

# Foreword: The Story of the Stockholm Treaty Lab

Annette MAGNUSSON\*

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.

## 1 BORN BETWEEN THE SILOS

Since the first investor-state case was filed at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) in 1993, the SCC has developed into

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\* Secretary General of the Arbitration Institute of the Stockholm Chamber of Commerce, founder and jury member of the Stockholm Treaty Lab. Email: [Annette.Magnusson@chamber.se](mailto:Annette.Magnusson@chamber.se)

the world's second largest institution for the administration of investor-state cases under its own rules.<sup>1</sup> Against this background, the SCC followed closely as the global discussion on the pros and cons of investor-state arbitration emerged over the past few years. The main objective of the SCC involvement in the debate was to facilitate fact-based discussion relating to outcomes, values, and general functions of investor-state arbitration. In this context, we made a number of observations, most notably relating to environmental issues, which was very much part of the debate on the value of investment protection and investor-state arbitration.

Our research into available investor-state awards in the public domain did not seem to support the popular conclusion that states' efforts to curb climate change is prevented by claims from foreign investors under international investment agreements. In parallel, we took note of discussions outside of the sphere of international investment law, which centred on the need for increased investments in climate change mitigation and adaptation. In that discussion, a general lack of stable and transparent investment policies was seemingly identified as a main obstacle to meaningful action against climate change.

The Paris Agreement was a political success. Nonetheless, a common sentiment in the climate change law arena is that governments are *simply not doing enough*, and that there are very few mechanisms – if any – forcing them to act. State commitments under the Agreement, the so-called Nationally Determined Contributions (NDCs) are commitments on procedure, not on result. And most importantly, there is no effective enforcement mechanism under the Paris Agreement: states cannot be held accountable for failure to meet their obligations or commitments. Why is it that state accountability is routine under investment agreements, whereas it is sorely needed but entirely absent under climate change agreements? It was out of this question that the idea of the Stockholm Treaty Lab was born.

What if a new treaty could be drafted – one that encourages investments in climate change mitigation and adaptation, and that draws on the enforcement of state undertakings in international investment agreements? For the benefit of the planet, much stands to be gained from cross-fertilizing international investment law, climate change law, and the urgent need for climate change action.

## 2 CROWDSOURCING INNOVATION IN CLIMATE CHANGE LAW

Through a crowdsourcing platform, the partners behind the Stockholm Treaty Lab challenged contestant teams from around the world to draft a model international treaty which, if adopted by states, would encourage investments in climate change

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<sup>1</sup> See <https://sccinstitute.com/statistics/investment-disputes-2017>.

adaptation and mitigation. The level of engagement in the contest gives rise to optimism; it appears the world is full of expertise ready to design creative ways to address the climate change challenge through international law. Crowdsourcing proved to be a suitable tool to channel this ambition into action.

In what is probably the first crowdsourcing initiative launched to design international law, the members of the twenty-two teams that submitted model treaties made up an impressive crowd. Experience and know-how included ministerial responsibilities for human rights, investment negotiations, design of wind turbines, life-cycle assessment of energy systems, hydrogen and carbon capture and storage, algorithmic trading and block chain applications, just to mention a few. With the publication of this special edition of the *Journal of International Arbitration*, we offer you a chance to meet some of the passionate experts who participated in the Stockholm Treaty Lab challenge.

### 3 A TREATY WISH LIST

The Stockholm Treaty Lab rests on the principle that the political commitment, technological innovation and economic trends of the past decade can join forces in a policy-oriented treaty that encourages and protects cross-border investments in climate change adaptation and mitigation. Such a treaty, if implemented, would create a predictable, transparent, stable, and enforceable investment policy regime within which ‘green’ FDI could flow safely and freely. Such a treaty would put the climate change objectives into action by encouraging investors to fund necessary innovation and to invest in sustainable technology. And by adding the experience gained from enforcement in the international investment law sphere, such a treaty would have the potential to effect real change.

This ambition, translated into the terms of the competition, was reflected in the assessment criteria against which submissions were assessed. The contestants were asked to draft a model treaty with the following characteristics:

- *Compatibility*. The Model Treaty is compatible with the Paris Agreement and the Sustainable Development Goals. It aims to facilitate states’ achievement of the climate-change objectives set out in those instruments. The Model Treaty is also compatible with fundamental principles of property law.
- *Efficacy*. If adopted by states, the Model Treaty will lead to a significant increase in green investments related to climate change mitigation and adaptation. To this effect, the Model Treaty proposes incentives and protections that serve foreign investors’ needs and interests. The claimed efficacy of the proposed incentives and protections is supported by research and data.

- *Viability*. The Model Treaty is likely to be adopted by states around the world. Adoption is likely because the Model Treaty serves the states' needs and interests, facilitates the achievement of climate-change goals, and does not unduly restrict the states' ability to legislate and regulate.
- *Universality*. The Model Treaty appeals to the potentially diverging interests of states and investors in different parts of the world. Where necessary, the Model Treaty includes alternative provisions from which contracting states may select the most appropriate based on context and circumstances.
- *Enforceability*. The Model Treaty is binding and enforceable. It contains an effective dispute resolution mechanism, through which both investors and states can bring claims related to the Treaty.

The competition formally opened for registration on 1 June 2017, on the crowd-sourcing platform HeroX. By the end of October 2017, close to 300 innovators from more than twenty-five jurisdictions had signed up. In February 2018, when the final deadline passed, twenty-two teams had submitted their model treaties and supporting argumentations. Then began the work of the jury.

#### 4 INNOVATION, PASSION, AND THE LAW

The members of the Stockholm Treaty Lab jury were chosen to represent a variety of backgrounds and expertise – primarily in climate policy, economics, and international law. The jury consisted of:

- David W. Rivkin, Partner at Debevoise & Plimpton and the Immediate Past President of the International Bar Association (IBA);
- Michael Lazarus, Director of the US Center of the Stockholm Environment Institute and an expert in energy and environmental analysis;
- Per Klevnäs, Partner at Material Economics, who previously worked at the Stockholm Environment Institute and the New Climate Economy;
- Mutchucumaraswamy Sornarajah, Professor of Law at the National University of Singapore and the author of several books on public international law;
- Annette Magnusson, Secretary General of the Arbitration Institute of the Stockholm Chamber of Commerce and founder of the Stockholm Treaty Lab Prize.

The jury's assessment of the submissions was blind; the names of contestant team members and affiliations had been removed from the documents. Each jury member reviewed all submissions, and selected and scored what they considered

to be the five best treaties. The jury members' scores were combined, resulting in a shortlist of treaties to be discussed by the whole jury at an in-person, all-day meeting.

One thing stood out quite early: the quality of the work submitted was high, and the participating teams had all invested significant time and expertise in the drafting of the model treaties. In this observation, the jury was unanimous.

The assessment criteria set a very high standard. At the end of its extensive deliberations, rather than naming one sole winner, the jury decided to commend two standout teams for their very different but equally creative solutions and innovative approaches to the challenge.

## 5 AT THE TOP OF THE TREATY LAB PODIUM

The team 'The Creative Disrupters' created a Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation. The motivation of the jury in commending this team was the following:

The text contains innovative and out-of-the box ideas and strong language to promote and encourage green investments while at the same time seeking to address the risks posed by non-green investments and supporting the need for just transitions. The model by which States own the definition of sustainable and unsustainable investments is innovative.

Team Innovate submitted a Protocol for the Encouragement, Promotion, Facilitation and Protection of Investments in Climate Change Mitigation and Adaptation. In the opinion of the jury:

The Protocol represents a commendable procedural innovation by building on existing investment treaties, while at the same time specifically encouraging green investments, including in the investment protection provisions. The text seeks to build on and support implementation of the Paris Agreement and the Sustainable Development Goals in a convincing manner.

The commended teams present their proposed treaties at pages 7-35 and 37-70 of this issue, respectively.

## 6 IMPACT IS EVERYTHING

From the time that the idea was conceived, the greater purpose of the Stockholm Treaty Lab has been about impact. To ensure that the innovative ideas and solutions presented in the contestant submissions receive due attention, the Stockholm Treaty Lab secretariat partnered with the *Journal of International Arbitration* to publish this Special Issue. We recognize the additional work put in by all teams as they converted their contest submissions into articles, and we wish

to thank them for their willingness to work with the co-editors. Several of the submissions are also available at the Stockholm Treaty Lab website.

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