

Argumentation to the Stockholm Investment Treaty

Technologies of Elon Musk continue to surprise the world. Electric cars, innovative PV panels, lithium-ion batteries, maybe the next could be carbon capturing technologies. The Elon Musk's approach is not to create something very new but to improve things that already exist. We plan to do the same with this Stockholm Investment Treaty: to improve our planet. This our green dream.

To implement our dream we have drafted the Model Treaty (“**Treaty**”) aimed to create a legal framework towards encouragement and protection of investments in climate change mitigation and adaptation with ultimate goal of enhancing the implementation of the Paris Agreement.

Below we outline the most significant and innovative aspects of the Treaty and then demonstrate how the Treaty meets the Assessment Criteria.

I. Overview of the Treaty

The definition of the covered investments plays a central role in the Treaty. After analysis of different approaches we agreed that “the most productive approach could be to take an open and dynamic stance towards definitions and standards”.¹ Our solution for such open and dynamic stance is defining the investments through the purpose with which they are made or altered. Such purpose shall be a contribution to achieving by a Host Party the objectives and aims as set out in Article 2 of the Convention, Article 2 of the Paris Agreement and relevant UN Sustainable Development Goals (“**Investment**”).

The Treaty establishes a comprehensive approach towards achievement of its purpose, providing for:

- (i) commitment of the Parties to reduce the greenhouse gas (“**GHG**”) emissions through the Investments;
- (ii) Investment promotion and facilitation;
- (iii) Investment protection;
- (iv) State-State and Investor-State dispute resolution mechanism.

¹ Inderst, G., C. Kaminker and F. Stewart (2012), "Defining and Measuring Green Investments: Implications for Institutional Investors' Asset Allocations", OECD Working Papers on Finance, Insurance and Private Pensions, No. 24, p. 5.

A. Commitment of the Parties to reduce the GHG emissions through the Investments

Inspired by the approach taken by the Kyoto Protocol and then by the Paris Agreement in relation to establishment of commitments of the States to reduce a certain amount of GHG emissions, we provided that each Party shall commit to reduce certain amount of GHG emissions through the Investments.

Under Article 4 of the Paris Agreement, each Party shall prepare, communicate and maintain successive nationally determined contributions (“NDC”) that it intends to achieve. As of 27 February 2018, 167 out of 175 Parties to Paris Agreement submitted their NDCs. The majority of NDCs provide for the commitment of the States by 2030. Meanwhile, under Article 4 of Paris Agreement each Party shall communicate NDC every five years in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties.

The Treaty thereby establishes a commitment of the Parties to the Treaty to achieve a minimum of 15 percent of their last commitment specified in NDCs through the Investments during 5 years period. For eight Parties of the Paris Agreement which did not communicate their NDCs this provision in the Treaty may serve an additional incentive to communicate them. As for the non-parties to the Paris Agreement the Treaty provides an alternative - to provide their commitment of reduction of GHG emissions through the Investments by ratifying the Treaty. As for the least developed countries and small island developing States, the Treaty provides for the commitment of best efforts.

B. Investment promotion and facilitation

The Treaty contains clearly defined obligations of the Parties as to investment promotion and facilitation that is one of the contemporary features of international investment law. These provisions could streamline States’ efforts to encourage international investment activities and give more guarantees for the investors. The importance of these provisions has been emphasized by UNCTAD.²

Until recently there was a systematic gap in state policies as to facilitation and promotion of investment, but the situation came to change when States started implementing different tools and came to unify them. Our Treaty proposes quite flexible approach whereas the State would not be limited in their way of promoting and facilitating of investment, yet the clear obligation of putting due efforts still exists.

² Investment Facilitation: A review of Investment Practices, UNCTAD, February 2017.

C. Investment protection

We critically addressed the concerns of the States that the International Investment Agreements “bite” and “limit the regulatory space of the contracting parties”³. At the same time, we have been cautious about safeguarding the efficiency of the purpose of the Treaty, including its protective value. Therefore, the Treaty envisages the following:

- (i) Covers only Investments, e.g. investments in climate change mitigation and adaptation.
- (ii) Does not protect natural persons investing in the Party having nationality of this Party.
- (iii) Introduces reference to legal stability within FET standard, clarifying that such legal stability protects from radical, drastic, disproportionate or unreasoned changes of fundamental legal framework, which destroys value of investment.⁴
- (iv) Clarifies the allowed occasions of indirect expropriation by equalizing it with cases for direct expropriation. Also the Treaty formulates requirements for compensating investors with a fair payment for the expropriated property.

D. Dispute resolution

We also critically addressed the concerns of the States and suggestions regarding reforming current system of investment dispute settlement.⁵ Meanwhile, we understand the current state of things in the world. The efficient alternative of arbitration has not been created yet and it requires a substantial period of time. We assert that the current system is working quite well, however we propose for a number of sound and critical aspects to be addressed. Therefore, the Treaty provides the following:

- (i) a transparency rule by default;
- (ii) a right of both the Investor and the Party to initiate arbitration;
- (iii) a limitation period of five years for initiating arbitration;

³ *World Investment Report 2015: Reforming International Investment Governance*, UNCTAD, Chapter IV, p. 125.

⁴ Based on practice of investment tribunals. See *CMS v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶¶274, 276; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶173; *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶307; *EDF; Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Award, 21 January 2016, Unofficial English translation by Mena Chambers, ¶ 514; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, ¶ 372; *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, ¶¶ 382, 368, 387-418.

⁵ *World Investment Report 2015: Reforming International Investment Governance*, UNCTAD, Chapter IV, p.145-157.

(iv) a wide range of options of arbitration rules.

As for the resolution of disputes between the States, in addition to the options of arbitration under the PCA Optional Rules for Arbitrating Disputes between Two States or adjudication of the dispute by the International Court of Justice, we introduce the option for the Parties to agree on arbitration procedure (in line with the Convention).

II. Argumentation of Compliance with Assessment Criteria

A. Compatibility

The Treaty is compatible with the Paris Agreement and the UN Sustainable Development Goals (“SDGs”) based on the following:

- (i) The terminology in the Treaty is streamlined with the Convention, SDGs, the Kyoto Protocol, and the Paris Agreement.
- (ii) The Treaty is created to serve the different means of achievement of common goal launched by the Convention, SDGs, Kyoto Protocol and the Paris Agreement.
- (iii) The purpose of the Treaty is to encourage and protect investments in climate change mitigation and adaptation. The Treaty aims to critically address the increasing concerns of the States in relation to the current system of investment protection and Investor State Dispute Settlement, so far as they do not undermine the possibilities to achieve the objectives of the Convention, the Paris Agreement, the Treaty and SDGs.
- (iv) The purpose of the Investments covered by the Treaty shall be a contribution to achieving by a Host Party the objectives and aims as set out in Article 2 of the Convention, Article 2 of the Paris Agreement and relevant SDGs.
- (v) Commitments of reduction of GHG emissions through the Investments, established in the Article 4 of the Treaty, shall be defined based on the nationally determined contributions under the Paris Agreement.
- (vi) The Treaty will use the UN Secretariat on Climate Change. It will help to save time and resources as the UN Secretariat works on climate change for a long time based on other different documents.
- (vii) The fundamental principles of property law are safeguarded. In particular, the provision on transparency restricts access to the confidential and proprietary information.

B. Efficacy

If adopted by the States, the Treaty will lead to a significant increase in the Investments due to the following:

- (i) The Treaty proposes a comprehensive solution, providing for (a) a commitment of the Parties to reduce GHG emissions through the Investments; (b) Investment promotion and facilitation; (c) Investment protection; (d) efficient dispute resolution options. Each component is designed to stimulate the Investments in a different way.
- (ii) We expect the Parties to elaborate the efficient policies and measures to achieve the goal of reduction of a minimum of 15 per cent through the Investments of their overall commitment in mitigation of climate change.
- (iii) Investment promotion and facilitation was included in the Treaty as they are the powerful means to attract investment and maximize its contribution to development, their success depends on the quality of investment-related policies and on the overall investment climate. This approach is supported by numerous OECD policy frameworks.⁶
- (iv) While there is no reliable research measuring how Investment protection and Investor-State dispute resolution impact on the decision of the potential investors to invest, we acknowledge that the investors do use and benefit from such instruments and structure their investments in a way to obtain investment protection. Furthermore, the Treaty suggests several solutions of practical problems in investment case law, providing for more clarity and certainty both for the States and the investors.

C. Viability

The Treaty is likely to be adopted by states around the world due to the following:

- (i) The Treaty provides an efficient tool in achievement of the objective of the Paris Agreement and the Convention.
- (ii) Commitments of reduction of GHG emissions through the Investments shall be defined based on the nationally determined contributions under the Paris Agreement, which, in turn, are determined by the States.
- (iii) Transparency clause and in particular access to the legislation helps to create predictability which at the same time may lead to the increase of the amount of investments. This approach will be beneficial for each of the Parties and for the investors.

⁶ OECD (2015), Policy Framework for Investment 2015 Edition, OECD Publishing, Paris.
<http://dx.doi.org/10.1787/9789264208667-en>

- (iv) Along with proposed efficient dispute resolution clause, the Treaty incorporates quite instrumental expropriation clause. With the proposed text, this clause would streamline the effort investors put to argue indirect expropriation cases, especially when such cases hail from tax treatment of the host states. Also we envisage the provisions on compensation for the expropriated property that would create favourable conditions and the level of guarantee for the investors to be fairly compensated by the State.
- (v) Double nationals of both Host and Home States are excluded from the scope of protection, which will serve as an additional guarantee for the States to engage only truly international investments.
- (vi) The Treaty is also more viable by inclusion of the losses and damages provision. The roots of the losses and damages provision go to the issue of necessity to provide an equitable remedy for those investors who suffered as a result of armed conflict, so that such investors will be guaranteed in their rights for compensation along with domestic investors (companies). The particular text of this provision has been drafted considering the similar provisions of Nigeria – Morocco BIT as well as Ukraine – Japan BIT. This provision was invoked several times in investment arbitration practice.

D. Universality

The Treaty appeals to the potentially diverging interests of States and investors in different parts of the world because:

- (i) The Treaty establishes obligations and commitments, i.e. the goals. However, the Treaty does not burden the States by establishing strict ways of realization of their commitments. The Treaty allows the States to design their policies and measures to achieve the goals.
- (ii) The Treaty provides for the obligations of best efforts for the least developed countries and small island developing States regarding commitment to reduce GHG emissions through the Investments.
- (iii) The clause on human rights is included as in investment activity can cross with, for example, living standards of providing safe and clean drinking water or sewerage

services. The international community recognizes that it is inappropriate to encourage investment by relaxing domestic labour, public health or safety.⁷

- (iv) The Treaty allows regulatory flexibility that can be used to promote sustainable investment by inclusion of general exceptions. Such provisions seek to justify Host State measures that are otherwise inconsistent with an obligation under the Treaty. Exceptions will typically allow the Parties of the Treaty to implement programs designed to protect human, animal, or plant life or health, or to conserve exhaustible natural resources, without incurring liability for breaching the Treaty.
- (v) The universality of this Treaty is also emphasized by the established governance. The United Nations Climate Change Secretariat works towards this goal, guided by the Convention's 195 and the Kyoto Protocol's 192 Parties. The work of the UN Secretariat for purposes of this Treaty is the silent expression of the continued importance of this topic for the entire world.
- (vi) The Treaty proposes the general approach for attracting investment. At the same time, it introduces provisions that allow States to regulate the investment climate based on their needs and opportunities. Some of the provisions encourage the States to elaborate their national legislation and own standards for improvement of investment climate.
- (vii) The Treaty tries to address one of the most difficult problems of all States, i.e. corruption. The corruption undermines the stability and predictability of investments.⁸ Consequently, the risk assessment of this investment drastically increases. The Treaty is not able to resolve this problem, however we believe that Article 15 would encourage the States to do something towards improvement in this sphere.

E. Enforceability

- (i) The Treaty was drafted considering the last generation of multilateral and bilateral investment agreements, the most recent trends in international investment law and last investment disputes. At the same time, the Treaty contains conservative clauses which guarantee the enforceability of this Treaty.

⁷ Marianna Nerushay, Promoting Sustainable and Socially Responsible Investment through Regional Trade Agreements, ICTSD, 16 February 2017.

⁸ Stefan Mbiyavanga, Improving domestic governance through international investment law: Should bilateral investment treaties learn from international anti-corruption conventions?/ 2017 OECD Global Anticorruption & Integrity Forum.

- (ii) The provisions of the Treaty regarding the commitment of the Parties to reduce GHG emissions through the Investments, Investment promotion and facilitation, Investment protection provide for the obligations of the Parties (save for the commitment to reduce GHG emissions through the Investments by the least developed countries and small island developing States).
- (iii) The Treaty includes provisions on denial of benefits, which will enable the State to deny investment protection on those occasions where investment protection should not be granted at all.
- (iv) Part IV of the Treaty contains an effective dispute resolution mechanism through arbitration.
- (v) Article 24 (3) expressly provides that both the Investors and the States may initiate arbitration under the Treaty.