Rethinking Investment Treaties

A roadmap

IISD REPORT

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Executive Summary

Investment treaties' roles, objectives, and functions are a topic of ongoing policy discussions. Understandably, these discussions tend to take the problems with existing investment treaties as their starting point. This document aims to contribute to the dialogue by asking a different—and more foundational—question:

If we were building the investment treaty regime from scratch today, what policy problems should the regime seek to solve, and how should it contribute to solving them?

We aim to assist policy-makers in designing practical solutions by reversing the common inquiry that starts from the issues with the existing regime. Instead, this document first identifies the most pressing policy problems of international investment governance and then considers whether addressing each of these problems through a treaty can help solve the problem in question.

Designed as a roadmap, the first section of the paper explains our methodology and briefly introduces our categorization of the main investment governance policy problems. The next three parts represent the core of the paper and contain discussions on specific policy problems identified within each of the three following categories:

- issues related to the encouragement and support of sustainable investment
- issues related to the impacts of investment projects
- cross-cutting issues of investment governance, institutions, and international cooperation.

Policy Problems Related to Encouragement, Incentivization, and Promotion of Sustainable Investment

The first category groups policy problems related to the central challenge of encouraging and supporting sustainable investment. For developing countries specifically, sustainable investment is needed to help poverty alleviation, creation of decent work, and industrialization. What is more, this group of policy problems is particularly relevant in the current context of climate action, in which the need for investment and divestment for climate mitigation, adaptation, and just transition toward a green economy is significant. Could investment treaties be useful instruments to achieve these twin policy objectives? Our analysis of this category reveals the following points.

Sustainable investment may be encouraged and supported by various tools. In investment policy-making, these tools have been typically discussed under four broad headings.

- **investment liberalization and market access**: There are clear policy rationales for removing restrictions that prevent foreign investors from making sustainable investments—for example, domestic laws that prohibit foreign shareholding in firms that produce green technologies. However, it is much less clear that treaties have a role to play. States can remove restrictions on sustainable foreign investment themselves, without any need for a treaty.

- **investment promotion and incentivization**: Treaties may not be ideal vehicles for directly incentivizing foreign investment through a grant of benefits to investors. They may, however, be useful for tackling the issue indirectly. This can be done by creating platforms for international cooperation on collective action problems related to sustainable investment incentivization (and unsustainable investment disincentivization), for instance, in the context of subsidies or by addressing the issue of high borrowing costs in developing countries.
- **investment facilitation**: The need for regulation of sustainable investment facilitation at the treaty level is likely limited to a narrow set of measures. These relate to commitments to technical assistance, cooperation, and investors' home country participation. These areas represent policy issues that individual countries are unable to solve on their own. Future investment facilitation treaty frameworks should also strive to ensure that they maximize the achievement of SDGs and that the facilitated investment (and reinvestment) does not undermine them. For developing countries, in particular, the implementation costs of any international facilitation frameworks must be carefully considered.
- **investment protection**: Given the known inefficacy of international investment protections in achieving their stated goals and the known additional problems and costs associated with the investment protection model, the policy case for the continuing relevance of the treaty protection model is doubtful. If states decide, nevertheless, to continue granting such protection, they should do so only with respect to some foreign investments, i.e., only sustainable investments, and they should limit the protection only to minimal constraints on opportunistic conduct by the host state.

If future investment treaties deal with any of the above areas of sustainable investment encouragement, they will have to address a distinctively legal question:

How should a treaty determine which investment is sustainable and which is not?

Such a determination cannot be made in the abstract, but only after the previous question about the tools the treaty uses to encourage investment is answered. In other words, treaty determination of what constitutes sustainable investment can only be made when the treaty parties know which purpose this determination serves at the treaty level. For this reason, we do not propose a particular way of defining sustainable investments. Instead, we highlight different options and tools that may be available.

Overall, we see encouraging sustainable investment (while discouraging unsustainable investment) as a central policy challenge for states but also an area where treaties have only a limited role to play. National and regional legal frameworks are better suited.

Policy Problems Related to Impacts of Foreign Investment Projects

The second category deals with the policy problems that arise in implementing and operating investment projects in the host state. Here, the identified policy problems deal principally with regulating foreign investment projects. The issue is ensuring that investment projects have the highest possible impact on achieving sustainable development and do not harm the realization of any recognized values and rights. Our analysis of this category highlights the following points.

Averting Negative Social and Environmental Impact of Investment Projects

Various instruments regulate human rights, public health, labour, safety, and environmental impacts of foreign investment. These instruments must be a starting point in the discussions about investor treaty obligations.

Domestic law should be the primary level of regulation, and treaties should be used in a complementary role. National legal frameworks are more appropriate to provide comprehensive, nuanced, and dynamic regulation of foreign investment. Treaties should, thus, clearly establish that investors must continuously comply with national laws.

In some cases, direct investor treaty obligations may improve the quality of investment, positively influence investor behaviour, and contribute to the promotion of sustainable development. However, whether a direct treaty obligation is the most appropriate tool depends on several factors, such as

- existence and appropriateness of existing national laws,
- existence and appropriateness of existing regional and international norms,
- existence and appropriateness of available remedial and enforcement mechanisms.

The interaction between investor treaty obligations and the existing national and international frameworks and enforcement mechanisms must be carefully considered. Treaty regulation should support the development of and reinforce strong national regulatory frameworks.

As existing remedies and avenues to access justice for individuals and communities affected by investor misconduct are limited and costly, treaties should focus on addressing this issue. To that effect, treaties could play a role in ensuring that states have or make their legal systems available for tort and civil liability actions for conduct breaching either the applicable laws of home or host states, or the treaties themselves.

Ensuring Positive Social and Environmental Impact of Investment Projects

Treaties should also strengthen the host state's capacity to reap the benefits of increased sustainable investment. They should not hamper national developmental policies by prohibiting performance requirements but rather facilitate productive industrialization through technology transfers, productive linkages with local economies, and creation of decent work.

Policy Problems Related to Investment Governance and International Cooperation

The third and final category deals with the cross-cutting issue of investment governance and cooperation and addresses, in particular, the institutional issues that arise therein. Here, we discuss specific collective action problems of international investment governance that relate to the improvement of institutional frameworks in which investment projects unfold. Our analysis foregrounds the following points.

Treaties may be useful to address the collective action problems of international investment governance and improve the institutional frameworks in which investment projects unfold. Increased international cooperation may benefit international investment governance in several areas:

- addressing the high costs of capital in developing countries through a multilateral platform;
- phasing out fossil fuel investments, ending public subsidies for their support, and creating funds to help alleviate the costs of just energy transition;
- addressing the obstacles to and creating incentives for technology and knowledge transfers to developing countries;
- enhancing regulatory cooperation, technical assistance, and capacity building.

Treaties could also foster sustainable national investment governance frameworks without aiming at their substitution or replacement. This can be done in the following areas:

- transparency, monitoring, and anti-corruption
    - government contracts transparency
    - transparency of national incentive frameworks
    - common beneficial ownership registries
    - due diligence reporting
- wide stakeholder participation in decisions about investment projects.
- access to justice and remedies, especially for actors affected by investors' misconduct.
    - improving national legal frameworks by making remedies for investor misconduct available via civil and tort liability claims.
    - investigating options for grievance and dispute prevention mechanisms.

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1.0 Introduction

Investment treaties' roles, objectives, and functions are a topic of ongoing policy discussions. With the many recognized policy problems associated with the existing investment treaty regime, policy-makers are seeking to reassess the role treaties play in future investment governance. Understandably, these discussions tend to take the problems with existing investment treaties as their starting point. The result, however, is that they often assume that investment treaties will continue to exist in something that resembles their current form—as treaties that guarantee legal protection to foreign investment—with the focus quickly turning to reforms that might ameliorate the most serious concerns with existing treaties.

The present document aims to contribute to this dialogue by asking a different and more foundational question:

If we were building the investment treaty regime from scratch today, what policy problems should the regime seek to solve, and how should it contribute to solving them?

We aim to assist policy-makers in designing practical solutions by reversing the common inquiry that takes the existing regime as its starting point. Instead, this document first identifies the most pressing policy problems of international investment governance and then considers whether addressing each of these problems through a treaty—that is, an international law instrument—can help solve the problem in question. Being a roadmap, the document does not provide conclusive answers but rather prompts policy-makers to ask different and, we think, more important questions.

Designed as a roadmap, this document is a step toward designing future investment treaties that respond to the most pressing policy problems of investment governance. The next step will be crowdsourcing ideas and innovative approaches to the content and design of future investment treaties, with the aim of leading to a more comprehensive set of specific recommendations and policy actions. This process will be open to all stakeholders, with ideas expected to come from governments, civil society, academia, international organizations, and the private sector. We hope to continue this work in a collaborative manner to discuss and design alternatives that work for the planet and the people.

The following part of the paper explains our approach and methodology. The next section briefly introduces our categorization of the main investment governance policy problems:

- issues related to encouragement, incentivization, and promotion of sustainable investment,
- issues related to the impacts of investment projects, and
- cross-cutting issues of investment governance and international cooperation.

The next three parts represent the core of the paper and contain brief discussions on specific policy problems identified within each of the three categories.

2.0 Reasons to Rethink Investment Treaties

Historically, investment treaties have focused on the protection of foreign investment from adverse state action. For developing countries, the main rationale for this focus was that internationally enforceable investment protections would attract greater foreign investment, leading to increased welfare. However, empirical evidence to show that treaty-based protections lead to increased foreign investment is mixed and inconclusive (Bonnitcha, 2017; Bonnitcha et al., 2017; Brada et al., 2021). Instead, the focus on investment protection and dispute settlement has created significant costs and has been the subject of extensive criticism, including on the grounds that the treaties are unbalanced in that they grant international legal rights to foreign investors without placing corresponding obligations on them. In the context of urgent climate action, investment treaties have been identified as a significant obstacle to the energy transition (Poulsen & Gertz, 2021; Tienhaara et al., 2022) and, more generally, to the realization of human rights and environmental protection (Office of the High Commissioner on Human Rights [OHCHR], 2023). As a result of the accumulated criticism, various reform proposals and processes have been launched at the national, regional, and international levels aimed at addressing the existing treaties' shortcomings (e.g., Organisation for Economic Co-operation and Development [OECD], n.d.-a; United Nations Commission On International Trade Law [UNCITRAL], 2024; United Nations Conference on Trade and Development [UNCTAD], 2018).

We acknowledge that tackling the problems created by the network of around 3,000 outdated treaties in force (UNCTAD, 2020) remains a crucial issue in international investment policy-making and recognize ongoing developments regarding the reform of investor–state dispute settlement (ISDS) (UNCTAD, 2024). This document, however, starts from a broader question:

If we were building the investment treaty regime from scratch today, what policy problems should the regime seek to solve, and how should it contribute to solving them?

An answer to that question could include a greater role for investment treaties in placing obligations on foreign investors—the approach followed in several newer investment treaties—but might also go beyond that in pointing to other problems of international investment governance on which cooperation between states is desirable and necessary. Thinking more broadly about the purpose of investment treaties raises questions as to whether they might have some role in helping address other policy problems, for example, ending harmful fossil fuel subsidies; ensuring alignment of financial flows with the Paris Climate objectives; combatting tax evasion and practices of base erosion and profit shifting (BEPS); ensuring that investment projects do not negatively impact human rights, public health, labour, and the environment; eliminating and discouraging corruption; or fostering sustainable development-enhancing institutional and governance frameworks nationally and internationally.

By posing such a broad question, this paper risks becoming unmanageably broad in scope. Consequently, we start by mapping other areas of governance that deal with foreign investment. More specifically, we take our cues from existing and ongoing normative processes beyond investment protection and dispute settlement to formulate a set of foreign investment-related policy problems and then ask about the role that treaties may play in addressing them.

Proceeding this way has numerous advantages. First, it recognizes that there are already sophisticated policy discussions and associated norms focused on solving various problems of investment governance. For example, the UN Guiding Principles on Business and Human Rights, the OECD's Inclusive Framework on BEPS, various model contracts and principles in extractive, agriculture, and infrastructure projects,[1] and an interlocking set of treaties and national laws dealing with foreign bribery. Moreover, this approach allows building on the existing proposals and frameworks developed by various organizations, such as the Columbia Center on Sustainable Investment's *Aligning Investment Treaties with Sustainable Development* (2019), the International Institute for Environment and Development's *Rethinking Investment Treaties in the Light of Sustainable Development* (2014), and Both Ends, Madhyam, and SOMO's *Rethinking Bilateral Investment Treaties* (Singh & Ilge, 2016). Due to these significant areas of norm-making and policy proposals, we do not have to "reinvent the wheel" and may instead refer to the emerging consensus on various legal solutions.

Second, starting from the policy problem formulation, our approach expands the regulatory modalities that are available to investment policy-makers. Not only does this widen the set of functions investment treaties may serve, but it also contributes to increasing coherence in investment governance by acknowledging that investment-related policy problems are more variegated than the current investment treaty regime recognizes. In turn, this allows a more informed decision on whether a treaty, or international law more generally, is the most appropriate governance level at which a given investment policy issue should be tackled.

Finally, we aim to move the debate about reforming investment treaties beyond approaches that focus on solving policy problems created by existing investment treaties themselves (no matter how important solving these problems may be). Instead, we propose a positive agenda with potentially new roles for investment treaties that are fit for the 21st century. In doing so, our approach treats policy problems created by current investment treaties as secondary.

[1] Extractive Industries Transparency Initiative; IGF Mining Policy Framework (2023); Danielson, 2013; About the IISD Model Contract Clauses - IISD Model Contract Clauses for Responsible Investment in Agriculture

Box 1. What can you do with a treaty?

Almost anything that states agree to can be included in a treaty. But the most beautifully drafted treaty language in the world achieves nothing if a treaty is signed and then forgotten—filed away in the back of government office, never to be read again. These considerations of effectiveness are especially relevant in the case of investment treaties. Historically, we know that there has generally been a low level of awareness of investment treaties among government officials and investors (Poulsen, 2015; Yackee, 2011). Even insofar as government officials have become aware of investment treaties, the treaties have generally not had the effect of changing government practices for the better in the ways envisaged by proponents of "old-generation" investment treaties (Bonnitcha & Williams, 2024; Calamita & Berman, 2022; Ostřanský & Pérez Aznar, 2023; Sattorova, 2018).

This observation points to an important cross-cutting issue when rethinking investment treaties. Any proposal for new forms of investment treaties needs to be grounded in an understanding of what can be achieved through treaties, as well as a realistic appreciation of the limits of treaties as a means for achieving wider social, political, and economic objectives.

This issue of effectiveness opens up a vast literature on the ways that treaties can have wider impacts in the world. Without seeking to be comprehensive, we provide a brief summary of some of the different ways that treaties can have effects in the world:

- First, and most obviously, treaties can **place binding legal obligations on states and other actors**. The content of such obligations can vary widely, including obligations to act (or not to act) in a particular way, as well as obligations to create new domestic institutions, to share information, or even simply to continue negotiating in good faith. Obligations contained in a treaty can be effective in themselves, to the extent that actors addressed by the treaty regard compliance with international law as important. They can also have a range of other effects—for example, to the extent that the obligations contained in treaties are given direct effect in national legal systems, or prompt rethinking of domestic policy priorities, or are invoked by disputing parties in contract-based or administrative proceedings.
- Second, treaties can **create or link to mechanisms for adjudication and enforcement** of the obligations contained therein. The power of "old-generation" investment treaties—and many of the problems associated with them—comes from ISDS as a dispute settlement mechanism. It is possible to imagine many other forms of dispute settlement mechanisms that can be created through treaties, including those that have jurisdiction over disputes between states and those that allow for claims to be brought by non-governmental organizations or local communities.

- Third, treaties can **authorize and enable certain conduct**. The basic starting point in international law is that conduct that is not specifically prohibited is permitted, in which case there is no need for treaty provisions to affirm what is permitted. But in some areas of international investment law—for example, technology transfer—the rules are unclear and contested, in which case affirmation that certain practices are permitted may enable states to adopt those practices.
- Fourth, treaties can **create new institutions** that provide a forum for monitoring or discussion of specified issues. The composition and mandate of these institutions can vary greatly, ranging from platforms for discussion and negotiation between states on matters of common concern to independent monitoring bodies to technical bodies that involve scientific or private sector input and aim to develop best practices in a field.
- Fifth, treaties can **articulate or develop normative consensus**. For example, treaties could seek to affirm the need for Free Prior and Informed Consent from Indigenous Peoples in relation to investments that affect them or their land, or they could seek to elaborate new norms against the use of fossil fuel subsidies. Historically, treaties have played an important role in developing normative consensus, but this is also an area where the extent of a single treaty's impact can be difficult to identify.

3.0 The Identification of International Investment Governance Policy Problems

As the first step in our rethinking of investment treaties, we identify current main policy problems in investment governance. This step requires scoping of policy areas that are adjacent to investment treaty law. A second step requires clarifying the relevant international dimensions of the problem.

This process requires careful consideration of what to include as a relevant policy problem and what to exclude. As a result, the list of policy problems we identified in this roadmap is by no means exhaustive. At the outset, it should be noted that different states may face specific investment governance policy problems that are not discussed in the report, and not all policy problems discussed here may be shared by all states. In compiling our set of policy problems, we were led by considerations that are most likely relevant to developing and emerging economies and the status of various international normative processes that touch upon foreign investment. The resulting list is designed to reflect the most pressing investment governance issues of the day, particularly those on which international cooperation is deemed desirable.

Even if we do not aim for our list to be exhaustive, the discussion in the roadmap may serve investment policy-makers in devising solutions for other investment governance issues not analyzed in the present report.

The foreign investment policy problems we discuss in this roadmap are divided into three broad categories.

Category 1: Policy problems related to the encouragement and support of sustainable investment

The first category groups policy problems related to attracting, promoting, incentivizing, and retaining sustainable investment. This group of problems is particularly relevant in the current context of climate action in which needs for investment and divestment for climate mitigation, adaptation, and just transition toward a green economy, are significant (Jones & Mun, 2023; UNCTAD, 2023d).

Category 2: Policy problems related to impacts of foreign investment projects

The second category deals with the policy problems that arise in the implementation and operation of investment projects in the host state. Here, the identified policy problems deal principally with the regulation of foreign investment projects. The issue is ensuring that investment projects have the highest possible impact on the achievement of sustainable development and do not cause harm to the realization of any recognized values and rights.

Category 3: Policy problems related to investment governance, institutions, and international cooperation

The third and final category deals with the cross-cutting issue of investment governance and cooperation and addresses, in particular, the institutional issues that arise therein. Here, we discuss specific collective action problems of international investment governance that relate to the improvement of institutional frameworks in which investment projects unfold.

In the next three parts of the paper, we formulate and briefly analyze specific policy problems within each of the three categories. For each specific policy problem, we clarify the key premises underlying the policy problem formulation, outline various ways in which treaties may help address the problem, and, finally, highlight questions that require further consideration, investigation, and clarification.

4.0 The Three Categories of International Investment Governance Policy Problems: What role for treaties?

4.1 Policy Problems Related to the Encouragement and Support of Sustainable Investment

Box 2. Encouragement of sustainable investment through treaties? A summary

A central policy challenge for all states (and developing countries in particular) is encouraging and supporting sustainable investments and discouraging and ending public support of harmful and unsustainable investments. Could investment treaties be useful instruments to achieve these twin policy objectives?

Sustainable investment may be encouraged and supported by various tools. In investment policy-making, these tools have been typically discussed under four broad headings:

- **Investment liberalization and market access**: There are clear policy rationales for removing restrictions that prevent foreign investors from making sustainable investment—for example, domestic laws that prohibit foreign shareholding in firms that produce green technologies. However, it is much less clear that treaties have a role to play. States can remove restrictions on sustainable foreign investment themselves, without any need for a treaty.
- **Investment promotion and incentivization**: Treaties may not be ideal vehicles for directly incentivizing foreign investment through a grant of benefits to investors. They may, however, be useful to tackle the issue indirectly. This can be done by creating platforms for international cooperation on collective action problems related to sustainable investment incentivization (and unsustainable investment disincentivization), for instance, in the context of subsidies or by addressing the issue of high borrowing costs in developing countries.
- **Investment facilitation**: The need for regulation of sustainable investment facilitation at the treaty level is likely limited to a narrow set of measures. These relate to commitments to technical assistance, cooperation, and investors' home country participation. These areas represent policy issues that individual countries are unable to solve on their own. Future investment facilitation treaty frameworks should also strive to ensure that they maximize the achievement of the United Nations Sustainable Development Goals (SDGs) and that the facilitated investment (and reinvestment) does not undermine them. For developing countries, in particular, the implementation costs of any international facilitation frameworks must be carefully considered.
- **Investment protection**: Given the known inefficacy of international investment

protections in achieving their stated goals and the known additional problems and costs associated with the investment protection model, the policy case for the continuing relevance of the treaty protection model is doubtful. If states decide, nevertheless, to continue granting such protection, they should do so only with respect to some foreign investments, i.e., only sustainable investments, and they should limit the protection only to minimal constraints on opportunistic conduct by the host state.

If future investment treaties deal with the above areas of sustainable investment encouragement, they will also have to address a distinctively legal question:

How should a treaty determine which investment is sustainable and which is not?

Such a determination cannot be made in the abstract but only after the previous question about the tools the treaty uses to encourage investment is answered. In other words, treaty determination of what constitutes sustainable investment can only be made when the treaty parties know which purpose this determination serves at the treaty level. For this reason, we do not propose a particular way of defining sustainable investments. Instead, we highlight different options and tools that may be available.

Key Premises

According to UNCTAD (2023), the investment gap across all SDG sectors has increased from USD 2.5 trillion in 2015 to more than USD 4 trillion per year today, and energy investment needs in developing countries are estimated at USD 2.2 trillion per year. The current global climate change challenge makes it clear that foreign investment, both public and private, is critical to achieving sustainable development. The transition to net-zero greenhouse gas emissions is estimated to require a cumulative of USD 12 trillion to USD 20 trillion in investment over the next two decades (International Monetary Fund, 2021).

The flip side of this investment gap challenge is the corresponding need to channel public funds away from harmful and unsustainable investments, particularly in the energy sector. In 2022, the global fossil fuel consumption subsidies reached an all-time high of USD 1 trillion (Global Subsidies Initiative & International Energy Agency, 2023).

These two premises combined lead to the formulation of the first (twin) policy problem: (a) the necessity of encouraging and enabling public and private investment for sustainable development and (b) discouraging and ending public support of harmful and unsustainable investments.

Sustainable investment may be encouraged by various tools. In investment policy-making, these tools have been typically discussed under four broad headings: (a) investment liberalization and market access, (b) investment promotion and incentivization, (c) investment facilitation, and (d) investment protection.

In relation to investment treaties specifically, the question is what role investment treaties may play in addressing the issue of encouraging sustainable investment and discouraging unsustainable investment. Are treaties a useful tool to achieve this goal? The following sections discuss what role treaties may play in supporting and encouraging sustainable investment under the previously mentioned four headings.

4.1.1 Liberalization of Sustainable Investment and the Role for Treaties

Historically, many states have imposed limitations and restrictions—sometimes even outright bans—on foreign investment. While most states are now more open to foreign investment, many retain limits on foreign investment in at least some sectors, for example, rules limiting the percentage of foreign ownership that is permitted in the sector in question or rules that require a prospective foreign investor to enter into a joint venture with a local partner. In principle, such domestic rules can be an obstacle to foreign investors seeking to make or expand sustainable investments (Gaukrodger, 2021). The term "investment liberalization" is used to denote the removal of restrictions that limit foreign investors' ability to make, acquire, or expand investments.

While there is a significant body of research on the impact of these restrictions on foreign direct investment (FDI) flows in general, there has been little research that seeks to explore the extent to which they pose obstacles specific to sustainable investment. More generally, policy discussions about investment liberalization raise a paradox. If states wish to encourage sustainable investment by foreign investors, it is unclear why they would simultaneously maintain restrictions on foreign investment in relevant sectors that make investing difficult (Bonnitcha, 2019). One possible explanation is inconsistent action between different arms of government; longstanding restrictions on foreign investment may not reflect the current government's priorities. Another possible explanation is that governments are often pursuing multiple objectives simultaneously. For example, a state may be seeking to encourage sustainable investment while simultaneously managing perceived national security risks associated with some types of inward FDI. This tension is reflected in the design of investment screening mechanisms, which have proliferated in developed states over the past decade (Bencivelli et al., 2023; Danzman & Meunier, 2023).

Old-generation investment treaties did not address questions of investment liberalization. Since the mid-1990s, a small but growing minority of investment treaties have included binding commitments on investment liberalization. The most significant of these is the extension of national treatment—i.e., the non-discrimination obligation—to the pre-establishment phase, thereby prohibiting a state from imposing conditions or restrictions on new foreign investment that do not apply equally to new domestic investment. Such obligations are normally accompanied by complicated treaty schedules, which exempt certain sectors and measures from the scope of investment liberalization obligations.

Should states include binding investment liberalization obligations in future investment treaties with a view to encouraging sustainable investment in liberalized sectors? In our view, this is unnecessary and carries risks. It is unnecessary because states that wish to eliminate existing restrictions on sustainable foreign investment can do that themselves without waiting for an investment treaty. Indeed, there are benefits of proceeding unilaterally, in that the more open regime can be extended to foreign investors generally rather than being offered only to foreign investors of the treaty party. It is risky because investment policy involves reconciling a range of competing considerations. In a context in which developed states are establishing new mechanisms to screen inward foreign investment, it seems unwise to enter into treaties that would preclude (or, at least significantly constrain) a state's ability to establish and operate such mechanisms.

There are, however, other ways that future investment treaties might address the question of investment liberalization. Another option to consider is that future investment treaties could require states to publish schedules that publicly list any restrictions on foreign investment that depart from the baseline assumption of pre-establishment national treatment. This would mimic the structure of existing investment treaties that deal with liberalization. It would allow states to clearly communicate the extent of restrictions on foreign investment at any given moment while simultaneously allowing states to retain the policy space to vary the extent of those limitations and restrictions as they see fit.

Questions to Consider

- What kinds of restrictions and limitations do states maintain on foreign investment? Are these restrictions in the nature of mandatory restrictions (for example, upper limits on the percentage of foreign ownership that is permitted in a given sector) or discretionary restrictions (for example, those that are imposed through an investment screening mechanism)?
- Do these restrictions and limitations place undue limits on sustainable investment, bearing in mind the other policy objectives that they serve?
- Does addressing investment liberalization through an investment treaty offer any advantage to a host state beyond what could be achieved through unilateral action?

4.1.2 Sustainable Investment Promotion and Incentivization and the Role for Treaties

There is a myriad of tools that are used to incentivize and promote investment. To mention but a few, tax incentives, subsidies, grants, loans, guarantees, quotas, certificates, and other kinds of economic or non-economic benefits, such as R&D support and training, are all provided to affect the location of investment (Thomas, 2007). Many of these tools come with their own drawbacks, including the cost to public finances and the risks of strategic "gaming" by investors—behaviour that fulfills the criteria for the award of a benefit without contributing to the achievement of the underlying policy goal. Choosing between these tools or their combination is often highly complex and context specific. Additionally, it should be borne in mind that many investments take place regardless of the presence of public incentivization, as investment decisions are often affected by general public policies and other aspects of the investment location, e.g., labour market regulation and education. The next paragraphs discuss two common tools to incentivize investment—tax incentives and subsidies—and assess whether they can be usefully regulated through a treaty. We also briefly discuss what role treaties may play in disincentivizing harmful and unsustainable investments.

Example 1. Tax incentives

Let us start with one of the most prevalent investment promotion tools: tax incentives. First, evaluation of whether tax investments are an effective investment promotion tool is methodologically challenging, as it requires the determination of whether the investment would have happened without the incentive granted. This challenge is further complicated by the fact that tax incentives are often introduced in conjunction with other ease-of-doing-business reforms, which may exaggerate the impact of tax incentives on investment decisions. Various empirical studies, including the 2015 Report to the G-20 by the Platform for Collaboration on Tax (International Monetary Fund et al., 2015) have, however, found that most investments would have taken place even in the absence of a tax incentive (Mataba & Readhead, 2024). Specifically in the context of the energy transition, UNCTAD (2023b) has noted that generic non-targeted incentives, such as tax incentives, are inappropriate for the energy transition. Targeted investment promotion instruments, which are more efficient for the energy transition, are, however, more administratively complex and can be burdensome on public finance (UNCTAD, 2023b).

What is more, the landscape of tax incentives is likely to undergo a significant overhaul considering the coming into force of the OECD Global Minimum Tax. Given the ongoing OECD BEPS process, the normative setting for international taxes can thus be expected to continue to shift (Mataba & Readhead, 2024).

Given the lack of proven effectiveness of tax incentives for encouraging sustainable investment, the recent normative shifts in international taxation, and the sovereign nature of taxation, it would follow that an investment treaty may not be the ideal vehicle for directly regulating tax incentives.

Example 2. Subsidies

The recent turn to industrial policies in the countries of the Global North has put the question of subsidies—another incentivizing tool—at the fore of current debates in international economic law. However, these tools are generally not available to developing countries with limited fiscal space, creating a problem of "race to the top." In addition, subsidies create important distributive effects in that they directly subsidize the private sector instead of regulating companies to internalize their environmental and social effects (Altenburger et al., 2023).

Nevertheless, calls for international cooperation on the regulation and definition of permitted subsidies, transparency of national subsidies, and improved enforcement have been made (Hillman & Manak, 2023).[2] While industrial and subsidies policies are based on national (e.g., the U.S.'s IRA and CHIPS act, China EV subsidies) and regional law (e.g., the EU Green Deal) instruments (Kamin & Kysar, 2023), there is a scope to regulate the use of subsidies through treaties to avoid their international trade-distorting effects, to improve resilience, and allow addressing policy problems such as climate change (Hillman & Manak, 2023).

[2] Discussions about regulation of subsidies have been going on in the international trade and tax communities for some time, and despite the potential impact of subsidies on investment, we do not discuss them in the paper further.

Example 3. Disincentivizing unsustainable investment

Finally, regarding the disincentivizing of unsustainable investments, treaties may be useful as cooperation mechanisms for regulating public support to known unsustainable investments in addition to sustainable investments.[3] Traditionally, investment treaties have focused on post-establishment investment protections and aimed at disciplining the regulatory power of the host state. However, treaties could be tuned to address the role of home states in granting various economic advantages to their investors. This is relevant in the context of subsidies as well as in broader governmental investment/export credit support, loans, guarantees, and insurance schemes.[4]

A potential advantage of focusing on home state measures is that the treaty parties may commit to dialogue and cooperation on support mechanisms for sustainable investment and commit only to broad parameters of this support (e.g., provision of information, transparency, broad criteria, or specific sectors), while leaving the details of implementation to their national laws and agencies (also see below Sections 3.3 and 3.4). States may commit to ensuring that the economic benefits they grant to their investors are available only for sustainable investments.

Treaties may also create specific phase-out obligations regarding fossil fuels projects or obligations related to ending fossil fuels and high-emission investment subsidies. Arguably, if such a treaty is adopted in a multilateral form with a significant number of parties, this can eliminate the negative effects of international competition for foreign investments (see, e.g., Fossil Fuels Non-Proliferation Treaty, n.d.).

The above suggests that treaties may not be ideal vehicles for directly incentivizing foreign investment through a grant of benefits to investors. They may, however, be useful to address some issues related to the use of incentives indirectly. This can be done by creating platforms for international cooperation between home and host states on collective action problems related to sustainable investment incentivization, for instance, in the context of subsidies or disincentivization of unsustainable investment.

Questions to Consider

- Which existing investment promotion tools (e.g., tax incentives, subsidies, grants, loans, guarantees, quotas, certificates, and other kinds of economic or non-economic benefits, such as R&D support and training) have been effective in encouraging investment, generally, and sustainable investment, specifically?
- Are these tools likely effective and available in a specific country or regional context?
- What are the added benefits of regulating the given investment promotion tool in a treaty, as opposed to other kinds of instruments?

[3] E.g. EU–New Zealand Trade Agreement, Chapter 19 on Trade and Sustainable Development, Annex on Environmental Goods and Services, Art 19.11, Art 19.17.

[4] While focusing on export, the OECD (2023) *Agreement to Expand Export Credit Support for Climate-Friendly and Green Projects* may be used as an inspiration to include home state support to outward sustainable investment too.

- Does the use of these investment promotion tools create collective action problems, such as race to the bottom or race to the top?
- Can a treaty effectively address the collective action problems created by the use of these investment promotion tools?

4.1.3 Facilitating Sustainable Investment Through Treaties?

While linked to the promotion and incentivization of investments, investment facilitation measures are a distinct category as they aim to tackle ground-level administrative obstacles to investment. Investment facilitation measures are "about making it easier for investors to establish or expand their investments, as well as to conduct their day-to-day business in host countries" (UNCTAD, 2023b, p. 2). Recently, investment policymakers have focused their attention on the creation of international rules regarding investment facilitation (Coleman et al., 2018; Jose, 2024; Nikièma & Maina; Singh, 2023; Zhang, 2018). This trend evidences a shift from investment protection toward facilitation at the treatymaking level.[5]

Analyzing investment facilitation features in existing international investment agreements (IIAs), UNCTAD categorized these provisions into five categories: (i) investment regulatory environment and administrative procedures, (ii) stakeholder engagement, (iii) cooperation mechanisms, (iv) proactive measures addressing specifically sustainable investment, and (v) provisions related to enforcement of investment facilitation commitments (UNCTAD, 2023a).

While the prevailing view is that the quality of regulatory climate positively impacts investment flows in general (e.g., Al-Thani et al., 2023; Balesteri & Olekseyuk, 2023; World Bank, 2021), there has so far been little conceptual and empirical work on the question of the added benefit of regulating investment facilitation through binding treaty commitments, as opposed to unilateral national law measures or collaborative regional and international frameworks. Many of the investment facilitation measures found in recent treaties have been pursued by a multitude of states as part of unilateral domestic reforms (Calamita, 2020). This raises questions about the usefulness and necessity of treaty regulation.

Studies that have focused on the added benefits of investment facilitation measures point toward a limited scope for useful treaty regulation. For instance, the 2018 Southern African Development Community (SADC)–IISD Investment Facilitation report (Brauch et al., 2019) based on a workshop that brought together investment policy-makers from the SADC members has identified very few typical investment facilitation measures that could be usefully regulated at the international level. Instead, a mix of national and regional mechanisms was viewed as better suited to achieve the goals of sustainable investment facilitation. The role of international regulation was viewed as complementary at best, and only for some investment facilitation measures. Similarly, based on Berger et al.'s (2022) inventory of investment facilitation measures that are considered to increase the investment's developmental impact,

[5] WTO Investment Facilitation for Development Agreement, see Jose, 2024; Brazil's Cooperation and Facilitation Investment Agreements, see Martins, 2017; EU–Angola Sustainable Investment Facilitation Agreement, see Directorate-General for Trade, 2023; Association of Southeast Asian Nations (ASEAN) Investment Facilitation Framework, see ASEAN, 2021.

Calamita and Schacherer (2022, pp. 12–14) have identified only a handful of measures that may be usefully included in international instruments. And even here, international regulation was complementary, rather than a sole governance level at which the measure is implemented. Among the measures they noted were, for instance,

- providing technical assistance to developing countries' investment promotion agencies to enhance their ability to facilitate sustainable FDI based on needs assessments,
- providing clear guidelines on corporate social responsibility (CSR) and responsible business conduct to outward investors with mandatory investor education in sectors with high development and environmental sensitivities,
- establishing clear criteria linking home-country support measures to the observation of internationally recognized standards of responsible business conduct, the acceptance and observance of corporate CSR policies and (in the case of projects with substantial impacts), ex ante developmental, environmental, and social impact assessments, and
- facilitating sustainable FDI projects through partnerships between investment authorities in host and home economies, including to help investors find bankable projects quickly.

This suggests that the need for regulation of sustainable investment facilitation at the treaty level is likely limited to a narrow set of measures. These relate to firm commitments to technical assistance, cooperation, and investors' home country participation. These areas represent policy issues which individual countries are unable to solve on their own.

Relatedly, it should be noted that different countries may need different investment facilitation frameworks that reflect their political and policy priorities, socio-economic conditions, and administrative capabilities. Existing research has shown that there is significant divergence in investment facilitation frameworks, even at the regional level (Calamita & Schacherer 2022; Singh, 2023). This point raises the question of whether it is desirable to have a universal or one-size-fits-all model of investment facilitation, or whether international investment facilitation regulation should be limited to the lowest common denominator.

Apart from that, it is crucial that investment facilitation provisions included in future IIAs take commitments to sustainable development seriously. Currently, there are significant gaps with respect to linkages between investment facilitation and sustainable development in the emerging investment facilitation models, including, crucially, in the WTO Investment Facilitation for Development Agreement (Calamita, 2023; Calamita & Schacherer, 2022; Jose, 2023; UNCTAD, 2023). Like investment protection treaties, the existing investment facilitation treaty models are based on the premise that investment facilitation leads to more foreign investment, which, in turn, leads to development. The corollary assumption is that economic development is necessarily sustainable development. These are, however, flawed assumptions as has been repeatedly confirmed by literature (Bonnitcha, 2017; Calamita & Schacherer, 2022).

Across-the-board and wide-ranging facilitation measures may thus also lead to increased negative effects of foreign investment, especially in the context of global competition for FDI and the regulatory race to the bottom (Coleman et al., 2018). Future investment facilitation treaty frameworks must strive to ensure that they maximize the achievement of the SDGs and that the facilitated investment (and reinvestment) does not undermine them (UNCTAD, 2016).

Finally, it should be borne in mind that some of the obligations included in recent investment facilitation treaty disciplines create significant demands on states in terms of administrative capacity and require whole-of-government reforms of national legal frameworks (Bernasconi-Osterwalder & Bonnitcha, 2020; Bernasconi-Osterwalder et al., 2020; Mohamadieh, 2019; Singh, 2018). Some emerging investment facilitation disciplines recognize that for states with lower administrative capacity, effectively implementing the investment facilitation obligations may be achieved only with capacity building, technical assistance, and similar supportive mechanisms.[6] However, to what extent these support measures can alleviate the existing resource constraints regarding onerous investment facilitation measures in the long term remains an open question.[7]

Questions to Consider

- What kind of investment facilitation measures respond best to a given national context?
- What is the value added by regulating these investment facilitation measures in a treaty, as opposed to national or regional law?
- If there are investment facilitation measures suitable for international regulation, is it more appropriate to regulate them through direct international disciplines or through more cooperative approaches?
- Which investment facilitation measures facilitate specifically sustainable investment? Is the sustainability criterion included in the measure's design? How do facilitation measures safeguard against possible negative impacts of the facilitated investment?
- How resource intensive will be the implementation of the selected investment facilitation measure? Does the implementation create additional demands on administrative capacity? Are there better alternatives in national and regional frameworks?

[6] See e.g. Section V of the WTO IFD (text of 6 July 2023); EU-ESA Economic Partnership Agreement , Art 5.30 and 5.31.

[7] The AfCFTA Protocol on Investment, for instance, approaches investment facilitation in a cooperative and subsidiary way, rather than through direct international disciplines.

4.1.4 Is There a Case for the Continued Relevance of Investment Treaty Protection?

As noted above, existing evidence is inconclusive at best on the point of whether international legal protections that are typically found in IIAs encourage investment (Bonnitcha, 2017; Brada et al., 2021). To the extent they marginally encourage foreign investment, treaty protections appear to be more effective in sectors that are least beneficial from a sustainable development and host state perspectives (Bonnitcha, 2017;). These are the sectors that often have significant negative environmental and social impacts, such as extractives and fossil fuels energy production (di Salvatore, 2021). Instead, investment protection treaties have contributed to the growth of the arbitration industry and third-party funding, i.e., not productive investments but sectors that directly benefit from the operation of the investment protection system. While investment protections may shape investors' behaviour to some extent because they accord increased protection to investments, thus potentially influencing investors' ability to access credit, they also give foreign investors undue leverage to influence public policy initiatives.

In combination with the known problems and costs of the regime, this raises serious questions about the continuing policy relevance of the treaty protection model. Regardless of the inefficacy of international investment protection in promoting investment, the protection standards under the existing investment treaties raise questions about arbitrariness and unpredictability of the protection accorded, as the protection is only accorded to some foreign investments and is not available to nationals, while it also does not distinguish between sustainable and unsustainable investment activities. In the context of climate action and sustainable investment, this is an important drawback.

Furthermore, it should be considered that to the extent that investment treaty protection and ISDS are functional equivalents to insurance (Gaukrodger, 2022) paid out of public money without investors having to pay the premium, there are multiple other legal and market mechanisms to protect investment (e.g., political risk insurance, contractual mechanisms, or the host state's legal frameworks). These have the benefit of investors having to carry the costs of protecting against the risks associated with their investment decisions.[8] Given that access to finance for sustainable investment in developing countries is one of the core policy issues in investment governance, reorienting treaties away from protection toward international cooperation on the financing of sustainable investment projects is a more promising way forward.

If states decide, nevertheless, to continue granting such protection, it will be important to limit any treaty protection only to investments that are responsible and aimed at advancing sustainable development. States should exclude the extraordinary open-ended and ill-defined protections and limit protections to a general non-discrimination obligation and the prohibition of direct expropriation without compensation. In addition, specific rules on compensation for breach of these standards should be included in the treaty in order to avoid overcompensating investors (Aisbett & Bonnitcha, 2021; Bonnitcha & Brewin, 2020; Ostřanský & Bernasconi-Osterwalder, 2022). Such minimal constraints on opportunistic

[8] It should be noted that investment contracts bring along their own policy issues (e.g., IISD, 2023).

conduct by the host state can address the main policy concerns to which investment protections were traditionally supposed to respond, such as obsolescing bargaining.

Questions to Consider

- Which policy concerns are investment protection standards supposed to address—e.g., investment promotion or obsolescing bargaining? Is there empirical evidence that they are capable of addressing these concerns?
- If there is a policy case for the inclusion of investment protection standards in treaties, which minimal constraints on host states' regulatory powers can address the policy problem efficiently?
- Should a foreign investor be entitled to greater protection treatment than under its home state's laws or under a typical political risk insurance?

4.1.5 How to Determine What Is Sustainable Investment for the Purposes of a Treaty

Even though there are questions about treaties' potential to directly encourage sustainable investments, let us assume, for the moment, that there is a role for investment treaties to do so. A next and distinctively legal question arises: How should a treaty determine which investment is sustainable and which is not? Such a determination cannot be made in the abstract but only after the previous question about the tools which the treaty uses to encourage investment is answered. In other words, treaty determination of what is sustainable investment can be only done when we know which purpose this determination serves at the treaty level. Determination of which investments are sustainable should, therefore, differ depending on whether the treaty regulates investment liberalization, incentivization, facilitation, or protection. For this reason, we do not propose a particular way of how sustainable investments may be defined. Instead, we highlight different options and tools that may be available.

In the context of climate action, various attempts at and approaches to the determination of sustainable investment have emerged. Many international actors have lately embarked on the definitional quest, particularly in sustainable finance taxonomies and environmental, social, and governance ratings. The EU, China, Chile, Indonesia, Malaysia, Mongolia, South Africa, and the United Kingdom are among more than 20 jurisdictions that are developing or have already developed their own sustainability taxonomies (Mealy, 2021). The broad idea underpinning these initiatives is to develop tools and processes to measure, assess and identify the level of sustainability of investment/business activities for a given area/jurisdiction/region.[9] This is intended to help debt issuers, investors, governments, and municipalities understand what investments will deliver a low-carbon economy (Climate Bonds Initiative, 2024).

Nevertheless, the major challenge in incorporating a taxonomy in investment treaties is that taxonomies are highly technical and detailed instruments. In addition, they are evolutive

[9] There are differences in approaches adopted by the existing taxonomies. The EU taxonomy, for instance, operates in a binary mode, defining business either as sustainable or not; however, it also includes a category of "transition activities" focused on rapidly shifting high-carbon industries to alignment with the Paris Climate Change Agreement, whereas the ASEAN taxonomy, for example, uses a traffic light system, thus presenting different levels of sustainability of business activities.

instruments, as they need to account for developments in scientific knowledge, state of technology, and politico-economic preferences. Treaties, in contrast, are instruments concluded for relatively long time periods and are, generally, difficult to amend. As a result, they are less apt to deal in a detailed manner with matters that undergo rapid developments and require context-specific determinations. Even if there are ways to incorporate a sustainability taxonomy by reference into a treaty, a question remains as to which institutions and procedures will be used to apply this taxonomy for treaty purposes. The additional challenge is the existing proliferation of taxonomies that makes it difficult to find a common baseline taxonomy for reference (Kidney, 2021; Mealy, 2021).

Apart from taxonomies, there are other ways treaties may determine the sustainability of investments. For instance, the contracting parties may determine what they consider as sustainable and unsustainable investment through annexes or schedules to a treaty. The determination of sustainability may be left for each state party to decide—allowing for greater flexibility, context-sensitivity, and political feasibility in negotiations[10]—or may use joint treaty party mechanisms.[11] Such annexes may be revised periodically through various joint party mechanisms, such as committees.

Finally, the fact that we express doubts about treaties playing a useful role in the sustainable investment classifications does not detract in any way from the importance of such determinations in other legal and policy instruments. To the contrary, investment sustainability determinations are a crucial and necessary step toward achieving SDGs and the energy transition.

Questions to Consider

- What is the purpose of determining which investments are considered sustainable under the treaty? And what would be the treaty consequences of such determination?
    - Are the consequences about encouragement of investment through direct conferral of benefits/incentives?
    - Is it about regulation of investment, such that investor treaty obligations accrue as well?
    - Is it about creating platforms and institutions for international cooperation between treaty parties?
- How detailed should the criteria for this determination be? How flexible should it be?
- Should the determination be made by each treaty party individually or by the treaty parties collectively?
- Which institutions and procedures are to be used for such treaty determination?

[10] The Creative Disruptors, n.d.; Brauch, 2020.The modernized Energy Charter Treaty agreement in principle used a flexible approach whereby contracting parties could make unilateral declarations excluding certain types of investments from the coverage by listing them in an annex; other contracting parties had the right to then reciprocally deny benefits to the same type of investment in their jurisdiction.

[11] In the context of climate action and investment treaties, various mechanisms, such as carveouts and annexes, have been proposed. See e.g. Paine & Sheargold, 2023.

4.2 Policy Problems Related to the Impact of Foreign Investment Projects

Box 3. Regulating the impact of foreign investment projects through treaties? A summary

The potential role of treaties in regulating the impact of investment projects has two aspects:

- averting negative social and environmental impacts
- ensuring positive social and environmental impacts

Averting Negative Social and Environmental Impact of Investment Projects

Various instruments regulate the human rights, public health, labour, safety, and environmental impacts of foreign investment. These instruments must be a starting point in the discussions about investor treaty obligations.

The primary level of regulation should be domestic law, and treaties should be used in a complementary role. National legal frameworks are more appropriate to provide a comprehensive, nuanced, and dynamic regulation of foreign investment. Treaties should, thus, clearly establish that investors must continuously comply with national laws.

In some cases, direct investor treaty obligations may improve the quality of investment, positively influence investor behaviour, and contribute to the promotion of sustainable development. However, whether a direct treaty obligation is the most appropriate tool depends on several factors, such as

- existence and appropriateness of existing national laws
- existence and appropriateness of existing regional and international norms
- existence and appropriateness of available remedial and enforcement mechanisms.

The interaction between investor treaty obligations and the existing national and international frameworks and enforcement mechanisms must be carefully considered. Treaty regulation should support the development of and reinforce strong national regulatory frameworks.

As existing remedies and avenues to access justice for individuals and communities affected by investor misconduct are limited and costly, treaties should focus on addressing this issue. To that effect, treaties could play a role in ensuring that states have or make their legal systems available for tort and civil liability actions for conduct breaching either the applicable laws of home or host states, or the treaties themselves.

Ensuring Positive Social and Environmental Impact of Investment Projects

Treaties should also strengthen the host state's capacity to reap the benefits of increased sustainable investment. They should not hamper national developmental policies by prohibiting performance requirements but rather facilitate productive industrialization through technology transfers, productive linkages with local economies, and the creation of decent work.

To improve developing countries' revenue mobilization, future investment treaties may include various tax-related provisions that remove the frictions created by the separate regulation of tax and investment at the international level.

There may be a role for treaties to secure the cooperation of states to ensure that distributional consequences of climate action policies are just and equitable. The removal of fossil fuel subsidies may help establish such funds and mechanisms.

Key Premises

While encouraging sustainable investment—through incentivization, facilitation, or otherwise—is one possible function for investment treaties of tomorrow, a significant number of international investment governance concerns relate to the impacts and effects of foreign investment projects. Various international processes and instruments recognize that foreign investment projects may and often do have negative social and environmental impacts.[12] Activities of foreign investors have posed issues in many areas, particularly regarding their effects on human rights, public health, labour, safety, and the environment.[13] Even sustainable investments may have harmful and negative impacts if they are not properly implemented and regulated.

In the investment treaty realm, the existing asymmetry between home state obligations and investor rights has been a major point of concern (Bernasconi-Osterwalder & Zhang, 2018; Choudhury 2020; Perrone & Vásquez, 2023). An important academic and policy debate on the international regulation of foreign investment projects, particularly through international investor obligations, has been going on for almost two decades (Mann et al., 2005).

The asymmetry of rights and obligations between investors and host state at the investment treaty level is just one reason for considering regulation of foreign investors' conduct directly at the treaty level (Bueno et al., 2023; Dumberry & Dumas-Aubin, 2024; Krajewski, 2020). The broader policy question is accountability for foreign investors' activities (Ryerson et al., 2022). Legal structuring of foreign investment operations, separate legal personality of corporations, and legal costs create significant difficulties for affected stakeholders to make foreign investors accountable (Bernasconi-Osterwalder, 2022; Guven et al., 2020; Laryea, 2018; Mann et al., 2005). Ensuring that human rights, public health, labour, and environmental protections are a priority when regulating the impacts of investment projects is, therefore, essential (A/76/238, para. 58).

[12] Office of the High Commissioner on Human Rights (2023); Special Rapporteur on Rights of Indigenous Peoples, Special Report on International investment agreements, including bilateral investment treaties and investment chapters of free trade agreements (2016); BHR Treaty Process; OHCHR Working Group on the issue of human rights and transnational corporations and other business enterprises; UN Guiding Principles on Business and Human Rights; OECD Guidelines for Multinational Enterprises.

[13] The main instruments already regulating the impact of investment activities include: UN Human Rights Council, Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (March 21, 2011); The World Bank Environmental and Social Framework; UN Special Rapporteur on Human Rights and the Environment, Framework Principles on Human Rights and the Environment; OHCHR Remedy in Development Finance: Guidance and Practice; International Labour Organization Declaration on Fundamentals Principles and Rights at Work and its follow-up, Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies for All.

A related policy problem is that while foreign investment is important for sustainable development and may bring various benefits, such as providing transfer of new technologies necessary for a just energy transition, current international regulation of foreign investment does not predominantly focus on ensuring that host states and their communities reap these benefits (Brauch, 2023). There is a need for investment regulation to ensure that host states and their populations enjoy the benefits of foreign investment for sustainable development while minimizing their negative impact.

There is a clear international dimension to the policy problem in that the regulation of investment's impact must avoid a "race to the bottom."

The following section discusses the two aspects of regulating the impacts of investment projects: (i) averting negative social and environmental impact and (ii) ensuring positive social and environmental impact.

4.2.1 How to Ensure That Foreign Investment Projects Do Not Have a Negative Social and Environmental Impact

There is no disagreement that appropriate regulation of investment projects is crucially important; however, whether investment treaties have a role to play is a debated question. Key issues concern the level of specificity that is possible/desirable in a treaty, enforceability of obligations, and the relationship of treaty obligations to underlying domestic law.

The Benefits and Drawbacks of Regulating Investor Obligations at the Level of Treaty

IISD has identified various areas in which investor obligations may be developed further (Bernasconi-Osterwalder et al., 2018; IISD, 2018; Mann et al., 2005). In 2018, IISD identified the following categories as potentially ripe for integration into treaties as investor obligations (Bernasconi-Osterwalder et al., 2018):

- general obligation to comply with host state's domestic law
- anti-corruption
- provision of information
- human rights, environment, labour, public health, gender, and Indigenous Peoples' rights
- social and environmental impact assessment
- taxation and BEPS
- transparency of contracts and payments
- tort and civil liability.

This work has been developed on the assumption that regulating these areas directly in treaties is beneficial and redresses the current asymmetry in the investment treaty regime. It is possible that investor obligations in a treaty influence investor behaviour and improve the quality of investment, contributing to the promotion of sustainable development, respecting human rights and the environment, and combating corruption (Bernasconi-Osterwalder et al., 2018, p. 6). Investor obligations may also complement and bolster national legal frameworks, address gaps and weaknesses in domestic legal systems, improve investment governance, create avenues for investor accountability, and consolidate existing international law norms (Bernasconi-Osterwalder et al., 2018). However, there are trade-offs in regulating investor obligations beyond national laws via treaties.

First, treaty obligations are unlikely to be as detailed and specific as national laws. As a result, investor treaty obligations may be limited to the codification of more general principles, such as "do no harm," "polluter pays," or "the precautionary principle." A related issue is that investor treaty obligations should be drafted in a way that allows the treaty obligations to react to changing developments, striving for the greatest possible protection of a given value. The way the interaction with other legal norms on the matter is designed through reference to other, more dynamic instruments (e.g., domestic law, other international law norms, or non-state norms) will, therefore, be crucial.

Second, various sectors necessitate different sectoral regulations. This raises the question of the potential under-inclusiveness of investor treaty obligations. If the treaty obligation applies to some investment activities—for instance, the obligation of conducting social and environmental impact assessments in the extractive industry—and says nothing on investment in, for example, retail or pharmaceuticals, does this mean that the latter are somehow less problematic or unregulated through a treaty? This issue again shows that when it comes to direct regulation of foreign investment activities, treaties may be more suited to play a complementary role and are ideally used to bolster the applicable national and international law frameworks.

Third, it is important to consider the question of the nature of investor treaty obligations. The limited existing practice of including CSR and responsible business conduct (RBC) provisions in investment treaties shows a strong preference for voluntary standards or obligations of best efforts.[14] The impact of such voluntary standards has been seen as minimal, though (Bernasconi-Osterwalder et al., 2018; Krajewski, 2020; African Group et al., 2013). More direct and mandatory international investor obligations have been seen in African treaty models.[15]

The recently concluded Protocol on Investment (POI) to the African Continental Free Trade Area (AfCFTA) provides a good example of taking into account some of the complexities of regulating investor obligations directly in a treaty (see Danish et al., 2023). Chapter 5 of the POI includes a comprehensive set of investor obligations related to compliance with national and international law; business ethics, human rights and labour standards; environmental protection; Indigenous Peoples and local communities; socio-political obligations; anti-corruption; CSR; corporate governance; and taxation and transfer pricing. While some of these obligations are linked to domestic law (such as the obligations related to Indigenous Peoples and local communities), others have no or limited parallel in domestic laws and have

[14] Brazil–India BIT (2020), Article 12; Brazil–Ecuador BIT (2019), Article 14; Brazil–UAE BIT (2019), Article 15; Brazil–Ethiopia BIT (2019), Article 14; Brazil–Suriname BIT (2018), Article 15; Brazil–Guyana BIT (2015), Article 15; Brazil–Morocco BIT (2019), Article 13.

[15] Nigeria–Morocco BIT (2016); ECOWAS Common Investment Code; SADC Model BIT Template (2012); AfCFTA Protocol on Investment (2021).

been developed independently in the protocol (such as the obligations on business ethics, human rights, and labour standards). The protocol applies this same approach to a single obligation heading. Thus, the obligations related to the environment, for instance, include obligations based on domestic law and international best practices,[16] regional international law,[17] and obligations derived from general principles of international law.[18]

This approach recognizes that the treaty level is not appropriate for regulating the full complexity of investor's operations. It recognizes that the primary level of regulation remains domestic law and uses international law only to complement and reinforce the former. This may be done through reference to generally accepted international law norms and general principles, through reference to applicable domestic laws, but also through a commitment of the treaty parties to legislate in the given area.

This multi-prong approach has benefits in that it allows addressing the gaps and drawbacks of the existing legal frameworks while also removing incentives for states to relax applicable standards in order to attract investment—the "race-to-the-bottom" problem.

Who May Enforce These Obligations, Where, and Against Whom? – Dispute settlement, remedial, and enforcement mechanisms

The above discussion about the desirability, nature, scope, and depth of investor treaty obligations is, however, intrinsically linked to the question of avenues for their enforcement or, more generally, about remedial mechanisms for violations of investor obligations, whether they are treaty based or not. As with the previous discussion, this question cannot be discussed in a vacuum and must consider the existing avenues for holding foreign investors accountable.

In the context of the role of treaties, scholarly and policy discussions have been predominantly held against the backdrop of the existing regime of investor–state treaty arbitration (Jarrett et al., 2023; Krajewski, 2020). That discussion is concerned with various ways to increase investor accountability in the current ISDS regime (see Jarrett et al., 2023; also Laryea, 2018). However, given the problems of the existing investment protection model, the discussion in this paper does not assume that future investment treaties should necessarily provide for investor–state arbitration. Instead, taking the limited options of redress by stakeholders directly affected by investors' misconduct as a starting point (Bernasconi-Osterwalder, 2022), we consider the possibility that investment treaties could be used to strengthen the available remedies without necessarily expanding or modifying the deeply problematic system of ISDS.

Treaties may thus oblige states to guarantee that avenues for redress are available under their domestic laws, in both the home state and the host state (Bueno et al., 2023; Krajewski, 2020). Treaties may play an important role in ensuring that states have or make their legal

[16] Art 34(1)(c) (requiring investors to "carry out an environmental impact assessment, in accordance with the best international standards and practices and as required by domestic law").

[17] Arte 34(1)(a) (requiring investors to "respect the right to a clean, healthy and sustainable environment, as reflected in Article 24 of the African Charter of Human and Peoples' Rights, and the Resolution of the United Nations General Assembly A/RES/76/300").

[18] Art 34(1)(b) (requiring investors to "comply with the principles of prevention and precaution when conducting their business activities to anticipate and prevent any risk of significant harm to the environment").

systems available for tort and civil liability actions for conduct breaching either the applicable laws of home or host states, or the treaties themselves.[19]

This access should not be unduly restricted, especially for the affected communities. The important questions to be held in mind when regulating access in this regard are of a technical nature—e.g., various personal and subject-matter jurisdictional, admissibility, and procedural norms regulating access to courts, questions about the direct effect of treaties in national legal systems, and the possibility to claim on the basis of a treaty (see IISD, 2018).

While not relying on domestic courts or investment treaty arbitration, proposals to use arbitration as a method to settle human rights violations by investors have also appeared (Center for International Legal Cooperation, n.d.). Nevertheless, the drawbacks related to consent as a cornerstone of arbitration, as well as potential costs, make these proposals auxiliary to domestic courts at best (Bernasconi-Osterwalder, 2022).

The current trend of due diligence legislation adopted in the countries of the Global North, while not relying on treaties, shows an increased promise of improving investor accountability (Krajewski, 2020; Ryerson et al., 2022). However, given that these laws emerge mostly in the seats of the foreign investors' headquarters in the Global North, they also raise questions about the remoteness of the forum from the breaching conduct, thereby delocalizing justice (Lichuma, 2021). These processes also may increase the costs associated with the pursuit of due diligence violations for the directly affected communities (IISD, 2023).

Questions to Consider

- In which circumstances it may be desirable to include investor obligations in a treaty? And in which way to include such obligations?
- Among the circumstances to consider may be those situations
  - in which there exists a clear international normative consensus on the matter;
  - in which the existing legal framework is known to suffer from deficiencies with the aim to improve on it (e.g., access to remedy for investor human rights violations);
  - in which national laws do not reflect regional or international best practices, using the treaty to complement and bolster national law frameworks (e.g., the environmental regulation).[20]
- Factors to consider when determining the way in which to include such obligations may include
  - the existence of the relevant obligations in the domestic (and, if applicable, regional) law of the state parties to the treaty;
  - the existence of the relevant obligations under international law;

[19] For an early reference see e.g., SADC Model BIT Template (2012); for a recent example see AfCFTA Protocol on Investment.

[20] A question to consider in this instance is whether obligations on the state parties as opposed to on investors is a better way to proceed.

- the efficacy of the relevant obligations as they currently stand under the relevant law;
- the way remedies are made available under domestic laws of the state parties;
- what procedural, jurisdictional, and applicable law obstacles communities affected by investor conduct currently face under the laws of the state parties;
- identifying areas in which there is potential for "race to the bottom."

4.2.2 How to Ensure That Host States' Societies Benefit From Foreign Investment Projects

While investment treaties have traditionally been understood as instruments to discipline the host state's behaviour, states can reimagine them to recentre their right to development in a sustainable manner. This would help ensure that investment treaties do not restrict their policy space and that wider benefits to the host societies ensue. Foreign investment is a tool, not a goal per se, and as such, should work for sustainable development.[21]

For developing countries, the objective is often not only attracting foreign investment but also leveraging quality foreign investment for fostering revenue mobilization, national industrialization, creation of production linkages aligned with sustainable development imperatives (e.g., in processing, manufacturing, and research and development), creation of employment and decent work, and alleviation of poverty (UNCTAD, 2023d). Technology transfers, training of the local workforce, and the ability to develop long-term pathways to sustainable development are important investment governance concerns for developing countries. Treaty regulation of the operation of investment is not exclusively about mitigation of potential negative effects but also about active maximization of investments' beneficial impacts, for instance, by promoting productive industrialization (African Climate Foundation, 2023).

First, given their levels of development, developing host countries must be able to draw from foreign investments not only contributions toward their economic growth but also technology and know-how for their sustainable industrialization. To ensure that investment treaties facilitate this, states should avoid broad treaty-based prohibitions that preclude the use of performance requirements by host states in the lifecycle of an investment (Cosbey & Mann, 2014; Nikièma, 2014). Instead, as has been seen in recent investment treaties, states should encourage technology transfers through treaty provisions. The creation of cooperation platforms on technology transfers could play a useful role in treaties (see Sections 3.3 and 3.4).[22]

[21] Regulation of international trade is an important element that impacts the availability of various local content measures to developing states (e.g., liberalization of environmental goods and services, carbon border adjustments, green technology, and intellectual property rights). While we touch upon some aspects of investment-related trade measures, a broader discussion on trade rules is out of the scope of this paper. See e.g., Baršauskaitė & Tipping, 2023.

[22] ECOWAS, Art. 47, AfCFTA, Art. 30 etc.

Second, tax and investment governance has been for a long time treated as two separate spheres. Today, it is no longer justifiable to ignore the important linkages and interactions that exist between the field of taxation and investment. While we do not propose a full integration of the two fields, we consider that, at the very least, it is important to clean the frictions that have been created by the separate regulation of the two fields at the level of treaties and international law. Investment treaty negotiators may want to acknowledge the impact of emerging global consensus on the treatment of various tax policy issues, such as BEPS and the global corporate minimum tax, on investment governance.

To that effect, future investment treaties may aim at incorporating various tax elements relevant to investment governance. Among those are international financial accounting standards that investors should adhere to, the establishment of arm's length principles for transfer pricing transactions between related companies, a general anti-tax avoidance clause, the related issue of transfer pricing in downstream transactions, and bolster state cooperation in areas of investigating and information sharing in relation to tax avoidance issues (Bernasconi-Osterwalder & Zhang, 2018). Referencing the existing leading tax processes, such as the OECD BEPS Inclusive Framework (OECD, n.d.-b), the Regional Tax Cooperation Platform for Latin America and the Caribbean (Economic Commission for Latin America and the Caribbean, n.d.), or the emerging UN framework convention on international tax cooperation (UN Department of Economic and Social Affairs, 2023).

Finally, in the specific context of energy transition, it is likely that whole sectors and workers will be impacted by the transition away from high-emission industries (COP 28 UAE Just Transition Work Programme). There may be role for treaties to secure that states cooperate on ensuring that distributional consequences of climate action policies are just and equitable. The removal of fossil fuel subsidies may help establish such funds and mechanisms.

Questions to Consider

- What treaty provisions can foster developing states' industrialization, implementation of industrial policies, improvement of work conditions, and other long-term national economic development programs?
- This may include
    - cooperation on transfers of technology
    - elimination of broad prohibitions of performance requirements
    - regulating or reinforcing international taxation elements relevant to investment, to improve revenue mobilization by
        i. making actionable commitments to eliminate BEPS through either state or investor obligations
        ii. recognizing and reinforcing existing and ongoing international normative processes on taxation
        iii. reinforcing commitments to information sharing and cooperation.
    - Redirecting phased-out fossil fuel subsidies toward the creation of just transition funds.

4.3 Policy Problems Related to Investment Governance, Institutions, and International Cooperation

Box 4. Improving international investment governance, institutions, and international cooperation? A summary

Treaties may be useful in addressing the collective action problems of international investment governance and improving the institutional frameworks in which investment projects unfold.

There are several areas in which international investment governance may benefit from increased international cooperation:

- addressing the high costs of capital in developing countries through a multilateral platform
- phasing out fossil fuel investments, ending public subsidies for their support, and creating funds to help alleviate the costs of just energy transition
- addressing the obstacles to and creating incentives for technology and knowledge transfers to developing countries
- enhancing regulatory cooperation, technical assistance, and capacity building.

Treaties could also foster sustainable national investment governance frameworks, without aiming at their substitution or replacement. This can be done in the following areas:

- transparency, monitoring, and anti-corruption
    - government contract transparency
    - transparency of national incentives framework
    - common beneficial ownership registries
    - due diligence reporting.
- wide stakeholder participation in decisions about investment projects
- access to justice and remedies, especially for actors affected by investors' misconduct
    - improving national legal frameworks by making remedies for investor misconduct available via civil and tort liability claims
    - investigating options for grievance and dispute prevention mechanisms.

Key Premises

On a number of occasions, the preceding text included a suggestion that future investment treaties may be more useful if they provide platforms for international cooperation on various collective action problems instead of directly regulating a given subject matter. As noted by UNCTAD, "a growing number of IIAs establish institutional frameworks for engagement, showing first steps toward transforming these treaties from one-off deals into platforms for lasting cooperation" (UNCTAD, 2023a, p. 8). This brings to the fore the cross-cutting issue of investment governance and international cooperation.

First, when it comes to solving collective action problems of an international nature, treaties are more appropriate instruments than national law tools. Collective action problems are those that either require cooperation between states due to the scale of the problem (e.g., mobilization of investment for the energy transition) or those in which a state is unwilling to address the issue due to concerns over the reaction by other states, or the lack of it (e.g., race to the bottom; problems arising out of international competition; divergent interest in a given subject matter, such as the different interests of countries producing critical raw materials versus those consuming them). Current investment governance frameworks evidence various collective action problems, some of which are linked to the above two policy problems (i.e., encouraging sustainable investment, and regulating the impacts of sustainable investment) for which treaties may provide a partial solution or at least contribute to the creation of platforms and mechanisms for solving them.

Second, some policy problems of investment governance seem to require the development of institutional frameworks within which investment projects unfold. The current international investment regime is weakly institutionalized, with the institutionalization concentrated in investor–state dispute settlement (essentially comprising of individual arbitral tribunals, loosely connected set of arbitral institutions, and the backdrop of multilateral conventions for enforcement of arbitral awards—the International Centre for Settlement of Investment Disputes and New York Conventions). Treaty-based institutions designed to address the collective action problems just discussed will contribute to an improved institutionalization of investment governance, particularly if they are multilateral in nature. However, treaties may also contribute to stronger institutionalization and improved sustainable investment governance by strengthening and supporting national law frameworks.

The list of policy problems below represents investment governance and international cooperation areas in which investment treaties may potentially play a useful role in addressing. It is recognized that a comprehensive discussion of solutions would require much more elaboration than the space allows. Hence, the suggestions below should not be treated as comprehensive or definitive. While addressing these issues through a multilateral instrument is clearly preferable, we are cognizant of the fact that some of the issues may not be ripe for a global compromise at present. Regional or plurilateral options may be advantageous in the absence of a multilateral solution. Alternatively, non-binding international instruments of cooperation (e.g., memorandums of understanding and political declarations) may also play an interim role in spurring further action.

We are aware that the potential for incoherence in international investment governance is increased with regional and plurilateral solutions. However, international action by a few committed states is preferable to no action at all.

4.3.1 Financing and Costs of Capital

Existing studies show that the costs of financing sustainable and climate-aligned investments in the developing world are a substantial obstacle (International Renewable Energy Agency, 2022). Credit constraints can prevent otherwise efficient investments from being made (Aisbett et al., 2023). Treaties may be useful to create platforms for addressing this issue. Such platforms should involve public actors, governments, development finance institutions, and private financial institutions that are increasingly interested in sustainable investing (Lee, 2023; Uszoki, 2020).

One of the main problems of financing sustainable investment in developing countries relates to currency risks. Creating partial foreign exchange guarantees through multilateral development banks has been suggested as a significant step toward making financing of sustainable investment projects cheaper (Persuad, 2023). Accessibility to long-term, low-interest concessional loans, blended and catalytic finance, and guarantees is also critical for lowering the costs of financing (Aydos et al., 2022). Additionally, the costs of sovereign debt service in developing economies add to the difficulties in mobilizing capital for sustainable investment projects (UNCTAD, 2023c).

Investment treaties may help strengthen some of the emerging sustainable financing mechanisms. Nascent hortatory language related to incentives in the form of grants and loans has recently appeared in the context of various climate finance cooperation mechanisms, such as Just Energy Transition Partnerships (JETPs) or Green Economy Agreements.[23] In JETPs, for instance, various public and private entities group together to help finance transition to a low-carbon economy in fossil fuels-dependent developing countries through grants, concessional loans, market-rate loans, guarantees, private investments, and technical assistance. Although JETPs are often formulated as political declarations, they do include some operative language, even if it is mostly aspirational.[24] Similar mechanisms may be envisioned in investment treaties, especially of a multilateral nature, such that the financial burdens are pooled, and institutions are created to manage their distribution.

Multilateral cooperation on sustainable investment should include making financing of sustainable investment projects in developing countries cheaper and reforming the global debt architecture.

Options to Consider

- creating multilateral cooperation platforms to address high costs of capital in developing countries for achieving sustainable development

[23] See, e.g., Kramer, 2022; Zpráva, 2021; https://ec.europa.eu/commission/presscorner/detail/cs/ip_21_5768 Singapore–Australia Green Economy Agreement.

[24] See, e.g., paras 17 and 18 of France _ Germany _ UK _ US and EU launch ground-breaking International Just Energy Transition Partnership with South Africa.pdf

- creating multilateral cooperation platforms to help channel funds into sustainable investment projects
- cooperating on the reform of global debt architecture.

4.3.2 Fossil Fuels Phase-out, Subsidies, and Just Transition Funds

As mentioned above, public support to fossil fuels and high-emission industries has been at its highest levels despite the known negative climate effects of these industries. From 2017 to 2019, G20 governments provided more than USD 500 billion via direct budgetary transfers and tax expenditure, price support, public finance, and SOE investment for the production and consumption of fossil fuels at home and abroad (Geddes et al., 2020; Global Subsidies Initiative). In 2022, the global fossil fuel consumption subsidies doubled from the previous year to an all-time high of USD 1 trillion (International Energy Agency, 2023; Laan et al., 2023; see also; Urpelainen & George 2021).

From an economic perspective, fossil fuel subsidies have sizable fiscal consequences (leading to higher taxes/borrowing or lower spending), promote inefficient allocation of an economy's resources (hindering growth), encourage pollution (contributing to climate change and premature deaths from local air pollution), and are not well targeted at the poor (mostly benefiting higher income households). (International Monetary Fund, n.d.)

The Glasgow Climate Pact (United Nations Framework Convention on Climate Change, 2021) calls upon states to phase out "inefficient fossil fuel subsidies, while providing targeted support to the poorest and most vulnerable in line with national circumstances and recognizing the need for support towards a just transition."

The end of public support of fossil fuels is a collective action problem on which international action is desirable, given that states are reluctant to be the first to cut the support out of fear of losing a competitive edge or threatening their energy supply. Treaties may include obligations on states that oblige them to accelerate the transition to a green economy, taking into account their level of development. This may take the form, for instance, of gradual phase-out obligations regarding fossil fuels. Arguably, if such a treaty is adopted in a multilateral form with a significant number of parties, it can eliminate the negative effects of international competition for foreign investments.[25]

While a multilateral treaty may be too ambitious, several committed states may agree in a treaty to go beyond their nationally determined contributions under the Paris Agreement. Another potential but weaker benefit is that by reaffirming the commitments under the Paris Agreement in another treaty, states might be marginally more likely to perform them, and such commitments may provide a clearer interpretative context for the investment treaty as a whole.

The public funds saved by ending fossil fuel subsidies may be pooled, for instance, into funds designed to alleviate the costs of just energy transition.

[25] https://fossilfueltreaty.org/cop27

Options to Consider

- Phasing out fossil fuels and ending fossil fuel subsidies through multilateral commitments may address the collective action problem that hinders the pace of the phase-outs.
- The funds saved may be used to address the costs of climate action and just energy transition.

4.3.3 Technology and Knowledge Transfers and Cooperation

In the context of climate action, it is in everyone's interest that the best and most sustainable technologies be deployed for investment projects at scale (Seco, World Trade Institute, & Centre for Development and Environment, 2021). Transfer of new technologies and knowledge is crucial for the energy transition and reaching the SDGs, especially for developing countries that often lack access to and funds for such technologies. The previous section already discussed the fact that the current legal frameworks hinder rather than facilitate such transfers, leading to the pace of technology transfers being much slower than those needed to reach the Paris Agreement goals (Chen, 2019). Technology transfers and diffusion, as well as technology incubation and research and development help developing countries industrialize, strengthen local production, and bolster development capacities.

Technology and knowledge transfers may be regulated by a treaty (the Paris Agreement indeed contains provisions on technology transfer, Art 4), but for its efficient implementation, states should consider changes to international intellectual property rights regimes, such as those under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (Brauch et al., 2024; Fertik et al., 2023). In addition, the common prohibition of performance requirements further hampers sustainable technology diffusion (Gehring & Tokas, 2022, p. 808; Perrone, 2022). Even though performance requirements have had varying levels of success in reaching the desired policy objectives, their wide-ranging prohibition in recent IIAs, especially when going beyond the WTO Trade-Related Investment Measures Agreement and when applied to environmental and sustainable investments, creates an obstacle to sustainable development (Bernasconi-Osterwalder et al., 2012, p. 27; Nikièma, 2014).

There is also a role for the home states of foreign investors to condition their outward investment support on transfers of technology and knowledge abroad, especially into developing countries. Various outward investment support measures, such as tax incentives, insurance schemes, or subsidies granted by developed countries may be conditioned by transfer of sustainable technologies to the developing world. Technology and knowledge transfers by the private sector into developing countries may also be considered tax deductible, further incentivizing this practice.

Deploying green technologies at scale is crucial for the decarbonization of the global economy and no state can achieve it alone (Aisbett et al., 2023). Given there are various ways technology transfers and cooperation may be encouraged (Perrone, 2022), broader cooperation frameworks on technology, knowledge, education, and research and development would be useful to address the different ways that green technologies are diffused and deployed at pace globally (Aisbett et al., 2023).

Options to Consider

- Future investment treaties should not include the obstacles to sustainable technology diffusion found in some existing investment treaties (prohibitions of performance requirements).
- States should consider incentivization of outward investment through conditioning their support by technology transfers.
- Creating cooperation frameworks that encourage technology and knowledge transfer into developing countries.

4.3.4 Regulatory Cooperation, Technical Assistance, and Capacity Building

In designing a future international investment governance regime, it is important to keep in mind not only states' often divergent interests but also their differentiated levels of technical and administrative capacity. In this sense, parties may commit to technical cooperation and assistance. Creating channels for cooperation among investment promotion agencies is an area in which treaties may help establish such mechanisms.[26] Capacity building, regulatory cooperation, and technical assistance are considered the ideal policy options to ensure that best practices are in place (Gehring & Tokas, 2022, p. 809).

This cooperation may range from the exchange of scientific and technical information and practices to direct training, exchange of personnel, capacity-building workshops, and task forces. These mechanisms may also help monitor the state of play of international investment flows and thus provide information on which further government measures may be based. Recent investment treaties and intergovernmental initiatives have moved toward creating such mechanisms for regulatory and technical cooperation (though not always foregrounding the sustainability element).[27] Regulatory cooperation may also involve forward-looking co-development of new regulations aimed at supporting new industries and supply chains (Aisbett et al., 2023).

Options to Consider

- States should consider using the treaties to create platforms, channels, and mechanisms for capacity building, regulatory cooperation, and technical assistance.

4.3.5 Fostering Sustainable National Investment Governance Frameworks

Investment projects unfold in complex domestic institutional and regulatory frameworks. Investment treaties may contribute to the improvement of these frameworks while not aiming at replacing or substituting them. Given the complexity of relations between investors, affected communities, and the home and host state governments, investment treaties are more suited

[26] See, e.g., AfCFTA POI, Art 42 and 43.

[27] E.g. India–UAE CEPA, Art. 12.3; EU–India Trade and Technology Council; Singapore–Australia Green Economy Agreement.

to play a subsidiary role. They may do so in three broad areas: (a) regulation of transparency, monitoring of investment activities, and anti-corruption; (b) stakeholder participation, and (c) regarding institutional frameworks for investor accountability, access to justice, and dispute settlement.

Transparency, Monitoring, Anti-corruption

While transparency of investment regulatory frameworks has been commonly discussed in the context of investment facilitation (see Section 1.3), the flipside is transparency regarding investors' activities. The policy importance of both elements is that such institutional frameworks foster an environment free of corruption and improve public participation and oversight. The role of investment treaties in this regard must take into account various international norms and guidelines that already exist in these areas.[28]

One significant area for international cooperation is ensuring that investment contracts between investors and government entities are stored in a publicly accessible repository. Enshrining such a general principle in a treaty will provide an added benefit and may potentially facilitate the adoption of such a measure domestically. Existing models and databases of investment contracts may serve as an example.[29] An important consideration is how to adjust the breadth of the contract transparency requirement to protect personal and commercially sensitive information.

Beyond contract transparency, transparency of the incentives framework (including subsidies) has been highlighted as another potential area for treaty regulation. Moreover, countries may further improve investment governance frameworks by ensuring that investors provide relevant information and make it public. Limited practice has already appeared in recent treaties, for instance, regarding corporate history.[30]

Future investment treaties may go further by helping establish beneficial ownership registries.[31] The ability to discover who stands behind investments reduces risks of corruption, money laundering, and conflicts of interest. It may also enable effective taxation, encourage responsible investment, and manage business risks. Debates about the regulation of beneficial ownership registries continue regarding the conditions of access, considering the protection of the right to privacy and data security concerns. A treaty obligation will have to consider the questions of scope and access (e.g., considering limits based on the right to privacy), the possibility of monitoring the rule's implementation, and whether to prescribe merely a minimum rule with states' discretion to introduce broader transparency.

[28] UN Convention against Corruption (2003), OECD Anti-Bribery Convention (1997).

[29] Extractive Industries Transparency Initiative; IGF Mining Policy Framework (2023); IISD Model Mining Development Agreement–Transparency Template; Brewin & Maina, 2022; CCSI OpenResource Contracts; CCSI OpenLand Contracts; CCSI OpenCommunity Contracts; CGD Government Contract Transparency.

[30] E.g. Brazil–India BIT, Art 11; Morocco–Nigeria BIT, Art. 6.

[31] Some countries have recently taken steps to improve transparency regarding beneficial ownership through their national laws. E.g., U.S.—Beneficial Ownership Information Reporting; Canada—Beneficial Ownership Requirements; EU—Beneficial ownership registers interconnection system (BORIS); however, the recent Court of Justice of the European Union ruling have limited its use, see Judgment of the Court in Joined Cases C-37/20 and C-601/20.

Like (now more common) treaty requirements to conduct environmental, social, and human rights impact assessments, treaties may consider requiring certain investors to report on due diligence, strengthening the trend of due diligence legislation discussed above. Treaties may create joint treaty mechanisms through which treaty party agencies cooperate to monitor their investors, with a mix of home and host state obligations.

Options to Consider

- enshrining an obligation of government contracts transparency
    - An issue to consider for a treaty would be to determine the scope of contract transparency requirement. Would it cover all contracts with state agencies? Only with the central agencies? With municipalities? With state-owned companies? In all sectors? Over certain threshold? and so on.
- transparency of national incentive frameworks
- establishing common beneficial ownership registries
    - scope and access of the registries should be considered
- including cooperation mechanisms on monitoring of foreign investors and due diligence reporting.

Stakeholder Participation

Ensuring that individuals and communities, including workers and Indigenous Peoples, affected by investment projects have a voice in decision making about the projects is an important aspect of transparency and inclusive public participation. International law already recognizes state obligations to this effect, particularly through the regulation of free, prior, and informed consent.[32] These obligations are not reflected in existing investment treaties, which generally regulate the area through host state obligations to publish or make publicly available regulations, procedures, and relevant administrative rulings.[33] Investment treaties rarely include investor and home state obligations, thus contributing to information asymmetries.

Future investment treaties can strengthen public access to information about potential foreign investments and establish mechanisms for the affected communities to have a say in approving potential foreign investments. This is the other side of the coin that must be considered when implementing investment facilitation measures geared specifically toward investors (see Section 1.3). It is important that policy-makers extend these provisions to ensure that the public and affected communities have a voice in investment decisions and public authorities´ decision making that affect them. This participation should be extended throughout the life cycle of the investment project.

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32 United Nations Declaration on the Rights of Indigenous Peoples, Art 19; ILO Convention No. 169, Art 6; The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters (Escazú Agreement), Art. 4 & 7.

33 E.g. Finland–Panama BIT (2009), Art 15(1); Latvia–Armenia BIT (2005), Art 14; ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art 7; Colombia–Japan BIT (2011), Art 7.

The public's rights to participate in decision making for potential foreign investments should, in the first place, be established in the host states' national laws. Treaties could serve to reference these instruments. However, where national laws are inadequate, investment treaties can be used to temporarily fill the gap. This could be done both through obligations on states to ensure that such mechanisms exist as a matter of domestic law and correlative limits on the rights of investors to access any other benefits of the treaty in cases where investors have failed to respect local communities' rights to participate.

Options to Consider

- Treaties could strengthen the public's right to participate in decision making about investment projects through
  - placing general obligations on states to ensure that the public's rights to participate in decision making are recognized in national law;
  - regulating the public participation mechanisms directly;
  - listing the affected communities' free, prior, and informed consent as a necessary characteristic of a "sustainable investment."
- This right to participation should be continuous.
- The right to participation may differ from sector to sector and from one investment to another.
- It is crucial to carefully consider the linkages between the treaty regulation and the domestic institutions, such that they operate in mutually supportive ways.

Access to Justice, Remedies, and Dispute Settlement

The current investment treaty regime focuses disproportionately on the resolution of disputes between investors and states. In addition, only investors may bring ISDS claims, with host states having a limited possibility to submit counterclaims. Individuals and communities affected by investors' activities, on the other hand, have no possibility to be parties to ISDS proceeding and generally have limited options to access remedies.

While treaty-based ISDS has been justified as contributing to the rule of law and good governance for all, empirical evidence is overwhelming in showing that the current structure of investment treaties is incapable of bringing about broader rule of law enhancing reforms from which wider segments of the population would benefit (Bonnitcha & Williams 2024; Calamita & Berman 2022; Ostřanský & Pérez Aznar 2023; Sattorova 2018). Instead of channelling significant amounts of funds into the improvement and operation of the flawed ISDS system that arbitrarily prioritizes only one set of relevant actors, states should consider investing in the improvement of general frameworks of remedial that are available to all relevant stakeholders—national judiciaries and domestic legal systems (see above).

Treaties may have a role, although a limited one, here. The most promising role for treaties is to help ensure that the national legal systems of both host and home states are available for civil and tort liability actions for investor misconduct (see Section 2.1). Treaties could potentially also play a role in establishing various grievance, prevention, or alternative dispute settlement mechanisms (i.e., non-adjudication and non-adversarial). However, it is an open question whether treaties should do this directly instead of mandating the parties to establish such mechanisms as per their national laws. The latter option may be preferable, given it will likely better respond to the particularities of different legal systems and different national social and political contexts.

Options to Consider

- removing ISDS from investment treaties and using the funds saved by not having to pay for the operation of the ISDS system to improve national legal frameworks and judiciaries;
- making national legal systems available for remedies for investor misconduct via civil and tort liability claims;
- investigating options for grievance, dispute prevention, and alternative dispute settlement mechanisms.

5.0 Conclusion

The paper aims to contribute to the dialogue about future investment treaties by asking the question,

If we were building the investment treaty regime from scratch today, what policy problems should the regime seek to solve, and how should it contribute to solving them?

An answer to that question may point to existing problems of international investment governance on which cooperation between states is desirable and necessary. In compiling our set of investment policy problems that treaties could help solve, we were led by considerations that are most likely relevant to developing and emerging economies and the status of various international normative processes that touch upon foreign investment.

Our list divides the main investment governance policy problems into three categories: (a) issues related to the encouragement and support of sustainable investment, (b) issues related to the impacts of investment projects, and (c) cross-cutting issues of investment governance, institutions, and international cooperation. We formulate and briefly analyze specific policy problems within each of the three categories. For each specific policy problem, we clarify the key premises underlying the policy problem formulation, outline various ways in which treaties may help address the problem, and, finally, highlight questions that require further consideration, investigation, and clarification.

Being a roadmap, the document does not provide conclusive answers but rather prompts policy-makers to ask different and, we think, more important, questions. Designed as a roadmap, this document is a step toward designing future investment treaties that respond to the most pressing policy problems of investment governance.

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