ARBITRATION INSTITUTE
OF THE STOCKHOLM CHAMBER OF COMMERCE

# Future Treaty Making

Speech by Annette Magnusson, SCC Secretary General

EFILA Inaugural Conference

*EU law and investment treaty law: convergence, conflict, or conversation?*

London, 23 January 2015

Good afternoon Ladies and Gentlemen.

Thank you for the opportunity to address you here today. My name is Annette Magnusson, and I am the Secretary General of the Arbitration Institute of the Stockholm Chamber of Commerce. For those of you who may not be familiar with the SCC, I could briefly just mention that we administer quite a few ISDS cases. Since our first ISDS case in 1993 we have seen a total of 73 ISDS cases, 51 of them under the SCC Rules. We also act as appointing authority under the UNCITRAL Arbitration Rules and in *ad hoc* proceedings, usually seated in Sweden.

As far as we know, 120 Bilateral Investment Treaties include a reference to SCC or arbitration in Sweden in the investor-state dispute resolution provision, plus the Energy Charter Treaty, where the SCC is one of three options for investor-state arbitration, together with ICSID and the UNCITRAL Arbitration Rules.

This is some of the background to SCC and Sweden's role in ISDS cases.

My topic for today is **Future Treaty Making**, and I will focus on the *substantive* terms of the treaty. This may seem a bit unexpected since we as an arbitral institution usually focus on procedure. You may have noted for example that in our response to the EU Consultation on ISDS we commented only on procedural issues, but today I decided to share with you some of my hopes for future treaties.

Perhaps I am speaking here today primarily as a citizen of the world, and as a parent, with the worries that come with it for climate change and the kind of world in which we – potentially – will be living in 50 or even 30 years from now and are leaving behind for our children.

But my observations are *triggered* by the role as head of an arbitral institution and the debate on ISDS, and in particular arguments raised by some of its fiercest opponents from environmental movements.

I will use this opportunity to try to demonstrate how I believe ISDS can play a decisive role in support of climate change mitigation and other measures of sustainable development.

In short, my conclusion will be, and what I will try to demonstrate is, that the environment needs *enhancement* of measures – not carve-outs.

I will give you three pieces of a puzzle, as I see it, put them together, to try to demonstrate the big picture, and hopefully this will inspire visionary treaty drafters to get going.

I.

My first piece of the puzzle is the fact that international environmental law is *not delivering*. It is simply not efficiently targeting the problems we are up against.

The problems associated with upholding environmental goals at global level because of lack of enforcement mechanisms are widely recognized.

For example, compensation for breach is not truly a part of multilateral non-compliance procedure in multilateral environmental agreements. Most dispute settlement processes in MEAs do not include compulsory binding procedures.

And in the context of environmental disputes between individuals or private organizations, when decided by international bodies, the available remedies are much weaker than in investment arbitration.[1] Certainly nothing like international investment law damages.

[1] Kathryn Gordon and Keke Mashigo, *OECD Report: Compliance and Dispute Settlement Procedures under International Environmental Law: An Overview*, 5 October 2010.

On the prospect of an effective international agreement on climate change, one commentator has said

"The current approach to climate change is not working, and it is not likely to work any time soon. Emissions will keep going up, and it will be another decade before anything substantive happens on the Kyoto front – if at all.

In 2020, some 30 years after the baseline for agreed targets for carbon reductions, the Durban agreement holds out the prospect that there may eventually be some sort of legally binding agreement. It is a hope, but not a guarantee. By that time, the carbon concentration may have crossed the 400 ppm threshold on current trends."[2]

II.

The second piece of the puzzle is the *role of private investment* in addressing climate change and sustainable development.

Climate change needs action *now*, and international business can play an important role.

Private companies can be frontrunners in sustainable development; as direct *purchasers* of renewable energy, as well as *producers* of renewable energy.

According to a recently published survey[3], 59% of the Fortune 100 Companies have set a renewable energy commitment, a greenhouse gas reduction commitment, or both. Companies set targets to reduce emissions from operations, and to invest in renewable energy.

Also according to a recent report from UNCTAD[4] , foreign direct investment plays a key role in building low-carbon economies by bringing in capital and green technology.

In fact, last year's World Investment Forum focused on sustainable development goals, and on the importance of channeling investment specifically to sustainable development goals-relevant sectors.

---

[2] Dieter Helm, *The Carbon Crunch. How We're Getting Climate Change Wrong – and How to Fix It*. Yale University Press (2012), p.175.

[3] *Power Forward. Why the World's Largest Companies Are Investing in Renewable* Energy (2013), available at http://www.worldwildlife.org/publications/power-forward-why-the-world-s-largest-companies-are-investing-in-renewable-energy

[4] *Promoting Low-Carbon Investment*, UNCTAD Investment Advisory Series A, No 7.

And I quote from the Ministerial Round Table summary:

"Private sector investment will be needed, first and foremost, to generate productive capacity, economic growth and employment. Foreign direct investment can help do this. An overall policy framework that is conducive to attracting investment is an essential prerequisite for investment-led inclusive and sustainable development."[5]

III.

The third piece of the puzzle is a reminder that international public law does not stand still.

The vast number of bilateral investment treaties and the principles developed by the application of these treaties serves as an example. This has been called a "profoundly progressive development of international law."[6]

States can now be held truly accountable for their international undertakings. If they do not deliver on their promise, there will be damages at the end of the road. This is quite unique.

For future treaty making, we should continue to be progressive.

To combat climate change, we need to turn the problem on its head. Apply a bottom-up approach, regional and national, and recognize the importance of international investment in this process.

But also, look at the inspiration of how ICSID was once created. When one multilateral treaty on the treatment of foreign direct investment was not possible to achieve, there was a change of focus. The creation of ICSID has been described as an "ingenious contribution … to sidestep was deemed to be sterile substantive confrontation with procedural creativity."[7]

[5] http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Chairs-summary-20-October-2014.pdf
[6] Judge Stephen M. Schwebel, *In Defence of Bilateral Investment Treaties*, Keynote Address ICCA Congress, 6 April 2014, available at http://www.sccinstitute.com/media/49810/iccamiamispeechfinalrendering.pdf
[7] Judge Stephen M. Schwebel, as above.

So these are our three pieces;

- ✓ International environmental law is not delivering.
- ✓ Business can and does make a difference to addressing environmental challenges, and
- ✓ Treaty terms and practice are not set in stone.

Where does this lead us?

By listening to the critique from the environmental opposition you could almost get the impression that the state of affairs in the world today is that all governments are extremely eager to enact measures to combat climate change, and they all stand ready to immediately initiate actions to reach the 2 degree target – were it not for the threat of being sued by a foreign investor.

This is simply not the case.

The problem is *not* that governments want to do so much but are being stopped in the tracks by their international obligations.

The problem is that governments are *not doing enough*, and that there are very few mechanisms – if any – forcing them to.

In October 2014, the very same week as the People's Climate March took place in New York and other places in the world, Environment Ministers from six EU Member States were quoted in the *Financial Times* as saying "The introduction of any legally binding renewable energy and energy efficiency target at EU or national level is not desirable."[8]

These two parallel and conflicting events – the very same week! – could hardly have been clearer in demonstrating the gap between global ambitions and the realities on the ground, and that measures to combat climate change need to be enhanced by aligning with economic incentives.

Smart drafting of future treaty terms could contribute to this development, and in applying the precedent that has been set by enforcement of treaty undertakings by means of ISDS, states would have to live up to their promise.

From an international environmental law perspective, this would be quite revolutionary.

***

[8] *Polish PM vows to fight EU climate targets*, *Financial Times* 2 October 2014.