

Stockholm Treaty Lab Competition: *Ryan Smith's Team*

Treaty Goals Argumentation:

The model treaty below followed the competition criteria through the following aspects:

1. Overall goals: Throughout the treaty we had the aspects of forward-looking and innovation incorporated within every clause we were drafting. For example, we have introduced the novel concept of “like-circumstances” as a mechanism to allow States to allow sustainable investors identical protections and promote the incentive for Sustainable Development. This is a move away from the traditional categorising of investors through comparisons of their industries, practices and overall characters, which we believe protects unsustainable investors and sometimes will inadvertently omit protection for sustainable investors.

The novelty of these mechanisms also have to be balanced with them being workable in practice. We approached workable solutions in two aspects: (i) It has to be possible legally for the State to introduce and uphold such protections and (ii) it has to be practically, possible in terms of its economy and political capital, for the State to allow these protections as a realistic options. These aspects are further explored in our compatibility criteria description.

Finally, the basis of it encouraging foreign investment, in terms of climate change mitigation and adaptation, could be described as one of the most prominent aspects of our investment treaty. We distinguished encouragement of investors by separating into what type of investors we sought to protect. For those investors currently engaged in sustainable industries or practices we gave higher protections throughout the treaty to make sure that they have the confidence that their investment will first and foremost be protected in the long term. Secondly, we also envisaged treaty protection in a way that such investors will receive favourable treatment as opposed to unsustainable investments which are covered by the Treaty. The other form of encouragement was to investors that are currently unsustainable but could adapt to sustainable practices. To omit all types of protection for these old unsustainable investors would undoubtedly hurt the host state, in that it would dissuade essential industries for the economy, ie. oil production and mineral mining, and therefore, it would be impossible to implement a treaty with these industries omitted. We therefore allowed the higher protections to serve as an incentive for these industries, through the substantive protections and definitions, provided that such industry adopted a sustainable approach within their practice.

2. Compatibility: To achieve compatibility with the Paris Agreement and the Sustainable Development goals, we have introduced goals with both indirect and direct effect.

The indirect effect is achieved through inserting of the goals and wording of the Paris agreement and sustainable development goals in the preamble of the Treaty. This will effectively mean that

if there is any disputed effect of the Treaty provision then, due to the Vienna Convention on the Law of Treaties Article 31, the interpretation must have consideration of the purpose of the treaty, which in this case will be further incorporation of sustainable development, as stated in the Preamble.

As for the direct effect of compatibility with the internationally outlined goals, there are many aspects of the Treaty protections that will be limited in favor of the host State legislating within its prerogatives in favour of sustainable development goals. This will serve as a bulwark against the oft stated criticism against Investment treaty arbitration, that it hinders socially and environmentally responsible regulations; i.e. that it causes the so-called 'regulatory chill'. Thus, once a dispute will arise, then the tribunal will have to consider it's final award in light of its impact, and potential conflict, with the goals of sustainable development.

These two aspects shall allow the state's pursuance of their sustainable development goals unhindered by investor's claims; i.e. regulation within these parameters will not give legal grounds for claiming breach of the Treaty protection.

Finally, the treaty is compatible with the fundamental principles of property law. We achieved this by incorporating traditional protections of bilateral and multilateral investment treaties, such as expropriation and fair and equitable treatment. We aimed at repurposing such protections to favour sustainable development rather than traditional investor-centric protections found in the BIT. We modified upon traditional provisions rather than creating provisions *de novo*, as this would mean having provisions that were untested internationally for their compatibility with fundamentals property law.

3. Efficacy: According to reports from the Green Growth Action Alliance, Bloomberg New Energy Finance, OECD or Climate Policy Initiative, economic growth and sustainability are interdependent and private financiers see these sustainable investment requirements as great opportunities. Data from the World Bank Group and the World Resources Institute reveal a growing trend in clean energy investment with great potential for the future when reducing risk and intensifying protection for investor. Using this data, we came to the conclusion that the role of international law in further incentivising such investments is through the form of higher protections. We therefore aimed to have favourable treatment, in the form of higher protection, for such investors that are fully committed to sustainable industries and/or practices. These protections, in combination with a rise in the overall attractiveness of sustainable industries, will make this treaty a very attractive option for both investors to invest and contracting parties to sign.

We additionally recognise the need of incentivising investors that are not currently sustainable, in either practice of industry, by the inclusion of lower standard default protections. The distinction between protections are also a means of incentivising such investors to adopt sustainable practices, through the use of definitions and alternative provisions, for them to gain the higher protections.

4. Viability: The model Treaty includes foundation for counterclaims, i.e. it creates obligations for investors, as well as provides a broad dispute resolution clause. Thus, the Treaty enables counterclaims on grounds of breach of investors obligations. Having such mechanism in place will cater towards the states' needs and interests in terms of claiming damages for investors misconduct. On the other hand the Treaty provides for right to regulate within the field of sustainable development, and in doing so excludes such legislative activity from the scope of expropriatory measures. This represents another state interest friendly provision, which together with availability of counterclaims may be perceived as an denominator of viability of ratification of the Treaty.

5. Universality: The Treaty includes three provisions which provide options that the contracting parties may chose to include in their version of the Treaty. First, the Treaty namely includes an alternative option within the time frame of application of the Treaty; i.e. the Treaty may have a retroactive application,, or it can have prospective application. This option caters towards the relevant context and concerns of the contracting States. Second, the Treaty provides different descriptions of territorial applicability of the Treaty, which essentially pertains to the question whether either of the contracting States has sea territory. Last provision which entails options for the contracting States to choose from, is the provision defining the meaning of sustainable development. This may be the most difficult part for the contracting States to agree upon, thus the Treaty includes three options which have common characteristics. Thus, although there are three options, which were included due to the consideration that while all States will be fully committed to the goals of sustainable development, they may define it different due to the propagation of different legal systems.

6. Enforceability: All provisions under this treaty will be binding and enforceable under public international law and by arbitral institutions. We have balanced our novel approaches within the boundaries of international law to not only stay binding but to be attractive to both the Contracting Parties to sign and potential investors to invest.

The dispute resolution clause has considered recent issues regarding jurisdiction and applicable , for example our use of a modified “cooling-off” period, and we have adapted accordingly. We have chosen investment dispute arbitration as this mechanism, out with it's criticism, is the most comprehensive and effective form of dispute resolution in international law. In addition to this, we have aimed to have disputes settled in the most efficient way possible while still maintaining the interests of transparency, sustainable development and overall fairness. Overall, we have aimed to achieve the effectiveness of investment arbitration while shielding our particular clause from criticisms of investor-bias, ambiguity and inconsistency.