

Document 2

The International Investment & Climate Change Agreement (The “IICCA”)

February 28, 2018 | Argumentation demonstrating how the Model Treaty meets the Assessment Criteria



Introduction & Key Features of the IICCA

As is apparent from its name, the IICCA has two primary goals: 1) promoting and protecting foreign Green Investments and 2) adapting strategies for climate change prevention, adaptation, and mitigation.

Here are the key features of the IICCA:

Proposition	Explanation
The IICCA is a simple document	<ul style="list-style-type: none"> • The IICCA is set up as a simple treaty by design, both in terms of its structure but also in the language used. The idea is to create a powerful mechanism in a succinct and straightforward manner. • The IICCA focuses on two all-encompassing terminologies to keep the treaty simple and to avoid complex legal jargons: “Green Investments” and “Climate Change Prevention, Mitigation, & Adaptation.” (see IICCA, Article 1.1).¹ Virtually all the obligations flow from these two key terminologies. • On the dispute resolution front, the IICCA focuses on both dispute prevention & dispute resolution.
The IICCA is a brief document	<ul style="list-style-type: none"> • The IICCA is a brief document. It comprises of 6 chapters: <ul style="list-style-type: none"> ○ Chapter 1 deals with initial provisions and general definitions; ○ Chapter 2 deals with the state obligations to protect and promote Green Investments; ○ Chapter 3 is a novel approach building on best practices for an investor’s obligations for Green Investments; ○ Chapter 4 deals with the state obligations for Climate Change Prevention, Mitigation, & Adaptation; ○ Chapter 5 deals with dispute prevention and resolution. This Chapter provides creative approaches to deal with disputes. In the first instance, there is a new mechanism to prevent disputes by references to “National Focal Points for Green Investments” and a “Multilateral Committee on Green Investments.” If a dispute cannot be prevented, then the dispute may proceed for resolution. There is a dual strategy adopted: (i) for disputes under Chapters 2 & 3, a dispute can be referred to international arbitration (with the possibility of adopting it to a court, if that is to materialize) and (ii) a state to state mechanism modelled on the WTO for disputes under Chapter 4. This multi-faceted mechanism to dispute resolution is a unique approach to

¹ References to the IICCA are to the Chapter and Article. Here, for example, “1.1” refers to Chapter 1, Article 1.

Proposition	Explanation
	<p>enforce the IICCA.</p> <ul style="list-style-type: none"> ○ Chapter 6 deals with miscellaneous provisions.
<p>The IICCA does not envision heavy infrastructure (physical or financial)</p>	<ul style="list-style-type: none"> • With a view towards being sustainable, the IICCA does not intend to create a new infrastructure either physically or financially. Indeed, the IICCA recognizes the reality that countries are in different states of development and has unique strategies to address this (see, for example IICCA, Article 4.8). • A core goal of the IICCA has been to take on existing obligations and practices and build on them. • Finally, whenever meetings were needed, the IICCA seeks creative ways to prevent expensive travel, for example, by facilitating communications through video conferencing and, where not feasible, through emails (see IICCA, Article 5.3).
<p>The IICCA takes into account best treaty practice (both investment and climate change)</p>	<ul style="list-style-type: none"> • The IICCA draws on best practices in both investment protection and climate change. Various treaties and models have been studied arduously in preparing the IICCA along with a careful examination of the investor-state jurisprudence. • The IICCA does not reinvent the wheel when it comes to structures and frameworks. Rather the IICCA seeks to give effect to it in a manner that is beneficial to both the goals of investment protection and climate change.

In the sections below, we have divided our analysis on the following 5 criteria: (A) compatibility, (B) efficacy, (C) viability, (D) universality, and (E) enforceability.

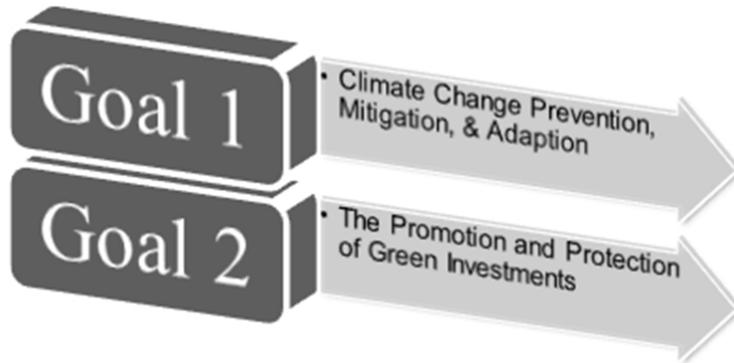
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SECTION I

Compatibility

Compatibility



The IICCA strives to achieve two broad goals:

- a. Climate Change Prevention, Mitigation, & Adaptation through
- b. the promotion and protection of Green Investments.

The IICCA seeks to create a regime that can address both climate change and foreign investment issues. In proverbial terms, it is hitting two birds with one stone. The IICCA does not seek to replace other institutional mechanisms that exist to address issues dealing with climate change or investment law. Rather it seeks to combine them in one comprehensive agreement. In drafting the IICCA, several international instruments have been studied to identify best practices.

These are presented in the table below:

Best Practices	
<i>International Investment Law</i>	<i>Climate Change Agreements</i>
EU-Canada Comprehensive Economic and Trade Agreement (CETA), entered into force provisionally on September 21, 2017	The United Nations Framework Convention on Climate Change (UNFCCC), effective March 21, 1994
Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP), not yet in force	The Kyoto Protocol to the United Nations Framework Convention on Climate Change, entered into force on February 16, 2005
Comprehensive Transatlantic Trade and Investment Partnership (TTIP), not in force	United Nations Programme on Reducing Emissions from Deforestation and Forest Degradation (UN REDD), entered into force on September 24, 2008

Best Practices	
<i>International Investment Law</i>	<i>Climate Change Agreements</i>
Central America Free Trade Agreement (CAFTA), signed on May 28, 2004, entered into force on January 1, 2009	The 2010 United Nations Climate Change Conference (the “Cancun Agreements”) (2010)
North American Free Trade Agreement (NAFTA), entered into force on January 1, 2004	The 2015 United Nations Sustainable Development Goals
Model Text for the Indian Bilateral Investment Treaty, Government of India, Ministry of Finance website, December 28, 2015	Transforming our world: the 2030 Agenda for Sustainable Development, GA A/RES/70/1, October 21, 2015
Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and [__] (the Brazilian Model Bilateral Investment Treaty).	The Paris Agreement Framework Convention on Climate Change, FCCC/CP/2015/L.9/Rev. 1, December 12, 2015

The IICCA also considers the political reality of our times since the Agreement is intended to be a practical one that States and Regional Economic Integration Organizations can adopt and sign on to (see IICCA, Article 6.2). The past few years have been instrumental in bringing into fore the drastic effects of climate change. The decision of the United States to withdraw from the Paris Agreement and the European proposal to create an investment court are both significant developments with far-reaching ramifications. Similarly, the international investment regime has come under severe scrutiny in the recent years. The IICCA attempts to recognize these realities when dealing with the various Agreements (see IICCA, Chapter 6).

Compatibility with the Climate Change Agreements

The IICCA is compatible with the Paris Agreement and the United Nations Sustainable Development Goals. The IICCA seeks to facilitate States’ achievement of the climate-change objectives set out in those instruments. The IICCA makes explicit references to both these Agreements and this is apparent even with a cursory glance of the Preamble which provides, *inter alia*, that:

AFFIRMING the commitment to prevent Climate Change and promote sustainable development in its economic, social and environmental dimensions and the important role that private investment could play in this regard pursuant to the United Nations 2030 Agenda for Sustainable Development which acknowledges “the role of the diverse private sector, ranging from micro-enterprises to cooperatives to multinationals, and that of civil society organizations and philanthropic organizations in the implementation” of the U.N. Sustainable Development Goals;

ACKNOWLEDGING the desire between the Parties to promote multilateral cooperation with respect to foreign green investments and the role of private entities pursuant to Article 6(4) of the Paris Agreement “to incentivize and facilitate participation in the mitigation of greenhouse gas emissions by public and private entities”;

Beyond these broad goals stated in the Preamble, the IICCA is structured to build off of the Paris Agreement. For example, one of the core obligations that is imposed on States is that they enact law and regulations “to give effect to the obligation under the International Agreements Dealing with Climate Change” and, in particular, “shall pursue efforts to hold the increase in the global average temperature to well below 2°C above pre-industrial levels pursuant to Article 2.1(a) of Paris Agreement” (see IICCA, Article 4.2.2). This is one of the core provisions of the Paris Agreement and has also been identified as one of the 17 Goals under the United Nations Sustainable Development Goals.² Further, the failure to enact such a law or regulation can be subject to the state-to-state dispute resolution mechanism modelled on the WTO system outlined in Chapter 5, Part C of the IICCA. In doing so, the IICCA takes a non-binding obligation under the IICCA and provides it with some teeth.

The IICCA does not, however, take enforcement to the extreme. This is by conscious design. Enforcement issues relating to the Paris Agreement have been a contentious issue. But, by providing a softer mechanism for enforcement, the IICCA is compatible with and builds on the Paris Agreement.

² See UN Sustainable Development Goals, Goal 13 “Take urgent action to combat climate change and its impacts” which provides, *inter alia*, “To address climate change, countries adopted the Paris Agreement at the COP21 in Paris on 12 December 2015. The Agreement entered into force shortly thereafter, on 4 November 2016. In the agreement, all countries agreed to work to limit global temperature rise to well below 2 degrees Celsius, and given the grave risks, to strive for 1.5 degrees Celsius. . . . Implementation of the Paris Agreement is essential for the achievement of the Sustainable Development Goals, and provides a roadmap for climate actions that will reduce emissions and build climate resilience.” See United Nations Sustainable Development Goals: 17 Goals to Transform Our World, available at <http://www.un.org/sustainabledevelopment/climate-change-2/>.

Compatibility with Fundamental Principles of Property Law

The IICCA recognizes that private investment will play a pivotal role in achieving the goals of Climate Change Prevention, Adaptation, and Mitigation.³ Therefore, the IICCA provides protections to a foreign investor's that have made "Green Investments."

The table below provides an explanation on the protections that have been provided and those protections that have been excluded:

Property Protections in the IICCA	Property Protections excluded from the IICCA
Protections against direct or indirect expropriation unless it is accompanied, <i>inter alia</i> , with "prompt, adequate, and effective compensation." See IICCA, Article 2.3(d).	The most-favored-nation treatment has been excluded. This is a conscious choice in the light of the jurisprudence which allows an investor to import "favorable" provision not present in IICCA. This may create a race-to-the-bottom where an investor wants to import provisions not present in the IICCA. Therefore, the MFN clause has been excluded.
A carefully circumscribed "Standard of Treatment" protection taking into account latest best practices. See IICCA, Article 2.3.	An express "full protection and security" provision is not provided because the "Standard of Treatment" provision would encompass this protection.
A "National Treatment" Protection which ensures that foreign investors and their Green Investments are treated equally to national investors in like circumstances. See IICCA, Article 2.4.	The "Umbrella Clause" has been excluded in the light of the conflicting jurisprudence and the fact the protections might be available from other provisions in the IICCA.

³ Indeed, the final of the 17 UN Sustainable Development Goals is partnerships. See UN Sustainable Development Goals, Goal 17 "Revitalize the global partnership for sustainable development": "Urgent action is needed to mobilize, redirect and unlock the transformative power of trillions of dollars of private resources to deliver on sustainable development objectives. Long-term investments, including foreign direct investment, are needed in critical sectors, especially in developing countries. These include sustainable energy, infrastructure and transport, as well as information and communications technologies." See United Nations Sustainable Development Goals: 17 Goals to Transform Our World, available at <http://www.un.org/sustainabledevelopment/globalpartnerships/>.

SECTION II

Efficacy

Efficacy

The IICCA seeks to usher in a significant increase in Green Investments related to climate change mitigation and adaptation. In order to achieve this, the IICCA seeks to incentivize the investors and protect the needs and interests of a foreign investor. The IICCA proceeds with providing incentives mindful of the fact that private sector investments constitute up to 86% of investment and financial flows and is thus the most important source of funds to address climate change mitigation and adaptation measures.⁴

The IICCA definition of Green Investments includes a wide range of investments that will have a sustained, positive impact on people's lives. We are cognizant of the fact that different States have different needs in terms of Green Investments. We wanted to include a broad range of investments under our definition to meet the needs of different countries (see IICCA, Article 1.1). For example, small island developing nations often have climate change needs that relate to public health and health infrastructure⁵ whereas, on the other hand, a country like Brazil may have needs more related to sustainable land use and forest restoration. By creating a broad but still practical definition for Green Investments, we ensure that the IICCA serves a valuable purpose to a broad swath of nations and encourage more nations to sign on. It is our strong hope that the IICCA will be adopted by more than 90% of UN member States.

Considerable thought has been put into making the IICCA effective at attracting Green Investments. It includes a broad definition of incentives to encourage investments including but not limited to financial incentives such as:

- i. tax measures providing tax deductions or credits, and/or lessen or eliminate certain taxes;
- ii. rebates, grants, and performance-based incentives that provide a direct cash incentive and do not require repayment;
- iii. loan programs, guarantees, and credit enhancements designed to provide lower interest loans and/or reduce risk associated with loans for Green Investments;

The claimed efficacy of the proposed incentives and protections is supported by research and data. As of 2015, at least 48 countries have adopted financial incentives to support renewable energy and energy efficiency deployment⁶ in addressing various barriers to renewable energy and energy efficiency technology deployment. For

⁴ See http://unfccc.int/press/fact_sheets/items/4982.php.

⁵ See <http://www.who.int/bulletin/volumes/96/2/17-206474/en/>.

⁶ IEA/IRENA 2015.

instance, financial incentives can improve access to capital, reduce the burden of high upfront costs, lower financing costs, support creation of new markets, and address split incentives associated with energy-efficient technologies.⁷ Transposing this into the text of the IICCA, these incentives could also be deployed in other Green Investments outside renewable energy and energy efficiency.

The IICCA also aims to balance out the interests of investors with that of the host State. A State party is, in the first place, the entity who enters into agreements such as the IICCA. To encourage States to sign on the IICCA, they continue to have the power to create “regulatory policies to promote foreign direct investment in green investments” and the incentives they have the option to grant to investors ought to complement, and not overrule, the existing regulatory policies.

The IICCA also includes financial incentives with huge potential in encouraging Green Investments, such as:

- v. issuance of “green government bonds” that could be sold to the private sector, with a commitment that all their resources would be channeled to new green investments;
- vi. guarantees to be tailor made *pari passu* to be given on loans made for the purpose of investing in low carbon technology for enhancing flows to low-carbon investment, but shall be carefully monitored and risks assessed regularly;
- vii. measures by a Party’s regulators and/or Central Banks that a minimum (e.g. 5%) of lending for profitable investment must be allocated towards low-carbon technology.

These mechanisms⁸ are relatively new in the market and their efficacy still to be tested. It does not necessarily mean however that they could be completely ignored at the outset. That is why the IICCA included these fresh mechanisms to give States fresh and forward-thinking options they could potentially study and grant as incentives to investors.

While providing for a broad definition of “Incentives” in Chapter 1 of the IICCA, it seeks to however narrow down, without necessarily being restrictive, the options to a specific context or circumstance of a State based on its status in the league of nations, *i.e.*, whether it is a developed economy, developing economy and economies in transition, a

⁷ Cox, Sadie, National Renewable Energy Laboratory, “Financial Incentives to Enable Clean Energy Deployment, Policy Overview and Good Practices”, Clean Energy Solutions Center, available online <https://www.nrel.gov/docs/fy16osti/65541.pdf>; American Wind Energy Association. 2014. Federal Wind Energy Policy, available online www.awea.org/Advocacy/Content.aspx?ItemNumber=6900.

⁸ Stephany Griffith-Jones, Merylyn Hedger and Leah Stokes, “The role of private investment in increasing climate friendly technologies in developing countries”, IPD, Columbia University and Institute of Development Studies; For “green government bonds”, see <https://www.pggm.nl/english/what-we-think/Pages/Energy-transition-requires-large-scale-financing.aspx>.

least developed country or a small island nation. The distinction will be elaborated in the part on “Universality”.

There is also significant debate within the international community in relation to the goals pertaining to i) Preventing the effects of climate change ii) Adapting the world to climate change.

While achieving both of these goals is necessary, the IICCA seeks to prioritize the preventive efforts. This is because with prevention, will come the cure. Small steps at a time will result in sea-change over a period of time. There are multiple rationales for this decision:

- Preventative measures are, by design, more equitable than adaptive measures. To illustrate this point, consider the following: If humanity is collectively able to prevent a one degree Celsius change in climate, this is going to have broad benefits that are shared roughly equally by countries around the globe. However, adaptive measures are most often applied in a specific region or city (e.g. building levees to help protect against climate related floods). Thus, while preventive measures seek to address the root of the problem, adaptive measures only seek to temporarily treat the symptoms.
- Preventative measures are more likely than adaptive measures to have environmental benefits beyond mitigating climate change.
- Preventative measures encourage altruism and work towards the global good. As we see it, corporations and countries have very little incentive to begin to fund adaptation measures for other countries when they may personally see little benefit from these measures.

All this being said, we have included measures within the IICCA to encourage investment in both preventive and adaptive measures (see, for example, IICCA Article 3.2).

SECTION III

Viability

Viability

The IICCA attempts to take advantage of the considerable momentum that has accumulated on behalf of climate action since the formulation of the Paris Agreement. Already, more than three quarters of signatory States have submitted NDCs as part of the agreement. Meanwhile, the governments, populations, and industries that have a vested interest in combating climate change are only growing. To illustrate this point, in the United States, the number of employees working to generate electricity through solar surpasses those doing so for coal, oil, and natural gas combined.⁹ In order to take full advantage of this momentum, the IICCA has been structured to encourage signatories as soon as possible.

As soon as the quorum (of 3 countries) for the treaty is met, signatories start realizing benefits. From individual countries' perspective, it is not necessary to wait until all other members of the global community have signed on, as even a small number of signatories already yields benefits.

The IICCA is drafted in a manner that makes it amenable to different States, whether a developed economy or developing economy. The IICCA, is therefore, likely to be adopted by States around the world. It seeks to serve the needs and interests of all States while also helping them achieve climate-change goals without restricting their ability to regulate and legislate.

The IICCA is a sustainable and viable treaty for several reasons:

- **Exclusion of nuclear power as a Green Investment:** Although increased global use of nuclear power has the ability to mitigate the impact of climate change, we decided to exclude this as a Green Investment. This decision is based upon evidence that inclusion of nuclear power would discourage government participation in our treaty.
- **Non-inclusion of a Most Favored Nation (MFN) clause:** The IICCA consciously does not include a clause on Most Favoured Nation (MFN). The idea is to create a multilateral treaty where all the countries are treated at par. The MFN clause has been the source of a number of disputes between investors and host States. Even cases where it has not been the source, it has been raised several times by the investors. The MFN clause has also been one of the primary reasons which has put the host States in defensive mode, many times giving them a reason to pull out of their BIT agreements. Including an MFN clause in a multilateral treaty such as this may dissuade several prospective signatories from signing on to this agreement or to ratify it, on an urgent basis.
- **Emphasis on fighting corruption:** The IICCA recognizes that corruption or the perception of corruption is a major impediment to buy-in international

⁹ See <https://www.forbes.com/sites/niallmccarthy/2017/01/25/u-s-solar-energy-employs-more-people-than-oil-coal-and-gas-combined-infographic/#36760e6a2800>.

agreements and treaties. As such, we have explicitly addressed efforts to combat corruption in our treaty (see IICCA, Article 3.4). Investors who have been discovered to engage in bribery or other forms of corruption within host countries will lose legal recourse in arbitral tribunals. However, in a novel approach, and in order to avoid the absence of consequences for 'misbehaving' host States, we have included a unique treaty provision requiring the tribunals in such instances to direct the host state to make a pre-determined contribution to the UNDP's anti-corruption initiative (see IICCA, Article 3.4).

- **Incentives that are tailored to individual countries' needs and desires from a climate change agreement:** The IICCA recognizes that different countries have vastly different needs and expectations from an international climate agreement. Part of the allure of the Paris Agreement, and the reason that virtually every country in the world has signed on to the agreement, is that it allowed individual countries to tailor the agreement to their needs (through developing their own Nationally Determined Contributions or NDCs. In the IICCA, we have attempted to give governments as much choice as possible to still encourage broad participation in the treaty, much like the Paris Agreement. However, unlike this agreement, the IICCA has considerably more enforcement mechanisms at its disposal. We recognize that incentives are necessary to convince countries to submit to the IICCA's "teeth". In order to encourage the multitude of diverse countries to sign on, we have tailored our incentives to the needs of three broad categories of countries: 1.) Developed Countries, 2.) Developing countries and economies in transition and 3.) Least Developed Countries and Small Island Developing States which are elaborated under the part, "Universality".

SECTION IV

Universality

Universality

The criteria of universality has been the bane of climate treaties. It is the job of governments to look after the interests of their own citizens, however, in a world that is increasingly globally connected, countries' individual incentives to further their own development has sometimes come at the expense of stalled progress on the global stage. The Paris Agreement rightly recognized that a first and crucial step to fighting climate change was to get all the nations of the world on board. The goal of the IICCA is to take it a step further; we hope to keep all the signatories of the Paris Agreement on board while providing more concrete steps for necessary and relevant action. We believe this goal is reachable in a large part because of the increasing sense of urgency that accumulates around climate change issues with each passing year. However, this urgency alone is not enough. Any treaty that is going to be adopted by nation States around the world with varying interests (including both capital exporting and capital importing nations) has to address the concerns of those States. The IICCA has provisions which are neutral in terms of their approach (i.e. they do not provide undue advantage to investors over States or vice versa) and are therefore likely to be accepted by countries with diverging ideologies. It respects and affirms the principle of "common but differentiated responsibilities and respective capabilities" enshrined in the Paris Agreement.

The IICCA has been drafted as a multilateral agreement. It has multiple incentives to encourage nation States with diverging interests to sign on. To simplify this, we have divided countries into three broad categories and outlined the incentives for each category to participate in the IICCA. The three categories are as follows: I. Developed Countries, II. Developing Countries, and III. Least Developed Countries. In addition, to encourage participation in the treaty, although the IICCA has been drafted as a multilateral agreement, it can easily be the basis for a bilateral or regional agreement as and when appropriate.

I. Developed Countries (OECD member States)

We have singled out the developed countries to the most stringent measures for failing to meet treaty obligations (see IICCA, Article 4.7) with the understanding that in several ways, they stand to benefit the most from an international climate change investment agreement.

While every nation accrues benefits from climate change mitigation (and for many small island nations, climate change is a literal matter of survival), developed countries typically have a vested financial interest in climate change mitigation efforts that vastly exceed that of other nations. This is a natural consequence of the reality that financial loss as a result of climate change will be strengthened in the presence of higher real estate values, more extensive infrastructure, and greater wages lost due to the effects of a climate change-induced disaster. An illustration of this can be seen by examining the cost of the Atlantic Hurricane season over the past 30 years. It is well established that hurricane costs have been rising, and although a portion of this has to do with the increase in intensity and frequency of storms (a matter that is intimately related to

global climate change), rising per capita income and GDP have also have a substantial effect.¹⁰ As a further illustration, consider Hurricane Irma, a major storm that caused damage to the US state of Florida and Caribbean island countries during the 2017 Atlantic Hurricane Season. It is estimated that the damage from this storm within the USA dropped by \$150 Billion due simply to a 30-kilometer change in the trajectory of the eye of the storm which pushed it further away from the highly populated and high income Miami-Dade county.¹¹

Additionally, studies show that developed economies with stable and secure investment climate translates to attractiveness of a country from an investor's perspective for the implementation of climate change investments and mechanisms.¹² Projects tend to concentrate on the most advanced of these economies to the extent that host states of these projects are often those that also receive the highest amount of total foreign direct investment flows¹³

Beyond this, the IICCA is designed to open up many new investment opportunities that would not have existed before. We believe this will further encourage the developed group of countries on board. Many smaller developed countries have very few BITs, limiting the opportunities for investors from these countries. Even larger countries, which typically have more BITs, will often have them with less than half of available nation States.

II. Developing Countries and Economies in Transition

While developing countries may not stand to gain as much from prevention of climate change as developed countries, we still wanted to include strong enforcement mechanisms for these countries. This is partially because prevention of climate change impacts in developing countries is a critical pillar of any plan to combat global climate change. Indeed, according to the Union of Concerned Scientists,¹⁴ of the ten countries that had the highest carbon dioxide emissions as of 2015, half of them were developing countries. Fortunately, many of the biggest polluters amongst these countries are enthusiastic supporters of the Paris Agreement. For instance, in the wake of the USA's Trump administration's decision to withdraw from the Paris Agreement, China and India

¹⁰ See <http://iopscience.iop.org/article/10.1088/1748-9326/11/11/114005>.

¹¹ See <https://www.bloomberg.com/news/articles/2017-09-11/-150-billion-misfire-how-forecasters-got-irma-damage-so-wrong>.

¹² Kati Kulovesi, *The Private Sector and the Implementation of the Kyoto Protocol: Experiences, Challenges and Prospects*, 16 REV. EUR. COMMUNITY & INT'L ENVTL. L. 145, 147–48, 150–52 (2007) as cited in Anatole Boute, "COMBATING CLIMATE CHANGE THROUGH INVESTMENT ARBITRATION," *Fordham International Law Journal*, Vol 35:613.

¹³ Sonja Peterson, *Greenhouse Gas Mitigation in Developing Countries Through Technology Transfer?: A Survey of Empirical Evidence*, 13 MITIGATION & ADAPTATION STRATEGIES FOR GLOBAL CHANGE 283, 300 (2008).

¹⁴ See <https://www.ucsusa.org/global-warming/science-and-impacts/science/each-countrys-share-of-co2.html#.WpHLPainHD4>.

have stepped up and are eager to take on a leadership role.¹⁵ Both China and India have recently become even more enthusiastic supporters of this agreement. For its part, the prime minister of India, Narendra Modi, who enjoys enthusiastic support in his home country, described inaction on climate change as “morally criminal.” Meanwhile, China’s carbon emissions are expected to peak significantly earlier than the date outlined in the NDC for the Paris Agreement.

III. Least Developed Countries and Small Island Developing States:

In order to increase the universality of this treaty, we wanted to provide the most incentives for LDCs and SIDSs. These are the two groups of countries that 1) share a great deal of vulnerability to the negative impacts of climate change. and 2) are likely to have limited ability to independently cope with or adapt to these impacts. In particular, SIDSs, while they may demonstrate varying degrees of economic development, are particularly vulnerable to rising sea levels and increased storm frequency and intensity. According to the World Health Organization, small island States, which collectively have a population of 65 million people, are at a high risk from natural disasters and negative health consequences from climate change.¹⁶ These countries have often been reluctant to sign on to previous climate agreements as they rightly recognize that while they have a lot to gain from climate change mitigation efforts, these nations have typically done very little to actually cause climate change and yet are in need the most for economic and social development and poverty eradication mechanisms¹⁷ to combat climate change and its effects. Therefore, in order to encourage these nations to sign on to the treaty, we have provided a lot of incentives for them to sign up, incentives that they could potentially grant to investors but nothing too burdensome on the part of the host State, while simultaneously holding them to less stringent requirements than other nations.

To conclude, in view of the differentiated responsibilities and respective capabilities, the IICCA seeks to set out a limited set of incentives that developed economies could grant to potential investors in accordance with priority projects they may need such as (but not limited to) research and development efforts for climate change technologies and support for pollution prevention and control within the territory of such states (see IICCA, Articles 1.1 and 4.7). For LDCs, SIDSs, developing economies and economies in transition, the IICCA sets out priority investments such as but not limited to protection of coastal zones, provision of timely climate information, public health and public infrastructure, sustainable land use and reforestation, and capital adequacy requirements for banks with a special view to these states’ climate vulnerability and the requirement to eradicate poverty and securing their food production systems (see IICCA, Articles 1.1 and 4.8).

¹⁵ See https://www.washingtonpost.com/world/asia_pacific/as-us-backs-away-from-climate-pledges-india-and-china-step-up/2017/06/01/59ccb494-16e4-4d47-a881-c5bd0922c3db_story.html?utm_term=.84cac7990978.

¹⁶ See <http://www.who.int/bulletin/volumes/96/2/17-206474/en/>.

¹⁷ See International Bar Association Climate Change Justice and Human Rights Task Force Report, “Achieving Justice and Human Rights in an Era of Climate Disruption”, available at <https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx/>.

Further, for LDCs and SIDs, the IICCA makes a bold move by providing that the incentives they are so inclined to grant to investors shall **not** be subjected to WTO requirements and / or challenges. Another key advantage we wish to highlight of investing in the LDCs and / or SIDs is the relative lack of competition unlike huge economies that most investors would want to be in.¹⁸

Another important aspect of the IICCA's universality is its three-party threshold for entry into force. Given the urgency of climate change issues, we decided it was important that our treaty enters into force as soon as possible. While we hope more than three States will become party to the IICCA as soon as it opens for signature, we know that different governments have different domestic requirements for becoming party to international agreements, and some of these take time. Governments also need to make decisions about which valuable international agreements they will become party to. As soon as three States signify that they are ready to be bound by the IICCA, it will enter into force. This will then start to put pressure on other countries, both from the State parties as well as domestic investors who wish to benefit from the Agreement by becoming a party to it. In this way, we hope to develop a critical mass of State-parties, and ultimately multilateralize the IICCA among the 197 parties that comprise the UNFCCC membership.

The IICCA is open to regional economic integration organizations (REIOs) to join. Allowing REIOs to become members is an important aspect of achieving the fundamental objective of universalization of the Agreement. Chapter 6 specifically provides for this, and builds in flexibility in terms of competency of REIOs. With Brexit and other international developments in mind, the IICCA also provides for potential changes in membership of a REIO.

Given the fundamental importance of the obligations in the IICCA, we carefully considered whether it was appropriate to allow for Parties to withdraw from the Agreement. However, we would not want States to decide not to join the Treaty because future governments would be unable to withdraw. Accordingly, we have respected the sovereignty of states and provided a simple withdrawal mechanism in Article 6.7 which is modelled on the Paris Agreement.

Finally, our provisions on periodic review and potential amendment of the IICCA (in Articles 6.4 and 6.5) are intended to enhance the life of the Treaty by ensuring that it can respond to and reflect international developments related to climate change and the environment.

¹⁸ See "Investment Opportunities in Least Developed Countries" available at http://unctad.org/sections/dite_dir/docs/diae_iac_investopp_en.pdf.

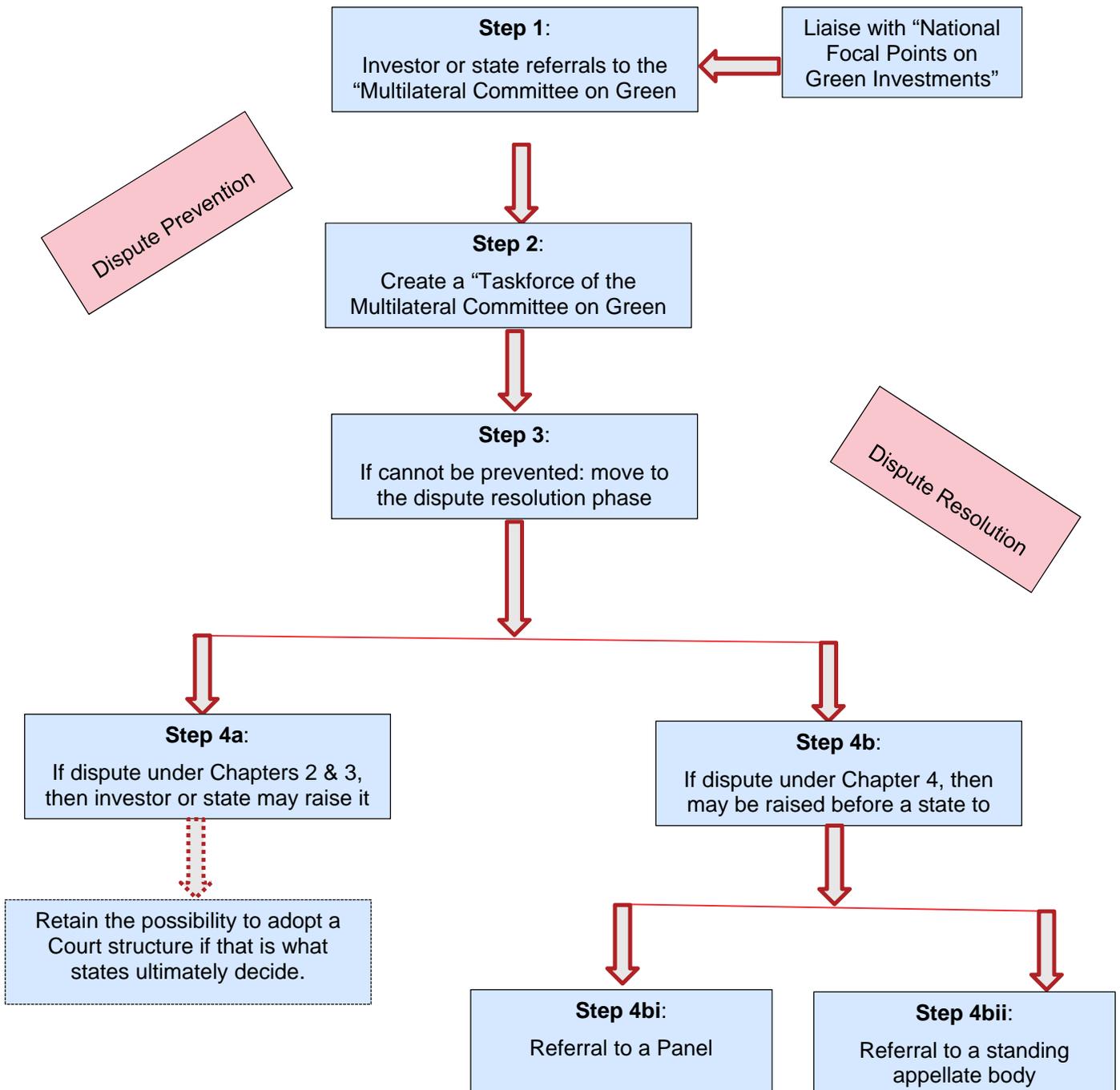
SECTION V

Enforceability

Enforceability

A core feature that sets the IICCA apart from other treaties is the enforcement mechanism that it establishes. Chapter 5 of the IICCA is devoted to enforceability. This Chapter seeks to incorporate dispute resolution mechanisms that can be used by both the States and the investors, thus giving the States an ability to bring claims independently, without waiting for institution of a claim by the investor to be able to file a counterclaim.

A summary of our enforcement scheme is set out diagrammatically here:



Any international agreement is only as effective as its wide ratification and its enforceability. International law, however, has significant constraints on the enforcement of international agreements (e.g., the lack of an international entity whose sole goal is law enforcement). Considering this, the IICCA creates a novel and unique enforcement scheme based which is outlined in Chapter 5. Indeed, within a particular chapter, the IICCA creates a hierarchy of obligations—primary obligations and secondary obligations—with different enforcement approaches for each of these obligations.

Home State and three other neutral parties shall form a Taskforce to facilitate this process. Before initiating arbitration, the relevant parties must call a meeting of the Taskforce to examine the issue. The Taskforce will then submit brief recommendations to the parties as to how the issue should be resolved within 30 days. Prevention is thus an inbuilt prerequisite before any matter can be raised for dispute resolution.

Part B: Disputes between Investors and States

If a dispute between an investor and a State is not resolved satisfactorily under Part A (Dispute Prevention), then it may be resolved under the arbitration procedures set out in Part B (Dispute Resolution between Investors and States).

The IICCA includes best practices from recent Bilateral Investment Treaties (BITs) and Free Trade Agreements, including the new Model BIT's of India and Brazil, the DR-CAFTA, the TPP, and the T-TIP. We have brought these best practices together to create a streamlined investor-state dispute settlement (ISDS) mechanism.

We have also ensured that this Part is forward-looking in light of the evolving international environment for ISDS. For example, Article 5.12(5) provides that if a separate, multilateral agreement enters into force between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties must strive to reach an agreement that would allow the appellate body to review awards rendered under the IICCA. The potential establishment of an arbitration court, as referred to in the Comprehensive Economic and Trade Agreement (CETA) could be one such development that triggers this provision under the IICCA.

Reflecting modern international best practice, as well as one of the key goals of the IICCA to enhance transparency, Arbitral Tribunals may adopt the UNCITRAL Rules to facilitate transparent proceedings. We also decided to fetter the authority of the ISDS tribunal by providing that Parties may issue joint declarations of their interpretation of the IICCA, which would then be binding upon the tribunal.

Part C: Disputes Between States

Disputes about the obligations set out in Chapter 4 (State Obligations for Climate Change Prevention and Reduction) that have not been satisfactorily resolved by the under Part A (Dispute Prevention), may be resolved under the arbitration procedures

set out in Part C (Disputes Between States). Chapter 4 includes some hard, or absolute, obligations (such as the obligation to enact laws and regulations to give effect to the obligations under the International Agreements Dealing with Climate Change) and some soft, more flexible obligations (such as to consider Public-Private Partnerships in developing mechanisms for Climate Change Prevention and Reduction). All of these obligations are enforceable between States.

Our state-to-state dispute settlement mechanism is based on the WTO model, and Section A of Chapter 28 of the CPTPP (*available at <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text/>*). We have sought to streamline this proven model for the successful resolution of international disputes.

An IICCA Panel is to be composed of seven members. One member is unilaterally appointed by each of the parties to the dispute, and the parties must also try to agree on the three other members. If they cannot agree, the remaining panelists are to be selected from a pre-established roster. If this is not possible, then the President of the ICJ shall appoint the remaining panelists. We have included a number of default mechanisms to ensure that a disputing party's lack of engagement in the dispute settlement process cannot block the establishment of a panel and therefore the resolution of the dispute.

Consistent with WTO rules, panelists must not be nationals of disputing parties, unless the parties agree otherwise. Importantly, they must have expertise and or experience in environmental law or practice, or other matters covered by this Agreement, or the resolution of disputes arising under international agreements. They are to be selected on the basis of their objectivity, reliability and sound judgment.

Once established, the role of the Panel is to hear the case (including third parties and amicus submissions as it considers appropriate) and to make an objective decision applying the facts to the obligations set out in Chapter 4. The Panel will then make findings, determinations and recommendations as necessary for the resolution of the dispute. Because of the importance of having an efficient dispute settlement procedure, the IICCA provides that the Panel must submit a report to the parties within 90 days. Anonymous separate opinions are permitted.

If the Panel determines that a party has breached its obligations under IICCA, the responding party must comply within a reasonable period of time. Either party may appeal the Panel's decision on legal issues to a standing Appellate Body which consists of seven experts on environmental law and the subject matter of the IICCA. The Appellate Body must issue a report within 60 days. This report is presumed to be accepted by the disputing parties unless they jointly decide not to accept the report.

Panelists and Appellate Body members must comply with the Rules of Procedure and the Code of Conduct that will be agreed between the Parties consistent with Article 5.23.

To keep abreast of developments in the settlement of international disputes, the parties to the IICCA must regularly, or when requested by one third of the membership, convene a meeting of experts to review the appropriateness of the dispute settlement mechanisms, including in light of any recent developments. Experts may develop recommendations in this regard and submit them to the parties to decide whether to adopt.

Together, we believe that this dynamic approach to the prevention and settlement of disputes presents the best of both worlds for both States and investors in Green Investments that are covered by the protections in the IICCA.