

# Climate change disputes: emerging trends for a global emergency

February 22, 2021

The issue of climate change grows more urgent every year, with a recent global opinion poll revealing that almost two-thirds of the population view it as a global emergency. At the UN Global Climate Change Conference (COP 26) scheduled to take place in the UK in November 2021, states will update their Nationally Determined Contributions (emissions-reduction goals, NDCs) for the first time since they signed the Paris Agreement in 2016. The importance of tackling climate change has further been underlined in the recently signed UK-EU Trade and Cooperation Agreement, which declares the fight against climate change as one of the bases for cooperation between the parties. These obligations under international law, coupled with greater pressure from the public, make it more likely than ever that states will take measures to combat the effects of climate change. However, the same measures could give rise to disputes between states and investors pursuant to international investment agreements (IIAs) or domestic legislation aimed at the protection of foreign investments. The possibility of collective action concerning climate change, and even inter-state disputes, also looms large.

## The rights of investors (and states) under IIAs

Investors regularly look to their rights under IIAs (or equivalent provisions in domestic legislation) when seeking to protect their investments in foreign countries. IIAs include bilateral investment treaties (BITs), multilateral investment treaties such as the Energy Charter Treaty (ECT), and free trade agreements. Some of the most common protections in international investment law include:

- protection against unlawful expropriation of the investment;
- the fair and equitable treatment (FET) of foreign investments;
- the provision of full protection and security (FPS) to foreign investments;
- the treatment of foreign investors no worse than local investors or investors from other nations;
- protection against discrimination against foreign investors;
- obligations concerning free transfer of funds; and
- provisions that states shall comply with their commitments or obligations undertaken in respect of the foreign investor.

Increasingly, it is common to see rights for states to take action against investors in certain circumstances. One might also expect to see new IIAs expressly recognising regulatory measures taken by states to address environmental issues as lawful under those agreements. In fact, this move towards the rebalancing of the rights of host states (and their citizens) and investors could be accelerated by the COVID-19 pandemic, as many states may want to see similar

carve-outs included in future IIAs around emergency public health measures. Indeed, certain aspects of climate change are related to public health, such as the proliferation of disease caused by global warming, as well as climate-related food insecurity leading to malnutrition.

## Investors as claimants where a state has acted to prevent climate change

A state's actions to combat climate change, which may well include drastic emergency measures, may result in a foreign investor bringing a claim for breach of their rights under IIAs or equivalent domestic legislation. For example, with coastal populations and ecosystems at risk from rising sea levels, a state could expropriate an investor's coastal land, perhaps without providing adequate compensation, for the purposes of building a sea wall to protect against flooding. In such circumstances, one could see an investor bringing a claim for unlawful expropriation under the relevant investment law.

Two recent decisions of the English courts highlight the tension between investors (in particular in the infrastructure and energy sectors) and governments carrying out their obligations to combat climate change. On 21 January 2021, although it dismissed an environmental charity's appeal in a judicial review challenge, the Court of Appeal nonetheless held that decision-makers considering development consent for infrastructure projects could place significant or even decisive weight on a project's greenhouse gas emissions.<sup>1</sup> This decision confirms that projects can be blocked due to their adverse impact on the climate.

Secondly, although the Supreme Court eventually overturned the ruling in late 2020<sup>2</sup>, it was noteworthy that the Court of Appeal had previously ruled against the Heathrow third runway expansion on climate change grounds, specifically on grounds that ministers had not properly considered their obligations under the Paris Agreement when making decisions as to the future of the project.<sup>3</sup> It is possible that analogous cases will arise in other jurisdictions where a foreign investor has the development of their investment blocked on similar grounds. When it comes to protections under international investment law, a state may be caught between performing its obligations to foreign investors under IIAs or equivalent domestic legislation, and those under treaties concerning climate change. It is foreseeable that an investor could bring a claim for breach of the FET standard, possibly alleging a lack of protection of the investor's legitimate expectations, if its investment is affected by a state's actions pursuant to other treaties such as the Paris Agreement.

The Paris Agreement does not address conflicts between its provisions and existing instruments of international law. One therefore looks to the general rules for resolving conflicts between treaties contained within Article 30 of the Vienna Convention on the Law of Treaties. The relevant part of Article 30 provides that, when parties to an earlier treaty (e.g. a BIT) are also party to a later treaty (e.g. the Paris Agreement), the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. However, Article 30 only concerns treaties "relating to the same subject matter". International legal scholars have commented on the difficulties in applying Article 30 when considering treaties of seemingly different subject matter that overlap on certain issues – for example, the intersection between trade and environmental or human rights treaties.<sup>4</sup> Therefore, there is at least some risk that an investor could challenge a state's argument that it was required to breach a pre-existing BIT obligation due to its new obligations under the Paris Agreement.

## Investors as claimants where a state has failed to act to prevent climate change

The opposite circumstances in which one may see a rise in investor-state disputes concerns states that fail to take any action to combat climate change, where this failure to act can be attributed to adverse climate events threatening foreign investments. The example in this scenario involves an investor whose investment suffers damage from climate-related weather conditions such as hurricanes or flooding. In these circumstances, an investor may bring a claim for breach of the FPS obligation in an IIA or equivalent provision in domestic law. While the FPS standard has traditionally been linked to protection against physical harms such as [deliberate?] destruction of property, arbitral tribunals have also considered environmental damage to an investment, specifically natural damage to an eco-tourism site, as a more novel example of a physical harm.<sup>5</sup>

It is also worth noting that the proposed revisions to the ECT (as currently drafted) would impose an obligation on a contracting state to "effectively implement...the Paris Agreement...including [a state's] commitments with regard to it [NDCs]". The proposed re-draft also includes an obligation to "promote and enhance the mutual supportiveness of investment and climate policies and measures". If these obligations are included in the final revised ECT, they may provide a further legal basis for an investor to bring a claim based on a state's breaches of its Paris Agreement commitments.

## Further possibilities for climate change disputes

A state's failure to act to prevent climate change could also lead to a rise in class or collective action. While collective action in the UK gained ground last year after the Supreme Court remitted a claim involving 46 million British consumers against Mastercard to the Competition Appeal Tribunal<sup>6</sup>, such large-scale "opt-out" collective action is currently only available for breaches of competition law. Group litigation orders (GLOs) – an alternative collective action process in UK civil procedure – are opt-in only and their take-up so far has been modest. Nonetheless, while not involving climate change per se, the Nchanga Copper Mine Group Litigation (*Lungowe v. Vedanta*)<sup>7</sup> was instigated by a large number of local farmers after being affected by environmental pollution caused by a mine in Zambia. Therefore, there is at least some precedent in the UK for collective action to be brought against commercial entities on environmental grounds (indeed, the Supreme Court has very recently reaffirmed the possibility for a UK-based parent company to be liable in tort for environmental damage caused by a foreign subsidiary's operations, and for the English court to assume jurisdiction over such claims).<sup>8</sup> "Representative actions" are even less common, given the requirement for all claimants to have the "same interest" in a claim. There is currently an appeal outstanding in the case of *Jalla v. Shell*<sup>9</sup>, where a representative action was commenced on behalf of many thousands of individuals affected by an oil spill off the coast of Nigeria. However, the judge at first instance held that although the claims raised common issues of fact, the proceedings were to be regarded as a set of individual claims because the claimants had suffered differing amounts of damage.

Collective action can also be brought in an investor-state context, although it is not without its challenges. The well-known ICSID mass claims against Argentina (the "Italian bondholders" claims)<sup>10</sup> raised issues of jurisdiction, namely the question of whether special consent is required in multiparty claims. Legitimate concerns also exist regarding the manageability of mass proceedings. While on a smaller scale than the Argentina claims, the filing of a recent claim by a group of 44 photovoltaic (PV) power investors from Italy, Greece, Luxembourg, Germany, Turkey, the Czech Republic and Cyprus against Romania<sup>11</sup> demonstrates that group ICSID claims do exist in a renewable energy setting. Previous group ICSID claims in the renewable energy sector (albeit with fewer claimants) have included a group of 10 claimants against Romania<sup>12</sup>, a group of nine investors against Spain<sup>13</sup> and a group of 10 claimants against the Czech Republic<sup>14</sup>. All claims related to the respective states' reforms in renewable energy legislation.

Although brought outside the investor-state context, there have been various actions across the globe against oil and gas companies<sup>15</sup> on the grounds that these companies have a responsibility to mitigate the effects of climate change.

It is possible that investors may bring claims against national oil companies on similar grounds, on the basis that their actions can be made attributable to the state (and thereby engaging the protections afforded to investors under investment treaties).

Finally, climate change disputes will not be limited to the circumstances outlined above. There is also scope for inter-state disputes to arise out of the climate change emergency. The Permanent Court of Arbitration (PCA) administers environmental disputes under multilateral treaties including the Convention for the Protection of the Marine Environment of the North-East Atlantic, the UN Convention on the Law of the Sea, the Indus Waters Treaty and the Rhine Chlorides Convention, as well as bilateral treaties and ad hoc arbitration agreements. The PCA has even adopted tailored rules for the arbitration and conciliation of disputes relating to the environment and natural resources. The IBA's report on Achieving Justice and Human Rights in the Era of Climate Disruption recommends the PCA as the preferred institution to handle international environmental disputes.

## The future of climate change in investment treaty arbitration

There have been various proposals put forth with the aim of placing greater importance on climate change issues in the revision of existing BITs or the drafting of new treaties. The winners of the 2017/18 Stockholm Treaty Lab competition proposed a "Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation" (the TSI).<sup>16</sup> While it is yet to be seen whether states will adopt this model treaty in its substantive form, it includes concepts that may be useful for states when considering their existing and future BITs. Firstly, there is the idea that investments may be defined as "sustainable" or "unsustainable", with different rights and obligations attached to each category and the ability for a state to deny certain benefits to unsustainable investments. Another suggestion is the introduction of mandatory environmental impact assessments prior to the establishment of investments. Finally, the TSI removes the concept of the FET standard altogether, as investors tend to use this protection to advance claims against a state's measures combatting climate change.

Another model treaty, the Netherlands model investment agreement, devotes an entire article to sustainable development. Among the provisions in Article 6 is an obligation for the state to ensure that its investment laws and policies provide for and encourage high levels of environmental protection. Another reaffirms contracting parties' obligations under multilateral agreements in the field of environmental protection, including under the Paris Agreement. The Morocco-Nigeria BIT (not yet in force) contains binding provisions which promote environmental protection, including an obligation on investors to comply with environmental assessment screening and assessment processes applicable to their proposed investments prior to their establishment, and to maintain an environmental management system for their investment. Where the above measures constitute the placing of obligations on investors, these could lead to counterclaims in proceedings that might otherwise have had little to do with climate change. For example, an oil company may sue a state for revocation of an exploration licence, leading the respondent state to submit a counterclaim for the impact of the oil company's emissions on the local population.

The fact that these environmental protection provisions are starting to appear in both model and forthcoming investment treaties is indicative of a greater emphasis placed on tackling climate change in investment law. These additional obligations placed on both states and investors, alongside the prospect of collective action and even inter-state disputes, mean that climate change will undoubtedly be a contentious topic in the years to come.

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1. *R. (on the application of ClientEarth) v. Secretary of State for Business, Energy and Industrial Strategy* [2021] EWCA Civ 43↩

2. *R. (on the application of Friends of the Earth Ltd) v. Heathrow Airport Ltd* [2020] UKSC 52↩

3. *R. (on the application of Plan B Earth) v. Secretary of State for Transport* [2020] EWCA Civ 214↩

4. "The treaty prevails over all other treaties past, and future," Anthony Aust, *Modern Treaty Law and Practice* 174 (2000) at 183; "Resolving Treaty Conflicts," Christopher J. Borgen, *The Geo. Wash. Int'l L. Rev* 37 (2005) at 580 & 603↵
5. See *Allard v. Barbados*, PCA Case No. 2012-06. Although in this case, the Tribunal found that "being aware of the environmental sensitivities of the [Claimant's nature reserve], Barbados took reasonable steps to protect it".↵
6. *Mastercard Inc v. Merricks* [2020] UKSC 51↵
7. GLO granted in *Lungowe & Ors v. Vedanta Resources plc & Anor* [2020] EWHC 749 (TCC)↵
8. *Okpabi and others v. Royal Dutch Shell Plc and another* [2021] UKSC 3; see also *Lungowe v. Vedanta Resources plc* [2019] UKSC 20↵
9. [2020] EWHC 2211 (TCC)↵
10. See, for example, *Abaclat and ors v. Argentine Republic*, ICSID Case No ARB/07/5↵
11. *Fin.Doc S.r.l. and others v. Romania* (ICSID Case No. ARB/20/35)↵
12. *LSG Building Solutions GmbH and others v. Romania* (ICSID Case No. ARB/18/19)↵
13. *Stadtwerke München GmbH, RWE Innogy GmbH, et al. v. Spain*, ICSID Case No. ARB/15/1 ↵
14. *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01↵
15. See, for example, *City of Oakland v. BP plc* (Case No. 18-16663), *State of Minnesota v. American Petroleum Institute* (Case No. 20-CV-1636), *Luciano Lliuya v. RWE AG* (Case No. 2 O 285/15) and *Milieudefensie et al. v. Royal Dutch Shell plc* (2019)↵
16. Nathalie Bernasconi-Osterwalder, Martin Dietrich Brauch, et al., "Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation: Aligning International Investment Law with the Urgent Need for Climate Change Action", in Maxi Scherer (ed), *Journal of International Arbitration*, (Kluwer Law International 2019, Volume 36 Issue 1) pp. 7-36↵

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