

Climate related Investment Claims

Jean Monnet European Climate Law Series – University of Cagliari

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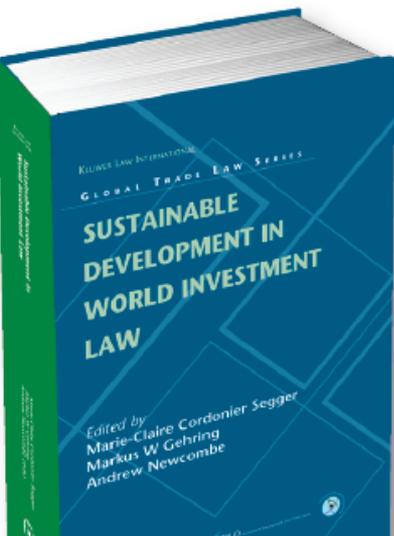
Faculty of Law

Sustainable Development in World Investment Law

*Edited by Marie-Claire Cordonier Segger,
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Sustainable development is a widely accepted objective of the world community. Its principles guide domestic and international law in many areas of economic, social, and environmental policy, particularly where these fields intersect. However, in our national and international investment policy and law, sustainable development remains challenging to implement.

There are over 3,045 international

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Investment Law and Climate Change

An Emerging Network of Int'l Investment Agreements (IIAs):

- Current int'l legal framework governing foreign investment is a vast network of over 3200 IIAs.
- IIAs seek to create 'favourable conditions' or a 'stable framework' for investment, for economic development, by impose binding obligations on States re: treatment of foreign investment:
 - (i) a wide asset-based definition of investment;
 - (ii) guarantees of non-discrimination (national and most-favoured-nation treatment);
 - (iii) a minimum standard of treatment often expressed as 'fair and equitable treatment' coupled with an obligation not to impose arbitrary or discriminatory measures;
 - (iv) the right to transfer investments and profits out of the host state; and
 - (v) compensation for measures tantamount to expropriation.
- A smaller number of IIAs provide for rights of entry for foreign investment, prohibitions on performance requirements, and 'umbrella clauses' under which a state agrees to observe its commitments to foreign investors.

Investment Law and Climate Change

Concerns: Would investors try to use IIAs to challenge climate laws and policies? And succeed?

- In most IIAs, foreign investors enforce new rights through investor-state arbitration provisions, using State's general consent to arbitration.
- **Concern:** BITS rules on 'regulatory expropriation' might limit pollution control measures
- **Concern:** BITS rules on performance requirements might limit tech transfer measures
- **Concern:** BITS rules on 'fair & equitable treatment' might constrain cap & trade credit allocations
- **Concern:** BITS rules on 'transparency & notification' might constrain new laws
- **Concern:** BITS stabilization clauses limit new climate laws.

... will new investor claims lead to regulatory chill?

Concerns founded on cases

Such concerns first raised in 4 controversial claims under *North American Free Trade Agreement* (NAFTA) Ch 11 :

- * *Ethyl v. Canada*: challenged export/provincial trade ban on MMT fuel additives;
- * *Azinian v. Mexico*: challenged cancellation of a municipal waste concession;
- * *Metalclad v. Mexico*: challenged closure of a hazardous waste site; and
- * *Methanex v. United States*: challenged Californian ban on the use of MTBE, another fuel additive.

Investment Law and Climate Change

Potential for Progress: Can IIAs promote investor confidence, wise regulations and more sustainable investments?

- Elements of standard IIAs could contribute to investor confidence (scope, national treatment, no expropriations, investor-state arbitrations)
- Some countries/regions conduct environment & sustainability reviews / assessments of their IIAs; some even take outcomes into considerations...
- Certain IIAs contain general exceptions for conservation of natural resources
- Certain pioneering IIAs also contain sustainable development provisions:
 - Energy Charter Treaty softly encourages renewables [EU reform proposals]
 - (Weak) preambular environmental commitments in some BITS
 - 'Not to lower standards to attract investment' provisions in some BITS
 - CSR provisions in some FTA Investment Chapters (*Peru-Canada FTA*)
- Awards like *Parkering* arbitral award suggests public interests could be included in assessment of 'like circumstances' ... *Vattenfall* arbitration is not encouraging [more proceedings initiated in response to fossil fuel phase-outs/reductions: *Lone Pine*; *TransCanada*; *Westmoreland*; *Uniper*; and *RWE*]

Most recent cases

<u>Claim</u>	<u>Issue</u>	<u>Treaty</u>	<u>Date submitted/decision</u>	<u>Notes</u>
RWE v the Netherlands	Coal-phase out and closure of coal mines	ECT	2021/pending	ICSID
Uniper v the Netherlands	Coal-phase out	ECT	2021/pending	ICSID – the Netherlands currently in the German courts seeking a declaration that both proceedings lack legal foundation as they are intra-EU in nature.
Mainstream Renewable Power et al v Germany	Renewable energy – planned offshore wind projects failed to get German government support	ECT	2021/pending	
EP Wind v Romania	undisclosed	ECT	2020/pending	ICSID
Fin.Doc and others v Romania	Solar - changes to incentive scheme for investments	ECT	2020/pending	ICSID
Arka Energy v Albania	Solar park project stalled due to controversy over the awarding of the tender	Albania-Netherlands BIT	2020/pending	
Shift Energy v Japan	Regarding measures taken in the renewable energy sector – scaling back of FITs	Hong-Kong-Japan BIT		UNCITRAL
Koch Industries v Canada	Over cancellation of emissions trading programme. Koch bought emissions allowances and was not compensated for them once the programme was abandoned despite the abandonment rendering	NAFTA		ICSID

Most recent cases

Encavis et al v Italy	Re solar park and measures that reduced or removed incentives previously granted	ECT	2020/pending	ICSID
Sapec SA v Spain	Solar investments	ECT	2020/pending	ICSID
Campos de Pesé v. Panama	Bioethanol production: regulatory changes and environmental pollution charges and penalties	Italy-Panama BIT	2020/pending	ICSID
Mitsui v Spain	Solar power plant. Re energy reforms of the renewables sector.	ECT	2020/pending	ICSID
Orazul International Espana Holdings SL v Argentina	Hydro and thermal power plants. May be to do with reduction in tariffs for renewables	Argentina-Spain BIT		
Latam Hydro and CH Mamacocha v Peru	Abandoned hydro power project after delays and local opposition	Peru-USA TPA	2019/pending	ICSID
Strabag, Erste Nordsee-Offshore Holding and Zweite Nordsee-Offshore Holding v Germany	Re regulatory changes including the intro of public auction process for offshore wind producers which effectively excluded projects which were not sufficiently advanced	ECT	2019/pending	ICSID
VM Solar and others v Spain	Undisclosed but may be related to modifications to renewable incentives regime	ECT	2019/pending	ICSID
Nord Stream 2 v EU	Re Gas Directive			UNCITRAL/ or Ad-Hoc – not sure if a climate case but might have an indirect link

Changes to Facilitate the Transition

SD Solutions in Procedures of trade & investment law:

Innovative changes in the process of treaty making & arbitration:

- Assessment / sustainability review procedures *ex-ante* the conclusion of trade & investment agreements
- Consultations between national trade, investment, environment, development authorities
- Transparency in treaty making (release of draft texts, transcripts, public hearings for civil society)
- Use of *amicus curia* briefs and consultation of SD experts in investment arbitration and trade disputes.

(See Gehring, 2005 & 2010; Bernasconi 2010; Malik 2010)

Changes to Facilitate the Transition

SD Solutions in Substantive Trade & Investment Treaty Law

- Preambular recognition of sustainable development
- More flexible national treatment/PPM standard

Provisions to prevent T&I treaties from constraining climate measures

- Reservations & exceptions (enviro, health, natural resources)
- New interpretations of 'like circumstances', 'fair and equitable treatment' and 'expropriation'
- Environmental treaties to prevail in the event of conflicts
- Commitments to avoid lowering standards to attract trade or investment

(See Miles 2008, Cordonier Segger, Gehring & Newcombe 2010)

Changes to Facilitate the Transition

SD Solutions in Substantive Trade & Investment Treaty Law (cont.)

Provisions for environmental & social cooperation parallel to treaties

- FTA environmental chapters, parallel treaties on environmental cooperation, joint work programmes on T&E issues, transparency / factual records processes for non-enforcement of environmental law
- FTA labour chapters, parallel treaties on labour & human rights cooperation, joint work programmes on T&L issues, complaints processes for non-enforcement of labour law.

Integrated provisions to favour more sustainable trade/investment through treaties

- Carefully tailored commitments in each chapter of a T&I FTA & in BITs
 - encouraging voluntary CSR & anti-corruption measures for investment
 - facilitating trade in environmental goods & services,
 - permitting green procurement,
 - facilitating & certifying trade in sustainable forest products, etc

(See Hepburn & Vuyela 2010; French 2010)

Newest FTAs: EU-UK Trade and Cooperation Agreement but note no ISDS just Party to Party Arbitration for Investment

- **Material Breach** - Article 764 (previously COMPROV.5) declares the fight against climate change as a one of the bases for cooperation alongside democracy, the rule of law, human rights and the non-proliferation of WMDs. Further, Article 771 (previously COMPROV.12) affirms that Article 764(1) (previously COMPROV.5(1)) is an essential element of the partnership established by the TCA as well as “any supplementing agreement.”
- The language is one of the strongest found in any trade agreement, declaring that “climate change represents an existential threat to humanity”, requiring each Party to “respect the Paris Agreement and the process set up by the UNFCCC and refrain from acts or omissions that would materially defeat the object and purpose of the Paris Agreement.” Both trading partners also commit to be advocates of the fight against climate change in international fora.
- See <http://eulawanalysis.blogspot.com/2021/01/analysis-5-of-brexit-deal-environment.html>

EU-UK Trade and Cooperation Agreement

- There is a separate definition of the “climate level of protection”, somewhat controversially defined in part as the reduction and removal of greenhouse gases emissions: “for the Union, the 40 % economy-wide 2030 target, including the Union’s system of carbon pricing [and] for the United Kingdom, the UK’s economy-wide share of this 2030 target, including the United Kingdom’s system of carbon pricing.” In law, that means a 37% reduction by 2030 based on 2005 levels for the UK.
- Neither of these definitions reflects the new ambitions agreed within the EU of 55% reduction, nor do they align with the announced 68% reduction from 1990 levels for the UK. Evidently, this leaves some room for discretion for both trading partners with regard to their 2030 targets. Unfortunately, the 2050 objective is currently described in Art. 355(3) (previously 1.1.3) of Title XXI (Level Playing Field) as just an ambition: “Each Party reaffirms its ambition of achieving economy-wide climate neutrality by 2050”. The climate change definition also includes “the phase-out of ozone depleting substances”.

EU-UK Trade and Cooperation Agreement

- Art. 392 (previously 7.3) obligates both parties to “have in place an effective system of carbon pricing” and suggests that they give serious thought on linking their respective carbon pricing systems to preserve the system’s integrity and possibly increase its effectiveness. It is worth highlighting that both sides are now committed to a carbon price for “from electricity generation, heat generation, industry and aviation.” This commitment could support the ICAO CORSIA implementation or indeed domestic carbon pricing of aviation between both parties. It does not include shipping but then the EU discussions on expansion of the ETS to shipping are still ongoing but could start in 2023.
- Article 391(2) (previously 7.2.2) contains one of the strictest formulations of a non-regression provision by adopting mandatory language prohibiting the weakening or reduction of levels of environmental or climate protection as defined in Art. 390(1) (previously 7.1) “below the levels that are in place at the end of the transition period”, including “by failing to effectively enforce its environmental law or climate level of protection”, with the sole caveat that this regression shall not occur “in a manner affecting trade or investment.”

EU – China Comprehensive Agreement on Investment (CAI)

- Article 6 Investment and Climate Change - Recognising the importance of pursuing the ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC) and the purpose and goals of the Paris Agreement adopted by the Conference of the Parties to the UNFCCC at its 21st session (the Paris Agreement) in order to combat climate change and its impacts and committed to enhance the contribution of investment to climate change mitigation and adaptation, each Party shall: a. **effectively implement the UNFCCC and the Paris Agreement adopted thereunder, including its commitments with regard to its Nationally Determined Contributions**; b. promote and facilitate investment of relevance for climate change mitigation and adaptation; including investment concerning climate friendly goods and services, such as renewable energy, low-carbon technologies and energy efficient products and services, and by adopting policy frameworks conducive to deployment of climate-friendly technologies; c. cooperate with the other Party on investment-related aspects of climate change policies and measures bilaterally and in international fora, as appropriate.

Conclusion

- Transition to green economy with benefits in the fight against poverty is generally manageable without raising investment concerns, just like environmental objectives could be achieved in other areas.
- While some investment rules could pose limits on climate policies, if carefully crafted they either don't give rise to investment concerns or can be defended based on their public policy objective.
- Room for improvement of investment rules exists: link to the Paris Agreement and corresponding justifications.
- 'Regulatory chill' is largely a matter of perception when elements to reduce investment concerns are considered.
- Further research on the interaction between domestic climate measures and investment rules is advised.

Many thanks, merci, gracias, danke

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