

STOCKHOLM TREATY LAB

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Stockholm Treaty Lab Competition: Model Investment Treaty

AGREEMENT BETWEEN STATE A AND STATE B FOR THE PROMOTION AND PROTECTION OF INVESTMENTS, hereinafter referred to as the "Contracting Parties";

Desiring to develop the economic cooperation between the Parties;

Desiring to encourage, create and maintain stable, equitable, favourable and transparent conditions for investors of one Party and their investments in the territory of the other Party for mutual environmentally sustainable benefit and hence stimulate the growth of sustainable economic development of both Parties;

Desiring to strengthen their economic and investment relations in accordance with the objectives and obligations stemming out of the co-current objectives of the Paris Agreement (2015) and the UN's "Transforming our World: the 2030 Agenda for Sustainable Development" (2016) (hereafter referred to the "Agenda 2030 Goals"), including climate change mitigation and sustainable development in its economic, social and environmental dimensions, and to promote investment in a manner aiming at high levels of environmental, health, safety and labour protection in accordance with the above internationally recognized standards and agreements in these fields to which they are parties;

Desiring to contribute to a stable framework for investment in order to maximize effective and sustainable utilization of economic resources and improve living standards;

Conscious that the promotion and reciprocal protection of investments in accordance with this Agreement will stimulate business initiatives;

Emphasising the importance of corporate social responsibility;

Recognising that the development of economic and business ties can promote respect for internationally recognised labour rights; Reaffirming their commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Rights;

Recognising that the promotion of sustainable investments is critical for the further development of national and global economies as well as for the pursuit of national and global objectives for climate change mitigation, sustainable development, and understanding that the promotion of such investments requires cooperative efforts of investors, host governments and home governments;

Recognising that the provisions of this agreement and provisions of international agreements relating to the environment shall be interpreted in a mutually supportive manner;

Recognising the basic principles of transparency, accountability and legitimacy for all participants in foreign investment processes;

Aiming to establish a long term transformation of the global trade by means of focusing on the implementation and utilisation of sustainable investments locally and globally.

Have agreed as follows:

Article 1 Scope

(1) This Agreement applies to measures adopted or maintained by a Party, after the entry into force of this Agreement, relating to investors of the other Party, or to investments of investors of the other Party.

(2) *Option I.* This Agreement applies to investments made prior to or after its entry into force.

Option II. This Agreement applies to investments made on or after its entry into force.

(3) This Agreement shall apply to:

a) the land territory, internal waters, and the territorial sea of a Party, and the airspace above the territory, in accordance with international law; and

[*Optionally:*]

b) the exclusive economic zone and the continental shelf of a Party, in accordance with international law.

Commentary:

Under paragraph (1), the scope of of this treaty applies only to measures adopted or maintained by one of the contracting states. Under paragraph (2) question whether or not the contracting states wish to have the the new investment protection regime applicable retroactively, i.e. to investment already established within their respective territories is left for the contracting states to determine. For that the treaty envisages two options to choose from. Paragraph (3) defines the territorial outer frame of applicability of the treaty. It provides for two-fold definition. Under subparagraph a) the territory is defined in a way that encapsulates every possible country, regardless of its access to open waters. Whereas the additional subparagraph b) concerns the outer limits of its underwater territory, which

is exclusively relevant for countries which do have access to open waters. Thus, subparagraph b) is considered as an option which may be abandoned by the contracting states who both do not have access to open waters.

Article 2 Definitions

(1) For the purposes of this Agreement:

(a) “*Like Circumstances*” means investments that are within the similar industry and with similar harmful emission.

(b) An investment qualifies as a “*sustainable investment*” if:

Option 1: It is reviewed and unconditionally stated as a sustainable investment or practice by an independent and internationally recognised body.

Option 2: It meets the United Nations-supported Principles for Responsible Investment (PRI).

Option 3: its resources are managed so as to maintain long-term production capacities and resources, or materials for the future. This would entail, among other, industries such as, but not limited to:

- (a) Production of renewable energy,
- (b) sustainable construction
- (c) sustainable transportation
- (d) sustainable forestry
- (e) climate mitigation food production
- (f) climate mitigation oriented textile industry
- (g) sustainable water treatment and production
- (h) Sustainable waste management

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(c) “*Investor*” means

- (ii) a natural person having the nationality of, or permanent residence in, a Party in accordance with its applicable law; or

(ii) any entity established in accordance with, and recognised as a legal person by the law of a Party, and engaged in substantive business operations in the territory of that Party, such as companies, firms, associations, development finance institutions, foundations or similar entities.

(d) "*Investment*" means every kind of asset owned or controlled, directly or indirectly, by an investor of a Party, including, but not limited to:

(i) Any legal entity incorporated in accordance with, and recognised as a legal person by the law of a Party,

(ii) shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom;

(iii) bonds, debentures, loans and other forms of debt, and rights derived therefrom;

(iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing;

(v) contracts;

(vi) claims to money and claims to performance;

(vii) intellectual property rights;

(viii) rights conferred pursuant to law or contract such as concessions, licenses, authorisations, and permits;

(ix) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.

(2) In order to qualify as an investment under this Agreement:

(a) an asset must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk; and

(b) must be made in the territory of one of the Contracting States other than the state where the investor is incorporated, or, is a national of; and

(c) controlled directly by an investor which had the nationality of, or, was incorporated in the Contracting State which is not the host to the investment.

Commentary:

The use of the “like-circumstances” mechanism has under paragraph (1)(a) both a substantive and procedural mechanism.

For the substantive aspect, we recognise that not all investments will be classified as sustainable investments within the parameters of the definition below. However, investors may run their investment in the sustainable way possible, potentially in industries that are an economically essential to the host state (e.g lithium mines), and they should not be penalised simply because the classification of their investment. Therefore, we aim to provide the substantive protections to industries that may not be traditionally classified as sustainable investments, but are still run in a sustainable way.

For the procedural aspect, the inclusion of like-circumstances rather than any foreign national standard in the MFN will allow them access to the MFN mechanism. Like circumstances as defined within the FET standard, are aimed at ensuring that there is equal footing between equal polluters in terms of their treatment under this Treaty. This will allow investors with lower emissions to be considered in a favorable way and will in such a way provide for a subtle incentive for investors to have a long term consideration adapting their investment to obtain more favourable ‘like circumstances’ footing. Mutatis mutandis, heavier polluters will be considered within a group with lesser standard of Treaty protection. This will serve as equal incentive to investors to refit or repurpose their investment to secure better standard of protection.

Under paragraph (1)(b) have included three potential options of a definition of sustainable investment. The first two are the inclusion of different international metrics, this is potentially for countries that already use these metrics in other aspects of their legal system, i.e. through company law. The last form is a non-exhaustive list of examples that we think are mostly inclusive of sustainable industries. If a State was using the prior two, they should be aware that the sustainable industries definitions are closely related to the like-circumstances mechanism.

Article 3 Favourable conditions and Fair and Equitable Treatment

(1) Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such investments. Provided:

- (a) Such Investor complies with the obligations stated in Article 5; and
- (b) Such investment is within like circumstances of a sustainable investment.

(2) Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party.

(3) Treatment described in paragraph (2) shall not be considered breached when:

(a) A host state proportionally regulates within in an area that affects an investor's investment; and

(b) Such regulation followed the Host State's international obligations to sustainable development.

Commentary:

We have created a distinction between the standards of providing favourable conditions and traditional fair and equitable treatment. The prior is a higher standard that obligates the host state to provide for favourable conditions, if the investor is (1) Complying with its standards in Article 3; and (2) The investment is contributing to sustainable development. We see this being very attractive to any potential sustainable investors, as there will be favourable conditions for them to invest. This has become increasingly important in sustainable energy fields, as the high initial cost to these projects and usually require some sort of favourable conditions to make mutually beneficial profits for both host and investor in the long run. This will reduce some initial economical concerns that foreign investors may have in a foreign sustainable investment.

The latter standard is a restatement of the traditional Fair and Equitable Treatment. We have not sought to modify this in any substantial way as it is a core protection that many investors, not just sustainable ones, rely on in a modern BIT. We envisage this treatment applying to all investors, in distinction to the particularised treatment under paragraph (1) above. This will mean that the BIT will not just attract a minor, but important, pool of sustainable investors, but also those that do not neatly fit this category. It is key for these investors to also be considered to allow for the incentive mechanism restated in many areas of the treaty to any have a true effect. We are aware that for the purpose of achieving goals under the Paris Agreement and the UN 2030 Agenda Goals there will be a substantial need to invest in investments that are not completely environmentally friendly, e.g. lithium mines, nuclear energy, etc., but however are still needed within a host state's economy. We recognize that such investments are necessary for the transition into the new, modern sustainable investment regime. Thus, the investments which do not meet the special favorable conditions criteria under paragraph (1), will nevertheless benefit from the FET standard.

Paragraph (3) establishes the right to regulate without breaching the substantive standard of protection afforded under paragraphs (1) and (2). This right is qualified in two regards. Firstly, we have a restriction of *how* such regulation is made. This is the requirement that such regulation must be done in a proportionate way (through the use of restriction of “unreasonable regulation”). We envisage that this will follow the traditional three limbed principle of proportionality. This should balance the rights of the investor with necessary regulation of the state. Secondly, is the *type* of regulation that is covered under this paragraph. The host state will have a restricted freedom to regulate within the frame of its international obligations towards achieving sustainable development and climate mitigation goals. Presuming that international obligations will be known publicly and well in advance before the host state will prepare implementation regulation acts, this will provide for enough transparency and predictability for the investor to consider implications of the host states’ international obligations in advance. The two qualifications contained in paragraph (3) also act as a reminder for the host state to act more transparently when changing its legislation. This will be required in order to modernise and comply with international sustainable development obligations, without breaching the treatment afforded under paragraphs (1) and (2).

Article 4 Expropriation

(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation.

(2) Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable.

Commentary:

In comparison to our comprehensive clause regarding Fair and Equitable treatment, we decided to keep our Expropriation clause rather standard. This is for two reasons. Firstly, the threshold for an investor to show expropriation has already been proven to be quite high in regards to initially showing that it was outwith a legal expropriation and also the fact that they must show either a formal taking or an indirect eradication of their control and usage of the investment.

Secondly, protection from expropriation is one of the core protections that an investor expect when investing under the BIT, so have a rather novel approach here would not be attractive to investors and thus to countries wishing to use this BIT to attract investors.

Article 5 Investor Obligations

(1) Investors, and their investments, shall comply with the domestic law of the Party in whose territory the investment was made, including the norms of private international law, and the general principles of international law.

(2) Investors and their investments shall not establish, manage or operate investments in a manner inconsistent with international environmental obligations binding on the Contracting Parties.

(3) For the purposes of this agreement, if there exists a disparity between the environmental standards between Contracting Parties, then the investor shall follow the higher environment standard regardless of where the investment is made.

Commentary:

While it is rather novel to establish investor obligations in a treaty mainly obligated with investor protections, we submit that this is necessary for the operation and viability of sustainable development, in three aspects. Firstly, the operations of counter-claims has been both useful as a method of holding investors accountable for their pollution and as a deterrent for potential polluting investors. However, as shown in recent cases such as *Urbaser v Argentina*, for a counter-claim to be effective there has to be some sort of obligation for the investor to either respect (i) an explicit obligation to “respect” the environment or (ii) to respect domestic or international law of the environment in the host state. We decided to focus on making the obligation to respect the law to remove the ambiguity of what respect to the environment *is* in the legal sense. Therefore, we incorporated traditional liability principles that exist in both the domestic and international law in regards to the environment. Additionally, we included “environmental obligations” as a whole to also include principles within such conventions as the Paris Agreement, which may not have directly enforceable effect, within either the domestic or international law, which means such breach of obligations may still be the basis for the counterclaims. This provision will therefore act in harmony with the other procedural requirements for counterclaims within the dispute resolution provision (Article 11). Finally, this may also be the basis for reduction of compensation of a potential breach of this treaty in the sense of the “Unclean hands” doctrine, in which if a investor contributed to the reason for the breach then they may have reduced compensation. In this sense, if the investor breached their environmental obligations then the tribunal may have justification to reduce any potential compensation. Lastly, this is an imposition on the investor to be bound by the higher standard of environmental protection among the two Contracting Parties’ legislation. Thus, it aims exclude the possibility of evading higher environmental standards in the investors home country, and would equally preclude the option of exploiting lower environmental protection in the host Country.

Article 6 Contracting Party Obligations

(1) Contracting Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law.

(2) Contracting Parties shall not waive, or offer to waive or otherwise derogate from its environmental law and its international climate mitigation obligations, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.

(3) Contracting Parties aims to promote predictable and stable legal development. This shall be achieved by:

- (a) Always publicising and having open consultations on any impending regulation that substantially affects the legal base or economic sector, to the effect of damaging an investor's investment.
- (b) If there is an indication that such regulation shall manifestly damage the economic viability of the investment, then the host state shall consider holding further consultations with the potentially damaged investors with the aim of finding alternative long term solutions.

Commentary:

Host states and investors are pursuing different goals which should have common long term effect on sustainable development and climate change mitigation. In order for this symbiosis to work on a long term basis we need to recognize that the hosts states need to have the possibility to change their legislative frame without breaching their obligations to investors. On one hand, the need to protect investors protected investments under the BIT remains of utmost importance. In order to marry this two concerns, a pragmatic approach should be considered whereby investors and states work hand in hand. That would entail a large degree of transparency in terms of predictable future changes or adjustments in the relevant national legislation which concerns the investment. Not only that, should there be evident that the changes within the applicable law would fundamentally affect the financial viability of the investments, the investor and the state should have an option by this BIT to address this in a way that it would benefit both as well as the overall goal of creating/facilitation sustainable investment.

Under Article 4 we aim to establish a contemporary scope of host state's obligations which represent the shift towards sustainable development obligations. Paragraphs (1) and (2) aim to exclude any possibility of race to the bottom in terms of environmental legislation for the purposes of attracting new investors. Paragraph (3) encompasses two obligations, both of which aim to facilitate dispute prevention and to accommodate pragmatic changes. Under subparagraph (a) a host state is obliged to undertake steps to make legislation that potentially affects investors and their investments public. Our aim was to provide the stability usually provided in stabilization clauses but without the

“regulatory chill”. Therefore, we have imported the more moderate paragraph (3) to allow for predictability without overly restricting the host state. By providing transparency of the future legal frame, the investors shall have the opportunity to be informed promptly and could thus be prepared for changes. Under subparagraph (b) a the prediction of viable economic consequences is addressed. A state shall be mindful of changes made with new legislation that may manifestly disrupt the economic viability of the investment. Should that be a case, the host state will be bound to consider undertaking further consultations with the disrupted investors with the aim of finding alternative solutions. Generally, subparagraph (b) serves as a codified reminder that both, the host state and the investors, are needed to make the long term sustainable investments possible. Thus, incorporating an incentive to carry out dispute prevention steps, is in our opinion, key to making the goals of sustainable development manageable and realistic.

Article 7 Necessity

This Treaty shall not preclude the application by either Party of measures necessary for the avoidance, correction or restoration for before, during or after impending substantial environmental damage. No Party shall incur liability in the application of such measures.

Commentary:

We recognize that an area open for abuse in investment treaty arbitration is the pursuance of claims against State’s in their application for preventing or remedying the damage after environmental disasters. The conflict between the two positions in this regard; the investor should not have to suffer for matters out with their control, but also the state should not be unreasonably prevented from actively remedying or preventing such disasters from happening, which usually involves measures interfering with foreign investments. Therefore, we sought a balance within the term “substantial environmental damage” which will serve as a cut of point for liability of the host state in measures aimed at avoiding, correcting or restoring the environmental status quo.

For clarity, the necessity provision is not self judging. The necessity provision shall be objectively assessed by the tribunal in the case of an arisen dispute. We specifically recognise that this defence of environmental necessity should be distinct from the customary international law definition of general necessity, found in the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Article 25. The rationale behind this is that where other necessities, i.e. war and armed conflict, financial instability, are self-contained to the state itself. However, environmental disasters can have an destabilizing effect globally and therefore any state’s effort to stop or remedy this should not be penalised by disputes, but supported in their protection.

Article 8 Most Favoured Nation Treatment

- (1) Each Contracting Party shall in its territory accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords to investors of any third country and to their investments, provided both investments are classified as sustainable investments or are within like circumstances of sustainable investment, with respect to treaties concluded by the Contracting Parties.
- (2) Treatment provided under paragraph (1) shall apply only to substantive protections.
- (3) Treatment provided under paragraph (1) shall not be applicable to:
 - (a) Any treatment that circumvents the obligations under Article 5(2); and
 - (b) Any treatment from the compartory treaty, that lowers the regulatory capacity of a contracting party to less than the standards set within this treaty.; and
 - (c) Any treatment accorded by a Party under a bilateral or multilateral international agreement in force on or signed prior to the date on which this Agreement came into effect.

Commentary:

Most Favourable Nation (MFN) clauses are somewhat of a double-edged sword. They enable an investor to be treated equally with other foreign investors in that host state, however they also may be used to circumvent specific requirements that the Contracting States had considered when creating the treaty. Therefore, we aimed for our MFN clause to allow limited recourse without circumventing the particular, provisions that aim to maintain a certain balance between investor rights and sustainable development progress. Thus we have introduced 3 limitations:

- (1) It shall only apply to future treaties, thereby excluding any previous protection that existed in the Contracting Parties BIT's. This is particularly because the majority of previous BITs and MITs do not maintain an appropriate balance between sustainable development goals and the investors interests.
- (2) It shall not alleviate the investors duties to respect the environment. Similar to the above concern, this treaty will be rather novel in introducing obligations on the investor which most other treaties will not contain. Therefore, to secure the applicability of these novel obligations, we must be clear that a MFN will not circumvent this.
- (3) Finally, the MFN clause shall not allow the investor to rely on treatment, that is FET and Indirect Expropriation protections, that would amount to manifestly restricting the State out with it's right to regulate under the parameters set out in the substantive protection settings. This is to balance the attractiveness that an MFN clause can allow

some investors while also making sure that the standards we have set in this treaty, and the broad ability for a state to react to new environmental requirements through legislations, are not circumvented through this mechanism. This provision explicitly precludes investors from seeking treatment from other treaties that would represent race to the bottom in terms of providing less regulation between these treaties.

Article 9 National Treatment

(1) Each Contracting Party shall encourage and create equal conditions for nationals or companies of the other Contracting Party to the same standard of treatment afforded to nationals and companies of the host State in like circumstances.

(2) Such National treatment above must not be lower than standards stemming from the international obligations referenced in Part 2 Article 4.

Commentary:

The purpose of this article is to prevent any discrimination from the host state between nationals or companies from their state to that of those coming from a foreign state. Thus there is an obligation that treatment, i.e. the standard of substantive protections afforded in Part 2, must be equal to both set of nationals or companies. This prohibits discrimination on the basis of State protectionism or creater national favouritism. However, we have incorporated the recurring mechanism of “like circumstances” to make sure that those involved in limited damage to sustainable development are grouped with other similar companies, regardless of nationality. Furthermore, this provides for a compounded reinforcement of the goals contained in the Paris Agreement and in the UN 2030 Agenda Goals. This is because on one side it prevents a host state from favorising its nationals and companies; and on the other hand it highlights the hosts state international obligation towards the sustainable development. In that sense it reinforces the host states obligation towards the international sustainable development and climate mitigation goals that are included, but go beyond the aim of this treaty. In essence national treatment is modified to prevent the race to the bottom, by prohibiting a host state from lowering the standards of sustainable development in order to attract investors. The goal of the national treatment goes beyond the prevention of favoritism by discriminating investors from other contracting states. This means that national treatment provision looks both towards the host state’s treatment of its own subjects, and treatment of other contracting state’s subjects. Effectively it aims to create a levelled playing field in terms of sustainable development goals. It achieves the second goal by allowing for different treatment by distinguishing investors who are contributing to sustainable development to those who do not. Only the prior parties will have the benefit of the national standards provision.

We also wish to be clear that the national standards provision will not be a mechanism that allows circumvention of any of the international environmental obligations of the

host state. This is almost a reverse instance of the State weakening or reducing its environmental law for the purposes of attracting unsustainable investors. Instead here, we wish to prohibit an investor seeking comparable treatment, from an unsustainable treaty base, to use within this treaty.

Article 10 Umbrella Clause

(1) Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

(2) For clarification, any obligation, within the confines of this article, means any obligation that when violated shall also amount to:

- (i) a violation of international law by the Contracting Party; and
- (ii) A violation of sustainable development aims stated within this treaty.

Commentary:

Umbrella clauses have been the subject to some criticism within academia of international law. For example, the Comprehensive Economic Trade Agreement between Canada and the European Union have purposely left it out due to concerns that the volume of contract claims being turned into treaty claims, and thus subject to higher protection and potential damages, is unattractive for states to engage in such a process. We accept this criticism but also recognize that within the field of climate change mitigation, many green energy productions are created through contracts with state entities. This leaves a gap for them where they may not be protected under the treaty. Therefore, we believe that an umbrella clause is essential for export of the green energy protections. Additionally, due to the application of paragraph 2(ii) this will not apply to those within unsustainable development industries. Once again, we hope that this will be a form of incentive equally for a unsustainable investor to consider switching to more green practices to allow for them to receive higher protection; and for attracting more sustainable investments in order to achieve the Paris Agreement and the UN Agenda 2030 Goals.

Article 11 Dispute Resolution

(1) In the event of any dispute arising within in this treaty, the parties to the dispute (“hereinafter referred to the disputing parties) shall aim to settle the dispute by amicable negotiations. Throughout negotiations the following must apply:

- (a) For clarification, the aims and objectives of these negotiations should include:
 - (i) Evaluation of the issues and possible implications in light of sustainable development goals; and
 - (ii) Propose a strategy for mutual resolution; and

(iii) Assess strategies in light of the sustainable development goals.

(b) Both parties to the dispute must actively participate in the above negotiations.

(2) In the event that there is no reasonable progress with negotiations within the minimum of 4 months, each Contracting Party hereby consents to the submission of such dispute to arbitration, in accordance with the provisions of this Article, under:

(a) The Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 (ICSID Convention); or,

(b) The United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Rules); or

(c) The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

Commentary:

The choice of words for “any dispute” is explicit to enable the procedural requirements for counterclaims by the state to be met. Recently in investment treaty arbitration, States have had success at protecting their environmental interests in pursuing counter claims to potentially polluting investor (see e.g. Urbaser v Ecuador). We see it as an essential tool to enable the Host state to petition the tribunal to address co-currently, with the investor’s claim, any negative effects that the investor’s investment has caused the national environment. During our research, we found that while environmental degradation claims were traditionally pursued within the host state’s legal systems the benefit of having it in the form of counter-claim is that it will be fair and impartial for the investor, compared to a national court, and will have more international enforceability with the state. The purpose of having counterclaims is not to act as a deterrent to any investor willing to pursue a claim under this treaty but to have a more efficient and immediate form of remedying environmental degradation. Thus this procedural access to counterclaims should be read in light of the above substantive obligation for the investor to recognise the Paris Agreement goals and environmental sustainability under Article 5.

What we seek to do by providing a more comprehensive requirement to negotiate before dispute is to establish that partnership between the investor and state are not destroyed due to situations that are intactly reconcilable. We believe that once a dispute reaches arbitration, it is most likely that the in any event the investor will withdraw his/her investment from the host state. This will likely deprive this host state from whatever service/resource the investor was providing and thus make the state seek cheaper and potentially more environmentally damaging alternatives. This could be damaging to the

aim of sustainable development, in that it is to foster long-term partnerships in reaching goals together. Altogether while seeking options to assist investments to abide by the developing legislative frame which seeks to achieve the goals of the UN 2030 Agenda Goals and the Paris Agreement. It is inevitable that national legislation will change in time and may affect prior investments. With such an explicit requirement of negotiations with state officials and sustainable development experts we wish to provide a conditions for nurturing the sustainable investment goals.

We have also examined the obligation to pre-negotiate under the current approach of International arbitral tribunals. From our examination we found that negotiations that have not set objectives or time limit are likely to be sidestepped by the investor or become a mere procedural formality. This is why we aimed to give the negotiations substance by incorporating set objectives and the requirement for active participation.

Of course we accept that there will be actions by the state or investor that is not possible to reconcile through negotiation and will have to be submitted to arbitration below. What we envisage with the clause to resolve is low-level miscommunication within the state regarding actions or an improper assessment of international obligations before undertaking a breaching action under this treaty.

The reason we picked the 4 months time limit for reasonable progress to be made within negotiations is that while we wish for them to be effective, we do not wish for them to be a mere waiting period to arbitration. 4 months period provides for a quality balance between enabling fruitful negotiations, and, in alternative event does not pose as a futile condition to arbitration, as it is fairly a short period and moreover consistent with the typical financial quarterly reports.

The choice of arbitral institutions, under paragraph 2, was chosen for their popularity of resolving investment disputes. We wish for investors to have a modicum of familiarity in the potential dispute proceedings and we believe the choice of institutions will be well known to the investor or their legal representations. Additional to this, both the UNCITRAL and SCC rules have strong transparency provisions in their rules which we believe, as shown below, are key to sustainable development. While ISCID has no apparent transparency provisions, these goals can be achieved through our own express provisions below, and we believe we would be remiss no to include the most popular institution for investor dispute resolution.

Article 12 Procedure

(1) Any arbitral award rendered pursuant to Article 11 shall be done so in a timely manner.

(2) Any tribunal constituted under this treaty shall consist, wholly or partially, of one member that is highly qualified in the field of either environmental law, environmental science or environmental economy.

(3) In the event that conduct by either of the disputing parties will cause substantial environmental damage, then either party may seek a decision from an emergency arbitrator, or interim decision from a tribunal to decide on specific performance, if the tribunal so find it reasonable.

(4) Any tribunal constituted, pursuant to Article 11, shall follow the rules of procedure set out by the particular Arbitral Institution chosen under Article 11(2).

(5) The Tribunal shall, as appropriate, take into account the principles of *res judicata* and *lis pendens*, in accordance with international law, to hinder abuse of rights under this agreement, as well as otherwise exercising sound judicial economy. If all parties to the dispute so agree, the Tribunal may consolidate claims.

Commentary:

The requirement under paragraph (1), is to ensure that dispute resolution is done in an efficient manner. By having the “timely” consideration, arbitrators will be aware of the effect drawn out proceedings have on sustainable development investment, as seen below in the commentary on paragraph (3), and will be able to avoid and block attempts by the disputing parties to have frivolous additions to the proceedings.

The requirement under paragraph (2), to have environmental background for arbitrators, is to keep environmental considerations at the forefront of any potential investment dispute. Currently, the majority of arbitrators are well versed in international public law but have disproportionately low knowledge of either environmental science, law or economy. To include at least one arbitrator with any of these knowledge of one of these fields, maintains that the “bigger picture” of the dispute, i.e. the sustainable development ramifications of awards, are considered by people with knowledge of how these disputes will affect the regional and global effect of the outcome of investment disputes.

The length of time taken to decide and enforce a dispute through the process of arbitration may in turn have the effect that any loss of investor right, i.e. revocation of energy licence, or environmental damage by the state may further worsen during the time taken to resolve the dispute. Thus we want to give powers to both parties to seek a temporary stay of such an action, under paragraph (3), until the dispute is settled. In regards to emergency arbitrators, such action will be in accordance with the arbitral institution where such action is sought.

The rules on procedure set out in paragraph (4), was a form of submission towards the arbitral institutions rules of procedure as they constitute fair and efficient rules. Additionally, we wanted the alternative option of party chosen rules on procedure to

preserve the freedom of the parties to set out their own procedure, due to the uniqueness of requirements for each investment dispute. However, we inserted the words “in accordance with this article”, to preserve our explicit requirements of procedure we have set out in Article 12 and the benefits they bring.

We have included consideration of the principles of *res judicata* and *lis pendens* within each dispute as we believe the frivolous duplication of claims is itself an abuse of the dispute resolution mechanism and overall a harm to any State complying with its sustainable development goals and objectives. Therefore, the tribunal have the express powers to duplicate these proceedings to avoid further cost, time and resources to responding to multiple disputes. To omit this power results in the attractiveness of pursuing sustainable development regulations being lowered.

Article 13 Transparency

(1) Any tribunal constituted under this treaty may, if the disputing parties so agree, conduct hearings open to the public. However, any disputing party that intends to use information, designated as protected information in a hearing, shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

(2) Arbitral awards rendered by a tribunal shall be made public.

(3) Anonymised proceedings, including submissions and content of hearings, may be reported to the public by the Secretary of the proceedings.

(4) A Party that is not a disputing Party and that considers it has an interest in the matter before the tribunal shall, on delivery of a written notice to the disputing Parties, be entitled to attend all hearings, make written submissions, present views orally to the tribunal, and receive written submissions of the disputing Parties.

(a) The tribunal has the discretion to accept or reject the third-party participation, with consideration of the following:

(i) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(ii) the non-disputing party submission would address a matter within the scope of the dispute;

(iii) the non-disputing party has a significant interest in the arbitration;
and;

(iv) there is a public interest in the achievement of sustainable development goals related to the subject-matter of the dispute;

(v) the submission is done in good faith.

(b) A tribunal should not accept a third-party submission if:

(i) Such submission would disrupt the proceedings; and a disputing party is unduly burdened or unfairly prejudiced by such submissions; or;

(ii) The disputing party is manifestly not independent from one of the disputing parties.

Commentary:

We recognise that transparency is a key aspect of delivering the goals of the Paris agreement (Article 13) and one of the overall aspects of sustainable development. Therefore, we also seek to achieve clarity and a full overview of any disputes that arise out with this treaty.

We aimed to achieve this by importing 3 methods of facilitating transparency:

(1) The first, and most obvious method, is by allowing hearings to be heard in public if the parties so agree. The benefits of this is that it removes the secrecy plaguing the system of investment treaty arbitration; by allowing these hearings to be held in public it will hold the parties and tribunals accountable to the public while simultaneously updating them and providing sources for academic development. This can be achieved in various ways to overcome logistical challenges. For example in *PacRim v Ecuador*, the hearings were made public through an online stream, and in *Vattenfall v Germany*, all hearings were made available from social media video hosting, i.e. YouTube.

(2) Allowing of an anonymised reporting system to be created that is by an impartial party, i.e. the secretary to the proceedings - we believe this is the neutral person present to the proceedings, and is thus best suited to carry out such a task. Any other third party could be susceptible to undesirable lobbying. This will mitigate the otherwise conflicting interests of the disputing parties on one side, who typically wish to keep the proceedings private, and the general public overall need to be informed in such matters.

(3) Similar to rationale behind having the hearings public, we believe that it is essential that all awards are made public. This will not only have the benefits to the public, mentioned above, but also for any investors looking to invest under this treaty, they will have more certainty on such things as interpretation and decisions under this treaty.

The underlying principle of this mechanism of transparency is that the majority of the information is accessible. We however specifically state within Paragraph (1) that there is a method to protect confidential information. This is to harmonise the fact that in cases there is a need to maintain a degree of confidentiality regarding sensitive materials, that are protected under national laws. Transparency ends where parties' duty to confidentiality starts; i.e. transparency provisions do not have absolute effect.

Under paragraph (4) we have allowed the option of amicus curiae to be involved in the dispute. The role we envisage them to take is to assist the tribunal in recognising aspects of the dispute that affect the environment and sustainable development, which the parties themselves may not raise or adequately explain. There are other benefits the amicus curiae may also bring to the attention of the tribunal, such as a unique perspective to areas connected to the dispute. The overall benefit is to allow the dispute resolution process to at least consider aspects of sustainable development during its process. The tribunal, within its discretion, should therefore consider such aspects when permitting or rejecting submission. We predict that by allowing amicus curiae there is the potential that it may prejudice the parties, disrupt the proceedings or that the amicus curiae is in reality a lobbying tool. Thus, the Tribunal has the power to exclude any amicus curia submission that is in risk of causing the above misfeasance, within para 4(b), as well as having a broad requirement for overall good faith requirements, para 4(a)(v).

Article 14 Calculation of Damages

(1) Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

- (a) monetary damages, and any applicable interest, no greater than the loss borne by the investor; and
- (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may not award punitive damages. A tribunal may also award costs and attorney's fees in accordance with this Treaty and the applicable arbitration rules.

(2) The arbitral tribunal may consider the effect of prior arbitral awards, with connected entities either by corporate structure or profit participation, in the assessment of compensation for damages.

Commentary:

We have included the ability for the tribunal to award the traditional monetary compensation but also restitution of property. While the ability to award monetary compensation is self explanatory within investment arbitration, we wished to include

restitution as it may allow the investor to return to its sustainable industry in its full efforts. While it is rare for a tribunal to award restitution, we believe to omit it will mean the destruction of long term partnerships between investor and State within sustainable industries. Equally rare is the awarding of punitive damages, however we have also included a prohibition of this as we believe that while the investor should be fairly compensated or restituted for any State wrong, they should not seek anything more than this. This is due to the fact that it makes the potential award ambiguous in the calculation of potential damages, which in turn makes the whole process, which we wish to associate with the propagation of sustainable development, seem to be a source of profit for the investor rather than a remedy. This is not attractive for any States to sign such a treaty that allows this.

Paragraph (2) is to work in tandem with our mechanism of consolidation of proceedings. If for some reason the proceedings are not consolidated, but in reality the investors in the two proceedings are the same overall entity, then the tribunal should consider this within the calculation of damages, to avoid “double recovery”. Similar to the reasons in the paragraph above, we wish for the dispute resolution process to be a remedy not a source of profit, and therefore wish to avoid double recovery at all costs.