

# WORKING PAPER

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The impact of different types of Regulatory Chill on State Governments entering into International Investment Agreements and how it might affect cities' ability to regulate for climate action without impediment or risk to the cities or the State.

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***The impact of different types of Regulatory Chill on State Governments entering into International Investment Agreements and how it might affect cities' ability to regulate for climate action without impediment or risk to the cities or the State.***

***Meet Kaur.***

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**Abstract:**

States worldwide enter into international investment agreements (IIA) for the purpose of attracting foreign direct investment (FDI). Examples exist of investors using the Investor-State Dispute Settlement (ISDS) provisions within an IIA to hold States liable for any impact on their investments.

An undesired effect of this approach by investors is the phenomenon of "regulatory chill" and its direct and indirect impact on a State's ability to regulate domestically.

Whether regulatory chill exists (and the extent to which it impinges on the State's regulatory space) is hotly debated. However, this paper opines that regulatory chill does exist and that its impact may be felt at city-levels too, with the policy ambitions of cities committed to climate action creating discord with IIA conditions. This discord creates risk for the city that may impede important progress towards climate resilience, and it creates risk for the State.

This paper discusses the risks to both city and State and explores measures to mitigate the risks.

Note that all information contained herein is correct as of 28 September 2020, the time of writing.

**keywords** – Regulatory Chill, International Investment Agreements, Investor-State Dispute Settlement, Cities, Climate Change

## 1. Introduction and Methodology

The current investment treaty regime may have caused disenchantment<sup>1</sup> to States. Indeed, it may be described as flawed<sup>2</sup> and undergoing a legitimacy crisis.<sup>3</sup> However, it has also been argued<sup>4</sup> that economic productivity stimulated by foreign direct investment (FDI) is the lifeblood of States and their cities.<sup>5</sup>

The imperative for rapid climate policy action at State and cities/sub-national level, and the increasing threat of investor-state dispute settlement (ISDS) under legacy International Investment Agreements (IIA)<sup>6</sup>, is creating a legal environment that could present a growing risk to States and their cities. ISDS has come to represent, on the one hand, the “erosion of sovereignty” as result of IIA and economic globalisation and, on the other, “the reassertion of sovereignty prompted by the backlash against the global economic order”,<sup>7</sup> thus causing tension for States and thereby impacting their cities.

### 1.1. Objectives and research method

Whilst there has been much work done on the interface between climate change issues and IIA for States,<sup>8</sup> there is scant research on the specific role and influence of cities at this interface. This gap is addressed in this paper. It postulates that cities’ ability to regulate for climate action is impacted by State governments’ obligations under IIA and that cities’ actions can also be the potential cause of challenges launched by foreign investors under the IIA.

Acknowledging and briefly discussing the extensive debate on the existence of regulatory chill and legitimacy of the FDI regime, this paper argues that regulatory chill does exist. The research herein analyses the various types of regulatory chill as expressed by Tienhaara<sup>9</sup> and examines the implications for sub-national entities.

In order to present the debate and existence of regulatory chill, a doctrinal research methodology is applied. This includes a literature review as a precursor

<sup>1</sup> see M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015) Chapters 6,7 and 8; M Sornarajah, ‘A Law for Need or a Law for Greed?: Restoring the Lost Law in the International Law of Foreign Investment’ (2007) 6 *International Environmental Agreements: Politics, Law and Economics* 329; Kyla Tienhaara, ‘Resisting the “Law of Greed”’ (*Green Agenda*, 2015) <<https://greenagenda.org.au/2015/09/resisting-the-law-of-greed/>>accessed 30 June 2020.

<sup>2</sup> see Gus Van Harten et al., Public Statement on the International Investment Regime, (Aug. 31, 2010) <<https://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>>; An Open Letter from Lawyers to the Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement, (May 8, 2012) <<https://tpplegal.wordpress.com/open-letter/>>both accessed 6 July 2020.

<sup>3</sup> for a discussion on the legitimacy issues facing the investment regime see SD Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham Law Review* 1521; JE Alvarez and G Topalian, ‘The Paradoxical Argentina Cases’ (2012) 6 *World Arbitration & Mediation Review* 491.

<sup>4</sup> see Stephan W Schill, Christian J Tams and Rainer Hofmann, ‘International Investment Law and Development: Friends or Foes?’ in Stephan W Schill et al, (eds), *International Investment Law and Development: Bridging the Gap* (Edward Elgar: Cheltenham 2015); Henrik Hansen and John Rand, ‘On the Causal Links between FDI and Growth in Developing Countries’ (2006) 29 *The World Economy* 21; Abdur Chowdhury and George

Mavrotas, ‘FDI and Growth: What Causes What?’ (2006) 29 *The World Economy* 9.

<sup>5</sup> FDI generated in 2019 =US\$1.39 trillion, UNCTAD Global Investment Trends Monitor, Vol 33 Jan 2020 <[https://unctad.org/en/PublicationsLibrary/di-aeiainf2020d1\\_en.pdf](https://unctad.org/en/PublicationsLibrary/di-aeiainf2020d1_en.pdf)> accessed 29 June 2020

<sup>6</sup> Unless otherwise specifically mentioned, reference to “IIA” in this paper includes Bilateral Investment Treaties (BITs), Investment Chapters in Free Trade Agreements (FTAs).

<sup>7</sup> Tim R Samples, ‘Winning and Losing in Investor– State Dispute Settlement’ (2019) 56 *American Business Law Journal* 115,116.

<sup>8</sup> see Stephan W Schill and Vladislav Djanic, ‘Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law’ [2018] *ICSID Review*; Stephan W Schill, ‘Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?’ (2007) 24 *Journal of International Arbitration* 469; J Anthony VanDuzer, ‘The Complex Relationship between International Investment Law and Climate Change Initiatives: Exploring the Tension’ in Panagiotis Delimatsis (ed), *Research handbook on climate change and trade law* (Edward Edgar Publishing 2016); Kyla Tienhaara, *The Expropriation of Environmental Governance. Protecting Foreign Investors at the Expense of Public Policy* (Cambridge University Press 2009); Benoit Mayer, *The International Law on Climate Change* (Cambridge University Press 2018)265-266.

<sup>9</sup> Kyla Tienhaara, ‘Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement’ [2018] 7(2) *Transnational Environmental Law* 229.

to further study<sup>10</sup>, and analysis relating the new information to the existing law.<sup>11</sup> Cases and select IIA are assessed qualitatively to extract information and are interpreted for the purposes of establishing the argument.

As law does not exist in a vacuum removed from the wider construct of society<sup>12</sup>, especially in the context of international investment law (IIL) as it may impact the State's economy, politics and its citizens, a broader socio-legal approach is adopted to examine the effect that IIL has on a city's ability to regulate.<sup>13</sup>

This wider approach allows for delving into a city's climate action plans and, in this respect, reference has been made to cities' networks<sup>14</sup> on how they assist cities in their aim to adapt to and mitigate for climate change. The role of cities vis-à-vis their climate action plans, their place within their State, and issues of public governance and public international law are also explored. Potential triggers for ISDS are also identified in order to demonstrate how city action may exacerbate regulatory chill.

The question of whether climate action and IIA can be complementary is addressed before discussing reforms and opportunities to mitigate risk. In considering reform, select IIA and particular provisions are examined. Amongst other reform options, the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (WG-III)'s initiative on reform of the ISDS regime is also explored. Throughout the analysis of potential reforms, a focus on what factors might reduce the impacts of regulatory chill

and mitigate the impact on State and cities' ability to regulate for climate action is maintained.

## 2. The State, the City and the Chill

### 2.1. Regulatory Chill: Types and Implications

A State's right to regulate described as a "legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate"<sup>15</sup> is part of its sovereign right and is, arguably, part of customary international law. However, international norms including treaty norms have established boundaries and constraints to this right.<sup>16</sup> It is believed that IIA, as interpreted and applied by arbitral tribunals, are "unduly restricting regulatory space, or even causing a 'regulatory chill' on socially desirable action",<sup>17</sup> thereby constraining the States' right to regulate and, consequently, sparking debate about the impacts of regulatory chill and desirability of the ISDS regime.

The *Philip Morris*<sup>18</sup> cases are oft-mentioned in support of and against the ISDS regime. The tobacco conglomerate used the ISDS regime strategically to put pressure on the governments of Uruguay<sup>19</sup> and Australia<sup>20</sup> by instituting investment arbitration against them.

<sup>10</sup> Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' [2012] Deakin Law Review 83,84.

<sup>11</sup> Terry Hutchinson, *Researching and Writing in Law* (3rd edition, Reuters Thomson 2010) 37.

<sup>12</sup> Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 *The Law Quarterly Review* 632.

<sup>13</sup> see Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Education 2007); Roger Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25(2) *Journal of Law & Society* 171.

<sup>14</sup>for example, Resilient Cities Catalyst <<https://www.rcc.city/>>; Global Resilient Cities Network <<https://www.rockpa.org/project/global-resilient-cities-network/>>; C40 cities <<https://www.c40.org/>> all accessed 1 July 2020.

<sup>15</sup> Aikaterini Titi, *The Right to Regulate in International Investment Law* (Hart Publishing 2014) 33.

<sup>16</sup> ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary, ICSID Case No.

ARB/03/16, Award (2 October 2006), [423] "while a sovereign State possess the inherent right to regulate..., the exercise of such right is not unlimited...[t]he rule of law, which includes treaty obligations, provides such boundaries."

<sup>17</sup> Lorenzo Cotula, 'Do Investment Treaties Unduly Constrain Regulatory Space?' (2014) 9 *QIL* 19,20.

<sup>18</sup> Philip Morris Asia Limited v The Commonwealth of Australia (PCA Case No. 2012-12) & Philip Morris Brands SÀRL *et al*, v Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award of July 8, 2016. [collectively, "Philip Morris"].

<sup>19</sup> *ibid* Philip Morris v Uruguay [423]– dismissed on merits, the tribunal held that Uruguay had not modified the "legal framework relied upon by the investor at the time of its investment 'outside the of an acceptable margin of change'".

<sup>20</sup> Philip Morris v Australia (n 18) [554,585]- dismissed with Philip Morris being denied jurisdiction as it had 'treaty-shopped' and had restructured its entity "at a point in time where a dispute was foreseeable", amounting to an abuse of rights.



Critics of the ISDS regime, Tienhaara<sup>21</sup> and Miles<sup>22</sup>, argue that the *Philip Morris* cases were launched against the host countries in response to legislation regulating plain packaging of tobacco products. Tienhaara labels this type of regulatory chill as “cross-border chill”<sup>23</sup> or another description being “indirect deterrence”.<sup>24</sup> She argues that it matters not whether the cases are won by the investor<sup>25</sup>, but it is the impact that these types of cases have on the government of the host country (and on other governments who put on hold their domestic legislation in anticipation of the result of such cases) that is of greater significance.

Whilst New Zealand eventually did pass the legislation on plain packaging, it made a conscious decision to “wait and see” until the *Philip Morris* case concluded.<sup>26</sup> It seems indisputable that the arbitration launched by Philip Morris had the effect of slowing down legislation in other countries that would impact its business albeit for a short time.

However, Schill favouring the ISDS regime argues that the *Philip Morris* case “is not part of an illegitimate encroachment of Australia’s policy space”, but rather a response to a “shortcoming” of the Australian legal system with regard to domestic enforcement of IIA.<sup>27</sup> It is opined here that Schill is missing the point and is choosing to interpret the scope of regulatory

chill narrowly and somewhat simplistically. The issue is not whether Philip Morris’ claim was legitimate, but that it used the ISDS regime strategically to delay prospective legislation that would impact its business.

The way in which provisions are interpreted and applied by tribunals can also cause what Tienhaara describes as a “threat chill”<sup>28</sup> or “direct/specific deterrence”.<sup>29</sup> This type of regulatory chill can impact the way a State regulates domestically and may impact on cities who have ambition to regulate for climate action taking in to consideration their whole supply chain, city spatial limits, and hinterland. A State may fail to take a measure if threatened with arbitration or if an arbitration is still ongoing. As succinctly stated by Williams, “the uncertainty regarding the outcome of the arbitration, the possible detrimental effect of passing legislation while proceedings are ongoing, and the fear that additional arbitration cases could be triggered”<sup>30</sup> can have a discouraging effect on States when deciding on domestic environmental legislation.

For example, the wide interpretation of Chapter 11 of NAFTA<sup>31</sup> in the *Metalclad*<sup>32</sup> and the *Pope & Talbot*<sup>33</sup> cases (decided during the same period) would be a cause of concern to governments and be described as a potential ‘threat chill’ that discourages lawmakers from introducing forceful regulations<sup>34</sup> or to “shy

<sup>21</sup> Tienhaara, ‘Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement’ (n 9).

<sup>22</sup> Kate Miles, ‘Investor-State Dispute Settlement: Conflict, Convergence, and Future Directions’ in Marc Bungenberg and others (eds), *European Yearbook of International Economic Law 2016*. (Springer 2016).

<sup>23</sup> Tienhaara, ‘Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement’ (n 9)237.

<sup>24</sup> Jane Kelsey, David Schneiderman and Gus Van Harten, ‘Phase 2 of the UNCITRAL ISDS Review: Why “Other Matters” Really Matter’ (2019) 935 SSRN Electronic Journal 1,11

<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3329332](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3329332)>accessed 8 July 2020

<sup>25</sup> experts predicted that Australia would have won, see for e.g. Tania Voon and Andrew D Mitchell, ‘Implications of International Investment Law for Plain Tobacco Packaging: Lessons from the Hong Kong-Australia BIT’ (2012) 4 Public Health and Plain Packaging of Cigarettes: Legal Issues 137,172.

<sup>26</sup> Lukasz Gruszczynski, ‘Australian Plain Packaging Law, International Litigations and Regulatory Chilling Effect’ (2014) 5 European Journal of Risk Regulation 242, 244; Martin Johnston ‘Pressure to bring in tobacco plain-packaging’ (*NZ Herald*, 2 March 2015) <[www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=11410127](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11410127)>; Cecilia Olivet and Alberto Villareal ‘Who really won the legal battle between Philip Morris and

Uruguay?’ (*The Guardian*, 28 Jul 2016) <[www.theguardian.com/global-development/2016/jul/28/who-really-won-legal-battle-philip-morris-uruguay-cigarette-adverts](http://www.theguardian.com/global-development/2016/jul/28/who-really-won-legal-battle-philip-morris-uruguay-cigarette-adverts)>both accessed 8 July 2020.

<sup>27</sup> Stephan W Schill, ‘In Defense of International Investment Law’ in Marc Bungenberg and others (eds), *European Yearbook of International Economic Law 2016* (Springer 2016)334; see also Schill and Djanic (n 8); Schill (n 8).

<sup>28</sup> Tienhaara, ‘Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement’ (n 9)235.

<sup>29</sup> Kelsey, Schneiderman and Van Harten (n 24)11.

<sup>30</sup> Zoe Phillips Williams, ‘Investor-State Arbitration in Domestic Mining Conflicts’ (2016) 16 Global Environmental Politics 32,47.

<sup>31</sup> North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [“NAFTA”].

<sup>32</sup> *Metalclad Corp v. United Mexican States ICSID Case No. ARB(AF)/97/1 Award 30 August 2000* [“*Metalclad*”].

<sup>33</sup> *Pope & Talbot Inc v The Government of Canada, Interim Award, 26 June 2000 (NAFTA)* [“*Pope & Talbot*”].

<sup>34</sup> Stephen Clarkson, ‘Hijacking the Canadian Constitution: NAFTA’s Investor-State Dispute Arbitration’ in A. Alexandroff (ed), *Investor Protection in the NAFTA and Beyond: Private Interest and Public Purpose* (Renouf Publishing Co, 2006) 97-98.

away from raising environmental...standards for fear of having to pay massive compensation claims".<sup>35</sup>

The tribunal in *Metalclad* only considered the sole effect of the government's measure on the investor's property, i.e., the impact on its economic value and not whether the host government's acts were unfair or protectionist.<sup>36</sup> In *Pope & Talbot*, the tribunal took the "substantial deprivation" approach<sup>37</sup> by examining whether the host government's acts substantially deprived the investor of its investment. Despite the different approaches, the decisions in both cases still meant that the host governments had to pay massive compensation to the investors.

By contrast, in *Methanex*,<sup>38</sup> the tribunal took a narrower approach when interpreting NAFTA's Chapter 11, deciding that, "as a matter of international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance to due process...is not deemed expropriatory and compensable."<sup>39</sup>

However, any hope that there had been a shift towards a better balance between public and private interests was short-lived as the tribunal in *Bilcon*<sup>40</sup> reverted to the type of decisions reminiscent of early ISDS cases where tribunals showed a lack of deference to governmental action to protect the environment.<sup>41</sup> Perhaps the silver lining of this decision is that the dissenting arbitrator Professor Donald McRae took issue with the majority's treatment of "community core values" and stated that the Joint Review Panel's acts were not arbitrary.<sup>42</sup> He opined that the majority's decision would influence the way envi-

ronmental review panels may operate in future, acknowledging that the majority's decision would invoke the regulatory chill effect.<sup>43</sup>

The issue of the threat chill has gained traction with States such as the Czech Republic, Italy, and Spain having had a number of recent arbitrations instituted against them as a result of these States altering their legislation on renewables.<sup>44</sup> For instance, the decision in *Eiser*<sup>45</sup> in favour of the claimant may increase the risk of States not meeting their international obligations in relation to climate change mitigation because States may become hesitant "to adopt measures to address climate change and other environmental issues out of fear of being sued at the international level".<sup>46</sup>

Since ISDS tribunals are constituted only to deal with a specific case, they are not bound by the decisions of previous tribunals. Unfortunately, this could hamper the way the law develops in this field and, thereby, cause uncertainty. Such uncertainty could have the effect of making governments nervous when faced with a potential arbitration threat because they would not have the jurisprudence to rely on. Hence, though the tribunal's approach in *Methanex* achieved a better balance between public and private interests, the next tribunal can decide as they deem fit because the doctrine of *stare decisis* does not apply to ISDS.

Furthermore, governments are also concerned that there is no mechanism to appeal the arbitral decisions<sup>47</sup> and they could, potentially, be saddled with a

<sup>35</sup> Lorenzo Cotula, 'The Regulatory Taking Doctrine' [2007] IIED Briefing Paper 3.

<sup>36</sup> *Metalclad* (n 32) [104].

<sup>37</sup> *Pope & Talbot* (n 33) [156-181]. This approach has been developed in subsequent awards by making clearer the distinction between deprivation of property interests and the effect on the economic value of an investment, e.g. *Sempra Energy International v. The Argentine Republic* ICSID Case No ARB/02/16, Award, 28 September 2007; see also Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2014) 252-253.

<sup>38</sup> *Methanex Corporation v United States*, Final Award on Jurisdiction and Merits, (2005) 44 ILM 1345 ["Methanex"].

<sup>39</sup> *ibid* [7] (Part IV, Chapter D).

<sup>40</sup> *Bilcon of Delaware et al v. Government of Canada*, UNCITRAL PCA Case No. 2009-04 ["Bilcon"].

<sup>41</sup> Stephanie Schacherer, *International Investment Law and Sustainable Development: Key Cases from the 2010s* (Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch (eds) The International Institute for Sustainable

Development 2018)60. <<https://www.iisd.org/library/international-investment-law-and-sustainable-development-key-cases-2010s>>accessed 8 July 2020.

<sup>42</sup> Stefan Dudas, 'Bilcon of Delaware et. al v. Canada: A Story About Legitimate Expectations and Broken Promises' (Kluwer Arbitration Blog, 11 Sept 2015) <<http://arbitrationblog.kluwerarbitration.com/2015/09/11/broken-promises-and-legitimate-expectations-bilcon-of-delaware-inc-et-al-v-canada/>>accessed 8 July 2020.

<sup>43</sup> *Bilcon* case (n 40) [48] Professor Donald McRae's dissenting opinion.

<sup>44</sup> Schacherer (n 41) 11,15-17.

<sup>45</sup> *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.l. v. The Kingdom of Spain*, ICSID Case No. ARB/13/36, Award 4 May 2017. Annulled in July 2020 due to a conflict-of-interest issue. (At time of writing, the claimant requesting a review). ["Eiser"].

<sup>46</sup> Schacherer (n 41)12.

<sup>47</sup> limited bases for annulment of the award under Article 52 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) (signed 18 March 1965 entered into force 14 October 1966).

huge monetary award made against them with no further recourse.

In his Indonesian case study, Gross, whilst acknowledging that the exact relationship between the Indonesian Government's decision to repeal the open-pit mining ban and mining companies' threats of arbitration could not be conclusively determined, believes that the threats were taken seriously.<sup>48</sup> Further, some law firms promote tactical use of ISDS to "prevent wrongful regulatory change"<sup>49</sup> and advise clients that "ISDS is a powerful tool in the investor's arsenal".<sup>50</sup> It is, therefore, hard to dispute that foreign investors *do use* ISDS to threaten.

Another type of regulatory chill that can have far reaching effects is "internalisation chill"<sup>51</sup> or "systemic chill"<sup>52</sup> because it can stop governments from even considering introducing policies or laws that may affect FDI in their jurisdiction. Policy makers may put in place vetting systems that engage legal advisors to review policies and prioritise avoidance of disputes over exploring environmental protection policies.<sup>53</sup>

Thus, some public interest policies may not even see the light of day if there is any risk of an investor-state case being launched. Internalisation chill can also result in the shift of the power balance amongst government agencies with the trade and industry agency wielding more influence on domestic policy decisions on issues traditionally not under their purview such as the environment.<sup>54</sup> Governments may be deterred by the potential costs (both in terms of legal costs and the compensation awarded) and the amount of time taken to deal with such arbitrations.

<sup>48</sup> Stuart G Gross, 'Inordinate Chill: BITs, Non-NAFTA MITs and Host-State Regulatory Freedom—An Indonesian Case Study' (2003) 24(3) *Michigan Journal of International Law* 893, 893-894.

<sup>49</sup> M Coleman, *et al.*, 'Foreign Investors' Options to Deal with Regulatory Changes in Renewable Energy Sector' (*Stephoe & Johnson LLP*, 23 September 2014) <[www.stephoe.com/en/news-publications/foreign-investors-options-to-deal-with-regulatory-changes-in-the-renewable-energy-sector-1.html](http://www.stephoe.com/en/news-publications/foreign-investors-options-to-deal-with-regulatory-changes-in-the-renewable-energy-sector-1.html)> accessed 8 July 2020.

<sup>50</sup> Holly Stebbing 'What is investor-State dispute settlement (ISDS)?' (*Norton Rose Fullbright*, July 2017) <[www.nortonrosefulbright.com/en/knowledge/video/2a1d2a3e/what-is-investor-state-dispute-settlement-isds](http://www.nortonrosefulbright.com/en/knowledge/video/2a1d2a3e/what-is-investor-state-dispute-settlement-isds)> accessed 8 July 2020.

<sup>51</sup> Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (n 9) 233-234.

<sup>52</sup> Kelsey, Schneiderman and Van Harten (n 24) 11.

There is little doubt that regulatory chill is difficult to measure, and pinpointing when and if governments take such factors into consideration had a particular IIA not been in existence would, admittedly, be purely hypothetical. As Cotula succinctly observes, the "information is not in the public domain, counterfactuals are not available, and biases undermine the evidence base".<sup>55</sup>

In fact, organisations like European Federation for Investment Law and Arbitration (EFILA)<sup>56</sup> believe that regulatory chill is over-stated. They believe that foreign investors are not challenging legislative acts, but are challenging administrative acts such as the permit and licence issuance. Furthermore, tribunal awards "do not call upon let alone force"<sup>57</sup> governments to chill their laws or regulations and only deal with the investor's right to compensation. EFILA argues that, though cases such as *Philip Morris* stem from legislative acts, "the fact that, thus far, these acts have not been 'chilled' – let alone unduly chilled – further invalidates the regulatory chill claim".<sup>58</sup>

However, this is an overly simplistic argument. It is true that awards do not 'force' host States to chill their laws. It is not within the remit of the tribunal to 'force' a chill.<sup>59</sup> However, an award made against a host government may make it hesitant in implementing public interest policies and legislation that may have

<sup>53</sup> Gus Van Harten and Dayna Nadine Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada' [2016] *Journal of International Dispute Settlement* 92.

<sup>54</sup> Kelsey, Schneiderman and Van Harten (n 24) 12.

<sup>55</sup> Cotula, 'Do Investment Treaties Unduly Constrain Regulatory Space?' (n 17) 20.

<sup>56</sup> Gloria Maria Alvarez, *et al.*, 'A Response to the Criticism against ISDS by EFILA' (2016) 33 *Journal of International Arbitration* 1 <[https://efila.org/wp-content/uploads/2015/05/EFILA\\_in\\_response\\_to\\_the\\_criticism\\_of\\_ISDS\\_final\\_draft.pdf](https://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the_criticism_of_ISDS_final_draft.pdf)> accessed 9 July 2020.

<sup>57</sup> *ibid* 25.

<sup>58</sup> *ibid* 30.

<sup>59</sup> Notably, in *Chevron Corporation/Texaco Petroleum Company v The Republic of Ecuador* PCA Case No.2009-23 (second Partial Award, Track II), 30 August 2018, the tribunal went beyond their remit and interfered with the judgment obtained in the Ecuadorian domestic courts by stating in their award that the judgment should not be enforceable in any jurisdiction as it had been obtained (in their opinion) through corrupt and fraudulent means.



an adverse impact on the foreign investor's investment. It is indisputable that both Canada<sup>60</sup> and New Zealand<sup>61</sup> delayed their legislation on plain packaging for tobacco products as a result of the tactical use of the ISDS by Philip Morris in taking governments to international arbitration. This in itself indicates the existence of regulatory chill.

Despite the complexity of the phenomenon of regulatory chill, there have been recent attempts to investigate its existence empirically, albeit with mixed results. Research conducted in Canada by Cote<sup>62</sup> and Van Harten and Scott<sup>63</sup> found that many government officials are generally unaware of the ISDS regime and its impact. Whilst Cote concludes that the incidence of regulatory chill is low,<sup>64</sup> Van Harten and Scott found that, despite the general lack of awareness, their research revealed that some officials perceive the risk of arbitration as real and that it has impacted on the uptake of environmental policy to the extent that some projects were abandoned.<sup>65</sup>

Broude, *et al.*, using 'negotiation' as an empirical window found that when countries calibrate and renegotiate their IIA, they tended to show a "greater tendency to limit investor protections in ISDS provisions".<sup>66</sup> Moehlecke, using an 'informational mechanism', explains how investors use ISDS to slow down the spread of legislation that impact their business.<sup>67</sup> Hence, it would not be far-fetched to conclude from

Van Harten and Scott's, Broude, *et al.*'s and Moehlecke's research that there is a distinct concern amongst States about the impact of regulatory chill on their regulatory space and that they are trying to recalibrate their obligations under the IIA so as to lessen the impact.

Another cause of regulatory chill worth mentioning arises from investment contracts between the host State and the foreign investor rather than from IIA between States. Such contracts may include stabilisation clauses that restrict the host government's regulatory space.<sup>68</sup> Whilst it is understandable that investors would seek political and regulatory stability to ensure that their investment is secure and economically viable, the flip side is that these clauses can impede "the ability of host states to regulate for the common good"<sup>69</sup> thus generating a regulatory chill effect.

## 2.2. Cities Forging Ahead

*"Climate Change is one of the greatest challenges mankind has ever faced. In this ongoing race against time, the cities of the world have a key role to play both as pioneers and prescribers."*

Anne Hidalgo, Mayor of Paris and Chair of C40<sup>70</sup>

Cities have grown exponentially during this past century and the trend of rapid urbanisation and the

<sup>60</sup> Matthew C Porterfield and Christopher R Byrnes, 'Philip Morris V. Uruguay: Will Investor-State Arbitration Send Restrictions on Tobacco Marketing up in Smoke?' (*Investment Treaty News*, 2011) <<https://cf.iisd.net/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/>> accessed 9 July 2020.

<sup>61</sup> Gruszczynski; Johnston; Olivet and Villareal (n 26).

<sup>62</sup> Christine Côté, 'The Chilling Effect of Globalization: A Look at the Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment' (PhD thesis, LSE, February 2014).

<sup>63</sup> Van Harten and Scott (n 53).

<sup>64</sup> Côté (n 62).

<sup>65</sup> Van Harten and Scott (n 53).

<sup>66</sup> Tomer Broude, Yoram Z Haftel and Alexander Thompson, 'Legitimation Through Renegotiation: Do States Seek More Regulatory Space in Their BITs?' [2017] SSRN Electronic Journal, 23; see also Tomer Broude, *et al.*, 'Who Cares about Regulatory Space in BITs? A Comparative International Approach', in Anthea Roberts, *et al.* (eds) *Comparative International Law* (Oxford Scholarship Online 2018).

<sup>67</sup> Carolina Moehlecke, 'Uncertainty, Information and Risk: How Investor-State Disputes Affect Global Policy Diffusion'

<<https://www.internationalpoliticaleconomy.com>

[g/sites/default/files/paper-uploads/2017-11-15-13:12:40-cmoehlecke@utexas.edu.pdf](https://www.internationalpoliticaleconomy.com/sites/default/files/paper-uploads/2017-11-15-13:12:40-cmoehlecke@utexas.edu.pdf)>; Carolina Moehlecke, 'The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty' (2020) 64 *International Studies Quarterly* 1.

<sup>68</sup> For an interesting discussion on the complex issue of stabilisation clauses, see Lorenzo Cotula, 'Regulatory Takings, Stabilisation Clauses and Sustainable Development' [2008] OECD Investment Policy Perspectives 69; Lorenzo Cotula, 'Reconsidering Sovereignty, Ownership and Consent in Natural Resource Contracts: From Concepts to Practice' in M Bungenberg *et al.* (eds), *European Yearbook of International Economic Law, Vol 9* (Springer 2018).

<sup>69</sup> Cotula, 'Regulatory Takings, Stabilisation Clauses and Sustainable Development' (n 68)80; Texaco Overseas Petroleum Company and California Asiatic Oil Company v The Government of Libyan Arab Republic 19 January 1977, 53 ILR 839, held that "nationalisation cannot prevail over an internationalised contract, including stabilisation clauses" [73]. This decision was followed in *Government of Kuwait v American Independent Oil Co (Aminoil)* 24 March 1982, 21 ILM 976.

<sup>70</sup> quoted from Julia Lipton *et al.*, 'Cities Leading the Way: Seven Climate Action Plans to Deliver on the Paris Agreement' (*C40 Cities Climate Leadership Group*, 2018) 1,2 <[www.resourcecentre.c40.org](http://www.resourcecentre.c40.org)> accessed 20 July 2020.



growth of cities is set to continue. India, Southeast Asia, Africa, and South America are projected to have several new 'mega-cities' housing populations exceeding 10 million and with some cities projected to exceed populations of 30 million.<sup>71</sup> Cities are no doubt the "drivers of innovation and entrepreneurship that account for a disproportionately strong share of a country's GDP per capita"<sup>72</sup>, but they are also the cause of extensive environmental impact, especially if one considers their supply chain impacts and total ecological footprint.<sup>73</sup>

More than half of the world's population now live in cities and it is estimated that by 2050 this will increase to two-thirds of the world's population.<sup>74</sup> As Barber notes, the nation-state is failing its citizens on a global scale and the city as the "human habitat of first resort has in today's globalising world once again become democracy's best hope."<sup>75</sup> He believes that cities are "where creativity is unleashed, community solidified and citizenship realised" and if "we are to be rescued, the city rather than the nation-state must be agent of change."<sup>76</sup>

Answering the clarion call for climate change, many cities are taking the lead<sup>77</sup> as they realise that they are both the drivers of global environmental change as well as potential victims of it.

The focal areas<sup>78</sup> for cities as they reduce their greenhouse gas (GHG) emissions are:

- a) energy – moving away from fossil fuels to renewable energy;

- b) transport and urban planning – reducing the reliance on vehicles powered by fossil fuels, next generation vehicles such as electric cars, investment in improving mass transit systems to use renewable energy, encouraging the use of bicycles, pedestrianising large parts of the city centre to encourage walking and limiting vehicular access;
- c) construction and building energy efficiency – improving on building standards, retrofitting old buildings to meet as close as possible the new building standards, using sustainable materials for low carbon and sustainable construction, sourcing new type of materials (e.g., new cement);
- d) solid waste management – minimising waste for incineration, less use of landfills, maximising resource reuse; and
- e) consumer goods – reducing consumption to sustainable levels, looking for new sources of food and potential divestment from big agriculture and cattle farming.

Examples of cities forging ahead are numerous.<sup>79</sup> In the area of sustainable mobility, cities like Stockholm, Copenhagen, New York City and Bogota have prioritised public transport, cycling and walking. They have re-designed their cities by creating segregated bicycle lanes to encourage people to cycle within the city. Barcelona's public electricity distributor aims to supply its customers with 100% renewable energy, Co-

<sup>71</sup> '68% of the World Population Projected to Live in Urban Areas by 2050, Says UN' (*United Nations Department of Economic and Social Affairs*, 2018)

13<<https://www.un.org/development/desa/en/news/population/2018-revision-of-world-urbanization-prospects.html>>accessed 4 August 2020.

<sup>72</sup> Victoria C Elliot (ed), 'Competitive Cities and Climate Change', *2nd Annual Meeting of the OECD Roundtable Strategy for Urban Development October 9-10, 2008, Milan, Italy* (OECD International Conference 2008), 4 <<http://www.oecd.org/fr/gov/politique-regionale/competitivitesandclimatechangemilanconference9-10october2008.htm>> accessed 26 May 2020.

<sup>73</sup> Lamia Kamal-Chaoui and Alexis Robert (eds), 'Competitive Cities and Climate Change' [2009] OECD Regional Development Working Papers No 2, 9 <<https://www.oecd-ilibrary.org/docserver/218830433146.pdf?expires=1600700780&id=id&accname=guest&checksum=E5ACA7BA284300169F63F5248C7A55F9>>accessed 26 May 2020.

<sup>74</sup> '68% of the World Population Projected to Live in Urban Areas by 2050, Says UN' (n 71).

<sup>75</sup> Benjamin R Barber, *If Mayors Ruled the World: Dysfunctional Nations, Rising Cities* (Yale University Press 2013) 3.

<sup>76</sup> *ibid* 4.

<sup>77</sup> 'Summary for Urban Policy Makers: What the IPCC Special Report on Global Warming of 1.5°C Means for Cities Urban Policy Makers' (2018) <[https://www.globalcovenantofmayors.org/wp-content/uploads/2019/02/Summary-for-Policy-Makers\\_Final\\_Online.pdf](https://www.globalcovenantofmayors.org/wp-content/uploads/2019/02/Summary-for-Policy-Makers_Final_Online.pdf)>accessed 23 July 2020.

<sup>78</sup> C40 Cities Climate Leadership Group "1.5°C Cities: the why, what and how of urban climate leadership" Policy Brief October 2019 <[www.c40knowledgehub.org/s/article/1-5-C-Cities-the-why-what-and-how-of-urban-climate-leadership?language=en\\_US](http://www.c40knowledgehub.org/s/article/1-5-C-Cities-the-why-what-and-how-of-urban-climate-leadership?language=en_US)>accessed on 23 July 2020.

<sup>79</sup> following examples of cities' climate action plans extracted from Realdania, C40 Cities and Nordic Sustainability, '100 City Projects Making the Case for Climate Action' [2019] <[www.climaterealityproject.org/sites/default/files/cities100\\_2019\\_report.pdf](http://www.climaterealityproject.org/sites/default/files/cities100_2019_report.pdf)>accessed 20 July 2020.

penhagen is taking a holistic approach and is encouraging low carbon innovation in the city so that it can achieve its ambitious goal of being carbon neutral by 2025, Hong Kong is installing hydropower and floating solar power systems in its reservoirs and London is (through incentives) encouraging its Borough residents to have solar panels installed on their roofs.

In the area of building energy efficiency, New York City has passed legislation in May 2019 that will require 50,000 of its largest buildings to take significant carbon cutting measures to ensure that it meets its policy goals of eliminating 6 million tonnes of carbon emissions by 2030.<sup>80</sup> Paris has embarked on the ambitious goal of retrofitting its entire housing stock within 30 years, Tokyo is ratcheting up its cap-and-trade scheme with stronger targets and mechanisms to increase the use of renewable energy,<sup>81</sup> and Washington D.C. has recently enacted the Building Energy Performance Standards (BEPS) to target energy efficiency as part of its Clean Energy DC roadmap<sup>82</sup> to halve the city's carbon emissions by 2032.

### 2.3. Threats to State and City from ISDS

In order for cities to march forward assertively with their plans, they need an injection of both local and foreign investment. However, investment, especially FDI, comes with risks and pitfalls.

As argued above, regulatory chill impacts the State's regulatory space directly and indirectly. This lack of freedom to regulate at will due to commitments in IIA can have a knock-on effect on the State's cities. With the exception of city-states such as Singapore, Monaco, the Vatican City and several small island states, most cities have devolved powers granted by the

State government whether in a dual level or multi-level mode of government.

Whilst cities are given powers to regulate within their boundary, they have traditionally been side-lined with regard to participation in trade and investment regimes. They have had "their participation framed as disruptive of the status quo" whilst their States have been the central and "traditional" actor in the deliberations in the current framework of multilateral trade negotiations.<sup>83</sup> Despite being side-lined, cities have used their devolved powers to assert themselves and take action for the benefit of their inhabitants, sometimes with the effect of triggering or giving rise to the threat of an ISDS case being launched against their States.<sup>84</sup>

In *Vattenfall (I)*<sup>85</sup> and *Novera*<sup>86</sup>, Hamburg and Sofia, respectively, asserted their powers in their city's interests despite the obligations their States may have had under the IIA. In *Vattenfall (I)*, the city of Hamburg granted a provisional permit to the Swedish company Vattenfall to build a coal-fired plant. However, in the final permit of approval, additional restrictions were included to lessen the impact of the power plant on the Elbe River. Vattenfall alleged that these additional and more stringent requirements violated the Energy Charter Treaty<sup>87</sup> and instituted a claim against Germany. The claim was subsequently settled, and Hamburg had to agree to lowering its environmental standards.<sup>88</sup> In *Novera's* case, Novera, having acquired three companies which held concession agreements for waste management in Sofia, became solely responsible for all cleaning operations in the city. Due to disputes regarding payments and service delivery, Novera stopped cleaning the city, causing waste to pile up and roads to become blocked with uncleared snow. In response, Sofia's Municipal

<sup>80</sup> New York City Climate Mobilization Act, a package of 6 bills (including Bill: Int 1253 establishing emissions caps for buildings over 25,000 square feet).

<sup>81</sup> Realdania (n 79); see also An analysis of the contribution U.S. C40 cities can make to delivering the Paris Agreement objective of limiting global temperature rise to 1.5 degrees Celsius <[https://c40-production-images.s3.amazonaws.com/researches/images/62\\_C40\\_DL2020\\_America\\_ordinal.pdf?1484666230](https://c40-production-images.s3.amazonaws.com/researches/images/62_C40_DL2020_America_ordinal.pdf?1484666230)>; Deadline 2020: How cities will get the job done <[https://www.c40.org/other/deadline\\_2020](https://www.c40.org/other/deadline_2020)>both accessed 12 August 2020.

<sup>82</sup> District of Columbia B22-0904 – Clean Energy DC Omnibus Amendment Act of 2018.

<sup>83</sup> Ohio Omiunu, 'Asymmetries in Trade and Investment Regimes in the Age of COVID-19 and beyond: A Reflection on Subnational Government Marginalisation and Resistance within the Trade and Investment Governance Structures' (*AfronomicsLAW*, 2020) 1 <https://www.afronomicslaw.org/2020/08/26/asymmetri>

[es-in-trade-and-investment-regimes-in-the-age-of-covid-19-and-beyond-a-reflection-on-subnational-government-marginalisation-and-resistance-within-the-trade-and-investment-governance-structure/](https://www.afronomicslaw.org/2020/08/26/asymmetri) accessed 26 August 2020.

<sup>84</sup> *ibid.*

<sup>85</sup> *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany* (ICSID Case No. ARB/09/6) (Settled) ["Vattenfall (I)"].

<sup>86</sup> *Novera AD, Novera Properties B.V. and Novera Properties N.V. v. Republic of Bulgaria* ARB/12/16 July 3, 2012 August 27, 2015 (Settled) ["Novera"].

<sup>87</sup> Energy Charter Treaty 2080 UNTS 100, registered on 30 September 1999, with the UN Secretariat in accordance with Article 102 of the UN Charter with No. 36116 and 36117 at <[www.encharter.org](http://www.encharter.org)>accessed 14 August 2020 ["ECT"].

<sup>88</sup> 'Key Cases\_ISDS Platform' (2020) 1,6 <<http://isds.bilaterals.org/?-key-cases>>accessed 27 July 2020.

Council terminated the concessions. Novera alleged that Bulgaria had expropriated its investment and was in breach of its IIA obligations and the corporation launched a claim against Bulgaria.<sup>89</sup> In both cases, the matter was eventually settled and, despite being hindered by the State's obligations under the IIA, the cities proceeded ahead with action to protect their citizens' public interests. However, the ramifications in both cases was that the State was held responsible for the cities' action.

As seen in Section **Error! Reference source not found.** above, cities with ambitious goals for climate action are moving forward to try to meet them and are pushing against legal boundaries. Such ambition can expose their State to risk. Under the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts,<sup>90</sup> a State can be held responsible for the acts of the organ of the State.<sup>91</sup> Investors tapping on the IIA to institute an ISDS case will rely on the ILC Articles to hold the State responsible for their cities' actions. In fact, in *UPS v Canada*,<sup>92</sup> the investor argued that the conduct of Canada Post (a postal entity created by Statute) should be attributed to Canada based on the test for attribution in ILC's Articles 4 and 5.<sup>93</sup> On the facts the tribunal rejected the investor's argument and held that the ILC Articles did not apply in this case.<sup>94</sup> However, other tribunals may well decide differently and hold the State responsible for the conduct of their entities. In relation to some claims, the way the tribunals have interpreted the plea of "necessity"<sup>95</sup> and "countermeasures"<sup>96</sup> has also been a subject of concern.<sup>97</sup>

As demonstrated by *UPS v Canada*, even where IIA have an exception that allow States to take measures that are "necessary" for the protection of its own security interests, tribunals have conflated the necessity conditions of ILC Article 25 with the treaty exception hence interpreting it in a very restrictive manner. This "problematic election to conflate" proved fatal for Argentina's defence.<sup>98</sup> In the *CMS*,<sup>99</sup> *Enron*<sup>100</sup> and *Sempra*<sup>101</sup> cases, the respective tribunals in arriving at their decision to reject Argentina's defence of necessity believed that the action Argentina took was not the only way it could have safeguarded its interests.<sup>102</sup> As observed by Kurtz, this restrictive interpretation is problematic because "it is always possible to conceive of multiple, hypothetical responses to complex events such as financial crisis, rendering the treaty exception all but redundant."<sup>103</sup>

With regard to the countermeasures defence, in *Corn Products*<sup>104</sup>, the Tribunal rejected Mexico's argument that the tax imposed on soft drinks and syrup that did not contain the cane sweetener produced by Mexico was in response to the USA's failure to keep to their obligation under NAFTA to increase market access for Mexican sugar.<sup>105</sup>

Whilst the afore-mentioned case dealt with measures taken by the Mexican State government and not a city in Mexico, it is not far-fetched to imagine a situation arising whereby a city could realise that its investment incentives conceived in good faith to catalyse climate action are no longer viable. In such an instance, the

<sup>89</sup> Anton Petrov, 'Bulgaria' in Csongor Istvan Nagy (ed), *Investment Arbitration In Central And Eastern Europe* (Edward Edgar Publishing 2019) 48.

<sup>90</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10, chap.IV.E.1, U.N. Doc A/56/10 available at <[www.refworld.org/docid/3ddb8f804.html](http://www.refworld.org/docid/3ddb8f804.html)>accessed 13 August 2020. ["ILC Articles"].

<sup>91</sup> *ibid* Articles 4 and 5 ILC Articles. See also Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001 <[https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)>; James Crawford, "Articles on Responsibility of States for Internationally Wrongful Acts." (*UN Audiovisual Library of IL* (2012)) <[https://legal.un.org/avl/pdf/ha/rsiwa/rsiwa\\_e.pdf](https://legal.un.org/avl/pdf/ha/rsiwa/rsiwa_e.pdf)>all accessed on 13 August 2020.

<sup>92</sup> *United Parcel Service of America Inc. v. Canada*, Award on the Merits (NAFTA Chapter 11 Arbitration, 11 June 2007) ["*UPS v Canada*"].

<sup>93</sup> *ibid* [47-48].

<sup>94</sup> *ibid* [78].

<sup>95</sup> ILC Articles (n 89) Article 25.

<sup>96</sup> *ibid* Article 49.

<sup>97</sup> Jürgen Kurtz, 'The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration' (2010) 25 *ICSID Review* 200.

<sup>98</sup> *ibid* 213.

<sup>99</sup> *CMS Gas Transmission Company v. Argentine Republic*, Award (ICSID Case No. ARB/01/8, May 12, 2005) ["*CMS*"].

<sup>100</sup> *Enron Corporation Ponderosa Assets L.P. v. Argentine Republic*, Award (ICSID Case No. ARB/01/3, May 22, 2007) ["*Enron*"].

<sup>101</sup> *Sempra Energy International v. Argentine Republic*, Award (ICSID Case No. ARB/02/16, Sept. 28, 2007) ["*Sempra*"].

<sup>102</sup> Flavia Marisi, *Environmental Interests in Investment Arbitration Challenges and Directions* (Kluwer Law International 2020)153-157.

<sup>103</sup> Kurtz (n 97) 214.

<sup>104</sup> *Corn Products International, Inc. v. Mexico*, Decision on Responsibility (ICSID Case No. ARB(AF)/04/1, Jan. 15, 2008) ["*Corn Products*"].

<sup>105</sup> Kurtz (n 97) 215.



city might start retracting these incentives and inadvertently open the way for foreign investors to institute claims against the city's State.

Renewable energy is a sector where local governments are proactively seeking more sustainable ways of powering their cities. The ECT's obligations for its State parties has been somewhat troublesome as can be seen by the numerous renewable energy cases that have been instituted under the ECT against Spain, the Czech Republic, and Italy.<sup>106</sup> These cases demonstrate that it can be a minefield for the State government when there is a reversal of policy or retraction of incentives provided to foreign investors. The common theme running through these cases<sup>107</sup> was that these three countries were granting ambitious incentives to promote investments in this sector. However, due to a change of circumstances and budgetary implications on the host countries, they changed their laws governing the incentives and revoked them. In *Eiser*,<sup>108</sup> *CEF Energia*,<sup>109</sup> *Greentech Energy*<sup>110</sup> and *Natland Investment Group*,<sup>111</sup> the tribunals found in favour of the investor. These tribunals held that Spain, Italy, and the Czech Republic, respectively, had breached the FET provisions under the ECT and that the investors were entitled to have legitimate expectations that their investments would not be impacted by the countries' change of policy and law. Cities could find themselves mired in such circumstances if they actively promote FDI to invest in this sector by offering incentives from which they may need to backtrack.

It cannot be denied that there have also been cases that were decided in favour of the State,<sup>112</sup> but this in itself can cause uncertainty as the cities would not be able to rely on previous awards as a basis for risk assessment when implementing policies in the public interest since ISDS tribunals are not bound by the decisions in past awards.

In the environmental, essential services and health arenas, tribunals have similarly held in favour of the investor despite recognising that the action taken by the host State was motivated by public interest, health and safety.

In *Azuriz*,<sup>113</sup> the claimant claimed expropriation of its investment and violation of FET alleging that the provincial government of Buenos Aires had not allowed it to increase the water tariffs and had not invested in the water infrastructure. The tribunal, in unanimously finding in favour of the investor, held that "the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim."<sup>114</sup>

Unfortunately, ISDS jurisprudence has been chaotic in the way it has assessed the FET obligation on States, and tribunals have adopted diverse interpretations of the FET standard.<sup>115</sup> Some tribunals have imposed a low threshold<sup>116</sup> for violating the FET standard whilst others have imposed a higher standard.<sup>117</sup> Such confusion in the jurisprudence does not

<sup>106</sup> cases against Spain-47, Italy-12, Czech Republic-6, statistics from EnergyCharter.org <<https://www.energycharter.org/cases/statistics/>>accessed 20 August 2020.

<sup>107</sup> Schacherer (n 41)15-17.

<sup>108</sup> *Eiser* (n 45).

<sup>109</sup> *CEF Energia B.V. v. The Italian Republic, SCC Arbitration V (2015/158)* ["*CEF Energia*"].

<sup>110</sup> *Greentech Energy Systems A/S & Ors. v. The Italian Republic, SCC Arbitration V (2015/095)* ["*Greentech Energy*"].

<sup>111</sup> *Natland Investment Group N.V., Natland Group Limited, G.I.H.G. Limited and Radiance Energy Holding S.à.r.l v. Czech Republic, PCA Case 2013-35* ["*Natland Investment Group*"].

<sup>112</sup> for example *-Isolux Netherlands, BV v. Kingdom of Spain, SCC Case V2013/153* (the tribunal held that there was no breach of the FET provision as Isolux being a savvy investor ought to have known that the renewable energy regulatory framework was undoing change and it was the risk they had taken); *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3* (the tribunal held Italy had not made special commitments with respect to the extension and

operation of feed-in tariffs, nor did it specifically ensure that relevant laws would remain unchanged); *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic, PCA Case No. 2014-01* (the tribunal held there had been no breach of FET and that the claimant should have known that changes to the existing regime were imminent).

<sup>113</sup> *Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award (July 14, 2006)* ["*Azurix*"].

<sup>114</sup> *ibid* [310].

<sup>115</sup> Ying Zhu, 'Fair and Equitable Treatment of Foreign Investors in an Era of Sustainable Development' (2018) 58 *Natural Resources Journal* 319, 328, table 1 - a concise depiction of general thresholds of FET in environmental-related investment disputes.

<sup>116</sup> in *Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, (May 29, 2003)* – the tribunal adopted a low threshold for determining a violation of the FET standard by imposing a long list of requirements on the host State.

<sup>117</sup> in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanz., ICSID Case No. ARB/05/22, Award, (July 24, 2008)*- the tribunal opined that the threshold for a violation of the FET standard is high and it required "a gross denial of justice or manifest arbitrariness falling below acceptable international standards" [597-598].



bode well for the States and especially for cities who just want to build momentum and get on with ensuring that their climate action initiatives meet the goals that they have set.

In cases where new legislation designed to protect local communities could mean lower profits for investors, investors may threaten to invoke ISDS if they are not offered compensation for their alleged losses. For example, cities' attempt to reduce GHG emissions could mean that they put in measures to control private cars from flooding into the city.<sup>118</sup> However, such measures could have an impact on private hire cars such as those that are on Uber networks. In fact, Colombia has recently ordered Uber to cease its ride-hailing operations and banned the Uber internet platform after a judge ruled the company violated competition rules.<sup>119</sup> Uber Technologies and its Colombian subsidiary, Uber Colombia, have threatened subsequently to initiate arbitration proceedings against Colombia under the Colombia-US Trade Promotion Agreement.<sup>120</sup>

#### **2.4. Can Climate Action and International Investment Law (IIL) be Complementary?**

Intriguingly, the renewable energy cases that occurred in Spain, Italy, and the Czech Republic show that IIL can be used as a sword as well as a shield in relation to environmental policy-related issues and regulations.<sup>121</sup> Investors in the renewable energy cases have used the fact that the countries were motivated to promote environmentally sound policies to claim losses that they had allegedly incurred due to incentives being withdrawn or recalibrated by these countries.<sup>122</sup> Similarly, host countries have used IIL's defences as a 'shield' against these claims, and have

also used environmental policy-related issues as a 'sword' to counterclaim against investors.<sup>123</sup>

IIA are seen as admission tickets to international investment markets and their limiting impact on state sovereignty, as controversial as it may be, is a "necessary corollary to the objective of creating an investment-friendly climate."<sup>124</sup> Boute<sup>125</sup> argues that the focus on the regulatory chill aspect of investment arbitration has taken away the attention from the potential positive contribution that IIL can make to combat climate change. She believes that private capital and technology are "indispensable to reorient the world economy towards more climate-friendly patterns."<sup>126</sup> In fact, she argues that climate law and investment law are complementary and mutually reinforcing and that they both aim to promote investments; climate law by creating "incentives to enable financial viability of low carbon investments" whilst investment law "aims to promote investment by protecting it against non-commercial risk."<sup>127</sup> She considers that the comparable principles have been developed in climate and investment law to attain the objective of promoting investment.<sup>128</sup> The argument being that States attract investors with the promise of financial incentives, thus creating the expectation amongst investors that their investments will be protected; in Boute's words, "[c]limate law creates rights and expectations, while investment law aims to protect them."<sup>129</sup>

However, the alternative view questions whether there is a causal link between the existence of IIA and

<sup>118</sup> Oliver Griffin, 'Bogota's Streets Traffic-Free as Private Cars Banned for the Day' (*Reuters*, 2020) 1 <<https://uk.reuters.com/article/us-colombia-no-car-day/bogotas-streets-traffic-free-as-private-cars-banned-for-the-day-idUKKBN2002FM>>accessed 15 August 2020.

<sup>119</sup> Nelson Bocanegra, 'Colombia Orders Uber to Cease Ride-Hailing, Cites Competition Rules Violation' (*Reuters*, 2019) 8 <<https://www.reuters.com/article/us-colombia-uber/colombia-orders-uber-to-cease-ride-hailing-cites-competition-rules-violation-idUSKBN1YP00R>>accessed 7 August 2020.

<sup>120</sup> Lisa Bohmer and Luke Eric Peterson, 'Uber Threatens Colombia with Treaty-Based Arbitration after Ban on Use of Its Ride-Sharing App' (*bilaterals.org*, 2020) 4 <<https://www.bilaterals.org/?uber-threatens-colombia>>accessed 7 August 2020.

<sup>121</sup> Jeff Sullivan and Valeriya Kirsey, 'Environmental Policies: A Shield or a Sword in Investment Arbitration?' (2017) 18 *Journal of World Investment and Trade* 100.

<sup>122</sup> Andrea K Bjorklund, "Sustainable Development and International Investment Law" in Kate Miles (ed) *Research Handbook on Environment and Investment Law*. (Edward Elgar Publishing, 2019).

<sup>123</sup> for example, *Perenco v Ecuador*, ICSID Case no. ARB/08/6, Interim Decision on Environmental Counterclaim (11 August 2015) [34], the tribunal held that where a legal relationship can be established between the investor and the host State that allows the filing of a counterclaim, the host State is entitled to full reparation of the environmental damage if such claim is substantiated.

<sup>124</sup> Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edition, Oxford University Press 2012) 14.

<sup>125</sup> Anatole Boute, 'Combating Climate Change Through Investment Arbitration' (2012) 35 *Fordham International Law Journal* 613.

<sup>126</sup> *ibid* 660.

<sup>127</sup> *ibid* 661.

<sup>128</sup> *ibid* 661.

<sup>129</sup> *ibid* 661.

an increased flow of FDI into green investment.<sup>130</sup> It states that there is no qualitative or quantitative data to prove that providing investor protection through IIA will increase investor participation in green investment.<sup>131</sup> Apart from a host State's political and legal framework (of which IIA are a part), other determinants such as the economic viability and the possible incentives offered by the host State impact a company's decision on where to make an investment.<sup>132</sup>

IIL appears to be linked fundamentally with climate change, sustainable development and environmental issues. Undoubtedly, there is a need for economic development and for environmental integrity to be mutually reinforcing and, as the tribunal in *Bilcon*<sup>133</sup> noted, it is possible. However, thus far, the way that reconciliation occurs is often vexing and unsatisfactory<sup>134</sup> and it seems perplexing that IIA fail to take climate change into account.<sup>135</sup>

With regard to dealing with climate action, IIA are a 'double-edged sword' in that, whilst they may help promote green investment, they can also be used to challenge regulatory efforts aimed at reducing GHG.<sup>136</sup> As Tienhaara concludes, if the renewable energy investors win their claims over a change in subsidies provided by the host State, this might incentivise and empower fossil fuel investors to resist attempts by host States to "roll-back on extensive and long standing fossil fuel subsidies." Furthermore, the use of ISDS by investors can also lead to a waste of the host State's resources in having to defend the cases when such resources could be put to better use.<sup>137</sup>

This is particularly relevant in the case of cities. Even though *vis-à-vis* the investor, it is the host State that is held liable for compensation and costs of the ISDS claim<sup>138</sup>, and whilst they cannot force their cities to pay, potentially the State could in other ways (for example by providing less government grants) hold their cities liable for the costs incurred. Cities individually may not have the resources to fend off such challenges, which would take away precious resources from their climate action plans and other public interest policies. Furthermore, State governments may 'persuade' their cities not to proceed with such ambitious plans for fear of ISDS challenges, thereby creating the chilling effect on cities' ability to regulate.

It is certainly tempting to believe that there is complementarity between climate action issues and IIL and that it impacts green investment in a positive way. However, putting aside the lack of qualitative or quantitative data to prove this, what can be seen from the plethora of cases in the renewable energy sector is that, it is less about being complementary, but rather more about the strategic and tactical manner in which investors have used the existence of an IIA and the ISDS regime.<sup>139</sup>

### 3. Reforms to "Warm the Chill"?

#### 3.1. IIA – Is it a case of "once BITten, Twice Shy"?

The purpose of IIA was to encourage foreign investment through a development of a legal scheme that

Sustainable Development' in Freya Baetens (ed), *Investment Law Within International Law: Integrationist Perspectives* (Cambridge University Press 2013).

<sup>133</sup> *Bilcon* (n 40) [597].

<sup>134</sup> *Bjorklund* (n 122) 68.

<sup>135</sup> Daniel B Magraw and Sergio Puig, 'Greening Investor-State Dispute Settlement' (2018) 59 *Boston College Law Review* 2717.

<sup>136</sup> *Alschner and Tuerk* (n 132).

<sup>137</sup> Tienhaara, 'Does the Green Economy Need Investor-State Dispute Settlement?' (n 130) 311.

<sup>138</sup> Lawrence Herman, 'Federalism and International Investment Disputes' (2011) 1

<<http://www.iisd.org/itn/2011/07/12/federalism-and-international-investment-disputes/>> accessed 20

August 2020; Tienhaara and Downie (n 131), 306 -Notably, in *Windstream Energy LLC v. Government of Canada*, (UNCITRAL (2010) PCA Case No. 2013-22), the provincial government of Ontario voluntarily agreed to pay the award in full instead of the Canadian Federal Government.

<sup>139</sup> for example, *Philip Morris* (n 20).

<sup>130</sup> Kyla Tienhaara, 'Does the Green Economy Need Investor-State Dispute Settlement?' in Kate Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar Publishing 2019). For a discussion on whether the existence of IIA and increased FDI flows are linked, see also Axel Berger, 'Financing Global Development: Can Foreign Direct Investments Be Increased through International Investment Agreements?' (2015) German Development Institute Briefing Paper 9/2015; Lauge Poulsen, 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence' in K. Sauvant (ed.), *Yearbook on International Investment Law and Policy 2009/2010* (Oxford University Press, 2010), 539; Jason Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence' (2010) 51 *Virginia Journal of International Law* 397.

<sup>131</sup> Kyla Tienhaara and Christian Downie, 'Risky Business? The Energy Charter Treaty, Renewable Energy, and Investor-State Disputes' (2018) 24 *Global Governance* 451; see also *ibid*.

<sup>132</sup> Wolfgang Alschner and Elisabeth Tuerk, 'The Role of International Investment Agreements in Fostering

would protect foreign investment from arbitrary and discriminatory government action that could impact the investment's commercial viability. It was meant to be used as a "shield" and not a "sword".<sup>140</sup> However, States are not helpless and they can always opt out of signing an IIA if they deem that the IIA have such an adverse effect on them. As argued by Werner, "(o)ne of the great fallacies of international relationships is a determinist belief that economic and political circumstances in fact dictate countries' policies, leaving them with no real choice. Quite to the contrary. Countries,... always have choices," and he believes that if countries are unhappy with the way investment arbitration functions, they have the option to opt out of it.<sup>141</sup>

In reviewing and examining the numerous investment arbitration cases that were launched against Argentina in the early 2000s,<sup>142</sup> Alvarez hypothesises that these cases show that the international investment regime is a tool of the State rather than its enemy and does not pose the "fundamental threat to 'sovereignty' that some had hoped and that others had feared".<sup>143</sup> In his opinion, the Argentina "crisis" cases were, paradoxically, lowering the crisis profile of the investment regime.<sup>144</sup>

However, Argentina was badly impacted financially by the ISDS and it did adopt a legal strategy and subsequently a diplomatic strategy to get out of paying the total sum of US\$750million (from the awards from the various cases taken against Argentina).<sup>145</sup>

Whilst it is open to countries to terminate IIA or not renew them as they fall due, they would still have to deal with the issue of the IIA's survival clauses and the impact on countries' economies that require the injection of FDI. There is no doubt that an intervention is necessary if IIA are to continue to be relevant for

all countries that are at the various stages of the development spectrum.

How tribunals interpret the provisions of IIA has been one of the main issues that result in uncertainty and a lack of consistency in arbitral awards. Hence, rather than take drastic steps to withdraw or terminate a treaty, States can perhaps look at improving and strengthening provisions within IIA.

Whilst IIA establish standards of investor treatment, many do not feature investor obligation clauses.<sup>146</sup> However, if they were to be included, tribunals would have to interpret these investor obligation clauses in favour of the State. In *Al-Warrag*<sup>147</sup>, the tribunal found that the investor had breached the provision in the IIA that imposed a specific "obligation on the investor to respect the law of the Host State."<sup>148</sup> As opined by Cotula, "investor obligations clauses can work, and that they can significantly affect the outcome of arbitrations"<sup>149</sup> and "effectively drafted investor obligations clauses could help the state to have an investor-state dispute thrown out due to inadmissibility or lack of jurisdiction; influence the tribunal's decision on the merits of the case; or reduce the amount of compensation due to the investor".<sup>150</sup>

Provisions in IIA can be drafted in such a way that there is little or no room for interpretation by arbitrators. Well-drafted provisions that are clear would also be effective in reducing the chill. Significantly, Morocco in close consultation with UNCTAD<sup>151</sup> recently undertook a thorough review of its model BIT and a new model was published in 2019.<sup>152</sup> Many of its provisions are worded concisely and are innovative. For example, this model BIT places much importance on sustainable development from the outset. Its preamble clearly states Morocco's desire to foster economic development without sacrificing sustainable development in relation to economic, social and environment

<sup>140</sup> Miles (n 22) 281.

<sup>141</sup> Jacques Werner, 'Making Investment Arbitration More Certain: A Modest Proposal' (2003) 4 *Journal of World Investment and Trade* 767-769.

<sup>142</sup> for discussion of Argentinian cases see José E Alvarez and Kathryn Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime' [2009] *The Yearbook on International Investment Law and Policy 2008/2009*.

<sup>143</sup> Alvarez and Topalian (n 3) 495,543.

<sup>144</sup> *ibid*.

<sup>145</sup> Shane Romig, 'Interview: Argentina Seeks Diplomatic Exit from ICSID Suits' (*Bilaterals.org*, 2007) 1 <<http://www.bilaterals.org/?interview-argentina-seeks>>accessed 10 July 2020.

<sup>146</sup> Lorenzo Cotula, 'Raising the Bar on Responsible Investment: What Role for Investment Treaties?' [2018] *IIED* 1.

<sup>147</sup> Hesham TM Al Warraq v Republic of Indonesia, UN-CITRAL, Award (15<sup>th</sup> December 2014).

<sup>148</sup> *ibid* [663].

<sup>149</sup> Lorenzo Cotula, 'Human Rights and Investor Obligations in Investor-State Arbitration' (2016) 17 *Journal of World Investment and Trade* 148,155-156.

<sup>150</sup> Cotula, 'Raising the Bar on Responsible Investment: What Role for Investment Treaties?' (n 147) 3.

<sup>151</sup> United Nations Conference on Trade and Development.

<sup>152</sup> Morocco Model BIT adopted 1 June 2019 <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/142/morocco>>accessed 12 July 2020.



policies and objectives. Whilst it is true that a treaty's preamble does not create binding obligations on parties, it does however provide clarity on the parties' intentions, which can be a useful guide when interpreting the substantive provisions of the treaty.<sup>153</sup> Furthermore, rather than leave it vague and expansive, the fair and equitable treatment (FET)<sup>154</sup> provision has been carefully drafted to include an exhaustive list of obligations, the breach of which would constitute a violation of FET. This model BIT also places obligations and responsibilities on the investor namely, the investments must be managed in accordance to the parties' international obligations in relation to the environment, labour and human rights.<sup>155</sup> The Morocco model BIT also incorporates novel ISDS provisions which impose a time bar on claims, circumscribes the scope of ISDS and requires the investor to exhaust local remedies before initiating international arbitration.<sup>156</sup>

Notably, the Morocco model BIT has sought to be more innovative than some newly minted and so-called "new generation" IIA. Where the equally recent Dutch Model BIT<sup>157</sup> has been criticised<sup>158</sup> for its lack of ambition with regard to sustainable development and its failure to fully address and protect the environment, labour and human rights, the Morocco Model BIT has sought to explicitly deal with such issues. It shows Morocco's commitment to prioritise sustainable development whilst trying to strike a balance between investor rights and the safeguarding regulatory space.<sup>159</sup>

Other recent IIA are also making inroads in refining and evolving their provisions with regard to expropriation and the ISDS clause. The 2016 EU-Canada Comprehensive Economic Trade Agreement (CETA)

explicitly provides for the right to regulate in the area of health, safety and the environment, provides a detailed and specific definition of the FET clause and excludes the most favoured nation clause.<sup>160</sup> Additionally, precise drafting of obligation clauses together with the use of broad general exception clauses would also go towards addressing criticisms of IIA<sup>161</sup> as well as carve-outs of certain industries.

A further option could be to omit ISDS provisions altogether from the IIA. Fourteen out of the fifteen IIA that were concluded in 2019 featured provisions that either omitted the ISDS provisions or at least put some limits on the operation of these ISDS provisions.<sup>162</sup>

### 3.2. Exception Clauses

Wilensky<sup>163</sup>, in reviewing the now defunct Trans-Pacific Partnership agreement, proposes several interesting clauses that potentially could be inserted to safeguard climate change related regulations. Apart from including general safeguard provisions, States could include climate specific exception clauses. These clauses could ensure that climate change measures that are implemented in good faith cannot be challenged and, if challenged, proof of good faith would be sufficient to dismiss the challenge. Moreover, clauses could be included that try to balance environmental obligations that States may have under other international climate change treaties with obligations under the IIA.<sup>164</sup>

<sup>153</sup> Vienna Convention on the Law of Treaties, signed 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331, Article 31.

<sup>154</sup> Morocco Model BIT (n 153) Article 6.

<sup>155</sup> *ibid* Article 18.

<sup>156</sup> *ibid* Article 32.

<sup>157</sup> Netherlands Model BIT (2018), <[www.acerislaw.com/wp-content/uploads/2018/07/Netherlands-Model-BIT-Draft.pdf](http://www.acerislaw.com/wp-content/uploads/2018/07/Netherlands-Model-BIT-Draft.pdf)> accessed 12 July 2020.

<sup>158</sup> Bart-Jaap Verbeek and Roeline Knottnerus, 'The 2018 Draft Dutch Model BIT: A Critical Assessment' (*Investment Treaty News*, 2018)

<<https://cf.iisd.net/itn/2018/07/30/the-2018-draft-dutch-model-bit-a-critical-assessment-bart-jaap-verbeek-and-roeline-knottnerus/>> accessed 17 June 2020.

<sup>159</sup> Hamed El-Kady and Yvan Rwananga, 'Morocco's New Model BIT: Innovative Features and Policy Considerations' (*Investment Treaty News*, 2020) 20 <<https://www.iisd.org/sites/default/files/publications/iisd-itn-june-2020-english.pdf>> accessed 17 June 2020.

<sup>160</sup> Maria A Gwynn, 'Balancing The State's Right To Regulate with Foreign Investment Protection: A Perspective Considering Investment Disputes in the South American Region' (2018) 6 *Groningen Journal of International Law* 110, 121-123 (tables 2 and 3)- summary of how the expropriation and ISDS clauses have evolved.

<sup>161</sup> Simon Lester and Bryan Mercurio, 'Safeguarding Policy Space in Investment Agreements' [2017] *IIEL Issue Brief* 12/2017 1,3.

<sup>162</sup> UNCTAD, "The Changing IIA Landscape: New Treaties and Recent Policy Developments", *IIA Issues Note* 1, July 2020, <<https://unctad.org/en/PublicationsLibrary/di-aepcbinf2020d4.pdf>> accessed on 10 July 2020.

<sup>163</sup> Meredith Wilensky, 'Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures Under the Trans-Pacific Partnership' (2015) 45 *Environmental Law Reporter* 10683.

<sup>164</sup> *ibid* 10693.



Decisions in cases like *Santa Elena*<sup>165</sup> and *S.D. Myers*<sup>166</sup>, where the tribunals were unwilling to relieve the host country from the obligations under the IIA due to competing obligations under other non-investment related international treaties, reinforce the importance of having provisions that address competing international obligations. Clauses such as the FET obligation and indirect expropriation could be drafted such that the investor must show proof of written and binding documents from the host State that invoked legitimate expectations on the part of the investor which were then violated by the State's implementation of climate change related regulations.<sup>167</sup>

### 3.3. ISDS Regime Reform

Critics of the ISDS regime such as Sornarajah have called for drastic changes to the existing regime, believing that “[w]iping the slate clean seems to be the only possible way forward.”<sup>168</sup> Recognising that there is a need to reform of the ISDS regime, UNCITRAL has been given the mandate to look into the various issues that have plagued this regime.<sup>169</sup> Issues such as, *inter alia*, the lack of certainty, consistency, coherence, correctness of arbitral awards and issues revolving round arbitrators’ code of conduct.

The EU has been vocal in its support of a Multilateral Investment Court (MIC) as a judicial “standing mechanism for the settlement of investment disputes”.<sup>170</sup> As ISDS tribunals are presently set up on an *ad-hoc* basis, the MIC is meant to be a permanent tribunal of first instance and an appeals tribunal. In brief, the appeals tribunal would have the power to review the decisions issued by the tribunal of first instance on the basis of an error of law, manifest mis-appreciation of facts or serious procedural shortcomings. There would be a permanent body of highly qualified judges

obliged to adhere to the strictest ethical standards and who would be assigned cases on a random basis. There would be gender representation amongst tribunal judges, and they would come from diverse geographical regions.<sup>171</sup>

The EU and its Member States argue that cost and time will be saved because there would be no need to spend time appointing arbitrators and because judges would not be motivated to protract hearings unnecessarily since they would not be paid in accordance with the time spent on the case. As for the issues of independence and lack of transparency, the disputing parties would not be able to choose the adjudicators that will hear their case. Instead, hearings would be held in open court, with third parties being able to make submissions and decisions being published subsequently.<sup>172</sup>

Whilst the establishment of a MIC seems a solution that could deal with many of the issues that plague the ISDS regime, such as transparency, consistency of decisions, independence of the adjudicators and consideration of third-party rights, many countries are not in favour of establishing a completely new regime. Upon examination of several of the proposals that countries have submitted,<sup>173</sup> there is no clear consensus on the way forward and there are many who simply do not support a MIC.

Another proposed reform that seems popular in varied forms with many countries including China, Japan, and Chile is an appellate system.<sup>174</sup> It bears some similarities to the MIC in that it is premised on the idea that there would be a body of permanent adjudicators with the jurisdiction to review arbitral awards on their merits, and parties will not get to

<sup>165</sup> *Compania del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, 39 I.L.M. (2000) [Santa Elena] [1329] “[T]he purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid.”

<sup>166</sup> *S.D. Myers v. Canada*, NAFTA UNCITRAL, Final Award (30 December 2002) [195] “Insofar as there was an indirect environmental objective—to keep the Canadian industry strong in order to assure a continued disposal capability—it could have been achieved by other measures”.

<sup>167</sup> Wilensky (n 164) 10694, 10698.

<sup>168</sup> Sornarajah, ‘Resistance and Change in the International Law on Foreign Investment’ (n 1) 408.

<sup>169</sup> Report of the United Nations Commission on International Trade Law Fiftieth session (3-21 July 2017) *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)* para 263-264.

<sup>170</sup> UNCITRAL Working Group III ‘Possible reform of investor-State dispute settlement (ISDS)’ Submission from

the European Union and its Member States A/CN.9/WG.III/WP.159/Add.1.

<sup>171</sup> *ibid* para 11-24.

<sup>172</sup> *ibid* para 51-56.

<sup>173</sup> See UNCITRAL Working Group III ‘Possible reform of the investor-State dispute settlement (ISDS) Appellate and multilateral court mechanisms’, Note by the Secretariat. 29 November 2019 [UN Doc No A/CN.9/WG.III/WP.185]- refers and incorporates the submissions from European Commission on the MIC and the other countries on the appellate system. See also UNCITRAL Working Group III the addendum A/CN.9/WG.III/WP.166/Add. 1,4.

<sup>174</sup> UNCITRAL Working Group III ‘Possible reform of the investor-State dispute settlement (ISDS)’ Submission from the Governments of Chile, Israel and Japan, A/CN.9/WG.III/WP.163; Submission from the Government of China (Stand-alone appellate mechanism) A/CN.9/WG.III/WP.177.

choose who adjudicates. It is envisaged that the dispute would still be dealt with under the present ISDS regime, with the option to appeal on the merits of the case. Potentially, it could cause problems with regard to the respective role of the ‘first instance’ arbitrators’ *vis-à-vis* the permanent members of the appellate system. Would the appellate system provide for a “review of issues *de novo* or ... accord some degree of deference to the findings of the first adjudicator”?<sup>175</sup> If it were to review all the issues again, it will not necessarily alleviate the issue of cost and time because it would be a second bite of the cherry and hence will incur more costs and take up more time having to deal with the same dispute again. Furthermore, depending on the reach of its jurisdiction it may have an impact on the national laws of the States.<sup>176</sup>

Other States prefer a larger role for their domestic court, wanting a return of the concept of exhausting local remedies before going for international arbitration<sup>177</sup>, whilst Brazil prefers an “Ombudsperson and the Joint Committee” style of dispute prevention and resolution rather than investor-state arbitration.<sup>178</sup>

A novel idea recently proposed for debate in the ISDS Academic Forum supporting the Working Group is provision of “a multilateral institution that could provide an umbrella for dispute settlement options that participating members could choose from ‘à la carte’”.<sup>179</sup> Schill and Vidigal argue that there is no need to start from scratch and suggest creating this Multilateral Institution for Dispute Settlement on Investment (MIDSI) that would administer the MIC, investor-State arbitration, and inter-State arbitration. There could be a MIDSI Agreement that States could be parties to and they can opt to accept compulsory jurisdiction in ISDS, choose from the menu of different modes of dispute settlement, and have the option and be granted the flexibility to decide on the core aspects of dispute settlement such as standing, the role of domestic courts, and remedies.<sup>180</sup> They also

suggest that membership and jurisdiction could be kept separate to give States further flexibility.

Whilst the MIDSI does indeed seem like an interesting idea, it also smacks of convenience; of not wanting to make a decision now in terms of the reform of the regime, but rather to kick the can down the road and put the onus on States to decide.

The idea of having options would seem seductive, but sometimes having too many choices can also lead to confusion. Furthermore, it may not resolve the issue of countries with a stronger bargaining power essentially being the ones that have the choice.

In the longer term, the MIC may work because a permanent court that deals with the issues in a consistent manner will engender confidence in parties and provide overall certainty as it would deal with the unpredictability of ISDS decisions. It is true that it may not be the perfect solution as judges may also adopt very expansive interpretations of provisions, but there would be an appeal process that parties could rely on and, in general, a court with highly qualified and trained judges tends to command more respect.

In relation to the issues that beleaguer the independence of arbitrators, the process for reviewing draft arbitrators’ code of conduct<sup>181</sup> that has been recently sent to countries for comments could perhaps be expedited with the intention of implementing it sooner rather than later. This could also assist in strengthening the confidence in the ISDS regime.

The UNCITRAL WG-III has an enormous task ahead. IIL and the ISDS regime are controversial and highly complex because the issues at hand are not merely contractual. The issues involved are also political and impinge on the realms of public international law and domestic law.

<sup>175</sup>Marike RP Paulsson, ‘UNCITRAL Working Group III: Reforms in the Realm of Investor-State Disputes – UNCITRAL’s Proposals for an Appellate Mechanism and Its Impact on Duration and Cost’ (*Kluwer Arbitration Blog*, 2020) 1.  
<<http://arbitrationblog.kluwerarbitration.com/2020/03/26/uncitral-working-group-iii-reforms-in-the-realm-of-investor-state-disputes-uncitrals-proposals-for-an-appellate-mechanism-and-its-impact-on-duration-and-cost/>> accessed 13 July 2020.

<sup>176</sup> *ibid.*

<sup>177</sup> UNCITRAL Working Group III ‘Possible reform of the investor-State dispute settlement (ISDS)’ Submission from the Government of South Africa, A/CN.9/WG.III/WP.176 para 43-46.

<sup>178</sup> UNCITRAL Working Group III ‘Possible reform of the investor-State dispute settlement (ISDS)’ Submission from the Government of Brazil, A/CN.9/WG.III/WP.171 para 6-9.

<sup>179</sup> Stephan W Schill and Geraldo Vidigal, ‘Designing Investment Dispute Settlement À La Carte: Insights from Comparative Institutional Design Analysis’ (2019) 18 *Law & Practice of Int’l Courts & Tribunals* 311,315.

<sup>180</sup> *ibid* 319.

<sup>181</sup> Secretariats of the International Centre for Settlement of Investment Disputes (ICSID) and UNCITRAL on 1 May 2020 released a draft Code of Conduct for Adjudicators for member states’ comment, <<https://uncitral.un.org/en/codeofconduct>> accessed 10 July 2020.

### 3.4. Other Solutions on the Horizon

As the ISDS cases referred to in the previous subsections indicate, there are many risks and threats that face cities when embarking on their ambitious climate action plans. Recognising the need to deal with climate change, there have been some interesting suggestions put forward to deal with these issues. For instance, a Fossil Fuel Non-Proliferation Treaty (FF-NPT) that deals with emissions at source has been put forward as part of a “new wave of supply-side climate policies.”<sup>182</sup> Newell and Simms suggest that the FF-NPT would be a very different type of treaty that would support and complement the Paris Agreement.

The postulated FF-NPT is based on a premise and pillars similar to those of the nuclear non-proliferation treaty. However, in the FF-NPT, *non-proliferation* (i.e., preventing the further exploitation of new fossil fuels), *disarmament* (i.e., a managed and accelerated decline of fossil fuel infrastructure and better planning and the construction of climate smart cities), and *peaceful use* (i.e., expanding existing initiatives to provide poorer countries with access to low carbon clean energy and technology) are defined in the context of climate change. They further suggest that national subsidies offered to fossil fuel industries could be re-directed towards meeting energy needs in lower carbon ways.<sup>183</sup> Whilst acknowledging that there would be challenges involved in making this treaty a reality, they believe these challenges are not insurmountable and the FF-NPT can provide a “transparent and fair means to stop climate breakdown.”<sup>184</sup>

Although the FF-NPT does not deal directly with IIA, if such a treaty were to come to fruition and States do sign it, then reference could be made to this treaty in IIA provisions and parties could obligate themselves

to its terms especially in relation investment in fossil fuel.

Other ideas in formulating a treaty that would deal with climate action and IIL came about as a result of a recent competition<sup>185</sup> in search of innovative ways forward. The two winning submissions<sup>186</sup> were TSI and the Green Investment Protocol.<sup>187</sup> Both winning entries were adjudged by the jury to be innovative with good ideas and seeking to encourage green investments.<sup>188</sup>

The TSI is structured around three main objectives of “demoting unsustainable investments; promoting sustainable investments; and ensuring a just transition to environmentally, socially and economically sustainable, climate-friendly and resilient economies and societies”<sup>189</sup> so as to ensure that parties’ obligations are in line with the goals set out in the Paris Agreement. There are many innovative ideas in this treaty, yet what stands out is that it “discriminates” between sustainable and unsustainable investment so as to eventually eradicate unsustainable investment; it allows States to adapt the definition of “sustainable” and “unsustainable” to the current state of their economy. Furthermore, it removes the FET standard, removes legitimate expectations and indirect expropriation, obligates states not to launch challenges at the World Trade Organisation (WTO) against each other’s potential subsidies for sustainable development, and ensures that the transition to sustainable investment is just for all with an emphasis on workers’ rights and citizens’ access to justice through an accountability mechanism.<sup>190</sup>

The TSI rebalances the power dynamic by imposing obligations on investors and giving rights to States (notably this treaty gives the State the right to initiate

<sup>182</sup> Peter Newell and Andrew Simms, ‘Towards a Fossil Fuel Non-Proliferation Treaty’ (2020) 20 *Climate Policy* 1043.

<sup>183</sup> *ibid* 1046-1047, 1049.

<sup>184</sup> *ibid* 1052.

<sup>185</sup> 2018 edition of Stockholm Treaty Lab Competition <<http://stockholmtreatylab.org/the-treaty-lab/>> accessed 19 August 2020.

<sup>186</sup> The Creative Disrupters’ submission “A Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation” [“TSI”] and Team Innovate’s submission “A Protocol for the Encouragement, Promotion, Facilitation and Protection of Investments in Climate Change Mitigation and Adaptation” [“Green Investment Protocol”] <<http://stockholmtreatylab.org/the-ideas/>> accessed 19 August 2020; another interesting submission (in the author’s opinion) is that of Team Planet’s “The Green Investment Treaty Model” <<http://stockholmtreatylab.org/wp-content/uploads/2018/10/Team->

**13-Argumentation.pdf**> – The proposed treaty’s main goals is to balance the right to regulate, encourage sound FDI in the context of climate action and sustainable development and flexibility by allowing countries to choose from alternative modes of dispute resolution; see also Daniel B Magraw and Sergio Puig, ‘Greening Investor-State Dispute Settlement’ (2018) 59 *Boston College Law Review* 2717 - which highlights Team Planet’s main suggestions.

<sup>187</sup> A brief and succinct look at the salient points as is it not the intention of this paper to go into an in-depth discussion of the TSI or the Green Investment Protocol.

<sup>188</sup> Annette Magnusson, ‘Foreword: The Story of the Stockholm Treaty Lab’ (2019) 36 *Journal of International Arbitration* 1.

<sup>189</sup> TSI “Argumentation Demonstrating How the Model Treaty Meets the Assessment Criteria” (n 187) 2.

<sup>190</sup> *ibid* 2.



an arbitration against the investor). This treaty proposition is indeed innovative, revolutionary and ambitious in the way it handles sustainable development, investor protection, States' rights and the rights of citizens.

However, the question is whether it is too radical a change. Undoubtedly, the proposed ideas are the 'shot in the arm' that climate action and the IIL regime need. Realistically though, for this treaty proposition to have a significant and positive impact it would need to be in widespread use with all States willing to adopt it; especially those States that have the stronger bargaining power in treaty negotiation. Furthermore, the legacy of the older and previously signed IIA would be an impediment to the immediate impact of this treaty. On the positive side, however, it could be used as a template to improve the next generation of IIA as "an example of a comprehensive approach to the current procedural and substantial challenges facing the international investment treaty regime."<sup>191</sup>

The Green Investment Protocol "aims to promote direction of flows of finance towards 'green' investments, by providing incentives for green investors, while safeguarding States' ability to regulate" and support implementation of the Paris Agreement and the Sustainable Development Goals. It strives to recalibrate the existing investment treaty framework by providing a balance between the need of States to regulate for climate change and the protection of foreign investment. The Green Investment Protocol seeks to leverage on the existing framework and does not seek to displace existing IIA but rather replaces provisions that are inconsistent with the protocol, prospectively instead of retrospectively.<sup>192</sup>

Among others, the FET clause clarifies the types of action that will violate it taking into account the need to incentivise green investment and States' ability to meet the Paris Agreement commitments. It also makes explicit the States' right to regulate for justifiable and non-arbitrary climate action; it places an obligation on investors to comply with the domestic laws of the host State at all times and imposes compulsory

mediation before any ISDS provision can be invoked.<sup>193</sup>

The Green Investment Protocol has a different and unique approach. It does not seek to create a new treaty, but rather a protocol that can be incorporated into existing or future IIA. States can unilaterally sign up to the protocol. It may not be as revolutionary or radical as the TSI, but it would appear that its strength lies in the fact that it is leveraging the existing framework.<sup>194</sup>

The fact that all of the options discussed thus far put climate action in the forefront is indeed encouraging, even if they have no legal force at the moment. If States were to enter into these proposed treaties or adopt the proposed protocol, these treaties/protocols would facilitate and enable climate action and sustainable development. They would also be more aligned to cities' action plans. Therefore, one could argue that the risk to the State brought about by cities' ambitious climate action plans is reduced as is the risk to the cities of impediment and conflict with their State.

There are other 'simpler' options that cities and their States could implement. To deal with political risk, city governments (with the assistance of their State) could work with international financial institutions to offer green investors "tailored political risk insurance policies on favourable terms" and also allow such investors access to affordable financing and a "currency risk guarantee fund to address the high costs of hedging currency risks" in green investments.<sup>195</sup>

Furthermore, since one of the problems is that city officials may not be fully informed of the issues surrounding IIA in place, more cooperation and knowledge exchange between the State government and their cities must be encouraged. State governments must make the concerted effort to consult their cities when negotiating and entering into IIA. One way to foster this collaboration and understanding could be to have city officials 'attached' to the relevant State departments that deal with negotiating IIA for a period of time and as part of their training so that knowledge can be shared. Opening channels of communications

<sup>191</sup> for an analysis of the TSI see Sofia de Murard, 'The Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation : A Model to Steer International Law toward Renewable Energy Investments and the Low - Carbon Transition Most Investment Treaties Do Not Explicitly Distinguish between Inves' (*Investment Treaty News*, 2020)  
<<https://www.iisd.org/sites/default/files/publications/iisd-itn-june-2020-english.pdf>>accessed 21 August 2020; and Martin Dietrich Brauch, 'Tackling Climate Change

Through Sustainable Investment : All in a Treaty ?' (*SDG Knowledge Hub*, 2018)

<<https://sdg.iisd.org/commentary/guest-articles/tackling-climate-change-through-sustainable-investment-all-in-a-treaty/>>accessed 21 July 2020.

<sup>192</sup> Green Investment Protocol "Commentary" (n 187) 1.

<sup>193</sup> *ibid.*

<sup>194</sup> *ibid.*

<sup>195</sup> Tienhaara and Downie (n 131) 463.



between sub-national legal advisors and State government legal advisors is particularly important in countries where there are dual or multi-level governance, but less so in a city-state such as Singapore where there is one level of governance and where legal advice is centralised to the Attorney-General Chambers that provides legal advice to the whole of government.<sup>196</sup>

City networks such as the C40 cities, apart from assisting in policy formation vis-à-vis climate action, could also launch seminars/workshops that educate mayors and city officials on general IIA provisions so that they are more aware when implementing their action plans. Cities could be empowered to approach their State governments for more information. Increased awareness of the threats and risks from ISDS would enable them to avoid the regulatory chill impacts and remain unimpeded when implementing their climate action plans.

It is evident that an increasing number of cities are unwilling to curtail their climate action or to take a back seat. There is also evidence to suggest that cities or “sub-national activism” will increase in relation to the expanding scope of IIA.<sup>197</sup> Therefore, there is a clear need for proactive communication and co-operation during treaty development (and enforcement), and a vital requirement for open exchange of information between the cities and their States. Additionally, there is also a need to build capacity at city level, perhaps with support of city networks and other Non-Governmental Organisations (NGO), to help cities establish clear policies, and to engage with, participate in, and be alert to risks of IIA. City networks such as C40 cities<sup>198</sup> could also assist by being ‘bridge builders’ and advocates operating between national governments and cities.

Whilst the 2030 Agenda for Sustainable Development<sup>199</sup> recognising the important role of cities has specifically established a sustainable development goal (SDG#11) related to cities and sustainable development, notably, the potential of cities to shape such goals goes beyond SDG#11. As cities “exert influence on local, regional and global resources and

waste assimilation capabilities to such an extent that their ecological footprint by far exceeds their spatial extent”,<sup>200</sup> cities are a great place for linking multiple sustainable development goals and “to identify systematic linkages between economy, energy, environment and social outcomes” in order to find “synergies (and trade-offs) that can lead to coherent and mutually reinforcing policies on urban development.”<sup>201</sup>

## 4. Conclusion

*“Perhaps we cannot raise the winds. But each of us can put up the sail, so that when the wind comes we can catch it”*

*E. F. Schumacher*<sup>202</sup>

This paper takes the position that regulatory chill does exist and explores the various types of regulatory chill that have the potential to inhibit climate action at State and cities/sub-national level. In addition, the paper has sought to demonstrate that, because of the potential impacts of regulatory chill due to the ISDS process, there is an imperative for increased awareness of the issues and for reform so that States and cities can proceed unimpeded and at pace with their plans to rise to the challenge of climate change.

Reform to the ISDS regime is critical and proposals for reform vary widely. Reforms such as the MIC and potential appellate system mooted by States as part of the UNCITRAL WG-III and other wishful and radical proposals are discussed in Section **Error! Reference source not found.** Whichever direction the reform finally proceeds, it is abundantly clear that reform is necessary.

It is argued that to reduce the chill, provisions in the IIA could be better drafted, with exception clauses, carve-out clauses, and clauses imposing investor obligations introduced in new IIA. The benefit of more precisely drafted treaties (new and existing) with fully clarified provisions will go towards reducing “the

<sup>196</sup> ‘Attorney-General’s Chambers’ (*Singapore Law Watch*, 2020) 1 <<https://www.singaporelawwatch.sg/About-Singapore-Law/Singapore-Legal-System/attorney-generals-chambers>> accessed 22 September 2020.

<sup>197</sup> Ohio Omiunu, ‘The Evolving Role of Sub-National Actors in International Trade Interactions: A Comparative Analysis of Belgium and Canada’ (2017) 6 *Global Journal of Comparative Law* 105, 136.

<sup>198</sup> for other city networks see (n 14).

<sup>199</sup> Transforming Our World: The 2030 Agenda for Sustainable Development A/RES/70/1 <[https://sustainable-](https://sustainable-development.un.org/content/docu-)

[development.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf](https://sustainable-development.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf)> accessed 4 August 2020.

<sup>200</sup> Elliot (n72).

<sup>201</sup> Christopher Doll, ‘Cities Should Be at the Heart of the SDGs’ (*United National University*, 2015) <<https://unu.edu/publications/articles/cities-heart-of-sdgs.html>> accessed 23 July 2020.

<sup>202</sup> attributed to Dr EF Schumacher, CBE, by Newell and Simms (n 183)10.

scope of interpretive discretion conferred on arbitral tribunals and clarify how much protection the state parties to a treaty intend provide.”<sup>203</sup>

For cities to progress unimpeded with their ambitious climate action plans, it is crucial that States renegotiate their existing treaties to overcome legacy issues so as not to ‘over-protect’ investors, especially those that might seek to exploit the ISDS process to slow development of regulations facilitating climate action. Indeed, “from the perspective of encouraging efficient investment decisions, it is preferable that investment treaty protections err by under-protecting rather than over-protecting foreign investment.”<sup>204</sup> Hence, to mitigate risk and lessen the impact of regulatory chill, it is imperative that the uptake of well-drafted model IIA be accelerated despite the many challenges. However, there must be the political will to adopt the model IIA<sup>205</sup> and to put into force newly produced and signed IIA that have been drafted to reform outdated IIA.<sup>206</sup>

Moreover, there must be effective collaboration between States, their cities, and city networks promoting climate action (for instance, C40), otherwise cities whilst proceeding with their plans may exacerbate risk and create discord with State level agreements. An analogous example can be drawn from the current COVID-19 pandemic, where Omiunu observes that “City Mayors,...have emerged in the spotlight of ‘glocal’ responses to the COVID-19 Pandemic” and in “fulfilling this critical role, sub-national governments have demonstrated resourcefulness, sometimes testing the boundaries of what is constitutionally acceptable nationally and internationally to deal with the current and unfolding realities of the Pandemic.”<sup>207</sup>

Climate action plans at city level that align with national and international commitments to the SDGs will require a redesign of both existing and future IIA in

order that a FDI regime can be fashioned which supports sustainable development, decarbonisation and rapid and equitable transition to a green economy. IIA are a key component of a broader governance framework (both nationally and internationally) that impacts and shapes investment flows.<sup>208</sup> One could conclude that there are transitional risks<sup>209</sup> (and perhaps opportunities) presented by IIA as society moves towards a net zero carbon economy. For instance, as is demonstrated by the renewable energy cases discussed in Section **Error! Reference source not found.**, there is a clear transitional risk to States as their cities move towards net zero carbon emissions at a rapid pace. If cities are unable to sustain the incentives that they were providing to promote green investment and trade, then their actions can sometimes be the direct cause of an ISDS case (e.g., *Vattenfall I*).

Reconciling IIL/IIA with environmental protection and climate action with the added dimension of national and sub-national tension is certainly a complex challenge. National (and sub-national) level policy implementation is influenced by good governance at the international level, and States acting alone cannot bring about the desired change. In order to meet the challenges of resource management and green growth, there needs to be a flexible and inclusive governance arrangement that is able to adapt and change. Hence, collaboration between the various tiers of government is key.<sup>210</sup>

Notably, whilst there is much information on how cities are progressing with their climate action plans, there is scant literature on the impact of regulatory chill brought about by their States’ obligations under IIA, and there has been little attention paid to the impact of regulatory chill on cities’/sub-national governments.

<sup>203</sup> Bonnitcha (n 37)338.

<sup>204</sup> *ibid* 77-78.

<sup>205</sup> see El-Kady and Rwananga (n 160); noteworthy, Japan - Morocco BIT (2020) signed 8 January 2020 (not in force) does not contain the same provisions as the Morocco Model BIT <<https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4911/japan---morocco-bit-2020>>accessed 12 July 2020.

<sup>206</sup> Martin Dietrich Brauch, ‘The Best of Two Worlds? The Brazil–India Investment Cooperation and Facilitation Treaty’ (*Investment Treaty News*, 2020) 1 <<https://www.iisd.org/itn/2020/03/10/the-best-of-two-worlds-the-brazil-india-investment-cooperation-and-facilitation-treaty-martin-dietrich-brauch>>accessed 17 June 2020.

<sup>207</sup> Omiunu (n 83)2.

<sup>208</sup> Lise Johnson, Lisa Sachs and Nathan Lobel, ‘Aligning International Investment Agreements with the Sustainable Development Goals’ (2019) 58 *Columbia Journal of Transnational Law* 58.

<sup>209</sup> Transitional risks are risks to governance, policy, law, norms, technology, and the economy resulting from transition to a net zero carbon society-see ‘ClimateWise Transition Risk Framework: Managing the Impacts of the Low Carbon Transition on Infrastructure Investments’ <<https://www.cisl.cam.ac.uk/resources/sustainable-finance-publications/navigating-transition>>accessed 20 August 2020.

<sup>210</sup> Jona Razzaque, *Environmental Governance in Europe and Asia: A Comparative Study of Institutional and Legislative Frameworks* (Routledge 2013).

Finally, more research is warranted to consider the impact of regulatory chill (and transitional risk) on cities' governments. Similarly, more work is needed to explore how States should collaborate with their cities to take advantage of the relatively adroit way that cities can face global issues, as evidenced by how some cities/sub-national governments have dealt with the present COVID-19 global pandemic.

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