TREATY ON SUSTAINABLE INVESTMENT FOR CLIMATE CHANGE MITIGATION AND ADAPTATION*

Argumentation Demonstrating How the Model Treaty Meets the Assessment Criteria

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1.0 Introduction

We must align the international investment regime with the need for climate change action in three interconnected dimensions. First, we need to build up climate-friendly and resilient investments. Second, we need to diminish flows of investment that lead to accelerated climate change and move us away from achieving broader sustainable development objectives. Third, we need to carry out a just transition to economic prosperity consistent with the imperatives of the Paris Agreement on climate change and the Sustainable Development Goals (SDGs).[1]

In 1992, the international community recognized the urgency of climate change by adopting the United Nations Framework Convention on Climate Change (UNFCCC) and set sustainable development goals in Agenda 21. The investment regime of several thousands of international investment agreements (IIAs), however, was created without due consideration of sustainable development imperatives such as climate change mitigation and adaptation.

Adopted in 2015 and in force from 2016, the Paris Agreement under the UNFCCC set an ambitious goal of striving to limit anthropogenic climate change to 1.5 °C above pre-industrial levels, while firmly committing to limit temperature increase to well below 2 °C. The Paris Agreement "aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by […] making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development."[2]

This creates a need for an unprecedented shift of both public and private investments away from carbon-intensive projects to low-carbon projects consistent with climate goals, and in support of achieving broader sustainable development goals. However, this shift is still far from occurring under current investment trends. Many investors and governments still turn a blind eye to the climate action imperatives under the Paris Agreement and the SDGs.

According to the International Energy Agency (IEA), global investment in the oil and gas sector totalled USD 649 billion in 2016. That was more than double the USD 297 billion invested in renewable electricity generation.[3] All told, fossil fuel investments are still double the amount of international investments made in climate projects in general.[4] Large-scale investments continue to flow into new projects extracting fossil fuels as well as coal power plants, oil and gas pipelines, and other related infrastructure, ports and railways.

Yet, the data of the Intergovernmental Panel on Climate Change (IPCC) show that as of 2014 nearly three quarters of proven reserves of coal, oil and natural gas are "unburnable" to maintain a reasonable chance of keeping warming below 2 °C.[5] More recent research has

[1] UNFCCC. (2015). *Paris Agreement.* Retrieved from https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf
[2] Ibid, Article 2.
[3] IEA. (2017). *World Energy Investment 2017.* Retrieved from https://www.iea.org/publications/wei2017/
[4] CPI. (2017a). *Global investment to address climate change reached a record high in 2015*. Retrieved February 7, 2018, from http://www.climatefinancelandscape.org/
[5] IPCC. (2014). *Climate Change 2014, Synthesis Report*, table 2.2, p.64. Retrieved from http://ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_All_Topics.pdf; McGlade, C. and P. Ekins, 2015. "The geographical distribution of fossil fuels unused when limiting global warming to 2ºC." *Nature*, 187–190, doi:10.1038/nature14016.

found that the oil, gas and coal in already-producing fields and mines are more than we can afford to burn while keeping likely warming below 2 °C.[6]

If the international community is to achieve the goals set forth in the Paris Agreement, estimates found in 2015 that a total of USD 16.5 trillion of investments in renewable energy would be required by 2030. This is only to keep global warming below 2 °C. More is required to reach the more ambitious target of 1.5 °C, and to adapt to climate change.[7] Over 2015 and 2016, renewable energy projects attracted on average annually USD 282 billion,[8] less than 20 per cent of the energy investment required annually to reach the minimum needed to stay below 2 °C, not including the additional investments needed to adapt to the effects of climate change. This last element is critical: out of a total annual average of USD 410 billion in investment in climate projects in general over 2015–2016, 93 per cent went into mitigation activities only.[9] There is an urgent need to foster and promote investments in adaptation internationally through innovative means.

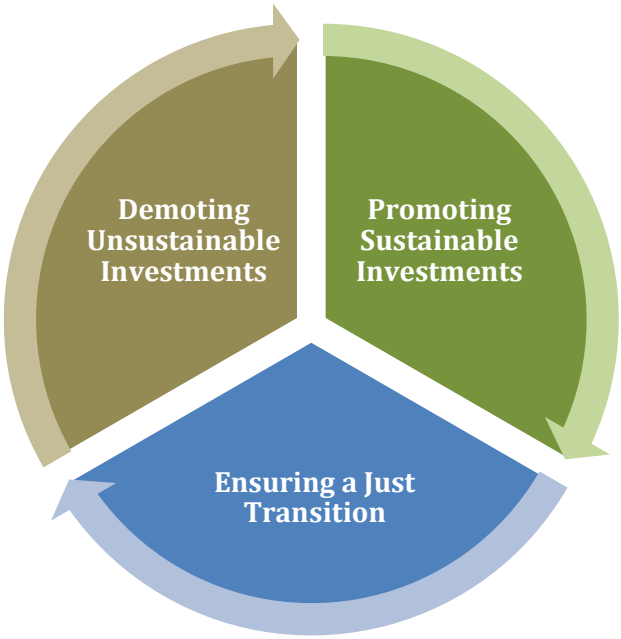
Investment, and the legal regimes that govern it, are critically important elements of the necessary transition. Ignoring that potential not only continues to allow unsustainable investments to flow apace, but also misses using a powerful tool to address climate change, in line with the SDGs. To accelerate the required shift away from unsustainable investments to sustainable investments, we propose the Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation (hereafter, the Treaty). The Treaty has three building blocks (see Figure 1):

1. Demoting unsustainable investments;
2. Promoting sustainable investments; and
3. Ensuring a just transition to environmentally, socially and economically sustainable, climate-friendly and resilient economies and societies (hereafter, a just transition).

The text that follows addresses each element in turn.

[6] Muttitt, G. (2016). *The Sky's Limit: Why the Paris climate goals require a managed decline of fossil fuel production.* Oil Change International. Retrieved from http://priceofoil.org/2016/09/22/the-skys-limit-report/.
[7] CPI. (2015). Global Landscape of Climate Finance 2015. Retrieved from http://climatepolicyinitiative.org/wp-content/uploads/2015/11/Global-Landscape-of-Climate-Finance-2015.pdf
[8] CPI. (2017b). Global Landscape of Climate Finance 2017, p.10. Retrieved from https://climatepolicyinitiative.org/wp-content/uploads/2017/10/2017-Global-Landscape-of-Climate-Finance.pdf
[9] Ibid.

Figure 1. Building Blocks of the Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation



2.0 Demoting Unsustainable Investments

We conceive of "unsustainable investments" as investments that would significantly impede the achievement of the climate change mitigation and adaptation commitments and objectives in line with sustainable development as affirmed in the Treaty, which references Agenda 21, the SDGs and the Addis Ababa Action Agenda on Financing for Development. For consistency, we define investors who made "unsustainable investments" as "unsustainable investors." The state Parties are free to designate particular sectors that meet this definition in their context, in Schedules incorporated as Annexes to the Treaty. The illustrative lists provided in the sample schedules include such unsustainable investment sectors as extraction and transport of coal, gas and oil.

The existing international investment regime is ill-suited to achieve the global efforts to keep climate change "well below" 2°C and achieve the SDGs for three reasons:

- Traditional IIAs focus on the protection and promotion of all types of investment, independent of the qualities of that investment, including from a climate perspective.
- Traditional IIAs can make it difficult for governments to adopt disruptive but necessary measures to address climate change because they provide extraordinary protections.
- Traditional IIAs fail to address the fact that many national governments have regulatory and incentive structures that do not reflect the need to scale back and disrupt unsustainable investment.

The Treaty deals with each of these issues by proposing innovative ways to reshape the current international investment regime.

2.1 Focusing on Quality, Not Quantity

The introduction to this piece sets out our current dilemma: the need to scale back unsustainable investments if we are to meet our international climate change mitigation and adaptation obligations in line with the SDGs. For example, as noted, further investment in the exploration for, production and distribution of, fossil fuels, is antithetical to the reality that only a fraction of current proven reserves can be burned if we are to respect the Paris Agreement target. Analysis by the IPCC indicates that as of 2014 nearly three quarters of proven reserves of coal, oil, and natural gas are "unburnable"[10] if we want to achieve the 2 °C target.

Yet traditional IIAs are blind to the characteristics of the investment they seek to promote and protect. They were designed to focus on protecting and promoting all types of investment, rather than on discriminating between desirable investment and undesirable investment, on the assumption that all investment is good investment.

The Treaty addresses this problem in several ways:

- It establishes what is in effect a filter: for the sectors in the Party-inscribed listing of unsustainable investments, there is no right to establish an investment, and there are circumscribed rights to expand an investment.
- Under the Treaty, non-discrimination rights (national treatment and most-favoured-nation [MFN] treatment) are only applicable as between investments of the same classification. Accordingly, although the Treaty does not allow a Party to discriminate between sustainable investments that are otherwise in like circumstances, it does allow—and even encourage—a Party to discriminate between sustainable investments, which are to receive more favourable treatment, and unsustainable investments, which are to be discouraged and ultimately eliminated.
- The Treaty imposes—on sustainable, unsustainable and non-classified investors and investments alike—obligations aimed at setting high and ever-increasing standards of environmental and social performance, including human rights and climate change considerations. The Treaty's accountability and dispute settlement mechanisms are designed to ensure that investors and investments comply with such standards.

2.2 Solving the Problem of Protecting Unsustainable Investments

When governments adopt disruptive but necessary policies limiting fossil fuel production, or other unsustainable investments, there is a risk that they will be found in breach of their obligations under IIAs, and forced to pay damages.[11] Such compensations to investors may run counter to the internationally enunciated goals addressed above, notably the Paris Agreement and the SDGs.

They can also lead to a regulatory chill, whereby governments abstain from passing ambitious climate policies in apprehension that they could be challenged in international

[10] IPCC, n. 5 above.

[11] Bernasconi-Osterwalder, N., & Haas, J. (2017, November 7). *When Climate Leaders Protect Dirty Investments*. Retrieved from Project Syndicate: https://www.project-syndicate.org/commentary/climate-trade-agreements-clean-energy-investment-by-nathalie-bernasconi-osterwalder-and-j-rg-haas-3-2017-11; Wilensky, M. (2015). Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures under the Trans-Pacific Partnership. *Environmental Law Reporter, 45*, 10683-98; *Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12*.

tribunals because these policies would result in the stranding of carbon-related assets.[12] The final effect is to limit the ability of states to fulfil the commitments and goals included in these international endeavours, impeding the shift to a low-carbon economy.

Box 1: Examples of IIAs Supporting Unsustainable Investments

We selected four arbitration cases (past or current) brought under IIAs that illustrate a loss of autonomy (partial or complete) on the part of states to enact necessary but disruptive measures to deal with unsustainable investments without facing the threat of arbitration and, possibly, the need for compensation.

Lone Pine v. Canada (2013) In 2011, the Canadian Province of Québec adopted the *Act to limit oil and gas activities*[13] (Act) specifically to restrict oil and gas activities beneath the Saint Lawrence River, the shores of which are home to a majority of the province's population. In reaction, the U.S. company Lone Pine Resources Inc. initiated arbitration in 2013 against Canada under the investment chapter of the North American Free Trade Agreement (NAFTA), arguing that the Act was arbitrary, unfair and inequitable, that it violated the investor's legitimate expectations and that it amounted to indirect expropriation.[14] Lone Pine is seeking USD 118.9 million in compensation for the suspension of one out of five permits that it acquired from Junex Inc. through a farm-out agreement.

TransCanada v. United States (2015) TransCanada, a Canadian energy corporation headquartered in Calgary with historical roots found in building Canada's first cross-country pipeline, applied for a transboundary pipeline permit in the United States for its Keystone XL project. The intent of the project was to transport an additional 900,000 barrels of crude oil originating from the Canadian oil sands, where extraction of crude oil is highly carbon-intensive. The U.S. State Department denied TransCanada a permit for the first time in 2012, and again in 2015 after further assessment of the project. Then-U.S. Secretary of State John Kerry cited that "moving forward with this project would significantly undermine our ability to continue leading the world in combating climate change."[15]

TransCanada initiated NAFTA arbitration against the United States demanding USD 15 billion in costs and damages. Among other grounds, TransCanada argued that the U.S. government's decision failed to stem from "objective factors" and that if failed to be representative of past practice that, according to TransCanada, gave it a legitimate expectation that its project would be approved.[16] TransCanada dropped its claims in 2017 when the new U.S. administration approved the project.

Rockhopper v. Italy (2017) Since 2010, Italy has adopted a precautionary standpoint on offshore oil and gas activity. It first adopted restrictions on new exploration and extraction activities in 2010, but repealed the policy in 2012, at which point the government wished to

[12] Tienhaara, K. (2017). Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement. *Transnational Environmental Law*. doi:10.1017/S2047102517000309.
[13] Québec National Assembly. (2011). *An Act to limit oil and gas activities.* Retrieved from http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2011C13A.PDF
[14] Global Affairs Canada. (2017). Lone Pine Resources Inc. v. Government of Canada. Retrieved from http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/lone.aspx?lang=eng
[15] ICTSD. (2016, July 15). TransCanada takes next step in NAFTA case on Keystone pipeline. Retrieved from https://www.ictsd.org/bridges-news/biores/news/transcanada-takes-next-step-in-nafta-case-on-keystone-pipeline
[16] Ibid.

limit imports and produce its own fossil fuels.[17] Regulatory processes have also meant that no new exploratory wells have been drilled off the shores of Italy since 2008. In January 2016, a renewed ban on new exploration and extraction activities was adopted as part of the country's budget law. The ban applies to oil and gas activities conducted within a 12-mile radius off the shores of Italy. The government expressed concerns over the possible environmental impacts of fossil fuel extraction at sea, also citing the risks of earthquakes in the area.[18] Such concerns had also been expressed in 2008 when a first ban was instituted.[19]

Between both bans, Rockhopper Exploration, an oil and gas corporation headquartered in the United Kingdom, acquired the Ombrina Mare oil field in the Adriatic Sea, which is located within that 12-mile radius. Ultimately, Italy denied Rockhopper Exploration an exploitation permit for the field. In March 2017, Rockhopper Exploration filed a claim for damages and compensation under the Energy Charter Treaty on the basis of loss of expected profits.[20]

Vattenfall v. Germany II (2012) In 2011, following the nuclear disaster in Fukushima and a decades-long public debate, Germany adopted an accelerated plan to fully phase out nuclear energy within its borders within a decade, i.e. by 2022.[21] It was also decided that old reactors would have to be shut down immediately, of which Vattenfall partially owned two. Vattenfall initiated arbitration against Germany under the Energy Charter Treaty, claiming that such expedited shutdown would result in USD 1.5 billion in lost revenues in 2011 alone. Vattenfall sought "fair compensation for the financial losses," ultimately claiming USD 5.8 billion plus 4 per cent interest in compensation for both past and future lost profits. According to some estimates by the German government, potential total arbitration costs of the proceedings for the government may amount to approximately EUR 9 million.

Vattenfall II is among the most salient cases that the Treaty seeks to prevent, namely to insulate states against challenges to disruptive regulation that is adopted in good-faith pursuit of public health and environmental benefits or protection and that ultimately strands assets. In this specific instance, nuclear energy was at the heart of the energy regulation. Future energy regulations will likely have similar impacts for fossil fuel assets and investments when adopted to fulfil internationally enunciated goals encompassed in the Paris Agreement and the SDGs.

The Treaty addresses these problems in several ways:

- The Treaty sets up new rules on climate-related investment. In terms of investment protection, it clearly defines the scope of protection accorded, in order to avoid expansive interpretations, and it clearly sets out the conditions to access international dispute settlement.

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[17] Maslin, E. (2016, January 6). *Italy reintroduces 12-mile exploration restriction*. Retrieved from Offshore Engineer: http://www.oedigital.com/component/k2/item/11251-italy-reintroduces-12-mile-exploration-restriction

[18] Milieudefensie. (2018). *Bescherming voor klimaatvervuilers*. Retrieved from https://milieudefensie.nl/publicaties/bestanden/bescherming-voor-klimaatvervuilers

[19] Maslin, n.16 above.

[20] Rockhopper Exploration plc. (2017, March 23). *Commencement of international arbitration*. Retrieved from http://rockhopperexploration.co.uk/2017/03/commencement-international-arbitration/

[21] Bernasconi-Osterwalder, N., & Dietrich Brauch, M. (2014). *The State of Play in Vattenfall v. Germany II: Leaving the German public in the dark.* IISD Briefing Note. Retrieved from http://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-II-leaving-german-public-dark-en.pdf

- The Treaty also deals with existing treaties between the Parties. It provides that the new Treaty replaces all existing investment treaties and chapters to the extent of overlap. This is in line with principles of public international law on the interpretation of treaties. It provides that existing treaties are amended so as to allow host states to deny benefits in case they are challenged in international arbitration in relation to an unsustainable investment, such as a fossil fuel investment. This reflects the approach taken with respect to tobacco-related measures in the Trans-Pacific Partnership (TPP) Agreement.
- It limits the degree to which investors or investments can access some of the most controversial, widely used and broadly interpreted remedies under traditional investment treaties. The Treaty does not include the standards of "fair and equitable treatment," "full protection and security" or "legitimate expectations." Rather, it provides an obligation for Standard of Treatment that, without linking it to customary international law, protects investors and investments against conduct that would breach internationally-agreed standards.
- The Treaty also removes the ability of investors and investments to seek remedy for indirect expropriation—another frequently used provision subject to widely divergent interpretations.
- Further, the Treaty removes all procedural rights for a Party-inscribed listing of unsustainable investments. Such investments and the investors that make them cannot access the dispute settlement mechanisms established under the Treaty and are subject to the exclusive jurisdiction of domestic courts of the host state. The Treaty also obliges the Parties to refrain from granting such rights in future treaties they may negotiate, and to seek to renegotiate existing treaties that grant such rights.

2.3 Supporting National Regulatory and Incentives Structures

The regulations and incentives that investments face in a host state vary considerably. In an ideal world each sovereign state would craft such structures in line with its international commitments to sustainable development, removing incentives for unsustainable investment and strengthening regulatory protection against the impacts of such investments in ways that correspond to the state's unique circumstances and priorities.

In a world that is less than ideal, where regulatory regimes are underdeveloped or incentive schemes are entrenched, international law can be called on to support national efforts in several ways. First, it can establish a baseline of internationally-agreed treatment to which states can turn with some justification, relieving them of the burden of individually justifying such measures, and even providing legal cover by reference to international standards. This is the intent behind, for example, the World Health Organization (WHO) Framework Convention on Tobacco Control. Second, it can allow states to argue against domestic vested interests that they are bound by their international legal obligations to certain commitments. World Trade Organization (WTO) law is widely understood to be used in this way, allowing states to take measures such as tariff reductions that are in the public interest even in the face of opposition by powerful stakeholders with narrower interests.

The Treaty provides support of this type in several ways:

- It commits the Parties to enforcing their existing commitments under multilateral environmental agreements, to enforcing their existing environmental laws, and to raising the level of ambition with respect to both.

- It provides procedural avenues for citizens to submit that states have failed to meet their obligations under the Treaty, or that investors or investments have failed to meet the standards set out for classification as sustainable investments under the Treaty.
- It commits the Parties to agree on modalities and timelines for phasing out investment incentives to unsustainable investments (such as fossil fuel subsidies; see Box 2).
- It obliges investors to undertake impact assessments, including consideration of environmental, social, human rights and climate change risks and impacts, with a baseline of internationally accepted standards and good practice.

Box 2: Incentives to Unsustainable Investment: The Case of Fossil Fuel Subsidies

Reforming and ultimately eliminating existing incentives to unsustainable investment can help close the financial gap in much-needed sustainable and climate-resilient investment. Fossil fuel subsidies (FFSs) are primary among such incentives, as they create barriers to investment in renewable energy sources, especially for electricity generation.[22] This happens in several ways.

First, FFSs create inefficiencies that strongly impact the allocation of resources: subsidized fuel prices translate into lower electricity prices, making it more difficult for renewable energy technologies to achieve grid parity. This is especially critical in the case of technologies that are still at an early point of the adoption curve and require speeding up their deployment to advance in the cost curves and become cheaper.

Second, FFSs distort price signals, lowering investors' appetite for less-rewarding renewable energy technologies and incentivizing a high consumption of energy, which works against sustainable development. FFSs act as a negative carbon price that favours fossil fuel energy over renewable technologies and energy efficiency.

Third, FFSs lock in investments and have a high opportunity cost for development: subsidized low-cost fuels incentivize investments in fossil fuel-based power plants, locking in financial resources and capacity for at least the next 40 or 50 years.

Indonesia provides a clear example of how investment in renewable electricity sources is heavily affected by fossil fuel subsidies and the volatility of supporting regulations. In 2014, Indonesia supplied 7 per cent of its total primary energy from renewable sources, and the country is aiming at increasing this share to 23 per cent by 2025.[23] The increase is expected to come mostly from the power sector. However, the government of Indonesia spends at least USD 644 million per year in subsidies to the coal industry for power generation (2015 data).[24]

Since 2004, the government of Indonesia has issued more than 30 different regulations promoting renewable energy via FiTs, tax exemptions, or investment incentives, notably for solar, wind and biomass. However, these technologies combined represented only 0.25 per

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[22] Bridle, R. & L. Kitson. (2014). *The Impact of Fossil-Fuel Subsidies on Renewable Electricity Generation*. Retrieved from: https://www.iisd.org/library/impact-fossil-fuel-subsidies-renewable-electricity-generation

[23] Ministry of Energy and Mineral Resources (MEMR) (2016). *Handbook of Energy and Economic Statistics of Indonesia 2016*. Retrieved from: https://www.esdm.go.id/assets/media/content/content-handbook-of-energy-economic-statistics-of-indonesia-2016-lvekpnc.pdf

[24] Attwood et al. (2017). *Financial Supports for Coal and Renewables in Indonesia*. IISD. Retrieved from: http://www.iisd.org/library/financial-supports-for-coal-and-renewables-indonesia

cent of all the electricity produced in 2016,[25] and the prospects for further development are not much better. Bridle et al.[26] (forthcoming) identify five major roadblocks to the development of renewable energy in Indonesia. One of these is the subsidies received by the coal sector, which has received considerable government support in the form of loan guarantees, tax exemptions and price supports that artificially lower the price of coal for power generation and thus the average price of electricity. Attwood et al. (2017) demonstrate that the price of renewably-generated electricity would be much lower than electricity generated from coal if subsidies were removed and the cost of externalities (in terms of air pollution and climate change impacts) were included.[27]

3.0 Promoting Sustainable Investments

We conceive of "sustainable investment" as investment that significantly contributes to the achievement of climate change mitigation and adaptation commitments and objectives of the Parties or otherwise furthers their respective domestic goals concerning climate change mitigation and adaptation, in full alignment with the SDGs. As with unsustainable investment, the specific sectors that Parties consider to meet those definitions are listed in their respective schedules to a Treaty annex. The illustrative list contained in the Treaty features, for example, the generation, transmission and distribution of renewable energy, as well as scientific research and development (R&D).

3.1 The Shortcomings of Existing Investment Trends and IIAs

In brief, the problem with the status quo is that not enough sustainable investment is taking place for the global community to meet its agreed climate change mitigation and adaptation objectives, in line with broader sustainable development goals. In the context of renewable energy, for example, there is a massive investment gap between the current levels and what is needed to scale up renewables to a level that they can have significant and positive impacts on climate change mitigation. The International Energy Agency (IEA) argues that "low-carbon investments are not on track to meet climate change objectives," with non-solar and wind investment falling "far short" of what is needed.[28]

The status quo is incompatible with global efforts to keep climate change "well below" 2 °C and achieve the SDGs. An ideal IIA would help address this challenge in at least four ways:

- Discourage unsustainable investments and investors as suggested in previous sections—this makes green competing investments more profitable;
- Provide clear signals of constant policy support for sustainable investments;
- Overcome the roadblocks in the way of sustainable investment by offering them protection; and
- Confer special treatment on sustainable investments agreed to contribute toward climate change mitigation and adaptation goals.

[25] MEMR, n.23 above
[26] Bridle et al. (forthcoming). Missing the 23 Per Cent Target: Roadblocks to the development of renewable energy in Indonesia.
[27] Attwood et al., n. 24 above
[28] IEA. *World Energy Investment 2017*. Paris: International Energy Agency, pp. 177-78.

3.2 The Solutions Proposed by the Treaty

3.2.1 Discouraging Unsustainable Investments and Investors

The previous section described the rationale for discouraging unsustainable investments and discussed the provisions of the proposed Treaty that have that effect. That sort of discouragement is in fact also an important element of the Treaty's support for sustainable investments. Where sustainable and unsustainable investments compete with one another, anything that discourages one encourages the other. The dynamics by which fossil fuel subsidies undermine investment in renewable energy was detailed above, and the reverse is also true: ending subsidies to fossil fuels make renewable energy sources more competitive.

3.2.2 Providing Clear Signals of Constant Policy Support

Sustainable investors look for clear signals that host governments have prioritized climate change mitigation and adaptation objectives and other sustainable development goals and are reasonably constant and predictable in their policies and targets. While it is impossible and undesirable to guarantee long-term regulatory stability, it is possible to signal long-term commitment. The Treaty does this by:

- Committing Parties, in an instrument of international law, to encourage, promote and create favourable conditions for sustainable investments;
- Committing Parties to raise their levels of ambition with respect to their Paris Agreement commitments in the form of their nationally determined contributions and their progress toward achievement of the SDGs;
- Guaranteeing non-discriminatory treatment (national treatment and MFN treatment) in like circumstances;
- Guaranteeing a standard of treatment that eschews egregious behaviour by the host state;
- Guaranteeing a fair process and compensation in the case of expropriation, and of no expropriation except for a public purpose;
- Guaranteeing the right of transfers relating to the investment; and
- Providing access to a mechanism for dispute settlement and prevention.

3.2.3 Providing Special Treatment for Sustainable Investments and Investors

Even after the treatment described above with respect to sustainable investments and investors, and the described commitments to disincentivize unsustainable investment and investors, there still may be market failures that act as obstacles to flows of such investments at rates that help ensure the Parties will achieve their goals under the Paris Agreement and the SDGs.

In such cases government intervention is warranted to help speed the rate and volume of flow of such investments. In some cases, it may be that market incentives will eventually work to remove barriers to investment for such investments, but the urgency of the challenges we face often demands that governments intervene to help accelerate that process.

The Treaty addresses this need in the following ways:

- It allows the Parties to cooperate in support of sustainable investment and to adopt common policies and regulations in areas such as product energy efficiency standards,

technical requirements for climate-smart infrastructure projects, de-risking of sustainable investments and export finance (see Box 4 for examples of this sort of cooperation in action).

- It allows for various green industrial policy measures (local content requirements, local employment requirements, R&D requirements, training requirements), circumscribing them to help ensure they are successfully employed, by limiting the quantum of support, requiring specific performance benchmarks, and mandating sunset clauses for support; and
- It commits Parties to not launch WTO challenges or national trade remedy cases against each other's subsidies for sustainable investment.

Local content requirements are controversial measures and are prohibited under the WTO Agreements on Subsidies and Countervailing Measures (SCM) and on Trade-Related Investment Measures (TRIMs). Such measures may have a chequered history, but they have been successfully employed in the past. Where the target of support is sustainable investment, success results in global benefits from increased innovation and price competition in an urgently needed technology space. As such, and in the face of their widespread use in spite of trade and investment law obligations, it makes more sense to guide their use toward best practice than to prohibit them.

The commitment to refrain from trade remedy challenge of subsidies for sustainable investment is also aimed at addressing a controversial use of trade remedies. In the last decade such challenges, both at the multilateral and national levels, have constituted a significant and growing impediment to the global dissemination of critically needed green goods. Given the urgency of the challenges in areas such as climate change, the response to foreign subsidies for investments to produce such goods should be gratitude for lowering global prices, and perhaps domestic subsidies along the same lines.

Box 3: Examples of Cooperation for Sustainable Investment

The Treaty commits the Parties to cooperation in support of sustainable investment. Such international cooperation can have meaningful results, as illustrated by the following real-world examples.

Examples in project financing
De-risking green projects or establishing sustainability obligations in the terms of loans granted by Multilateral Development Banks (MDBs) and Development Banks (DB, national or international) to be also adopted by suppliers and contractors can be effective incentives for sustainable investments and a protection mechanism against investor–state arbitration. The impact can be magnified if the mechanisms are adopted by private finance institutions, which is a major goal of public banks' programs.

Financing sustainability premiums is one of the practices observed by DBs. Sustainability premiums are designed to reduce the risk for the investor, and thus encourage sustainable investments. Sustainability premiums can become a successful business case for the private finance sector to enter that market, enabling a scale up of the mechanism. This is the case of the EBRD's (European Bank for Reconstruction and Development) energy-efficiency and TCO (total cost of ownership) savings approach designed for their Industrial Energy-Efficiency Programme. This TCO savings model has been further deployed by privately

managed funds, such as the London-based Sustainable Development Capital LPP (SDCL).[29] Governments could also impose similar obligations to private finance institutions.

In a similar line, the Energy Savings Initiative (ESI) created by the Inter-American Development Bank's Financial Innovation Lab is a tool that uses public money to de-risk sustainable investments and make them attractive for private lenders. "The ESI addresses the performance risk and key financial and non-financial investment barriers to green finance (...), helps potential private sector investors feel confident (...) and helps local financial institutions becoming more aware of the real risks and returns associated with green projects."[30] These types of initiatives help create climate-friendly credit lines and related services that private finance institutions can scale up with a lower risk, offering reassurance to investors.[31]

Examples in sustainability obligations for public investment projects
Governments can incorporate climate risks management into public investment projects, securing that investors consider climate adaptation criteria in their proposals and that, as a consequence, sustainable investments become the standard.

In 2015, the Governments of Germany and Peru initiated a project to update Peru's public procurement policies and measures. The aim of the project is to mainstream adaptation to climate change in public investment decision making and policies, particularly by integrating climate risk analysis in financial investment projects.[32] The tourism sector was the first to introduce climate risk management into public investment projects, with energy and water to follow. By 2017, the Government of Peru had released its new public investment system.[33]

The new public investment system is guided by the public investment document *Directiva para la Formulación y Evaluación en el Marco del Sistema Nacional de Programación Multianual y Gestión de Inversiones* (Directive for the Formulation and Evaluation for the National System of Multiannual Programming and Investment Management Framework).[34] The directive is supported by an annex on required minimum information in project bankability studies, where these studies need to include information on infrastructure project exposures and vulnerabilities to climate change.[35] In addition, the annex requires that the study identify any climate change risks or environmental contamination to which stakeholders can be exposed as a result of the project. The studies are also required to outline environmental and climate risk management, including the costs of any appropriate technology and employment of mitigating measures. Lastly, the study is required to submit

[29] Bielenberg, A. et al (2016). Financing change: How to mobilize private-sector financing for sustainable infrastructure. McKinsey Center for Business and Environment.
[30] Inter-American Development Bank (2015). Sustainability Report 2015. IDB
[31] Ibid.
[32] GIZ (n.d.). *Public investments are becoming climate resilient.* Retrieved from: https://www.giz.de/en/worldwide/13314.html
[33] Ministerio de Economia y Financias, Peru (n.d.). *Sistema Nacional de Programación Multianual y Gestión de Inversiones INVIERTE.PE*. Retrieved from: https://www.mef.gob.pe/es/acerca-del-invierte-pe
[34] Ministerio de Economia y Financias, Peru (2017, September 12). Directiva Para La Formulación Y Evaluación En El Marco Del Sistema Nacional De Programación Multianual Y Gestión De Inversiones. Retrieved from: https://www.mef.gob.pe/es/normatividad-inv-publica/instrumento/directivas/15870-directiva-n-002-2017-ef-63-01/file
[35] Ministerio de Economia y Financias, Peru (n.d). *Anexo N° 01: Contenido Mínimo Del Estudio De Preinversión A Nivel De Perfil*. Retrieved from: https://www.mef.gob.pe/contenidos/archivos-descarga/anexo1_directiva002_2017EF6301.pdf

any measures adopted and associated costs to guarantee sustainability throughout the infrastructure's life span, including climate resiliency.

Examples in national and international adaptation obligations
Governments can enhance national legislation to include sustainability obligations for infrastructure investments or prohibit those that do not meet climate targets. By doing this, countries can ensure that only investments meeting their sustainability objectives are allowed, indirectly promoting sustainable investments and giving a clear message to investors.

The Canadian federal government gives an example in the area of public infrastructure. The Canadian National Research Council is updating the country's building legislation to include climate change projections into the building codes to ensure that public infrastructure investments, that usually have a lifespan of 40 years or more, will be able to withstand the impacts of climate change. Canada is already facing infrastructural challenges, with the federal disaster financial assistance program costs going up annually. Since 2011, the program has had an annual cost of CAD 360 million, mostly due to forest fire and flooding damages.[36]

Updates on the building code are supported by the Pan-Canadian Framework on Clean Growth and Climate Change, which outlines the need to invest in "infrastructure that strengthens resilience" and development of "climate-resilient codes and standards."[37] In its 2017-2020 Departmental Sustainable Development Strategy, the federal government committed CAD 81 billion toward public procurement investments, particularly CAD 9.2 billion to go toward green infrastructure projects that support: (1) climate change mitigation; (2) adaptation, resilience and disaster mitigation; and (3) environmental quality. This funding will be implemented through bilateral federal-provincial/territorial agreements.[38] In addition to this funding, the 2017 budget introduced a CAD 2 billion Disaster Mitigation and Adaptation Fund geared toward large-scale infrastructure projects.

At the subnational and municipal levels, some governments have taken steps in prohibiting infrastructural investments that are not climate resilient, such as construction in flood-prone areas. An example is Alberta, where in the wake of the 2013 Calgary flood a total of CAD 1.7 billion was accrued in insurable damages, and 110,000 people were affected.[39] Shortly after the flood, the provincial government updated its Flood Recovery and Reconstruction Act, through the introduction of Bill 27 that prohibits municipalities from approving developments in flood-prone areas. Construction in flood fringe zones, shallower than floodways, are permitted in some municipalities; however, the construction should be flood-proofed, being resilient to one-in-100 years flood events.[40] In addition, through Bill 27, amendments were introduced to the Municipal Government Act and the Emergency

[36] Rabson, M. (2017, November 13). Canada seeks updated climate change predictions to revamp building codes. *The Globe and Mail*. Retrieved from: https://www.theglobeandmail.com/news/national/canada-seeks-updated-weather-predictions-in-order-to-revamp-building-codes/article36957356/
[37] Government of Canada. (2016). *Pan-Canadian Framework on Clean Growth and Climate Change*, p.31 Retrieved from https://www.canada.ca/content/dam/themes/environment/documents/weather1/20170125-en.pdf.
[38] Government of Canada. (2017). *2017-2020 Departmental Sustainable Development Strategy.* Retrieved from: http://www.infrastructure.gc.ca/pub/other-autre/dsds-smdd-2017-2020-eng.html
[39] Calgary Public Library (2014). *Calgary'S Most Damaging Flood.*Retrieved from: http://floodstory.com/floods/2013-flood
[40] Ramsay, C. (2013, July 14). *Alberta government outlines policy for building in flood-prone areas.* Retrieved from: https://globalnews.ca/news/716584/alberta-government-outlines-policy-for-building-in-flood-prone-areas/

Management Act.[41] Other provinces with similar legislation include Saskatchewan, Manitoba, Ontario, and New Brunswick.[42]

4.0 Ensuring a Just Transition

The Paris Agreement refers to "the imperatives of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities."[43] We use a broad definition of a just transition for all sectors in accordance with the International Labour Organization (ILO)'s Guidelines.[44] The ILO Guidelines present a vision of just transition as "a bridge from where we are today to a future where all jobs are green and decent, poverty is eradicated, and communities are thriving and resilient. More precisely, it is a systemic and whole of economy approach to sustainability. It includes both measures to reduce the impact of job losses and industry phase-out on workers and communities, and measures to produce new, green and decent jobs, sectors and healthy communities. It aims to address environmental, social and economic issues together."[45]

4.1 The Problems within Existing Investment Trends and IIAs

Back-casting from a future where we have achieved the Paris Agreement goals and the SDGs highlights the fundamental transition that humanity faces over the coming decades—a transition as disruptive as the Industrial Revolution, but packed into a much shorter timeframe. Few sectors will be spared the pains of change; energy, transport, agriculture, manufacturing, construction, resource extraction and harvest will all be significantly transformed. While the final result will be a better world, the challenge is to ensure that the transformation, and the underlying environmental drivers, do not cause human misery on anything like the Industrial Revolution scale.

Our present institutions and governments do not have good records when it comes to managing transition. In the area of trade policy, for example, although we understand that trade liberalization will have winners and losers, we have done very little to help the losers, either within the context of trade law and policy, or via flanking measures such as safety nets and retraining efforts that accompany liberalization. Traditional IIAs are even further removed from these sorts of considerations, though investment flows are the fundamental transformative vehicles of change.

Just transition can also be conceived of in terms of allowing a smooth transition away from the climate-unfriendly, unsustainable status quo to ensuring that the priorities and rights of affected citizens are valued in decisions about existing or planned unsustainable investments.

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[41] Government of Alberta (2013, October 28). *Protecting Albertans from future floods*. Retrieved from https://www.alberta.ca/release.cfm?xID=3525407F82569-C375-ACEB-66CCC4FAAA2DEAD0

[42] Kerr Wood Leidal Associates LTD. (2017). *What is the best way to manage flood risk in Canada?*. Retrieved from: https://www.kwl.ca/sites/default/files/Final%2020170528%20Flood%20Risk%20Management%20Matrix.pdf

[43] UNFCCC, n.1 above, Preamble

[44] International Labour Organization (ILO). (2016). *Guidelines for a just transition towards environmentally sustainable economies and societies for all*. Retrieved from http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_432859.pdf

[45] Just Transition Centre. (2017). *Just Transition: A Report for the OECD*. Retrieved from https://www.oecd.org/environment/cc/g20-climate/collapsecontents/Just-Transition-Centre-report-just-transition.pdf

Current practice for IIAs and adjudication mechanisms presents a lack of access to remedy to most stakeholders that can be affected, directly or indirectly, by certain investments, some examples of which are provided in Box 5.

4.2 The Solutions Proposed by the Treaty

Ideally, an IIA would address just transition in at least four ways:

- It would help reduce the impacts of drivers such as climate change.
- It would create employment to replace lost jobs and ensure worker rights.
- It would provide institutions by which those affected by investment-led transition could have a voice in the governance of investment and investors.
- It would foster cooperation and efforts by Parties to manage the transition in such a way as to cushion the impacts on workers and citizens.

4.2.1 Reducing Climate Change Impacts

Reducing climate change impacts is part of the necessary effort for a just transition according to the ILO. Those impacts as a rule tend to fall on the poor and marginalized, who cannot afford to adapt. The Treaty addresses this need through its overall thrust toward encouraging sustainable investment in such areas as climate change mitigation and adaptation, and by discouraging unsustainable investment. It also provides for specific actions Parties may take to fulfil their obligations for ensuring a just transition, as described under Section 4.2.4 below.

4.2.2 Creating Employment, Ensuring Rights

A key part of a just transition is ensuring meaningful employment for those whose jobs are lost in the process of change and ensuring that their rights are respected in the process. The Treaty addresses these challenges by:

- A multi-pronged focus on encouraging sustainable investment—a focus that, if successful, will create new green jobs.
- Commitments by Parties to respect international labour and human rights obligations, and obligations on investors and investments to similarly uphold best practice in these areas.

4.2.3 Creating Institutions of Inclusion

To ensure a just transition, institutions of inclusion are important. Decision-making processes, political or judicial, should allow not only investors as employers and governments to put forth their argumentation, for instance, but should include trade unions, affected communities, and all other relevant community groups. Rosemberg speaks of "social dialogue."[46] The Treaty addresses these needs in the following ways:

- Transparency provisions and openness are hallmarks of the Treaty as a whole. There are, for example, civil society representatives on the influential Joint Committee,

[46] Rosemberg, A. (2017). *Strengthening Just Transition Policies in International Climate Governance.* Muscatine: The Stanley Foundation, p.9 Retrieved from https://www.stanleyfoundation.org/resources.cfm?id=1629

public input is sought in the Investment Policy Review Mechanism and all Treaty-related documents are designated publicly available.
- The Treaty establishes an accountability mechanism with mediation and compliance functions for individuals and communities to raise investment-related concerns.
- The Treaty departs from the conventional investor-versus-state model, allowing other stakeholders—individuals, communities, domestic investors and states—standing to initiate claims and counterclaims.

4.2.4 Providing for Cooperation on a Just Transition

National-level actions such as training, social safety nets and adjustment policies are at the heart of a just transition. The Treaty lays out a non-exhaustive illustrative list of actions Parties may take to fulfil their obligations for ensuring a just transition, including such actions as:

- Strengthening social safety nets;
- Creating targeted education and training programs;
- Protecting pension funds including energy sector workers' pension savings[47] (which may require their divestment from increasingly risky fossil fuels investments);
- Additional government funding for just transition, which some jurisdictions (European Union,[48] Alberta[49]) opt to do with funding mobilized through carbon pricing. Reallocation of savings from fossil fuel subsidy reform is another feasible option.[50]

Box 4: Stakeholder Participation in the Transition from Unsustainable Investments

In view of addressing the lack of opportunity for all stakeholders to participate in investor–state arbitration proceedings, we cite two cases of investor–state disputes where affected stakeholders' voices and values were not heard in the context of challenges to measures to pursue more sustainable outcomes, adopted by a developing country in one of the examples and by a developed country in the other.

Bear Creek v. Peru.[51] In 2004, Bear Creek, a Canadian company based in Vancouver, found silver ore deposits in the Santa Ana mine in Peru, not far from the Bolivia–Peru border. Bear Creek officially completed the process to secure mining rights by December 2007. The company submitted an impact assessment report in 2011. The same year, Santa Ana encountered social unrest, especially over communities' concerns that Lake Titicaca and the

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[47] Ibid.
[48] Krukowska, E. (2017, November 9). *EU Reaches Deal to Overhaul World's Largest Emissions Market*. Retrieved from Bloomberg: https://www.bloomberg.com/news/articles/2017-11-09/eu-reaches-deal-to-overhaul-world-s-largest-emissions-market
[49] Wilt, J. (2017, January 1). *Five Handy Facts About Alberta's New Carbon Tax*. Retrieved from DeSmog Canada: https://www.desmog.ca/2017/01/01/five-handy-facts-about-alberta-s-new-carbon-tax
[50] Gass, P., & Echeverría, D. (2017). *Fossil Fuel Subsidy Reform and the Just Transition: Integrating approaches for complementary outcomes.* Retrieved from https://www.iisd.org/library/fossil-fuel-subsidy-reform-and-just-transition-integrating-approaches-complementary-outcomes
[51] Levine, M. (2015, November 26). *ICSID tribunal renders interim decision on Ecuador's environmental counterclaim in long-running dispute*. Retrieved from IISD's Investment Treaty News: https://www.iisd.org/itn/fr/2015/11/26/icsid-tribunal-renders-interim-decision-on-ecuadors-environmental-counterclaim-in-long-running-dispute-perenco-ecuador-limited-v-republic-of-ecuador-icsid-case-no-arb-08-6/

land in the vicinity of mining activities were being contaminated. In June 2011, a new president was elected in Peru, and Bear Creek's authorization was revoked by decree.

Bear Creek initiated arbitration against Peru in 2014 under the Peru–Canada Free Trade Agreement (FTA) to seek compensation for the revocation. The government argued that Bear Creek's limited community outreach was the cause of strikes, protests, instability, food shortages and poor sanitation in a region close to an international border. The tribunal determined that the government was aware of Bear Creek's limited outreach to gain social license and that the government could not in hindsight claim that the investor's conduct was insufficient or at the root of social unrest. In a dissenting opinion, one of the arbitrators referred to the ILO's Indigenous and Tribal Peoples Convention and noted that, although the obligations found in the Convention befall only states, this "does not, however, mean that [the Convention] is without significance or legal effects for [private foreign investors]."[52] The dissenting arbitrator noted that "it is for the investor to obtain the 'social license', and in this case it was unable to do so largely because of its own failures."[53]

Bilcon v. Canada.[54] In 2002, the Canadian province of Nova Scotia granted a permit to build and operate a quarry. Bilcon acquired the quarry in 2004, along with a marine terminal. In 2007, a Joint Review Panel (JRP) co-chaired by the federal and provincial governments conducted an environmental assessment of Bilcon's quarry and marine terminal project. The JRP ultimately decided to reject the project, finding that it was incompatible with "community core values."

In 2008, Bilcon initiated arbitration under NAFTA to seek compensation for the JRP's decision. The tribunal found that the government's decision was arbitrary and that applying the "community core values" standard was comparable to requiring a public referendum on the project. Canada's nominee on the tribunal dissented, pointing out that "community core values" referred to "human environmental effects," which the JRP found that Bilcon had failed to dutifully address in their Environmental Impact Statement. The dissenting opinion also submitted that in this case "a state was held liable in damages to an investor for putting important value on how a project affects the human environment and for taking into account the community's articulation of its own interests and values."[55]

5.0 Innovative Features

The Treaty contains a few key features worth highlighting, as they constitute innovative means for achieving climate change mitigation and adaptation objectives, in line with broader sustainable development goals, through an IIA.

- While the Treaty focuses on climate-friendly and resilient investment, it situates that pursuit within the broader context of the globally-agreed SDGs, and a deep

[52] International Centre for Settlement of Investment Disputes (ICSID). *Bear Creek Mining Corporation v. Republic of Perú.* ICSID Case No. ARB/14/21, Partial Dissenting Opinion, para. 10. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf
[53] Ibid, para. 37.
[54] Davis, M. (2015, May 21). *UNCITRAL tribunal finds Canada's environmental assessment breached international minimum standard of treatment and national treatment standard*. Retrieved from IISD Investment Treaty News: https://www.iisd.org/itn/2015/05/21/uncitral-tribunal-finds-canadas-environmental-assessment-breached-international-minimum-standard-of-treatment-and-national-treatment-standard-clayton-bilcon/
[55] Ibid.

understanding of the potential contribution to those goals that investment can make. As such, it commits Parties and investors to respect for international standards and best practice on environment more broadly, human rights, labour, development in the host state, among others.

- The Treaty features a balance of rights and obligations, assigning both to home states, host states and investors. This is in contrast to conventional IIAs that focus almost exclusively on investor rights and host state obligations.
- The Treaty is also unconventional in its treatment of domestic investors, for whom it strives to ensure procedural and substantive rights equal to those of investors of other Parties.
- Whereas conventional IIAs are designed to attract investment indiscriminately, the Treaty features a range of means to promote sustainable investments and investors, and to discourage unsustainable investments and investors.
- The Treaty concerns itself with the necessary just transition—a challenge that is most often ignored because it is difficult, and which has never featured as part of an IIA or trade agreement.
- While it strongly encourages common approaches, the Treaty does not define sustainable and unsustainable investments or investors, but rather leaves that critical determination to the Parties themselves. This is in line with the concept of sustainable development, which is highly context specific, dependent on differing historical, geographical, ecological and social circumstances. It is also in line with the basic approach of the Paris Agreement, under which the Parties submit commitments in nationally determined format. It allows for appropriate flexibility among states of differing capabilities, and differing priorities, and in doing so makes it more likely that states will sign and ratify.
- The Treaty provides certainty and predictability for investors as to the treatment to which they are entitled. The three classifications—sustainable, unsustainable and non-classified—carry important implications, and the definitions in the Treaty, supplemented by the Parties' schedules, make it clear in which category investments will fall. In the event of uncertainty, there is a mechanism whereby investors can request authoritative determinations.
- The Treaty is flexible enough to be adopted as a bilateral, regional or multilateral agreement and provides bracketed options in this regard.

6.0 Conclusion: How the Treaty meets the assessment criteria

The introductory paragraph of the assessment criteria of the Stockholm Treaty Lab Prize reads:

> *The Stockholm Treaty Lab Prize will be awarded to the contestant team that drafts the most forward-looking, innovative, and workable Model Treaty, with the highest potential to encourage foreign investment in climate change mitigation and adaptation.*

The drafters note that the competition is geared toward drafting a model treaty that, if adopted, would lead to a significant increase in investments aimed at achieving climate change mitigation and adaptation goals. Accordingly, the Treaty keeps a narrower focus on climate change, defining "sustainable investment" as investment geared toward addressing the issue of climate change in line with the objectives of the Paris Agreement and the SDGs. The drafters think that the ideal approach would be to integrate the climate change issue into

a broader investment treaty that covers a range of sustainable development issues. That treaty would replace existing investment treaties and specifically integrate climate-related concerns, but only as one of the issues related to sustainable development.

The Stockholm Treaty Lab Prize sets out five criteria for evaluating entries. In light of the Treaty text itself and of the argumentation above, we set out below the ways in which the Treaty meets those criteria.

1. ***Compatibility**. The Model Treaty is compatible with the Paris Agreement and the Sustainable Development Goals. It aims to facilitate states' achievement of the climate change objectives set out in those instruments. The Model Treaty is also compatible with fundamental principles of property law.*

The Paris Agreement and the climate change mitigation and adaptation commitments and objectives it encapsulates, as well as broader sustainability goals as set out in the SDGs, form the core of the Treaty and are referenced throughout its text, starting from the preamble.

Article 1.2: Objective expressly mentions the achievement of the Paris Agreement and SDGs as the ultimate objective of the Treaty. *Article 2.1: Climate Change and Sustainable Development Objectives* reaffirms the Parties' commitment to both international instruments. These articles, beyond ensuring the systemic and teleological compatibility of the Treaty with the Paris Agreement and the SDGs, expresses the commitment of the Parties to raise their level of ambition as regards both climate change mitigation and adaptation goals, and sustainable development objectives.

The Treaty's provisions under *Part 2: Sustainable Investment* consist of tools to facilitate such objectives and goals. Such provisions establish cooperation mechanisms between the Parties to achieve climate change mitigation and adaptation objectives as well as broader sustainable development goals. They also point to specific measures and policy instruments that Parties may use to that end.

Finally, the approaches adopted and the rights and guarantees provided to investors and their investments—including, for example, the protection of the right to ownership of property against expropriation (*Article 3.4: Direct Expropriation*) and against targeted discrimination (*Article 3.3: Standard of Treatment*) by the host state—illustrate the Treaty's overall compatibility with fundamental principles of property law.

2. ***Efficacy**. If adopted by states, the Model Treaty will lead to a significant increase in green investments related to climate change mitigation and adaptation. To this effect, the Model Treaty proposes incentives and protections that serve foreign investors' needs and interests. The claimed efficacy of the proposed incentives and protections is supported by research and data.*

The Treaty includes several incentives and protections that serve the needs and interests of sustainable investors. Such incentives and protections will effectively lead them to increase the flows of foreign investment aimed at climate change mitigation and adaptation, in full alignment with the achievement of the SDGs. The available research and data that support the proposed incentives and protections has been presented in the argumentation above.

Among the incentives (and disincentives) that the Parties may adopt under the Treaty, we highlight (based in particular on *Article 2.4: Incentives for Sustainable Investment* and on *Article 2.6: Limitation of Advantages and Rights of Unsustainable Investors and their Investments*):

- financial incentives in the forms of investment insurance, grants or loans at concessionary rates;
- fiscal incentives such as tax holidays, pioneer status and reduced tax rates;
- subsidized infrastructure or services, market preferences;
- development-oriented incentives, to encourage preferential markets schemes and specific investors within the region;
- incentives for technical assistance or technology transfer;
- investment guarantees;
- progressive reduction and ultimate elimination of investment incentives for unsustainable investments, such as subsidies or other financial support for the production and consumption of the products of unsustainable investments, such as fossil fuels; export credit accorded to the products of such investments; and privileges accorded to such investments or their operation under special export zones.

We highlight among the protections provided by the Treaty:

- the right to a classification of a potential investment as sustainable, unsustainable or non-classified (*Article 3.1: Classification*);
- the protection against non-discrimination against domestic or third-state sustainable investments in like circumstances (*Article 3.2: Non-Discrimination*);
- the protection against manifestly abusive treatment and other conduct that would breach internationally-agreed standards (*Article 3.3: Standard of Treatment*);
- the protection against direct expropriation (*Article 3.4: Direct Expropriation*);
- the right to make transfers without undue restrictions or delays (*Article 3.6: Transfers*).

3. ***Viability****. The Model Treaty is likely to be adopted by states around the world. Adoption is likely because the Model Treaty serves the states' needs and interests, facilitates the achievement of climate change goals, and does not unduly restrict the states' ability to legislate and regulate.*

The Treaty includes several features that make it likely to be adopted by states around the world, developing and developed countries alike.

First, it serves states' needs and interests by imposing obligations that form basic expectations of states regarding investors and investments (*Part 4: Obligations of Investors and Investments*). It also serves those needs and interests by guiding investors and investments toward quality investment aimed at climate change mitigation and adaptation and at sustainable development (*Part 2: Sustainable Investment*).

Second, as argued above, the Treaty's compatibility with the Paris Agreement and the SDGs facilitates the achievement of climate change goals. Furthermore, through state–state cooperation and through incentive and disincentive measures, the Treaty gears domestic and

foreign investors and their investments toward climate change mitigation and adaptation (*Part 2: Sustainable Investment*).

Finally, the Treaty does not unduly restrict the states' ability to legislate and regulate in the public interest (*Part 5: Rights of States*). Rather, it explicitly acknowledges such ability as a right of states in accordance with customary international law and general principles of international law. Importantly, the Treaty refers specifically to the right of states to take good-faith non-discriminatory regulatory measures to achieve the objectives of the Paris Agreement, in line with the SDGs (*Article 5.1: Right to Regulate*). Further, the Treaty expressly safeguards the States' right to pursue their development goals (*Article 5.2: Right to Pursue Development Goals*) and to impose performance requirements aimed at allowing domestic investors or investments to compete unassisted in open markets (Article 5.3: Performance Requirements).

4. ***Universality***. *The Model Treaty appeals to the potentially diverging interests of states and investors in different parts of the world. Where necessary, the Model Treaty includes alternative provisions from which contracting states may select the most appropriate based on context and circumstances.*

As pointed out in Section 5.0 above, while the Treaty strongly encourages common approaches, it leaves to the Parties the critical determination of what constitutes sustainable and unsustainable investments or investors. The Parties are free to designate particular sectors that meet either definition in their context, in Schedules incorporated as Annexes to the Treaty. This is in line with the concept of sustainable development, which is highly context specific, dependent on differing historical, geographical, ecological and social circumstances. It is also in line with the basic approach of the Paris Agreement, under which the Parties submit commitments in nationally determined format. It allows for appropriate flexibility among states of differing capabilities, and differing priorities. In doing so, the Treaty makes it not only universally appealing but also more likely for states to sign and ratify (criterion 3, above).

The Treaty also includes, in bracketed text, options for the Parties to select depending on whether they conclude it as a bilateral, regional or multilateral treaty. One example is provided in paragraph 7 of *Article 2.6: Limitation of Advantages and Rights of Unsustainable Investors and their Investments*. The eventual need for technical assistance of certain Parties to implement some of the provisions is also recognized in bracketed text. See, for example, *Article 2.5: Cooperation on Unsustainable Investment*. Brackets were also used to provide alternative options for the composition of the Tribunal established under *Article 9.7: Tribunal*, depending on Parties' specific contexts and preferences.

The drafters acknowledge that the contents of other provisions may need to be adapted depending on the circumstances of the contracting states. Numerous alternative paragraphs, Articles or Parts could have been provided in an attempt to cover all potential circumstances. Through bracketing, it could have been suggested that entire paragraphs, Articles or Parts may be considered optional depending on the actual contracting states involved. However, the drafters avoided making the Treaty too complex by providing a multitude of options. Instead, the drafters opted for proposing cleaner text, with language that would be acceptable and applicable to most if not all states, regardless of their level of development. This decision was taken based on understanding that the necessary adaptations will naturally occur as a result of negotiations based on the Treaty text.

5. ***Enforceability****. The Model Treaty is binding and enforceable. It contains an effective dispute resolution mechanism, through which both investors and states can bring claims related to the Treaty.*

The Treaty provides for binding obligations on states (*Part 3: Rights of Investors and Investments*; *Part 6: Obligations of States*) and on investors (*Part 4: Obligations of Investors and Investments*). It also includes an international dispute settlement mechanism to enforce these internationally binding obligations. The mechanism also serves for the Parties to resolve disputes between themselves (state–state) concerning the interpretation or application of the Treaty (*Part 9: Dispute Prevention and Settlement*).

As required, the Treaty includes an effective dispute resolution mechanism through which investors and states can bring claims related to the Treaty. The inclusion of such mechanism does not necessarily result from a sense of conviction by the drafters that all disputes related to sustainable investments *should* have a chance to be elevated to the international level. The proposed mechanism builds on lessons learned from issues and limitations of international dispute settlement mechanisms contained in traditional IIAs, as illustrated in the argumentation above. The Treaty innovates in several aspects, including, among others:

- Access to justice is extended not only to investors or states, but also to individuals and legal entities of the states, where they have been affected by non-compliance of investors or states with their obligations under the Treaty (*Article 9.1: Scope, paragraph 1*). This is additional to the accountability mechanism with multistakeholder mediation and accountability functions to hear complaints brought by individuals or communities affected or potentially affected by an investment or brought by civil society organizations (*Part 7: Accountability Mechanism*).
- Investors or investments may not submit claims or disputes in cases of fraudulent misrepresentation, concealment, corruption or conduct amounting to an abuse of process (*Article 9.1: Scope, paragraph 2*).
- Unsustainable investors and their investments do not have access to the Treaty-based dispute settlement mechanism (*Article 9.1: Scope, paragraph 3*).
- Not only claims are expressly allowed, but also counterclaims (*Article 9.1: Scope*).
- The Treaty provides for an appellate mechanism (*Article 9.8: Appellate Tribunal*).