v OPIC*²⁰¹ the tribunal accepted that stabilization clauses as part of international law supersedes domestic law. These cases demonstrate that courts will uphold stability as a contractual guarantee. Lastly, in *Suez (InterAgua) v Argentina*, the tribunal accepted that contractual documents gave rise to legitimate expectations²⁰².

The place of FET's legitimate expectation arising from the contract has been a source of divided opinion.²⁰³ Tribunals have embraced a more balanced view that for a breach of contract to amount to a violation of FET, it must be serious and capricious. For example, the tribunal in *Waste Management, Inc. v Mexico*,²⁰⁴ was emphatic that the breach must be an "outright and unjustified repudiation of the transaction". Based on this finding, the tribunal refused to find a violation of FET for failure to pay the investor by the state.

Legitimate expectations may be founded on the general national or international law applicable at the time of investment. This legitimate expectation is based on the understanding that an investor relies on the general promises found in the law. Some of the promises are in the form of licenses, legislation, constitutional guarantees, treaty guarantees, assurances, and affirmations.²⁰⁵

¹⁹⁶ Continental Casualty Company V. The Argentine Republic, ICSID Case No. ARB/03/9, September 5, 2008, Para. 261.

¹⁹⁷ Total SA V. The Argentine Republic, ICSID Case No. ARB/04/01 Para 101.

¹⁹⁸ Parking-Compagniet AS V. The Republic of Lithuania (ICSID Case No. ARB/05/8) (Award, September 11, 2007, Para 344.

¹⁹⁹ Gustav F W Hamester GmbH & Co KG V. The Republic of Ghana, ICSID Case No. ARB/07/24 Para 337

²⁰⁰ Texaco V. Libya Int'l Arbitral Award, 104 J. Droit Int'l 350 (1977).

²⁰¹ Revere Copper & Brass, Inc. V. OPIC, AAA Award of August 24, 1978, 17 ILM 1321 (1978).

²⁰² Suez, Sociedad General De Aguas De Barcelona SA And Interaguas Servicios Integrales Del Agua SA V The Argentine Republic, Decision On Liability, ICSID Case No ARB/03/17, 30 July 2010, Para 212.

²⁰³ Fulvio Maria, FET and Legitimate Expectations. In: Fair and Equitable Treatment and The Fabric of General Principles 92 (2018).

²⁰⁴ Waste Management, Inc. V. Mexico, ICSID Case No. ARB (AF)/00/3, Award of April 30, 2004, Para 115.

²⁰⁵ Laryea, Emmanuel, Legitimate Expectations in Investment Treaty Law: Concept and Scope of Application 4,10 (Chaisse J., Choukroune L., Jusoh S. Eds Handbook of International Investment Law and Policy 2020).

All these form part of the broad promise, which lures investor to invest in the host state. In *Metalclad Corporation v Mexico*²⁰⁶ the federal government assurances that the municipality will grant permits automatically was held to create a legitimate expectation. The tribunals stated that “metalclad was entitled to rely on the representation of federal officials and to believe that it was entitled to continue its construction of the landfill.”²⁰⁷ This was an interesting finding, especially because the requirement for permit should not be in vain. Construction is a highly sensitive endeavor and permits requirements guarantee safety of the project.

Legitimate expectation may also arise from a guarantee in a legislation. This guarantee may be found in a generation legislation or as part of the broad legislation targeting foreign investors or a sector. For instance, in Article 26.2 of the Model Petroleum Agreement of Ghana, the investor is assured of the stability of the investment, which includes “the fiscal and contractual framework.”²⁰⁸ This provision protects the investor from the changes in the legal regime hence inhibiting the state’s power to regulate in the public interest. However, Ghana has shifted from the freezing to economic equilibrium stabilization clauses.²⁰⁹ Investors in Congo have invoked stabilization clauses to seek insulation from changes in the mining code. For instance, Randgold Resources, a company with headquarters in Jersey, has argued that it is entitled to 10 years of stability after the enactment of the law.²¹⁰ The role of general law was affirmed by the tribunal in *Saluka* in the following terms.

‘[a]n investor’s decision to invest is based on the state of the law and the totality of the business environment at the time of the investment as well as on the investor’s expectation that the conduct of the host State subsequent to the investment will be fair and equitable.’²¹¹

Political statements are one source of legitimate expectation that have caused considerable contestations. The first point of contention has been defining what amounts to a political statement.²¹² Is it statements made by politicians? Or statements made in a political context? what is a political context? This uncertainty has led to some tribunals to reject political statements as a source of legitimate expectations. The tribunal in *El Paso v Argentina* held that political statements²¹³ were not capable of giving rise to legitimate expectations.

²⁰⁶ *Metalclad Corporation V. The United Mexican States*, ICSID Case No. ARB (AF)/97/1 Para 89.

²⁰⁷ *Id.*

²⁰⁸ Abdullah Faruque Typologies, Efficacy and Political Economy of Stabilization Clauses: A Critical Appraisal 4 *Oil, Gas & Energy L. J.* 34[2007].

²⁰⁹ Onyi-Ogelle, Obioma Helen, And Paul Musa, *The Effect of Stabilization Clauses in Petroleum Contracts in Developing Countries Like Nigeria* 2.3 *International Review of Law and Jurisprudence (IRLJ)* 152[2018].

²¹⁰ David Mckay *Miners To Target Stability Clauses Ahead Of Key DRC Code Talks* [April 10 2022] <https://www.Miningmx.Com/News/Markets/32132-Miners-Pitch-Congos-Kinshasa-Targeting-Stability-Clauses/> <https://www.Miningmx.Com/News/Markets/32132-Miners-Pitch-Congos-Kinshasa-Targeting-Stability-Clauses/>.

²¹¹ *Saluka Investments BV V. The Czech Republic*, UNCITRAL, Partial Award of March 17, 2006, Para 301

²¹² *Continental Casualty Company V. The Argentine Republic*, ICSID Case No. ARB/03/9, The Award, September 5, 2008, Para. 261(I).

²¹³ *El Paso Energy International Company V. The Argentine Republic*, ICSID Case No. ARB/03/15 Para. 395.

The tribunal was emphatic that political statements do not provide guarantees even if they might have induced investors to investing.

The more crucial category for this piece is the legitimate expectation that originates from FET generally. Under this conceptualization, the investor expects that the state will act in all its dealings in a reasonable, transparent, consistent, and fair way.²¹⁴ The question then arises what do these broad terms mean in assessing the conduct of the state. In *Charles Lemire v Ukraine* where the tribunal was confronted with whether failure to issue a license to the investor to expand its business amounted to a breach of legitimate expectation. The tribunals stated that “a regulatory system for the broadcasting industry was to be consistent, transparent, fair, reasonable, and enforced without arbitrary or discriminatory decisions.”²¹⁵ This interpretation leaves questions on the scope of legitimate expectation.

4.2.2 Legitimate Expectations’ Conflict with Climate Change Obligations

Legitimate expectation has been the mainstay of protecting the investor’s reliance and providing a stable environment.²¹⁶ This standard has been applied as a catchall for all inequitable conducts. Indeed, FET’s framework is enabled by specific standards of legitimate expectation. Despite the importance of legitimate expectation, its broad nature has been a point of tension with the state power to regulate.²¹⁷ This has been experienced in examining states’ conduct besides legitimate expectation’s ubiquitous entailments. One of these contentious standards is the provision of a stable legal environment and consistent conduct that is free from ambiguity. Together with the demand for states to act fairly, non-discriminatory, and transparently, legitimate expectation is used to incorporate all investors disappointments. This part is divided into two (i) legitimate expectation’s stability and climate change and (ii) relooking at legitimate expectation through the lenses of “malleable thesis”.

4.2.2.1 Legitimate Expectation’s Stability and Climate Change

Legitimate expectation’s stability will impede states’ power to implement climate change policies. While some tribunals have expressly rejected the idea of unchanging legal regulation, others have adopted such a position.

²¹⁴Thunderbird V. Mexico Ad Hoc Arbitration, Arbitral Award, January 26, 2006, Para.147.

²¹⁵Joseph Charles Lemire V. Ukraine, ICSID Case No. ARB/06/18 Para 267.

²¹⁶Zeyl Trevor, Charting The Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law, 49 Alta. L. Rev 203, 222 (2011).

²¹⁷*Id* 221.

²¹⁸Tribunals have read legitimate expectation as imposing stability in two ways. First, a stable legal environment as an independent guarantee to all investments. Second, the cumulative effect of the requirement for states to act in a consistent, free from ambiguity, and totally transparent manner establishes stability. This cumulative effect creates what this research refers to as “the romanticized state”.

The obligation to provide a predictable and stable business framework will conflict with the climate change obligations. Signs are emerging of tribunals reading stability to impede states regulatory changes in favor of the environment. For instance, *Eco Oro v Columbia* ²¹⁹despite a clear environmental exception, the tribunal stated that the host state has a responsibility to guarantee a predictable business environment. The tribunal quoted with approval the finding in *Merrill, Award* ²²⁰which stated that the investor is entitled to operate in a normal environment that is not subject to changes and uncertainties.

One of the most pronounce way to impose stability is through the legitimate expectation’s standard of a stable legal and business environment. The tribunal in *Duke V Ecuador* ²²¹stated that “[t]he stability of the legal and business environment is directly linked to the investor’s justified expectations.” ²²²The tribunal then linked legitimate expectation’s stability with FET. Although the tribunal went on to give a caution that the expectations must be reasonable, the ubiquitous nature of reasonableness renders the caution worthless.

Stability can also be introduced by invoking the cumulative effect of requiring states to act in a consistent, non-ambiguous, and transparent manner. This stability relies on the utopian conception of a perfect state that is faultless as it will be argued extensively later in this paper. Through this “romanticized state” which operates in a perfect world free from uncertainties, crisis, and coordination problems, the investors are informed of all laws that will affect them in the future. The tribunal in *Tecmed* ²²³was the first to determine that legitimate expectation places these standards. While the tribunal did not mention the word stability, the effect of these standards is to read in stability. What was even more revealing on the wide scope of the three standards is the interpretation that the tribunal gave to what it envisioned as a consistent conduct of the state. The tribunal stated that the state acts consistently if it does not change any previous decisions which were relied upon by the investor in deciding whether to invest.²²⁴

²¹⁸*Id* 221-225.

²¹⁹*Eco Oro Minerals Corp. V. Republic of Colombia*, ICSID Case No. ARB/16/41 Para 770.

²²⁰*Merrill and Ring Forestry L.P. V. Canada*, ICSID Case No. UNCT/07/1 (March 31, 2010) Para. 233.

Duke Energy Electroquil Partners and Electroquil SA V Ecuador, ICSID Case No. ARB/04/19,

²²¹*The Award*, August 12, 2008, Para. 340.

²²²*Duke Energy Electroquil Partners and Electroquil SA V Ecuador*, ICSID Case No. ARB/04/19 340.

²²³*Técnicas Medioambientales Tecmed, S.A. V. The United Mexican States*, ICSID Case No. ARB (AF)/00/2. At Para 153.

²²⁴*Técnicas Medioambientales Tecmed, S.A. V. The United Mexican States*, ICSID Case No. ARB (AF)/00/2. 154.

It would be disingenuous to present the contention of legitimate expectation's stability as having the effect of impending climate change as a one-sided argument. There is a counterargument that some tribunals have accepted that states can regulate for public interest.²²⁵ The argument here is that when confronted with public interest matters, some tribunals have upheld the power of the state to regulate and rejected legitimate expectation's stability. To support this argument, awards such as *Plasma Consortium Limited v Republic of Bulgaria*,²²⁶ *Impregilo SpA v The Republic of Argentina*,²²⁷ and *Parkerings v Lithuania*²²⁸ are cited, where the tribunal stated that “[i]t is each state's absolute right and privilege to exercise its sovereign legislative power. A-State has the right to enact, modify or cancel a law at its discretion.” In response to this argument: - the decisions upholding the power of the state to regulate are sporadic and not binding. Thus, they cannot offer a serious assurance that tribunals will follow them. Second, there is a growing trends showing that tribunals have rejected the power of state to regulate as a justification for policy change. For example, in *Eco Oro v Colombia and Occidental v Ecuador* which has been discussed extensively in the paper.²²⁹ Third, the problem is structural largely touching on one-sided substantive standards and tribunals dispositions to elevate investor rights.

Moreover, the conflict is likely to manifest itself in several ways. The first and the most obvious is the change of the law that bans certain GHG products such as coal.²³⁰ The second is through the imposition of disclosure obligations that the investors argue are burdensome and amount to arbitrary interference with the business environment. This can be seen in the prism of the Environmental, Social, and Governance (ESG) through capital markets regulators.²³¹ The problem will arise from the huge disclosure requirements, which are costly. It can also arise due to punishment arising from false disclosures, such as greenwashing. Here, investors will be challenging the primary mandate to regulate to their detriment- although questions of estoppel might arise to preclude the investors from raising such a defense.

Legitimate expectations' stabilization insulates investors against changes in the regulatory regime of the host states.

²²⁵Giannakopoulos, Charalampos. The Right to Regulate in International Investment Law and The Law of State Responsibility: A Hohfeldian Approach 162(Permutations of Responsibility in International Law 2019).

²²⁶Plasma Consortium Limited V Republic of Bulgaria, Award, ICSID Case No ARB/03/24, August 27, 2008, Para 219.

²²⁷Impregilo Spa V the Republic of Argentina, ICSID Case No ARB/07/17, Award, 21 June 2011, Paras 285, 290–91.

²²⁸Parkerings-Compagniet AS V. Republic of Lithuania, ICSID Case No. ARB/05/8) Para 332.

²²⁹Occidental Petroleum Corporation V Republic of Ecuador ICSID Case No ARB/06/11 Award (October 5, 2012) Para 526.

²³⁰Lobel Nathan and Fermeglia Matteo, *Investment Protection and Unburnable Carbon: Competing Commitments in International Investment and Climate Governance*, 4 *Diritto Del Commercio Internazionale* 1, 17(2018).

²³¹Alston Bird, How Is ESG Regulation Influencing Investor Behaviour? (April 15 2022) <https://www.jdsupra.com/legalnews/how-is-esg-regulation-influencing-3894739/>.

The argument has been that states can regulate but that they will be subject to prompt, effective, and full compensation to foreign investors.²³² The question becomes should states pay for legislating in the public interest.

4.2.2.2 Relooking at Legitimate Expectations and the “Malleability Thesis”

The norm of legitimate expectations needs reconstruction away from what some tribunals have fashioned it. The vision of this project is to redirect this norm to the correct path of balancing interests and considering context. Through what this project calls “the malleable thesis” I argue that the nature and role of legitimate expectation demonstrates that it is an indeterminate concept meant to protect reasonable assurances considering the entire environment. Legitimate expectation cannot, therefore, be divorced from the context that gives rise to the expectations. One crucial factor in assessing legitimate expectation is the character of the institution of the state and the centrality of public interest in its organization. The character of the state as the protector of public interest is inimical to the interpretation of legitimate expectation to freeze public interest laws.²³³ Given this understanding, this part engages with investor’s expectation and argues that an investor cannot reasonably expect to impede the rights of the state to change its laws. It posits that climate change is a public interest matter that requires eminent state action. Due to the nature of the state as a protector of public interest, the investor cannot expect that the state would legitimately abdicate this central role.

A state cannot fold its hands when an issue that affects public interest arises.²³⁴ Some states may act or not, others may be slow or speedy, but the expectations to discharge state’s mandates exists. Can an investor legitimately expect that the state will remain, mum, especially when staring at a catastrophe such as climate change? The answer to this question is no, and investor rights are expected to give way to the more significant societal concerns.²³⁵ Public interest has occupied a pedestal position in the life of society. Doctrines such as eminent domain, compulsory acquisition and emergency powers exist to allow state to protect the life of the nation. One way that the state reacts is to change its laws to address the eminent national concerns.

²³²Compañía Del Desarrollo De Santa Elena S.A. V. Republic Of Costa Rica, ICSID Case No. ARB/96/1.

²³³Giannakopoulos, Charalampos Supra 218, 162.

²³⁴Guest Alison, *Interpreting Public Interest Provisions in International Investment Treaties*, 18 Chi. J. Int’l L 321, 333 (2017).

²³⁵*Id.*

Some tribunals, such as the tribunal in *Continental Casualty Company v. Argentina*,²³⁶ was of the view that an investor cannot expect the country will not change its laws, especially during a crisis. The tribunal was emphatic that investor expectation must consider the nature of the state as a custodian of the public interest.

Legitimate expectation is a highly qualified principle, and it should be easily displaced if a justified state interest is demonstrated.²³⁷ One of the features of legitimate expectation is that it has several indeterminate concepts embodied in it. The requirement of assurances being legitimate has two implications. First, the expectations must have a foundation in state's action. This action can take the shape of the law, contract, or any of the sources of legitimate expectation previously discussed. Second, the expectations must have been within the realm of what is reasonable to expect from the state. For example, one cannot expect that the state will fulfil an illegal promise such as award of licenses through corruption. Apart from legality, the context of the promise is relevant in reviewing the reasonableness of state assurances. The "malleable thesis" of legitimate expectation provides that this concept has no settled entailment. The norm of legitimate expectation does not have a necessary form that it must follow. It is a malleable standard that balances interests through the lenses of fairness. This norm embodies other standards such as reasonableness which are also malleable. Reasonableness of a decision in the context of competing interests requires a value judgement. One must examine what is sensible and equitable to expect when a nation is threatened to conclude about the validity of assurances. The test that this research suggest is of a rational informed promisor. Of course, deciding what values are upheld more than others is not an easy task but it buttresses the malleable nature of legitimate expectation.

Under customary international law, the state has a right to regulate. While this right to regulate is not absolute, it is crucial in cases of public interest. It emanates from the character of the state as a sovereign entity.²³⁸ The effectiveness of the state as a key player in international law would be highly undermined if this right was curtailed through legitimate expectation. The recognition of the right of state to regulate as overriding the standard of legitimate expectation is likely to face three objections. First, state consent to international investment treaties is an expression of sovereignty. Second, the right to regulate is not absolute, and states have accepted the limitation of this right through treaty obligation providing for lawful expropriation.

²³⁶Continental Casualty Company V. Argentina, ICSID Case No. ARB/03/9, Award, 5 September 2008, Para. 258.

²³⁷Potestà Michele, Legitimate Expectations in Investment Treaty Law: Understanding The Roots and The Limits of a Controversial Concept, 28 Icsid Review 88, 90 (2013).

²³⁸Mann Howard, The Right of States to Regulate and International Investment Law: In UNCTAD, The Development Dimension of FDI: Policy and Rule-Making Perspectives 211, 214 (2002).

The requirements for lawful expropriation include:²³⁹

- (i) public interest or purpose
- (ii) non-discriminatory
- (iii) due process and compensation that is prompt, adequate, and effective.

Third, the state gave the investor representations through their legal regime, and the state's right to regulate is not impeded provided they compensate the investor.

While states' sovereignty is not a *carte blanche* for eroding investor rights, legitimate expectation is a flexible standard that allows for considering context. First, legitimate expectation is a malleable standard that is subject to qualifications.²⁴⁰ This is what this research has referred to as "malleability thesis". Legitimate expectation is inherently an indeterminate concept. Words such as legitimate allow for examining the broader context. What is legitimate is subject to a holistic analysis of circumstances. This analysis can lead to an entire evaluation of the environment by asking questions such as legitimate to who? Why are expectations legitimate? Is the legitimacy of expectation normative or procedural? These questions reveal that the concept of legitimate expectation is not a settled.

The other counterargument is that the power to regulate is not absolute since states have accepted standards such as lawful expropriation which require compensation. The answer to the expropriation analogy is that legitimate expectation is different from expropriation because of the severity of measures. For expropriation to be successfully invoked, the investment must be severely affected. In *LG & E Energy v Argentina*, the tribunal refused to hold that Argentina had expropriated the claimant's investment because there was no "a permanent, severe deprivation of LG & E rights with regard to its investment, or almost complete deprivation of the value of LG & E investment."²⁴¹ However, the tribunal accepted the breach of stable legal environment under FET.

In response to the third objection on state luring investor through promises, in international law, legitimate expectations' stable business environment is the exception instead of the norm.²⁴² This means that the state must have accepted expressly to curtail its vital right to regulate. Some tribunals have recognized the inherent right of the state to regulate and rejected legitimate expectation. For instance, the tribunal in *Toto v Lebanon*²⁴³ was of the view that without an express stabilization, the state could not be impeded from changing its laws. It

²³⁹United Nations Conference On Trade and Development, Expropriation 27(UNCTAD Series On Issues in International Investment Agreements II 2012.)

²⁴⁰Mann, Howard Supra 231.

²⁴¹LG&E Energy Corp., LG&E Capital Corp., And LG&E International, Inc. V. Argentine Republic, ICSID Case No. ARB/02/1 Para 200.

²⁴²Michele Potestà, *Legitimate Expectations In Investment Treaty Law : Understanding The Roots And The Limits Of A Controversial Concept*, 28 ICSID Review 88, 118(2013).

²⁴³Toto Costruzioni Generali S.P.A. V. The Republic Of Lebanon, ICSID Case No. ARB/07/12.

follows that this inherent right of the state to change its laws, especially at the time of adversity, means that the right to regulate climate change overshadows legitimate expectations. This is in line with global recognition of the need for decisive action with the UN Secretary General decrying that “the world remains way off target in staying within the 1.5-degree limit of the Paris Agreement.”²⁴⁴

The scope of legitimate expectation should be delineated not to cover the public interest legal changes.²⁴⁵ Climate change is one of the biggest global challenges, and an investor cannot reasonably expect that they would have rights that impede this global concern. Indeed, the legitimate expectation is determined by the nature of the promise in place, and the circumstances of each case. An investor cannot expect that their rights will be elevated above the public interest of global nature.²⁴⁶

4.3 Autonomous Stable Legal Environment and Climate Change

It sounds odd to suggest that the right of the state to change its laws is subject to an overriding right of the investor. The investor’s right to a stable legal and business environment exists as an autonomous FET standard. In practice, however, this standard overlaps with legitimate expectation’s promise of stability. The difference is that legitimate expectation is based on reasonable promises that are lied upon by the investor. There is no caveat such as reasonableness in autonomous stable legal and business environment. In theory, this makes legitimate expectation a higher standard to meet.²⁴⁷ Nevertheless, both stabilities have elicited tension with the state power to regulate.

The obligation to provide a stable business and legal environment has been interpreted as a treaty guarantee.²⁴⁸ This obligation stops the state from altering the laws that existed when making the investment. The rationale is that an investor has committed enormous capital based on the legal regime that existed, and it is unfair for the state to change the law. The understanding is that the laws in a state are a big luring factor for investors. A case that is often cited to illustrate stability is the *Occidental*, where the tribunal stated that “there is certainly an obligation not to alter the legal and business environment in which the investment has been made.”²⁴⁹ The rationale of this finding is that the entire regime of international

²⁴⁴UN News, 2021 *A Crucial Year’ For Climate Change, UN Chief Tells Member States* (March 3 2022) <https://News.Un.Org/En/Story/2021/02/1084132> .

²⁴⁵Gülçür Abdulkadir, *The Necessity, Public Interest, And Proportionality in International Investment Law: A Comparative Analysis*, 2 U. Balt. J. Int’l L. 215, 217 (2019).

²⁴⁶*Id* 264.

²⁴⁷Ortino Federico, *The Obligation of Regulatory Stability in The Fair and Equitable Treatment Standard: How Far Have We Come?* 21 J. Int. Econ. Law 845,847(2018).

²⁴⁸*Id* 858.

²⁴⁹*Occidental Exploration and Production Company V Ecuador, Final Award, LCIA Case No UN3467, IIC 202 (2004)*), Para 191.

investment law is designed to protect investments. Thus, the changes in the law can be a threat to the protection accorded to the investment.²⁵⁰

Some tribunals have held that the intentions of the changes in the legal regime are irrelevant in assessing whether the state violated the stability guarantee.²⁵¹ Instead, the obligation to compensate the investor is absolute. The tribunal in *Sempre v Argentina*²⁵² remarked that the purpose of the stability is to realize the treaty's object, which is to protect the investor. It then stated that reasons for the changes in the law are inconsequential even when they are noble. This reasoning is against the noble goals of governments tackling global warming through several policy changes to reduce GHG.²⁵³

Stability limits the sovereign power of the state to change its laws.²⁵⁴ This power should not be limited lightly through inferences. To do so would be to elevate investors on a pedestal which is not the intention of international law. An investor operates in a polycentric environment that involves competing interests and with a possibility of societal disasters. To argue that all these interests should be sacrificed at the altar of the investor is an insular interpretation of the law. The tribunal in *Philip Morris v Uruguay*²⁵⁵ recognized the right of the state to regulate in the public interest. It was emphatic that the stability under FET should not impede the right of the state to change its laws in the public interest. Additionally, the dynamic nature of the state was recognized by the tribunal in *Eiser v Spain*²⁵⁶ where the tribunal observed that the state should not be impeded from changing laws to respond to the evolving nature of the society. This piece does not advocate for unchecked power of the state since that can lead to abuse of power. Although the tribunal in *Parkerings v Lithuania* recognized the right of the state to change its laws as unhindered, it added a caveat. The tribunal stated that it is prohibited for "a state to act unfairly, unreasonably or inequitably in the exercise of its legislative power."²⁵⁷

²⁵⁰CMS Gas Transmission Company V. The Republic Of Argentina, ICSID Case No. ARB/01/8. Para 274.

²⁵¹Ortino, Federico Supra 240, 850.

²⁵²Sempre Energy International V. Argentine Republic. (ICSID Case No. ARB/02/16), Para. 303-04. See Also Enron, Award, May 22 2007, Para. 268.

²⁵³Dubash Navroz, *Climate Laws Help Reduce Emissions*, 8 Nat. Clim. Change. 709,709 (2020).

²⁵⁴Ortino, Federico Supra 240, 850.

²⁵⁵Philip Morris Brand SARL, Philip Morris Products S.A. And Abal Hermanos S.A. V. Oriental Republic Of Uruguay, ICSID Case No. ARB/10/7, Award, July 8, 2016 (N 120) Para 422.

²⁵⁶Eiser Infrastructure Limited And Energía Solar Luxembourg S.À R.L. V. Kingdom Of Spain, ICSID Case No. ARB/13/36Award, May 4, 2017 (N 143) Para 362.

²⁵⁷Parkerings-Compagniet AS V. Republic of Lithuania, ICSID Case No. ARB/05/8 Para 332.

4.4 The Effect of the Conflict Between Climate Change and the Standard of Stable Legal Environment

The obligations of legitimate expectation and provision of a stable legal environment are the two most contentious aspects of FET.²⁵⁸ These obligations have been interpreted as imposing an absolute duty to states. Tribunals have been adamant that foreign investors must be compensated if there is interference with FET.²⁵⁹ This raises the question of whether states that seek to implement the Paris Agreement or other international instruments on climate can do so without the requirement of compensation. This blind stability that fails to recognize the reason for the change in the law conflicts with climate change agenda.²⁶⁰ Tribunals will interpret FET as elevating the interest of foreign investors beyond climate change obligations. One of the decisions that adopted this parochial mode is *Occidental v Ecuador*.²⁶¹

States will be required to compensate foreign investors if they change the law to the detriment of investors. This diverts the resources that could be used for climate change adaptation and mitigation to pay investors. Going by the jurisprudence in *Tecmed Medioambientales Tecmed, S.A. v The United Mexican States*²⁶² poor states which are struggling with transition are likely to suffer double tragedy of compensating investors and paying for the cost of cleaner energy. This is buttressed by decisions such as *Metalclad Corporation v. The United Mexican States*,²⁶³ where the tribunal refused to recognize the protection of the environment as an excuse for state action citing that environment was not one of the treaty exceptions.

The international climate change agenda will be slowed by international investment law.²⁶⁴ Without regulating significant emitters such as the burning of fossil fuels, climate change goals will remain a mirage. UNFCCC and Paris Agreement have a strong mandate for the state to implement policies to reduce temperature to below 2 Celsius pre-industrial periods. The climate change agenda will have serious opposition from international investment law going by decisions like *Sempra v Argentina*, which stated that “[w]hat counts is that in the end the stability of the law and the observance of legal obligations are assured, thereby

²⁵⁸Henckels Caroline, *Proportionality and The Standard of Review in Fair and Equitable Treatment Claims: Balancing Stability and Consistency with The Public Interest 2* (In Society of International Economic Law (SIEL), 3rd Biennial Global Conference Working Paper No. 27 2012).

²⁵⁹*Id.* 4.

²⁶⁰Ortino, Federico *Supra* 240, 851(2018).

²⁶¹*Occidental V Ecuador I*, Award, July 1, 2004, At 191.

²⁶²*Técnicas Medioambientales Tecmed, S.A. V. The United Mexican States*, ICSID Case No. ARB (AF)/00/2.

²⁶³*Metalclad Corp V The United Mexican States*, CASE No. ARB (AF)/97/1, August 30, 2000.

²⁶⁴Stephan Schill, *Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?* 24, *J. Int. Arbitr.*, Issue 469, 470(2007).

safeguarding the very object and purpose of the protection sought by the treaty.”²⁶⁵ The requirement for the states to act consistently paints a doom picture for the push to decarbonize.²⁶⁶

The effect of the parochial interpretation of FET on climate change action is that it will have a chilling effect on the state’s interventions.²⁶⁷ This effect will be motivated by two fears, to wit, that of huge compensation and the fear of being “blacklisted” as investor unfriendly. Most developing countries depend on foreign investors to spur their economic growth. Therefore, if investors view them as having decisive climate change action, they are likely not to attract investments. The chilling effect can undermine the climate change agenda by creating inertia on climate change regulations.²⁶⁸ States confronted with the option of facing the wrath of investors’ compensation and protecting climate change might choose to forego climate change for two reasons. First, the failure to implement climate change agenda has no immediate direct harm exclusive to the state. It is because of the interconnectedness of climate change and the lack of penalties in climate change enforcement. Second, compensation has a direct harm which disincentives states to act. This situation will be compounded by the fact that developed countries and upcoming economies are the highest emitters of GHG. Therefore, developing states are likely to cite such facts to demonstrate that they are not responsible for emissions even without climate change policies.

5 In Search Of An International Law Answer; A Case For Climate Change *Erga Omnes* Obligations

The conflict between FET’s stabilization and climate change obligations presents a daunting international law challenge. International law has struggled with the question of harmonization of obligations without success.²⁶⁹ This question has been perennial and perplexing, especially with the proliferation of bilateralism and fragmentation of international law. Most states lack a common and clear position on international law. States have committed themselves internationally on multiple fronts without considering the potential conflict in future obligations. This has been exacerbated by the lack of a clear hierarchy of laws at the global level. Other than *jus cogens*, treaty law arguably has the same force of law across the international regime. The cumulative effect of this nature of international law has

²⁶⁵Sempra Energy International V the Argentine Republic, ICSID Case No ARB/02/16, Award, September 28, 2007, Para 300.

²⁶⁶Stephan Schill Supra 257.

²⁶⁷Kyla Tienhaara Supra 176, 257.

²⁶⁸Carolina Moehlecke, The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty 64 Int Stud Q 1, 2 (2012).

²⁶⁹Ghouri Ahmad, Is Characterization of Treaties a Solution to Treaty Conflicts? 11 Chin. J. Int. Law 247, 251 (2012).

undermined its effectiveness. Yet, there has emerged “super-obligations” ranking above bilateral obligations. Although there are three widely accepted consequences of erga omnes obligation, this piece suggests a fourth effect called “ceding way”. This part argues that erga omnes obligations rank above bilateral and some multilateral obligations. It engages with the value of erga omnes obligations and concludes that these types of obligations will assist in navigating the murky waters of conflicting international responsibilities. This part contends that climate change erga omnes obligations is a source of legitimacy to overshadow investment obligations that run counter the reduction of GHG. It concedes that the exact formulation of what obligations are erga omnes require a much broader research project beyond this piece.

5.1 Reimagining the Hierarchy of Norms; A Case for the Emerging *Erga Omnes* Obligation to Mitigate and Prevent Climate Change

The concept of erga omnes has been one of the most ingenious inventions to fill the gap in the law of state obligations. International law has inherent weaknesses which have been debated for centuries. Some legal philosophers have gone to the extent of denying the validity of international law as a legal system.²⁷⁰ For instance, Austin’s command theory posits that law is a command of the sovereign backed with sanctions, and this sovereign is habitually obeyed.²⁷¹ Based on this conceptualization of law, international law is not law, and Hart contests international law by arguing that it lacks a law-making and a mandatory adjudication body.²⁷² Other scholars have taken a less extreme position by arguing that international law does not impose a binding obligation. For instance, Goldsmith and Posner argue that states need not abide by international law.²⁷³ Despite these contestations, the existence of international law is a settled question. What, however, has been a source of debate is the nature of obligations that international law imposes. Illustrative of this contest is the debate surrounding the special rapporteur on jus cogens report and the push by various special interest groups to declare their domain as *jus cogens*.²⁷⁴ This piece argues that while it is difficult to conclude that climate change has acquired the status of jus cogens, the case for erga omnes obligations can be successfully made.

²⁷⁰Anthony D’Amato, Is International Law Really Law, 79 NW. U. L. REV. 1293, 1297 (1984-1985).

²⁷¹Bix Brian, John Austin (April 13 2022) <https://Plato.Stanford.Edu/Entries/Austin-John/>.

²⁷²Paysandú Mehrdad, The Concept of International Law in The Jurisprudence of HLA Hart 21 Eur. J. Int. Law 21.4 967,975 (2010).

²⁷³Jack Goldsmith and Eric Posner, The Limits of International Law (2005).

²⁷⁴Dire Tladi, Remarks In A Symposium Called Making Sense Of Higher Law: The ILC’s Special Rapporteur On Jus Cogens (March 27, 2022) <https://Www.Youtube.Com/Watch?V=Nsh5deb1kbq>.

Despite the lack of a clear hierarchy in international law in the fashion of the domestic law, certain obligations such as *erga omnes* have emerged to occupy the first order.²⁷⁵ Often *erga omnes* is confused with *jus cogens*. However, while all *jus cogens* norms attract *erga omnes* obligations, not all *erga omnes* obligations are based on *jus cogens* norms.²⁷⁶ Indeed, the stand of *jus cogens* norms in the international legal order is settled as the highest norms. The puzzle has been whether *erga omnes* obligations occupy the second position. Ulf has captured the debate on these norms and responsibilities in the legal academia.²⁷⁷ Ulf's article summarizes arguments in the debate by quoting leading scholars such as Malcolm Shaw who argues that *erga omnes* is a higher obligation compared to the others, or at worst it is a distinct obligation.²⁷⁸ This does not mean that *erga omnes* is the highest obligation, but Malcolm Shaw recognizes that it is not an ordinary obligation. Ulf captures the position of Erika who posits that *erga omnes* "constitutes a second layer of the international value system, below that of peremptory norms".²⁷⁹ The position that *erga omnes* is just below the *jus cogens* norms is the most plausible international law position. This is because if other norms are of the same status as *jus cogens*, then it loses its character as a peremptory norm. *The Barcelona Traction Case*²⁸⁰ has identified the importance of the subject matter and multilateral obligations as the two elements of *erga omnes*.

Erga omnes obligations are owed to the entire global community.²⁸¹ These obligations differ from the traditional understanding of international law as establishing reciprocal duties of contractual nature. Due to their importance, international law recognizes existence of universal obligations that should be enforced by any state. The ICJ's *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*²⁸² indicates that the state parties to the convention propound a common interest as opposed to parochial one. This way, states came together to achieve an international goal of punishing the crimes that shocks the conscience of humanity. The implication of *erga omnes*

²⁷⁵Craig Eggett and Sarah Thin, Clarification And Conflation: Obligations Erga Omnes In The Chagos Opinion <https://www.ejiltalk.org/clarification-and-conflation-obligations-erga-omnes-in-the-chagos-opinion/> (March 10 2022).

²⁷⁶Id.

²⁷⁷Ulf Linderfalk, International Legal Hierarchy Revisited—The Status of Obligations Erga Omnes, 80 Nord. J. Int. Law 1-23 (2011).

²⁷⁸Malcolm Shaw, International Law, 124 (6th Ed 2008).

²⁷⁹Erika De Wet, The Emerging International Constitutional Order: The Implications of Hierarchy in International Law for The Coherence and Legitimacy of International Decision Making, 2 Potchefstroom Electron. Law J 1, 9(2007).

²⁸⁰Barcelona Traction, Light and Power Company, Limited (Belgium V. Spain) (New Application: 1962), The Second Phase, Judgment of 5 February 1970, ICJ Reports 1970, P. 32, Paras. 33–34.

²⁸¹Bassiouni Cherif, International Crimes: "Jus Cogens" And "Obligatio Erga Omnes" 59 Law Contemp. Probl. 63,72 (1996)

²⁸²Advisory Opinion Concerning Reservations to The Convention On the Prevention and Punishment of the Crime of Genocide, International Court of Justice (ICJ), May 28, 1951.

is that they create an obligation that is above ordinary reciprocal obligation. If there is a conflict between the ordinary treaty obligation and *erga omnes* obligation, the former should “cede way” to the later. This ceding way does not mean that *erga omnes* will invalidate other treaties, but it means that it will overshadow ordinary obligations. The basis of this argument is the effect of *erga omnes* as a superior obligation ranking above ordinary treaties.

The superiority of *erga omnes* obligation is hinged on a normative claim of its value.²⁸³ General international law expresses values of the global community. International investment law expresses the values of the rule of law and protection of the foreign investor.²⁸⁴ In international human rights, the value of human dignity occupies a significant position in the discourse.²⁸⁵ In the areas of climate change, the value of protecting the earth from the existential challenge of global warming is the main concern.²⁸⁶ While the formulation of these values is an intuitive act that is subject to fierce challenge, the existence of some value to be served by the international order is not in doubt—the germane question is what becomes of these values if they compete with each other. One answer that this research will pursue is that the international community, like any other community, cares about certain values more than others.²⁸⁷ For instance, the international community is strongly concerned about its existence.²⁸⁸ Consequently, climate change engages the basic value of the international community, which is its existence and alleviation of huge suffering.

5.1.1 Treaty Language Signaling that Climate Change Obligations are *Erga Omnes*

The international climate change regime has taken a global and multilateral outlook on the issue of global warming.²⁸⁹ This regime is made up of several legal instruments which trace their roots to the Earth Summit. The first major climate change treaty was the UNFCCC passed in 1992 in Rio. This treaty represented a watershed moment in climate change governance. Climate change initiatives are marred with politics, with factionalism being on the increase.²⁹⁰ UNFCCC has continued to be a monumental treaty with 196 member states, meaning that it has a wider coverage across the globe.

²⁸³Ulf Linderfalk *Supra* 286, 6.

²⁸⁴Jeswald Salacuse, *The Treatification of International Investment Law*, 13 *Law & Bus. Rev. Am.* 155, 158 (2007).

²⁸⁵Kate Karklina, *Human Dignity as A Foundational Value of Peremptory Norm*, 9(In International Riga Graduate School of Law RGS� Research Paper No. 22).

²⁸⁶United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38 Preamble.

²⁸⁷Bederman David, *The Spirit of International Law* 13 (2002).

²⁸⁸Villalpando Santiago, *The Legal Dimension of the International Community: How Community Interests Are Protected in International Law* 21 *Eur. J. Int. Law* 387, 392 (2010).

²⁸⁹Linn Johannes, *Recent Threats To Multilateralism*, 9 *Glob. J. Emerg. Mark. Econ* 86-101 (2017).

²⁹⁰Giddens Anthony, *The Politics of Climate Change*, 43 *Policy Polit* 155, 159 (2015).

Although the effectiveness of UNFCCC in reducing GHG is subject to debate, its centrality in the climate change agenda cannot be contested. The norms of UNFCCC have been reinforced in the Kyoto Protocol, Copenhagen, Paris Agreement, and Cancun Agreement. This part argues that based on the language of these instruments and wide subscription, core climate change obligations are *erga omnes*.

The language of the UNFCCC and Paris Agreement demonstrates core climate change obligations are owed to the global community as a whole.²⁹¹ The preamble of UNFCCC encapsulates the nature of climate change obligation by stating that “acknowledging that change in the Earth’s climate and its adverse effects are a *common concern of humankind*.”²⁹² The invocation of common concerns of humankind has significance in assessing the nature of the interests involved.²⁹³ Climate change is then viewed from the prism of the global obligations to curb global warming. The Paris Agreement adopts similar language in the preamble but goes on to add that states should look at climate change holistically.²⁹⁴ States are required to consider human rights and vulnerable groups while addressing the climate change crisis. The implications of using language such as common concern of humankind are that climate change obligations are not seen as contractual. Instead, they extend beyond states individual interests.

The implications of the use of the language of the common concern of humankind signal that climate change is *erga omnes* obligation.²⁹⁵ First, the use of common concerns of humankind engages the collective action of the global community. This is because what is common in the circumstances means widespread and not involving a few states.²⁹⁶ In other words, it is shared among several states by virtue of being members of the international community. Second, this delocalizes and multilateralizes the goal of addressing climate change. Thus, climate change is not only a national matter which should be exclusively addressed by states domestically. State has extraterritorial interest in the climate system.²⁹⁷ Additionally, this obligation is not contractual between various states, which means there is no reciprocity in narrow sense. A state need not be directly affected for it to participate in this type of intervention.

²⁹¹Moellendorf Darrell, Climate Change and Global Justice, 3 Wiley Interdiscip. Rev. Clim. Change 131, 132 (2012).

²⁹²United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38.

²⁹³Mayer Benoit, A Review of the International Law Commission Guidelines On the Protection of the Atmosphere, 20 Melbjlintlaw 453, 472 (2019).

²⁹⁴Paris Agreement to The United Nations Framework Convention On Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Igos Preamble.

²⁹⁵Mayer, Benoit Supra 286, 473.

²⁹⁶*Id.*

²⁹⁷Quirico, Ottavio, Climate Change and State Responsibility for Human Rights Violations: Causation and Imputation 65 Neth. Int. Law Rev 185, 193 (2018).

Lastly, the use of the words humankind means that the uniting factor is the protection of humanity. The selection of word “humankind “as the baseline, points to the transcendental nature of climate change. It is no longer an issue of specific unique national interest such as economic or territorial interest; rather, it is the protection of humans.

UNFCCC and Paris Agreement provides that climate change is a global concern that require a global response. The preamble of UNFCCC enumerates the nature of climate change as “the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response.”²⁹⁸ The objective of the Paris Agreement is that “it aims to strengthen the global response.”²⁹⁹ These two major international climate change instruments provide that the obligations imposed upon states are global. While not all global obligations are *erga omnes*, this is a signal as to the character of climate change. These two instruments are also widely subscribed by states, demonstrating the global consensus on this issue. Of course, one might argue that these treaties contain so many provisions that each provision cannot be viewed as an expression of consensus. However, the wide attention that COPs have attracted illustrates how states view their climate change obligation as taking a global shape.³⁰⁰ A close look at these international climate change obligations shows that they are owed to the entire universe.

The principal objection to the argument on the use of the common concern of humankind is found in the report of the International Law Commission (ILC) on draft guidelines on the protection of the atmosphere with commentaries. The ILC commenting on the preamble of these guidelines remarks that

It is understood that the expression identifies a problem that requires cooperation from the entire international community. At the same time that its inclusion does not create, as such, rights and obligations, and, in particular, that it does not entail *erga omnes* obligations in the context of the draft guidelines.³⁰¹

The ILC commentary does not undermine the argument that common concern for humankind manifests *erga omnes* obligations. To prove this, this piece will make three arguments. First, the ILC commentary does not explain why the phrase “common concern” does not signal *erga omnes* obligations.

²⁹⁸United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38 Preamble.

²⁹⁹Paris Agreement to The United Nations Framework Convention On Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Igos Article 2.

³⁰⁰Robert Mcsweeney Analysis: How Delegations At COP Climate Summits Have Changed Over Time (April 12 2022) <https://www.carbonbrief.org/analysis-how-delegations-at-cop-climate-summits-have-changed-over-time>.

³⁰¹International Law Commission (ILC) *Report Draft Guidelines On the Protection of the Atmosphere, With Commentaries* Thereto A/CN.4/736, 4 (2021).

Even if the reasons were provided in the debating stage of the report, the ILC arguments were overly weak.³⁰² For instance, the ILC's main concern is that characterizing common concern of humankind as providing for *erga omnes* would lead to the proliferation of litigation against states. This argument by ILC is unpersuasive because being a gatekeeper for the state is not a requirement for an obligation to acquire *erga omnes*. As rightly pointed out by Mayer that "[s]uch reasoning represents an appeal to consequences (argumentum ad consequentiam), a logical fallacy through which the truth-value of a statement is assessed based on a normative judgment of its consequences".³⁰³ This is a subversion of the mandate of the ILC because the ILC is not meant to be states apologist to minimize litigation against states.

The other argument is that the ILC comments on the scope of "common concern for humankind" are restricted to their draft rules. The ILC was not making a sweeping statement on the phrase common concern for humankind. Although the effect of its statement can be used comparatively to show that climate change obligations are not *erga omnes*, such an argument will not be founded on the language of ILC. Lastly, the fact that ILC found it necessary to comment that the phrase common concern of humankind in the guidelines did not amount to *erga omnes* supports the thesis of this part. This implies that the ordinary use of this phrase imposes an *erga omnes* obligations hence it was necessary for ILC to clarify the scope of its draft rules. As Dinah correctly observes that "as an international law term, it is notable, first for what it does not include, which is a reference to states. It is rather a humanity, the multitude of individuals whose concerns are at issue."³⁰⁴ This understanding informs why the ILC found it crucial to clarify the scope of this phrase when dealing with the draft regulations. Additionally, even if the phrase does not lead to the automatic conclusion of *erga omnes* obligation, there is a possibility when looked at cumulatively with other arguments made in this paper it leads to this conclusion.

While this piece concedes that it is difficult to make a watertight case for climate change as a preemptory norm, it argues that the ILC has taken a conservative and overly cautious approach to environmental law issues.³⁰⁵ The ILC has construed its mandate narrowly giving preeminence to the codification of international law, which makes the institution operates as herald.³⁰⁶ Given the current ILC approach towards climate change and environmental law in general, its pronouncement on these subjects shouldn't be given much weight.

³⁰²Sixth Committee of the General Assembly and The Topical Summary of the Debate in The Sixth Committee (A/CN.4/724) And ILC Report, A/70/10, 2015, Chap. V, Paras. 45–54.

³⁰³Mayer, Benoit Supra 293, 469

³⁰⁴Dinah Shelton, *Common Concern of Humanity*, 39 *Envtl. Poly & L.* 83,83 (2009).

³⁰⁵Mayer Benoit Supra 292, 460

³⁰⁶*Id*

The recent 2022 ILC report titled the Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), cements the argument that ILC is not the best authority when it comes to climate change and environmental matters.³⁰⁷ This piece makes three arguments why the ILC could have done more in advancing environmental law and climate change norms in international law, but it failed dethroning it the peerless position to comment on climate change. First, the ILC core mandate of ILC is enshrined in article 13(1) (a) of the UN Charter and article 1 of the Statute of the ILC, which provides that ILC is mandated to assist the General Assembly to, “initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification”.³⁰⁸ Although article 14 of the Statute of ILC adopts a restricted view of the phrase progressive development of international law, article 13 (1) (a) of the UN Charter has no express constraints. Progressive development of international law introduces discretion to the ILC to make suggestions on how norms are involving.³⁰⁹ Therefore, ILC can consider the development of international law regarding climate change and environment. Given the importance of climate change and environmental norms such as no harm principles in the current climate change discourse it is a failure for the ILC 2022 report on *jus cogens* to make no recognition on environment or climate change. The report does not recognize the value that the protection of environment and climate protects, which is an underlying test for the elevation of a norm.³¹⁰

Second, despite the stature of the no harm principle as the foundation of the obligation to prevent transboundary harm,³¹¹ the ILC 2022 *jus cogens* report is silent on environment and climate norms. The ILC makes a list of what it calls “a non-exhaustive list of norms”, which have previously been referred to as *jus cogens*.³¹² This restrictive approach was unnecessary given the scope of the report as containing rules of identification and legal consequences of preemptory norms. Third, the no harm principle has the same underpinning as the crime of aggression which the ILC identified as *jus cogens*.³¹³ Although it is not conclusive evidence that since no harm principle and crime of aggression both protect against a violation of territorial integrity under article 2 (4) of the UN Charter, they have same standing in international law, the transboundary effects of climate change should receive same seriousness as crime of aggression.

³⁰⁷International Law Commission (A/77/10) Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries

³⁰⁸U.N. Charter art. 13.

³⁰⁹International Law Commission Statute article 13 (1) (a)

³¹⁰Prosecutor v Anto Furundzija, International Criminal Tribunal for the former Yugoslavia (ICTY) (1998) IT-95-17/1-T para 153

³¹¹Brent, Kerry Anne (2017). The Certain Activities case: what implications for the no-harm rule?. *Asia Pacific Journal of Environmental Law*, 20(1), 28, 51

³¹²International Law Commission supra conclusion 23

³¹³Brent, Kerry Anne supra 51.

The obligation of the states under common concern for humanity transcends national interest.³¹⁴ The focus is humanity as a race of human beings instead of nationals of a particular state. This requires states to cooperate among themselves to realize this higher goal of protecting society. Such a reasoning animates the collective approach to climate change as an issue that is of great value due to its centrality to the existence of the universe.³¹⁵

5.1.2 The Nature and Consequences of Climate Change as Signaling *Erga Omnes*

Many commentators have characterized climate change as pervasive, irreversible, global, and lethal.³¹⁶ Others view climate change as an existential issue posing the greatest threat to humanity. Whatever way one regards climate change, it is the greatest challenge facing humanity in this century. What makes climate change this complex is the interconnectedness of the climate system, meaning that it is not subject to territorial boundaries. The other is that its universal nature implies that emission in one place will affect outlying areas. The consequences of global warming have been devastating. This challenge is intricate, and one community alone cannot effectively respond to climate change. This part then considers whether this nature and consequences of climate change leads to the conclusion that it is an *erga omnes* obligation.

Climate change is interconnected both in its nature and its effects, and this means that the emission of GHG in one place will have an impact beyond its locality.³¹⁷ Climate change occurs as a reaction to the increase of GHG in the atmosphere. The concertation of GHG affects the climate balance leading to global warming. Due to the widespread nature of the atmosphere, the emission of the GHG will lead to the trapping of the Sun's heat in the atmosphere.³¹⁸ Human activities have altered the greenhouse effect, with more heat being retained. The web nature of climate system means that boundaries cannot contain its effect. Although the web nature of climate change is not peculiar to it, it is more pronounced when it comes to climate than other

³¹⁴Jimena Murillo Chávarro, The Common Concern of Humankind and Its Implications in International Environmental Law 5 *Mqjlicenvlaw* 133, 138 (2008).

³¹⁵Cottier, Thomas, Philipp Aerni, Baris Karapinar, Sofya Matteotti, Joëlle De Sépibus, And Anirudh Shingal the Principle of Common Concern and Climate Change 3 *Archiv Des Völkerrechts* 293, 297 (2014).

³¹⁶Sasmita Mohanty and Bimal Prasanna Mohanty Global Climate Change: A Cause of Concern 32 *Natl Acad Sci Lett* 149, 149 (2009).

³¹⁷Cottier, Thomas *Supra* 299, 295.

³¹⁸Mitchell, John, The "Greenhouse" Effect and Climate Change 27 *Reviews of Geophysics* 115, 115 (1989).

environmental subjects. Judge Weeramantry addressed the web nature in *Legality of the Threat or Use of Nuclear Weapons* advisory opinion stating that:

“The Global environment constitutes a huge, intricate, delicate interconnected web in which a touch there or a palpitation there sends tremors throughout the whole system. Obligations Erga Omnes, rules jus cogens and international crimes respond to this state of affairs by permitting environmental wrongs to be guarded against by all nations.”³¹⁹

The nature of climate change involving multiple states means that its response cannot be national. From a moral and global justice point of view, states owe the entire universe the obligation to mitigate and prevent climate change because the effect cannot be contained in one nation.³²⁰ One defining character of these obligations is that they arise where there is the likelihood that the actions or inactions of a state will harm others. If the issue being dealt with is global due to the shared atmosphere, it means that the obligation should not be national only. Some authors have commented that climate change poses a massive challenge because it is “planetary in scope and due to its long-term and potentially irreversible consequences intergenerational in impact.”³²¹ The ever-present challenge of mitigating climate change requires global action because these efforts will be ineffective unless coordinated internationally. This rationale informs the UNFCCC and Paris Agreement provisions on international cooperation.

It is undeniable that climate change is an existential risk to humanity.³²² Even if one might contest the existential nature of climate change as hyperbole, it is the most significant threat to human life. These statements have been echoed by the UN Secretary-General who has warned that global warming is an existential threat to life.³²³ The effects of climate change have been dire on human life. Due to climate change, the heat levels, floods, and drought, have increased. The warming has led to the melting of Antarctic ice, Greenland ice and increased heat

³¹⁹Legality of The Threat or Use of Nuclear Weapons [1996] ICJ 2 Dissenting Opinion of Judge Weeramantry, Part 3 Sec 4:1 (B).

³²⁰Quirico Ottavio, *Towards A Peremptory Duty to Curb Greenhouse Gas Emissions?* 44 Fordham Int'l LJ 923, 928 (2020).

³²¹Bodansky Brunne E and Rajamani, *International Climate Change Law 2* (2017).

³²²Smith, Glen. *Clothing The Emperor: Supporting National Climate Change Action in Ireland Through Local Governance Networks* in *Creating Resilient Futures Integrating Disaster Risk Reduction, Sustainable Development Goals and Climate Change Adaptation* Agendas 109, 110 (2021).

³²³United Nations News, *Climate Change: An 'Existential Threat' To Humanity, UN Chief Warns Global Summit* (April 12, 2022) <https://News.Un.Org/En/Story/2018/05/1009782> .

retention.³²⁴ Climate change also threatens the existence of marine life because of the acidity in the water.³²⁵ Additionally, climate change threatens human life through depletion of food security, health, and economic challenges. The question is what do these catastrophic effects of climate change mean for the international obligations.

Since climate change threatens human life unprecedentedly, the obligations placed upon states are higher than ordinary ones. Protection of life occupies a core part in the design of international order. Indeed, the importance of climate change is fortified by the type of interests that its actions are meant to safeguard. Climate change obligations create a correlative right to the international community due to the importance of global life. For instance, the ICTY in *Furundzija* stated

“Furthermore, the prohibition of torture imposes on States obligations erga omnes, that is, obligations owed towards all the other members of the international community, each of which then is a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative rights of all members of the international community. It gives rise to a claim for compliance accruing to every member, which then has the right to insist on the fulfillment of the obligation or in any case to call for the breach to be discontinued.”³²⁶

The sixth IPCC report calls for an urgent and drastic shift in the climate change policy to reduce global warming.³²⁷ Climate change is affecting the world dangerously and faster than previously anticipated.³²⁸ One of the significant clarion calls is that extreme weather is causing untold human suffering and that time is running out.³²⁹ The increase in global warming will have a broad irreversible impact on human beings and the environment.³³⁰ Thus, the environment cannot be protected adequately without addressing the climate change concerns.

³²⁴Robert L. Glicksman, *Global Climate Change and The Risks to Coastal Areas from Hurricanes and Rising Sea Levels: The Costs of Doing Nothing* 52 Loy. L. Rev 1127, 1138 (2006).

³²⁵United States Environmental Protection Agency, Climate Change Indicators: Ocean Acidity (April 13 2022) <https://www.epa.gov/climate-indicators/climate-change-indicators-ocean-acidity#:~:text=Although%20the%20ocean's%20ability%20to,Water%20to%20produce%20carbonic%20acid.>

³²⁶In *Furundzija's Judgment Where Prosecutor V. Anto Furundzija*, Judgement of December 10, 1998, Case No. IT-95-17/1, Para 151-152.

³²⁷The Intergovernmental Panel On *Climate Change, Climate Change 2021 The Physical Science Basis* 36(2021) <https://www.reuters.com/business/cop/un-climate-report-urges-world-adapt-now-or-suffer-later-2022-02-28/> .

³²⁸*Id.*

³²⁹*Id.*

³³⁰Stephen H. Schneider and Kristin Kuntz-Duriseti, *Uncertainty and Climate Change Policy*. *Climate Change Policy* 77 (2002).

State's obligations to curb global warming should be viewed as occupying a special character in the international legal order. The implication of the special character of climate change is that it supersedes international investment law.

A counterargument against the case for *erga omnes* obligation is that the international climate change regime is overly weak. To support this argument is the voluntary nature of the NDC under Paris Agreement, which lacks enforcement mechanisms. These counters are valid, but they fail for two reasons. First, climate change obligations are contained in different treaties, including the UNFCCC, which is the main convention. This means that the Paris Agreement is an addition to the main treaty. Second, the Paris Agreement provides for clear obligation under Articles 4,5,6,7, and 8 mandating states to reduce GHG. The lack of coercive or mandatory obligations does not mean that the current obligations are ineffective. Thus, the regime of international climate change offers a platform for coordination of international response.

5.1.3 The effect of *erga omnes* obligations and a case for “ceding way” of climate change obligations

The concept of *erga omnes* has received considerable attention in international law academia.³³¹ While important contributions have been made in understanding this vital concept, the scope of these writings have been limited to concept identification and a few consequences.³³² In fact, significant focus has been oscillating between *erga omnes* and *jus cogens*. Although there are several effects of *erga omnes* obligations, this part considers “ceding the way” to *erga omnes* by ordinary treaty obligation.

Beyond the implications of many states having a legal interest in *erga omnes*, there are several effects of this concept.³³³ Yoshifumi identifies three consequences of *erga omnes* as follows; the obligation not to recognize illegal situations, third-party countermeasures, and the locus standi of not directly injured States in response to a breach of obligations *erga omnes*. States have an obligation not to recognize illegal acts which violate *erga omnes*. Although this obligation was articulated in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*³³⁴ it is not clear to what extent this finding was influenced by the fact that the norm under consideration was also *jus cogens*. The consequence of non-recognition is

³³¹Crow Kevin and Lina Lorenzo-Escobar, From Traction to Treaty-Bound: Jus Cogens, Erga Omnes and Corporate Subjectivity in International Investment Arbitration 13 J. Int. Disput. Settl. 121, 138 (2022).

³³²*Id* at 141.

³³³Tanaka Yoshifumi, The Legal Consequences of Obligations Erga Omnes in International Law 68 Neth. Int. Law Rev 1,3(2021).

³³⁴Legal Consequences of the Construction of a Wall in The Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Reports 2004.

different from “ceding way” since the conflicting international investment law obligations cannot be termed as illegal. Illegality of an act must exist first before the consequence of non-recognition can attend. Additionally, the existence of international investment law conflicting *erga omnes* obligations cannot be termed as a breach of international law.

The breach of *erga omnes* obligation allows third party states to take counter measures.³³⁵ This phenomenon of third-party counter measure has become a common way of enforcing compliance of international obligations. For example, third party counter measures have been adopted against Russia for invading Ukraine and breaching an international norm against aggression. The requirement for these measures to be taken is a breach of international law norm. The other effect is that breach of *erga omnes* gives *locus standi* to each member of the international community.³³⁶

This project argues that *erga omnes* obligations have a fourth implication which is to “excuse breaches of ordinary treaty obligation.” Since *erga omnes* has no capacity to invalidate a treaty like *jus cogens*, the implication of its superiority is to overshadow ordinary treaty obligations. All treaties are not equal since some establish an *erga omnes* obligation, which is superior to the others. International law elevates *erga omnes* for two reasons which are related to the elements of this norm. The first is that *erga omnes* expresses an important norm in international law hence such a norm should supersede others. The second is that international law takes a consequential approach which is that an obligation that increases utility for many states should occupy a higher rank.

A conflict between *erga omnes* obligation and international investment law obligations will be resolved by international investment law ceding way for *erga omnes*. The culpability of states for upholding *erga omnes* obligations and breaching international investment law does not attach. The treaty continues to exist without the ability to impede an *erga omnes* obligation. The basis for this theory of ceding way is that superiority of *erga omnes* must have implications. The scope of the implication of *erga omnes* is constrained only by *jus cogens*. Therefore, as a second order norm *erga omnes* cannot have same effect as first order norm of *jus cogens*. At the same time, *erga omnes* cannot have same consequences as ordinary treaties.

³³⁵Tanaka Yoshifumi Supra 317,16.

³³⁶Tanaka Yoshifumi 317,20.

6 The Suitability Of International Investment Arbitration To Decide Climate Change Cases, And A Call For Public Interest Sensitive Adjudication

The backlash against the investor-state arbitration is on the surge.³³⁷ Questions such as whether arbitration is the best mechanism to solve international investment disputes have taken a prominent place in the debate.³³⁸ Intuitively, the idea that an arbitrator, possibly a private practitioner in a leading city, is likely to decide a country's climate change policy sounds obnoxious. To some, the backlash is misplaced because the arbitrator is deciding a narrow dispute on how the investor was treated. Depending on one's worldview, these questions might appear as arising out of a misapprehension of investor-state dispute resolution mechanism or not. While the existence of the backlash cannot be denied, the validity of reasons of its causes is subject to contention. No other area has brought into question the legitimacy of international investment law, like tribunals' decision on cases touching on right to regulate in public interest. To compound this issue, tribunals have been contradicting each other, especially on matters of public policies.³³⁹ Admittedly, most public policy issues are controversial even at the domestic level. To solve the legitimacy deficits, talks of reforming the system have gained traction in the mainstream institutions such as UNCTRAL and ICSID.³⁴⁰ While these bodies have demonstrated responsiveness, their reforms agenda is procedural and tangential leaving the underlying issues unanswered.³⁴¹

Climate change is a pertinent issue that has attracted global attention over the last decade. This attention has been increasing with the adverse climate change effects being felt worldwide. The solution to this looming crisis of this century can only be achieved if states take decisive action at the national level.³⁴² Both private and public sectors have a role in addressing the climate change menace. Indeed, since the private sector is a significant emitter of GHG, their involvement is likely to accelerate reducing global warming.³⁴³ Yet, investors are becoming the stumbling

³³⁷Asha Kaushik, Revisiting History: How The Past Matters for The Present Backlash Against the Foreign Investment Regime, 50 Harv. Int'l. LJ. 491, 492 (2009).

³³⁸*Id* 509.

³³⁹Anders Nilsson & Oscar Angelson, Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed, 30 J. Int'l Arb. 56, 588 (2013).

³⁴⁰Frank J. Garcia, Lindita Ciko, Apurv Gaurav and Kirrin Hough Reforming the International Investment Regime: Lessons from International Trade Law 18 J. Int. Econ. Law, 861, 885 (2015).

³⁴¹Gathii, James, Reform and Retrenchment in International Investment 1,1 (2021) <https://ssrn.com/abstract=3765169> Or <http://dx.doi.org/10.2139/ssrn.3765169>.

³⁴²Voigt, Christina *State Responsibility for Climate Change Damages* 77 Nord. J. Int. Law 1,10(2008).

³⁴³Ganguly, Geetanjali, Joana Setzer, And Veerle Heyvaert *If at First You Don't Succeed: Suing Corporations for Climate Change* Oxf. J. Leg. Stud 841, 847 (2018).

block to the realization of the climate change agenda.³⁴⁴

Investor have aggressively attacked the climate change policies being adopted by states as demonstrated by the cases discussed in part four. Just to highlight a few, in *Vattenfall AB and others v. Federal Republic of Germany*,³⁴⁵ an investor challenged government policy to reduce production of coal in Germany. This was repeated in the cases of *Lone Pine Resources Inc. v. The Government of Canada*,³⁴⁶ where the investor challenged Quebec law to limit oil and gas exploration in a bid to reduce fossil fuels. Additionally, an investor challenged Italy's oil exploration policy in the case of *Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic*.³⁴⁷ The recent exit of Netherlands, France, Germany and announcement of intent to leave by Luxembourg the Energy Charter Treaty signals a regime which is under siege.³⁴⁸ Yet, this does not necessarily mean that it is a win for climate change because of the sunset clauses which allows the treaty to remain in force for 20 years after a state has withdrawn from the treaty.³⁴⁹ Therefore, the proponents of a reformed international investment law should not be quick to celebrate the developments.

The investor state dispute resolution mechanism has been discredited as an illegitimate regime.³⁵⁰ In the biblical Damascus journey, this regime can be likened to "Saul" whose work is destruction of good work by impeding climate change action. A laundry of transgressions can be highlighted, for example, tribunals have been awarding colossal amount of money leading to a chilling effect on public interest regulation. Additionally, state right to regulate in public interest has been heavily impeded to a point where states have directly proclaimed their fear of the investor state arbitration.³⁵¹ There has been an expansive and one-sided interpretation of substantive standard elevating the rights of the investors and importing standards such as stable legal environment in the absence of stabilization clauses.³⁵² The other problem is the perception or existence of bias.³⁵³ Can such a discredited regime decide climate change cases?

³⁴⁴Hannah Thomas-Peter *Fossil Fuel Firms Sue Governments Across The World For £13bn As Climate Policies Threaten* Sky News, UK (10 April, 2022) <https://news.sky.com/story/fossil-fuel-companies-are-suing-governments-across-the-world-for-more-than-18bn-12409573>.

³⁴⁵ICSID Case No. ARB/12/12.

³⁴⁶ICSID Case No. UNCT/15/2.

³⁴⁷ICSID Case No. ARB/17/14.

³⁴⁸Frédéric Simon Another blow for Energy Charter Treaty as Luxembourg announces exit (November 18, 2022) <https://www.euractiv.com/section/energy/news/another-blow-for-energy-charter-treaty-as-luxembourg-announces-exit/>

³⁴⁹Andrei Belyi, The Energy Charter process in the face of uncertainties, 14 J. World Energy Law Bus 363, 364.

³⁵⁰Gathii, James Thuo, Supra 325.

³⁵¹Elizbeth Meager Supra 129.

³⁵²Puig Sergio and Gregory Shaffer, Imperfect Alternatives: Institutional Choice and The Reform of Investment Law 112 Am J Int Law 361, 366 (2018).

³⁵³*Id.*

The hallmark of this part is to highlight the seriousness of concerns raised on the suitability of investor-state dispute resolution mechanism. These questions should be explored before a cascade of climate change-related investment disputes erupts. This piece argues that unless arbitral tribunals have a “Damascus moment” by abandoning investor exclusive adjudicative philosophy and adopt public interest-oriented adjudication they are ill-suited to decide climate change cases. The idea of the “Damascus moment” is motivated by the need for tribunals to abandon “a sole master” approach where the investor rights are the only controlling interests.

6.1 Mapping The Debate on the Legitimacy of Investor-State Dispute Resolution: A Multiple Sided Discussion

Like any other debate, the question of legitimacy of international investment law is multiple sides often contesting the existence, substantive standards, procedural and the dispute resolution.³⁵⁴This debate has created camps, one made of practitioners and arbitrators who are committed to the system that they serve for apparent reasons.³⁵⁵Most of them are beneficiaries of the investor-state system as currently practiced. There is some nuance needed in the analysis since it will be imprecise to generalize all practitioners and arbitrators. The other category is made up of academics and civil society, who are fierce critics of this system.³⁵⁶It is essential to highlight that there is a category of academics and think-tank institutions who are also beneficiaries of this system and are committed to defending its legitimacy.³⁵⁷Also, there are certain countries and unions of nations committed to reforming or abandoning the regime. This part seeks to highlight main arguments on both sides of the debate before making the key argument of this paper.

6.1.1 The arguments in favor of deciding all questions using investor-state arbitration

No better summary of the proponents of investor-state mechanism that can be offered than Rob Howse’s summary.³⁵⁸ Howse starts by establishing his legitimacy as an insider in the investor-state dispute mechanism before attacking those who criticize this regime.

³⁵⁴Asha Kaushik Supra 321, 525.

³⁵⁵Ylli Dautaj, Between Backlash and The Re-Emerging “Calvo Doctrine”: *Investor-State Dispute Settlement In An Era of Socialism, Protectionism, And Nationalism*, 41 NW. J. INT’L L. & BUS 273, 310 (2021).

³⁵⁶Tannoy Das, *The Rotten Core Of International Investment Law* (14 March 2022) <https://www.Afronomicslaw.Org/2020/04/15/The-Rotten-Core-Of-International-Investment-Law>.

³⁵⁷Alvarez Maria, and Piotr Willinski, *A Response to The Criticism Against ISDS by EFILA* 33 J. Int. Arbitr. 1-10 (2016).

³⁵⁸Rob Howse, *Courting The Critics of Investor-State Dispute Settlement: The EU Proposal for A Judicial System for Investment Disputes* 6-7 (2015).

He characterizes some detractors by making the following statement “the criticisms of the existing ISDS system are ill-informed and indeed irresponsible.”³⁵⁹ The author lays down the basic premises of the criticism as fundamentally flawed by reducing the commentaries as missing the point. This is because they attack individual cases contesting precise allegations of gross violation of investment standards. However, the author does not address the issue that while these cases are specific disputes, they reveal a perverse disposition in determining cases. For instance, the case in *Eco Oro v Colombia* demonstrates the tribunal’s perception of the place of the environmental protection when weighing it with investor rights.³⁶⁰ Additionally, to look at the issue from the prism of disjointed cases would be missing the structural aspects of a system. The investor-state dispute resolution mechanism does not result from an accident. Like all other systems, they have a purpose and a dominant worldview which the major players continuously shape.

The other argument is that there is no evidence that arbitrators are biased against states, and in fact, states win more cases than investors.³⁶¹ This argument is offered to demonstrate that arbitrators are competent and fair. To answer this argument, states winning or not is reductionist because a fair evaluation of the system is not based on who wins. To do so would be looking at the results only, which do not communicate the entire story. To judge the system fairly, one needs to assess its evolution, design, goals, composition, processes, and outcome. It might be the case that states are winning more cases, but investors who succeed win on flimsy reasons and are awarded colossal amounts. Even so, this type of evaluation leaves a lot unexplored, and it might lead to hasty conclusions.

The most persuasive argument in favor of investor state dispute resolution mechanism is that the regime is meant to establish the rule of law by depoliticizing and delocalizing disputes.³⁶² The investor is guaranteed protection of investments against arbitrary interference by the host states. Although the underlying philosophy of this argument is that host states have weak rule of law that is not capable of protecting the foreign investor, there is some merit in this goal of investor-state dispute mechanism. The example that is often given is Yuko’s expropriation by the Russian government and how the domestic courts could not protect the investor.³⁶³ To reject the value of investor-state dispute resolution mechanisms wholesomely would be mistaken. Generally, being a foreign investor comes with some downside.

³⁵⁹*Id* 2.

³⁶⁰*Eco Oro Minerals Corp. V. Republic of Colombia*, ICSID Case No. ARB/16/41

³⁶¹Ylli Dautaj *Supra* 337, 309.

³⁶²Brower Charles and Schill Stephan, *Is Arbitration a Threat or A Boon to The Legitimacy of International Investment Law?* 9 *Chic. J. Int. Law* 477-482 (2009).

³⁶³Henley Kathryn, *Telephone Law and The ‘Rule of Law’: The Russian Case*, 1 *Hague J. Rule Law* 241, 242 (2009).

With some protections, the host state will take its commitments on the treatment of foreign investors seriously.³⁶⁴ While this argument has considerable merit, it is not entirely true especially because of advances that have been made in democratization process.

6.1.2 The Case Against Investor-State Dispute Resolution

The investor-state dispute mechanism is fiercely contested to the extent of shaking its core. With the exponential increase in the number of BITs cases have increased making this area of law one of the most active international law domains. The increase has also drawn considerable attention, which has heightened scrutiny. The scrutiny has raised several questions touching on the contradictory decision, the ability to balance public interest and investors' rights and arbitrators bias among others. One question that has preoccupied the debate is the suitability of international investment arbitration to determine public interest regulatory disputes. This part engages with some arguments against the investor-state dispute resolution mechanism.

The substantive standards are over-broad giving arbitrators unabated discretion.³⁶⁵ The argument has been that tribunals have approached international investment law without a sense of judicial discipline that comes with recognizing exercise of limited power. Often standards such as FET and indirect expropriation have been interpreted to overturn state actions for minute transgressions. Since the world is not perfect, this means that most states mishaps will be brought under the umbrella of broad standards. A corollary to this, is that the text of the treaty does not matter because the arbitrators have wide powers which they use to transplant their sense of justice.³⁶⁶ This means that the state is held to very high and arbitrary standards that ignore governance's realities. The example of these standards was encapsulated in the case of *Metalclad Corp v Mexico*³⁶⁷ which stated that the state violated FET for failing to ensure a transparent, constant, and predictable environment to the investor. Similarly, in *Técnicas Medioambientales Tecmed, S.A. v. the United Mexican States* considering FET, the tribunal faulted the government for not renewing a license for investors hazardous waste landfill by remarking thus:

³⁶⁴Schultz Thomas and Cédric Dupont, Investment Arbitration: Promoting The Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study, 25 Eur. J. Int. Law 1147, 1163 (2014).

³⁶⁵ZhuYing, Fair and Equitable Treatment of Foreign Investors in an Era of Sustainable Development, 58 Nat. Resour. J. 319, 321 (2018).

³⁶⁶Garcia Carlos, All The Other Dirty Little Secrets: Investment Treaties, Latin America, And The Necessary Evil of Investor-State Arbitration, 16 Fla. J. Int'l L. 301, 310 (2004).

³⁶⁷*Metalclad Corp. V. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, The Award, 5 ICSID Rep. 209, Para. 99 (August 30, 2000).

The foreign investor expects the host State to act consistently, free from ambiguity, and totally transparently in its relations with the foreign investor, so that it may know beforehand any rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.³⁶⁸

The investor-state dispute resolution mechanism obstructs the right of the state to regulate in favor of public interest.³⁶⁹ This observation has offered one of the most pronounced attacks against the international investment law regime. The concern is that tribunals ignore the glaring public interest in favor of investor protection. It is one thing for the tribunal to question state's motivation and it is another to ignore public interest. Even the most altruistic reasons have come under sharp attack. For instance, although there was no award, the case of *Foresti v Republic of South Africa*³⁷⁰ demonstrates the extent to which the investors can go in challenging state policy. The investor had contested the Black Empowerment Policy, which sought to give access to black people who have been historically disadvantaged and excluded in the economy under apartheid regime. In another case, the tribunal held that Canada had violated the minimum standard of treatment in the case of *Bilcon v Canada*³⁷¹ concerning the failure by the Canadian authority to approve the mining project for environmental and community considerations. Through the aggressive elevation of the investor, tribunals have shelved the environment, human rights, and public health. Yet, the state's power to regulate as an expression of sovereignty is the bedrock of the modern international law.³⁷² Some tribunals have tried to walk the fine line between state regulation and investor protection.³⁷³

The other challenge is bias which is considered as one of the most egregious crimes against the legitimacy of adjudicatory mechanisms. The investor-state arbitration has come under sharp attack for being biased against states.³⁷⁴ The bias has two dimensions.³⁷⁵ First, the pool of arbitrators is made up of commercial lawyers who appear in some cases as counsels for corporations.³⁷⁶

³⁶⁸Técnicas Medioambientales Tecmed S.A. V. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, Para. 154 (May 29, 2003).

³⁶⁹Stephanie Bijlmakers, Effects of Foreign Direct Investment Arbitration On a State's Regulatory Autonomy Involving the Public Interest, 23 AM. REV. OF INT'L ARB. 245, 249 (2012).

³⁷⁰Foresti V. Republic of S. Afr., ICSID Case No. ARB(AF)/07/1, Award (August 4, 2010).

³⁷¹Bilcon of Delaware Et Al V. Government of Canada, PCA Case No. 2009-04.

³⁷²Thompson, Alexander, Tomer Broude and Yoram Haftel, Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, And Change in Treaty Design 73 International Organization 859, 875 (2019).

³⁷³Telenor Mobile Commc'ns A.S. V. Republic of Hung., ICSID Case No. ARB/04 /15, Award, ¶ 64 (Sept. 13, 2006).

³⁷⁴Nolan Michael Challenges to The Credibility of the Investor-State Arbitration System 5 Am. U. Bus. L. Rev. 429, 438 (2015).

³⁷⁵William Park, Arbitrator Bias, 1(Boston University School of Law, Public Law Research Paper No. 15-39 2015).

³⁷⁶Nolan Michael Supra 376, 356.

Sergio and Shaffer have described this phenomenon as follows “[c]ollectively, these individuals[arbitrators] constitute a small club of self-regulated decision-makers that lacks gender and geographic diversity.”³⁷⁷ Second, most arbitrators are from the Global North, judging disputes against stereotyped Global South states.³⁷⁸ The bias of arbitrators affects their ability to balance public interest matters. The world view of these arbitrators is commercial lawyers, which limits their exposure. Additionally, the system is seen as self-perpetuating because of the close pool of arbitrators, which is difficult to penetrate. This skews the systems in favor of the commercial interest, at the expense of public interest.

The other line of attack on the investor-state arbitration is the contradictory awards arising from similar facts.³⁷⁹ Although the lack of harmonious interpretation of investment standards can be attributed to the decentralized dispute resolution mechanism, the rule of law demands certainty in the system. Despite the lack of a precedent system in international investment law, the centrality of consistency in adjudication cannot be underscored. The landmark cases to demonstrate the contradiction is *LG&E*³⁸⁰ and *CMS*³⁸¹ cases. Both cases originated from similar facts on the adjustment of tariffs arising from the Argentinian crisis. The tribunal in *CMS* stated that Argentina had contributed to the crisis. Therefore, it could not invoke necessity as a defense. While the tribunal in *LG&E* accepted the defense of necessity, remarking that the investor had not demonstrated that Argentina contributed to the crisis. The contradiction raises the question whether this regime can be trusted to protect public interest.

6.2 The Suitability of Investor-State Arbitration to Decide Climate Change Disputes

It is risible to claim that international arbitration has no value as a method of resolving international disputes resolution. Despite a few benefits, the regime is fundamentally flawed, which the raises the question of its suitability to decide climate change disputes.³⁸² Unlike other public interest issues, climate change is global, lethal, and imminent which demands that its cases be taken with gravitas they deserve. The race to stabilize the global temperature has become one of the

³⁷⁷Puig Sergio and Gregory, Shaffer Imperfect Alternatives: Institutional Choice and The Reform of Investment Law, 112 Am. J. Int. Law 361,366(2018).

³⁷⁸ *Id.*

³⁷⁹Waibel Michael, Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E, 20 Leiden J. Int. Law 637,641 (2007).

³⁸⁰*LG&E Energy Corp. V. Argentine Republic*, ICSID Case No. ARB/02/1, Decision On Liability (October 3, 2006).

³⁸¹*CMS Gas Transmission Co. V. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005).

³⁸²Julie Maupin, Public and Private in International Investment Law: An Integrated Systems Approach, 54 VA. J. Intl L. 367, 385 (2014).

most urgent and vital policy actions of the 21st century. This part argues that there are severe concerns for the arbitrators deciding climate change-related disputes. These concerns extend beyond individual arbitrators to the entire system of international investment law, which was not designed with pressing public interest in mind. However, the only remedy to cure these flaws is infusion of the system with public interest.

6.2.1 Investor-State Arbitration Is Fundamentally Flawed to Decide Climate Change Cases; “The Saul” Of International Adjudication

Currently, investor-state dispute mechanism has serious issues, making it unsuitable to decide climate change-related disputes.³⁸³ Unless these concerns are addressed, the arbitration cannot navigate the sensitive subject of climate change. As argued above, the substantive standards privileges investors above public interest. This has been seen in cases such as *Santa Elena*³⁸⁴ holding that the reasons for the change in legal regime is inconsequential in determining state’s liability and damages.³⁸⁵ Additionally, the science surrounding climate change is still evolving, and a lot remains uncertain. This is the reason climate change is supported by principles such as precautionary. With the high threshold placed upon the state to act transparently, consistent, and free from ambiguity, it might be difficult for tribunals to decide some of these malleable issues relating to climate change.

When tribunals accede to the arena of climate change, they will influence public policy on such a contentious issue.³⁸⁶ Based on the experience of cases such as *Eco Oro*³⁸⁷ tribunals have not proved to be good in balancing public interests and investors’ rights. This problem is not sporadic acts of a few arbitrators, but it is a structural issue that deals with the distribution of obligations and rights. Under this system, the investor operates without many obligations while the state shoulders numerous duties. Disputes relating to fundamental issues such as climate cannot afford to be subjected to such a skewed dispute settlement mechanism. This is compounded by the lack of doctrinal assurances that require tribunals to consider climate change interests in deciding investor rights.

The other concern is the parameters of the state’s role as the protector of public interest. This role of the state has never been questioned to the extent that international investment law does. Investors have challenged almost all regulations that affect them, even in cases that are thought to be unassailable. There are

³⁸³*Id.*

³⁸⁴*Id.*

³⁸⁵Di Benedetto Saverio, *International Investment Law and The Environment* 33(2013).

³⁸⁶*Id.*

³⁸⁷*Eco Oro Minerals Corp. V. Republic of Colombia*, ICSID Case No. ARB/16/41.

numerous academic writings discussing some of the defenses that states can make against investment cases arising from regulating Covid-19.³⁸⁸ However, the mere contemplation that investors would file several cases based on Covid-19 related laws demonstrates the extent of the challenge that states are likely to face even in the noblest measures.

6.2.2 A Case for the “Damascus Moment” Public Interest Oriented Investor-State Arbitration in Deciding Climate Change Disputes

The debate on the concerns about investor-state arbitration has rotated around binary options of courts or arbitration.³⁸⁹ While the solution of establishing a court has been the kneejerk reaction to the backlash on international investment law, this solution is not the panacea to legitimacy deficit. A court just transfers powers to a permanent body administered almost like ICSID. However, the court's existence without addressing broader questions such as design of substantive standards will be unhelpful. Further, this does not address the fundamental questions that go to the problem's root causes. Indeed, courts can be commercially single-minded, as demonstrated by the many commercial divisions in several jurisdictions.³⁹⁰ Efficiency and facilitation of commercial transactions are the underlying philosophies of these court. This demonstrates that courts are not the silver bullet though they might be the first step towards harmonizing the jurisprudence. Courts or arbitration is an issue of the form of the dispute resolution mechanism, which is secondary to addressing structural flaws. This part calls for a *metanoia* of the investor-state arbitration in what it describes as “Damascus moment”. Without this systemic change, international investment law will run a foul with climate change action.

The centrality of public interest as the organizing philosophy for climate change policy cannot be gainsaid. The public interest has been lacking in investor-state arbitration. To regain the legitimacy that is pivotal in deciding climate change disputes, tribunals must be guided by public interest consideration. Of course, this does not mean that the state policy must be upheld. Instead, the tribunal should not look at the dispute from the private law lens, with the major objective of protecting investors. Rather, it should be accustomed considering state policy to advance climate change.³⁹¹

³⁸⁸Dimitrios Katsikis, ‘Necessity’ Due to COVID-19 As A Defence to International Investment Claims, 36 ICSID Rev/ FILJ 46, 48 (2021).

³⁸⁹Howse Rob, *Designing A Multilateral Investment Court: Issues and Options*, 36 Year. Eur. Law 209, 215 (2017).

³⁹⁰Winslow Luke, Alec Baker and Charles Goehring the *Neoliberal Conquest of the Supreme Court*, 3 Commun. Public 205, 205-217 (2018): 205-217.

³⁹¹Alexei Atif, *Preventing The Regulatory Chill of International Investment Law and Arbitration*, 9 International Law 85,85(Research Canadian Center of Science and Education 2020).

“The Damascus moment” requires a complete shift on adjudication of government policy. The tribunal is supposed to acknowledge the right of the state to regulate as a legitimate action of the state. In the area of climate change, the tribunal must acknowledge that climate change is an imminent threat to humanity. Therefore, it is a primary responsibility of states to implement measures to mitigate global warming. Science has established those human activities are responsible for the rise in global average temperature.³⁹² Specifically, GHG arising from burning of fossil fuel makes two-third of all GHG.³⁹³ Government actions to reduce GHG in the atmosphere are inevitable. Therefore, the tribunals cannot decide investments disputes outside the context of the climate change emergency.

The emergency context must be preeminent in interpreting and implementing international investment law. Key facts should guide arbitrators in deciding investment cases. First, ton of billions of GHG is being emitted in the fossil fuel industry.³⁹⁴ Second, two-third of cities are at the verge of destruction by rising sea levels.³⁹⁵ By 2050, 140 million people will be displaced by climate change in Sub-Saharan Africa, Latin America and South Asia.³⁹⁶ International investment law must be guided by the words of scientist who have proclaimed that “[t]he climate crisis has arrived and is accelerating faster than most scientists expected. It is more severe than anticipated, threatening natural ecosystems and the fate of humanity.”³⁹⁷ These issues should be crucial factors in deciding the legality of state action to reduce the GHG and how it affects investors.

When in conflict with the international investment law, climate change obligations should be considered as *erga omnes* obligations ranking above international investment law. International investment law cannot be interpreted as an exclusive discipline. Despite the problem of fragmentation of international law, the international system has states as major subjects of international law. Thus, when the entire system is challenged by catastrophe like climate change the system must respond in a coordinated way. This nature of international system should influence how arbitrators view their roles. In any case, arbitrators have often quoted general international law in interpreting states obligation to demonstrate that tribunals recognize that international investment law does not operate in isolation.

Investor-state tribunals should recognize that there is no perfect government that works seamlessly. When dealing with a rapidly evolving area like climate

³⁹²United States Environmental Protection Agency, Global Greenhouse Gas Emissions Data (April 10 2022) <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data> .

³⁹³*Id.*

³⁹⁴United Nations, *The Climate Crisis – A Race We Can Win* (April, 10 2022) <https://www.un.org/en/un75/climate-crisis-race-we-can-win> .

³⁹⁵*Id.*

³⁹⁶*Id.*

³⁹⁷William Ripple, Christopher Wolf, Thomas Newsome, Phoebe Barnard, William Moomaw, *World Scientists' Warning of a Climate Emergency*, 70 *Bioscience* 1,9 (2020).

change, states cannot be expected to figure it out and work faultlessly. Most arbitrators have an ideal conception of government and how it should run in an almost magical manner. Yet, the government is a complex entity with several centers of powers, which often work in a dynamic world full of uncertainties. The human rights law has managed to handle this nature of government by developing doctrines such as margin of appreciation.³⁹⁸ For instance, the tribunal viewed state action as discriminatory in *Quiborax v Bolivia* when the government reacted to quell the unrest and environmental degradation. It concluded that “discrimination does not cease to be because it is undertaken to achieve a laudable goal”.³⁹⁹

While human rights doctrines are not automatically transferable to international investment law, it is important that an arbitrator’s world view of government operations is not used to disproportionately impede the public interest.⁴⁰⁰ Additionally, governments work in a polycentric environment involving conflicting interests. To streamline the variant interests’ governments will limit the rights of one party for a cohesive co-existence. Unless the international investment law caters for this inherent character of exercise of state powers, the tribunal’s decisions will be aloof and elitist, which might undermine the global climate change agenda.

International investment law has fundamental flaws that make the regime run counter climate change action. This area is not designed to balance competing interests. Tribunals have approached international investment law myopically without considering other areas of international law. At the end, what has been produced is a one-sided regime. Despite these weaknesses the regime can have a Damascus moment which incorporates public interest in case determination. Tribunals must not only view climate change obligations as *erga omnes* but also must have an emergency worldview.

7 Conclusion

This piece has sought to examine the tension between stabilization under FET and climate change action. It highlighted that FET is formulated broadly and interpreted expansively to incorporate even the slightest transgressions against the investor. This sweeping nature of FET has turned out to be a gateway for incorporating the arbitrators’ sense of justice beyond treaty provisions.

³⁹⁸Hwang, Shu-Peng, *Margin of Appreciation in Pursuit of Pluralism? Critical Remarks On the Judgments of the European Court of Human Rights On The ‘Burqa Bans*, 20 Hum. Rights Law Rev 361, 365 (2020).

³⁹⁹*Quiborax SA and Non Metallic Minerals SA V. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2. Award Para 253.

⁴⁰⁰Beharry Christina and Melinda Kuritzk, *Going Green: Managing The Environment Through International Investment Arbitration*, 30 Am. U. Int’l L. Rev 383, 421 (2015).

Tribunals interpret FET as a one-sided guarantee that acts as a pathway for stabilization akin to stabilization clauses. This situation has been compounded by tribunals interpreting FET using the dictionary meaning of the word fair and the word equitable. The interpretation yields broad terms which have no material content. Although the new generation of investment treaties have a restricted FET, the inclusion of words such as “includes” undermines the effectiveness of this restriction. Additionally, the new generation treaties operate in a culture with an embedded view of FET, which means that tribunals ignore the restrictions and interpret FET expansively. While tribunals label FET as a standard, they apply it as a categorical rule that operates without exception or context. Yet, FET is supposed to be interpreted considering context and incorporating relevant information such as the reason for a violation and the purpose of state action.

The project has interrogated the question of international climate change as the century’s crisis, which has acquired a moral galvanizing effect. It sought to provide a basis for elevating international climate change obligations above FET by viewing the later as an emergency. It discussed how the IPCC has painted a doom picture requiring the most urgent climate response. The universe has one climate system, which means that climate change knows no boundaries. Thus, states have adopted the language of international law and relations in responding to climate change. This research called for rethinking of international law to harmonize ordinary obligations with climate change emergency. International law has benefits such as relatively developed principles such as no-harm and precautionary principles, which can aid in solidifying climate change obligations. The no-harm principle should be interpreted broadly with presumptions to overcome the challenges associated with causation in climate change. This piece suggests adoption of the emergency framework in the wake of these conflicting international law obligations. The climate change catastrophe warrants the adoption of an emergency structure that will lead to climate elevation above other international commitments.

The international law project is imperfect because of the fragmentation and lack of a clear hierarchy of laws. For instance, investors have deployed international investment law to stop climate change actions. The fossil fuel companies have instituted over five cases challenging climate change action for breaching FET and other standards. These companies are suing governments for over \$ 18 billion. The cases have led to some governments expressing their fear of implementing climate change policies because of investor-state dispute resolution.

The core of this research is examining the tension between stabilization under FET and climate change. One of the standards that incorporate stabilization is a legitimate expectation. This piece finds that even in the absence of stabilization clauses or specific promises, tribunals have interpreted the mere existence of a particular legal regime as creating legitimate expectations. Tribunals have rationalized this reading of legitimate expectation, arguing that investors invested

based on laws that existed at the time of investments, which means the law should not change. For instance, in *Duke v Ecuador* the tribunal concluded that “[t]he stability of the legal and business environment is directly linked to the investor’s justified expectations”. Here, the legitimate expectation incorporates a stable legal environment. Legitimate expectation also establishes stability by demanding consistent, non-ambiguous, and transparent state conduct. These standards insulate investors from public interest legal changes such as the adoption of climate change policies. Yet, legitimate expectation is subject to caveats such as reasonable expectations that offer a path for incorporating context in interpreting the law. The paper has offered an extensive discussion of what it calls the reconstruction of legitimate expectation through the lenses of “malleable thesis”. It argues that legitimate expectations have no settled meaning and to determine the core of the concept one must look at the context and make a value judgment. Through a reasonable promisor it reconstructs what amounts to legitimate expectation. It is not proper for an investor to expect the state will not respond to global emergencies like climate change. The other form of stabilization is autonomous stability under FET.

The conflict between climate change obligations and international investment law requires a coherent legal structure and infusion of public interest in investment disputes. *Erga omnes* obligations offer a concrete architecture to solve the question of conflict of international commitments. Claiming that an obligation is *erga omnes* elevates it higher than ordinary treaty obligations. *Erga omnes* obligation expresses a value judgment because only crucial standards meant to protect humanity, or the universe occupy the pedestal place. These obligations embody what society considers more important than others because every society has a ranking of commitments based on the interests they protect. While this research did not explore fully the exact formulation of obligation that amounts to *erga omnes*, it was clear that some aspects of climate change obligations have acquired this standard. This piece relied on treaty language such as “common concern for humankind” to argue that some climate change obligations are *erga omnes*. These treaties also delocalize and multilateralizes climate change commitments. The preamble of UNFCCC buttresses the notion that climate change has global nature which requires a global response. The nature of climate change as a global crisis that knows no boundaries and poses existential danger signals that curbing global warming is an *erga omnes* obligation. Apart from the three widely accepted consequences of *erga omnes*, this research has proposed a fourth consequence of ceding way for *erga omnes* obligations if they conflict with ordinary treaties.

The last question that this project has sought to answer is the correct forum to resolve climate change-related disputes. The investor-state dispute resolution mechanism faces vast backlash based on substantive and procedural reasons. One of the significant sources of the backlash is the view that the regime impedes

states' public interests' regulations. This dispute resolution mechanism has acquired a character like the biblical "Saul" in the Damascus journey. Some of the transgressions of this regime are that the substantive standards privilege an investor more than the right to regulate for public interest. The others are colossal damages, arbitrators' bias, contradictory decisions, and abuse of substantive standards to impose a utopia view of states. This piece argues that the concerns are legitimate, and they raise serious issues about the appropriateness of tribunals to determine climate change-related disputes. These concerns are justified because international investment law did not envision these tribunals deciding public interest cases. In what this research calls "the Damascus moment," the tribunals can make a complete shift from investor-exclusive adjudication to a holistic and public interest approach. This shift is characterized by adopting public interest-oriented adjudication on climate change. It also requires the realization that there are no perfect governments, especially in times of evolving crises like climate change.