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**COP21: Climate Change Related Disputes:  
A Role for International Arbitration and ADR**

**7 December 2015**

**Opening Session: Introduction to the IBA Task Force on Climate Change Justice and Human Rights and the importance of accessible and enforceable dispute resolution mechanism frameworks**

*David W. Rivkin / Roger Martella (Sidley Austin, DC)*

**9.30am – 10.30am (Questions at 10.15am)**

**David W. Rivkin: Remarks [c. 25 mins]**

It is a privilege to be with you here in Paris in the midst of COP21, one of the most important global environmental, political and economic negotiations of our time. As you will all be familiar, the goal for this year's meeting is to achieve a universal agreement on climate change from all the nations in the world. One of the greatest challenges for the negotiators is to persuade stakeholders that commitments will be enforceable beyond COP21. It is difficult to fill the lacuna in the UNFCCC as it currently stands by national or international courts. However, the reason we are here today is that the lacuna may be filled by consensual international arbitration.

For the last two years, the IBA has been particularly focused on the role that international law can play in addressing the global challenges posed by climate change. Today's conference focusing on the resolution of climate change disputes is an important part of the work that many in the IBA have been doing in this area.

**IBA Climate Change and Human Rights Report**

In 2013, the IBA Task Force on Climate Change Justice & Human Rights, co-chaired by senior Canadian environmental lawyer David Estrin and leading English human rights barrister Baroness Helena Kennedy QC, set out on a daunting mission to review existing international and domestic legal frameworks addressing climate change and to make recommendations to improve them to promote climate justice.

The Task Force was formed with 19 expert members, including human rights practitioners, environmental practitioners, and corporate lawyers, with broad global representation. The result of their work – the widely acclaimed Report – ‘*Achieving Justice and Human Rights in an Era of Climate Disruption*’, contains concrete recommendations to reform domestic, regional and international law to promote climate justice.

The Report has been widely received as a catalyst in the broader climate movement, with leaders in the field – some of whom are here today – emphasizing that it should be read by everyone involved in climate policy. The Report presents a critical survey of existing international, regional and domestic legal frameworks relevant to climate change. It identifies specific opportunities for legal, regulatory and institutional reforms at multilateral, state, corporate and individual levels to enhance mitigation and adaptation to climate change from a justice-focused perspective. The Report contains over 50 specific and practical recommendations to achieve greater justice and human rights in the global response to climate change. The focus is ‘climate change justice’, which recognizes that climate change will disproportionately affect those who have the least ability to prevent, adapt or otherwise respond to climate change, increasingly extreme weather events, rising sea levels and new resource constraints.

The Report’s 50+ recommendations cover legal reforms for judiciaries and legislatures, capacity-building, knowledge and skills transfer for developing states, and transparency in dispute resolution, as well as being targeted at specific institutions including the WTO, the UN, the IMO and the UNFCCC. The recommendations also cover bilateral and regional trade agreements, international investment, and multilateral adaptation measures.

We launched the Report in October 2014 at a showcase session at the IBA’s Conference in Tokyo, with presentations from US former Vice President Al Gore; former President of Ireland and the UN Secretary General’s Special Envoy on Climate Change Mary Robinson; and former President of Mexico Felipe Calderón. In addition, the IBA held further launch events in London at the House of Lords in November 2014, and in Washington DC in March 2015.

### Progress over 2015

Since releasing this report, I have made climate change justice a particular focus of my Presidency, and I have been delighted with the response we have had both within the IBA and around the world. Besides the leaders of many IBA committees, I have been privileged to work with John Knox, the UN Special Rapporteur on Human Rights and the Environment (who is here with us today); President Mary Robinson and her team at the Mary Robinson Foundation – Climate Justice; representatives of Pope Francis and the Archbishop of Canterbury (following the publication of the

Papal Encyclical on Climate Change in June 2015); the Yale Center for the Study of Globalization; and with barristers, solicitors and judges around the world.

In particular we have pushed forward the debate on corporations' responsibilities to mitigate and adapt to climate change through a number of events in the last six months, including a webinar with the UN Global Compact in April, a public seminar with the Business and Human Rights Resource Centre in London in June; a full show-case session at the IBA's Annual Conference in Vienna in October, and just last month we co-organized a panel on Climate Change, Business and Human Rights at the UN Business and Human Rights Forum in Geneva, comparing the IBA's work with the release of the Oslo Principles on Climate Change.

During the COP21 negotiations, it is a particularly important time to recognize the linkages between human rights and climate change. I have been engaging with some of the UNFCCC climate change negotiators to focus on the need to recognize human rights within the UNFCCC negotiations, and in particular to ensure that the deal reached here in Paris will not – even inadvertently – contribute to the suffering already faced by millions around the world as a result of climate changes. We have supported the 'Geneva Pledge' made by a number of countries emphasizing the importance of bringing together human rights and climate change experts within governments. I will participate in other events in Paris this week, including a UN Global Compact session with business leaders that I will attend later today and a breakfast on Thursday with Mary Robinson, the French Presidency of the COP and senior state negotiators.

Recognition of the human rights impact of climate changes is growing. Human Rights Watch in October released its first reports linking human rights abuses directly to climate change, focusing on the impact of climate change on the health and livelihood of indigenous peoples in the Turkana region of northwest Kenya, and the pressure on poor Bangladeshi families to force very young girls into marriage before their lands are eroded by climate change.<sup>1</sup> A number of commentators – the latest of which was Prince Charles in the UK – have attributed the Syrian refugee crisis partially on climate change exacerbating severe drought in the country since 2011.

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<sup>1</sup> See <https://www.hrw.org/video-photos/video/2015/10/15/kenya-climate-change-threatens-rights> and <http://www.hrw.org/news/2015/06/09/climate-change-forcing-bangladeshi-girls-child-marriage>.

## The Report's Dispute Resolution Recommendations

One of the catalysts for today's conference was the focus in the IBA's Report on the potential role of arbitration in resolving environmental disputes. In particular, the Report recognizes that, although judicial bodies such as the ICJ and ITLOS provide important fora for the resolution of environmental disputes, many states have already opted to settle certain investment disputes with private entities through arbitration, namely the system of investor-state dispute settlement (ISDS) that arises under a number of bilateral and multilateral trade treaties. The Report also identifies that the Permanent Court of Arbitration (PCA) has made significant progress towards enhancing its own procedural rules to permit effective resolution of environmental disputes, most notably its release of *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment*, the first and only arbitral rules developed specifically with environmental disputes in mind. As you will hear later today, the PCA is already facilitating a number of cases regarding emissions trading (which are of course not ISDS cases), and the PCA's Optional Rules have already been adapted to help the design of new environmental dispute resolution mechanisms, including those used by the Gold Standard Foundation (which regulates international emissions credits).

The Report endorses the PCA's work in this area and commends its approach to other international arbitration institutions, while also emphasizing the importance of transparency in these environmental disputes, so that consideration of broad community perspectives are ensured within the arbitral process. These concepts will be central to today's discussions.

### Benefits of arbitration

As I described in a speech and article several years ago<sup>2</sup>, international arbitration has been used at least since ancient Greek times to resolve important disputes and to avert major political and diplomatic crises. In so doing, it has helped create the rule of law. International arbitration should similarly play a critical role in developing the legal framework of the post-COP21 world.

International arbitration is flexible, not only in its procedural rules and tribunal appointment processes, but in the different types of parties that may choose to use it and the types of disputes it can be applied to. Arbitration allows parties to provide for independent, impartial resolution of disputes that may be impossible to resolve

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• <sup>2</sup> D.W. Rivkin, "The Impact of International Arbitration on the Rule of Law," *Arbitration International*, Volume 29, Issue 3 (2013)

domestically because of the political fall-out for one side or the other. Arbitration can be established in advance, in a contract, or agreed to on an *ad hoc* basis to resolve a particular crisis.

By holding parties to their agreements and creating predictability and certainty, arbitral tribunals have promoted international rule of law and international commerce. For example, through investment arbitration, which I will discuss shortly, arbitrators have developed a supranational rule of law that has helped to create uniform standards for acceptable sovereign behavior. Any government interested in attracting foreign investment must recognize these principles. Imagine if similar principles could be developed for climate change mitigation expectations, or for minimum standards for aiding disadvantaged communities to deal with extreme storm events or sea level rises?

In addition, affected populations should be able to participate in the arbitral process, provided the terms of the arbitration agreement or the rules used clearly encompass their rights and protections.

Finally, the commercial stakeholders in climate change related issues – such as international monetary lenders, insurers, construction companies, states, and extraction industries – all stand to benefit from certainty of contract, including in respect of internationally or state- or industry-imposed climate change or sustainable development objectives and targets.

### Business responsibility

The business community is and should be at the forefront of these debates. Increasingly the leading global businesses are concerned about the threat of climate change to their businesses, to their supply lines, their sources of raw goods, consumer perceptions, increasing taxes, energy and distribution costs.

The UN Global Compact very recently published “The CEO Study – A Call to Climate Action”. It results from hundreds of one-to-one interviews with CEOs from the world’s largest companies, across 152 countries and 41 industry sectors. One of the most compelling results of this research is that an overwhelming 91% of global CEOs view climate change as an urgent priority for business. Over half of CEOs are actively calling for urgent action by policy makers to unlock growth and innovation in the private sector. Two-thirds believe business is not doing enough to tackle climate change. These business leaders are calling for certainty, for legislative and fiscal action to increase investment, for global, robust and predictable carbon pricing mechanisms, for performance standards to enhance resilience and reduce emissions and for the removal or phasing out of fossil fuel subsidies. What is also particularly compelling is that this week’s talks in Paris are central to realizing these aims – 74% of leaders of the world’s largest companies see a long-term agreement in Paris as

critical to unlocking private sector investment in climate solutions. As I mentioned, I will be attending a UNGC conference on these issues this afternoon.

The IBA's Report also closely focused on the obligations on corporations. Since the launch of the UN Guiding Principles on Business and Human Rights in 2011 (a global standard adopted by the UN General Assembly to prevent and address the risk of adverse impacts on human rights linked to business activity), the Report notes the increasing recognition of corporate responsibility for human rights in relation to the environment. The Report recommends that states increase their focus on corporate responsibility for greenhouse gas emissions and environmental harm, but through clear regulatory standards that make compliance possible for corporations. In particular, the Report suggests that more states should require corporations specifically to disclose and ultimately verify their own greenhouse gas emissions.<sup>3</sup> These moves align with the conclusions of the then UN Secretary General's Special Representative on Business and Human Rights, John Ruggie, who had concluded that *'the State responsibility to protect against non-State abuses ... requires States to play a key role in regulating and adjudicating abuse by business enterprises, or risk breaching their international obligations.'*<sup>4</sup>

Throughout 2015 the IBA has been actively developing practical guidance for businesses as to how they should implement the Guiding Principles. The IBA has released Guidance for Bar Associations (adopted at the IBA Conference in October), and we are also planning to publish in mid-2016 a Practical Guide for Business Lawyers. Both of these documents are designed to provide guidance for lawyers in advising their clients on complying with the Guiding Principles and avoiding human rights impacts. Environmental and climate change impacts must be considered by businesses in their future activities, and we have an important role in advising them.

Arbitration can help provide certainty in this area. One of the key comments we received when developing the IBA Report was that businesses were open to increased regulation on environmental and human rights issues, but that this regulation needed to be transparent, clear, and, above all, provide certainty for businesses planning their financial and operational commitments. In this regard, carefully designed arbitration clauses in contracts would allow disputes between suppliers over the impact of new carbon tax legislation to be actively anticipated and provided for, as opposed to this being a risk that businesses cannot mitigate against. Just as price review arbitrations are used routinely to resolve gas pricing disputes in the context of changing macroeconomic events over time, arbitration could be used to renegotiate aspects of

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<sup>3</sup> See e.g. UK Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013.

<sup>4</sup> Report of the UN Special Representative for Business and Human Rights, A/HRC/4/35, para 18, cited in Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/25/53 para 58.

broader supply pricing that will be unavoidably – although perhaps unpredictably – affected by future regulatory responses to climate change.

## ISDS

Investor-state dispute resolution (ISDS) will play a key role in developing this certainty. We can already see international arbitration being used extensively by foreign investors to resolve investment disputes, particularly in the energy sector.

The importance of substantial and sustained investment in the energy sector cannot be overstated. The need for investment is especially acute in the renewables sector, with US\$550 billion said to be required each year until 2030 to avert the impact of climate change.<sup>5</sup> Public finance alone will not be able to achieve an infrastructure objective of this magnitude.<sup>6</sup>

Given the needs for investment, the protections afforded to private investors through the global network of over 3,000 bilateral investment treaties (BITs) are particularly significant for those in the energy sector. Both the substantive protections afforded to investors and the availability of an independent, neutral forum for the resolution of disputes between investors and host states play a significant role in encouraging these immense investment decisions. Given the size of investments required in the energy sector, it is not surprising that disputes involving that sector have represented a substantial portion of investor-state arbitrations, and that the sector has produced the largest arbitral awards on record. Almost 40% of all cases registered with ICSID until 2012 were in the energy sector,<sup>7</sup> with oil, gas and mining disputes representing over a third of all ICSID claims in 2014.<sup>8</sup>

However, the ISDS system that has proved so significant in encouraging investment in important emerging economies in recent years is itself under attack. Ongoing negotiation of multilateral trade agreements such as the Trans-Pacific Partnership (TPP), concluded in October (which will cover 12 countries in the Asia-Pacific region<sup>9</sup>) and the Transatlantic Trade and Investment Partnership (TTIP), which if

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<sup>5</sup> International Renewable Energy Agency, ‘Press Release: \$550 Billion Annually Will Avert Most Serious Impacts of Climate Change, Says IRENA’ (*International Renewable Energy Agency*, 27 June 2014).

<sup>6</sup> Organisation for Economic Co-operation and Development, *OECD and Post-2015 Reflections: Enabling Investment in Sustainable Energy Infrastructure* (Element 4, Paper 2) 1 - 3.

<sup>7</sup> Anibal Sabater and Mark Stadnyk, “International Arbitration and Energy: How energy disputes shaped international investment dispute resolution”, in Kim Talus (ed.) *Research Handbook on International Energy Law* (Edward Elgar Publishing, 2014), 199.

<sup>8</sup> ICSID, *The ICSID Caseload – Statistics* (Issue 2014-2) 26.

<sup>9</sup> USA, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

concluded will involve all 28 countries in the EU and the United States, has refocused public and political attention on the role of investment protection and arbitration of investment disputes in particular.

As many of you will be aware, there is an intense and very public debate on the advantages and perceived threats of ISDS, particularly in the context of TTIP here in Europe. Despite the general success of states in investor-state arbitrations, opponents of the system claim that it does not and cannot strike an appropriate balance between the state's right to regulate in the public interest and the protection of investors. They claim that arbitration is not an appropriate forum in which to resolve the interplay between private interests on the one hand and public policy objectives or wider international law norms – especially in relation to sustainable development and the protection of human rights – on the other. The fiercest critics also assert that the very existence of the ISDS system has a chilling effect on a state's regulatory ambitions, dissuading states from enacting legislation that would otherwise serve the public interest.

The IBA published a fact sheet earlier this year, which pointed out that many of these criticisms are erroneous.<sup>10</sup> Most importantly, I and others have argued that the investment treaty system and ISDS in particular *can* achieve an appropriate balance between those private rights and public interests most likely to be engaged in energy and natural resource investments. In my view, the system is already recalibrating to meet these challenges in the environmental sphere. While a range of improvements to the investment treaty system can and should be considered, it is vital that a neutral, effective mechanism exist for resolving disputes between investors and states, particularly in order to incentivize foreign investment in renewable energy.<sup>11</sup>

In a speech at the Chartered Institute's London Centenary Conference in July, I noted four assumptions about ISDS that I believe we can all agree are correct. First, BITs and broader regional treaties, like TTIP and TPP, promote trade, in that the countries involved derive an economic benefit from them. Second, States benefit from including in those treaties promises to investors. These promises encourage investors to come to their countries to make meaningful investments that improve their economy.

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<sup>10</sup> <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=1dff6284-e074-40ea-bf0c-f19949340b2f>

<sup>11</sup> D.W. Rivkin; S. J. Lamb; N. K Leslie, "The future of investor-state dispute settlement in the energy sector: engaging with climate change, human rights and the rule of law"; *Journal of World Energy Law & Business* (2015) Vol. 8(2), 130-153.

Third, investors need a meaningful process to enforce the promises that the States have made. The promises in a treaty are effectively meaningless without some reasonable mechanism for enforcing them, and so would not provide the intended economic benefits. The days of gunboat diplomacy and diplomatic protection to enforce those promises are long gone. They are not effective, and investors require a specific mechanism in their hands, not their government's.

Fourth, in all treaties, not just BITs and other trade agreements, States surrender some sovereignty. Entering into a treaty is itself an act of sovereignty. Each state makes promises to the other that it will or will not act in a certain manner in the future. Therefore, the fact that States give up some sovereignty in BITs by making promises to investors or through agreeing to arbitration or some other mechanism for resolving disputes, is nothing unique and nothing that should be of concern.

With these assumptions in mind, I mentioned seven different factors that are important for judging the quality of the decision-making that will result from any mechanism to resolve disputes in a BIT or a broader treaty like TTIP or TPP:

1. a fair and neutral decision-maker;
2. an efficient process;
3. the decision-makers should have a good understanding of international law and the ability to apply international law;
4. the decision-makers should have the ability to consider the public interests behind the government action that is being challenged;
5. the process should in fact act as a proper check upon the government's actions by enforcing the promises the government willingly made;
6. the process should be transparent and open to submissions by others on issues of public interest; and
7. the process should provide some degree of consistency in the decision-making.

Let me briefly touch on three of these factors:

### Neutrality

The current ISDS system provides a neutral body to decide disputes – certainly more neutral than state courts. It also provides party input into the appointment of the decision-makers, which gives both parties additional confidence.

The EU has proposed a two-tiered tribunal system - a Tribunal of First Instance and an Appeal Tribunal. Because the proposed draft provides that members of the Tribunals are appointed by State Parties, these appointments may be tainted by political considerations. The draft also provides that members of the Tribunals shall

be appointed for a six-year term and can be reappointed once. Concern about reappointment by the States that are parties to the cases before the tribunals would compromise the neutrality of those appointed, or at least raise serious doubts about their neutrality in the minds of investors. Thus, based on the draft, the proposed system would not provide fair and neutral decision-makers as well as the current system.

### Growth of transparency and inclusion

As I mentioned earlier, one of the key recommendations in the IBA Report was that while promoting arbitration of environmental disputes, the institutions themselves must take a leading role in promoting the transparency of such arbitrations. Indeed in some climate change cases it may not even make sense for the parties to accept to arbitrate unless express transparency provisions are agreed at the outset.

ISDS decisions can have a serious impact on third parties' interests, particularly regarding investments touching on sustainable development or environmental issues, so transparency and inclusion will be particularly important in climate change disputes. A system that does not allow for affected parties to be heard is vulnerable to serious criticism. Moreover, because an award may eventually have to be paid from a public Treasury, the more the public knows about the decision the government made, its reasons, and the government's obligations under the treaty, the more likely it is that the public will eventually accept compliance with any award. Greater transparency better achieves promotion of the rule of law.

The NAFTA Parties have been at the forefront of initiatives promoting transparency in arbitration proceedings over recent years. The NAFTA Free Trade Commission's Notes of Interpretation provide for NAFTA parties to publicize all documents submitted to, or issued by, a Chapter Eleven Tribunal,<sup>12</sup> subject to redactions of confidential or otherwise protected information. Hearings are usually open to the public, with the ability to close them when confidential information is discussed. The NAFTA parties have also explicitly recognized that nothing in the NAFTA limits a tribunal's discretion to accept written submissions from a non-disputing party, specifically recognizing that such submissions could bring a perspective, knowledge or insight that is different from that of the disputing parties.<sup>13</sup>

The major arbitration institutions are now providing greater transparency on investor-state disputes. In 2006, the World Bank's International Centre for Settlement of Investment Disputes (ICSID) modified its rules so that excerpts of all awards are

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<sup>12</sup> *NAFTA Free Trade Commission's Notes of Interpretation of Certain Chapter Eleven Provisions*, A.2.(b).

<sup>13</sup> NAFTA Free Trade Commission, *Statement on Non-Disputing Party Participation* (Oct. 7, 2004).

published (subject to limited exceptions), and tribunals can permit amicus curiae to file briefs without party consent.<sup>14</sup> UNCITRAL's 2014 Rules on Transparency in Treaty-based Investor-State Arbitration (commonly incorporated into ISDS clauses) now require all hearings under future BITs to be open to the public, the publication of awards, and empower tribunals to invite third-party submissions.<sup>15</sup> The UN General Assembly has also recently adopted the UN Convention on Transparency in Treaty-Based Investor-State Arbitration, which would apply to all arbitrations conducted under existing investment treaties.

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<sup>14</sup> Rules of Procedure for Arbitration Proceedings, International Centre for Settlement of Investment Disputes Convention, Regulations and Rules (10 April 2006), Rule 37 <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF.htm> accessed on 5 January 2015.

<sup>15</sup> The Rules will apply by default to disputes arising out of treaties concluded on or after 1 April 2014, when investor-State arbitration is initiated under the UNCITRAL Arbitration Rules (unless the parties otherwise agree), and also to investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules, and in ad hoc proceedings.

## New generation BITs and FTAs

Finally, much of the criticism of ISDS is not aimed at the procedure but at the substantive protections in the treaties that permit challenges to regulation, especially in the energy area. Some of the most controversial cases have involved nuclear and solar power. However, once again we must remember that states win most of the cases filed against them, and investors relying on fair and equitable treatment protections must usually demonstrate breach of a specific promise that encouraged the investment. In any event, responding to that criticism requires not a change in ISDS procedures but in the substantive terms of the treaties themselves.

In that regard, it is worth noting that environmental issues are being considered increasingly by states at the outset of drafting investment chapters contained in the new regional agreements, which are much more detailed than the early bilateral investment treaties.

In the mid-1990s, the proportion of concluded BITs with environmental language began to rise, and in the last decade it rose steeply. By 2011, 62% of the publicly available BITs that included some form of environmental language contained a general reservation of policy space for environmental regulation.<sup>16</sup> UNCTAD has also identified that BITs are increasingly incorporating sustainable development-oriented features, such as those identified in its Investment Policy Framework for Sustainable Development.<sup>17</sup>

The IBA's Report provides a comprehensive coverage of this 'new wave' of pro-environment clauses included in these investment chapters, for example (i) obligations explicitly supporting environmental measures; (ii) obligations to promote foreign direct investment in environmental goods and services; (iii) requirements not to derogate from existing environmental laws when seeking to attract investment; and (iv) explicit exceptions for environmental measures from trade obligations.

For example, a number of recent BITs have included preamble language that investment protection must be consistent with internationally recognized labor rights, environmental protection and sustainable development.<sup>18</sup> The preamble to the CETA

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<sup>16</sup> Gordon and Pohl, *ibid*, 10 – 13.

<sup>17</sup> United Nations Conference on Trade and Development, *Investment Policy Framework for Sustainable Development* (2014) 116.

<sup>18</sup> For example, the US Model BIT 2012 notes the parties are: "*Desiring to achieve these objectives in a manner consistent with the protection of health, safety and the environment, and the promotion of internationally recognised labor rights*". The preamble of the Canada Model BIT states "*Recognizing the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development.*" The Japan/Switzerland FTA states in its preamble that the parties are "[d]etermined, in implementing this Agreement, to seek to preserve and protect the environment,

expressly states that the EU and Canada preserve their right to regulate and to achieve legitimate policy objectives, including public health and the environment.

Other recent agreements have included specific obligations to promote sustainable development, to encourage trade in environmental products,<sup>19</sup> or to facilitate FDI in environmental technologies or eco-labeled goods.<sup>20</sup> The 2012 revision of the U.S. Model BIT turns the “best-endeavors” commitment not to relax domestic environmental and labor laws into a binding obligation (Article 12(2)), and explicitly recognizes the importance of environmental laws and policies, as well as multilateral environmental and labor agreements.<sup>21</sup> The TPP text mandates that parties “shall not waive, or otherwise derogate from, [their] environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment...”<sup>22</sup> In TTIP, the EU has proposed that the text enhance governments’ ability to regulate in the public interest through an operational provision which will refer to the right of Governments to take measures to achieve legitimate public policy objectives, on the basis of the level of protection that they deem appropriate. Also recognized in the IBA’s Report are the so-called ‘environmental side agreements’ or stand-alone environmental chapters increasingly found within trade deals, such as in the TPP.<sup>23</sup>

It is clear that we are entering a new era of BITs/FTAs, in which states are delineating more specific obligations in the negotiation of these agreements, both as to standards of investor protection and regulatory autonomy. As we are seeing in the context of TTIP, CETA and TPP, ‘self-calibration’ of the ISDS system is already evident. In the future we may also see more movement in the areas of state counterclaims, which would be particularly relevant for environmental claims. In short, there is much we can learn from the ISDS system in promoting arbitration as an option for resolving environmental disputes and enforcing environmental contractual and treaty obligations.

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*to promote the optimal use of natural resources in accordance with the objective of sustainable development and to adequately address the challenges of climate change”.*

<sup>19</sup> Art. 9 of the Japan/Switzerland FTA includes the substantive obligation to “*encourage trade and dissemination of environmental products and environmental-related services*” in pursuit of a “*climate-change related goal*.”

<sup>20</sup> The Korea-EU FTA includes an obligation in Art. 13.6(2) to “*strive to facilitate and promote trade and foreign direct investment in environmental goods and services, including environmental technologies, sustainable renewable energy, energy efficient products and services and eco-labelled goods*.”

<sup>21</sup> U.S. Model BIT, Arts 12 and 13.

<sup>22</sup> TPP Agreement, Art 20(6).

<sup>23</sup> See e.g. the North American Agreement on Environmental Cooperation (NAAEC); and the China NZ Environment Cooperation Agreement (alongside the 2008 China-NZ FTA).

## Conclusion

With today's conference, we are bringing together multi-disciplinary experts in international arbitration, trade and investment, environment and climate change, as well as representatives from business, government and international institutions. There is huge potential to consider how the existing use of international arbitration and ADR mechanisms in resolving climate change related disputes may be advanced and expanded, both in the context of contractual obligations and treaty mechanisms. Ultimately, I hope that today's conference allows us to discuss the role for arbitration and ADR in enforcing commitments made by the state parties to the UNFCCC negotiations, including their all-important underlying pledges. I am very much looking forward to exploring these exciting new opportunities with you today.