

## How the investment protection regime can contribute to a better environment

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Thank you very much for the introduction, and for the opportunity to be here.

As a brief background to the SCC, and why I am speaking on this topic today, I will just say that at the SCC we handle about 200 commercial arbitration cases a year, but that we have also seen quite a large number of investor-state arbitration cases over the years. As of 31 December 2104 we had had more than 70 ISDS cases, both under the SCC Rules and the UNCITRAL Rules. This makes us the second largest institution for ISDS cases under our own rules in the world, after ICSID, and the SCC Rules the third most commonly used rules for decided ISDS cases, after ICSID and UNCITRAL Rules. Against this background, we have also become quite involved in the debate on ISDS.

I.

Last week I attended the Climate and Business Summit in Paris, in turn part of the Climate Week Paris, where high representatives from business and governments came together to discuss the challenges ahead, in preparation for the Climate Summit in Paris later this year, when governments are expected to agree on targets for a new Climate Convention.

And if there was one message that came across very clearly during these two days it was this; *investment, investment and investment.*

To tackle the risk of climate change, we need investment in new technology and infrastructure. This is fundamental.

Staggering numbers were mentioned. Ninety trillion USD worth of investment will be needed, and even higher numbers were also mentioned.

But another element also needed is stability in policy, and predictability.

These are long term investments, for example infrastructure investments, with at least a 20 to 30-year horizon.

It was emphasized on several occasions that the legal framework needs to be predictable. And you heard opinions like “governments should not change the rules of the game when the game has already started”.

The question was asked: “How will the Paris agreement be able to mobilize capital and accelerate the transition to a low-carbon economy?”

But perhaps the most important question in Paris – from our perspective here today – was the following: “Will we have the wisdom to put the incentives in place?”

So...

- ✓ Investment, investment and investment.
- ✓ Stability in policy and predictability.
- ✓ Smart – and bold – energy policy

This is what we need to combat climate change.

Moving now to a different silo of the international debate, ours, and the ISDS issue, and you get quite a different picture.

## II.

In this silo, the current debate on ISDS, spurred by the negotiation of new free trade agreements with investment chapters – such as the TTIP – and a number of high profile – but usually not yet decided – cases, a quite different picture is painted.

In this silo, investment protection is put into question and should be limited

Private interests are more often described as a threat to the environment, rather than as part of the solution.

And should investment protection provisions be agreed in these international treaties, extensive carve outs are deemed necessary for the sake of the environment.

Another observation from this silo is that from the realities of pending cases in the public domain, we learn that policy appears to be far from predictable and stable.

## III.

Switching silos can be a very sobering experience.

In this silo over here – the “Paris silo” if you like – private investment is seen as absolutely necessary from an environmental – including climate change – perspective.

But in this other silo – the “ISDS silo” – private investors represent a wild beast that needs to be tamed.

I think the world would be better off if we could combine the experience of both silos.

What knowledge or insights do we have that is useful for the other, and, most importantly, that would be useful for *a better environment*?

If we do, I think there is an opportunity to see some *real progress* in terms of international environmental protection, including climate change mitigation.

As one speaker at last week’s meeting put it; “innovation lurks in the darkness between the silos”.

IV.

This is what we know.

First: a better and safer environment for us and our children requires vast amounts of private investment.

Second: States play an important role in providing sound economic conditions, including predictable and stable legal frameworks.

And third: BITs and ISDS provide a mechanism holding States to their promise.

It is time to connect the dots.

What structural changes do we need to see in society to safeguard our environment?

How do we make sure every child on this planet has access to electric light to be able to do their homework – without raising the temperature of the entire planet?

And what investments do we need to make this happen?

And if we want these investments to happen; how do we draft the investment protection chapters of our international treaties not only to reflect the insight of needed investments, but also encourage them to actually happen?

This is the type of conversation we should be having.

We need to draft visionary treaty terms which reflect investment needed, for example, if we are to succeed in keeping global warming below 2 C.

The beauty of including this in an investment chapter in future free trade agreements or bilateral investment treaties is that it comes with an efficient enforcement mechanism – the ISDS – something which is currently lacking in the international environmental law regime.

If we can combine treaty terms that truly reflect the role played by private investment for a better environment, and the existing enforcement mechanisms of international arbitration, I believe true progress for the environment could be achieved on a global level.

This is how the investment protection regime contributes to a better environment.

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