STOCKHOLM TREATY LAB PRIZE

TEAM EZRA

ARGUMENTATION

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COMPATIBILITY

The United Nations Framework Convention on Climate Change (UNFCCC) states that parties to the Convention should promote sustainable development (article 2 § 4) and, to that end, cooperate to promote a supportive and open international economic system (article 3 § 5). Article 6 § 4 of the Paris Agreement urges signatories "[t]o incentivize and facilitate participation in the mitigation of greenhouse gas emissions by public and private entities." The text adopting the Paris agreement similarly states "[w]elcomes the efforts of all non-Party stakeholders to address and respond to climate change, including those of . . . the private sector." This Model Multilateral Investment Treaty (Treaty) aims to further develop this open international economic system to support private sector participation in the mitigation of climate change.

This Treaty seeks to guarantee that investors are guided by national investment policy frameworks which benefit from high levels of stability, transparency and predictability, while simultaneously limiting restrictions imposed on parties' sovereign freedom to pursue national development policies and strategies.

The Preamble

The preamble of this Treaty is designed to flow from clause to clause so that the clauses build cumulatively into a set of principles and obligations that embody the spirit of the Treaty as a whole. Acknowledging that this Treaty builds upon and complements existing frameworks for climate action, it recounts the obligations of signatories to the United Nations Framework Convention on Climate Change. This preamble also recognizes the desired end-state: a climate that does not face an apparent, significant, anthropogenic risk of a two degree rise in temperature. The preamble additionally notes that efforts to mitigate and adapt to the challenges of climate change can, and should, run in tandem with the Sustainable Development Goals.

Further, the preamble clarifies that the United Nations Climate Change Framework is by no means sufficient to prevent further climate change, and should be supported by active efforts to galvanize the private sector, with specific regard to investments. The primary mode of catalyzing such investments is through enhanced protection of investors who invest in green technologies. It is also noted that special attention must be allocated to the interests of developing countries, and this Treaty will provide accommodations for gaps in capacity to implement effective policies .

In essence, the preamble funnels from the broad understanding that climate change is one of our species' most pressing problems at present, toward cooperation with existing frameworks to reduce climate emissions, toward specific actions that will incentivize investments in green technology and facilitate the flows of foreign direct investment to spur sustainable economic growth and improved human welfare.

Green Investments and the Environment

Article 10 ensures that any obligations created by or as a result of this Treaty shall not adversely affect any existing or future environmental protection, which would undermine the purpose of this Treaty.

EFFICACY

Defining Climate Investments

Article 2 states that this Treaty applies to measures adopted or maintained by a party relating to a Climate Investment. Climate Investment has been defined in Article 1 as an investment that has the potential to either mitigate climate change or enhance the adaptive capacities of sectors, communities, regions and nations. This definition has been inspired by the contribution of Working Group III to the Intergovernmental Panel on Climate Change's Fifth Assessment report.

This Treaty does not seek to protect investments that will lead to only marginal climate benefits. The requirement that the mitigating or adaptive effect of the investment is substantial is purposefully vague. This increases the viability of this Treaty by giving the parties discretion in deciding which investments they want to incentivize. International climate change negotiations have shown that different countries and negotiating blocks have different interests in the mitigation and adaptation of climate change. For example, this clause will allow a western European country to promote more climate-related investments by interpreting 'substantial' broadly while it allows a developing country, by using a narrow definition, to promote only those investments that will have a significant impact on that countries' carbon emission levels.

This Treaty seeks to incentivize and protect substantial climate investments even when it is not certain that they will lead to actual mitigation or adaptation. An investor investing in an experimental technology that has the potential to revolutionize energy efficiency, for example, cannot be certain that it will. The mere expectation of gain and the assumption of risk are core elements of investment. Absolute certainty about the effects of an investment would be a burden of proof that many of the investors that this Treaty seeks to incentivize would be unable to meet. The definition of Climate Investment in Article 1 therefore requires that there must be a reasonable expectation that the investment will lead to mitigation or adaptation. This must be a substantiated prediction that would lead a reasonable person to believe that the investment will result in a climate benefit that would not otherwise have occurred. It is for the individual parties to interpret this clause according to their needs and interest in order to assess what constitutes a reasonable expectation. This also increases this Treaty's viability and universality.

The definition gives several examples of investments that could be a covered climate investment under this Treaty such as investments in renewable energy or low-carbon energy alternatives, combustion technologies for improved efficiency and sustainable infrastructure. The examples are to function both as a guide to signatory parties implementing this Treaty and as an inspiration to investors. These are the kinds of investments this Treaty seeks to promote and incentivize, but is not limited to.

National Treatment

Article 3 provides for a national treatment clause. It incentivizes foreign direct climate investments by prohibiting discrimination between the treatment of foreign and domestic investors. If a party wishes to retain its right to use preferential treatment as a tool to implement development policy, it may do so by making a reservation as referred to in article 19 of the 1969 Vienna Convention on the Law of Treaties. It must be emphasized, however, that the promise of national treatment has proven to be a significant incentive to potential investors, so it is recommended that parties do not make this reservation.

In the General Agreement on Tariffs and Trade (GATT), a national treatment clause is used to address the problem of importing countries deploying protectionist policies to advantage domestic producers at the expense of total growth and production. In the sphere of green energies and technologies, when a reduction of greenhouse gas emissions will result from the growth and production of the products and activities which have been explicated in this Treaty's definitions, total growth and production will contribute to a reduction in climate emissions. By obliging signatories to commit to a national treatment clause, there will be greater total growth and production of green products and activities.

The GATT requires that national treatment be applied with respect to internal taxes. This provision of the GATT has frequently been the source of dispute (John H. Jackson. 1989. National Treatment Obligations and Non-Tariff Barriers, 10 Mich. J. Int'l L. 207). The successes of the national treatment clause in the GATT, however, have been notable. The proper use of a national treatment clause for the purposes of this Treaty is thus to provide non-discriminatory protection to investors only, and the clause will not apply to tariff policies or any tax structure that applies to investments that fall outside the scope of this Treaty. Internal tax structures will only be subject to the national treatment clause if they apply directly to investors or their climate investments, which will both foster a more inclusive investment climate for green investments while at the same time not precluding member state participation due to unattractive obligations to fundamentally reform internal tax policies.

Fair and Equitable Treatment

Article 4 provides for a fair and equitable treatment clause. It incentivizes climate foreign direct investments by guaranteeing investors fair and equitable treatment.

Paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation to provide “fair and equitable treatment” includes but is not limited to the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.

The judgement of what is fair and equitable will always depend on the specific circumstances of the particular case. However, it is a strong indicator that the minimum standard of of fair and equitable treatment is infringed by conduct attributable to a party and harmful to the investor when the conduct is arbitrary, grossly unfair, unjust, idiosyncratic, or discriminatory, exposes the investor to sectional or racial prejudice; or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the party which were reasonably relied on by the investor. (See for this standard the arbitral award of the ICSID tribunal in the 2004 Waste Management, Inc. No. 2 v. United Mexican States dispute)

Determining the legitimate and reasonable expectations of the investor will be equally dependant on the circumstances of the particular case. The following principles, which were drawn from the 2010 IISD report, 'Climate Change and International Investment Agreements: Obstacles or Opportunities?', may be used as a guideline:

- Parties must ensure a stable, transparent and predictable investment environment while investors cannot expect that the relevant circumstances prevailing at the time the climate investment is made remain totally unchanged.
- A lack of representations by the Party that were actually relied on by the investor may indicate that the standard has not been breached.
- Investors should not be allowed to recover for loss attributable to its own conduct.
- Investors cannot complain that their climate investments have failed due to practices or laws that were in place at the time the climate investment was made and which were, or ought to have been, known to it before investing.
- The investor's legitimate expectations must be balanced against the parties' legitimate right to regulate investment related matters in the public interest.

Expropriation and Compensation

Article 5 incentivizes foreign direct climate investments by prohibiting expropriation without adequate compensation. It applies not only to direct expropriation but also to measures taken by a party which have an effect equivalent to expropriation. The article does not unduly restrict the states' ability to legislate and regulate as it allows for expropriations for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on payment of compensation. Additionally, it is already a well recognized rule in international law that the property of foreign nationals cannot be taken, whether for public purposes or not, without adequate compensation.

Not all state measures interfering with property are expropriations. State measures may affect foreign interests considerably without amounting to expropriation in cases where foreign investments are subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. (See Ian Brownlie, Public International Law, (Oxford University Press 2013), at 509)

An important question is therefore to what extent a party may affect the value of climate investments by regulation, either general in nature or by specific actions in the context of general regulations, for a legitimate public purpose without effecting an expropriation. This issue has been discussed extensively in a 2004 OECD working paper titled: '"Indirect Expropriation' and the 'Right to Regulate' in International Investment Law".

The line between the concept of indirect expropriation and governmental regulatory measures not requiring compensation has not been clearly defined in international investment. Tribunals have therefore been required to undertake a thorough case-by-case examination and careful consideration of the specific wording of expropriation clauses. The criteria tribunals use in making distinctions are:

- the degree of interference with a property right;
- the character (context and purpose) of governmental measures; and
- the interference of the measure with reasonable and investment-backed expectations.

This Treaty stipulates that non-discriminatory regulatory measures by a party that are designed and applied to protect legitimate public welfare objective, such as public health, safety or the environment, do not constitute expropriations. Determining whether measures taken by a party constitute indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

- the economic impact of the Party measure, although the fact that a measure or series of measures by a Party has an adverse effect on the economic value of a Climate Investment, standing alone, does not establish that an indirect expropriation has occurred;
- the extent to which the government measure interferes with distinct, reasonable, Climate Investment-backed expectations; and
- the character of the government measure.

More specifically, when considering the issue of whether a taxation measure effects an indirect expropriation, the following elements, as described in the March 25, 1997 OECD Report to the Negotiating Group on the Multilateral Agreement on Investment (DAFFE/MAI EG2(97)1), should be borne in mind:

- The imposition of taxes does not generally constitute indirect expropriation. The introduction of a new taxation measure, taxation by more than one jurisdiction in respect to a climate investment, or a claim of excessive burden imposed by a taxation measure are not in themselves indicative of an indirect expropriation.
- A taxation measure will not be considered to constitute indirect expropriation where it is generally within the bounds of internationally recognized tax policies and practices.

When considering whether a taxation measure satisfies this principle, an analysis should include whether and to what extent taxation measures of a similar type and level are used around the world. Further, taxation measures aimed at preventing the avoidance or evasion of taxes should not generally be considered to be expropriatory.

- While expropriation may be constituted even by measures applying generally (e.g., to all taxpayers), such a general application is in practice less likely to suggest an expropriation than more specific measures aimed at particular nationalities or individual taxpayers. A taxation measure would not be expropriatory if it was in force and was transparent when the investment was undertaken.

- Taxation measures may constitute an outright expropriation, or while not directly expropriatory they may have the equivalent effect of an expropriation (so-called "creeping expropriation"). Where a taxation measure by itself does not constitute expropriation it would be extremely unlikely to be an element of a creeping expropriation.

Transfers

Article 6 has the effect of incentivizing foreign direct climate investments by ensuring investors that all payments relating to their climate investments may be freely transferred into and out of the territory of the Party they are investing in.

This article does not unduly restrict the Party's ability to legislate and regulate as paragraph 3 states that Parties may delay or prevent transfers through the equitable, non-discriminatory and good faith application of measures that are in the public interest. For greater certainty, the paragraph specifies that relevant areas of public interest here are the protection of the rights of creditors, the regulation of the stock market, record-keeping and the enforcement of judicial or administrative judgements.

Performance Requirements

Article 7 has the effect of incentivizing foreign direct climate investments by preventing Parties from imposing certain performance requirements upon investors and/or their climate investments. Precluding signatories from engaging in practices or enacting certain policies which would either adversely affect investors or nullify the effect of this investment treaty would render the protections afforded by it futile. It is thus crucial to specify which performance requirements this treaty will disallow. Though this clause takes certain, limited powers from member states, the protections it affords to all relevant investors within those member states offers strong incentives to sign, thus adding to the overall efficacy of the treaty by contributing to a universal standard by which climate investments are understood to be paired with strong protections to investors.

This article does not unduly restrict the Party's ability to legislate and regulate as paragraph 2 provides that Parties are allowed to adopt measures necessary to further the public interest. The article relates to requirements, undertakings and commitments which are directly imposed on or made by investors and/or their climate investments. It does not intend to cover provisions applicable as the general law of the land governing in particular customs, trade or environment matters such as duties (including anti-dumping duties, preferential rates, origin rules), quantitative restrictions, safeguard measures, trade sanctions, measures necessary to protect human, animal or plant life, health or the conservation of living or non-living exhaustible natural resources.

Publication of Laws and Decisions Respecting Investment

Article 8 has the effect of incentivizing foreign direct climate investments by requiring parties to make its laws, regulations and policies affecting climate investments available promptly. This creates greater certainty and transparency generally improves a parties' investment environment.

Further, as found by the 2015 OECD report to G20 finance ministers and central bank governors, divergent national standards remain one of the most salient barriers to international investment in clean energy. Divergent national standards create an environment where investors are unaware whether their investments are considered by national laws to be climate investments, and thus inside the purview of this treaty. While it is unrealistic to homogenize all future standards, as new technologies will cause laws and standards to evolve, promulgating laws and decisions respecting investment will allow investors to make determinations about their investments and whether or not they are affected by this treaty. This will also provide investors access to other legal protections provided to them by this treaty by making the application of such legal protections clear and promulgated within national laws and decisions. Legal protections shrouded in obscurity and which are not known to investors cannot provide them incentive to invest and thus must be published and made available.

Climate Investment Promotion

Most international investment treaties only promote foreign direct investment indirectly by granting investors and their investments various protections. They contain hortatory language encouraging parties to promote investment or contain non-binding provisions on such investment promotion. This Treaty differs in that Article 9 contains concrete obligations to actively promote investment. It calls for facilitation mechanisms allowing for informationsharing and the creation of investment promotion forums. Parties are required to engage in collaborative initiatives and to provide technical assistance. This creates a more stable, predictable and transparent investment climate and requires parties to progressively simplify the formal and administrative challenges investors face.

VIABILITY

Scope of the Treaty

Article 2 (2) contains a limitation to the scope of the Treaty. This Treaty does not apply to climate investments made by investors of another party that do not have a genuine connection with that party. An Investor has a genuine connection with a Party when there exists a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. This definition is inspired by the International Court of Justice which, on page 23 its April 6th, 1955 Nottebohm judgement, held: ''According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State''.

This genuine-connection requirement makes this Treaty more likely to be adopted by states around the world because it prevents ''Treaty shopping''. Without the limitation, investors from non-signatory states could take advantage of the investment protections and incentives provided by the parties to this Treaty by channeling their investments through legal entities based in the territory of a party.

Under customary international law, States have the right to regulate the admission of foreign investors and their investments into their territories. This Treaty does not affect that right by granting investors a right of establishment. Parties remain free to impose conditions on the admission and establishment of foreign investors.

Most Favored Nation (MFN) Treatment

This Treaty does not contain an MFN clause. The increased investment protection that such a clause would provide for would be offset by the decrease in the viability of the Treaty as a whole. MFN clauses entitle investors to circumvent the clauses in this Treaty by importing more investor-friendly provisions from another international investment agreement to which the parties are signatories. This effectively trumps the intentions of the parties negotiating this Treaty and allows investors to 'cherry pick' provisions from several agreements. This is undesirable in this multilateral Treaty as it would require states around the world to consider and scrutinize all of their existing and future obligations under other international investment agreements before becoming a party.

Standards of Corporate and Social Responsibilities

Article 11 increases the viability of this Treaty by encouraging parties to impose upon investors the obligation conduct themselves according to the standards of corporate and social responsibility laid down in the UN Guidelines on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

The OECD Guidelines aim to promote positive contributions by enterprises to economic, environmental and social progress worldwide. Requiring parties to adhere to these standards also aims to facilitate parties' achievement of the climate change objectives set out in the UN climate change framework as the OECD Guidelines states that: ''Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.''

This provision increases the viability of this Treaty as it helps balance party commitments by investor obligations. It also supports the spread of the standards of corporate and social responsibility, which are increasingly important in investment policymaking.

Exceptions and Safeguards

Section F on exceptions and safeguards ensures that the Treaty serves the parties' needs and interests, facilitates the achievement of climate-change goals, and does not unduly restrict the parties' ability to legislate and regulate. It is a flexibility mechanism safeguards policy space without eroding the treaties' investment enhancing effect.

The section does not apply to Article 5 (expropriation and compensation) as that article itself contains exceptions on public interest grounds.

The public order exceptions in Article 33 may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society. Parties would be able to avail themselves of this defense against an investor's complaint even if it was not expressly included in this Treaty as it is also a defense under customary international law. (See Article 25 of the International Law Commission's Draft Articles on State Responsibility)

Signature

The present treaty references "all States, regional economic integration organizations, and any separate customs territories" as potential signatories. Further clarification is provided in the requirements that these entities must "posses full autonomy in the conduct of matters covered by the present Treaty and are able to undertake obligations under the terms of the present Treaty".

The purpose of the list of potential signatories is to ensure the list of potential signatories is as broad as possible. Increasing the range of the Treaty increases the viability of the Treaty, as it increases the likelihood that many countries will adopt the Treaty. The more states adopt the protections and benefits associated with this Treaty, the more other states will be encouraged to adopt the Treaty- resulting in a pile-on effect. Furthermore, the longer list clarifies the potential signatories, rendering the overall Treaty more clear. A clear Treaty is more likely to be adopted by states, as there is less concern over later confusion and litigation.

The simpler "all States formula", which provides that "all States may sign a treaty", has resulted in confusion as to the extent to which parties whose status as sovereign states was unclear would be able to participate. On December 14, 1973, the General Assembly issued a general understanding stating that: "The Secretary-General, in discharging his functions as a depositary of a convention with an 'all States' clause, will follow the practice of the Assembly in implementing such a clause and, whenever advisable, will request the opinion of the Assembly before receiving a signature or an instrument of ratification or accession." As such, when receiving treaty-related instruments from one such entity, the Secretary-General follows the advice of the General Assembly of the United Nations.

The reference to regional economic integration organizations and separate customs territories was aimed at the European Union (EU). Following the Lisbon Treaty, which came into force , the EU benefits from full legal personality. Consequently, the EU may sign international treaties in the areas of its attributed powers or join an international organization. Meanwhile, Member States are restricted to international agreements that are compatible with EU law. It is generally understood that foreign direct investment (FDI) falls within the common commercial policy of the European Union. Consequently, it forms part of the sphere of exclusive competence of the European Union. While the EU foreign direct investment does fall under the exclusive competence of the EU, an EU Member State may request authorization from the European Union, as provided for in Regulation 1219/2012.

Thus, there is some uncertainty as to the negotiation and application of investment treaties between European countries themselves and between European countries and non-EU countries. In a position consistently adopted by EU institutions, such as the EU Commission, intra-EU Bilateral Investment Treaties (BITs) conflict with EU law. However, in a recently issued opinion, the Advocate General (AG) of the Court of Justice of the European Union (CJEU), Mr Wathelet stated that a bilateral investment treaty (BIT) between European countries is compatible with EU law. Similarly, he concluded that in disputes arising from BITs between two Member States, arbitral tribunals may refer questions on the interpretation of EU law to the CJEU through the preliminary reference procedure. Even then, though the opinion of the AG is typically influential, it is not binding on the CJEU.

Similarly, other organizations and unions, which do not have the same restrictions and structures as the EU could be encouraged to adopt the Treaty symbolically. Overall, it would seem more likely to encourage entities like the European Union to adopt this treaty, if the "All States" language was expanded upon. Should there be any confusion as to the definition of the relevant regional economic integration organizations and separate customs territories, the article is still clarified by the two qualifiers of "posses full autonomy in the conduct of matters covered by the present Treaty and are able to undertake obligations under the terms of the present Treaty".

Ratification and Entry into Force

Providing for signature subject to ratification, acceptance, or approval increases the enforceability of the Treaty. Ratification allows Parties enough time to seek approval for the Treaty at the domestic level and enact national legislation necessary to ensure compliance. Ratification allows for the engagement of a Party's international responsibility once the Treaty enters into force. Here, the Treaty does not introduce a time limit limiting ratification of the Treaty. The lack of time limit should allow Parties sufficient time to modify their legislation, ameliorating the efficacy of the Treaty by ensuring it is enforceable at the national and international level. Additionally, the instruments of ratification must be deposited with the Depositary. Depositing the instrument of ratification with the Secretary General of the United Nations facilitates the publicizing of the instrument. Thus, Parties know when and through what provisions a Treaty has entered into force at the national level of each Party, increasing Parties' abilities to hold each other accountable.

The Treaty enters into force on the Territory of a signatory Party on the thirtieth day following the date of deposit of that signatory Party's instrument of ratification. A month would seem appropriate as there is no time-limit restricting parties ratification of the Treaty. Though other multilateral treaties enter into force after a certain number of Parties have deposited their instruments of ratification, this Treaty does not specify requirements in addition to the depositing of an instrument of ratification. An argument could be made that restricting the entry into force of a Treaty encourages signatory States to apply pressure to other States to become signatories. This Treaty, however, has been conceptualized as beginning its life in a manner similar to a Bilateral Investment Treaty (BIT). If only one Party signs, then the Treaty does not practically enter into force, as there is no other Party for the signatory Party to be obliged to. On the other hand, once there are two signatory Parties, this Treaty will operate in a manner similar to a BIT.

The operation of this Treaty as a BIT has the advantage of allowing Parties to develop their national legal framework incrementally with regard to the application of this Treaty, as the Parties are only obligated to each other. Additionally, other entities will be encouraged to participate once they have evidence that the Treaty works in practice. Similarly, as the standards and incentives outlined in the Treaty are increasingly relied upon, the language and concepts expressed in the Treaty could filter out into other investment agreements. The dispersal of legal language tends to be a frequent occurrence in international law, and has been a significant factor in growing areas of law like international investment law. The immediate entry into force would allow the original signatory Parties some flexibility in applying the Treaty, inspire sufficient confidence in the international community to encourage other parties to join and influence the development of international investment law generally.

Once there are more signatories, the operation of this Treaty would more closely resemble that of a multilateral investment treaty, rather than a BIT. Accordingly, the Article dealing with entry into force, provides for the entry into force of the articles dealing with the Parties Group and Appellate Tribunal. The Parties Group would enter into force following the deposit of the fourth instrument of ratification. Whereas, the Appellate Tribunal would enter into force following the deposit of the tenth instrument of ratification. The delay of the entry into force of these institutions is logical if the number of parties does not justify the creation of such institutions. Similarly, the delay keeps costs associated with the Treaty lower, until there are enough Parties to support their creation.

Non-Applicability, Suspension, and Reservations

The provision allowing for reservations is intended to balance the flexibility of national authorities with international obligations in the field of investment, especially for developing countries. There are considered to be two main approaches in international investment agreements: the first based on a positive listing where countries agree to undertake liberalization commitments, and the second based on a negative list approach that considers that substantive treaty obligations apply in full unless a Party lodges a specific reservation providing for the non-conformity of regulatory measures.

Analyses of the trend in reservation have demonstrated the tendency of investment restrictions to cover service sector activities, with a small portion treating horizontal measures and primary sector activity, and only a marginal number relating to manufacturing. Developing countries tend to deal more with regulatory challenge of more pronounced social and economic problems with more limited resources and expertise, requiring a trial and error process to solve. Thus, developing countries tend to lodge more reservations than developed countries. Interestingly, the sectors subject to reservations remain broadly similar across development levels.

The Treaty provides that Parties can opt to not have the Treaty apply between the signatory Party and another Party. Additionally, a Party may formulate a reservation upon signing or ratifying the Treaty. However, such reservations may not be contrary to the object or purpose of the Treaty. By allowing Parties to opt out of agreements with certain Parties or certain provisions, the Treaty is designed to provide Parties with the most amount of flexibility, without depriving the Treaty of its object or purpose.

This Treaty would most benefit developing countries, as Parties which do not have a developed legal infrastructure, and would benefit from Foreign Direct Investment. By allowing Parties to make reservations, developing countries will be more likely to become signatories to the Treaty. Furthermore, by not providing for a positive listing, this Treaty avoids many of the difficulties associated with previous attempts to negotiate an international investment treaty, where a list of reservations must meet all Parties' needs. Finally, there is evidence that in practice, Parties will adopt similar reservations

UNIVERSALITY

Each article of this Treaty and its general spirit are designed to fastidiously address the possible concerns and apprehensions of its potential signatories. The optimal effect of this Treaty will result from willing participation of all parties, and this Treaty thus provides the sharpest and most incisive policies to achieve its desired ends while at the same time maintaining strong appeal to potential signatories. It carefully weighs the factors that have caused member state hesitation in past treaties against the potential effect of any particular requirement that member states oblige themselves to. By providing protections to domestic investors making international investments in tandem with obliging signatories to provide those same protections to international investors making domestic investments, this Treaty balances the incentives to sign this Treaty with the commitments of its signatories.

Special and Differential Treatment with regards to Investment Promotion

Article 16 paragraph 4 shows recognition for the fact that developed countries have different concerns and needs than developing countries when it comes to international investment policymaking. The clause ensures that the Treaty imposes less far-reaching obligations on developing countries with regards to investment promotion. The adoption of such a provision in this Treaty will render it more acceptable to developing countries.

This approach is consistent with the principle of common but differentiated responsibilities as adopted in the UN Climate Change Framework. Developing countries should not be forced to achieve the same standards in protecting and incentivizing climate investments as developed countries because they have less historical responsibility for the current concentration of GHGs in the atmosphere.

Further, a difference in factor endowments leverages inherent comparative advantages of developing countries, and differing factor endowments encourage foreign direct investment (OECD Economic Studies No. 36, 2003/1). Allowing provisions to assist developing countries in the implementation of policies and execution of judicial norms will thus contribute to their economic growth by means of buttressing the foundations on which production capacities can be more completely realized.

Relationship to Other International Agreements

Article 38 provides for alternative provisions from which parties may select the most appropriate based on context and circumstances. Parties can choose between this Treaty prevailing over any other international agreements and this Treaty not affecting their rights and obligations deriving from other international agreements.

Authentic Texts

To ensure the universality of these texts, a broad range of languages for the authentic texts has been applied. Often the exact meaning of legal terms changes with the language. By recognizing a broader range of authentic texts, confusion between the two parties and inefficiency in the negotiation and implementation of investment agreements are avoided. Thus operating in different languages becomes a less likely source of litigation. Similarly, it has the soft power effect of recognizing the markets which operate through these languages. It also encourages countries which are not signatory, to consider the language of the Treaty in drafting their own agreements. Thus the Treaty may be slowly adopted as a form of best practice, even if it is not signed and ratified outright.

ENFORCEABILITY

Investor-state dispute settlement

Investor-state dispute resolution (ISDS) mechanisms can affect a party's policy space. As previous arbitrations have included challenges to State measures that were meant to protect public welfare, the treat of arbitration could discourage parties from acting in their citizen's best interests. The number of ISDS cases, which are mostly directed at developing countries, has increased over the years. These cases pose a significant burden on the defending country. In an ISDS proceeding against the Russian Federation, three claimants constitution the majority shareholders of the former Yukos Oil Company together claimed $ 114 billion in damages and got a $ 50 billion award.

And it is not just the rise in the number and value of claims that causes concern. Host countries have often seen foreign investors use ISDS mechanisms in unanticipated ways, like challenging measures adopted in the public interest like environmental protection regulations. Other criticisms of ISDS mechanisms concern the unpredictability of arbitral tribunals and a lack of transparency. This Treaty resolves these issues by, amongst other things, carefully limiting the scope and application of substantive clauses such as those dealing with National Treatment and Expropriation and Compensation and limiting the scope of the ISDS clause itself, requiring tribunals to take standards of investment behavior into account and incorporating the UNCITRAL transparency rules.

A short summary of the procedure this Treaty requires is that investors must first exhaust all domestic remedies, request consultation and observe a cooling-off period before being able to submit a claim to arbitration. The arbitral award can be reviewed by a newly established permanent appellate tribunal.

ISDS - Scope

Article 2 paragraph 1 limits the parties' exposure to litigation by limiting the scope of provisions subject to dispute settlement by arbitration to claims from investors that a Party has breached an obligation under Section C with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment, sale or disposal of its Climate Investment. It is a positive lists of the types of obligations that shall be covered by ISDS. Obligations on this Treaty not included in the list fall outside the scope. This approach prevents the ISDS system from having a chilling effect on good-faith public welfare regulations.

Article 2 paragraph 2 limits the scope of the investor-state dispute resolution section with respect to the expansion of a Climate Investment to situations where the measure relates to the existing business operations of a Climate Investment and the investor has, as a result, incurred loss or damage with respect to the Climate Investment. The reason for this limitation is that this Treaty does not create pre-establishment rights. As Parties retain the right to impose measures or restrictions on the establishment of new Climate Investments regardless of this Treaty, they must have the same rights with respect to the expansion of an existing Climate Investment. In other words, this prevents Investors from claiming pre-establishment rights on the basis that their future investment would merely be the expansion of an existing investment.

Article 2 paragraph 3 makes the access to dispute settlement by the investor conditional upon the investor's behavior. It clarifies that investors may only bring claims when they have acted responsibly.

Article 2 paragraph 4 requires that the investor exhausts local remedies before submitting its claim to arbitration. It is a principle of international law that states should have the opportunity to address an alleged wrongdoing in its own legal framework before its international responsibility can be called into question. This approach encourages the role of domestic courts and potentially prevents baseless or meritless claims from being submitted to arbitration. In addition, the applicable law will in many investment disputes be the law of the country in which the investment is made. It is efficient to let claims be reviewed first by institutions that are the most qualified to apply that law.

Arbitration does incentivize investment by offering a stable, neutral and transparent dispute resolution mechanism when a countries' national legal system is is non-neutral towards foreign investors, corrupt or otherwise incapable of providing justice. Paragraph 4 therefore provides that the requirement to exhaust local remedies does not apply when the available domestic legal remedies are incapable of reasonably providing the investor relief in respect of the same measure for which it claims a breach of this Treaty.

<u>ISDS - Consultations</u>

This Treaty seeks to incentivize long-term and positive relationships between states and investors. Article 13 expresses that sentiment by creating a consultations mechanism aimed at preventing minor conflicts from escalating to lengthy, expensive and complicated procedures which could irreversibly damage business relationships.

Paragraphs 3 and 4 set out the requirements of a request for consultations by an Investor. The request must set out the identity of the Investor, the basis for its claim and the relief sought. It must be sufficiently specific to allow the defending party to effectively engage in the consultations and to prepare its defense.

If an investor does enter into consultations with the defending party, then paragraph 5 requires it to submit a claim to arbitration within 18 months of submitting the request for consultations. If it does not, it is deemed to have withdrawn its request for consultations and, if applicable, its notice requesting a determination of the defending Party. The Investor will then also lose its right to submit a claim to arbitration with respect to the same measures.

ISDS - Requirement for the Submission of a Claim to Arbitration

Article 14 states that investors must submits their disputes to arbitration within five years from the date the investor first acquired or should have acquired knowledge of the alleged breach. This clause is to protect parties' rights. Allowing investors to wait longer to submit their claim could result in the defending party losing the ability to gather evidence to disprove the claim. Additionally, an investor with a valid and legitimate claim should pursue it with reasonable diligence.

Claims may only be submitted to arbitration if the Investor has requested consultations and has allowed for a 6 month cool-off period from the submission of the request for consultation. As the decision of the tribunal is final and binding, the Investor must withdraw or discontinue any procedure before another tribunal or court and waive its right to initiate any other claim or proceeding. This waiver shall only cease to apply under under the conditions set out in paragraph 4.

ISDS - Submission of a Claim to the Tribunal

Investors may submit their claim under either ICSID or UNCITRAL Arbitration rules. The ICSID Rules are specially designed to take account of the special characteristics of ISDS and to maintain a balance between the interests of investors and Parties. It is generally an effective and independent dispute-settlement institution and providing access to it creates a favorable investment climate. ICSID arbitration is only available if both the host party and the home party of the investor are contracting parties of the ICSID convention. If this is not the case and an investor still wishes to submit a claim to arbitration under ICSID Rules, it may be able to choose to submit its claim under the ICSID Additional Facility Rules, which allows access to ICSID arbitration in a number of additional cases. The downside of submitting a claim under the Additional Facility Rules is that, as it is not ISDS under the ICSID Convention, the Convention rules on the recognition and enforcement of arbitral awards do not apply.

The UNCITRAL rules have proven to provide an effective and stable mechanism for the resolution of investment disputes. Additionally, UNCITRAL has acknowledged that there are widespread concerns regarding ISDS and has in its Working Group III, which was convened in Vienna in late November 2017, started discussion about possible reform of ISDS. A forwardlooking Treaty must provide access to a dispute resolution mechanism that notices when the current circumstances in relation to investor-state arbitration poses challenges and continually examines the need for reform. According to the December 19, 2017 Working Group III report, UNCITRAL will look to address the duration and cost of ISDS procedures, including third party funding, and transparency.

ISDS - Scientific and Technical Expertise

Article 20 provides that a Tribunal may request a written report of a scientific or technical review board or expert. This Treaty applies to investments that can reasonably be expected to substantially contribute to a reduction of GHG emission levels or to investment that can reasonably be expected to substantially enhance the adaptive capacities of sectors, communities, regions and nations. Tribunals will need access to expert opinions as the claims arising out of this Treaty could involve highly technical questions that arbitrators are unqualified to address.

ISDS - Appellate Tribunal

Article 21 creates an appellate mechanism. In investment disputes, the ability to appeal the legal conclusions of an *ad hoc* panel to a permanent Appellate Tribunal serves two valuable functions. First, it acts as a check against legal error and therefore both incentivizes investment and reassures parties. Second, Recourse to a permanent Appellate Tribunal helps to ensure consistency of interpretation of Treaty provisions from one dispute to the next, improving the predictability of this Treaty. It strengthens the overall confidence in the dispute settlement system, thus facilitating the acceptance of and compliance with adverse outcomes in particular cases.

The Appellate Tribunal has the power to uphold, modify, reverse or remand an award based on errors in the application of the law and manifest errors in the appreciation of facts. Unlike the appellate bodies created by international trade agreements, such as the WTO Appellate Body, this Treaty allows the Appellate Tribunal to remand a case to the ad hoc Tribunal. If it did not, there would be appellate proceedings that leave a particular dispute unresolved due to a reversal coupled with an inability to remand.

ISDS - Establishment of a Permanent Court

Article 22 states that the parties shall pursue the establishment of a permanent multilateral investment tribunal for the resolution of investment disputes. Like the introduction of an appellate mechanism, the establishment of a permanent court could further improve predictability and accountability, consistency, transparency and coherence in ISDS jurisprudence resulting from disputes arising as a result of this Treaty. It would also make the ISDS process quicker and more efficient. Another benefit of having a permanent court is that tenured judges are more likely to be impartial and neutral than party-appointed arbitrators. This Treaty does not directly establish a permanent court as the benefits will only outweigh the costs and efforts when there is a large number of parties. It is appears to be more efficient to let parties find the most cost-effective way to establish such a court through international cooperation and negotiation.

ISDS - Claims Manifestly Without Merit

Article 24 provides an expedited procedure to dispose of claims without legal merit at the preliminary stage of an arbitration proceeding. This article was adopted to allow tribunals to dismiss claims early before the process unnecessarily consumes the resources of the disputing parties. It applies to both jurisdictional objections as objections on the merits.

The word 'manifest' means that the responding party must establish its objection clearly and obviously, with relative ease and dispatch. This high standard was adopted to protect the efficacy of the dispute resolution process. To respect due process, this rule is only directed at clear and obvious cases. Preliminary objections that involve a consideration of complex legal and factual issues should be dismissed. (See for this standard the award of the ICSID Tribunal in Brandes Investment Partners, LP v. Venezuela.

ISDS - Interim Measures of Protection

Article 25 states that a tribunal may order interim measures of protection. This article was adopted because while parties may also have the option of applying to a domestic court to get interim relief, it is more effective that they request it from the tribunal. The tribunal will the specialized legal or technical knowledge required to decide the application, are neutral compared to potentially unfriendly courts, and may be in a better position to ensure the privacy of the proceedings. Also, an interim measure ordered by an arbitral tribunal will cover may jurisdictions while the effectiveness of a domestic court order is limited to the court's territory.

ISDS - Transparency of the Proceedings

Article 26 addresses the common criticism that ISDS procedures lack transparency. It does so by incorporating into this treaty the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, even when arbitrations are conducted under rules other than the Uncitral Rules. This ensures consistency with parties' obligations to act transparently, and citizens' access to information and right to participation, including in environmental matters.

The confidentiality of sensitive or proprietary information is secured by paragraph 4, allowing for the redaction of confidential or protected information.

ISDS - Final Awards

Article 28 sets out the requirements for a tribunal final award, which must be issued within 24 months of the date the claim is submitted and shall be final and binding between the parties to the dispute. The Article requires that the Party Group will consider adopting additional rules and measures which would reduce the financial burden on small and medium sized investors. This ensures that not just big companies but also smaller enterprises will be incentivized to make climate investments.

Article 29 requires that any arbitration under the section is held in a State that is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards as that Convention only applies to arbitral awards made in a State that is a party to it.