

# Kluwer Arbitration Blog

## The Contents of Journal of International Arbitration, Volume 36, Issue 1, 2019

Maxi Scherer (General Editor Journal of International Arbitration) · Tuesday, February 19th, 2019

We are happy to inform you that the latest issue of the journal is now available and includes the following contributions:

[Annette Magnusson, 'Foreword: The Story of the Stockholm Treaty Lab' \(2019\) 36 Journal of International Arbitration, Issue 1, pp. 1-6](#)

*In 2015, the world community adopted the Paris Agreement and the Sustainable Development Goals, setting an ambitious agenda for curbing global warming and ensuring a sustainable future. It is broadly recognized that attaining these goals will require investments amounting to trillions of dollars across the globe: renewable energy plants must replace carbon-heavy ones; energy-efficient transportation will be needed to carry an increasingly mobile world population; sustainable agriculture and forest restoration must substitute unsustainable land use and deforestation; and climate-resilient infrastructures must be built where global warming and rising sea levels already put communities at risk. Much of the technology necessary to reduce climate change and its effects already exists - affordable solar energy, for example, and energy-efficient vehicles, and carbon capture and storage. Investments are needed to bring these existing technologies to meaningful scale around the world, beyond the borders of the countries that can readily afford them. Investments are also necessary to support innovation in areas where the current state-of-the-art technology is still not sufficient to effect the necessary change. In today's globalized economic system, many of these investments are likely to be cross-border in nature. In other words, if the global climate-change goals are to be attained, a significant increase in 'green' foreign direct investment (FDI) must materialize. For several decades, international investment agreements have been used to increase FDI flows by incentivizing and protecting investments. But no international legal instrument exists that specifically encourages much-needed green investments.*

[Martin Dietrich Brauch, Yanick Touchette, Aaron Cosbey, Ivetta Gerasimchuk, Lourdes Sanchez, Nathalie Bernasconi-Osterwalder, Maria Bisila Torao Garcia, Temur Potaskaevi, Erica Petrofsky, 'Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation: Aligning International Investment Law with the Urgent Need for Climate Change Action' \(2019\) 36 Journal of International Arbitration, Issue](#)

1, pp. 7-35

*The climate change mitigation and adaptation objectives set by the Paris Agreement under the United Nations Framework Convention on Climate Change (UNFCCC) and the broader Sustainable Development Goals (SDGs) under the Agenda 2030 create a need for an unprecedented shift from carbon-intensive to low-carbon investment projects. Investment and the legal regimes that govern it—including international investment law—are critical to this shift. To accelerate it, the authors propose the Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation. One of the winners of the Stockholm Treaty Lab competition, the treaty has three building blocks: (1) encouraging Sustainable Investments; (2) discouraging Unsustainable Investments and eliminating new Unsustainable Investments; and (3) ensuring a just transition to sustainable and low-carbon economies and societies. It allows states to indicate, in schedules to the annexes of the treaty, which sectors will be defined as Sustainable or Unsustainable Investments. It protects and signals policy support for Sustainable Investments, while denying treaty-based procedural rights to Unsustainable Investments and committing states to agree on modalities and timelines for phasing out incentives for Unsustainable Investments, such as fossil fuel subsidies. It includes investor obligations and provides access to justice to individuals and communities through an accountability mechanism.*

[Paula Henin, Jessica Howley, Amelia Keene, Nicola Peart, 'Innovating International Investment Agreements: A Proposed Green Investment Protocol for Climate Change Mitigation and Adaptation' \(2019\) 36 Journal of International Arbitration, Issue 1, pp. 37-70](#)

*This article describes a proposal for a new Green Investment Protocol for the Encouragement, Promotion, Facilitation, and Protection of Investments in Climate Change Mitigation and Adaptation ('Green Investment Protocol' or 'Protocol'), which aims to incentivize foreign investment in climate change adaptation and mitigation so as to help achieve the targets set out in the Paris Agreement.*

[Silke Noa Elrifai, Simon R. Sinsel, Maya Hennerkes, Hans Rusinek, 'A Model Multilateral Treaty for the Encouragement of Investment in Climate Change Mitigation and Adaptation' \(2019\) 36 Journal of International Arbitration, Issue 1, pp. 71-94](#)

*The Paris Agreement sets out to limit global warming to below 2°C, yet the pathway to reach that goal is unclear. This specifically applies to the mobilization of investment for climate change mitigation and adaptation. One way to mobilize foreign investments is to create a favourable investment climate with the help of multilateral investment treaties. In this article, a model treaty is proposed to considerably increase climate-friendly investments while maintaining regulatory flexibility for signatory states. Building on Design Thinking principles, key challenges for the success of such a treaty are identified and provisions are crafted incorporating feedback from twenty-five experts from finance, policy, and legal domains. The proposal addresses four key challenges: (1) define climate change mitigation and adaptation investments; (2) decrease the barrier of limited access to capital due to perceived and actual risks; (3) combat insufficient investor trust in long-term contracts; and (4) retain states' ability*

*to regulate. The treaty proposal addresses these challenges by proposing, inter alia, a definition for mitigation and adaptation investments that establishes a link to the Nationally Determined Contributions under the Paris Agreement, an innovative financing mechanism, a conversion of host country subsidies to investment grants, and a performance verification using latest distributed ledger technology.*

Daniel Magraw, Leila Chennoufi, Krycia Cowling, Charles Di Leva, Jonathan Drimmer, Chiara Giorgetti, Young Hee Lee, Jan Low, Kendra Magraw, Steve Mccaffrey, Grace Menck Figueroa, Sergio Puig, Anabella Rosemberg, 'Model Green Investment Treaty: International Investment and Climate Change' (2019) 36 *Journal of International Arbitration*, Issue 1, pp. 95-134

*Mitigating and adapting to the extraordinary threats posed by climate change will require dynamic responses across all elements of human society. Governments face urgent, unprecedented challenges in this regard, including with respect to regulating foreign investment. The international investment regime was not designed to take account of this reality, however, either substantively or with respect to the settlement of disputes. This article proposes a new approach to foreign investment regulation designed to rectify this systemic failure, in the form of an innovative bilateral investment treaty drafted by a multidisciplinary team of internationally renowned experts. The approach proposes a balanced, reciprocal set of obligations for both investors and host states consistent with the Paris Agreement. To incentivize transformation, moreover, the article argues for investment treaties that demand good governance by investors, establish sufficient policy space for host states (via a sectoral approach that specifically addresses areas such as climate change, water, agriculture, human rights, indigenous peoples and public health), and adopt a flexible, fair, accountable and transparent approach to dispute settlement, including enhanced standards for arbitrators and a Code of Ethics—among other innovations.*

Christopher Campbell , Coimbra Trigo Ana, 'A Vision for Green Foreign Direct Investment: Proposals for an Investor-State Collaborative Effort' (2019) 36 *Journal of International Arbitration*, Issue 1, pp. 135-160

*Time is of the essence. With each passing day, the options and alternatives available to the peoples of the world to stem the tide of man-made destruction to the Earth are steadily disappearing. The Stockholm Treaty Lab challenged professionals from various disciplines to imagine and design strategies to mitigate and reduce the detrimental impact of human beings upon the planet. This article reflects the culmination of thought processes and ideas of one the participating teams.*

*The team drafted a legal instrument within the currently existing U.N. infrastructure, and included a number of aspects advocating for its widespread adoption, seeking to incentivize parties with the power to effect environmentally sound change to be more active. Economists, business consultants, lawyers, and scientist sought to find solutions to three man-made issues, namely (1) food waste, (2) deforestation, and (3) lack of renewable energies. Each of these three categories represent a major exacerbating force upon climate change, yet are areas that could be drastically affected with cooperation among states and investors. Within each category, both general policies and specific solutions/incentives are outlined. Further, dispute*

*resolution mechanisms and the imagined economic impact for investors financing these initiatives are discussed. It is the belief of the team that the problems considered by the article have little chance of being effectively addressed unless there is widespread cooperation, thus it is hoped that articles like this one can be the catalyst for that change.*

José Rafael Mata Dona, 'Stockholm Convention on the Use of Blockchain to Boost Climate Action' (2019) 36 *Journal of International Arbitration*, Issue 1, pp. 161-170

*This article examines an innovative junction between international investment law and climate change law with the potential to increase foreign investment in climate change mitigation and adaptation. In particular, it explores the use of Blockchain (1) as a climate change investment vehicle, (2) in the collection of evidence of emission reduction compliance and (3) in the implementation of a Carbon Tax. Finally, it analyses the possibility to incorporate those three Blockchain applications to the network of already existing International Investment Agreements (IIAs) and describes a new role arbitration can play in the resolution of new type of claims.*

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