

MODEL GREEN INVESTMENT TREATY

Executive Summary

The infusion and sound implementation of climate-friendly foreign direct investment are necessary to address the severe threats climate change poses to humanity. Foreign direct investment (FDI) has the potential to generate substantial economic and environmental benefits, including with respect to combatting climate change, for example through the establishment of more efficient supply chains and the dissemination of good practices and technology within emerging market economies. To reap the full potential environmental benefits from these FDI inflows, adequate host country capacity and appropriate international investment agreements (IIAs) are needed.

Traditional IIAs, however, do not take climate change into account. That failure is especially unfortunate because climate change presents unique uncertainty and other challenges to investors and to governments. That is because the effects of climate change can be so disruptive to economic and other human activity, because those effects are unpredictable at the local level, and because the international community and host countries face the need to continually readjust climate change-related goals and thus regulatory policies in light of the Paris Agreement.

The Model Green Investment Treaty (Green Treaty) is designed to fill that vacuum by integrating investment and climate change laws and policies within the framework of sustainable development. The structure of the Green Treaty retains the form of a traditional IIA, i.e. preamble, operative provisions, final clauses, annexes. Substantively, the Green Treaty re-conceptualizes fundamental aspects of IIAs to take account of the specific challenges posed by climate change to investors, society and governments and to capitalize on the experience gained with traditional IIAs. When possible, language from existing IIAs is used to minimize questions of interpretation.

The Green Treaty embodies innovations at several levels, all of which support the Paris Agreement on Climate Change and sustainable development. These include:

- approaching the critical need to protect Parties' right to regulate not only with general statements but also with express attention to *sectoral areas* of particular relevance to climate change, such as incentives, water, agriculture, land use, energy, public health, labour, human rights, Indigenous Peoples and finance;
- providing *balance* in obligations by including disputable investor obligations, including with respect to planning, implementation and reporting (mentioned below);
- crafting Party obligations to fit the context of climate change by including all the usual *IIA disciplines* except the prohibition on performance requirements, because addressing climate change may require the latter, e.g. with respect to agriculture or energy use;
- emphasizing the importance of *sound planning*, such as by requiring environmental impact assessment (EIA) taking into account climate risks, a compliance program to ensure proper governance, and an environmental management program to ensure investments do not stray from a climate-friendly path;
- focusing on the full lifetime of investments to ensure planning and implementation that support the host country's efforts to address climate change, with enforceability being an indispensable part of a multipronged approach designed to achieve *effective implementation*;
- specifying and integrating investment reporting and Party *reporting* requirements under the Paris Agreement, such as providing for a transparent and participatory process involving foreign investments for the Paris Agreement's five-year cycle of adjusting Nationally Determined Contributions;
- emphasizing the importance of *education, capacity building, technology transfer and finance*, including means of monitoring and reporting on climate change-related educational efforts;
- requiring *transparency* with respect to promulgating and publishing climate-related measures, including regarding subsidies and other incentives or dis-incentives, and in international dispute settlement;
- specifying balanced treatment of allegations of *corruption* that embodies proper incentives to both investors and Parties;
- encouraging *cooperation* between Parties and between Parties and foreign investors in the event of natural disasters, which will be exacerbated by climate change;
- providing *flexibility* regarding dispute settlement, in the form of three alternative methods of dispute settlement (i.e. domestic courts of the host country, traditional investor-State dispute settlement, and a standing tribunal) for prospective Parties to an IIA to choose among before finalizing the IIA, and also in a choice between exhaustion of local remedies and fork-in-the-road; and
- *strengthening* and adding credibility to climate change-related *dispute settlement*, for example by requiring: that cases be decided expeditiously and with due process if the

Parties choose to settle investor-initiated disputes in domestic courts of the host country; that arbitrators have a basic familiarity with climate change law and sustainable development law and policy if the Parties choose either of the international dispute settlement mechanisms; the use of a code of conduct appropriate for climate-related international disputes; and Parties to report publicly on compliance with treaty-based decisions or awards.

Some of these innovations might be seen as favoring investors and investments, others as favoring Parties. None were included for either of those reasons, however, but rather because the entire package comprises an integrated and balanced approach to encouraging sound foreign investment in the context of combatting climate change and achieving sustainable development.

The Green Treaty fulfils each of the five assessment criteria. A detailed application of the criteria follows immediately after this Executive Summary. It suffices to say here that many of the Green Treaty's elements relate to more than one criterion, which reflects the fact that the Green Treaty is an integrated whole, with provisions dovetailing with each other to attain comprehensiveness and balance.

Climate change poses tremendous threats to individuals and human society; but we cannot be paralyzed by this -- intellectually or in terms of policies and action. Massive capital flows, carefully planned and implemented projects, and international cooperation and coordination are needed to address climate change. The Green Treaty presents a dynamic path to achieving these, and to building a better tomorrow for present and future generations.

Application of the Assessment Criteria to the Green Treaty

The following applies the five assessment criteria identified by the Treaty Lab to the Green Treaty.

1. Compatibility

Many elements of the Green Treaty satisfy the Compatibility criterion. Clauses 1, 2, 4, 11, 13 of the Preamble (which while not legally binding sets the conceptual and interpretive framework for the treaty) either directly refer to climate change, sustainable development or the Paris Agreement or relate to issues addressed expressly in the Paris Agreement. The sectoral approach to ensuring the Parties' right to regulate takes express account of activities and areas of particular relevance to climate change, such as agriculture, water and finance. The Green Treaty's requirements regarding sound, climate-friendly planning (e.g. environmental impact

assessment, compliance program and environmental management plan) will lead to more climate-friendly investment outcomes, as will the focus on effective implementation. The monitoring and reporting requirements will also promote climate-friendly implementation and outcomes, while at the same time facilitating compliance with the Paris Agreement's reporting requirements.

The Green Treaty's provisions regarding human rights and just transition for labour support language regarding each of these in the Preamble to the Paris Agreement – the first time either had been expressly included in a multilateral environmental agreement – and if carried out will lead to greater climate justice and increased public acceptance of, and pressure for, measures taken to combat climate change. The requirements for transparency in promulgating laws, strategizing about nationally determined contributions and dispute settlement will also lead to greater public acceptance and to better climate outcomes. The Green Treaty's focus on education regarding climate change will result in enhanced public understanding of issues surrounding climate change and how it is being addressed (or not addressed). Encouragements of Parties to cooperate regarding capacity building and technology transfer may result in investments that are more effective in combatting climate change.

Attention to water, land use and the rights of landowners will result in more sustainable land use patterns and reduced political unrest, which itself interferes with sustainable development. The balanced approach to corruption in the Green Treaty will incentivize less corrupt behavior and thus more efficient and effective climate-related projects. Literally each of those elements relates to one or more Sustainable Development Goals (SDGs), and thus will lead to more coherent and successful progress toward achieving them. This is true not only with respect to SDG 13 on climate, but also SDG 2 on food and agriculture, SDG 3 on health, SDG 4 on education, SDG 6 on water, SDG 7 on energy, SDG 15 on forests, and SDG 16 on promoting the rule of law and substantially reducing corruption, among others.

2. Efficacy

Examples of elements of the Green Treaty that fulfil the Efficacy criterion include clauses 4, 7, 8, 10 of the Preamble. The Green Treaty's treatment of subsidies, incentives and dis-incentives provides clarity regarding their treatment to investors. The requirement that Parties be transparent with respect to the promulgation and enactment of subsidies, incentives and dis-incentives and regarding other investment-related measures allows investors and investments to better know what is actually happening and may lead to more rational decision making in this respect. The sectoral approach clarifies rules regarding other activities and areas of

particular relevance to climate change, again reducing uncertainty for investors. The focus on education provides a promise of a more stable country in which to invest.

The provisions regarding the financial sector will serve to reassure investors that needed domestic infrastructure in this respect will be forthcoming. The attention to water, land use and the rights of landowners should serve to reassure potential investors about the long-term stability of their investments. The balanced approach to corruption will reassure investors that they will not lose all treaty benefits (as they would under CETA) if a rogue employee engages in corrupt behavior in violation of company policy. Strengthening of international dispute settlement such as the requirement that (discussed in greater detail under Enforceability), including the requirement that Parties report publicly on their implementation of awards.

The Efficacy criterion asks for data to support assertions that a particular design will attract investment. We have surveyed the literature and are skeptical that sufficient hard data exist to reach definitive conclusions regarding what characteristic or combination of characteristics of an IIA will best encourage FDI generally, and even more so FDI that is climate-friendly and supportive of sustainable development.¹ The best approach, we believe is to rely on investment, sectoral and other experts and a participatory decision-making process to craft an IIA that suits the conditions of the countries involved.² The Green Treaty represents an effort to do that without country-specific details or broad-based public input.

3. Viability

Many aspects of the Green Treaty satisfy the Viability criterion. Clauses 3, 4, 5, 6, 7, 9 of the Preamble are examples. The treaty's consistency with and support for the goals and process of the Paris Agreement and sustainable development (described under *Compatibility* above) facilitate the achievement of climate goals. The Green Treaty's strong, precise protection of the right to regulate, including through the sectoral approach and the preclusion of the prohibition on performance requirements, serve States needs and will be attractive to States; the sectors chosen are likely to be critically important to many States as climate change's effects become clearer – water and agriculture being prime examples. Regarding water, for example, most States will have to both strategize about long-term needs and prepare for short-term emergencies.

¹ E.g., Pohl, Joachim, *Social benefits and costs of International Investment Agreements*, OECD Working Papers on International Investment 4 (2018).

² See United Nations Conference on Trade and Development, *The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998-2004*, at 9, IIA Issues Note (2014).

The Green Treaty's provisions on sound planning, including with respect to climate risks, will appeal to States because they makes it more likely that projects will produce climate-friendly results and simplifies regulatory oversight because internal mechanisms are in place that regulators can interact with. The Green Treaty's focus on sound implementation also leads to more climate-friendly (and probably more profitable) outcomes, which will appeal to States. The strengthening of international dispute settlement, e.g. through the requirement that arbitrators be familiar with climate change and sustainable development law and policy and the climate-crafted code of conduct, will appeal to States because the system will be fairer and more credible to their publics. The flexibility with respect to type of dispute settlement and whether exhaustion is required will appeal to because countries have very different views on these issues.

4. Universality

The primary aspect of the Green Treaty that satisfies the Universality criterion is the overall balance of the treaty, which is achieved by a blend of the elements described in the Executive Summary. In addition, the flexibilities the Green Treaty allows with respect to dispute settlement will allow countries with varying views on that subject to effectively resolve them within the Green Treaty's framework: States can deal with perhaps this most contentious issue in the way that best suits them.

Other examples of Green Treaty provisions relating to the Universality criterion include clauses 6, 7, 9, 12, 13, 14 of the Preamble, and in particular the reference to States' "own domestic priorities" in the ninth clause. The clarity provided by the sectoral approach regarding States' right to regulate and investors' right to challenge regarding areas and activities of special importance to climate change may be attractive to many States and investors, because it reduces uncertainty. The same result is likely from the Green Treaty's collaborative and participatory approach to determining adjustments to Nationally Determined Contributions under the Paris Agreement. The coordinated obligations with respect to reporting on foreign investment's contribution to combatting climate change will appeal to countries, in part because it dovetails well with the focus on effective implementation. The emphasis on education, capacity building, technology transfer and finance will appeal to many countries, and the preambular reference to common but differentiated responsibilities will appeal to developing countries and is well understood by industrialized ones.

The inclusion of carefully crafted, climate-relevant obligations of investors and the ability of States to bring counter claims against investors with respect to those obligations will appeal to States and will also increase the credibility of the treaty relationship among the public.

Investors may not be pleased by this aspect, of course, but the obligations are not onerous; and if they are complied with and the opportunity to participate in the process of determining five-year adjustments to nationally determined contributions is taken advantage of, the result should be a more collaborative partnership with host country governments and one that will assist the host country in fulfilling its legal obligations and political commitments under the Paris Agreement.

5. Enforceability

The Green Treaty contains many elements that together fulfil the Enforceability criterion. By providing three alternative modes of dispute settlement, the Green Treaty allows countries to select a method that meets the needs of the Parties; this fact alone can lead to better implementation and ultimately enforcement if the need for it actually arise. The Green Treaty also strengthens each of the three alternatives to increase enforceability. The alternative of using domestic courts is strengthened by a requirement that any such cases be decided in an expeditious manner that provides due process. The investor-State and standing tribunal alternatives are strengthened in three major ways. First, the treaty provides an enhanced code of conduct, which should both reduce any post-award complaints and increase the credibility of the process. Second, the treaty requires the application of the UNCITRAL Transparency Rules in Treaty-Based Investment Disputes, which has many advantages including increasing credibility, allowing public input that may be helpful, and informing the public about what countries must do to comply with awards. And third, the Green Treaty requires countries to report on compliance with awards.

In addition, the Green Treaty treats enforceability as one of a suite of mechanisms designed to have foreign investment that actually contributes to sustainable development and combatting climate change. The other elements, as described in the executive Summary, include provisions designed to ensure that projects are carefully planned (EIA, compliance program, environmental management plan), that reporting occurs regarding performance, and that such reports are public and open to sunshine as part of a Party-wide process conducted in conjunction with its obligations under the Paris Agreement. The emphasis on planning will likely result in fewer disputes because investments will be more likely to perform and Parties less likely to be surprised by what occurs. Similarly, the emphasis on effective implementation may result in fewer disputes because Parties will likely be more satisfied with performance; Further, the Green Treaty provides unusual clarity about the Parties' right to regulate, thus better informing both investors and Parties about treaty obligations. This can be expected to increase performance with treaty obligations. Finally, the importance of enforceability is made clear in clause 15 of the Preamble.

In sum, the balanced, comprehensive approach of the Green Treaty fully satisfies the assessment criteria.

Background Information

Climate change already is causing harm around the world, and its effects will intensify and worsen unless international efforts regarding climate change are strengthened and intensify; even if that would occur the momentum for climate change already built into the atmosphere will cause considerable warming and its associated effects.

Increases in energy efficiency and other green growth projects are widely recognized as providing both new financial opportunities and enhancing environmental security. Green investment is further recognized to being a means toward unlocking sustainable growth. The level of financing required for water, agricultural, energy and other manufacturing sectors is estimated to be approximately \$5 trillion a year through 2020.³

Climate change affects virtually all aspects of society; but some countries and segments of society are more likely to be involved in important ways, either as being harmed by climate change, as contributing to it, or as being part of the solution. The Green Treaty thus approaches climate change in a nuanced way, addressing what are likely to be the most important areas, activities and issues.

The Treaty is structured in a traditional manner, with a preamble followed by operative articles and final clauses. Annexes are included to clarify certain points. Many of the Treaty's provisions are more-or-less standard, and it draws on language from already existing investment agreements such as the Canada-European Union Trade Agreement and the Trans-Pacific Partnership in order to avoid unnecessary questions of interpretation. At times those provisions are modified to reflect the Green Treaty's focus on climate change.

Some of the more significant aspects of the Green Treaty are highlighted below.

PARTIES' RIGHT TO REGULATE

The Green Treaty contains a general statement protecting the Parties' right to regulate (Article 6), and another regarding regulating with respect to measures relating to climate

³ World Economic Forum Green Growth Action Alliance, Green Investment Report: The ways and means to unlock private finance for green growth (2013). 6.

change (Article 5). The former is more or less standard. The latter relates to specific issues and threats raised by climate change, such as emergencies (e.g. a heat wave) or population movement.

The Green Treaty also identifies and addresses specific sectors and activities in terms of protecting the Parties' right to regulate. The Treaty establishes the importance of regulating in these areas and specifies particular treatment of them in the course of investment disputes, depending on the characteristics of the area or activity and its relation to climate change. This usually but not always involves specifying that the standard of proof is clear and convincing evidence (e.g. Energy, Article 10). The Labour provision (Article 14) does that and exempts certain regulatory actions altogether. The provision regarding subsidies (Article 7) is considerably more protective of Parties' rights, and that about water (Article 8) even more so. The public health provision (Article 11) exempts investments in some commodities (e.g. tobacco) from coverage by the treaty. The provision regarding corruption (Article 16) prescribes a measure of damages. The finance provision (Article 17, discussed below) takes yet another approach, reflecting the need in many emerging market economies to develop a robust financial regulatory regime. The sectors and activities were selected on the bases of the collective expertise of the team and the attention paid to them by the Paris Agreement and other climate instruments. Examples of sectors are presented below.

Water

Water shortages exist in many areas already. Some countries, such as Iran, are water bankrupt, i.e. they are using more water every year than they receive in rainfall, etc. There is a large need for water-related investment, e.g. in desalination plants, water-efficient technologies, and other technologies. World population is expected to grow from today's 7 billion to approximately 9 billion by 2050,⁴ placing greater demands on water supplies, for example for drinking water, sanitation and production of food. Climate change is likely to place further stresses on water availability, as the amount and timing of precipitation are disrupted and the strength and duration of storms intensify, which could affect, inter alia, river flows, recharge of aquifers as run-off patterns change, and irrigation needs for agriculture. Expansion of permitted uses in some basins, such as generation of hydro-electric power may place new stresses on the integrity of riverine systems and on other watercourse States if those uses occur in more difficult or sensitive areas. Large commercial purchases of water are occurring that

⁴ UNITED NATIONS, WORLD POPULATION PROSPECTS: THE 2012 REVISION, VOL. I COMPREHENSIVE TABLES xvi (2013), http://esa.un.org/wpp/Documentation/pdf/WPP2012_Volume-I_Comprehensive-Tables.pdf.

affect water usage, particularly be communities displaced from the land.⁵ Persons displaced by climate change may place new demands on water in the areas through which they move and in which they ultimately settle.

Aquifers are increasingly becoming polluted and salinised in some coastal areas, particularly as sea levels rise. Alterations in agricultural patterns engendered by climate change are likely to affect the demand for water for irrigation purposes. Increased average temperatures due to climate change will affect availability of, and demand for, water. Efforts to alleviate malnutrition for the almost one billion people now malnourished will require water to grow additional food. Large sovereign and commercial investments in agricultural lands in developing countries, and thus in the water which pertains to those lands, may increase demand for water or change water usage patterns. Environmental refugees, primarily due to climate change and consisting of both internally displaced persons and international refugees, are likely to stress existing governance structures, including structures relating to water, and create additional demands for water in some locations.

Roughly 750 million people, 325 million of whom are in sub-Saharan Africa, currently lack access to safe drinking water, a situation expected to worsen as already over-used aquifers dry up or are contaminated, unsustainable pollution of freshwater sources continues, and demand from increasing population grows. Foreign investment in large-scale land-and-water purchases or leases, in order to grow crops for export to investors' home countries, as are occurring in Africa and elsewhere often involve displacing local farmers and in unsustainable water and land use.

The Green Treaty ensures that countries have wide, though not unlimited, latitude to exercise their right and obligation to regulate water, whether it be surface water or groundwater, due to water's unique characteristics. These include that water is essential to human life and to virtually all other life forms, water's integral role with respect to so many ecosystem services, and water's inseparable relation to human rights, most directly the human right to water and also other rights such as the rights to life, to food and to enjoy culture. The treaty thus advances SDG 6, related to availability and sustainable management of water and sanitation for all.

The Green Treaty also ensures that States have the right to regulate investments with respect to virtual water, i.e., the water that is used to produce an agricultural, industrial or consumer good or service, in particular those that are destined for export by the investor. For

⁵ See THE FOOD AND AGRICULTURAL ORGANIZATION & EARTHSCAN, THE STATE OF THE WORLD'S LAND AND WATER RESOURCES FOR FOOD AND AGRICULTURE: MANAGING SYSTEMS AT RISK, at x (2011), <http://www.fao.org/docrep/017/i1688e/i1688e.pdf>.

example, Saudi Arabian companies reacted to the prohibition on growing fodder in that country (because its aquifers were being pumped dry) by buying land in Arizona and California and using almost-free water there to grow fodder for export to Saudi Arabia. Countries can be expected to begin to regulate such uses, which deplete their own water supplies in an often-unsustainable manner. Regulatory needs include that host countries may need to require investors to depurate water used in its investment, including shared waters, to limit use, to require the use of grey water, to regulate desalination plants, and to subsidize investments in water technology.

Agriculture and Related Land Use

Agriculture is critically important to human well-being. It is also critically threatened by climate change, foreign investment will be needed to help address the problems, and increased regulation can be expected to occur. Agriculture is at the center of five emerging crises: climate change, water shortage, increasing demand for food, rapid urbanization, and increasing foreign investment in land (and perhaps more importantly in the water accompanying that land) in developing countries to grow food for export to investors' home countries. For these reasons, agriculture is examined here in greater detail than are other sectors.

Agricultural production is essential to nourishing people as well as to providing fiber, fuel and other necessities, and it is threatened multiple ways by climate change. Moreover, agricultural production is certain to be under greater pressure in the future from inter-related perils such as increasing water shortages, soil degradation, foreign investment to grow crops for export, increasing demand for land to grow carbon sinks, and increasing demand for food. With respect to the last-mentioned, for example, demand for food is expected to increase 60% by 2050 due to population growth and improved standards of living. Nutrition already is abysmal in many parts of the world: hundreds of millions of children are malnourished and in danger of being stunted; as many as 250,000 children go blind and eventually die every year from Vitamin A deficiency and millions of other people are partially or fully blind from the same cause; other vitamin and mineral deficiencies affect over 1.5 billion people; and approximately 1 billion people go to sleep hungry every night. Much of this is due to inefficient distribution networks and inequality within and among countries, but this does not negate the facts that hundreds of millions of people need more food now, that demands on agricultural production will increase in the future, and that the pressures mentioned above will make meeting those demands ever more difficult.

Agriculture is significant environmentally, especially with respect to climate change. For example, approximately 70% of world water use and 90% of global water consumption is due to

agriculture. Clearing land for agriculture typically reduces biological diversity and often involves deforestation, thus affecting carbon sinks and adding carbon directly to the atmosphere when the cleared forests are burned. Agricultural activities are responsible for about one-third of greenhouse gas (GHG) emissions. The climate regime was slow to address agriculture; but the Paris Agreement specifically mentions agriculture in Article 2, and a decision on agriculture was finally adopted at COP 23 in 2017, which will facilitate financing to the agricultural sector from climate change-financing mechanisms.

Agriculture is integrally connected with significant social and cultural issues. For example, there are roughly 500,000,000 farming families worldwide, almost all of them on small holdings (i.e., less than 0.25 hectares (0.62 acres) of farmland per person) and almost all of them poor. Disruptions in land-holdings can violate property and other rights of small holders and communities, including those of Indigenous Peoples, and can lead to political and economic instability. Indeed, agriculture is integrally connected with many human rights, including the rights to food and water and thus the right to life, the right to enjoy culture, and to own and use property. Efforts to protect those rights implicate the full array of political and civil rights.

Although climate change will have some positive effects (e.g., increased carbon dioxide in the atmosphere facilitates crop growth), it is also expected to result in several pressures on agriculture, including:

- more frequent and extreme weather events, which, for example, can harm crops in the field;
- changes in daily and seasonal weather patterns, which will affect growing patterns and increase the need for irrigation and other water management techniques;
- less predictable growing seasons (which will have the practical effects of seed wastage due to multiple plantings and shorter effective growing seasons);
- increasing aridity in already dry countries;
- desertification, which limits the type of crops that can grow in an area;
- depletion of groundwater and possible land subsidence due to reduced recharge;
- salinization of ground water as sea level rises, which affects crops;
- changes in the ranges of insects, including crop pests such as aphids and locusts;
- use of arable land for afforestation or to grow crops for biological carbon capture and storage, rather than to grow food crops; and
- climate migrants (including by rural farmers to urban areas), whose movement and settlement may affect croplands, urban agriculture, and local food supplies of the

persons living in the areas affected by the migrants and whose needs will place unpredictable demands on food distribution systems.

Indeed, most of these effects are already occurring.

Increased demands will be made on agriculture, and thus on water and soils. For example, the agricultural system is expected to produce 60% more food than present levels by 2050 in order to deal with population growth and demands for rising standards of living. In addition to the quantity of food grown, the nutritional quality of food is also important and is expected to improve to prevent under- as well as over-nourishment. Finally, acute distributional inequalities exist that result in malnourishment and outright starvation; at some point countries can be expected to institute measures to remedy these problems.

Achieving the increase in food production and nutritional content face significant hurdles even apart from climate change and water shortages. Almost all the land that is most suitable for agriculture other than forested land is now being cultivated. Increasing the area under cultivation will thus involve utilizing marginal land or increasing deforestation, the latter of which will lead to a net increase in GHG emissions. Developing higher-intensity farming methods, tools for use in precision agriculture, and more efficient irrigation techniques could alleviate these pressures and in any event increase agricultural productivity.

Developments in technology, management and crops will occur with the potential to improve agricultural productivity and sustainability. These include: breeding of crop varieties better able to tolerate drought, salty soil and disease and pest pressure; irrigation using drip and other efficient technologies and solar-powered pumps; techniques for improved rotation and nutrient management; more efficient desalination processes; and countless others. Many of these developments will occur in industrialized countries, geared toward large-scale agriculture. However, crop breeding, in particular, needs to be done under climatic and disease-pressure conditions relevant to local environments. This raises issues of whether such technological advances will be available to farmers in developing countries at the appropriate scale and affordable. Another question is whether such developments will be suitable for small-scale farming and instead will drive agriculture toward large-scale farming, a result that would most probably lead to increased poverty, massive migration to already-overcrowded cities and political instability.

It is essential that IIAs take these factors into account with the goals of promoting sustainable increases in agricultural production, domestic investments, including with respect to research and development (R&D) activities – and possibly technology and crop transfers --,

aimed at improving agricultural productivity, post-harvest handling and sustainability, including with respect to achieving SDGS such as 2 (food and agriculture) and 12 (sustainable consumption and production patterns). This would include, for example, breeding and other R&D intended to develop:

- plants and animals with increased resilience to pressures likely to result from climate change, e.g., crops with drought resistance, flood resistance and salinity tolerance, and crops with short-duration maturity periods;
- crops and practices that lead to high-intensity farming;
- high-yielding crops;
- crops with enhanced nutritional characteristics (e.g., enhanced iron and Vitamin A);
- crops and practices that reduce agricultural emissions of GHGs;
- crops and practices that require less harmful pesticides;
- more water-efficient and energy-efficient irrigation systems;
- more efficient food systems approaches (covering, for example, variety development, crop rotation, nutrient management, storage, marketing, distribution, waste disposal); and
- precision-agriculture techniques applicable in local conditions and to small holders.

The Green Treaty raises these critical considerations, albeit briefly, and requires that challenges to agricultural regulation be proven by clear and convincing evidence in order to provide the Host Country government latitude to regulate and incentivize agricultural activities, broadly construed.

Corruption

It is well known that corrupt and fraudulent activities are not uncommon and that they may undermine sustainable development. The Green Treaty obligates investors, before making an investment, to adopt – and subsequently implement – an internal program to combat corruption and fraud. The internal program must materially align with guidance on compliance programs published by at least one leading authority, such as the OECD’s *Good Practice Guidance on Internal Controls, Ethics and Compliance*, the ISO 37001 *Anti-Bribery Management System*, or the UN Office on Drugs and Crime’s *An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide*. If a disputing party alleges official bribery, it has the burden of proving it by clear and convincing evidence. If the tribunal is made aware of the possibility of corruption by another source, such as an amicus curiae brief, the tribunal may proceed within its discretion to investigate the matter. If a finding of corruption is made, the

claim may go forward but damages are limited to the value of the performance received by the host country, not including the value of the bribe(s).

This approach differs from the approach taken by ISDS tribunals and from the anti-corruption approach of CETA, which treats the presence of corruption as a jurisdictional issue and would bar the claim from proceeding if corruption is shown. CETA, art. 8.18. We believe that is too harsh on foreign investors, who may have received the business even without corruption and who may have performed the project flawlessly; and we believe it could result in unjust enrichment to the host country, at least one of whose officials was by definition involved in the corruption, and thus would be disproportional. The Green Treaty contains what we believe is the best solution to a difficult situation, which provides the best set of incentives to both investor and government: the claim is permitted to go forward but damages are limited to the actual value of the performance received by the host country, not including the value of the bribe(s). The investor thus is not deprived of all damages and has an incentive to maximize the value of its performance to the host country, whereas the host country has to pay something for the value it received and thus does not have much incentive to allow corruption to occur and then call “Foul!” This approach is draws on the concepts of unjust enrichment and *quantum meruit*.

Financial Regulation

The massive amount of capital needed to deal with climate change presents a significant opportunity to build meaningful finance policies to shape the course these investments will take. Developing countries in particular represent a significant portion of the market in green technology. The level of clean-energy asset financing of non-OECD countries grew at a rate of 47% per year between 2004 and 2011, significantly more than the OECD-investment growth rate of 27% per year. At this rate, levels of green investment in developing countries are on track to eventually exceed that of developed countries.⁶

It is important that FDI in emerging market economies be considered in the context of both the risks of unfettered innovation and the risks associated with incomplete and underdeveloped financial markets. Clarifying regulatory standards has never been more necessary in light of the lack of clear international investment principles and standards with respect to IIAs. Both domestic investment laws and IIAs constitute the legal framework for cross-border investment, but the level of standardization of policies in the international community is limited beyond the guiding recommended standards of the Basel Accords. This

⁶ *Ibid.*

presents a mixed picture of investment policymaking, especially when considering that the majority of IIAs currently in force were crafted in the 1990s,⁷ making them outdated and unable to adapt to an investment environment that is rapidly changing. Among the IIAs that were adopted globally in 2016, more than two-thirds explicitly referred to investor obligations; but among the 25 laws that dealt with environmental issues, these obligations lacked specifics with regards to what laws or sectors were involved. Moreover, only two of these IIAs referenced investor obligations to respect international standards and principles.⁸

Article 17 is intended to serve as a means to address these shortfalls. It seeks to address three primary issues: the desirability of governments and stakeholders collaborating to develop climate-friendly financial flows; the promotion of investor compliance with pre-existing host country laws, as well as requiring investors to adhere to international standards that prevent financial firms from taking excessive risks, in order to address the instances of countries whose regulatory landscape is still developing; and recognizing the right of countries to formally implement accepted international principles such as those advocated in the Basel Accords with regards to credit, liquidity and market risks.

BALANCE BETWEEN OBLIGATIONS OF PARTIES

The Green Treaty provides disputable obligations for both Parties and investors. This is not unheard of, but it also is not the norm.

PARTY OBLIGATIONS

The Green Treaty includes all the standard Party obligations except the prohibition on performance requirements, which is not included because addressing climate change is likely to require measures that would be precluded by such a discipline (e.g. a requirement that crop breeding be done locally in order to deal with locally mutating viruses). The treaty thus includes obligations regarding Market Access, National Treatment, Most Favoured Nation Treatment, Fair and Equitable Treatment, and Expropriation. The Green Treaty also includes other obligations specifically related to climate change, including a reporting obligation regarding the climate change-related impacts of FDI, an obligation to require environmental impact assessments for substantial proposed investments, and an obligation that the process of considering five-year adjustments to nationally determined contributions under the Paris Agreement be transparent and open to public participation, including by foreign investors..

⁷ United Nations Conference on Trade and Development, World Investment Report 2017: Investment and the Digital Economy 127 (2017).

⁸ *Ibid.* 109

PLANNING, IMPLEMENTATION AND REPORTING

The Green Treaty requires a virtuous circle of careful planning (EIA, compliance program, environmental management plan), effective implementation, and reporting and disclosure of certain climate change-related information and activities, including those that are not climate-friendly. In the course of that, it is expected that investments will take all steps necessary to obtain a social license with respect to their activities. Investments are also required to comply with local laws and with either the World Bank or IFC environmental and social standards.

This approach should provide investors more certainty regarding what their investment is likely to entail, and it will do the same for Parties. This hopefully will avoid the kind of situation that recently occurred in Iceland, where firms mining bitcoins came to use as much energy as the rest of Iceland combined. These obligations are disputable as counter-claims or offsets.

MULTIPRONGED APPROACH

The Green Treaty embodies a novel approach to implementation that includes but is broader than enforceability, will be critical to the Green Treaty's success. The Green Treaty takes a novel three-pronged approach in this respect.

First, it provides for a systematic comprehensive process to facilitate carrying out Party and investor obligations in a climate-friendly manner. This includes investor obligations designed to ensure proper planning (e.g. by conducting an environmental impact assessment including climate change-associated risks and having a compliance program in place), standards regarding performance (e.g., consistency with the World Bank or International Finance Corporation environmental and social safeguards), sunshine with respect to actual performance through reporting requirements, and follow-up, as well as Party obligations to analyze and report climate-related impacts of FDI. These requirements dovetail with those in the Paris Agreement and thus support that agreement. They are reinforced by a requirement that investments comply with local law.

Second, the Green Treaty recognizes the possibility of Parties assisting each other regarding climate change-related investments and strategic planning. This is particularly so with respect to external sources of financial assistance and climate change-related emergencies and natural disasters.

Third, the Treaty provides three alternative dispute settlement options for potential Parties to a treaty to decide upon before the treaty is finalized: national courts; traditional investor-State dispute settlement; and a permanent investment court. Flexibility is important in this respect to allow potential Parties to craft the treaty to fit their characteristics and preferences. Additional flexibility is provided regarding the question of exhaustion of local remedies, for the same reason. These choices would be made during the negotiation process, before the treaty is finalized. Investors would thus be aware of the approach taken in a particular treaty.

EDUCATION, CAPACITY BUILDING, TECHNOLOGY TRANSFER

The Green Treaty has provisions regarding education of the public, including reporting on citizens' climate change awareness. Parties are encouraged to cooperate with respect to capital flows and other activities that facilitate capacity building and technology transfer. Parties are prohibited from using subsidies, loans, insurance and guarantees to promote investments in the other Party that are not climate-friendly.

FLEXIBILITY & STRENGTHENING ENFORCEABILITY

The Green Treaty includes several novel provisions to strengthen enforceability and improve decision making in dispute settlement. These include obligations that national courts decide investment-related cases expeditiously if that option is chosen for the treaty, and that Parties report on compliance with arbitral awards or decisions.

Enhanced Expertise of Arbitrators

The Green Treaty requires that members of international tribunals (the second and third dispute settlement options) have a basic knowledge not only of investment law but also of climate change law and of sustainable development law and policy. Few international arbitrators now possess such expertise, which is essential to adjudicating issues relating to climate change and which can be gained without undue effort. If this provision becomes effective, it is predictable that major academic institutions interested in arbitration (e.g., in Geneva, Switzerland, or Washington, DC, USA) will hold short courses to provide such training, probably partly or wholly on line.

Use of Experts

The Green Treaty expressly authorises international tribunals to engage experts to provide expertise that may be needed in a particular case, e.g. regarding whether the claimant has a sufficient environmental management program. The Treaty specifies that the UNCITRAL Rules on Transparency in Treaty-Based Investment Disputes apply in order to ensure that the public is informed of disputes, including relating to climate change, and to increase the credibility of dispute settlement.

Code of Conduct

The Green Treaty includes a Code of Conduct for Arbitrators (Annex 38-B-1/38-C-1) that applies to all international dispute resolution mechanisms identified in the Treaty (investor-State and State-State). The Code is significantly more detailed than the few existing and recent Codes. In addition to general duties of the arbitrators, the Code uniquely provides for specific duties and obligations in all the phases of the arbitral proceedings. Duties are owed to both parties and other arbitrators. Significantly, the Code also details specific issues to be disclosed, which include past and pending appointments and work as counsel as well as conflict of interest. As such, we believe the Treaty is responsive to recent criticisms of the investor-State dispute settlement (ISDS) regime that claim that the arbitral process lacks transparency and clear rules of procedure.

Transparency

The Green Treaty requires that the UNCITRAL Transparency in Treaty-Based Investment Disputes be used in all international dispute resolution mechanisms identified in the Treaty (investor-State and State-State). These rules were recently negotiated in UNCITRAL and represent a balanced and workable set of rules that recognizes the important functions served by transparency in this context. As with the code of conduct, we believe the Treaty is responsive to recent criticisms of the investor-State dispute settlement (ISDS) regime that claim that the arbitral process lacks transparency and clear rules of procedure.

CONCLUSION

Climate change, like widespread poverty and inequality and the threats of nuclear proliferation and a global pandemic, poses tremendous threats to individuals and human society – threats that are being experienced now around the world even as international efforts to address climate change are inadequate. But we cannot be paralyzed by this -- intellectually or in terms of policies and action. Massive capital flows, carefully planned and effectively implemented projects, and international cooperation and coordination involving all

stakeholders are needed to combat climate change. The Green Treaty presents a dynamic path to achieving these, and to building a better tomorrow for present and future generations.