# MEMO

# THE GREEN INVESTMENT TREATY:
## Aligning investments with climate objectives

**Wei Zhuang • Peter Lunenborg**
**Dimitrij Euler • Gustavo Laborde • Xiaoyue Du**

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**Contents**

# 1 INTRODUCTION

1.1. The essential realisation that investment and climate change are economically, socially and environmentally intertwined is not yet fully reflected in international law. Currently, there is no comprehensive international agreement for incentivizing and protecting **Green Investment**, i.e. investments that mitigate greenhouse gas (GHG) emissions or strengthen resilience to climate change. To achieve the Sustainable Development Goals (SDGs) and the purpose of the Paris Agreement, this gap must be filled.

1.2. The Green Investment Treaty (hereafter, the Treaty) constitutes a significant step forward in bridging the gap between international investment law and climate change regime. If adopted, the Treaty would provide a transparent, stable and enforceable international investment policy regime. It would incentivize investors to fund low-carbon projects, stimulate technological innovation and application, and drive investments towards a global low-carbon and climate-resilient transition. It is the most forward-looking, innovative and workable Model Treaty, with the highest potential to protect, promote and facilitate investment in a low-carbon and climate resilient transition. The succeeding sections of this memo demonstrate in turn that the Treaty fully meets the following criteria:

a. <u>Compatibility</u>: While fully respecting fundamental principles of property law, the Treaty is compatible with the Paris Agreement and the Sustainable Development Goals (Section 2);

b. <u>Efficacy</u>: The Treaty will lead to a significant increase in green investment related to climate change mitigation and adaptation (Section 3);

c. <u>Viability</u>: The Treaty is likely to be adopted by States around the world (Section 4);

d. <u>Universality</u>: The Treaty appeals to the potentially diverging interests of States and investors in different parts of the world (Section 5); and

e. <u>Enforceability</u>: The Treaty is binding and enforceable (Section 6).

# 2 COMPATABILITY: WHILE FULLY RESPECTING FUNDAMENTAL PRINCIPLES OF PROPERTY LAW, THE TREATY IS COMPATIBLE WITH THE PARIS AGREEMENT AND THE SUSTAINABLE DEVELOPMENT GOALS

2.1. The Treaty aims to facilitate States' achievement of the climate-change objectives set out in the Paris Agreement and the SDGs. While fully respecting the fundamental principles of property law, it complements the United Nations Framework Convention on Climate Change (UNFCCC) and other agreements under its auspices (UN Climate Agreements), including the Paris Agreement. The following subsections address these two issues in turn.

## 2.1 The Treaty is compatible with the Paris Agreement and the SDGs

2.2. The Treaty is compatible with the Paris Agreement and the SDGs because (1) it envisages the objectives and principles of the UN Climate Agreements, including the sustainable development objective; (2) Part II of the Treaty seeks to implement the UN Climate Agreements and achieve SDGs by integrating positive standards to enable investment in a low-carbon and climate-resilient transition; and (3) other provisions are designed in accordance with the UN Climate Agreements and the SDGs.

### 2.1.1 The Treaty envisages the objectives and principles of the UN Climate Agreements, including the sustainable development objective

2.3. The Treaty expressly envisages the objectives and principles of the UN Climate Agreements, including the sustainable development objective. First, the object and purpose of the Green Investment Treaty is to complement the UN Climate Agreements, including the Paris Agreement, by enabling a low-carbon and climate-resilient transition and incentivizing Green Investment.[1]

[1] Article 1 of the Green Investment Treaty.

2.4. Second, the Preamble to the Treaty starts with expressly acknowledging the importance of the 2030 Agenda for Sustainable Development of the UN and the UN Climate Agreements, particularly the Paris Agreement.[2] It emphasises the role of Green Investment in fulfilling the promise of the SDGs and the Paris Agreement. Ultimately, it indicates Parties' intention to establish a legal framework for facilitating, promoting and protecting investments that mitigate GHG emissions or strengthen resilience to climate change in accordance with the objective of sustainable development.

2.5. Most importantly, in the Treaty provisions, express reference is made to the principle of equity and common but differentiated responsibilities and respective capabilities in accordance with Article 3.1 of the UNFCCC.[3] Further, Article 5 of the Treaty takes full account of the special needs of least-developed countries (LDCs) or small island developing countries and proposed financial and technological support pursuant to Article 9.9 of the Paris Agreement and Article 4.3 of the UNFCCC. In addition, Articles 7 and 12 of the Treaty are designed to achieve the objectives of the Paris Agreement and the SDGs.

### 2.1.2 Positive standards to enable investment in a low-carbon and climate-resilient transition seek to implement the UN Climate Agreements and achieve the SDGs

2.6. Part II of the Treaty, entitled "Enabling the Low-Carbon Transition", is designed to stimulate large-scale investments in a global low-carbon and climate-resilient transition which are required for achieving the objectives of the UN Climate Agreements and the SDGs. Three types of rules are introduced in accordance with the UN Climate Change Agreements and the SDGs: (1) rules designed to facilitate a robust global transition from a fossil fuel-based economy to a low-carbon economy; (2) rules designed for sustainable land use; and (3) rules that stimulate innovation, transfer and application of environmentally sound technologies which enhance and support the first two types of rules.

#### 2.1.2.1 Rules designed to facilitate a robust global transition from a fossil fuel-based economy to a low-carbon economy

2.7. Sections 2-5 of Part II introduce various climate-friendly rules including carbon pricing (Section 2), fossil fuel subsidy reform (Section 3), promotion of renewable energy (Section 4) and enhancing energy efficiency (Section 5) to facilitate a robust global transition from a fossil fuel-based economy to a low-carbon economy.

2.8. As will be demonstrated in Section 4.2, these climate-friendly rules facilitate States' achievement of the climate change objectives set forth the UN Climate Change Agreements, particularly, the key objective of the Paris Agreement to "[make] finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development" (Article 2.1 (c) of the Paris Agreement). Pursuant to Article 6.4(b) of the Paris Agreement, such climate-friendly rules provide incentives for the private sector to participate in the mitigation of GHG emissions. Ultimately, they will contribute to an overall mitigation in global emissions, as emphasized in Article 6.4(d) of the Paris Agreement.

2.9. Moreover, all these climate-friendly rules contribute both directly and indirectly to the achievement of the SDGs. These rules respond to the call of SDG13 for "[taking] urgent action to combat climate change and its impacts". Fossil fuel subsidy reform is designed in accordance with the SDG 12(c) which explicitly requires countries to rationalize and phase out inefficient fossil-fuel subsidies in a manner that minimizes adverse impacts on the poor and the affected communities. Renewables, together with energy efficiency, are the key to SDG 7: "[ensuring] access to affordable, reliable, sustainable and modern energy for all". Section 4 of Part II (Promotion of Renewable Energy) is designed to achieve the objective of "[increasing] substantially the share of renewable energy in the global energy mix" by 2030 (SDG 7.2). Section 5 of Part II (Enhancing energy efficiency) is designed to achieve the objective of "[doubling] the global rate of improvement in energy efficiency" by 2030 (SDG 7.3).

[2] Recital 1 of the Preamble to the Green Investment Treaty.
[3] Articles 6.2(a) and 115 of the Treaty.

### 2.1.2.2 Rules designed for sustainable land use

2.10. Section 6 of Part II of the Treaty entitled "Sustainable Land Use", containing two articles: Article 26 (Forest Restoration) and Article 27 (Sustainable Land Management), is designed to implement the commitment identified in Article 4.1 (d) of the UNFCCC, that is, to promote sustainable management, the conservation and enhancement of sinks and reservoirs of GHGs. This section encourages States to take concrete actions and establish incentive mechanisms in accordance with Article 5 of the Paris Agreement.

2.11. Article 26 is introduced to respond to the call of SDG 15.2 for sustainable management of forests and reforestation globally by 2020. The obligations in this article contribute to sustainable forest management as required by SDG 15.B. Article 27 is designed to promote sustainable land management which could help "achieve a land degradation-neutral world" by 2030 (SDG 15.3). If implemented, Section 6 has the potential to "[p]rotect, restore and promote sustainable use of territorial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss" (SDG 15).

### 2.1.2.3 Rules that stimulate innovation, transfer and application of environmentally sound technologies

2.12. Section 7 of Part II of the Treaty, entitled "Innovation, transfer and application of environmentally sound technologies", is compatible with the UN Climate Agreements and SDGs. The term "environmentally sound technologies" is defined in accordance with Article 4.1(c) of the UNFCCC. Pursuant to Article 10.5 of the Paris Agreement, Article 28 of the Treaty seeks to promote technological innovation, ultimately achieving the goals of the Paris Agreement. Concrete provisions in this article reflect the recommendation of the UNFCCC Technology Executive Committee to the Conference of Parties in the context of the Paris Agreement.[4]

2.13. In response to Article 10.1 of the Paris Agreement, Articles 29 and 30 of the Treaty seek to facilitate access to and transfer of technology. While promoting technology transfer on mutually agreed terms (Article 29), this treaty also encourages countries to incentivize technology transfer to developing countries, particularly LDCs (Article 30). Article 30 echoes and builds upon commitments contained in Article 10.6 of the Paris Agreement. Article 31 of the Treaty, based on Article 4.1(c) of the UNFCCC, seeks to "strengthen cooperative action on technology development and transfer" in the line with Article 10.2 of the Paris Agreement. Following the logic of Article 10.3 of the Paris Agreement, the Technology Mechanism established under the UNFCCC is expected to serve this Treaty.

2.14. This section is compatible with SDG 17.7 which seeks to promote the development and transfer of environmentally sound technologies to developing countries on mutually agreed terms and contributes to SDG 7 (ensuring access to affordable, reliable, sustainable and modern energy for all), SDG 8 (promoting sustainable economic growth) and SDG 9 (fostering innovation).

### 2.1.3 Other provisions that are designed in accordance with the UN Climate Agreements and the SDGs

2.15. Many other provisions are designed to facilitate States' achievement of the climate-change objectives set out in the UN Climate Agreements and the SDGs, including but not limited to, (1) rules regarding responsible investment and environmental transparency; and (2) rules regarding facilitation, promotion and protection of Green Investment.

### 2.1.3.1 Responsible investment and environmental transparency

2.16. Part III of the Treaty, entitled "Responsible Investment and Environmental Transparency", emphasizes the private sector's role in climate change mitigation while considering the social and environmental aspects of the sustainable development objective, as enshrined in the Paris Agreement. It is introduced in accordance with Article 6.4(a) of the Paris Agreement which aims "to promote the mitigation of greenhouse gas emissions while fostering sustainable development".

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[4] Technology Executive Committee (2017), Technological Innovation for the Paris Agreement: Implementing Nationally Determined Contributions, National Adaptation Plans and Mid-Century Strategies, UNFCCC TEC Brief, No. 10.

2.17. Pursuant to Section 2 of Part III, States should adopt policies to encourage enterprises to take voluntary actions to reduce GHG emissions. This section seeks to enhance "private sector participation in the implementation of nationally determined contributions" as required by Article 6.8(b) of the Paris Agreement. Commitments to conduct environmental impact assessments (Section 3 of Part III) seek to ensure that foreign direct investments in a low-carbon transition do not erode the "environmental integrity and transparency" as required by Article 6.2 of the Paris Agreement.

2.18. Both responsible investment and environmental transparency help address climate change concerns, thereby contributing to SDG 13 (combating climate change). In addition, Responsible investment has the potential to "[s]trengthen the means of implementation and revitalize the global partnership for sustainable development" (SDG 17) while environmental transparency could "ensure responsive, inclusive, participatory and representative decision-making at all levels" (SDG 16.7).

#### 2.1.3.2 Green Investment facilitation, promotion and protection

2.19. Part VI of the Treaty, entitled "Green Investment Facilitation, Promotion and Protection", proposes strong protections that serve foreign investors' needs and interests, as will be demonstrated in Section 3.2. This part could not only facilitate participation in the mitigation of GHG emissions by the private sector (Article 6.4 (b) of the Paris Agreement) but also enhance "private sector participation in the implementation of nationally determined contributions" (Article 6.8(b) of the Paris Agreement). Ultimately, this part could help achieve the key objective of the Paris Agreement contained in Article 2.1 (c) by making finance flows "consistent with a pathway towards low greenhouse gas emissions and climate-resilient development".

2.20. Like Part II of the Treaty, Part VI has the potential to contribute both directly and indirectly to the achievement of the SDGs. It could facilitate investment in low-carbon and climate-resilient transition, and thus contribute to climate change mitigation and adaptation (SDG 13). Among others, it could play a key role in achieving SDG 7 (access to affordable, reliable, sustainable and modern energy for all), SDG 8 (promoting sustainable economic growth) and SDG 9 (fostering innovation). Section 3 of Part IV on Investment Promotion also directly responds to the call of SDG 17.5 to adopt and implement investment promotion regimes for LDCs.

### 2.2 The Green Investment Treaty is compatible with the fundamental principles of property law

2.21. Property laws require States to protect the property rights of investors, enterprises and indigenous groups. However, a state has the right to interfere in the right of property if certain conditions are met, for example, 'in the public interest and subject to the conditions provided for by law and by the general principles of international law.'[5] This Treaty is compatible with the fundamental principles of property law.

2.22. First, the Treaty protects foreign investment and its constituent elements, including private property and property rights. In case of expropriation, the Treaty requires "prompt, adequate and effective" compensation pursuant to Article 66. Compensation is due also for indirect expropriations effected through regulatory measures. Under this Treaty, foreign investors and foreign investments enjoy full national treatment. In addition, access to and transfer of technology in Article 29 of the Treaty is subject to intellectual property laws.

2.23. Second, to ensure that States adequately protect the property right of investors, indigenous groups, other individuals and entities, the Treaty outlines certain requirements for an environmental impact assessment (Section 3 of Part III).

## 3 EFFICACY: THE TREATY WILL LEAD TO A SIGNIFICANT INCREASE IN GREEN INVESTMENT RELATED TO CLIMATE CHANGE MITIGATION AND ADAPTATION

3.1. If adopted by States, the Green Investment Treaty will lead to a significant increase in Green Investment because (1) the Treaty proposes various incentives that serve foreign investors' needs and interests; and (2) the provisions on Green Investment Facilitation, Promotion and Protection

[5] ECHR, Protocol 1, Article 1(1); see also General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources".

effectively serve foreign investors' needs and interests. This is further supported by the fact that the provisions of Part II and III are well aligned with the policy positions of business and investor communities with respect to climate change.

## 3.1 The Treaty proposes various incentives that serve foreign investors' needs and interests

3.2. The Treaty provides comprehensive incentives that serve different foreign investors' needs across various sectors, including (1) incentives to facilitate a global transition from a fossil-fuel based economy to a low-carbon economy; (2) incentives for sustainable land use; and (3) incentives for innovation and transfer of environmentally sound technologies.

### 3.1.1 Incentives to facilitate a global transition from a fossil-fuel based economy to a low-carbon economy

3.3. Without government intervention, it is difficult to achieve a level playing between renewable energy and fossil fuels due to market failures to internalise the external costs associated with fossil fuel burning and the positive externalities generated by renewable energy. In order to address this challenge, Sections 2-5 of Part II of the Treaty provide various incentives for the private sector to invest in a low-carbon transition including through carbon pricing (Section 2), fossil fuel subsidy reform (Section 3), promotion of renewable energy (Section 4) and enhancing energy efficiency (Section 5).

#### 3.1.1.2 Carbon pricing

3.4. Through a clear price signal, carbon pricing provides incentives for companies and individuals to prioritize investments in low-carbon options and to change production and consumption models, ultimately driving a large-scale transition to a low-carbon economy.[6] World Bank found that for companies, carbon pricing also enables them to manage risks and plan their low-carbon investments.[7]

3.5. The argument that carbon pricing would serve the foreign investors' needs and interests is further supported by the fact that many private entities have voluntarily adopted internal carbon prices. According to the CDP Report (2017), nearly 1400 companies including over 100 Fortune Global 500 companies, disclosed the use of an internal carbon price on the belief that "carbon risk management is a business imperative".[8] Article 7 of the Treaty also encourage States to redirect the revenues deriving from carbon pricing mechanisms to Green Investment, providing enormous opportunities to the private sector. Thus, the well-designed carbon pricing mechanism introduced by Section 2 of Part II would serve the needs and interests of foreign investors.

#### 3.1.1.3 Fossil fuel subsidy reform

3.6. Like carbon pricing, removal of fossil fuel subsidies could provide incentives for private firms to invest in renewable energy and energy efficiency.

3.7. Global fossil fuels subsidies were estimated at USD 5.3 trillion in 2015.[9] The existence of such subsidies significantly discourages the private sector from investing in a low-carbon transition. Research estimates that the elimination of all fossil fuel subsidies would reduce carbon emissions by roughly 10 percent by 2050 which provides enormous opportunities for green investment.[10] Further, Article 12 of the Treaty encourages States to redirect savings made from fossil fuel subsidy reform to green investment. The rules governing fossil fuel subsidy reform in Section 3 of

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[6] Manjyot Bhan Ahluwalia (2017), The Business of Pricing Carbon: How Companies Are Pricing Carbon to Mitigate Risks and Prepare for a Low-carbon Future, Centre for Climate and Energy Solutions, at p. 18.

[7] The World Bank, Carbon Pricing, 1 December 2017, http://www.worldbank.org/en/results/2017/12/01/carbon-pricing.

[8] CDP (2017), Putting a Price on Carbon: Integrating Climate Risk Into Business Planning, at p. 2.

[9] David Coady et al. (2015), How Large Are Global Energy Subsidies? *IMF Working Paper*, WP/15/105, at p. 5.

[10] Philip Gass and Daniella Echeverria (2017), Fossil Fuel Subsidy Reform and the Just Transition: Integrating Approaches for Complementary Outcomes, GSI Report, the International Institute for Sustainable Development, at p. 1.

Part II, thus, serve the needs and interests of foreign investors who seek to invest in a low-carbon transition.

#### 3.1.1.4 Promotion of renewable energy

3.8. The private sector's interest in the use of renewable energy has grown significantly in recent years. As of 2017, 89 global companies headquartered in Europe, Asia, and North America had set targets to achieve 100% renewable energy consumption, while many others have established lower, but substantial goals.[11] This provides significant opportunities for private companies to invest in renewable energy.

3.9. However, the private entities that invest in renewable energy would be disadvantaged because the market fails to internalise positive externalities associated with renewable energy in its price. Thus, additional governmental support is needed to incentivize investment in renewable energy.[12] Section 4 of Part II commits States to implement predictable long-term policies incentivizing investments in renewable energy. Notably, Article 15 of the Treaty provides for well-designed, well-targeted and well-limited incentives for renewable energy investment.

#### 3.1.1.5 Enhancing energy efficiency

3.10. Promotion of energy efficiency in the private sector can cut energy cost and leverage new investments in renewable energy and energy-efficiency technologies. McKinsey & Company estimated that energy efficiency worldwide represented about 40% of GHG reduction potential that could be realized at relatively low cost.[13]

3.11. Section 5 of Part II, largely inspired by the G20 Voluntary Energy Efficiency Investment Principles adopted in 2017, provides a guiding framework for designing and implementing policies that stimulate both the demand for and supply of energy efficiency investments.[14] This Treaty makes the G20 Principles more legally binding. In addition, Article 23 of the Treaty strengthens the commitment of public financial institutions to support energy efficiency investments. Further, Article 25 promotes international standards that will incentivize the creation of more efficient markets (with lower prices) for energy efficient goods and reduce GHG emissions.[15]

### 3.1.2 Incentives for sustainable land use

3.12. Various barriers exist in relation to lack of inclusion of the private sector including smallholders in sustainable land use: weak forest governance, lack of transparency and insufficient finance.[16] Costs associated with the transitioning to a different business model are further preventing the transition to sustainable land use management.[17] The business-as-usual approach generally does not work effectively for sustainable land use which requires public finance. As observed by Climate Focus (2017), the magnitude of finance for forests is highly disproportionate to the private sector's investment needs and the mitigation potential of the forest sector.[18] UN Environment found that climate finance for land use only represented 1-2% compared to

[11] Lori Bird et al. (2017), Policies for Enabling Corporate Sourcing of Renewable Energy Internationally, *A 21st Century Power Partnership Report*, Technical Report NREL/TP-6A50-68149, at p. 3.

[12] IPCC (2012), *Renewable Energy Sources and Climate Change Mitigation: Special Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, at p. 870.

[13] McKinsey & Company (2010), Energy Efficiency: A Compelling Global Resource, McKinsey & Company, at p. 2.

[14] G20 Energy Efficiency Investment Toolkit, G20 Energy Efficiency Finance Task Group (EEFTG), 2017, available at: http://www.unepfi.org/wordpress/wp-content/uploads/2017/05/G20-EE-Toolkit.pdf.

[15] Thematic session on regulatory cooperation between Members: energy efficiency, 14 June 2016, available at: https://www.wto.org/english/news_e/news16_e/tbt_14jun16_e.htm.

[16] UN Environment, How to Scale Up Climate Finance for Sustainable Land Use? Available at: http://events.globallandscapesforum.org/agenda/bonn-2017/day-1/discussion-forums-2-parallel-sessions/agriculture-land-use-finance/.

[17] Ibid.

[18] Climate Focus (2017), Progress on the New York Declaration on Forests: Finance for Forests - Goals 8 and 9 Assessment Report, Prepared by Climate Focus in cooperation with the New York Declaration on Forest Assessment, at p. 6.

investments in renewable energy[19], indicating a need to scale up private investment in sustainable land use.

3.13. Section 6 of Part II seeks to reduce the investment risk and scale up investment flowing into sustainable land use activities. It addresses private sector's concerns by enhancing forest governance and facilitating finance. Article 26 of the Treaty *inter alia* encourages States to ensure that REDD and REDD+ credits can be traded within carbon markets. Article 27 of the Treaty encourages States to adopt policies and incentives that promote sustainable land management with a view to reducing GHG emissions in a demonstrable and cost-effective manner. Some of the provisions match the recommendations from the 'Little Forest Finance Book' for policy interventions and public-sector support mechanisms (termed 'catalysts'), in particular those relating to the clarification of property rights (Article 26.2(e)), national planning and coordination (especially Article 27) and subsidies and tax incentives (Articles 26 and 27).[20]

### 3.1.3 Incentives for innovation and transfer of environmentally sound technologies

3.14. The main problems the private sector investing in technological innovation frequently face are the transformation of a viable technology into a product that could be used at a large scale and the commercialization of innovative technologies.[21] To address these concerns, Article 27 of the Treaty encourages countries to prioritize resources, enhance public and private partnerships, and strengthen enabling environments including through market creation and expansion.

3.15. Further, the UN Department for Economic and Social Affairs (UNDESA) finds that most financing for technology transfer is dependent on FDI flows as well as "technical cooperation provisions in external assistance grants and loans and export credit agency funding".[22] However, these mechanisms do not always provide sufficient incentives and policy contexts conducive to investment in environmentally sound technologies. In addition to improving the enabling environment for market-based technology transfer, this Treaty proposes a set of incentives and commitments to promote technology transfer to countries with special needs including: (1) commitments by Parties with high capabilities to provide financial resources, including for the transfer of technology, to Parties with special needs (Article 5 of the Treaty); and (2) incentives for the transfer of technology to institutions and enterprises of developing countries, in particular LDCs (Article 30 of the Treaty). The incentives provided in Section 7 of Part II not only serve the needs of the foreign investors that seek to invest in developing countries but also benefit the private sector of developing countries.

## 3.2 The Provisions on Green Investment Facilitation, Promotion and Protection effectively serve foreign investors' needs and interests

### 3.2.1 Investment facilitation and promotion

3.16. Sections 2 and 3 (Investment Facilitation and Promotion) of Part IV seek to effectively serve foreign investors' interests and needs by incorporating rules that facilitate and promote investment which are emerging areas in the international investment regime.

3.17. Investment facilitation and promotion are not only necessary for countries to succeed in a competitive international business environment, but also crucial for the private sector to participate in the implementation of the SDGs. According to the UNCTAD World Investment Report 2014, sectors related to the SDGs tend to be more heavily regulated and investments usually face more

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[19] UN Environment, How to Scale Up Climate Finance for Sustainable Land Use? Available at: http://events.globallandscapesforum.org/agenda/bonn-2017/day-1/discussion-forums-2-parallel-sessions/agriculture-land-use-finance/.

[20] Global Canopy Programme (2012), The Little Forest Finance Book - 14 catalysts to scale up forest-friendly finance, https://globalcanopy.org/publications/little-forest-finance-book-14-catalysts-to-scale-up-forest-friendly-finance-en-fr-sp

[21] Technology Executive Committee (2017), Technological Innovation for the Paris Agreement: Implementing Nationally Determined Contributions, National Adaptation Plans and Mid-Century Strategies, UNFCCC TEC Brief, No. 10.

[22] UN-DESA World Economic and Social Survey 2011, The Great Green Technological Transformation,
available at: http://www.un.org/en/development/desa/policy/wess/wess_current/2011wess.pdf.

barriers.[23] UNCTAD therefore argues that investment in the SDGs requires enhanced investment facilitation and promotion.

3.18. Investment facilitation is a set of policies and actions that seek to make it easier for investors to establish and expand their operations, as well as to conduct their day-to-day business in host countries. Section 2 of Part IV (Investment Facilitation) introduces rules that alleviate ground-level obstacles to investments, for example by introducing transparency and improving the availability of information, and by making administrative procedures more effective and efficient.

3.19. This Treaty has specific provisions on promotion of Green Investment. Studies suggest that investment promotion in sectors explicitly targeted by investment promotion agencies leads to more investment in the post-targeting period, relative to the pre-targeting period and non-targeted sectors. This relationship appears to hold true in particular for developing countries.[24]

### 3.2.2 Investment protection

3.20. Section 4 of Part IV of the Treaty provides strong protection for Green Investment, serving foreign investors' needs and interests, backed up by effective dispute avoidance and settlement mechanisms (See Section 6 on Enforceability). For instance, the standards of treatment promulgated by this Treaty are those supported by the International Chamber of Commerce since these standards are based on norms considered to represent a 'gold standard'.[25]

3.21. Further, this Treaty fully incorporates suggestions proposed by a comprehensive academic study on IIAs and investments in renewable energy which seeks to help generate more green investment.[26] These suggestions have been incorporated into this Treaty including (i) a broad enough definition of "investment" to ensure that investments in "hybrid property" such as tradable renewable energy certificates (TRECs) and GHG emissions allowances are protected (Definition of investment under Article 2 (General Definitions)); and (ii) expressly providing that energy from renewable sources is not "like" energy from non-renewable sources for purposes of government support. Accordingly, this Treaty stipulates that Green Investment is not 'like' 'non-Green Investment' (Article 44.2 – Scope).

3.22. Moreover, the Section on Investment Protection provides a predictable and transparent regime which could effectively serve the private sector's interest. A vast body of economic research provides evidence of a positive effect of investment protection/international investment agreements (IIAs) on investment flows. Consequently, this Treaty is expected to significantly increase Green Investment. Some findings of the literature include:

- IIAs enhance FDI attractiveness of the recipient country adding security, transparency, stability and predictability to the investment framework.[27]
- IIAs have a positive effect on FDI inflows, which is larger when the IIA is signed with economically more important countries such as the United States.[28]
- Merely signing an IIA has a positive signalling effect and IIAs that have entered into force have stronger positive effect than those that have been signed.[29]
- IIAs show a political commitment of the recipient countries to economically liberal policies.

[23] Investment Facilitation: The Perfect Match for Investment Promotion, IPA Observer, July 2017, http://unctad.org/en/PublicationsLibrary/webdiaepcb2017d4_en.pdf

[24] See for instance, 'Roll out the Red Carpet and They Will Come: Investment Promotion and FDI Inflows, Harding and Javorcik, University of Oxford, http://users.ox.ac.uk/~econ0247/IPA.pdf

[25] See ICC (2016), Foreign Direct Investment – Promoting and protection a key pillar for sustainable development and growth, https://iccwbo.org/media-wall/news-speeches/icc-outlines-8-principles-to-mobilize-investment-for-the-sdgs/.

[26] Gentry and Ronk (2016), International Investment Agreements and Investments in Renewable Energy,http://www.waipa.org/wp-content/uploads/2016/07/Ronk_International-Investment-Agreements-and-Investments-in-Renewable-Energy.pdf

[27] UNCTAD (2009), The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries

[28] Salacuse, Jeswald and Sullivan (2005), Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain & Sauvant and Sachs (eds.) (2009), The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows

[29] Egger and Pfaffermayr (2004), The impact of bilateral investment treaties on foreign direct investment, Journal of Comparative Economics, Vol. 32, No. 4, pp. 788-804, December 2004.

- IIAs can partially substitute low quality of governance and institutions in a country and are most useful when they provide security and certain standards of treatment to foreign investors where domestic institutions fail to deliver these standards.[30]
- There is a positive relation between the total number of BITs concluded by a country and the FDI inflows to that country, based on studies focused on developing countries in general, Central and Eastern Europe and Latin America.
- A very relevant study for the Green Investment Treaty is a 2014 empirical study which found that FDI characterized by higher sunk investment costs responds more strongly to the signing of IIAs. Green Investment has a large degree of irreversibility and are more sensitive to risks and more attractive for expropriation, and are therefore more responsive to the protection provided by an IIA.[31]

3.23. In Ecuador where there has previously been a policy of withdrawing from the investment regime, there is a growing realization, expressed by the new government's Minister of Hydrocarbons as well as the Minister of Foreign Trade that resolving disputes between investors and States by way of international arbitration incentivizes inflow of potential new investment and provides foreign investors with legal certainty.[32]

## 3.3 The Treaty is well-aligned with policy positions of business and investor communities with respect to climate change

3.24. Through joint declarations and statements, businesses and investors regularly indicate to governments what they should do to drive Green Investment. A representative sample of major business/investor statements, often disseminated around major UNFCCC meetings (Conference of Parties), show that they are clamouring for the type of policies that this Treaty proposes including in the areas of carbon pricing, fossil fuel subsidy reform, renewable energy, energy efficiency, sustainable land use, innovation/technology and environmental transparency.

**Table 1– Business/Investor Statements on climate change-related policies**

| Busines/Investor Statement | Year | Carbon Pricing | Fossil Fuel Subsidy Reform | Renewable Energy | Energy Efficiency | Sustainable Land Use | Innovation/Technology | Environmental Transparency |
|---|---|---|---|---|---|---|---|---|
| Letter from Global Investors to Governments of the G20 | 2017 | ✓ | ✓ | | ✓ | | | ✓ |
| ICC submission to One Planet Summit | 2017 | ✓ | | | | | ✓ | ✓ |
| International Business Declaration - Ambitious climate action today is essential for future economic success | 2017 | ✓ | ✓ | | | | | |
| World Business Council on Sustainable Development (WBSCD) COP23 Policy Asks | 2017 | ✓ | | | ✓ | ✓ | ✓ | |
| Marrakesh Declaration | 2016 | | | | | | ✓ | |
| Montréal Carbon Pledge | 2015 | | | | | | | ✓ |
| The Paris Declaration | 2015 | | | ✓ | | | | ✓ |
| Global Investor Statement on Climate Change | 2014 | ✓ | ✓ | ✓ | ✓ | | ✓ | ✓ |
| Business Declaration on Increasing EU's Climate Ambition | 2010 | ✓ | | ✓ | ✓ | | ✓ | |

[30] Neumayer and Spess (2005), Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries? & Coupé, Orlova and Skiba (2010), The Effect of Policies on FDI Flows to Transition Countries, Chapter 9 in Global Exchange and Poverty.
[31] Colen, Persyn and Guariso (2014), What type of FDI is attracted by bilateral investment treaties?
[32] 'Ecuador adopts a new approach towards foreign investment', 26 January 2018, http://isds.bilaterals.org/?ecuador-adopts-a-new-approach&lang=fr

3.25. Interestingly, the call for government support to renewable energy appears to have a lower priority in recent years, perhaps because governments responded to calls for support – yet it remains important to keep this on the agenda and to provide guidance to governments on how to balance predictability and flexibility in the provision of such incentives. Sustainable land use is an emerging issue for business raised for instance by the World Business Council on Sustainable Development ahead of COP23.

3.26. In conclusion, this Treaty comprehensively addresses existing and emerging needs and interests of business and investors.

## 4 VIABILITY: THE TREATY IS LIKELY TO BE ADOPTED BY STATES AROUND THE WORLD

4.1. The Green Investment Treaty is likely to be adopted by States around the world. Adoption is likely because (1) the Treaty serves States' needs and interests; (2) the Treaty facilitates the achievement of climate-change goals; and (3) the Treaty does not unduly restrict the States' ability to legislate and regulate.

### 4.1 The Green Investment Treaty serves States' needs and interests

#### 4.1.1 The provisions of the Treaty represent existing or emerging norms

4.2. One of the guiding principles for designing the Treaty was that the proposed text should represent existing or emerging norms that are supported by a sizeable group of States with differing levels of development, or should represent recommendations by authoritative international organisations such as UNCTAD, other UN agencies or OECD or international groups such as International Bar Association (IBA) or B20. Following this principle ensures that the Treaty serves States' needs and interests. Annex I to this Memo provides an overview of sources for the proposed norms in this Treaty.

4.3. Further, UNCTAD World Investment Report 2015 identifies five key areas for reform of investment treaties: (1) Safeguarding the right to regulate, (2) Reforming investment dispute settlement; (3) Promoting and facilitating investment; (4) Ensuring responsible investment; (5) Enhancing systemic consistency of the IIA regime. [33] This Treaty fully incorporates the relevant recommendations in these five key areas, which are most relevant with respect to the viability of any investment treaty.

#### 4.1.2 The Treaty enhances systemic consistency of the IIA regime

4.4. This Treaty seeks to enhance the systemic consistency of the IIA regime, especially in the area of Green Investment. It establishes a relatively high standard for facilitation, promotion and protection of Green Investment. Provisions managing the relationship between this Treaty and existing IIAs ensure that the best treatment is available for Green Investment and Green Investors (Article 46 – Relation to Other Investment Treaties). The norms of this Treaty are to be extended in future treaties between Parties and non-Parties. It is anticipated that final awards might be subject to a future appeals mechanism.

### 4.2 The Green Investment Treaty facilitates the achievement of climate-change goals

4.5. As demonstrated in Section 2 (Compatibility), this Treaty is designed to complement the UN Climate Agreements, ultimately facilitating the achievement of climate-change goals. Full implementation of Part II on Enabling the Low-Carbon Transition, Part III on Responsible investment and environmental transparency and Part IV on Green Investment Facilitation, Promotion and Protection will significantly facilitate the achievement of climate-change goals.

4.6. Part II of the Treaty (Enabling the Low-Carbon Transition) is designed to stimulate large-scale investments in a global low-carbon and climate-resilient transition, ultimately achieving the objectives of the UN Climate Agreements and the SDGs. Intergovernmental Panel on Climate Change (IPCC) found that fossil fuel burning and industrial processes contributed about 75% of the

[33] UCTAD World Investment Report 2015, 'Reforming International Investment Governance', http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf

total GHG emissions increase, followed by land-use change.[34] Thus, Part II of the Treaty introduces rules to address respective concerns: (1) rules that facilitate a robust global transition from a fossil fuel-based economy to a low-carbon economy; and (2) rules designed for sustainable land use. These rules are further enhanced by rules that stimulate innovation, transfer and application of environmentally sound technologies. In practice, many States have already implemented these provisions or planned to do so, as indicated in the Nationally Determined Contributions (NDCs) communicated by States.

### 4.2.1 Rules that facilitate a robust global transition from fossil fuel-based economy to low-carbon economy

4.7. Sections 2-5 of Part II introduce various climate-friendly rules including carbon pricing (Section 2), fossil fuel subsidy reform (Section 3), promotion of renewable energy (Section 4) and enhancing energy efficiency (Section 5) to facilitate a robust global transition from a fossil fuel-based economy to a low-carbon economy.

#### 4.2.1.1 Carbon pricing

4.8. Carbon pricing encourages the private sector to internalize the external cost of GHG emissions associated with their business activity and increases the prices of coal, oil and nature gas, i.e. fossil fuels, thereby incentivizing investments in a low-carbon transition.[35] Section 2 of Part II seeks to introduce a well-designed carbon pricing mechanism which represents "a simple, fair and efficient policy option" to mitigate climate change,[36] and thus is essential to achieve the central objective of the UN Climate Agreements.

4.9. Over 90 countries have included proposals for emissions trading system (ETS), carbon taxes and other carbon pricing initiatives in their Intended Nationally Determined Contributions (INDCs) which outline their intended national efforts towards achieving the objective of the UNFCCC as set out in its Article 2.[37] In the context of the Paris Agreement, over 40 countries and 25 subnational jurisdictions, responsible for about 25% of global GHG emissions, have put a price on carbon.[38]

#### 4.2.1.2 Fossil fuel subsidy reform

4.10. A successful and swift implementation of the UN Climate Agreements requires the reduction of fossil fuel subsidies. By lowering the price of fossil fuels, fossil fuel subsidies constitute a big hurdle to combatting climate change. They "encourage wasteful consumption, disadvantage renewable energy, and depress investment in energy efficiency".[39] Section 3 of Part II seeks to tackle these problems by obliging countries to reform fossil fuel subsidy.

4.11. According to the Global Subsidies Initiative (2015), 13 countries have included fossil fuel subsidy reform in their INDCs as a means of reducing GHG emissions in the run-up to Paris negotiations.[40] Countries have further pledged to phase out inefficient fossil fuel subsidies under

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[34] IPCC (2014), Climate Change 2014: Synthesis Report, Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, at p. 5.

[35] Manjyot Bhan Ahluwalia (2017), The Business of Pricing Carbon: How Companies Are Pricing Carbon to Mitigate Risks and Prepare for a Low-carbon Future, Centre for Climate and Energy Solutions, at p. 1.

[36] The World Bank, Carbon Pricing, 1 December 2017, available at: http://www.worldbank.org/en/results/2017/12/01/carbon-pricing.

[37] World Bank and Ecofys (2016), *Carbon Pricing Watch 2016*, Washington, DC: World Bank, available at: https://www.ecofys.com/files/files/world-bank-group_ecofys-carbon-pricing-watch_160525.pdf, at p. 1.

[38] World Bank and Ecofys (2017), *Carbon Pricing Watch 2017*, Washington, DC: World Bank, https://openknowledge.worldbank.org/handle/10986/26565 License: CC BY 3.0 IGO, at p. 2.

[39] Fossil Fuel Subsidies Reform Ministerial Statement, WTO Doc. WT/MIN (17)/54, 12 December 2017, at p. 1.

[40] Anika Terton et al. (2015), Fiscal Instruments in INDCs: How Countries Are Looking to Fiscal Policies to Support INDC Implementation, *IISD Discussion Paper*, Geneva: International Institute for Sustainable Development, at p. 2.

the auspices of the World Trade Organization (WTO), the G20, the G7, Asia-Pacific Economic Cooperation (APEC) and Vulnerable Twenty (V20) in the context of the Paris Agreement. [41]

#### 4.2.1.3 Promotion of renewable energy

4.12. Deployment of renewable energy plays a critical role in climate change mitigation and adaptation. Section 4 of Part II obliges or encourages countries to adopt renewable energy targets and policies which feature prominently in countries' NDCs, "a cornerstone for implementing the Paris Climate Change Agreement".[42]

4.13. International Renewable Energy Agency (2017) found that among the 194 Parties to the UNFCCC, 145 identified renewable energy action as a means to mitigate and adapt to climate change, and 109 Parties set quantified targets for renewables in their NDCs.[43] If implemented, the renewable energy polies and targets could further unlock significant investment opportunities in renewable energy, thereby accelerating a low-carbon and climate resilient development.

#### 4.2.1.4 Enhancing energy efficiency

4.14. Enhancing energy efficiency is central to achieving the ambitious goals of the Paris Agreement. Studies show that improving energy efficiency can dramatically reduce GHG emissions, thereby helping countries meet their commitments under the UN Climate Agreements.[44] Section 5 of Part II obliges countries to set national energy efficiency targets and encourage investments in energy efficiency, which feature prominently in countries' INDCs.[45]

4.15. UNEP DTU Partnership (2017) found that over 167 countries included policies or actions on enhanced energy efficiency in their INDCs.[46] International Energy Agency found that energy efficiency could contribute "the largest share of total emissions reductions" while supporting national targets for economic growth and poverty alleviation.[47]

### 4.2.2 Rules designed for sustainable land use

4.16. Sustainable land use, including carbon sequestration through rehabilitation and forest restoration, plays an important role in mitigating climate change while ensuring the long-term resilience capacity of vulnerable communities.[48] In particular, Action Agenda for the New York Declaration on Forests (2014) emphasizes that reducing carbon emissions from deforestation and increasing forest restoration will be extremely important in achieving the objective of the Paris Agreement, i.e., limiting the rise in temperature to 2 degrees Celsius.[49] According to Handers (2018), 139 INDCs commonly refer to forest loss, with 46 INDCs mentioning deforestation. [50]

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[41] Fossil Fuel Subsidies Reform Ministerial Statement, WTO Doc. WT/MIN (17)/54, 12 December 2017; G20 Hamburg Action Plan, G20 Germany 2017, 08 July 2017, Hamburg, at p. 13; G7 Ise-Shima Leaders' Declaration, G7 Ise-Shima Summit, 26-27 May 2016, Ise-Shima, at p. 28; 2016 Leaders' Declaration, Asia-Pacific Economic Cooperation, 20 November 2016, Lima; V20 Ministerial Communiqué, Ministerial Dialogue IV of the Vulnerable Twenty (V20) Group, 23 April 2017, Washington, DC.

[42] United Nations Framework Convention on Climate Change, Online Tool Makes Climate Action Plans More Comparable, *New NED Explorer*, 16 January 201.

[43] IRENA (2017), Untapped potential for climate action: Renewable energy in Nationally Determined Contributions, International Renewable Energy Agency, Abu Dhabi, at p. 13.

[44] UNDP, GEF, and UNECE (2016), Experience in Europe and the CIS Region with Clean Energy: UNDP, GEF, and UNECE, at p. 4 ; Saritha S. Vishwanathan, et al. (2017), Enhancing Energy efficiency in India: Assessment of sectoral potentials, Copenhagen: Copenhagen Centre on Energy Efficiency, UNEP DTU Partnership, at p. v

[45] Ibid.

[46] Ibid.

[47] IEA (2016), Energy, Climate Change and Environment, *2016 Insights*, OECD/IEA, Paris, at p. 63.

[48] UNCCD (2015), Land Matters for Climate: Reducing the Gap and Approaching the Target, United Nations Convention to Combat Desertification, Bonn, at p. 3.

[49] Forests: Action Statements and Action Plans, Climate Summit 2014, United Nations, New York.

[50] Sabine Henders et al. (2018), Do national strategies under the UN biodiversity and climate conventions address agricultural commodity consumption as deforestation driver? *Land Use Policy* 70, pp. 580-590, at p. 583.

4.17. IPCC (2014) found that deforestation and carbon-intensive agriculture contribute almost 25% of all anthropogenic GHG emissions, making sustainable land use one of the most important targets for climate change mitigation and adaptation.[51] According to the United Nation Convention to Combat Desertification, sustainable land use and management could close the remaining GHG emissions gap by up to 25%.[52] These sustainable land management practices often generate adaptation co-benefits.[53] Accordingly, if implemented, Section 6 of Part II has the potential to facilitate the achievements of climate change goals.

### 4.2.3 Rules that stimulate innovation, transfer and application of environmentally sound technologies

4.18. Innovation, transfer and application of environmentally sound technologies play an essential role in achieving the goals of the Paris Agreement. IPCC (2014) reaffirms that innovation and investments in environmentally sound technologies are critical to reducing GHG emissions and strengthening resilience to climate change.[54] Section 7 of Part II sets rules to accelerate and encourage technological innovation, transfer and application which will facilitate the transition to a low-carbon and climate-resilient economy.

4.19. The UNFCCC Technology Executive Committee considered that harnessing technological innovation is a prerequisite for States to efficiently implement their NDCs and national adaptation plans.[55] It found that the importance of climate technologies was highlighted in nearly 140 developing countries' NDCs and that around 50% of all developing countries explicitly referred to the importance of technological innovation for achieving their climate objectives.[56]

## 4.3 The Green Investment Treaty does not unduly restrict the States' ability to legislate and regulate

4.20. This Treaty does not unduly restrict the States' ability to legislate and regulate, because of (1) the incorporation of the 'Right to Regulate' and (2) the circumscription or clarification of standards of treatment and (3) the exceptions clauses.

### 4.3.1 Right to Regulate

4.21. The Right to Regulate is formulated as a basic principle in Article 45 of the Treaty.[57] It is also an element for guiding the discretion of tribunals in difficult procedural situations. Article 90 ('Discretion of the Tribunal'), adapted from Article 1.4 of the UNCITRAL Transparency Rules, emphasises the role of the arbitral tribunal to balance the public interest, the Right to Regulate, and the disputing parties' interest in a fair and efficient resolution of the dispute. In *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* five NGOs requested access to investor-State proceedings as the arbitration raised a number of issues of vital concern to the local community in Tanzania. [58] The tribunal conducted the case under the ICSID arbitration rules prior to 2006 and considered that there was no general rule that supported the NGOs' request. This particular tribunal applied its discretion in favour of the disputing parties' interest (i.e. against the request of the NGOs).[59] If this dispute would have been operated under Article 90, the tribunal could have used its discretion to balance procedural integrity with the Right to Regulate and the public interest in the dispute.

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[51] IPCC (2014), Climate Change 2014: Mitigation of Climate Change, Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Edenhofer, O., R. Pichs-Madruga, Y. Sokona, E. Farahani, S. Kadner, K. Seyboth, A. Adler, I. Baum, S. Brunner, P. Eickemeier, B. Kriemann, J. Savolainen, S. Schlömer, C. von Stechow, T. Zwickel and J.C. Minx (eds.), Cambridge University Press.

[52] United Nation Convention to Combat Desertification, "Land and Climate Change", available at: http://www2.unccd.int/issues/land-and-climate-change.

[53] Ibid.

[54] IPCC (2014), Climate Change 2014 Synthesis Report: Summary for Policymakers, at p.26.

[55] Technology Executive Committee (2017), Technological Innovation for the Paris Agreement: Implementing Nationally Determined Contributions, National Adaptation Plans and Mid-Century Strategies, UNFCCC TEC Brief, No. 10.

[56] Ibid.

[57] The language is based on Brazil's WTO submission for an Investment Facilitation Agreement

[58] ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 Sep 2006, paras 121-133

[59] *Ibid.*, paras 134-140

### 4.3.2 Circumscription or clarification of standards of treatment

4.22. As mentioned in Section 4.1.1, UNCTAD regards 'Safeguarding the right to regulate' as a reform objective in IIA reform. More specifically, this reform objective includes circumscription or clarification of standards of treatment and "safety valves", e.g. exceptions for public policies, national security and balance-of-payments crises. In drafting the investment protection provisions, the relevant recommendations have been taken on board with a view to achieving an optimal balance between investment protection and a State's right to regulate, taking into account the standards reflected in 'modernized' investment treaties. [60] Key examples include:

- **Definition of covered investor.** This Treaty includes criteria for the definition of covered investors: a company must have its registered office and engage in substantial economic activities in the home State.
- **Definition of covered investment**. This Treaty includes a legality requirement: protection is only afforded to investments made in accordance with the applicable law at the time the investment is made.
- **National Treatment and Most Favoured Nation (MFN) treatment.** This Treaty requires a comparison of investors/investments that are "in like circumstances" and clarifies that such assessment depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.
- **REIO exception.** The MFN clause includes an exception for Economic Integration Agreements.
- **Expropriation** – Annex to clarify direct and indirect expropriation (combining elements from CPTPP and CETA).
- **Performance requirements**. This Treaty contains a number of 'state-of-the-art' performance requirements such as a prohibition for States to require investors to source their goods and/or services from domestic providers. However, restrictions on mandatory and incentive-based performance requirements can create possible conflicts with climate policy objectives. [61] In this Treaty there is no prohibition for States to require investors to use particular technologies, for instance, environmentally sound technologies.
- **Filter mechanism for taxation disputes**. This Treaty defines and limits the coverage of taxation measures. Furthermore, if the respondent country and investor's home country agree that a challenged measure does not amount to expropriation, that decision is binding on the tribunal (i.e. is not subject to Investor-State Dispute Settlement).

### 4.3.3 Exceptions

4.23. This Treaty contains exceptions for the implementation of public policies (taking elements from Article XX of the General Agreement on Tariffs and Trade (GATT)), for reasons of national security (taking elements from Article XXI GATT and Energy Charter Treaty) and temporary safeguard measures in the event of serious balance of payments or external financial difficulties or threats thereof.

4.24. Article 76 of the Treaty ('Implementation of UNFCCC and agreements under its auspices') provides flexibility for States to take measures that implement their NDCs under the Paris Agreement, under some conditions balancing possible tension between the climate change and investment protection regimes.

4.25. This exception can be invoked if an investor or State brings a claim against a State. The conditions for invocation by a State are: (1) the State implementing the measure ratified the UNFCCC, the Paris Agreement and any other agreement concluded under the auspices of the UNFCCC after 31 December 2019 which is open for signature to all States, and implements the transparency provisions of the Paris Agreement; (2) the measure is a domestic mitigation measure, relates to the Party's nationally determined contribution and aims to achieve one or more

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[60] Several of these elements are also touched upon by the Energy Charter Secretariat in a 2018 communication on 'Consultations on the Modernization of the ECT' in which they list 17 elements of new approaches included in recent IIAs. This Treaty fully addresses all these elements.

[61] See also Güven and Johnson (2016), International Investment Agreements: Impacts on climate policies in India, China, and beyond, http://ccsi.columbia.edu/files/2016/12/Trade-in-the-Balance-International-Investment-Agreements-Impacts-on-Climate-Change-Policies-in-India-China-and-Beyond-Nov-2016.pdf

objectives of the nationally determined contribution; (3) the measure is not a disguised restriction on international investment; (4) the measure was subject to stakeholder consultation and promptly published (cross-linkage with Articles in the Section on Investment Facilitation) and (5) the measure must not be contested in domestic courts.

## 5 UNIVERSALITY: THE TREATY APPEALS TO THE POTENTIALLY DIVERGING INTERESTS OF STATES AND INVESTORS IN DIFFERENT PARTS OF THE WORLD

5.1. The Green Investment Treaty appeals to the potentially diverging interests of States and investors in different parts of the world. Where necessary, the Treaty includes alternative provisions from which contracting States may select the most appropriate ones based on context and circumstances.

### 5.1 The Green Investment Treaty appeals to the potentially diverging interests of States

5.2. The Treaty appeals to the potentially diverging interests of States because of (1) the incorporation of various types of climate-friendly rules; (2) addressing needs of lesser-developed countries; (3) designation of Articles under Categories which provides flexibility for States to implement certain provisions of the treaty taking into account their development level and national circumstances; and (4) choice between alternative provisions.

#### 5.1.1 Various types of climate-friendly rules serve divergent interests of States

5.3. As previously demonstrated, Part II of the Treaty ('Enabling the Low-Carbon Transition') contains three types of rules: (1) rules that facilitate a robust global transition from a fossil fuel-based economy to a low-carbon economy; (2) rules designed for sustainable land use; and (3) rules that stimulate innovation, transfer and application of environmentally sound technologies. All these rules are designed to address the <u>common concern of mankind</u>, i.e., climate change, thereby serving the common interests of all States.

5.4. These rules serve divergent interests of States because they take account of divergent concerns and interests of different States. Considering each country or region has different industry structure and strength, different types of measures such as carbon pricing (Section 2), fossil fuel subsidy reform (Section 3), promotion of renewable energy (Section 4), enhancing energy efficiency (Section 5) and sustainable land use (Section 6) are proposed. Countries can introduce these rules in accordance with their national circumstances. Further, provisions provide flexibility through diverging levels of obligations (e.g. 'should', 'shall endeavour', 'shall') and qualifiers (e.g. as 'appropriate', 'as far as possible')

5.5. The argument that these rules serve divergent interests of States is evidenced by the fact that various States have already implemented these provisions or planned to do so, as indicated in their NDCs. As demonstrated in Section 4.2 , over 90 States have included proposals for emission trading system (ETS), carbon taxes and other carbon pricing initiatives in their INDCs;[62]13 States have included fossil fuel subsidy reform in their INDCs as a means of reducing GHG emissions;[63]145 States identified renewable energy action as a means to mitigate and adapt to climate change, and 109 States set quantified targets for renewables in their NDCs;[64] over 167 countries included policies or actions on enhanced energy efficiency in their INDCs;[65] 139 INDCs commonly refers to forest loss, with 46 INDCs mentioning deforestation; [66] and importance of climate technologies was highlighted in nearly 140 developing countries' NDCs and around 50 per

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[62] World Bank and Ecofys (2016), *Carbon Pricing Watch 2016*, Washington, DC: World Bank, available at:
https://www.ecofys.com/files/files/world-bank-group_ecofys-carbon-pricing-watch_160525.pdf, at p. 1.

[63] Anika Terton et al. (2015), Fiscal Instruments in INDCs: How Countries Are Looking to Fiscal Policies to Support INDC Implementation, *IISD Discussion Paper*, Geneva: International Institute for Sustainable Development, at p. 2.

[64] IRENA (2017), Untapped potential for climate action: Renewable energy in Nationally Determined Contributions, International Renewable Energy Agency, Abu Dhabi, at p. 13.

[65] Ibid.

[66] Sabine Henders et al. (2018), Do national strategies under the UN biodiversity and climate conventions address agricultural commodity consumption as deforestation driver? *Land Use Policy* 70, pp. 580-590, at p. 583.

cent of all developing countries explicitly referred to the importance of technological innovation for achieving their climate objectives.[67]

5.6. The low-carbon transition would have different impact on different types of economies, particularly those with more energy-intensive industries, and thus rules have been tailored to take their interests into account, as demonstrated in Section 5.1.2.

### 5.1.2 Articles addressing the needs of lesser-developed countries

5.7. Various other Articles in the Treaty address the needs of lesser-developed countries:

- **Countries with Special Needs.** Parties with high capabilities shall endeavour to provide financial resources, including for the transfer of technology, needed by Parties with special needs to meet the agreed full incremental costs of implementing measures that are covered by Part II.
- **Technical Assistance and Capacity Building**. Parties agree to facilitate the provision of technical assistance and capacity building to Parties that have designated Articles under Category C. The Compliance Council (see Section 6.5 below) can recommend the provision of technical assistance and capacity building.
- **Integration of the principle of Common but Differentiated Responsibilities**. See Articles 6.2 and 115.1 of the Treaty.
- **Redirection of Revenues** from carbon pricing mechanisms or the phase out of fossil fuel subsidies should be in line with the SDGs. Further, eliminating fossil fuel subsidies should be done in a manner that protects the poor and the affected communities in developing countries.
- **Incentives for technology transfer.** Parties shall facilitate and promote the use of incentives granted to institutions and enterprises in its territory for the transfer of technology to institutions and enterprises of developing countries, in particular LDCs.

### 5.1.3 Designation of Articles under Categories

5.8. The Green Investment Treaty allows the categorization of Articles located in the substantive Sections of the Treaty:

- Category A contains Articles that a Party designates for implementation upon entry into force of this Treaty;
- Category B contains Articles that a Party designates for implementation on a date after a transition period of maximum 10 years following the entry into force of this Treaty;
- Category C contains Articles that a Party designates for implementation within 5 years following the entry into force of this Treaty and which require the provision of technical assistance and capacity building, in accordance with Article 117 (Provision of Technical Assistance and Capacity Building); and
- Category D contains Articles that a Party does not designate for implementation and which are not legally binding for that Party.

5.9. This categorization is inspired by the WTO Trade Facilitation (TF) Agreement, which entered into force on 22 February 2017. The TF Agreement is the most significant multilateral trade agreement to have entered into force in recent years. It embeds a novel and unprecedented regime for 'Special and Differential Treatment', WTO parlance for flexibility accorded to developing countries and LDCs. According to some observers, the TF Agreement represents a model for concluding multilateral treaties and enabling the involvement of all States.[68]

5.10. This Treaty has some provisions that facilitate a high level of commitments by Parties:

- Each Party shall ensure that its designation of Articles reflects its highest possible ambition and takes into account its existing international obligations.

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[67] Ibid.

[68] See for instance 'Why trade facilitation deal is the model for multilateralism', The Business Times Singapore, 24 March 2017, http://www.businesstimes.com.sg/opinion/why-trade-facilitation-deal-is-the-model-for-multilateralism.

- The duration of transition periods under Category B and C has been limited (which is not the case with the TF Agreement). Category B Articles must be implemented within a period of 10 years (the number of years can be selected by the Party), Category A must be implemented within a period of 5 years. In other words, all Articles designated under Category A, B and C are to be implemented within maximum of 10 years.
- Where a Party is a party to an investment treaty which offers substantially similar treatment as Section 4 of Part IV (Investment Protection), it shall endeavour to designate all Articles of this Section under Category A.

5.11. On the other hand, this Treaty proposes Category D, a flexibility not part of the TF Agreement, which enables Parties to not implement certain Articles.[69] Certain safeguards have been introduced to prevent that designation of Category would undermine the effectiveness of this Treaty:

- A Party shall refrain from designating the majority of Articles of substantive Sections under Category D or undermining the effectiveness of objectives of this Treaty through designation of Articles under Category D.
- If a decision is made in a Committee concerning an issue covered by an Article designated under Category D by a Party, that Party's objection cannot block consensus.

5.12. In practice, a certain level of 'fairness' between countries at different levels of capacities would be achieved through negotiations between interested Parties prior to signature of this Treaty. This also happened in the case of TF Agreement (e.g. the end result was that countries with higher capabilities have higher levels of commitments). Overall, such designation increases the appeal of this Treaty to States with diverging needs and levels of development.

### 5.1.4 Choice between alternative provisions

5.13. In the area of Investor State Dispute Settlement (ISDS), Parties can choose between alternative provisions in two cases, both 'hot-button' areas in ISDS:

**Table 2: Choice of Options**

| Default (no choice made by State) | Alternative / Option offered to State |
|---|---|
| Scope of ISDS extends to pre-establishment and post-establishment phase | 'Opt-out': A Party may choose to exclude claims under Article 63 (National Treatment) and Article 64 (Most-Favoured-Nation Treatment) with respect to the establishment or acquisition of a covered investment |
| Parties consent to submission of a claim for breach of obligations under Part IV (Green Investment Facilitation, Promotion and Protection) to arbitration | 'Opt-in': Extension of consent to submission of a claim for breach of an investment agreement or investment authorizations |

5.14. The concept of options is adapted from the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS Convention)

5.15. First, application of National Treatment and MFN obligations to the pre-establishment stage (and associated claims under ISDS for breaches thereof) is a contentious issue in investment treaty making. At present one cannot speak about a commonly agreed international standard. The majority of IIAs grant rights to protected foreign investors only after they have been allowed into the territorial jurisdiction of the state;[70] Yet, a growing minority of treaties grant rights to foreign investors since the admission phase, a trend which was started by Chapter 11 of the North American Free Trade Agreement (NAFTA), Article 1103. This approach is also followed by Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The EU-Canada Comprehensive Economic and Trade Agreement (CETA) also extends MFN and NT to pre-

[69] Under the WCO Revised Kyoto Convention, Parties can choose to accept Chapters. In this case it was considered that such flexibility would undermine the effectiveness of this Treaty and an Article-by-Article approach was opted for.

[70] 'The Most-Favoured-Nation Clause in Investment Treaties, IISD Best Practices Series, February 2017, page 6, https://www.iisd.org/sites/default/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf

establishment stage (after EU made concessions to Canada), however breaches of this obligation cannot be enforced under ISDS: under the CETA, ISDS does not apply to breaches of MFN and NT obligations with respect to the establishment or acquisition of covered investments.

5.16. In the case of China, the history of its approach to the scope of national treatment in its IIAs can be divided up in stages that correspond with China's internal investment development, as well as its role in the international economy: first, China's almost complete rejection of national treatment in the 1980s and 1990s; second, its conditional acknowledgment of post-establishment national treatment from 2000-2013; and third, its adoption of pre-establishment national treatment with a negative list after 2013.[71] Accordingly, any attempt to formulate a multilateral treaty that accommodates the characteristics and circumstances of each Party, including lesser developed countries, should recognize that different countries might have different approaches to National Treatment and MFN.

5.17. Second, the submission of claims for breach of investment agreements and investment authorizations in the Investment Chapter of CPTPP has been suspended, until Parties agree to end such suspension.[72] This shows that these provisions are considered controversial for an important subset of States.

5.18. This issue is closely related to States' views on the umbrella clause, which obliges the host state to observe specific undertakings towards its foreign investors. Practically speaking, an umbrella clause can elevate a contract claim to the level of a treaty claim. In order for States to consider submission of claims for investment agreements, the definition of 'investment agreement', clarifies that only 'written agreements' are covered. This follows a recommendation from the UNCTAD World Investment Report 2015 for countries wishing to avoid potentially far-reaching legal consequences.

## 5.2 The Green Investment Treaty appeals to the potentially diverging interests of investors

5.19. This Treaty contains sections which are generally applicable to all investors and investments and as such appeal to all investors and investment. As demonstrated in Section 3.3 many if not all measures proposed in Part II and III of the Treaty have also been proposed by different businesses from different sectors and countries (financial sector, industries etc.). Part IV (Green Investment Facilitation, Promotion and Protection) is specifically targeting Green Investment and appeals to investors that seek to make Green Investment. The following subsections demonstrate that (1) the Treaty appeals to small and medium-sized enterprises (SMEs) and larger enterprises alike; and (2) the Treaty appeals to investors across different sectors.

### 5.2.1 The Treaty appeals to SMEs and larger enterprises alike

5.20. This Treaty appeals to SMEs and larger enterprises alike. Some of the obligations arising out of Part II and III could involve implementing measures by States that impose obligations or requirements on enterprises which might be more onerous for SMEs compared to the larger enterprises. This has been taken into account in the design of the treaty language. More specifically, several provisions that appeal in particular to SMEs, include the following:

- Reference to international standards (Renewable Energy, Energy Efficiency, Greenhouse Gas Emissions Reporting). ISO 50001 is explicitly mentioned as a relevant international standard in the area of energy management systems.[73] Applying international standards is usually comparatively beneficial for SMEs as they do not always have the capacity to follow different standards at the same time.
- Public Financial Institutions are required to take into account the needs of SMEs in their interventions, for example, in the area of energy efficiency.

[71] 'Opening Pre-Establishment National Treatment in International Investment Agreements: An Emerging 'New Normal' in China?', Asian Journal of WTO & Int'l Health Law & Policy (AJWH), Vol. 11, 2016, Qianwen Zhang, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2849063

[72] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Article 2 in conjunction with Paragraph 2 of Annex, https://www.mfat.govt.nz/assets/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf

[73] ISO 50001 - Energy management systems - A practical guide for SMEs, https://www.iso.org/publication/PUB100360.html

- Access to and transfer of technology. Preventing abuse of obvious information asymmetries in the negotiation of licences is more important to SMEs as they usually have lower capacity to overcome information asymmetries and lower bargaining power in general with respect to technology licensing.
- The use of the qualifier 'as appropriate' and 'as far as possible' allows States to give particular attention to SMEs, for instance with respect to the commitment to establish targets for GHG emissions reduction.
- The costs of GHG reporting or verification obligations on enterprises are to be taken into account.
- Enterprises are encouraged to voluntarily incorporate into their internal policies the CSR standards that are most relevant to them.
- Provision is made to building up the capacity of local enterprises to take up CSR standards.
- Lack of transparency in the regulatory environment is a key concern of SMEs[74]. The Section on Investment Facilitation addresses this concern.

### 5.2.2 The Treaty appeals to investors across different sectors

5.21. As demonstrated in Section 3.1, the Treaty provides comprehensive incentives that appeal to investors across various sectors in different parts of the world, including (1) incentives to facilitate a global transition from a fossil-fuel based economy to a low-carbon economy; (2) incentives for sustainable land use; and (3) incentives for innovation and transfer of environmentally sound technologies.

5.22. Various incentives introduced in Part II would serve the interests of the private entities that seek to invest in a low-carbon and climate-resilient transition. In practice, almost all companies are actively trying to reduce carbon emissions, for example, from lowering fossil fuel consumption or improving energy efficiency. There are two reasons: one is that reducing carbon emissions often means cutting cost, and the other is that reducing carbon emissions can mitigate the risk on energy cost and operation from potential legislative and regulatory activities on climate change.

5.23. In practice, many companies have voluntarily implemented the proposed climate-friendly policies. As demonstrated in Section 3.1 , as of 2017, nearly 1400 companies disclosed the use of an internal carbon price; [75] 89 global companies headquartered in Europe, Asia, and North America had set targets to achieve 100% renewable energy consumption, while many others had established lower, but substantial goals.[76]

## 6 ENFORCEABILITY: THE TREATY IS BINDING AND ENFORCEABLE

6.1. The Green Investment Treaty is both binding and enforceable. To begin with, the Treaty is binding on the Parties; at the same time, it has various in-built features that foster voluntary compliance with the Treaty obligations (Section 6.1). There are also mechanisms in place designed to prevent disputes from arising in the first place (Section 6.2). If a dispute nonetheless comes into being, the Treaty creates the legal tools to effectively deal with them: an investor-State dispute settlement mechanism (ISDS) (Section 6.3) and a State-State dispute settlement (SSDS) mechanism (Section 6.4). To further ensure compliance, the Treaty finally makes provision for a Compliance Council to oversee matters relating to compliance (Section 6.5).

### 6.1 Promoting compliance with obligations of the Treaty

6.2. The Treaty is both binding and enforceable. It is binding because its core provisions impose enforceable legal obligations upon the Parties. The Treaty is also enforceable insofar as it includes various in-built features designed to promote voluntary compliance with the Treaty obligations. This includes notably the following features:

- **Binding obligations: freedom to choose the means**. Each Party has the obligation to give full effect to the Treaty provisions. At the same time, the Parties are free to choose the means

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[74] See for example WTO's World Trade Report 2016, 'Levelling the trading field for SMEs', https://www.wto.org/english/res_e/booksp_e/world_trade_report16_e.pdf.

[75] CDP (2017), Putting a Price on Carbon: Integrating Climate Risk Into Business Planning, at p. 2.

[76] Lori Bird et al. (2017), Policies for Enabling Corporate Sourcing of Renewable Energy Internationally, *A 21st Century Power Partnership Report*, Technical Report NREL/TP-6A50-68149, at p. 3.

by which they are to comply with those obligations: they enjoy a margin of appreciation to select the "necessary measures" required to give full effect to the Treaty provisions.

- **Provisions for technical assistance and capacity building.** The Parties agree to facilitate the provision of technical assistance and capacity building to Parties that have designated Articles under Category C on mutually agreed terms, either bilaterally or through the appropriate international organizations. The objective is to assist Parties to fully implement the provisions of this Treaty**.**

- The **Committees** provide fora for the Parties to discuss, review and encourage the implementation of Treaty provisions.

- A permanent **Secretariat** supports the work of the Ministerial Conference on Green Investment and, more generally, the implementation of the Treaty. It also provides administrative assistance in relation to State-State disputes.

- **Consultative Mechanisms**. Each Party shall make use of existing, or establish new, consultative mechanisms, such as domestic advisory groups, to seek views and advice on matters relating to this Treaty. Stakeholders may submit opinions and make recommendations on any matter related to this Treaty on their own initiative. In addition, a Joint Civil Society Forum is to be established. Through these consultative mechanisms, non-governmental entities can apply 'soft pressure' on Parties to comply with their Treaty obligations.

- **Sunset clause**. If a Party withdraws from the Treaty, the provisions of this Treaty shall continue to apply to Green Investment, whether made in the territory of that Party by investors of other Parties or in the territory of other Parties by investors of that Party, for a period of 20 years from the date when the withdrawal takes effect.

### 6.2 Mechanisms to prevent disputes

6.3. **Contact points.** Under Section 2 of Part IV on Investment Facilitation, each Party is required to designate contact points at the central level of government. The purpose of these contact points is to address at an early stage any difficulties and complaints on the part of investors, with a view to preventing disputes (See Article 55 – Resolving Difficulties and Complaints). Under the Treaty, investors are encouraged to have recourse to this mechanism, prior to the submission of a dispute either to national courts or to arbitration (Article 81 – Consultation and Negotiation).

6.4. The concept of 'dispute avoidance' has already been included into several investment treaties. For example, the China-Korea FTA (Article 12.9), Brazil's recent IIAs and its submission for a draft WTO Investment Facilitation Agreement, and the UNCTAD Global Action Menu for Investment Facilitation incorporate provisions of this nature. In practice, several countries have mechanisms for dispute avoidance in place. For instance, Peru has established a Dispute Board in the construction sector which is a pre-arbitration mechanism, giving rise to the possibility of subsequently submitting the disputes to arbitration under certain conditions.[77]

6.5. **Consultations with respect to non-conforming measures at the regional level of government**. If a Party considers that another Party's measure is inconsistent with the Treaty and creates a material impediment to investment for its investors, it may request consultations with regard to that measure. The Parties shall enter into consultations to exchange information about the operation of the measure and to consider whether further steps are necessary or appropriate.

### 6.3 Investor-State dispute settlement mechanism

6.6. ISDS is binding for all Parties. As mentioned at 5.1.3, the implementation of Part VI (Dispute Settlement), comprising ISDS and SSDS, is mandatory;

6.7. Whereas the Green Investment Treaty's ISDS is largely modelled upon the CPTPP, it displays several innovations and simplifications. The Treaty's ISDS provisions are designed to meet a double objective: on the one hand, to afford the Parties and panels enough flexibility to tailor the

[77] New Trends in Construction Dispute Resolution in Peru: Implementation of Dispute Boards, DRBF Forum, Volume 18, Issue 1, April/May 2014, http://www.npg.pe/publicaciones/NPG.PE%20-%20New%20Trends%20in%20Construction%20DB%20Resolutions%20in%20Peru%20-DBRF.pdf

proceedings; on the other hand, to uphold high procedural standards to cement the legitimacy of the final outcome, and thus to facilitate its enforceability. Some pertinent highlights:

- **Choice for the investors**. Investors have the choice of submitting a claim either to domestic courts or to arbitration. This affords procedural flexibility to investors, recognizing that in some instances domestic courts may be the more appropriate course of action.

- **Extended scope**. This Treaty extends the scope of ISDS compared to most conventional treaties in at least two ways, thereby enhancing its enforceability: (1) The scope of the Section on Investment Protection is extended from 'measures adopted or maintained by a Party' (as in CPTPP) to 'measures or omissions attributable to a Party'. Thus, the Treaty explicitly covers both measures and omissions. (2) Investors can bring claims for alleged breaches of Part IV obligations. That is, claims may be predicated not just upon standard investment obligations—such as fair and equitable treatment (FET)—but also upon obligations arising from the Sections on Investment Facilitation and Investment Promotion. In particular, the Investment Facilitation provisions are more specific, and therefore have more teeth, than the more standard provisions on Investment Protection

- **Stockholm Chamber Commerce (SCC) as appointing authority**. The SCC has vast experience in the area of climate change-related disputes. To assist the Parties and the Board, the Secretariat will keep a roster of individuals with expertise on disputes relating to climate change and the environment. This is inspired by Article 8.3 of the Permanent Court of Arbitration (PCA) Optional Rules for Environmental Disputes.

- **Application of UNCITRAL Transparency Rules by default**. The UNCITRAL Transparency Rules represent an ever more widely accepted international benchmark on areas ranging from the publication of information and documents to open hearing and submissions by third parties. Third-party submissions are especially important in the area of climate change, as it may bring to the attention of the tribunal viewpoints on technical or legal issues that may otherwise escape its attention. In *Methanex* for instance, the *amici curiae* raised important environmental issues that had been left unaddressed.[78] Some IIAs, such as the recent Austria-Kyrgyz Republic BIT, require these Transparency Rules to apply to all arbitrations.[79] The application of these Rules renders the Treaty more viable, universal, and enforceable at the same time.

- **Conflicts of interest in international arbitration.** For the legitimacy of ISDS, it is of the essence that arbitrators are not just impartial and independent, but that they are also perceived to be so**.** For this reason, the Treaty encourages the application of the 2014 IBA Guidelines on Conflicts of Interest. These Guidelines represent a well-received international benchmark and break new ground on issues such as third-party funding.[80]

- **Mechanism for expedited review and dismissal of frivolous claims and claims outside the tribunal's jurisdiction**. This mechanism enables respondent Parties, on an extremely expedited basis, to move to dismiss (1) frivolous or otherwise unmeritorious claims and (2) claims the tribunal is not empowered to resolve (See Article 89 – Conduct of the Arbitration).

- **Aggregation of claims.** On request, tribunals may aggregate claims raising common questions of fact or law, which may increase efficiency, reduce legal costs, and prevent strategic initiation of duplicative litigation.

- **Mechanism for Parties to interpret Treaty provisions with binding effect.** Mechanism enables Parties to confer and to issue joint decisions on the interpretation of Treaty provisions binding on tribunals. This option is intended to further strengthen the legitimacy of ISDS and thus the enforceability of arbitral awards.

[78] Going Green: Managing the Environment Through International Investment Arbitration, American University International Law Review, Beharry and Kuritzky, Volume 30, Issue 3, Article 2 http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1847&context=auilr

[79] http://investmentpolicyhub.unctad.org/Download/TreatyFile/5500

[80] Third-Party Funding In International Arbitration: To Regulate Or Not To Regulate?, Marc Krestin, Rebecca Mulder (Linklaters), 12 December 2017, http://arbitrationblog.kluwerarbitration.com/2017/12/12/third-party-funding-international-arbitration-regulate-not-regulate/

### 6.4 State-State dispute settlement mechanism

6.8. The SSDS mechanism in the Green Investment Treaty is largely modelled upon the CPTPP, which in turn is predicated upon the WTO's Dispute Settlement Understanding (DSU). Because States by and large hold the WTO dispute settlement mechanism in high regard, it makes sense for the Treaty to mirror the various provisions of the DSU (and CPTPP). The central idea is that WTO-style SSDS provisions are likely to promote greater compliance and enforceability than the relatively straightforward and succinct SSDS provisions in most IIAs.

6.9. However, this is not to say that the Treaty is a verbatim copy of the CPTPP's dispute settlement mechanism. In a number of respects, the Treaty departs from the CPTPP either to simplify or to tailor the dispute settlement mechanism to its specific needs:

- **A permanent and centralized Secretariat.** Under the CPTPP, States establish their own national offices to provide administrative assistance in disputes where a State is involved as party. Here, the Treaty would create a permanent and centralized Secretariat to provide administrative support across the board, which would facilitate enforceability as it would engage States with the dispute settlement process from the beginning, guaranteeing specialized legal expertise and institutional knowledge at lower costs.
- **Composition of panels**. The CPTPP has elaborate and complex provisions on this issue. In order to simplify, the PCA is proposed as the appointing authority for SSDS. Notably, the PCA is also the appointing authority under the Energy Charter Treaty for State-State disputes.
- **Required expertise of panellists.** All panellists shall have expertise or experience in public international law, international investment, climate change or other matters covered by this Treaty; or on the resolution of disputes arising under international investment or environmental treaties.
- **Measures in case of non-compliance with panel reports.** If a Party does not comply with a (final) panel report, the other Party has a right to suspend the application to the other Party of obligations under this Treaty, except Article 65 (Minimum Standard of Treatment) and Article 66 (Expropriation and Compensation). In case of continued non-compliance, Parties can decide *inter alia* to suspend the non-complying Party's right to participate in decisions of some or all bodies established under this Treaty. This idea is derived from the draft Multilateral Agreement on Investment (MAI).[81]

### 6.5 Compliance Council

6.10. The Compliance Council is one of the innovations of the Treaty. It is centred on the notion that enforcement is more effective when it is based on cooperation rather than coercion. The Green Investment Treaty can also be considered a Multilateral Environmental Agreement (MEA) that fosters the provision of global public goods. For agreements of this nature, evidence shows that coercion is less likely to be an effective enforcement tool.[82]

6.11. MEAs typically provide for mechanisms of compliance-control based on the idea of cooperation and partnership rather than confrontation. These new mechanisms are aimed at responding to compliance deficits in a non-adversarial manner. Under certain circumstances the non-complying State Party can even count on being supported by other Parties by means of capacity-building, transfer of technology, and finance. [83]

6.12. The Compliance Council under this Treaty is modelled upon the Implementation Committee under the Geneva Convention on Long-range Transboundary Air Pollution. The Compliance Council is a mechanism additional to and separate from SSDS (and ISDS) (See Article 97.2 – Scope).

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[81] The draft MAI text can be accessed here: http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf. Other measures that Parties could take in response to non-compliance by another Party with obligations of this Treaty might include partial or full denial of the right to access dispute settlement procedures or even expulsion of a non-complying state from the Treaty in the event of a continued refusal to comply with a final panel report (these measures are currently not included in the Treaty or the draft MAI).

[82] Beyerlin, P.T. Stoll and R. Wolfrum (2006), 'Ensuring Compliance with Multilateral Environmental Agreements - A Dialogue between Practitioners and Academia'

[83] *Ibid*., Chapter 'Conclusions drawn from the Conference on Ensuring Compliance with MEAs'

## 7 CONCLUDING REMARKS

7.1. In conclusion, we respectfully submit that the Green Investment Treaty constitutes the most forward-looking, innovative and workable Model Treaty, with the highest potential to protect, promote and facilitate investment in a low-carbon and climate resilient transition. The Green Investment Treaty is forward-looking because it is designed to fill the gap in international law by aligning investments with climate objectives, sending a clear, strong, long-term signal to the private sector that a global transition to a low carbon economy is now well underway. The Green Investment Treaty is innovative because it makes climate and investment rules mutually supportive: not only does it make use of investment rules to protect and incentivize Green Investment but also introduces rules to enable low carbon and climate-resilient transition which would ultimately facilitate Green Investment. The Treaty is workable because it fully meets the following criteria:

a. Compatibility: The Treaty aims to facilitate States' achievement of the climate-change objectives set out in the Paris Agreement and the SDGs. While fully respecting the fundamental principles of property law, it complements the UNFCCC and other agreements under its auspices (UN Climate Agreements), including the Paris Agreement.

b. Efficacy: If adopted by States, the Green Investment Treaty will lead to a significant increase in Green Investment related to climate change mitigation and adaptation because (1) the Treaty proposes various incentives that serve foreign investors' needs and interests; and (2) the Provisions on Green Investment Facilitation, Promotion and Protection effectively serve foreign investors' needs and interests. This is further supported by the fact that the provisions of Part II and III are well aligned with the policy positions of business and investor communities with respect to climate change.

c. Viability: The Green Investment Treaty is likely to be adopted by States around the world because (1) the Treaty serves the States' needs and interests; (2) the Treaty facilitates the achievement of climate-change goals; and (3) the Treaty does not unduly restrict the States' ability to legislate and regulate.

d. Universality: The Green Investment Treaty appeals to the potentially diverging interests of States and investors in different parts of the world. Where necessary, the Treaty includes alternative provisions from which contracting States may select the most appropriate ones based on context and circumstances.

e. Enforceability: The Green Investment Treaty is both binding and enforceable. The Treaty is binding on the Parties; at the same time, it has various in-built features that foster voluntary compliance with the Treaty obligations. There are also mechanisms in place designed to prevent disputes from arising in the first place. If a dispute nonetheless comes into being, the Treaty creates the legal tools to effectively deal with them: an ISDS and a SSDS mechanism. The Treaty finally makes provision for a Compliance Council to oversee matters relating to compliance.

## ANNEX I – SOURCES FOR THE PROPOSED NORMS IN THIS TREATY

| Section | Sources for the proposed norms |
|---|---|
| *Part II – Enabling the Low-Carbon Transition* | |
| Section 1: General Provisions | CETA, UNFCCC COP decision 1/CP.21 (paragraph 20) |
| Section 2: Carbon Pricing | International Energy Charter, OSCE 2008 Astana Declaration, , European Parliament resolution of 14 October 2015 on Towards a new international climate agreement in Paris, Recommendations from 2017 B20 Climate Task Force Report, 2017 OECD report 'Investing in Climate, Investing in Growth' |
| Section 3: Fossil Fuel Subsidy Reform | G20 discussions on fossil fuel subsidies, MC11 Fossil Fuel Subsidies Ministerial Statement[84] |
| Section 4: Promotion of Renewable Energy | WTO Agreement on Subsidies and Countervailing Measures, draft UNECE standard on PPPs in renewable energy (November 2017), Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, WTO Agreement on Technical Barriers to Trade |
| Section 5: Enhancing Energy Efficiency | Mainly from G20 Voluntary Energy Efficiency Investment Principles. Other sources include Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/27/EU on energy efficiency COM(2016) 761 final, Financial Action Task Force Recommendation (definition of financial institution), Commission Directive 2006/111/EC (definition of public financial institution) |
| Section 6: Sustainable Land Use | New York Declaration on Forests, recommendations from report by UN Convention to Combat Desertification titled 'Land Matters for Climate: Reducing the Gap and Approaching the Target'. |
| Section 7: Innovation, Transfer and Application of Environmentally Sound Technologies | Recommendations from policy brief by UN Technology Executive Committee, Energy Charter Treaty (Article 8), EU-CARIFORUM EPA (Article 142 on Technology Transfer), Article 66.2 of the WTO TRIPS Agreement, UNFCCC (definition of environmentally sound technologies), 2012 OSCE Parliamentary Assembly Resolution on Promotion and Use of New and Renewable Sources of Energy |
| *Part III – Responsible Investment and Environmental Transparency* | |
| Section 1: General Provisions | CPTPP, CETA, recent Canada IIAs, Norway model BIT, recommendations from UNCTAD World Investment Reports |
| Section 2: Greenhouse Gas Emissions of Enterprises | Oslo Principles on Global Climate Change Obligations, Climate Principles for Enterprises, IRENA report on Stranded Assets and Renewables, recommendations from 2013 IBA report 'Climate Change and Human Rights' |
| Section 3: Environmental Impact Assessments | Espoo Convention (for definition of environmental impact assessment), ICJ judgment of 20 April 2010 'Pulp Mills on the River Uruguay (Argentina v. Uruguay)', Principle 10 of Principles for Responsible Investment in Agriculture and Food Systems, recommendations from 2013 IBA report 'Climate Change and Human Rights' |
| *Part IV – Green Investment Facilitation, Promotion and Protection* | |
| Section 1: General Provisions | CPTPP, Energy Charter Treaty (in particular Article 10.6(a)), CETA (Right to Regulate), Canada-Peru FTA (suspension of existing IIA). |
| Section 2: Investment Facilitation | WTO proposals on Investment Facilitation[85], work of G20 Trade and Investment Working Group on Investment Facilitation in 2016 and 2017, APEC Investment Facilitation Action Plans, UNCTAD Global Action Menu on Investment Facilitation, China-Korea FTA, Mainland and Hong Kong Closer Economic Partnership Arrangement, Investment Agreement (entry into force 1 January 2018), recent Brazil IIAs, Draft Disciplines on Domestic Regulation (WT/MIN(17)/7/Rev.2; WT/GC/190/Rev.2 of 13 December 2017) (Processing of Applications, Opportunity to Comment |

[84] on behalf of Chile; Costa Rica; Iceland; Liechtenstein; Mexico; The Republic of Moldova; New Zealand; Norway; Samoa; Switzerland; The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Uruguay

[85] As of 25 February 2018, WTO Members with submissions on Investment Facilitation include Russia (JOB/GC/120 of 31 March 2017), Mexico, Indonesia, Korea, Turkey and Australia (MIKTA) (JOB/GC/121 of 6 April 2016), China (JOB/GC/123 of 26 April 2017) and Brazil (JOB/GC/169 of 1 February 2018).

| Section | Sources for the proposed norms |
|---|---|
| | and Information before Entry into Force), Combination of China proposal in JOB/GC/123 (para 2.5) and Article 10.1.1 of the WTO Trade Facilitation Agreement (Review of Investment Approval and Screening Processes) |
| Section 3: Investment Promotion | WTO proposals on Investment Facilitation, UNCTAD IF Action Menu Action Line 10, draft UNECE standard on PPPs in renewable energy (November 2017), recommendations from UNCTAD publication 'Promoting Low-Carbon Investment' (Investment Advisory Series A, number 7) |
| Section 4: Investment Protection | CPTPP, CETA, recommendations from UNCTAD World Investment Reports, issues raised by Energy Charter Secretariat in the context of consultations to be held in 2018 on the modernization of the ECT, Canada-Mongolia BIT (para 1 of performance requirements), Chile-Hong Kong BIT (para 2 of article on denial of benefits), |
| *Part V – Exceptions* | GATT Article XX and XXI, Canada model BIT, Energy Charter Treaty |
| *Part VI – Dispute Settlement* | |
| Section 1: Resolution of Disputes between Investors and Parties | CPTPP, CETA (e.g. scope, third-party funding) , US-Chile FTA (appellate mechanism), UNCTAD IIA Issues Note 'Improving Investment Dispute Settlement: UNCTAD Policy Tools' (November 2017), UNCITRAL Transparency Rules, PCA Optional Rules for Environmental Disputes (Art 8.3), Energy Charter Treaty, SADC model BIT (Article 19). |
| Section 2: Resolution of Disputes between Parties | WTO Dispute Settlement Understanding (DSU), CPTPP, Energy Charter Treaty, DR-CAFTA, draft Multilateral Agreement on Investment (Responsive Measures) |
| *Part VII – Implementation* | WTO Trade Facilitation Agreement, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, TPP |
| *Part VIII – Institutional and Administrative Provisions* | Energy Charter Treaty, Marrakesh Agreement establishing the WTO, CPTPP, CETA (in particular Consultative Mechanisms)<br>Compliance Council: Decision 2006/2 by Executive body of the Convention on Long-range Transboundary Air Pollution on 'Implementation Committee, its structure and functions and procedures for review' (ECE/EB.AIR/2006/2), facilitative branch of the Compliance Committee under the Kyoto Protocol |
| *Part IX – Final Provisions* | Energy Charter Treaty, CPTPP, China-Pakistan FTA (English as prevailing language), Art XVI:5 of the Marrakesh Agreement establishing the WTO (reservations) |