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Non-Renewable, Non-Negotiable? Is the ISDS Mechanism Turning into a Major Barrier to Climate Action?

- Anuradha Lawankar (II B.A.LL.B.)

On March 11, 2024, the Organisation for Economic Co-operation and Development (OECD) hosted its 9th annual Investment Treaty Conference on "Supporting the Global Energy Transition: Methods to align investment treaties with the Paris Agreement." Delegates discussed a carveout of climate change measures in Investor-State Dispute Settlement (ISDS) as a central reform proposal.

The warning from the Intergovernmental Panel on Climate Change (IPCC) in October 2018 underscored the urgent need for governments to take decisive action within the next 12 years to mitigate the looming threat of catastrophic climate change. The report highlighted the imperative of reducing global greenhouse gas emissions by 45% by 2030 to align with the goals of the Paris Agreement. However, achieving this target necessitates a significant transformation in our energy systems.

Initiatives aimed at reducing demand for fossil fuels through investments in energy efficiency, renewable energy, and carbon pricing arrangements have been the focus of most governmental efforts. There has been a growing recognition of phasing out plans and measures to restrict the supply of fossil fuels along with changes in demand-side initiatives. Most of the supply-side policies are more likely to face challenges through ISDS mechanisms due to their direct impact on specific investments and aggressive climate action measures.

The fossil fuel sector is typically categorized into three main segments within the value chain: upstream, transport and downstream. Upstream activities involve exploration and extraction with key assets being the fossil fuel reserves themselves. Predominantly, proven oil reserves are concentrated in Venezuela, Canada, Russia, the Middle East, and to some extent, the United States and certain African countries like Nigeria and Libya. (Along with gas and coal reserves). Asset stranding in this segment occurs when known reserves remain untapped due to economic and legal constraints. Majorly it is

News at a Glance

The Iraqi Council of Representatives passed a law Saturday criminalising same sex relationships and transgender individuals. The Anti-Prostitution and Homosexuality Law amends a previous law from 1988, providing prison sentences and fines for most of its offenses. Anyone convicted of participating in a same sex relationship could face imprisonment for ten to fifteen years. The law also criminalizes transgender individuals, making it illegal to identify as anything other than your biological sex assigned at birth, which could result in one to three years imprisonment For more information see here.

The Superior Council of Communication (CSC) of Burkina Faso said in a statement that it had suspended several more international news outlets for covering a Human Rights Watch (HRW) report accusing the country's military of killing civilians. For more information, see here.

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caused due to project cancellations or underutilization that results in sunk investment.

Sadly, even after the clear implications of the carbon budget and commitments to the Paris Agreement, the fossil fuel industry has persisted in investing in further exploration activities and new infrastructure. Governments too have continued to plan for fossil fuel developments that contradict their climate commitments. For now, there exists considerable uncertainty regarding how the assets might be affected and how various stakeholders, including financial institutions, companies, and governments can manage the risks associated with stranded assets.

Countries in the Global South with unexploited deposits of fossil fuels may face not only stranded resources, leaving them with limited options for economic development, but also potential liability for stranding them. Assets such as coal power plants are often younger in developing countries, so investors are more likely to suffer financial losses in the transition to cleaner forms of energy.

Under most treaties, disputes are typically settled by ad hoc (especially established) arbitral tribunals. The arbitrations can be conducted under different sets of rules, and there is considerable variation in the specifics. Under most arbitration rules, the parties appoint a panel of three arbitrators to settle the dispute. Often, each party appoints one arbitrator, with the chair either jointly appointed by both parties or by the party-appointed arbitrators.

Arbitrators can be appointed even when the government refuses to cooperate, and proceedings can continue even if the government does not take part. These features mean that ISDS has legal ramifications against non-complying states. There has been a significant increase over the past few years owing to:
First, investors' access to international redress, without needing to first exhaust local remedies;
Second, broad interpretations of the protections provided to foreign investors, made by ad hoc tribunals;
and Third, large compensation awards that sustain an international industry of

News at a Glance

While Lebanon is still not a ratifying member of the ICC Rome Statute, the filing of the declaration grants the court the authority to investigate serious crimes committed in Lebanon in the last six months. Since October 7, Lebanon has accused Israel of repeated breaches of both its sovereignty and international law following clashes between the armed group Hezbollah and Israeli forces. For more information see **here**.

The Supreme Court of Austria referred the case to the CJEU in 2021, seeking clarification with respect to, among others, whether the GDPR's data minimization principle permits a data controller's processing of personal data without restriction as to time or type of data. The court also sought clarification as to whether a data subject's own statements regarding his or her sexual orientation made during a panel discussion allow a data controller's processing of other data relating to that data subject's sexual orientation for the purpose of personalized advertising. For more information see **here**.

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Globally, the value of stranded assets in the power sector alone could amount to climate change, the projected value of stranded assets in the power sector alone could amount to as much as US $1.8 trillion. This makes public actions aimed at phasing out fossil fuels trigger ISDS claims under relevant investment treaties, with investors alleging discrimination and indirect expropriation. To bring a claim, a business must demonstrate its status as a foreign investor with the investment protected under a particular treaty. This broadens the pool of potential claimants to include a wide range of financial investors holding direct or indirect equity stakes in fossil fuel companies. Notably, many of the known ISDS cases initiated under the Energy Charter Treaty (ECT) were filed by private equity funds or other financial investors.

The fossil fuel industry has emerged as the most prolific user of this problematic system. ISDS has enabled fossil fuel investors to sue governments for actual and projected losses of profit to the tune of billions of USD, effectively challenging States' energy transition policies. The average award to fossil fuel investors amounts to USD 600 million.

According to a conservative estimate, "global action on climate change could generate more than USD 340 billion in legal claims from oil and gas investors" in the upstream sector alone.

Damages serve as the primary remedy under international investment law, implying that ISDS may not directly impede governments' regulatory abilities as long as compensation is provided to investors. However, this perspective overlooks that investment treaties often mandate States to compensate foreign investors based on more generous standards than those stipulated in their domestic policies. The adherence to investment treaty obligations prioritizes market value and entails substantial compensation amounts resulting in significant strain on public finances particularly in low and middle-income countries.

Additionally, the inconsistent jurisprudence of ISDS creates uncertainty, potentially deterring States from taking regulatory actions, fearing expensive proceedings. This phenomenon is also known as "regulatory chill," where States reduce or even abandon climate measures in the

News at a Glance

A global coalition of human rights organizations sounded the alarm on Monday over the fates of young men facing imminent execution in Saudi Arabia for crimes allegedly committed when they were minors. Advocacy groups argued that Saudi Arabia's decision to move forward with the executions of several young men for crimes committed when they were minors flies in the face of the nation's planned reforms and international standards. The advocacy groups, included global organizations like Human Rights Watch and the World Coalition Against the Death Penalty, as well as regional and national groups from around the world. For more information, see here.

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face of ISDS proceedings.

Addressing the complex challenges posed by investment treaties and ISDS mechanisms is crucial for achieving the goals outlined in the Paris Agreement. The significant financial stakes involved can hinder states from implementing necessary measures to limit global warming to 1.5°C and create disincentives for businesses to divest from fossil fuel assets. To navigate this, States and supranational entities such as the EU must carefully consider various strategies. Multilateral reforms addressing procedural aspects of ISDS and considerations of damages and reflective loss could alleviate some impacts on the low-carbon energy transition.

National and international policy approaches should also integrate awareness-raising and debate on ISDS issues in climate policy forums and consider explicit provisions addressing ISDS in proposed multilateral treaties. Meanwhile, implementing national policy approaches that sustain energy transition while mitigating ISDS risks, such as reverse auctions for coal power plant closure or suspending fossil fuel exploration programs, can be effective. Their efforts in promoting transparency, collaboration, and mainstreaming of climate goals in investment treaty policy are vital for driving public action and ensuring accountability in achieving a sustainable energy transition.

USA's IRA: Illegally Legal Till When?

- Shreya Basu (III B.A.LL.B.)

The US's Inflation Reduction Act (IRA) 2022, has been a point of contention among several States, particularly for the 'discriminatory' nature of the subsidies it imposes. Most notably, it has aggravated the ongoing trade war between the US and the People's Republic of China.

China recently opened a formal dispute before the World Trade Organisation's Dispute Settlement Body (DSB) regarding the same, specifically regarding its Electronic Vehicle (EV) Industry. China's exports of components of the EV industry are currently valued at $368 million, even after the 27.5% tax imposed on Chinese products along with other restrictions. To decrease even this dependence, President Biden passed the IRA two years ago to help boost the North American EV Industry.

News at a Glance

UN Spokesperson Stéphane Dujarric provided an update on the recent UN investigation into UN Relief and Works Agency for Palestinians in the Near East (UNWRA) staff, saying that one case has been closed and three suspended. Eight staff members remain under investigation after Israeli claimed that UNWRA staff in Gaza were involved in the Hamas-led October 7 terror attack. For more information, see here.

The Democratic Republic of the Congo (DRC) ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. The DRC's ratification of the Optional Protocol, which will enter into force on May 26, 2024, represents a significant step toward strengthening the prevention of torture and ill-treatment in the country. For more information, read here.

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The IRA mandates a specific percentage of components of the EV must be sourced and assembled on North American soil to qualify for Clean Vehicle Credit. Additionally, it also modifies conditions for tax subsidies to claim Renewable Energy Tax Credits, which is necessary to incentivise ongoing research in American renewable energy industries.

Raising these issues before the DSB, China's primary basis for raising these contentions is that the IRA discriminates against goods of Chinese origin, which impairs China from reaping benefits from international trade. First, China argues that the fundamental obligation under Article III(4) of the General Agreement on Tariffs and Trade (GATT), 1994, is violated wherein North American goods, i.e., of national origin, are given preferential treatment over imported goods. Consequentially, China invokes Article 3.1(b) of the Agreement on Trade-Related Investment Measures (TRIMs) and highlights the US's violation of Article XI of GATT. Finally, China relies on Articles 2.1 and 2.2 of the Agreement on Subsidies and Countervailing Measures (SCM) to prove the prohibition of the same. In the face of it, the US might take the defence of general exceptions to GATT, laid down under Article XX. However, this is highly unlikely with the DSB rejecting even environmental defences under Article XX(j), as laid down in the *India-Solar Cells* case. A defence under the SCM would additionally fall flat as protectionism for environmental interests is applicable only in the case of previously non-existing industries (Article 8). Meanwhile, the US EV Industry is established and showcases strong growth projections.

As likely as it is that China's request will succeed in the stage of adjudication by a panel, there is less certainty if the US decides to appeal against the decision. The WTO Appellate Body has been blocked from functioning for the past four years due to objections raised regarding the appointments of the judges by the US itself. For this very reason, States like South Korea and the EU are reluctant to challenge the IRA directly in the WTO.

If this situation continues, States are likely to create ad-hoc political agreements rather than resort to

Upcoming Activities

Call for Papers: Oxford Workshop in Honour of Judge Theodor Meron

The Oxford University Faculty of Law, All Souls College, and Trinity College will host a workshop on 21 June 2024 in honor of Judge Theodor Meron, Visiting Professor of International Law at the University of Oxford and Honorary Fellow of Trinity College, Oxford. The workshop is for early career researchers, including doctoral students and independent researchers, working on topics and themes addressed by Judge Meron in his career as a lawyer, academic, and judge. These topics and themes may include, amongst others, issues relating to sources of international law, notably treaties and custom, international humanitarian law and international criminal law, human rights law, international institutional law, and literature and law, as well as questions relating to the international judicial function. For more details, see here.

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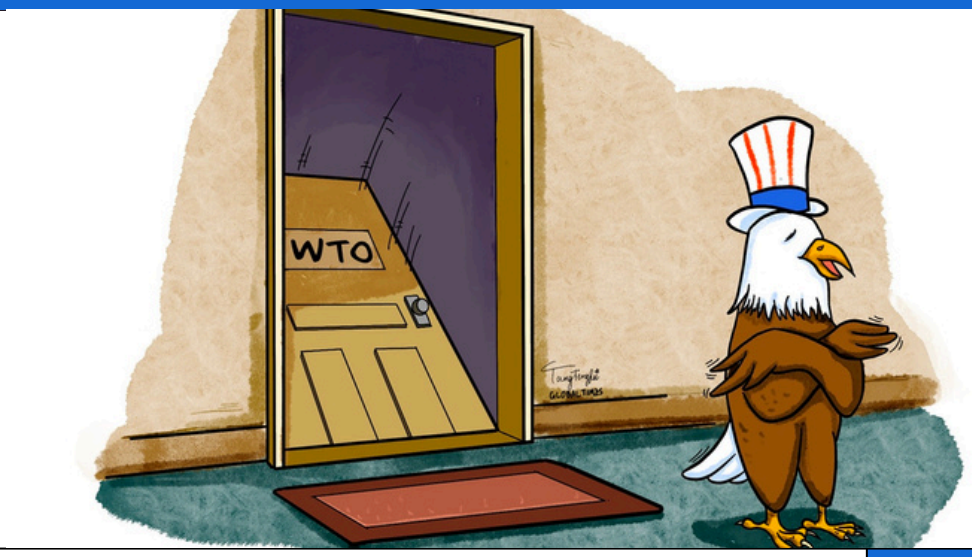

the WTO for regulated dispute resolution. The very foundational agreements on which the WTO was built are being challenged, and the absence of a functioning Appellate Body paves the way for a state of anarchy in the world of international trade law. While the Multi-Party Interim Appeal Arbitration (MPIA) does fix the problem to some extent, awards by this Tribunal are not binding on non-members of the MPIA. Obligations to comply with international trade regulations thus lie on the member States, and they are forced to resolve all disputes amicably by themselves.

India's Call For Restoration of the WTO Appellate Body

- Arya Mitkari (II B.A.LL.B.)

On 28 February 2024 at the 13th Ministerial Conference of the World Trade Organisation (WTO), India called for the restoration of the Appellate Body (AB) along with a mechanism to formalise the ongoing informal dispute settlement process. The WTO's two-tier Dispute Settlement Body (DSB) involves consultation and adjudication. The AB has been non-functional since 2019, as the US had blocked the appointment of judges to the body. This rendered the process ineffective, as the losing countries could drag the case on endlessly by just appealing.

This is because, as per Art. 16 of the Dispute Settlement Undertaking (DSU), Panel decisions, if appealed, will not be adopted by the DSB until the appeal process is completed. The United States believes that in the present system, the AB overarched its mandate and has become more powerful than the States, themselves. Their view suggested that the system had become prolonged and expensive. The Western ideology has caused a lot of trouble and harm to the developing and Least Developed Countries (LDCs), as they cannot effectively participate in discussions. This raises the question of the WTO's credibility and the rules-based trade order it strives to uphold. The US proposes a single-tiered system where the parties involved have more scope to bilaterally resolve the dispute.

This system has now been replaced by the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), based on Article 25 of the DSU. This "interim and temporary" arrangement has been signed by only 26 members of the 164-member body, the USA not being a

Upcoming Activities

Call for Papers: The Energy Charter Treaty and Dispute Resolution Mechanisms Conference

This conference on the Energy Charter Treaty (ECT) and dispute resolution mechanisms in the energy sector is set to take place on 5 October 2024, at the International Hellenic University in Thessaloniki, Greece. Key topics are he ECT's ongoing relevance and adaptation to contemporary energy challenges; A critical analysis of dispute resolution mechanisms established by the ECT; Insights into the use of arbitration and mediation for resolving energy disputes; Exploring recent developments and challenges encountered in energy arbitration; A thorough analysis of Investor-State Dispute Settlement (ISDS) within the energy sector; and, the crucial role played by international organizations in facilitating effective energy dispute resolution. For more details, see here.

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signatory. This system aims to tackle the limitations and criticisms of the original body through arbitration. Since MPIA is a political arrangement, challenges such as resource constraints and the temporary nature of the arrangement need to be addressed. It would be strenuous to ensure equitable participation and long-term stability without this. Another concern that arises is that in the 3 years it has been active, the body has only passed one arbitral award. This is owing to a low number of signatories, States' lack of trust in the MPIA, and shortage of resources.

The DSB is the most extensively used international adjudicatory mechanism, having received nearly 600 complaints since its establishment which shows that the States trust the existing system. Gathering support for an alternative system which will work similarly to the existing system would be difficult for the MPIA bloc. The need for a formal structure rises now more than ever since the LDCs cannot participate effectively in informal discussions. The WTO has come to a functional halt. The ability to take up new issues has also been affected owing to the problem of not having a process for appeal. A clear solution is needed to overcome this problem.

India has thus called for formalisation and multilateralisation of the process with its 3-point action plan. India wants to discuss the DSB under the guidance of the chair under Art. 3 and 4 of the Ministerial Conference (MC) 12 Declaration. With the new system, India aims to have a member-driven system and has suggested active participation and an opportunity to bring in new proposals at any point during the discussions. It also aims to increase transparency, with complete participation and consensus-based decision-making. Ultimately India plans to restore the AB.

The solution that India has provided is unlikely to work out, the sole reason being the United States' power in the WTO. Almost all the members want to reinstate the AB with almost 75 members filling out joint reports for the same. For a successful dispute resolution mechanism to be in place, its functioning should be above power politics, transparent, impartial, accessible, cost-friendly, and provide effective means of implementation.

Upcoming Activities

Call for Submissions: Juris Gentium Law Review

The student-run law review in Indonesia, Juris Gentium Law Review (JGLR) is now opening its doors to law students, of any level of study, to publish their research findings on matters concerning International Law (both public and private) and Comparative Law in the form of articles, case commentaries, book reviews, or article reviews for its 2024 issue. Submission deadline: 30 June 2024. For more details, see here.

Call for Papers: The Use of Human Rights Language in International and EU Law

The Faculty of Law of the University of Trento is soliciting abstracts to participate in the XXI Conference of Young Scholars of International Legal Studies. This year's Conference will be co-funded by the Horizon Europe's project HRJust. The deadline for submission of abstracts is 20 June 2024. For more details, see here.

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International Trade Law: On the Brink of Accountability?

- Soumik Ghosh (III B.A.LL.B.)

International trade has played a major role in the development of economies around the world. Its vitality has been such that it has largely been left untouched in terms of implementing sustainability directives leading to an inverse correlation between the both. While the discussion surrounding the sustainability of international trade has been around for two decades with the latest being international trade set as a key policy instrument to contribute to all other SDGs in the 2015 agenda, the outcome has never left the ambit of voluntary implementation of such measures by stakeholders.

Most measures relating to sustainability in international trade are in the forms of directives, declarations, or principles outlined in preambles which lead to them having no binding effect and essentially are classified as soft law. A more specific approach to this is the Voluntary Sustainability Standards [VSS] which are benchmarks of sustainability determined by various organizations. In a report by the United Nations Conference on Trade and Development (UNCTAD), it has been highlighted how little to no empirical evidence exists in support of VSS as most of these studies are highly context-dependent and not comprehensive enough to provide generalized results. Overall a comparative analysis leads to the conclusion that VSS have little to no impact on the current sustainability goals of States.

The EU, on the other hand, has taken a converse approach as they have introduced the Corporate Sustainability Due Diligence Directive (CS3D), which is yet to be passed but is a significant step in imposing and clarifying the legal liability of companies in the context of various sustainability directives. Albeit the current version of the bill is watered down from what was first proposed, it still introduces stringent measures for corporations to undertake.

The CS3D is in line with the EU's commitment to the European Green Deal and focuses on shaping companies' management of environmental, social, and governance matters. The CS3D applies to different categories of in-scope EU and non-EU

Upcoming Activities

Call for Papers: Asser Institute Conference on General Principles in EU External Relations Law

General principles play an important role in EU external relations law shaping the legal framework for EU external action as well as strengthening the judicial accountability of the EU as a global actor. The conference aims to investigate these questions and more, exploring the topic of 'General Principles in EU External Relations Law. Applicants are invited to submit an abstract of max. 500 words by 10 June 2024. For more details, see here.

Call for Papers: Law and Disinformation Workshop

The workshop will take place on 24 October 2024 in Tromsø, Norway. Interested students may participate in the workshop should submit an abstract (up to 500 words), short bio (up to 150 words), and CV to gaiane.nuridzhanian {at} uit(.)no by 15 June 2024. For more details, see here.

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companies. Covered companies will need to adopt and implement effective due diligence policies for identifying, preventing, mitigating, and ending actual and potential human rights and environmental harms in their operations, those of subsidiaries, and their business partners relating to their 'chain of activities.' They will also be required to adopt and put into effect a transition plan for climate change mitigation aligned with the Paris Agreement's objective of limiting global warming to 1.5°C.

Additionally, companies must comply to avoid significant administrative and financial penalties, and they will be subject to civil liability for damages caused by non-compliance. The largest in-scope companies will have three years, likely until 2027, from the entry into force of the CS3D to comply, others will have four or five years. In essence, this initiative is a landmark step in regulating the operations of corporate entities and enforcing sustainable practices outside of mere recommendations. This initiative also ensures a central portal for reporting violations instead of a labyrinth of legal forums for the affected stakeholders to pursue. However, this bill is not without its loopholes: many of the counsels for transnational companies opine that the implementation of this measure may lead to an overwhelming amount of litigation for said companies. Additionally, this legislation does not set up a separate enforcement mechanism rather it is dependent on member nations appointing supervisory authorities to oversee compliance with the responsibilities laid out in national legislation, implemented according to CS3D, which will bring into question the determination of member states to oversee compliance thus granting a certain level of discretion.

While a landmark step, the CS3D aims to bring sustainability directives into force of law while holding some of the largest corporations accountable. Despite some concerns about its pragmatic implementation, it still upholds and sets the precedent for the world at large which in itself is a crucial step toward a more sustainable and accountable corporate landscape, thus benefiting citizens, companies, and developing countries alike.

Upcoming Activities

Quain Lectures in Jurisprudence 2023/24 series: three lectures by Prof. Amia Srinivasan (All Souls College, Oxford), followed by a Commentators' Seminar

A 'critical genealogy' is an account of the origins of some thing of contemporary significance – a widespread belief, institution, practice, value, concept – put forward with the purpose of unseating or discrediting that thing. These lectures will think about critical genealogy in some of its historical, epistemological and political dimensions. The lectures start on 13th May and end on 17th May. For more details, see here.

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