

# **Aligning Swiss Investment Treaties with Sustainable Development:**

An Assessment of Current Policy Coherence and Options for Future Action

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## **Executive Summary**

Policy makers and other stakeholders are currently asking fundamental questions about whether and to what extent international investment agreements (IIAs) are consistent with and are helping to advance sustainable development objectives at home and abroad. These questions are being driven by the convergence of two significant trends: one is the increased public debate regarding the objectives, costs and benefits of IIAs, which is being driven by negotiation of new “mega-treaties” by countries around the world and a continued rise in investor-state arbitrations initiated under these IIAs; the second is convergence among world leaders on the need to ensure that government policies – both at the domestic and international level – catalyze private sector activity in order to achieve sustainable development objectives as recently defined by the Sustainable Development Goals.

This report provides a framework to help answer those questions about whether and to what extent IIAs can and do support sustainable development, and applies that framework to a review of Swiss IIAs. The objective of the review is to help inform discussions regarding whether and how to shape policies regarding existing and future IIAs.

The framework identifies five principles that should guide the content and application of IIAs (if and when the treaties are concluded) in order to align them with sustainable development objectives:

1. Maintain legitimate policy space and allow legal and regulatory frameworks to evolve over time to address new challenges and changing circumstances;
2. Do no harm;
3. Advance labor standards, human rights, and environmental protection;
4. Increase cross-border investment flows; and
5. Ensure policy coherence across relevant government policy spheres.

This study reviews 40 Swiss IIAs – agreements concluded over roughly the past 50 years with countries from different geographic regions and different income levels – in light of those five principles. Based on that review, this report concludes both that Swiss IIAs often risk frustrating sustainable development outcomes, and also represent missed opportunities to proactively advance progress under the sustainable development goals. Nevertheless, the report also identifies feasible, concrete steps that the government can take to address these issues in both their existing and future treaties.

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## 1. Introduction

With the increasing numbers of international investment disputes filed under the thousands of existing international investment agreements (IIAs), and the negotiation of new “mega-treaties” such as the 12-country Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership agreement (T-TIP), there is growing attention on and concern regarding IIAs and the investor-state dispute settlement (ISDS) mechanism that IIAs commonly contain. Various stakeholders are intensely engaging with the complex questions of whether IIAs and

ISDS, as currently designed and implemented, are the appropriate standards for international economic governance and, if not, how they should be reformed.<sup>1</sup>

Alongside these developments, governments and other stakeholders have been working to define and establish a global agenda for achieving sustainable development and tackling the challenges of climate change. These efforts include, in particular, establishing a set of Sustainable Development Goals (SDGs) and related targets and indicators; establishing commitments and identifying channels for public and private sector contributions to financing for development (FfD); and concluding new agreements on climate change mitigation and adaptation.

A common theme that runs through each of these three global agreements – on SDGs, FfD, and climate change – is the need for governments to mobilize private sector investment to achieve policy objectives, including by incentivizing private investment in certain areas and steering it away from others.

This theme is relevant for the design of IIAs, which shape governments' treatment of foreign investors and investments in order to “foster the economic prosperity *of both states*.”<sup>2</sup> In the 21<sup>st</sup> century, “economic prosperity” is understood in the context of long-term, holistic and inclusive sustainable development. As stated in “Transforming our world: the 2030 Agenda for Sustainable Development,” the outcome document agreed by consensus at the conclusion of inter-governmental negotiations on the post-2015 development agenda, ensuring economic prosperity means “ensur[ing] that all human beings can enjoy prosperous and fulfilling lives and that economic, social and technological progress occurs in harmony with nature.”<sup>3</sup>

Based on that view of investment treaties –as agreements that aim to promote and protect foreign investment in order to advance sustainable development – there are a number of principles that should guide the content and application of IIAs (if and when the treaties are concluded). These principles<sup>4</sup> are:

1. Maintain legitimate policy space and allow legal and regulatory frameworks to evolve over time to address new challenges and changing circumstances;
2. Do no harm;
3. Advance labor standards, human rights, and environmental protection;
4. Increase cross-border investment flows; and
5. Ensure policy coherence across relevant government policy spheres.

Each of these principles is described further in Section 2, along with a brief overview of how investment treaties may or may not align with them. Following that overview, each section contains an assessment of how Swiss investment treaties conform to these principles. The assessment is based on an in-depth review of 40 IIAs (5 early Bilateral Investment Treaties (BITs) without ISDS, 31 BITs with ISDS, 2 Free Trade Agreements (FTAs), and 2 FTAs concluded between members of the European Free Trade Association (EFTA) and other states (Annex I)).

The agreements were selected to include texts Switzerland has concluded over a 50-year time period with countries from all geographic regions and different income levels. The selection was also designed to allow for an examination of evolution in treaties over time. Thus, certain countries' agreements were included in the sample because those countries had concluded an early BIT with Switzerland, and then replaced and/or supplemented that text with a subsequent BIT and/or FTA.<sup>5</sup> By including BITs, FTAs, and EFTA agreements, the sample aims to facilitate

an examination of variations among different types of IIAs. Finally, some treaties were selected that had been used by investors in ISDS. This was done in order to enable a review of how treaty provisions in Swiss IIAs are being invoked and applied in practice (see also Annex III, compiling cases brought under Swiss investment treaties).

After analyzing these IIAs and their alignment with the five principles set forth above, this note concludes in Section 3 by recommending steps the government might consider taking in order to help ensure that its IIAs – existing and future – advance, rather than hinder, sustainable development. Existing treaties raise different opportunities and challenges for reform from future treaties. For new treaties, countries have the freedom to craft new provisions, exclude more traditional clauses, and/or even opt to move away from IIAs and/or ISDS altogether. For existing treaties, bringing old treaties in line with current priorities can require termination, renegotiation, and/or interpretive clarification through exchange of diplomatic notes or other channels.<sup>6</sup> For both existing and future treaties, some action can also be taken at the purely domestic level through, for example, requiring domestic companies to comply with certain transparency obligations when filing treaty claims. Although taking into account both existing and future treaties increases the complexity of the government’s task, policy coherence and effectiveness require a backward look at the large stock of treaties already in force and a forward look at the agreements that may be concluded in the future.

## **2. Principles to Align Treaties with Sustainable Development Objectives**

### **2.1 Maintain legitimate policy space and allow legal and regulatory frameworks to evolve over time**

#### **2.1.1 Overview**

Governments need policy space to be able to ensure that they can enact, implement, revise and refine their policies, laws, and regulations in order to achieve environmental, human rights and economic objectives, which may evolve over time with changing needs and circumstances. While the roles of different government actors vary among and even within countries, this may mean, for example, that legislatures need to be empowered to take new or amend existing legislative action; executive officials need to be able to set policies and priorities and exercise discretion where appropriate; and administrative and judicial courts need to be free to perform the roles assigned to them under domestic law to give meaning to laws and regulations, rule on the scope of public and private rights and obligations, and invalidate or impose penalties on illegal conduct.

Yet one concern often raised about investment treaties with ISDS is that they restrict policy space of government officials to take such actions in the public interest in two primary ways: one is that legitimate good faith actions taken by governments can trigger lawsuits and liability when those actions interfere with private property rights or even mere “expectations”<sup>7</sup>. This, in turn, may cause governments to not implement those measures, to remove or modify the measures, or to exempt certain companies from compliance with the new measures, to the possible detriment of environmental, social, or other policy aims. A second way that investment treaties with ISDS may

restrict policy space is that they can displace and therefore undermine the role of domestic adjudicative bodies (including administrative courts) in developing the law through decisions interpreting and applying laws and regulations and creating new doctrines.<sup>8</sup>

A related concern is that, in both reviewing actions of government officials and adjudicating matters of domestic law, the balance ISDS tribunals are striking between private rights and expectations, on one hand, and public rights and interests, on the other, is different and more protective of private property than the balance struck in many domestic legal systems.<sup>9</sup> Indeed, there is increasing attention being paid by governments and commentators in the EU, the US and elsewhere to the questions of (1) whether and in what contexts tribunals have interpreted treaties as providing investors with greater substantive rights and remedies than are permitted under domestic law; and (2) assuming investment treaties *do* provide those greater rights and remedies, what the implications are for (a) democratic processes to shape domestic policies, and (b) governments' willingness and ability to address social, environmental and economic issues, and to respect, protect and fulfill human rights.

A growing body of research suggests that investment treaties do in fact provide investors greater substantive protections than are available under the law of many developed states, including those that are often considered to have strong property rights guarantees. In those states, governments are not immune from challenge, but legislatures have adopted rules and courts have developed doctrines that provide governments with strong procedural and substantive shields against liability for acts that negatively affect the economic rights and interests of private parties.<sup>10</sup> These rules and doctrines, in turn, protect the governments' right to act in the public interest and help prevent public officials and entities from being paralyzed by litigation and financial liability or the fear thereof. To the extent that claims against governments are brought in domestic fora, those rules govern the lawsuits' adjudication. But to the extent that suits are brought under IIAs through ISDS, the procedural and substantive rules change, and government vulnerability increases.

For many developed countries, the vast bulk of economic litigation against governments has proceeded in domestic courts, which tend to be more deferential to the state. Among the reasons that might explain this:

- many developed, capital exporting states have not traditionally concluded IIAs with ISDS with other developed, capital exporting states, so much foreign investment in developed states is not (yet) covered by IIAs;
- foreign investors may be comfortable and accustomed to using domestic courts in developed countries (for disputes against the government or other parties); and
- developed states that have concluded treaties with other developed capital exporting states have tended to take extra precautions to ensure that the treaty standards in those agreements are interpreted narrowly.

For developing countries, however, the picture is often different:

- more foreign investment in developing, capital importing countries is covered by IIAs, and that investment is often concentrated in activities that have tended to give rise to investor-state disputes such as investment in infrastructure and in the extractive industries.
- whether because of language issues, unfamiliarity with domestic law or domestic legal service providers, mistrust of the domestic legal system, bias, and/or a preference for

- international arbitration, foreign investors in developing countries may be more reluctant to use the host country's legal system; and
- at least some capital exporting states have included treaty provisions that are drafted or interpreted to impose stronger constraints on developing countries than on developed states, with the result that IIAs provide particularly strong protections when invoked against developing countries.<sup>11</sup>

These factors create a system in which developing countries are left particularly exposed to claims and liabilities under IIAs. As one scholar has written:

It is shocking to consider that a United States investor may lose a case against its government in the United States Supreme Court, a German investor may lose the same case in the Bundesverfassungsgericht (Constitutional Court), and a French investor may lose it in the Conseil d'État, but, nevertheless, that any of them may win it against a Sri Lanka or Bolivia on the basis of such open-ended [IIA] principles as no expropriation without compensation or FET.<sup>12</sup>

Because of the relatively vague nature of many investment treaty obligations, some of the concern about the impact of investment treaties is not based on the fact that they *will* result in claims and/or liability for states, but that there is a *risk* that they will, and that risk may cause governments to abandon otherwise legitimate public interest measures taken by the executive or legislative branches. Not all states will necessarily be equally sensitive to these risks. As some academics have noted, the uncertain content of treaty obligations and potential for claims and liability may be more likely to have a chilling effect on the actions of government officials from developing than developed countries given that the former may have poorer access to necessary legal expertise to evaluate the merits of claims/defenses, be more concerned about the possibility of having to pay significant legal fees and a potential award,<sup>13</sup> and be more concerned about the reputational impacts that a dispute and/or claim could have.

The risk of litigation faced by a host state can vary based on the ISDS provisions incorporated in treaties. Some agreements and models, for example, have provisions that seek to restrict or secure early dismissal of frivolous claims;<sup>14</sup> require exhaustion of remedies;<sup>15</sup> and filter certain issues to state-to-state dispute resolution and away from tribunals.<sup>16</sup> Some treaties also have mechanisms designed to prevent parallel or subsequent suits, requiring investor/ claimants to waive their rights to pursue other avenues of relief once they initiate ISDS under the IIA. Treaties without those provisions can increase states' exposure to claims and high litigation costs.

### 2.1.2 Evaluating the impacts of IIAs on policy space

In light of these issues, it is crucial to evaluate and address the possible constraints investment treaties place on domestic policy space. As stated in the Addis Ababa Action Agenda of the Third International Conference on Financing for Development (“Addis Ababa Action Agenda”):

The goal of protecting and encouraging investment should not affect our ability to pursue public policy objectives. We [the Heads of State and Government and High Representatives, gathered in Addis Ababa, Ethiopia, from 13 to 16 July 2015] will endeavour to craft trade and investment agreements with appropriate safeguards so as not to constrain domestic policies and regulation in the public interest. We will implement such agreements in a transparent manner.

In order to ensure that investment treaties do not frustrate states' efforts to develop and implement laws and policies in the public interest, it is important to carefully shape their substantive obligations accordingly. This necessitates a careful evaluation of

- which substantive provisions are included in the treaty (e.g., fair and equitable treatment (FET), full protection and security, non-impairment, non-discrimination, obligation against unlawful expropriation, free transfer requirements, restrictions on performance requirements, and the umbrella clause) (see Box 1);<sup>17</sup>
- how the provisions are drafted (including the extent to which they permit unintended/unforeseen interpretations);
- whether there are any exceptions that narrow the scope of the obligations; and
- the extent to which the ISDS and related provisions leave governments vulnerable to litigation including, in particular, frivolous claims, parallel suits, and disputes filed through treaty shopping.

## Box 1 IIA Obligations

**Fair and equitable treatment (FET):** The FET obligation has emerged from relative anonymity through the mid-1990s to the most frequent standard upon which investors base their claims, and the most frequent standard on which they prevail. It is notoriously vague, with states, investors, tribunals, academics and others adopting often widely diverging interpretations of the standard's meaning. In brief, these interpretations can be divided into two main groups: one which treats the FET obligation as being tethered to the minimum standard of treatment under customary international law (MST); and the other which views the FET obligation as an autonomous standard which imposes more extensive obligations on states than the MST. Notably, treaties have tended not to expressly state that the FET is bound by the MST; and, absent such language, tribunals have been reluctant to interpret the FET obligation as being limited to the MST. Thus, over roughly the past 15 years, a number of countries have been explicitly tying the FET to the MST in their treaties in order to ensure that the tribunal interprets the FET obligation as being defined, and limited by, the MST. In contrast, other countries and negotiating blocks such as the EU have adopted a different strategy for avoiding unintended and overly broad interpretations; in its agreement with Canada and proposal for the TTIP, for example, the EU has set forth a closed list of conduct that it considers as constituting a violation of the FET obligation.<sup>18</sup>

**Full protection and security (FPS):** The FPS standard provides investors/investments a measure of protection against harms caused by non-state actors (and according to some tribunals, state actors as well). There are two main lines of interpretation of this provision. One is that the FPS standard protects investors/investments against any harm, including harm caused by changes in the host state's legal framework. Under this interpretation, the FPS obligation becomes close in meaning to the FET obligation. The second main line of interpretation is that the FPS standard only protects investors/investments against physical harm, and thus requires states to exercise due diligence in affording foreign investors/investments a normal, non-discriminatory level of police protection. Some more modern model IIAs and treaties have begun specifying that FPS only refers to protection against physical harm.<sup>19</sup>

**Non-impairment:** Some treaties contain a provision stating that the host state will not "impair" covered investments through arbitrary and/or discriminatory measures. According to some tribunals, this standard is roughly equivalent to, or a part of, the autonomous FET obligation.<sup>20</sup>

**Non-discrimination:** IIAs typically have two different non-discrimination provisions: the national treatment obligation, which requires a state to treat foreign investors as favorably as its domestic investors; and the most-favored nation treatment obligation, which requires a state to treat foreign investors from its treaty parties as favorably as foreign investors from other treaty parties or third states. In a growing minority of IIAs, these obligations apply on a pre-establishment basis, meaning that through the non-discrimination obligation, states commit to grant investors from IIA parties rights of market entry and establishment on the same terms as are granted to domestic (or any other foreign) investors. Some countries include exceptions to these non-discrimination obligations, carving out existing and even certain future measures from the national and/or most-favored nation treatment provisions. These carve-outs/exceptions can be used for diverse policy aims including preventing foreign ownership of firms operating in sensitive sectors (e.g., national defense), permitting states to grant preferences or advantages to domestic constituents for policy reasons (e.g., preserving policy space to accord assistance/preferences to historically disadvantaged minorities), and ensuring that states can comply with other domestic and international legal obligations (e.g., permitting states to accord special legal rights to indigenous peoples within their territories).

**Obligation against unlawful expropriation:** Most investment treaties contain a provision affirming that states have the right to expropriate property, but declaring that, if the state does expropriate property, it must pay compensation for the expropriated property.<sup>21</sup> Treaties often also state that compensation must be effective, adequate, and prompt. Even if an IIA is silent on the issue, it is generally interpreted to protect against direct *and* indirect expropriations (e.g. policy measures that effectively nullify the economic value of an investment). Because of the difficulty in drawing a line between, on one hand, legitimate regulatory measures that negatively affect property rights and, on the other, indirect expropriations, a number of more recent agreements have included additional text to guide tribunals in distinguishing between the two.

**Restrictions on performance requirements:** A relatively small but growing number of investment treaties contains restrictions on performance requirements (e.g., restrictions on requirements to use or accord preferences to local providers of goods and/or services, or restrictions on technology transfer requirements) that incorporate obligations under the WTO's Agreement on Trade-Related Investment Measures ("TRIMs Agreement"), or that impose restrictions that go beyond the TRIMs Agreement. When IIAs incorporate TRIMs and TRIMs+ obligations, they also typically subject those obligations to ISDS, creating a large body of potential private treaty enforcers. In contrast, under the WTO system of dispute settlement that is used to enforce compliance with the TRIMs Agreement, disputes are only initiated and resolved at an inter-state level.

**Transfer requirements:** IIAs usually have provisions requiring states to permit investors/investments to freely transfer capital in and out of the host country. Historically, these "free transfer" articles were broadly worded, with few exceptions or clarifications. Over time, however, countries have begun including provisions expressly permitting them to restrict or delay transfers for certain reasons, including to protect the interests of creditors, ensure payment of taxes, or protect or restore financial security and stability in the country.

**Umbrella clause:** One feature of a large minority of older IIAs is the "umbrella clause". One study found that it is present in 43% of IIAs signed between 1962 and 2011; and 13% of treaties signed between 2012 and 2014.<sup>22</sup> There are a number of variations in how this clause is worded. Depending on the text of the clause and the meaning given to it by the tribunal, umbrella clauses have been interpreted as requiring governments to comply with only written contractual obligations owed to the claimant/investor, or, more broadly, to require governments to comply with any obligation they have assumed under domestic or international law. According to some tribunals, an umbrella clause will only be breached if the government was acting as a "sovereign" when it violated its obligation (e.g., by passing a law invalidating an underlying contract); yet according to others, the government can also breach the umbrella clause if it was acting as a normal contracting party (e.g., failing to pay sums due under the contract). Both the nature of the obligations covered by the umbrella clause (e.g., only written contractual obligations entered into with the investor or any obligations assumed by the government), and the types of actions that may breach it (e.g., only "sovereign" acts or any commercial or sovereign conduct), affect the scope of the umbrella clause obligation and the restraints it imposes on state action. Given the diverging interpretations tribunals have assigned to these treaty provisions, states that continue to include umbrella clauses in their treaties have begun to more carefully draft them in order to more clearly state the scope of the obligation.

### 2.1.3 Application to Swiss IIAs

Overall, although there has not been a formal Swiss "Model BIT",<sup>23</sup> there is significant consistency among the universe of Swiss BITs. Researchers who have mapped the textual

coherence of 133 countries' treaties over time rank Switzerland 19<sup>th</sup> in terms of internal treaty coherence.<sup>24</sup> Swiss IIAs usually follow the traditional European model, common features of which are that the text is relatively short in length, contains relatively little in terms of text that narrows or clarifies treaty obligations, and does not usually include exceptions. This is in contrast to a growing trend among other IIAs to clarify treaty obligations and to carve out exceptions or exclusions from the IIA or ISDS for certain public policy measures.

Among the core features usually found in the Swiss BITs reviewed are:

- an FET obligation that is not tied to the MST (*cf.* 2012 US Model BIT) or otherwise narrowed or limited (*cf.* CETA) (see Annex II);
- FPS obligation that does not specify whether it is limited to protection from physical harms;
- non-impairment provisions;
- obligations to grant foreign investors necessary permits and approvals;
- post-establishment non-discrimination obligations that usually do not contain any exceptions or carve-outs for policy reasons;<sup>25</sup>
- obligations to provide compensation for expropriation, typically without further clarifying the meaning of an “indirect” expropriation;
- transfer requirements that mandate free transfers in and out of the country and usually do not include any exceptions for enforcement of tax law, protection of creditor rights, or to safeguard or restore financial stability;<sup>26</sup>
- umbrella clauses, the wording of which varies among agreements and ranges from broad to narrow formulations;
- beginning in the 1980s, ISDS provisions which, over the past several decades, have largely remained unchanged (i.e., without being updated to include provisions to prevent frivolous claims or multiple suits,<sup>27</sup> to incorporate a state-to-state filter mechanism for certain types of claims,<sup>28</sup> or to require transparency in ISDS<sup>29</sup>); and
- provisions that aim to restrict treaty shopping.<sup>30</sup>

Swiss BITs generally do not contain:

- restrictions on performance requirements<sup>31</sup> (*but see* BIT with Mexico, FTA with Japan);
- general or specific exceptions or other protections for environmental, social or other public interest policies or the “right to regulate”;<sup>32</sup>
- requirements for exhaustion of remedies.

Together, these features combine to leave states exposed to claims and potential liabilities for good faith action taken in the public interest, permitting broad interpretations of treaty provisions and access to ISDS that threaten states' legitimate policy space. Aspects of Swiss BITs that both lead to and depart from this general pattern are discussed in more detail below.

This discussion focuses on the BITs and FTAs concluded by Switzerland that are included in the review. The agreements concluded by Switzerland as part of the EFTA group of states tend to place more emphasis on investment liberalization than protection<sup>33</sup> and do not include ISDS.<sup>34</sup> Consequently, they often do not raise the same issues regarding constraints on policy space as Swiss BITs and FTAs with investment chapters.

## *Substantive standards*

While there are many common threads that can be found throughout Swiss BITs, the agreements are not identical. Figure 1 below plots the treaties based on the strength of obligations they impose on host states, with a lower number representing a treaty whose substantive standards are relatively stringent as compared to other Swiss BITs reviewed, and a higher number representing a treaty that permits more policy space. The numbers are assigned based on an analysis of the FET obligation, the non-impairment provision, the requirement to provide necessary permits, the non-discrimination obligations (and exceptions thereto), and the umbrella clause. For each standard, the treaty is given a value that ranges from 0 to 2, with 0 being the most restrictive and 2 being the most flexible (as compared to other Swiss treaties in the sample). The number assigned to each treaty is the sum of all values, and aims to provide a rough approximation of the cumulative strength of each agreement.

To illustrate, the BIT with Cambodia (KHM), which was signed in 1996, is assigned a “0”. It has an unrestrained FET obligation, a non-impairment obligation, a commitment to give investors all necessary authorizations (and does not make that requirement subject to domestic law), non-discrimination obligations without any exceptions or limitations, and a broadly worded umbrella clause.

In contrast, the BIT signed with India (IND) in 1997, which is assigned a “6.5”, similarly contains a vaguely worded FET obligation, but does not include a non-impairment provision, nor a requirement to provide investors necessary licenses or authorizations. Additionally, it includes certain exceptions to both non-discrimination obligations, and has a more narrowly worded umbrella clause that only permits recourse to ISDS in the absence of normal judicial remedies.

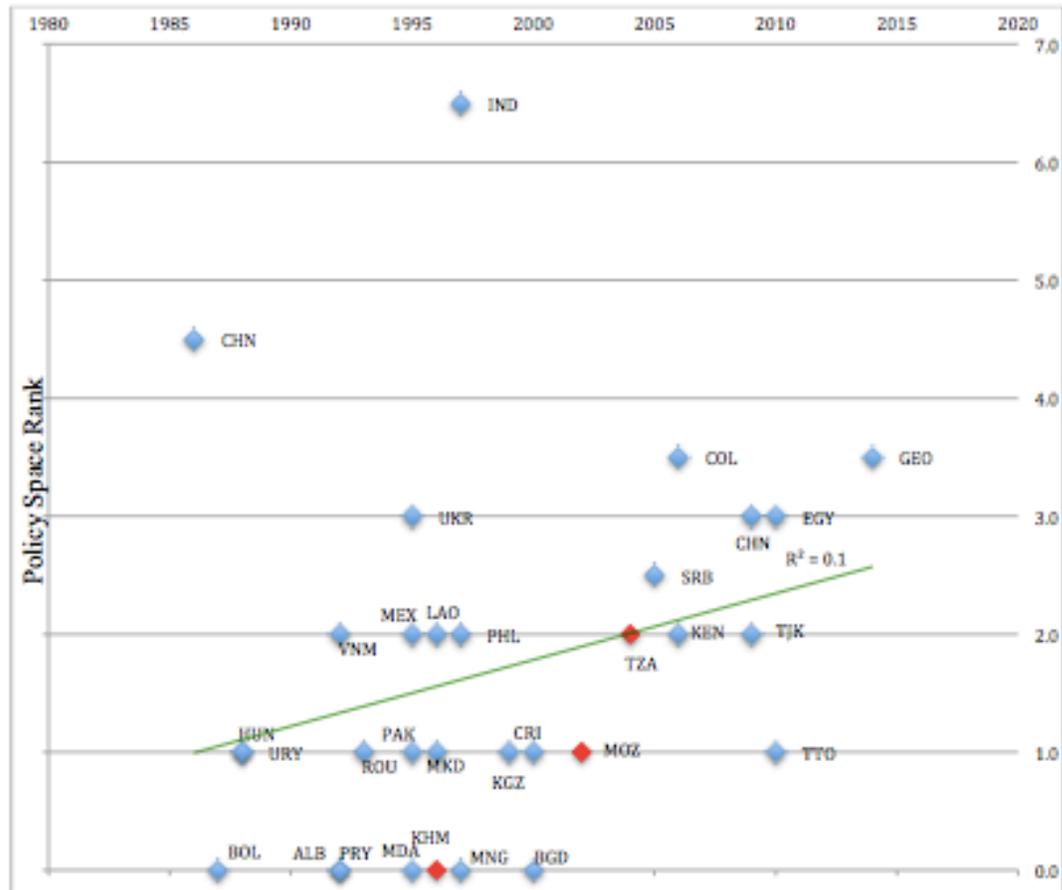
Representing a middle position, the 2009 BIT with China (CHN), which is assigned a “3”, contains a standard Swiss FET provision, a non-impairment provision, a requirement to provide necessary licenses *subject to domestic law*, domestic policy exceptions to the national treatment obligation (but not the most-favored nation treatment obligation),<sup>35</sup> and a relatively narrow umbrella clause. Unlike the treaty with India, however, there is no provision prioritizing domestic dispute resolution of umbrella clause claims.

As this chart shows, there appears to be a slight trend over time toward allowing states greater policy space; that trend is consistent with a broader movement among a number of countries to reform their IIAs. Nevertheless, a simple R-squared analysis shows that the correlation is weak and does not yet reveal any marked shift in BIT policy.<sup>36</sup>

The substantive contents of Swiss IIAs are described below in more detail.

***FET obligation:*** In all of the Swiss BITs with ISDS reviewed, the treaty contains an FET obligation. In none of the BITs or other IIAs with FET provisions is the FET obligation tied to the MST (*cf.* US Model BIT) or otherwise limited (*cf.* CETA and the EU proposal for the TTIP’s investment chapter). Consequently, the FET obligations in Swiss IIAs are susceptible to broad and often unpredictable interpretations by tribunals. As the FET obligation is the main basis for investor claims and state liability in known cases, its content has a significant impact on the assessment of the scope of obligations and constraints on policy space imposed on states.

Figure 1 Strength of Treaty Obligations in Swiss BITs with ISDS



Source: Author's analysis based on a review of BITs and evaluation of the non-discrimination obligations (and exceptions thereto), FET obligation, non-impairment obligation, requirement to provide necessary permits, and umbrella clause obligation.

\* Countries in red are low-income countries.

#### Three-letter Country Codes

China (BIT)	CHN	Ukraine	UKR	Tanzania	TZA
Bolivia	BOL	Cambodia	KHM	Serbia	SRB
Hungary	HUN	Laos	LAO	Colombia	COL
Uruguay	URY	Macedonia	MKD	Kenya	KEN
Albania	ALB	India	IND	China	CHN
Paraguay	PRY	Mongolia	MNG	Tajikistan	TJK
Vietnam	VNM	Philippines	PHL	Egypt	EGY
Romania	ROU	Kyrgyzstan	KGZ	Trinidad & Tobago	TTO
Mexico	MEX	Bangladesh	BGD	Georgia	GEO
Moldova	MDA	Costa Rica	CRI		
Pakistan	PAK	Mozambique	MOZ		

***Non-impairment obligation:*** All of the Swiss BITs with ISDS reviewed except 4 (BITs with China, Vietnam, Laos, and India) contain non-impairment obligations. Because this standard has been interpreted as being similar to the FET standard, the consistent presence of the non-impairment obligation presents similar risks for host states as the FET obligation.

***Obligation to provide permits:*** Except for three agreements (the BITs with China (1986), India, and Georgia),<sup>37</sup> each of the Swiss BITs with ISDS reviewed contains a provision that requires host states to provide foreign investors with any permit necessary for their operations. This provision is not especially common among the existing stock of IIAs.

In 16 of those 28 BITs, the state parties added a caveat, clarifying that a state's obligations to provide necessary permits were "subject to" the state's domestic laws.<sup>38</sup> This caveat makes clear that governments are under no obligation to provide permits (e.g., mineral exploitation permits) where doing so would conflict with domestic laws (e.g., environmental laws). Thus, the test for a breach would be the tribunal's determination of whether the host government complied with its domestic law in determining not to provide the approval. Yet in contrast to domestic law systems, in which the remedy for an unlawful failure to provide a permit would often be a judgment nullifying the unlawful act, ISDS claims would likely award damages as a remedy (which could potentially include total lost profits that would have accrued over the expected lifetime of the investment). Consequently, the removal of these issues to an investor-state tribunal might have consequences for interpretation of domestic law and available damages/remedies.<sup>39</sup>

In 12 of the 28 Swiss BITs, many of which are the older BITs in the sample, there is no such caveat that subjects the obligation to provide permits or other approvals to compliance with domestic law.<sup>40</sup> Rather, the obligation to provide permits appears as a strict, mandatory standard that leaves no room for operation of domestic laws – however important from a policy perspective – that might frustrate operation of a foreign-owned investment.

***Umbrella clause:*** All 31 of the Swiss BITs with ISDS reviewed contain umbrella clauses. A majority of the umbrella clause provisions in those 31 BITs, many of which are among the older treaties in the sample of agreements with ISDS, seem open to an interpretation that they provide foreign investors a private right of action to enforce *any* obligation assumed by the state under domestic or international law.<sup>41</sup> This interpretation significantly expands state vulnerability to ISDS claims.

In contrast, a minority of umbrella clause provisions in the Swiss BITs with ISDS are worded in a narrower manner, indicating that they only provide a means of enforcing extant rights the investors secured through investor-state contracts.<sup>42</sup> While relatively narrow as compared to the provisions that protect "any obligation" assumed by the government toward investors, such provisions still have important policy implications. One crucial implication is that, by moving contract disputes to an arbitration forum, umbrella clauses can displace the role of domestic courts in developing and applying contract law. Particularly in common law jurisdictions, that is an important role of the courts. Courts, for example, are entrusted with identifying elements of valid contracts, and in delineating circumstances in which contracts are void or unenforceable because they are unconscionable in their terms, or violate other policy norms. In this sense, courts can play a role of guardians of the public interest against illegitimate public-private deals. Removing these disputes from the domestic forum – irrespective of whether that forum has shown to be biased or corrupt – weakens the ability of courts to play that oversight role and thereby reduces their ability to scrutinize the legitimacy and enforceability of purported official promises or commitments.

## ISDS

Switzerland's early BITs did not have ISDS; disputes, if any, were to be resolved through state-to-state mechanisms. Among Swiss treaties, advance consent to ISDS first appeared in the agreement signed with Panama in 1983.<sup>43</sup> Among the treaties reviewed for this report, none had ISDS provisions until the treaty signed between Switzerland and China in 1986. In that treaty, ISDS was limited to disputes relating to expropriation. The 1988 BIT with Hungary was similarly limited to allegations of expropriation. Overall, however, from at least the mid-1980s through the present, Swiss BITs have generally contained ISDS provisions permitting arbitration of any disputes arising under the treaty.

Over time, the dispute settlement provisions have remained rather consistent. Most Swiss BITs contain relatively brief ISDS provisions and do not contain the range of clauses that have been included in other IIAs to restrict or limit claims, including mechanisms for early dismissal of frivolous claims, provisions channeling certain issues to an inter-state dispute resolution system, provisions requiring or providing for consolidation of multiple related claims, or provisions preventing claimants from initiating multiple proceedings in different fora.<sup>44</sup>

**Frivolous claims:** In order to protect states against having to incur costs of defending frivolous claims, some treaties concluded over roughly the past 15 years have begun to include mechanisms enabling states to seek and secure prompt dismissal of claims that, on their face, lack merit.<sup>45</sup> None of the Swiss IIAs reviewed contain those provisions.

**State-to-state filters:** A growing number of treaties specify that state officials or an inter-state treaty body have the authority to definitively resolve the merits of certain claims and defenses raised in ISDS. The NAFTA, for example, gives the treaty's Free Trade Commission (FTC) the ability to determine whether a respondent state is covered by reservations it has taken to the non-discrimination obligations and restrictions on performance requirements.<sup>46</sup> Any determination by the FTC is binding on an ISDS tribunal. Similarly, the CETA permits respondent states to ask authorities of the treaty parties whether a taxation measure or financial services-related measure challenged by an investor in ISDS violates the underlying treaty and/or is covered by an exception.<sup>47</sup> The Swiss treaties reviewed do not contain these mechanisms.

**Shareholder claims/multiple lawsuits:** In some Swiss BITs with ISDS, there are provisions that can be used to help guard against multiple claims arising out of the same set of facts. In some cases, these provisions are incorporated in articles on expropriation. More specifically, in some treaties' articles on expropriation, the treaty contains language making it clear that shareholders, in certain circumstances, are able to recover for expropriation of the investment in which they hold shares.<sup>48</sup> In the BIT Switzerland signed with Kenya in 2006, for example, the parties stated:

Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall, to the extent necessary and subject to its laws, ensure that compensation according to paragraph (1) of this Article will be made available to such investors.<sup>49</sup>

This language is important because it implies that, where there is no such language expressly allowing shareholder claims for harms to the company in which they hold shares (e.g., for breach of the FET obligation), such shareholder claims for *company* losses are not permitted under the IIA (though shareholder claims would be permitted for harms to the shareholder's rights as a shareholder such as expropriation of shares, revocation of voting rights, restrictions on

dividends). This interpretation reflects an underlying distinction between shareholder claims for harms to their rights as shareholders, and company claims for harms to the company, while recognizing a narrow circumstance in which shareholders can bring claims for harms to the company. This interpretation of IIAs as generally distinguishing between shareholder and company claims (but allowing some narrow departures) is consistent with corporate law in many jurisdictions.

Yet as noted by the OECD in a series of recent works,<sup>50</sup> the majority of tribunals has adopted a different approach that has allowed shareholders (including minority, non-controlling shareholders) to bring claims for damage to the company in which they hold shares. By adopting this approach, tribunals have permitted:

- states to be subject to multiple claims arising from the same set of facts and same harms to one investment,
- shareholders/claimants to upset settlement or other litigation strategies adopted by corporate management, and
- shareholders/claimants to recover damages directly, at the potential expense of company creditors and shareholders who were not party to the ISDS case.

Swiss investment treaties suggest that, except where otherwise specified, Swiss negotiators did not intend to allow shareholders to be able to directly assert claims for company losses under its investment treaties. Yet the language on this issue is not clear, nor is it always present in Swiss treaties (compare approaches taken in NAFTA<sup>51</sup> and US-CAFTA-DR<sup>52</sup>).

Another approach that can be found in Swiss IIAs is to address these issues in the dispute settlement provisions, as illustrated in the BIT with Mexico. There, the treaty distinguishes between claims brought by investors for harms they suffer and claims brought by investors for harm to the company, and only permits investors to bring claims on behalf of the company if they own or control the company. If non-controlling shareholders bring claims on their own behalf that arise out of the same government actions, those disputes are to be consolidated.<sup>53</sup>

***Treaty shopping:*** Arbitral decisions have tended to permit investors to structure or restructure their investments in order to gain treaty protections, provided that the restructuring was not done after the relevant dispute arose. Consequently, investors can establish a shell corporation in a particular nominal “home” country that has an IIA with the host country, route the investment through that shell company “investor”, and thereby benefit from treaty coverage. An exception is if the treaty clearly indicates that the investor must have real economic ties with the home country. Importantly, Swiss IIAs often have such provisions requiring that company investors have their seat and/or real economic activities in the home country.

Despite these requirements, claimants without significant ties to the home country have tried on several occasions and with varying degrees of success to bring claims under Swiss BITs.<sup>54</sup> A provision in BITs requiring investors to submit proof of its ties with the home country at the time of filing the dispute would help protect host states from having to expend time and financial resources seeking dismissal of claims brought by companies that lack the required connections with the home state.<sup>55</sup>

***Exhaustion of remedies:*** None of the Swiss BITs reviewed contain provisions requiring full exhaustion of domestic remedies to provide domestic courts the opportunity to apply/develop the law and remedy alleged wrongs. Some treaties, however, do require use of domestic proceedings in certain contexts or to a specific degree. The BIT with Egypt requires investors to first pursue

relief through domestic administrative proceedings;<sup>56</sup> and requires investors to pursue contract-based disputes in accordance with any procedure specified under the contract (as opposed to choosing to pursue claims under the treaty's umbrella clause).<sup>57</sup> A few require investors to pursue domestic litigation for a certain period of time (18 months in the 1988 BIT with Uruguay, 6 months in the 2006 BIT with Colombia, and 3 months in the 2009 BIT with China).

Absent any requirement that the investor exhaust remedies, tribunals have interpreted the treaties as imposing no such requirement.

***Few exceptions:*** Swiss BITs largely lack general and specific exceptions or other protections narrowing the scope of treaty obligations and preserving policy space. A minority of BITs reviewed did have some relevant provisions, including:

- essential security exceptions (e.g., 1997 BIT with India, 2010 BIT with Egypt),
- exceptions to the non-discrimination provisions for industrial policy (e.g., 2004 BIT with Tanzania, 2006 BIT with Kenya),
- exceptions to the free transfer obligation (some exceptions to this obligation have been relatively common in treaties concluded over the past decade), and
- exceptions for taxation measures (e.g., 1997 BIT with India, 2006 BIT with Colombia).

Some more modern IIAs, including the 2009 FTA with Japan and the 2014 BIT with Georgia, contain exceptions that address environmental, labor and other issues. The FTA with Japan incorporates the GATS' general exceptions for obligations relating to the making of investments;<sup>58</sup> the BIT with Georgia incorporates an article that is addressed to protecting states' right to regulate in the public interest.<sup>59</sup> It states:

(1) Aucune disposition du présent Accord n'est interprétée comme empêchant une Partie contractante d'adopter, de maintenir ou d'appliquer toute mesure conforme au présent Accord qui vise l'intérêt public, telle que les mesures se rapportant à la santé, à la sécurité, au travail ou à l'environnement ou les mesures prudentielles raisonnables.

2) De telles mesures peuvent être adoptées, maintenues ou appliquées à condition qu'elles ne soient pas mises en œuvre de façon arbitraire ou injustifiable et qu'elles.

The "right to regulate" article in the Swiss BIT with Georgia is consistent with efforts of other governments to limit the circumstances in which good faith measures taken for legitimate public interest purposes can give rise to treaty liability.<sup>60</sup> Such clauses signal an awareness among governments that, especially in light of the significant powers delegated to arbitral tribunals to interpret IIAs' often vaguely worded standards, IIAs can potentially, but are not designed to, impose undue limits on policy space. Yet because such explicit protections for the "right to regulate" are a new feature in investment treaties, their utility in practice is still largely untested.

What current practice does exist raises important questions about whether these provisions will be effective in their purported aims. For instance, the NAFTA includes a provision which, like the Georgia-Swiss BIT, states, "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *otherwise consistent with this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."<sup>61</sup> Reflecting the text's ambiguity, neither states nor

tribunals have appeared to give it any weight in determining whether to accept an investor's challenge to environmental measures.<sup>62</sup>

Right to regulate provisions using the "otherwise consistent with this treaty" language may be subject to a similar fate. Moreover, the "right to regulate" article in the Switzerland-Georgia BIT raises another issue. The second clause adds that a measure otherwise protected by the first "right to regulate" clause will breach the treaty if the measure is implemented in an "arbitrary or unjustifiable way" and constitutes a disguised restriction on investment. Similar to the non-impairment obligation, this second clause in the right to regulate article appears to effectively subject public interest measures to an inquiry by the tribunal as to whether implementation was an "arbitrary" or "unjustifiable" restriction on investment.<sup>63</sup>

### *Conclusion regarding Swiss IIAs' impacts on policy space and potential policy action*

Some aspects of Swiss IIAs are notable for the ways in which they safeguard states' interests. For example, the common requirement that investors have substantive business operations or real economic activities in the home states helps protect host states from exposure due to treaty shopping; additionally, a general absence of provisions on performance requirements leaves governments a greater range of policy tools to use when trying to ensure that the host economy benefits from the foreign investment it receives.

Nevertheless, because of the

- breadth of substantive standards Swiss IIAs include, such as the requirement to provide foreign investors necessary permits,
- relatively vague nature of core standards including the FET obligation,
- minimal policy exceptions, and
- traditional provisions on ISDS, which give rise to problems of frivolous suits, multiple claims, and easy access to supra-national review,

Swiss IIAs leave countries vulnerable to claims and liabilities that can constrain legitimate policy space. While more recent Swiss treaties have refined certain obligations to make them more narrow and precise (e.g., by making the obligation to provide permits subject to domestic law, and by more clearly specifying the types of obligations covered by the umbrella clause), older treaties without those refinements remain in force; moreover, all treaties continue to employ an apparently autonomous and open-ended version of the FET obligation.

Similarly, while modern Swiss BITs like the agreement with Georgia may contain an express recognition by the treaty parties that IIAs should not be interpreted to unduly impair states' right to regulate, the wording used may not provide any meaningful protection.

In order to address these issues, Box 2 lists certain priority actions that can be taken at the domestic policy level and options for implementing reforms in future and existing treaties.

#### **Box 2 Actions and Channels for Protecting Policy Space under IIAs**

##### **Review and Establish Domestic Policy:**

- **Evaluate substantive standards:** Assess whether they are appropriately tailored to meet policy goals of preserving policy space (while protecting investors against the type of government conduct that should be subject to rules and dispute settlement under

international law); in particular, consider the implications of standards that are open to interpretations challenging good faith and non-discriminatory conduct by legislators, regulators, and courts. These standards include the:

- FET obligation;
  - non-impairment obligation;
  - unrestricted obligation to provide licenses and permits;
  - umbrella clause; and
  - obligation to provide compensation for indirect expropriation.
- **Consider appropriate and meaningful exceptions:** To the extent a substantive standard is included that poses risk to and liability for crucial policy action, ensure there are exceptions that can effectively guard against claims and/or liability. Provisions such as broad “right to regulate” clauses that are subject to compliance with the treaty’s obligations provide little cover to government conduct.
  - Evaluate the **role of ISDS** and consider:
    - whether it is necessary in any or all treaties (as opposed to relying on state-state dispute settlement and other mechanisms of investor protection such as contract or risk insurance and human rights treaties);
    - if ISDS is used, consider including
      - **exhaustion requirements** to maintain and help improve the functioning of the domestic legal system, and help reduce speculative claims for damages that are taken directly to ISDS;
      - **filter mechanisms** to remove certain types of issues or disputes to a state-to-state mechanism and away from tribunals; and
      - **additional technical improvements** to the mechanism to reduce frivolous claims, multiple proceedings, treaty shopping, and other abuses.

**Shape new treaties:** The policy issues discussed above can be used to design the content of future agreements, setting the framework – reflected in a model or otherwise – of what must and must not be included in any text that is negotiated.

**Address existing treaties:** As the content of existing treaties is already established, design options are more limited for a large number of treaties; but reform options nevertheless exist and should be pursued as a matter of priority. Steps include:

- **Audit existing treaties** to assess their consistency with policy goals;
- **Terminate and/or renegotiate** “old” agreements that impose significant policy constraints on or liability risks to host countries; and/or
- **Exchange diplomatic notes or take other steps** clarifying the states’ understanding of vaguely worded provisions or controversial interpretations (e.g., the meaning of the FET obligation, the ability of minority shareholders to bring claims for harms to the company).<sup>64</sup>

## 2.2 Do no harm

### 2.2.1 Overview

Home governments risk reputational and potentially legal consequences for supporting outward investments that result in harm to host countries and communities.<sup>65</sup> Relatedly, as part of the National Action Plan process, home governments are increasingly and specifically being called upon to assess and address conduct of their firms operating overseas.<sup>66</sup> Thus, it is important to consider whether IIAs, which are often concluded by home states in order to assist their investors' outward investment activities, have safeguards to help ensure that the IIAs' beneficiaries do not cause egregious harms in their host countries.

One analogous area in which governments have recognized the potential for negative consequences of outward-investment-promotion activities, and have taken steps to prevent those unwanted outcomes, is in connection with providing political risk insurance and export credit insurance. These government-sponsored insurance schemes, which aim to ease the path for outward-oriented enterprises, often incorporate relatively robust screens and systems designed to help ensure that beneficiaries do not have deleterious social, environmental and human rights impacts in host countries.

Policies of Switzerland's SERV,<sup>67</sup> the World Bank's Multilateral Investment Guarantee Agency (MIGA),<sup>68</sup> the United States' Overseas Private Investment Corporation (OPIC),<sup>69</sup> and the OECD's "Common Approaches"<sup>70</sup> are but some of the examples of how governments have dedicated significant effort to ensuring that their investment- and export credit-insurance programs only support enterprises and activities that adhere to specific environmental, social, human rights, and governance standards. These include both *ex ante* screens and *ex post* exclusions. In terms of *ex ante* screens, some of these programs flatly exclude certain types of projects from coverage due to the negative potential environmental and social impacts they may have.<sup>71</sup> Other *ex ante* screens include requirements that the project score above a certain number of points on a "development matrix" that takes into account such factors as job creation, training, private sector development, and technology/knowledge transfer.<sup>72</sup>

In terms of *ex post* exclusions, MIGA's contracts, for instance, specify that MIGA may terminate its coverage if the insurance holder violates *its* contractual obligations to MIGA (which include obligations to operate the investment project in accordance with the host country's laws), materially violates relevant World Bank Performance Standards and Environmental Guidelines, or engages in corrupt, fraudulent, or other wrongful practices.<sup>73</sup> MIGA's contracts also provide that MIGA may terminate the insurance contract if the *investment project* (which is not a party to the insurance contract) materially violates many of those same obligations (e.g., obligations to comply with host state law and the Performance Standards and Environmental Guidelines, and to not engage in money laundering, corruption, or certain other wrongful activities).<sup>74</sup>

In addition to misconduct that constitutes an automatic or permissible ground for terminating the contract or denying coverage, these insurance programs often also state that other misconduct can be a ground for denying coverage if the misconduct contributed to the action taken by the host state/harm suffered by the investor.<sup>75</sup>

Together these examples highlight ways in which home states or institutions have developed tools to ensure that, when actively supporting international investment, their efforts do not inadvertently aid those engaged in wrongful conduct and frustrate sustainable development outcomes in host countries.

Because investment treaties

- share a similar mission with government-sponsored insurance and guarantee programs for supporting outward-oriented firms, and
- raise similar concerns regarding reputational and legal risks for the home state or intergovernmental institution,

investment treaties, like other government efforts to encourage and support outward investment, should be guided by a “do no harm” principle and contain provisions and mechanisms to ensure the principle is made effective in practice.<sup>76</sup>

Importantly, denying IIA protection to certain investors/investments based on their conduct does not mean that host governments have the freedom to abuse those individuals and entities. Rather, it only means that the particularly strong and premium-free political risk insurance provided by IIAs will not be available to those investors or investments. Investors and investments can still avail themselves of other protections and avenues for relief including legal actions in the domestic or other contractually specified forum, political risk insurance from private providers that may not have the same policy constraints as government providers, recourse under relevant human rights instruments that protect rights to property and access to justice, and diplomatic protection (including through state-to-state dispute resolution).

## 2.2.2 Evaluating whether IIAs reflect “do no harm” principles

There are two key routes through which investment treaties can incorporate screens and exclusions similarly denying coverage or protection to investments that might result in harms in the host country. One is in connection with the definition of covered “investments.” Another is through denial of protection at the merits phase. States, however, often do not make such conditions for protection and recovery explicit in their treaties and, absent such language, tribunals have been largely reluctant to interpret treaties as implicitly including those requirements except in two situations.

The first is when tribunals determine that the alleged investment lacks the essential features/characteristics of an “investment” (which is analogous to screens requiring covered investments to score above a certain level on a development matrix). According to some tribunals, the object and purpose of investment treaties compel the conclusion that the term “investment” must have an inherent objective meaning. According to this view, not all assets listed in a BIT’s list of covered “investments” will qualify as such. Rather, the assets must have certain qualities, including that they represent a commitment of resources into the host state for a duration of time, and contribute to the economic development of the host state.<sup>77</sup>

This interpretation of the term “investment” in BITs, however, is not accepted by all arbitrators or commentators. Indeed, disputes under Swiss treaties have shown tribunals to adopt diverging approaches. In *Romak v. Uzbekistan*, the tribunal determined that the claimant’s claims for payment due under a wheat supply contract did not have the qualities of an investment under the relevant Swiss-Uzbek BIT,<sup>78</sup> similarly, in *Alps Finance v. Slovakia*, the tribunal determined that

the claimant's purchase of receivables due from an insolvent Slovak company was not an investment under the Swiss-Slovak treaty.<sup>79</sup> In contrast, in both *SGS v. Pakistan* and *SGS v. Philippines* the tribunals did not interpret the term "investment" to have any inherent objective meaning and determined that the contracts for services at issue in the disputes were included among the assets listed as covered investments under the treaty. As these examples show, absent clear language in the treaty requiring assets to have certain characteristics in order to qualify as "investments," tribunals may, but will not necessarily, apply this screen.

The second circumstance in which tribunals have interpreted IIAs to exclude certain investors/investments from coverage is in cases when there is evidence that the investment was procured through fraud or corruption. Tribunals have been relatively uniform in determining that such investors/investments are not entitled to benefit from treaty protection.<sup>80</sup> Tribunals, however, have held that evidence of fraud, corruption, or other wrongdoing *in the course of operating* the investment will not lead to a loss of treaty protections.<sup>81</sup> In 2014, a tribunal also ruled that there is no international principle of "unclean hands" that prevents investors who have engaged in wrongdoing more generally from benefitting from treaty coverage and invoking ISDS.<sup>82</sup>

Apart from those two circumstances above, tribunals have permitted investors to maintain their cases and have purported to take investor misconduct into account when addressing the merits of investor claims and/or the amount of damages that should be awarded.<sup>83</sup> In a few cases, tribunals have permitted states to bring counterclaims against the investor.<sup>84</sup> These approaches depend on tribunals' exercise of discretion, and have not been guided by any clear rules. Consequently, except in the event of fraud or corruption in the making of an investment, IIAs and the tribunals that interpret them are failing to send investors any easily discernable signals that their knowing or negligent wrongful conduct in the host state will carry any consequences.

As tribunals have evidenced reluctance to impose screens based on investor misconduct, some states have begun including relevant filters/conditions in their models and treaties. Examples include the Southern African Development Community's Model BIT Template,<sup>85</sup> India's Model BIT,<sup>86</sup> and the CETA.<sup>87</sup>

Incorporating such provisions in investment treaties helps ensure that the investment supported by investment treaties does not have negative impacts in the host country. Thus, evaluating whether and to what extent IIAs reflect these "do no harm" principles entails analyzing those treaties to identify whether they have any relevant screens or exclusions.

### 2.2.3 Application to Swiss IIAs

Swiss IIAs, as is the general pattern among the stock of IIAs that exist, tend not to include any express screens or exclusions reflecting a "do no harm" policy in the host country. Thus, in contrast to many government sponsored political risk insurance schemes, investors can seek to avail themselves of the protections of investment treaties irrespective of the conduct of their operations in the host country.

In order to prevent IIAs from promoting or aiding investments that cause harm in the host country, Box 3 below identifies potential priority actions that can be taken at the domestic level and mechanisms for implementing reforms in existing and future treaties.

## Box 3 Actions and Channels for Implementing a "Do No Harm" Principle

### **Review and Establish Domestic Policy:**

- Identify requirements for protection: Identify types of conduct and activities that can be excluded ex ante and/or ex post from the free political risk insurance coverage provided by investment treaties. Investors/investments covered by the exclusions can be excluded from treaty protection entirely or, more narrowly, from access to ISDS;
- Policies can be drawn from practices of political risk insurance providers and further developed in connection with other processes such as the formulation of National Action Plans.
- Potential exclusions can be based on the sector or activity (e.g., development of all or some types of fossil fuel resources, development of large dams), or violation (e.g., engaging in corrupt conduct, violation of fundamental human rights in the host country).

### **Shape new treaties:**

- Ex ante and ex post exclusions can be integrated directly in new models and treaties (and can be designed to be shaped/refined over time by treaty bodies).<sup>88</sup>
- Requirements can also be imposed through domestic law through legislation governing companies incorporated in the home country.

### **Address existing treaties:**

- Interpretive strategies (e.g., exchange of diplomatic notes) can be used to clarify concepts like the definition of “investors” and “investments” and answer questions regarding whether and what types of individuals, entities, and conduct are and are not protected by the treaties.
- Requirements can also be imposed through domestic law through legislation governing companies incorporated in the home country.

## 2.3 Advance labor standards, human rights, and environmental protection

### 2.3.1 Overview

In addition to the questions of whether IIAs restrict policy space for public interest measures and whether they avoid exacerbating harms in the host country, a related question is whether IIAs proactively help ensure that international investment advances host states’ efforts to protect labor rights, human rights and the environment.

The notion that IIAs should help advance performance in these areas has gained increasing ground over recent decades. During negotiations of the Multilateral Agreement on Investment, broad support “emerged for key elements [in the text] to address labour and environmental issues.”<sup>89</sup> More recently, the European Commission announced that its IIAs should be “guided by

the principles and objectives of the Union's external action more generally, including promotion of the rule of law, human rights, and sustainable development."<sup>90</sup>

Reflecting these policy statements, a growing number of IIAs include provisions addressing the environment, labor and human rights. As the OECD reported in 2014:

More than three-fourths of recently concluded IIAs (i.e. between 2008 and 2013) contain language on [sustainable development or responsible business conduct "SD/RBC"] (mainly Free Trade Agreements with investment protection provisions) and virtually all of the investment treaties concluded in 2012 and 2013 include such language. Forty-seven of the fifty-four countries covered by the survey have included some form of SD/RBC language in at least one of their treaties.<sup>91</sup>

Yet despite this trend, due to a large stock of older and long-lived IIAs, only a minority of all IIAs in force contain such labor, human rights, or environmental provisions.<sup>92</sup>

### 2.3.2 Evaluating whether IIAs advance labor standards, human rights and environmental protection

Treaties that address labor, human rights, or environmental issues use a variety of approaches to advance these objectives. These varying approaches can be grouped into five categories, some or all of which can be found in many modern IIAs:

**1. Exceptions or carve-out provisions:** these provisions are used to ensure that, notwithstanding states' treaty obligations, governments retain the policy space to meet environmental, labor, development, or other objectives. These provisions are therefore defensive or reactive in nature, while the four following categories take a more proactive approach to ensuring that IIAs promote sustainable development.

#### *Examples (from Canada-Peru FTA):*

Notwithstanding articles on national treatment, local presence, performance requirements, and senior management and boards of directors:

"Canada reserves the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities."<sup>93</sup>

and

"Canada reserves the right to adopt or maintain any measure with respect to the provision of public law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care."<sup>94</sup>

**2. Non-lowering of standards provisions:** these provisions state that governments should or shall not waive or derogate from their existing labor or environmental standards in order to attract investment.

***Example (from NAFTA):***

“The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.”<sup>95</sup>

- 3. Upgrading provisions:** these provisions call on states to improve and/or maintain labor rights, human rights, and/or environmental protection in line with specified international standards.

***Example (from EU-Singapore FTA):***

3. In accordance with the obligations assumed under the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up adopted by the International Labour Conference at its 86th Session in 1998, the Parties commit to respecting, promoting and effectively implementing the principles concerning the fundamental rights at work, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.

The Parties reaffirm the commitments to effectively implementing the ILO Conventions that Singapore and the Member States of the Union have ratified respectively.

4. The Parties will make continued and sustained efforts towards ratifying and effectively implementing the fundamental ILO conventions and they will exchange information in this regard. The Parties will also consider the ratification and effective implementation of other ILO conventions, taking into account domestic circumstances. The Parties will exchange information in this regard.

5. The Parties recognise that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage.<sup>96</sup>

***Example (from Canada-Benin BIT):***

Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.<sup>97</sup>

- 4. Cooperation provisions:** these provisions call on states to cooperate in achieving specified environmental, labor, or other goals, or in establishing mechanisms or institutions to identify priorities for future cooperation.

***Example (from US-DR-CAFTA):***

1. The Parties recognize the importance of strengthening capacity to protect the environment and to promote sustainable development in concert with strengthening trade and investment relations.

2. The Parties are committed to expanding their cooperative relationship, recognizing that cooperation is important for achieving their shared environmental goals and objectives, including the development and improvement of environmental protection, as set out in this Chapter.

3. The Parties recognize that strengthening their cooperative relationship on environmental matters can enhance environmental protection in their territories and may encourage increased trade and investment in environmental goods and services.

4. The Parties have negotiated an [Environmental Cooperation Agreement “ECA”]. The Parties have identified certain priority areas of cooperation for environmental activities as reflected in Annex 17.9 and as set out in the ECA. The Parties also have established an Environmental Cooperation Commission through the ECA that is responsible for developing, and periodically revising and updating, a work program that reflects each Party’s priorities for cooperative environmental programs, projects, and activities.

5. The Parties also recognize the continuing importance of current and future environmental cooperation activities in other fora.<sup>98</sup>

**5. Special and differential obligations on states:** these provisions, often included in connection with cooperation obligations, call for the developed country partner to provide assistance to the less developed country partner in achieving environmental, social, or other objectives.

*Example (from EFTA-Costa Rica-Panama FTA):*

The Parties agree that this Chapter embodies a cooperative approach based on common values and interests, taking into account the differences in their levels of development as appropriate and the respect of their current and future needs and aspirations.<sup>99</sup>

Table 1 below illustrates how different treaties concluded in 2013 combine some or all of these provisions to address environmental and/or labor issues.

**Table 1 Provisions to Help Ensure IIAs Advance Protection of the Environment (E) and Labor (L) Standards**

Treaty	Non-lowering of E or L standards	Upgrading of E or L standards consistent with international law	Cooperation on E or L issues	Cooperation on economic growth and development	Special and differential obligations
EU-Singapore FTA	Yes; parties shall not derogate from or fail to enforce E or L	Yes for environment, labor, climate change and CSR	Yes; provisions in chapters on “Trade and Sustainable Development” and “Non-Tariff	Yes; provisions in chapters on “Services, Establishment and Electronic	No

	laws through sustained or recurring action/inaction; focus on effect		Barriers to Trade and Investment in Renewable Energy Generation”	Commerce” and “Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation”	
<b>EFTA-Bosnia and Herzegovina</b>	Yes; require enforcement of laws, regulations and standards; parties “shall not” violate L standards for comparative advantage; focus on intent	Yes for environment and labor	Yes; chapter on “Trade and Sustainable Development” has provisions on cooperation on labor, environment, and sustainable development	Yes; provisions on cooperation for economic growth and development in chapter on “Investment, Services and Government Procurement”	No
<b>EFTA-Panama-Costa Rica</b>	Yes; require enforcement of laws, regulations and standards; parties “shall not” violate L standards for comparative advantage; focus on intent; includes unique provision on non-derogation from other public interest measures	Yes for environment and labor	Yes; chapter on “Trade and Sustainable Development” has provisions on cooperation on labor, environment, and sustainable development; “sustainable development” also to be “integrated and reflected” in general cooperative activities per chapter on “Cooperation”	Yes; provisions on cooperation for economic growth and development in chapter on “Cooperation”	Yes; chapter on “Trade and Sustainable Development” takes into account differences in levels of development
<b>China-Switzerland FTA</b>	Yes (for environmental issues, not labor); parties recognize that it is inappropriate to encourage trade/investment by weakening domestic protections	Yes for environment (not labor, though there is a separate agreement on labor)	Yes; chapters on “Environmental Issues” and “Economic and Technical Cooperation” have provisions on cooperation on labor, environment and sustainable development; FTA also refers to separate side agreement for cooperation on labor issues	Yes; provisions on cooperation for economic growth and development in chapter on “Economic and Technical Cooperation”	Yes; chapters on “Environmental Issues” and “Economic and Technical Cooperation” take into account the different levels of social and economic development of the parties
<b>China-Iceland FTA</b>	No	No	Yes; “Cooperation” chapter requires enhanced cooperation on both labor and environment; FTA also refers to separate side	Yes; provisions on cooperation for economic growth and development in chapter on “Cooperation”	Yes, in article on “Development Cooperation”, parties confirm objective of promoting development in China with

			agreement for cooperation on environmental protection		Iceland's assistance
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Source: Lise Johnson and Lisa Sachs, “International Investment Agreements, 2013: A Review of Trends and New Approaches,” in *Yearbook on International Law and Policy 2013-2014* (Oxford University Press 2015).

Examining whether a country’s IIAs contain all or some of these types of provisions helps gauge whether and to what extent that country’s IIAs can operate as tools to advance sustainable development objectives including protection of labor rights, human rights and the environment.

### 2.3.3 Application to Swiss IIAs

Some Swiss and EFTA FTAs contain provisions addressed to advancing labor rights, human rights and the environment. Some examples of this can be seen in Table 1. Since IIAs are premised on the idea that foreign investment can usefully promote sustainable development in the home and host countries, these provisions commit the treaty parties to strengthening regulations that govern international investment, helping to ensure that investments do not perversely undermine sustainable development goals. Without these provisions, the treaties are largely *investor protection* agreements, without any shared responsibilities for ensuring that the investments do not negatively impact society and the environment in the regions in which they are operating.

This approach, however, is largely confined to FTAs, and has not yet become an integral part of BITs concluded by Switzerland, which remain primarily focused on investment protection.

Some steps that can be taken to better enlist IIAs in relevant efforts to improve social and environmental standards and protections are listed below in Box 4.

#### Box 4 Actions and Channels for Using IIAs to Advance Labor Standards, Human Rights, and Environmental Protections

##### **Review and Establish Domestic Policy:**

- Identify criteria for or other policies regarding the types of instruments that should contain these provisions (e.g., only FTAs or also BITs; agreements with countries facing particular environmental, human rights, or labor issues);
- Consider how IIAs can be used to advance other international obligations for cooperative action on environmental, human rights, and labor challenges (e.g., through commitments to promote technology transfer for climate change mitigation and adaptation); and
- Consider how National Action Plans inform content of IIAs’ human rights provisions.

**Shape new treaties:** New models and treaties can be designed to incorporate domestic policy decisions regarding how to more holistically and proactively address investment-related human rights, labor, and environmental issues.

**Address existing treaties:** Certain “old” treaties not addressing labor, human rights, or environmental issues may be ripe for renegotiation; additionally, side agreements could be negotiated and/or treaty bodies (where established) used to ensure that states more effectively

leverage IIAs for progress in these areas.

## 2.4 Increase cross-border investment flows

### 2.4.1 Overview

The 2030 Agenda for Sustainable Development sets forth a set of targets, including for governments to encourage “financial flows, including foreign direct investment, to States where the need is greatest;”<sup>100</sup> “[a]dopt and implement investment promotion regimes for least developed countries”<sup>101</sup>; and “promote investment in energy infrastructure and clean energy technology.”<sup>102</sup> IIAs, in theory, could be enlisted to help meet these targets.

IIAs can also be used to meet objectives regarding technology transfer. In Article 66.2 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement), for example, “[d]eveloped country Members” committed to “provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.” Similarly, parties to the United Nations Framework Convention for Climate Change agreed in 1992 that the “developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country parties.”<sup>103</sup> Because foreign investment is a key channel through which technology transfer occurs, IIAs that effectively increase foreign investment can thereby help advance progress on these commitments.

Yet IIAs do not appear to be serving their investment promotion function. Throughout their history, which is often said to have begun with the signing of the first bilateral investment treaty between Germany and Pakistan in 1959, provisions in investment treaties have largely focused on protecting foreign investors from harms suffered as a result of conduct by their “host” states. This investment protection, it has been contended, can catalyze international investment flows. Although investment treaties might indeed affect how a company structures its investment in the host state (e.g., encouraging investors to route their investments through an intermediate state that has a strong investment treaty with the host state), data is far from conclusive that the treaties have any significant effect on an investor’s decision regarding whether and how much to invest in a particular host destination.<sup>104</sup> As currently designed, therefore, IIAs are failing to live up to their policy promise of catalyzing international investment and technology transfer.<sup>105</sup>

But this does not necessarily have to be the case. Rather than simply imposing obligations on host governments, investment treaties could take a more holistic approach and include commitments on the part of the home state to actively take steps to increase cross-border investment flows, and to place particular emphasis on ensuring that the investment is in sectors and activities consistent with the states’ development objectives. Indeed, as is highlighted below, some treaties are already doing this.

## 2.4.2 Evaluating the potential for IIAs to increase cross-border investment flows

A number of existing treaties illustrate how states can use IIAs to proactively promote cross-border investment. The Cotonou Agreement is one example. Concluded between the EU and the members of the African, Caribbean, and Pacific (ACP) Group of States in 2000 and subsequently amended, the agreement provides for inter-state cooperation and EU assistance in a range of activities that aim to increase cross-border investment flows. These include capacity building for investment promotion agencies, dissemination of information regarding business opportunities in ACP states, provision of risk capital and investment guarantees, and assistance in developing relevant technical, managerial and professional expertise.<sup>106</sup>

Another example of an IIA which includes investment promotion provisions is the Japan-Mexico Economic Partnership Agreement, which contains an article aimed at promoting investment in activities designed to advance sustainable development and tackle the challenges of climate change. It states:

The Parties, recognizing the need for environmental preservation and improvement to promote sound and sustainable development, shall cooperate in the field of environment. Cooperative activities under this Article may include:

- (a) exchange of information on policies, laws, regulations and technology related to the preservation and improvement of the environment, and the implementation of sustainable development;
- (b) promotion of capacity and institutional building to foster activities related with the Clean Development Mechanism under the Kyoto Protocol to the United Nations Framework Convention on Climate Change, as may be amended, by means of workshops and dispatch of experts, and exploration of appropriate ways to encourage the implementation of the Clean Development Mechanism projects;
- (c) encouragement of trade and dissemination of environmentally sound goods and services; and
- (d) encouraging the exchange of information for the identification of investment opportunities and the promotion and development of business alliances in the field of environment.<sup>107</sup>

Most treaties that contain such investment promotion/cooperation provisions state that those provisions are not covered by the relevant treaty's dispute settlement provisions.<sup>108</sup> Instead, to promote compliance with the provisions, IIAs more commonly establish standing institutions responsible for monitoring and implementation. The FTA between the EU and Singapore, for example, establishes a Board on Trade and Sustainable Development and provides for multi-stakeholder input in order to help monitor and implement the state parties' commitments relating to sustainable development. That FTA provides:

### Institutional Set up and Monitoring Mechanism

1. Each Party shall designate an office within its administration that shall serve as contact point with the other Party for purposes of implementing this Chapter.

2. The Parties shall establish a Board on Trade and Sustainable Development (hereinafter referred to as the “Board”). The Board shall comprise senior officials from within the administrations of each Party.
3. The Board shall meet within the first two years after the date this Agreement enters into force and thereafter as necessary, to oversee the implementation of this Chapter.
4. Each meeting of the Board shall include a public session with stakeholders to exchange views on issues related to the implementation of this Chapter. The Parties shall promote a balanced representation of relevant interests, including independent representative organisations of employers, workers, environmental interests and business groups, as well as other relevant stakeholders as appropriate.
5. Each Party shall establish new or make use of existing consultative mechanisms to seek advice from relevant domestic stakeholders on the implementation of this Chapter, such as domestic advisory groups. Such mechanisms shall include balanced representation of independent economic, social and environmental stakeholders. These stakeholders include employers and workers organisations, and nongovernmental organisations. These stakeholders may, on their own initiative, submit views or recommendations to their respective Parties on the implementation of this Chapter.<sup>109</sup>

Establishing such institutions and mechanisms requires resources, but can help ensure that the treaties are living instruments that are effective in meeting their state parties’ goals.

These examples of substantive provisions and procedural mechanisms illustrate the variety of ways states can craft their IIAs to more actively catalyze investment. State parties can use IIAs to promote investment flows generally, increase investment into the less developed country partner, and/or increase investment in particular sectors or activities.

### 2.4.3 Application to Swiss IIAs

Switzerland cited its conclusion of “a high number of bilateral agreements with LDCs, promoting and protecting investments” as among the steps it takes to comply with its Article 66.2 commitments under the TRIPs.<sup>1</sup> Traditional BITs such as those concluded by Switzerland, however, focus on investment protection, not promotion; and, as noted above, investment protection, standing alone, does not necessarily have an effect on investment flows.

In contrast to Swiss BITs, some Swiss and EFTA FTAs do contain provisions on investment promotion; and, over time, the attention given to investment promotion in those agreements has increased.<sup>110</sup> One example of a relatively recent text is the Switzerland-China FTA, which was signed in 2013 and complements the parties’ previously concluded BIT. The FTA contains a chapter (chapter 9) entitled “Investment Promotion” that sets forth areas in which the parties may cooperate in promoting cross-border investment, and provides for the parties to engage in further dialogue regarding investment facilitation and liberalization.<sup>111</sup> The Switzerland-China FTA also

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<sup>1</sup> Switzerland – Report on the Implementation of Article 66.2 of the TRIPs Agreement, Council for Trade-Related Aspects of Intellectual Property Rights: Addendum, October 21, 2014, IP/C/W/602/Add. 4, para. 3.4.

has a more detailed chapter on economic and technical cooperation (chapter 13) which aims, inter alia, to “create and enhance sustainable trade and investment opportunities by facilitating trade and investment between the parties.”<sup>112</sup>

Other examples are the EFTA-Panama-Costa Rica FTA, which contains investment promotion provisions in its chapters titled “Trade and Sustainable Development” (chapter 9), and “Cooperation” (chapter 10); and the Switzerland-Japan FTA, which has a chapter entitled “Promotion of a Closer Economic Relationship” (chapter 13) and establishes a “Sub-Committee on Promotion of a Closer Economic Relationship” in order to advance the chapter’s objectives.

One important inquiry would be whether the state parties to these agreements have implemented their investment promotion plans and commitments under these texts and, if so, whether there are any measurable benefits that have resulted from these treaty provisions and associated activities. Experiences and lessons learned under existing IIAs could be used to better ensure future BITs and FTAs are able to catalyze cross-border investment flows.

This inquiry, as well as other actions and options for more effectively using IIAs to increase investment flows, are listed below in Box 5.

### Box 5 Actions and Channels for Using IIAs to Increase Investment Flows

#### **Review and Establish Domestic Policy:**

- Assess whether such provisions should be included in all IIAs (including BITs) or, for example, only IIAs with countries below a certain income level;
- Evaluate whether there should be a focus on promoting certain types of investment (e.g., investment in infrastructure, or in renewable energy);
- Assess the options for establishing treaty bodies and/or national contact points to ensure effective implementation of IIA-related investment promotion strategies.

**Shape new treaties:** Options adopted through a domestic review process can be implemented in new models and treaties.

#### **Address existing treaties:**

- Review existing provisions and mechanisms on investment promotion in IIAs with a view toward both understanding and improving their effectiveness.
- Renegotiate texts, conclude new side agreements and/or use treaty bodies (where established) to incorporate investment promotion activities in agreements that do not adequately address these issues.

## 2.5 Ensure policy coherence across relevant government policy spheres

### 2.5.1 Overview

As emphasized by Switzerland in its position on a Framework for Sustainable Development Post-2015, policy coherence is essential:

*In order to establish a new holistic framework post-2015, it is essential that all relevant policies that contribute to achieving global goals, for example policies on trade, the financial sector and agriculture, or even those relating to health, social affairs and education, be coherently geared to sustainable development. Improved policy coherence is needed not only at the national but also at the regional and global levels. Although national policies are important for reforms and progress, they must also be complemented by global measures. For this to happen, effective international regimes are necessary. Switzerland advocates that foreign policy should be geared as much as possible to global sustainable development. According to the Federal Council's Sustainable Development Strategy 2012-2015, all the departments of the federal administration make their contribution to sustainable development at the national and at the global level.<sup>113</sup>*

While, as noted above, international investment holds promise for advancing post-2015 development outcomes, it also poses a number of significant challenges, many of which are intensifying and have remained largely unaddressed by both public and private actors. These include the challenges of:

- tackling corruption and kleptocracy;
- improving the rule of law and good governance at all levels and strengthening transparent, effective and accountable institutions; and
- promoting responsible business conduct of international investors and ensuring appropriate accountability of these actors.

Effectively addressing these challenges, which affect and/or are affected by international investment, requires international cooperation. Nevertheless, to date, the IIAs that largely write the rules on international economic governance have largely failed to contain provisions on these issues. Instead, as currently drafted and implemented, IIAs may even exacerbate these problems.

### *Tackling corruption and kleptocracy*

Some risks of policy incoherence and opportunities for policy coherence arise in connection with the scope of investment treaties – namely, who and what the treaties protect. Investment treaties could potentially be enlisted in the fight against corruption in international transactions, efforts to conceal kleptocracy through offshore entities and complex corporate relations, and other egregious violations of the law if investors or investments that engaged in such conduct were denied the benefits of investment treaty protection. Yet, as noted above, the general rule adopted by tribunals is that, unless the treaty expressly states otherwise, investors and their investments will only be denied coverage if the investment was *made* through corruption or fraud by the investor. Other offenses or corrupt or fraudulent activities post-establishment will not affect a tribunal's power to hear the investor's claims.<sup>114</sup>

Arbitrators have also been reluctant to pierce the corporate veil, effectively allowing beneficial owners to cleanse their records of wrongful conduct in the establishment or acquisition of an investment by moving investments from one affiliate to another.<sup>115</sup> Through this approach, tribunals have protected assets secured through kleptocratic transactions, declining to look beyond the superficial legality of an asset transfer from government officials/entities to political insiders or allies at well-below market value.<sup>116</sup> By recognizing such improperly acquired assets

as protected “investments”, arbitral decisions provide them a veneer of legitimacy and – through investment treaty protection – a powerful shield against future attempts to challenge the underlying transaction.

As discussed above, clearer direction to tribunals, including express screens and exclusions, can be used to address these issues.

### *Improving the rule of law and good governance*

IAs are often cited as tools that can be used to improve the rule of law and good governance by holding governments accountable for abuses of authority.<sup>117</sup> Yet while the theory is plausible,<sup>118</sup> it is unclear whether IAs have been effectively playing these roles. Empirical studies examining the issue have found that signing a BIT may have minor negative effects on the rule of law, and that successful ISDS claims might also have a negative, though statistically insignificant impact, on the rule of law.<sup>119</sup>

The lack of an empirical connection between signing an investment treaty and an improvement of the rule of law may be traced to methodological challenges in conducting such analysis; but it is also plausible that IAs may in fact have negative impacts on good governance. For instance, to the extent that IAs make it less risky for foreign investors to invest in jurisdictions with little respect for the rule of law, IAs may dampen the motivation that governments might otherwise have to improve their investment climates so as to be able to attract investment. Similarly, if foreign investors are able to escape the domestic jurisdiction and pursue their legal claims in international arbitration, that may reduce important pressure that would otherwise be placed on the government to improve the domestic legal system, and could undermine the perceived authority and legitimacy of domestic institutions.

Investment treaties could, but do not, contain any provisions or mechanisms regarding capacity building for courts or administrative officials designed to ensure investors (both foreign and domestic) have access to a fair, effective and efficient legal system. Rather, investors are simply able to opt out of that domestic legal system.

Notably, this approach whereby investors are given a direct route to investment arbitration and no effort is made to emphasize the primacy or strengthen the capacity of the domestic system contrasts with the approach taken in international human rights law – another area of law that similarly provides private actors the right to bring claims seeking supra-national of government conduct. In the context of international human rights law, it has been highlighted that the objective of providing for supra-national review of domestic conduct is to “cause States internally to guarantee basic rights and not merely to allow access to the [treaty’s dispute settlement] system.”<sup>120</sup> Correspondingly, requiring exhaustion of local remedies remains important to “force[] applicants both to take every available course and to agitate for change when remedies turn out to be ineffective.”<sup>121</sup> This view – which considers supra-national mechanisms as an instrument for advancing domestic reforms, but recognizes the crucial role of domestic systems as the main targets for and implementers of reforms – seems to apply as forcefully to situations involving violations of international human rights as it does to situations involving violations of economic rights.

IAs might also have potential negative effects on the rule of law and good governance as a result of the method of dispute resolution they incorporate. Although much progress has been made in terms of increasing transparency of investor-state arbitration through adoption of the UNCITRAL

Transparency Rules and Mauritius Convention on Transparency,<sup>122</sup> disputes under most existing IIAs can still be litigated and resolved behind closed doors<sup>123</sup> in proceedings where the decision makers lack the independence and accountability of judicial officials.<sup>124</sup> Even domestic shareholders in the investment, creditors, and other individuals or communities who may be affected by the treaty claims and/or outcomes have no legal right to participate in or shape the proceedings, may not (whether by order of the tribunal or practical limitations) be able to follow developments in the arbitration, and may not even know the outcome of settled or resolved disputes.

These concerns about ISDS – namely, that it (1) provides foreign investors a powerful and privileged route to claims and remedies; (2) can prevent interested and even affected individuals and entities from accessing information about and participating in the proceedings or their outcomes; and (3) delegates significant decision-making authority to individuals who are not accountable to the public, whose decisions are effectively shielded from review, and who are not governed by strong rules on independence and impartiality – raise important questions regarding whether the ISDS system itself is consistent with the principles of equality, transparency, certainty, and accountability that the rule of law embodies.<sup>125</sup>

### *Promoting responsible business conduct*

The standards of protection and remedies available under IIAs provide investors various signals and incentives regarding desirable conduct. Some of these signals and incentives, in turn, may actually discourage responsible business conduct.

A key way through which this happens is through interpretations that discourage investors from taking action to avoid or mitigate harms to individuals, communities or the environment, or to comply with the spirit of the law. This issue arises primarily as a result of the way some tribunals have interpreted the vaguely worded FET obligation. This obligation, which is contained in most IIAs in some form, has emerged as the obligation on which most claims are based, and on which they are most likely to succeed.

One common principle stated in investment treaty decisions is that the FET obligation protects an investor’s “expectations” that its investment will be able to benefit from the legal and business framework that existed at the time its investment was made.<sup>126</sup> As a result, states have been liable for actions taken by any branch or level of government that subsequently interfere with those “expectations.” The purpose of the measure – i.e., whether it is designed to prevent harms to others or to the environment, to adapt the legal framework to changing circumstances, or to reduce government expenditures – and whether it was taken in good faith, is generally deemed by tribunals to be irrelevant to the analysis of whether the measure breaches the treaty. Rather, the focus is on whether the investor had “expectations,” and whether those “expectations” were breached.

The type of “expectations” that are protected are key to determining the scope and significance of treaty standards; and on this issue, tribunals have adopted widely divergent views. The narrowest view is that, for an investor’s “expectation” to be protected by the investment treaty, it must be valid and binding under domestic law.<sup>127</sup> In this sense, the “expectation” is more appropriately characterized – and recognized under domestic law as being – a substantive property right. This is consistent with traditional notions of international law, which recognize domestic law as being responsible for creating and defining the scope of economic or property rights, and international law as placing constraints on the government’s ability to interfere with those existing rights.

Other approaches taken by tribunals, in contrast, represent a departure from that model, recognizing and protecting “expectations” that do not qualify as extant economic or property rights under domestic law.<sup>128</sup> Tribunals have, for example, protected investors’ “expectations” that were generated by non-binding statements or representations made by some government representatives (notwithstanding contrary statements or representations that might have been made by other government entities or officials); the general legal framework existing at the time the investment was made; and the investors’ own expectations as to its business plans.<sup>129</sup>

Recognizing such a broad range of “expectations” as being protected under IIAs, and requiring governments to pay compensation for subsequent actions that interfere with those expectations, can have undesirable consequences for investor and government conduct:

- Allowing investors to rely on representations made by officials or entities (e.g., that an environmental permit will be provided) without the authority to deliver on or bind the government to the promise or assurance made, can discourage investors from doing appropriate due diligence to fully understand the actual requirements of the applicable legal framework, and can enable investors to discount doubts regarding the legality of or support for their plans or operations. This can also frustrate important principles of separation of powers (e.g., by allowing statements by administrative officials to effectively confer enforceable rights on investors even if the process through which those de facto rights were created did not comply with the procedures or substantive rules established by legislation).
- Allowing investors to sue (or threaten suit) for changes in the applicable legal framework (including changes in policies regarding enforcement of existing laws) that increase the investors’ costs of doing business may reduce investors’ incentives to proactively take steps to reduce their risks of being subject to increased compliance costs or penalties. Investors, for instance, may be less likely to adopt voluntary pollution control strategies or other efforts to internalize negative externalities if they believe they can use investment treaties to successfully challenge future government efforts to require such actions and either cause the government to abandon the measure or secure compensation for increased costs they incur as a result of having to comply with the measure. Similarly, in light of tribunal decisions deeming a change in interpretation or enforcement of existing legislation to constitute a violation of the FET obligation, investors may be more willing to adopt aggressive tax positions if there had been a history of lax enforcement of tax rules in the host country.

In light of some interpretations of the FET standard, therefore, there is a risk that investors will bring investment treaty claims to challenge changes in laws, regulations, or enforcement practices or policies that impose new costs or constraints on the operations of investment, even if the changes do not interfere with vested economic or property rights held by individuals or companies, and irrespective of the purpose of the measure. Beyond the questions this raises about government policy space, it also has implications for investor conduct.

Treaty standards can potentially be shaped to limit or even bar such claims. As noted above, for example, states have adopted different strategies to narrow the scope of a key source of claims and liabilities, the FET obligation. Some states have done so by expressly tying the standard to the MST, and others by identifying the types of conduct that do and do not constitute a breach. In addition to those approaches, states have also included language to further prevent aggressive litigation.

For instance, in addition to its provisions attempting to rein in interpretations of the FET obligation, the CETA adds a range of clarifications, including one on taxation that states:

For greater certainty, the fact that a taxation measure constitutes a significant amendment to an existing taxation measure, takes immediate effect as of its announcement, clarifies the intended application of an existing taxation measure, or has an unexpected impact on an investor or covered investment, does not, in and of itself, constitute a violation of Article X.9 (Treatment of Investors and of Covered Investments).

This clarification<sup>130</sup> is noteworthy because it illustrates the challenges of controlling interpretations of IIA standards and preventing their abuse. By including this clarification, the treaty parties imply that they considered investors might have otherwise succeeded on such claims notwithstanding the state parties' effort to narrow the FET obligation (see Annex II).

This clarification is also noteworthy in that, while it narrows the scope of the treaty as it applies to taxation measures, the exception raises questions about whether and to what extent such claims could be brought based on analogous actions in other areas of policy. The taxation clarification arguably implicitly recognizes the risk of successful claims for such actions as significant amendments to environmental legislation, changes in policies and practices regarding enforcement of environmental laws, and environmental measures that have unexpected impacts on covered investments. Environmental measures do not receive the added protections that taxation measures do.<sup>131</sup> Consequently, opportunities remain open for investors to use the agreement to challenge and potentially recover damages for good faith actions to strengthen environmental protections.

These opportunities for litigation, in turn, have ramifications for investors' responses to actual and potential regulatory actions. Such issues are important to consider when assessing whether IIAs and ISDS send investors signals that help promote responsible business conduct.

## 2.5.2 Evaluating policy coherence of IIAs

The section above highlighted a range of issues that can be affected by IIAs. It is not an exhaustive discussion, but merely illustrates the connections that IIAs have with, and potential impacts IIAs have on, other policy areas.

The task of evaluating the policy coherence of existing and future IIAs will vary from state-to-state in terms of the issues that are addressed; but there are various processes can be used to ensure that the exercise is done. Some states, for example, secure input on treaty policies and/or model BITs from the public as well as from different agencies or ministries of government. Additionally, some governments seek inter-agency reviews of briefs and positions submitted to tribunals on the meaning of treaty obligations.

Once policies regarding existing and/or future IIAs are adopted, some steps to implement them require action to be directed to actors at the international level – e.g., through termination or (re)negotiation of treaties, and input in disputes. Other actions can be directed toward domestic actors. To address issues of transparency, for example, a home state can pass legislation requiring domestic individuals or entities filing claims under the home state's treaties to comply with such requirements as obligations to directly notify the home state and other shareholders or creditors of the case, to disclose information about the claimant and its beneficial owner to the host state, and to make public any documents submitted in ISDS.

### 2.5.3 Application to Swiss IIAs

The preambles of modern Swiss IIAs reflect a commitment to policy coherence, drawing the links between those agreements and related issues such as protection of human rights and the environment, promotion of good governance, and efforts to combat corruption. In practice, however, there remains a risk of policy incoherence. With respect to the issues discussed above, for example, Swiss IIAs, like many other IIAs:

- do not specify any consequence for serious investor misconduct such as fraud or bribery during the operation of the investment;
- do not set forth rules on when it is appropriate or necessary to pierce the corporate veil;
- do not require transparency of ISDS disputes (except for a provision in the 2014 Swiss-Georgia BIT);
- do not expressly require exhaustion of domestic remedies; and
- may provide disincentives for responsible business conduct due to treaty standards that allow investors to bring challenges for good faith changes in the legislative and regulatory status quo.

In light of the significant powers tribunals have to give precise meaning to treaty provisions on jurisdiction and the merits, and the number of older Swiss treaties in force that are especially susceptible to being invoked in ways unintended and undesired by the state parties, the task of ensuring policy coherence becomes even more difficult – and pressing.

Box 6 below highlights some action areas and options for addressing these issues in new and existing treaties.

#### Box 6 Actions and Channels for Increasing Policy Coherence

**Review and Establish Domestic Policy:** Establishing and maintaining coherence between IIAs and other areas of policy is, to a significant extent, about process – namely, ensuring that various stakeholders within and outside of the government have the opportunity to identify and raise potential issues of inconsistency. Relevant actions include:

- ensuring inter-departmental/inter-ministerial communication and input on IIA policy (including whether and in what circumstances to conclude the treaties);
- providing inter-departmental/inter-ministerial opportunities to comment on submissions to the tribunal that are made when the government is a respondent state, as well as when the government is making non-disputing party submissions in other disputes;
- increasing dialogue with lawmakers regarding IIA plans and policies; and
- establishing a multi-stakeholder committee to provide input on investment policy; members may include representatives from the private sector, non-governmental organizations, academia, and labor.

**Shape new treaties:** Processes established at the domestic level can be used to craft the content of new negotiating policies and priorities and/or new models.

**Address existing treaties:** Various steps can be taken to ensure that efforts to increase policy coherence also address the large stock of existing treaties. These include:

- using domestic processes to develop policies and priorities for termination and/or

- renegotiation;
- exchanging diplomatic notes and or using other interpretive tools to help ensure that outcomes of review processes (e.g., understandings of vague treaty provisions) are applied to existing agreements;
  - adopting international instruments such as the UNCITRAL Transparency Convention to reform a broad set of existing agreements and bring them in line with current policies; and
  - using domestic legislation to govern the conduct of domestic individuals and entities in a manner that increases policy coherence (e.g., by requiring them to disclose documents produced in ISDS and to disclose facts necessary to establish their identities and connection to the home state).

### 3. Concluding Recommendations

Evaluating Swiss IIAs against five factors -

1. Maintain legitimate policy space and allow legal and regulatory frameworks to evolve over time to address new challenges and changing circumstances;
2. Do no harm;
3. Advance labor standards, human rights, and environmental protection;
4. Increase cross-border investment flows; and
5. Ensure policy coherence across relevant government policy spheres,

- helps reveal the extent to which those agreements are consistent with advancing sustainable development objectives.

The most pressing and complex challenges of Swiss IIAs relate to the first and last factors – maintaining legitimate policy space and ensuring policy coherence. In significant part, this relates to the fact that, once treaties are concluded, ISDS tribunals are delegated the power to give IIAs’ vaguely worded standards more precise meaning. The policy space state parties think they retain, and the policy coherence states believe they have achieved, will not necessarily be reflected in tribunal decisions.

These persistent challenges of ensuring policy space and policy coherence raise fundamental questions about the scope of Swiss IIAs (i.e., who and what is protected), the meaning of IIA obligations and exceptions thereto (what type conduct is permitted/prohibited), and the design and merits of ISDS. When answering those questions, it is important to start from scratch, conducting an overall assessment of the domestic and international objectives of investment treaties, and an evaluation of how to achieve those objectives without the costs of doing so exceeding the gains. Given the fundamental re-assessments of these instruments that governments around the world are undertaking, there is no need to take any given model as a starting place.

Other states have started to respond to these challenges by, for instance, not concluding additional IIAs, clarifying the FET obligation or other substantive provisions in newer IIAs, excluding all or some of those substantive obligations from the agreements, inserting additional exceptions, and refining ISDS, excluding its availability in certain contexts, or only permitting it in certain IIAs.

For existing treaties, states can unilaterally or jointly terminate treaties, renegotiate agreements, or exchange diplomatic notes or other forms of agreement to provide clarity to interpretation of vague provisions. The options are thus diverse and merit serious consideration, particularly in light of the fact that the Swiss IIAs reviewed tend to present relatively high risks to policy space.

Turning to the second factor – whether IIAs are consistent with a “do no harm” principle – practice from export insurance and political risk insurance schemes illustrates both why and how IIAs can similarly impose conditions on investors’ ability to benefit from the free political risk insurance they get through IIAs. In addition to treaty solutions, Switzerland, in its role as a home state, can impose relevant conditions on its investors through domestic legislation and can require, for example, a statement of compliance with investor obligations to be filed with initiation of any investor-state dispute.

With respect to the third and fourth factors, growing precedent among Swiss and other treaties illustrates approaches the government can take in order to use its IIAs to advance protection of human rights, labor rights, and the environment, and to increase cross-border investment flows. While not common in older IIAs, provisions directed to such aims are increasingly included in modern agreements, particularly FTAs but also BITs, and are critical for more fully leveraging the power of IIAs to advance sustainable development objectives. An assessment of whether and to what extent these provisions have led to practical actions and tangible outcomes would be useful for design of similar provisions in new treaties and amendments to existing texts without such clauses.

Importantly, timing is ripe for considering each of these issues of IIA policy due to agreements on the SDGs, FfD, and the upcoming agreement on climate change, and due to heightened debate on the nature, purpose, and design of IIAs.

## Annex I. Treaties Reviewed

As noted in the main text, this paper was based on an in-depth review of 40 IIAs (5 early bilateral investment treaties (BITs) without ISDS, 31 BITs with ISDS, 2 free trade agreements (FTAs), and 2 FTAs concluded by the EFTA states).

The agreements were selected to include texts Switzerland has concluded over a 50-year time period with countries from all geographic regions and different income levels. The selection was also designed to allow for an examination of evolution in treaties over time. Thus, certain countries' agreements were included in the sample because those countries had concluded an early BIT with Switzerland, and then replaced and/or supplemented that text with a subsequent BIT and/or FTA. Moreover, by including BITs, FTAs, and EFTA agreements, the sample aimed to facilitate an examination of variations among different types of IIAs. Finally, some treaties were selected that had been used by investors in ISDS. This was done in order to enable a review of how treaty provisions in Swiss IIAs are being invoked and applied in practice.

<b>COUNTRY</b>	<b>YEAR OF SIGNATURE</b>
Costa Rica (no longer in force; replaced by BIT signed in 2000)	1965
Tanzania	1965
Egypt (no longer in force; replaced by BIT signed in 2010)	1973
Indonesia	1974
Mali	1978
<b>BITs with ISDS</b>	
China (no longer in force; replaced by BIT signed in 2010)	1986
Bolivia	1987
Hungary	1988
Uruguay	1988
Albania	1992
Paraguay	1992
Vietnam	1992
Romania	1993
Mexico	1995
Moldova	1995
Pakistan	1995
Ukraine	1995
Cambodia	1996
Laos	1996
Macedonia	1996
India	1997
Mongolia	1997
Philippines	1997
Kyrgyzstan	1999

Bangladesh	2000
Costa Rica	2000
Mozambique	2002
Tanzania	2004
Serbia	2005
Colombia	2006
Kenya	2006
China	2009
Tajikistan	2009
Egypt	2010
Trinidad & Tobago	2010
Georgia (not in force)	2014
<b>FTAs</b>	
China	2013
Japan	2009
<b>EFTA FTAs</b>	
Macedonia	2000
Colombia	2008

## **Annex II. Sample Provisions on FET**

This annex is included to help illustrate the textual differences between treaties that include an FET obligation that is (1) not expressly tied to the MST or otherwise limited; (2) expressly tied to the MST; and (3) otherwise limited through list of conduct required or prohibited by the FET obligation.

### **1. Provision adopting a standard approach (untethered/unlimited)**

#### Switzerland-Georgia BIT

Art. 4: Protection, traitement

(1) Les investissements des investisseurs de chaque Partie contractante bénéficient en tout temps d'un traitement juste et équitable et jouissent d'une protection et d'une sécurité pleines et entières sur le territoire de l'autre Partie contractante. Aucune Partie contractante n'entrave d'une quelconque manière par des mesures injustifiées ou discriminatoires la gestion, l'entretien, l'utilisation, la jouissance, l'accroissement ou l'aliénation de tels investissements.

#### Switzerland-Colombia BIT

Article 4: Protection and Treatment

...

2. Each Party shall ensure fair and equitable treatment within its territory of the investments of investors of the other Party. This treatment shall not be less favourable than that granted by each Party to investments made within its territory by its own investors, or than that granted by each Party to the investments made within its territory by investors of the most favoured nation, if this latter treatment is more favourable.

...

\* \* \*

### **2. Provision tying FET to MST**

#### 2012 US Model BIT

Article 5: Minimum Standard of Treatment<sup>9</sup>

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

<sup>9</sup> Article 5 [Minimum Standard of Treatment] shall be interpreted in accordance with Annex A.

#### Annex A

##### Customary International Law

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5 [Minimum Standard of Treatment], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

#### CAFTA-US-DR

##### Article 10.5: Minimum Standard of Treatment<sup>1</sup>

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

<sup>1</sup> Article 10.5 shall be interpreted in accordance with Annex 10-B.

Annex 10-B

Customary International Law

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Articles 10.5, 10.6, and Annex 10-C results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

\* \* \*

### **3. Provision specifying what FET does/does not include**

CETA

Article X.9: Treatment of Investors and of Covered Investments

1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 6.

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:

- (a) Denial of justice in criminal, civil or administrative proceedings;
- (b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
- (c) Manifest arbitrariness;
- (d) Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
- (e) Abusive treatment of investors, such as coercion, duress and harassment; or
- (f) A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment may develop recommendations in this regard and submit them to the Trade Committee for decision.

4. When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

5. For greater certainty, ‘full protection and security’ refers to the Party’s obligations relating to physical security of investors and covered investments.

6. For greater certainty, a breach of another provision of this Agreement, or of a separate international Agreement, does not establish that there has been a breach of this Article.

### EU Commission proposal for TTIP

#### Article 3: Treatment of Investors and of Covered Investments

1. Each Party shall accord in its territory to covered investments of the other Party and investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 5.

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or a series of measures constitutes:

- (a) denial of justice in criminal, civil or administrative proceedings; or (b) fundamental breach of due process, including a fundamental breach of transparency and obstacles to effective access to justice, in judicial and administrative proceedings; or
- (c) manifest arbitrariness; or
- (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or
- (e) harassment, coercion, abuse of power or similar bad faith conduct; or
- (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

3. The Parties shall, upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The [...] Committee (reference to article on Services and Investment Committee) may develop recommendations in this regard and submit them to the [...] Committee (reference to article on Trade Committee). The [...] Committee (reference to article on Trade Committee) shall consider whether to recommend that the Agreement is amended, in accordance with Article [relevant procedures for the amendment of the Agreement].

4. When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

5. For greater certainty, ‘full protection and security’ refers to the Party’s obligations relating to physical security of investors and covered investments.

6. For greater certainty, a breach of another provision of this Agreement, or of any other international agreement, does not constitute a breach of this Article.

## **Annex III. Claims Pursued by Swiss Investors under Swiss Investment Treaties**

This annex collects information about cases filed under Swiss treaties. It identifies 23 treaty-based ISDS disputes based on information collected from the ICSID website, italaw.com, UNCTAD’s database of ISDS cases, *Investment Arbitration Reporter (“IARReporter”)*, and Matthias Scherer, “Inventory of Arbitration Proceedings Based on Swiss Bilateral Investment Treaties (BIT),” 33 ASA BULLETIN 1 (March 2015). The information consists of information that was reported as of October 1, 2015.

For each case, available information regarding the date the claim was initiated, the nature of the investment, the nature of the claim, and the status or outcome of the proceedings is noted. In a row on “transparency”, this annex also notes whether and to what extent information about the dispute is publicly available, and whether and to what extent non-parties to the dispute (i.e., amicus curiae) have been able to participate in the proceedings.

There are a number of reasons why it is important for the home state to gather information about how its treaties are being used. Such information, for example, can help the home state identify whether the treaties are serving their intended purpose(s), and relatedly, whether and to what extent the treaties are being used in a manner consistent with sustainable development objectives (e.g., are they being used to challenge important environmental, health, and safety regulations? are they being used to hold governments accountable for egregious conduct that would otherwise go unremedied?). This information can also help home states identify whether claimants are asserting arguments and tribunals are issuing interpretations with which the home state agrees, and helps ensure that home states can make submissions to tribunals on questions of treaty interpretation.

The cases are listed in alphabetical order by the name of the claimant.

<b>Case Name</b>	<b>Alimenta SA v. Gambia, ICSID Case No. ARB/99/5</b>
<b>Date initiated</b>	Registered at ICSID July 12, 1999
<b>Project/Investment</b>	Investor engaged in a groundnut enterprise
<b>Nature of Claim</b>	Unknown
<b>Outcome</b>	Proceedings discontinued May 3, 2001 per settlement; the terms of the settlement are unknown.
<b>Transparency</b>	Only the existence of the dispute is known per ICSID rules; the nature of the claims and settlement are not publicly known.

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<b>Case Name</b>	<b>Alpiq AG v. Romania, ICSID Case No. ARB/14/23</b>
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<b>Date initiated</b>	Registered at ICSID November 17, 2014
<b>Project/Investment</b>	Long-term energy supply contracts between Alpiq's two subsidiaries and an insolvent Romanian SOE
<b>Nature of Claim</b>	The investor alleges that the termination in bankruptcy proceedings of long-term energy supply contracts with the insolvent SOE constitutes a violation of the Switzerland-Romania BIT and the Energy Charter Treaty (ECT). The exact allegations/bases of treaty claims are not known.
<b>Outcome</b>	Pending
<b>Transparency</b>	TBD: the case is only in an early phase; the existence of the case is known per ICSID rules, but other early documents such as the investor's notice of claim have not been made public.

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<b>Case Name</b>	<b>Alps Finance and Trade AG v. Slovakia, UNCITRAL</b>
<b>Date initiated</b>	Unknown; claimant appointed its arbitrator on January 19, 2008
<b>Project/Investment</b>	Purchase of receivables from a Slovak business
<b>Nature of Claim</b>	The claimant had contracted to purchase certain receivables owed to a Slovak business from an insolvent debtor. When a Slovak court decision rendered the claimant unable to enforce its claims against the bankrupt debtor, the claimant brought this BIT action, alleging violation of the articles on FET, FPS, and expropriation. Although the tribunal did not reach the merits of the claimant's claims, the tribunal stated that those claims were "highly unlikely" to succeed on the merits.
<b>Outcome</b>	Case dismissed for lack of jurisdiction. Although the claimant was incorporated in Switzerland, the tribunal determined that the company did not have its "seat" or "real economic activities" in the country as required under the BIT between Switzerland and the Slovak Republic. The tribunal also considered that mere purchase of receivables did not possess the characteristics of an "investment".
<b>Transparency</b>	Only a heavily redacted copy of award has been made available; it was disclosed due to a Freedom of Information Act request to Slovak government by journalists.

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<b>Case Name</b>	<b>Border Timbers Ltd, Border Timbers International (Private) Ltd., and Hangani Development Co. (Private) Ltd. v. Zimbabwe, ICSID Case No. ARB/10/25</b>
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<b>Date initiated</b>	Registered at ICSID December 20, 2010
<b>Project/Investment</b>	Commercial farms and forestry business
<b>Nature of Claim</b>	The claimants allege their estates were illegally expropriated as a result of Zimbabwe's land redistribution program. The claimants also allege that Zimbabwe breached the FET and FPS obligations by failing to provide adequate protections against invasion of the claimants' lands.
<b>Outcome</b>	Award rendered on July 28, 2015. Outcome unknown as of September 30, 2015.
<b>Transparency</b>	<p>The existence of the dispute is known as per ICSID rules; some procedural documents have also been made available.</p> <p>The tribunal rejected a petition by the European Center for Constitutional and Human Rights (ECCHR) and a group of indigenous communities in Zimbabwe to submit an amicus brief. The indigenous communities claimed rights to occupy the lands at issue in the ISDS dispute.</p> <p>The tribunal based its decision to reject the amicus petition on the following reasons and conclusions: (1) the interests of the would-be amicus curiae were adverse to the claimants; (2) human rights law was, according to the tribunal, not relevant to the dispute; (3) questions regarding the rights of indigenous communities were not within the scope of the dispute; and (4) that, while ECCHR's mission and expertise related to corporate responsibility for human rights violations, no such allegations of corporate misconduct had been made in the BIT dispute.</p>

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<b>Case Name</b>	<b>Bryn Services Ltd. v. Latvia</b>
<b>Date initiated</b>	Unknown
<b>Project/Investment</b>	The investment is reportedly deposits in a Latvian bank.
<b>Nature of Claim</b>	The details are unknown, but the case is reported to relate to the Latvian government's takeover of a troubled Latvian bank in which the investor was a major depositor.
<b>Outcome</b>	The case settled in 2014.
<b>Transparency</b>	Non-transparent; the only information about the dispute has been reported by <i>IARporter</i> .

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<b>Case Name</b>	<b>Cervin Investissements SA and Rhone Investissements SA</b>
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**v. Costa Rica, ICSID Case No. ARB/13/2**

<b>Date initiated</b>	Registered at ICSID March 11, 2014
<b>Project/Investment</b>	Natural gas distribution project
<b>Nature of Claim</b>	The claimants brought this action to challenge and seek roughly \$30 million in compensation for the government's actions setting the price of and imposing a levy on liquid petroleum gas (LPG). The claimants also reportedly challenged measures of the Ministry of Environment, Energy and Transport.
<b>Outcome</b>	<p>Pending. In a decision on jurisdiction issued December 15, 2014, the tribunal upheld jurisdiction over the claimants' FET claims relating to the tariff and other regulatory charges.</p> <p>The claimants are incorporated in Switzerland and beneficially owned by the Zeta Group, a Mexican parent company. Prior to establishment of the Swiss companies in 2010, Zeta Group subsidiaries had sought diplomatic protection from Mexico and filed a notice of intent to initiate an ISDS case under the BIT between Switzerland and Mexico. The tribunal rejected Costa Rica's argument that the tribunal should reject jurisdiction over the claimants' claims on the ground that the claimants were established through a corporate restructuring for the sole purpose of gaining access to ICSID arbitration under the Costa Rica-Switzerland BIT. Although the tribunal agreed with Costa Rica that restructuring the investment for the sole purpose of gaining access to ICSID jurisdiction would be improper, it determined that (1) it was Costa Rica's burden to prove that the restructuring was done for the sole purpose of obtaining the treaty's protection (as opposed to, e.g., for tax reasons), and (2) that Costa Rica had failed to meet that burden.</p>
<b>Transparency</b>	The existence of the dispute is known as per ICSID rules; the decision on jurisdiction has been publicly released.
<b>Other</b>	The underlying treaty requires an investor's "seat" to be in the home country, but does not require "real economic activities" in the home country. The decision on jurisdiction indicates that Costa Rica may have conceded that the claimants had their "seat" in Switzerland.

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<b>Case Name</b>	<b>Credit Suisse First Boston v. India, UNCITRAL</b>
<b>Date initiated</b>	2004
<b>Project/Investment</b>	Unknown
<b>Nature of Claim</b>	Unknown

<b>Outcome</b>	Settled
<b>Transparency</b>	Non-transparent; the only information about the case is its existence as noted on the UNCTAD website.

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<b>Case Name</b>	<b>Emmis International BV (Netherlands), Emmis Radio Operating BV (Netherlands) and MEM Magyar Electronic Media v. Hungary, ICSID Case No. ARB/12/2</b>
<b>Date initiated</b>	Registered at ICSID July 18, 2012
<b>Project/Investment</b>	Radio broadcasting venture; one of the claimants, MEM Magyar Electronic Media is controlled by a Swiss national
<b>Nature of Claim</b>	The claimants objected to the government’s decision not to renew their radio broadcasting licenses; in connection with that argument, the claimants also argued that the government improperly failed to provide them with an “incumbent advantage”.
<b>Outcome</b>	In an award issued April 16, 2014, the tribunal rejected the claimants’ claims on the ground that they had no right to have their licenses renewed or to obtain an “incumbent advantage”.
<b>Transparency</b>	The existence of the dispute is known as per ICSID rules; the decision on jurisdiction has been publicly released.
<b>Other</b>	The underlying treaty between Switzerland and Hungary (like the underlying treaty between the Netherlands and Hungary) only permitted ISDS for expropriation claims.

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<b>Case Name</b>	<b>Flughafen Zürich AG and Gestión e Ingeniería IDC SA v. Venezuela, ICSID Case No. ARB 10/19</b>
<b>Date initiated</b>	Registered at ICSID August 9, 2010
<b>Project/Investment</b>	20-year concession to operate an airport on Isla Margarita
<b>Nature of Claim</b>	The claimants (one Chilean company and one Swiss company) brought claims under their respective BITs alleging that Venezuela’s take-over of the airport expropriated their investment. The claimants also alleged that related administrative measures and two decisions of the Venezuelan Supreme Court violated the FET obligation.
<b>Outcome</b>	In an award rendered November 18, 2014, the tribunal determined

that Venezuela expropriated the claimants' investments; and although the tribunal rejected the investors' claims that various administrative measures violated the FET obligation, a majority of the tribunal did accept their arguments that one decision by the Supreme Court constituted a denial of justice in breach of the FET obligation.

The tribunal awarded each investor \$9.7 million, interest running from the date of the expropriation, a majority of their legal fees and costs, and the claimants' share of the arbitration costs. The total award exceeded \$30 million.

**Transparency** The existence of the dispute is known as per ICSID rules; other documents (award, dissent, and decision on proposal to disqualify expert witness) have been made public.

**Case Name** **Holcim Ltd., Holderfin B.V., and Caricement B.V. v. Venezuela, ICSID Case No. ARB/09/3**

**Date initiated** Registered at ICSID April 10, 2009

**Project/Investment** Cement manufacturer

**Nature of Claim** Holcim brought a claim arguing that Venezuela violated its previous agreement to pay Holcim \$550 as compensation for nationalizing Holcim's assets.

**Outcome** Holcim and Venezuela filed a request to suspend the proceedings on September 10, 2010, after agreeing to settle the dispute. Reports are that, under the terms of the settlement, Venezuela agreed to pay \$650 million to Holcim. Of that amount, \$260 million had already been paid and the remainder was to be paid over the course of four years. In December 2014, Holcim reported that the last of the installment payments had been paid.

**Transparency** The existence of the dispute is known as per ICSID rules; the terms of the settlement and updates on payment are publicly available at Holcim's website.

**Case Name** **Intersema Bau AG v. Libya, UNCITRAL**

**Date initiated** Initiated in 2008; exact date not publicly known

**Project/Investment** A series of construction contracts with a Libyan municipality and a settlement agreement with the Libyan government; the settlement agreement at issue in the dispute was reportedly deemed not to be an "investment" by the tribunal; rather, the agreement arose out of the original investments (the construction contracts).

<b>Nature of Claim</b>	The investor settled a contract dispute with the government for roughly SFr 31 million. After the government withheld payment of SFr 13 of that amount, the investor brought suit under the BIT, and sought recovery of the full sum of SFr 140 million that it would have allegedly been owed absent the settlement agreement.
<b>Outcome</b>	In a January 2010 award, the tribunal reportedly found Libya liable for violating the Libya-Switzerland BIT's umbrella clause and FET obligations due to the government's failure to abide by the settlement agreement. The tribunal did not accept the government's reasons for nonpayment. As compensation, the tribunal awarded the unpaid amount under the settlement agreement, rejecting the claimant's request for the larger sum of SFr 140 million.
<b>Transparency</b>	The documents are not public but the outcome has been reported on by journalists.

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<b>Case Name</b>	<b>Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Venezuela, Case No. ARB/11/19</b>
<b>Date initiated</b>	Registered at ICSID July 19, 2011
<b>Project/Investment</b>	Fertilizer plant
<b>Nature of Claim</b>	The claimants are reportedly suing Venezuela based on the government's nationalization of their fertilizer plant.
<b>Outcome</b>	Pending
<b>Transparency</b>	The existence of the case is known as per ICSID rules; submissions by the parties and interim decisions/orders by the tribunal are not public.

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<b>Case Name</b>	<b>Konsortium Oeconomismus v. Czech Republic, UNCITRAL</b>
<b>Date initiated</b>	On July 31, 2008, claimant requested damages and sought conciliation under the Switzerland-Czech Republic BIT
<b>Project/Investment</b>	Proposed development of waste incineration plant
<b>Nature of Claim</b>	Unclear
<b>Outcome</b>	Case dismissed on December 5, 2011, due to the claimant's failure to prosecute its claims; the tribunal ordered the claimant to pay the Czech Republic's legal fees and costs.
<b>Transparency</b>	The Czech government released the award after a request was made

under the government's law on freedom of information

**Other** Under German law (the law that governed the arbitration, which had its seat in Frankfurt), claimants were obligated to disclose the identity of consortium members. If such information were not provided, the legal representatives of the consortium would be held responsible for the costs of the arbitration. Because the claimant never disclosed the identity of its consortium members, the tribunal ordered the claimant's legal representatives to pay the Czech Republic's arbitration costs and fees.

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<b>Case Name</b>	<b>Branimir Mensik v. Slovakia, ICSID Case No. ARB/06/9</b>
<b>Date initiated</b>	Registered at ICSID on May 10, 2006
<b>Project/Investment</b>	Mineral water spring project
<b>Nature of Claim</b>	Unclear
<b>Outcome</b>	The case was dismissed on December 9, 2008, due to the claimant's failure to prosecute its claims
<b>Transparency</b>	The existence of the case is known as per ICSID rules; additional information about the claim is not publicly available.

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<b>Case Name</b>	<b>Bernhard von Pezold et al. v. Zimbabwe, ICSID Case No. ARB/10/15</b>
<b>Date initiated</b>	Registered at ICSID on July 8, 2010
<b>Project/Investment</b>	For further information, see above, <i>Border Timbers Dispute</i> , as the two cases have been joined
<b>Nature of Claim</b>	
<b>Outcome</b>	
<b>Transparency</b>	
<b>Other</b>	

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<b>Case Name</b>	<b>Philip Morris Brands Sàrl, Philip Morris Products SA, and Abal Hermanos SA v. Uruguay, ICSID Case No. ARB/10/7</b>
<b>Date initiated</b>	Case registered at ICSID March 26, 2010
<b>Project/Investment</b>	Manufacture and sale of cigarettes

<b>Nature of Claim</b>	The claims arise out of measures adopted by the government of Uruguay that, inter alia, require graphic images to be displayed on cigarette packaging. According to the claimants, the measures destroyed the good will associated with, and limited the use of, their trademarks, causing a decrease in cigarette sales and depriving the claimants of their intellectual property rights. The claimants allege violations of the BIT's (1) non-impairment, (2) FET, (3) expropriation, and (4) umbrella clause obligations.
<b>Outcome</b>	<p>Pending; in a decision issued on July 2, 2013, the tribunal rejected Uruguay's objections to jurisdiction. One of those objections was that the tribunal lacked jurisdiction because the claimants had failed to comply with the treaty's mandatory 18-month domestic litigation requirement before initiating the arbitration. The tribunal agreed that the requirement was not met at the time the arbitration was initiated, but held that the 18-month requirement was subsequently satisfied after the arbitration was initiated through continued pursuit of domestic litigation. Because the domestic litigation requirement was ultimately met, the tribunal concluded, it could take jurisdiction over the dispute.</p> <p>Another objection raised by Uruguay was that the claimants' claims were barred by a provision in Article 2(1) of the BIT stating, "The Contracting Parties recognize each other's right not to allow economic activities for reasons of public security and order, public health or morality, as well as activities which by law are reserved to their own investors." The tribunal rejected Uruguay's argument, holding that Article 2(1) only applied at the admission and pre-establishment phase; according to the tribunal, that provision did not govern regulation of existing investments and did not prevent the tribunal from examining whether the tobacco regulations were consistent with the BIT.</p>
<b>Transparency</b>	<p>The existence of the case is known as per ICSID rules; certain of Uruguay's filings have been released (ie., Uruguay's memorial and reply on jurisdiction), and certain decisions/orders by the tribunal (ie., the decision on jurisdiction, and two procedural orders). The claimant's submissions have not been publicly released.</p> <p>In procedural orders issued in early 2015, the tribunal ruled that it would accept amicus submissions from (1) the World Health Organization (WHO) and WHO's Framework Convention on Tobacco Control Secretariat, and (2) the Pan American Health Organization.</p>

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<b>Case Name</b>	<b>Romak SA v. Uzbekistan, UNCITRAL, PCA Case No. AA280</b>
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<b>Date initiated</b>	The claimant filed its notice of arbitration on March 20, 2006
<b>Project/Investment</b>	Contracts for sale of wheat and a commercial arbitration award
<b>Nature of Claim</b>	In the mid-1990s, the claimant had contracted with Uzbek entities (including allegedly state-owned/controlled entities) for the sale of wheat; according to the claimant, however, it was not paid for its shipments and, as a result, turned to arbitration and secured an award for \$10.5 million. Romak's subsequent attempts to enforce payment in Uzbek courts failed.  In 2006, Romak initiated the arbitration, alleging that non-payment of the contracts and the decisions of Uzbek courts violated the BIT. It asserted violations of the FET, FPS, expropriation, and umbrella clause obligations.
<b>Outcome</b>	In an award dated November 26, 2009, the case was dismissed for lack of jurisdiction on the ground that the contract rights and arbitral award did not constitute "investments" under the BIT.
<b>Transparency</b>	The award has been made public.

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<b>Case Name</b>	<b>R.S.E. Holdings v. Latvia</b>
<b>Date initiated</b>	August 2014
<b>Project/Investment</b>	Unknown
<b>Nature of Claim</b>	Details are unknown, but the case reportedly relates to treatment of the claimant by a state-owned bank.
<b>Outcome</b>	Pending
<b>Transparency</b>	Non-transparent; limited information about the case is available through <i>IAReporter</i> .

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<b>Case Name</b>	<b>SGS Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13</b>
<b>Date initiated</b>	Registered at ICSID November 21, 2001
<b>Project/Investment</b>	Contract for pre-shipment inspection services
<b>Nature of Claim</b>	Contract-related disputes brought under the treaty's umbrella clause.
<b>Outcome</b>	In a decision on jurisdiction dated August 6, 2003, the tribunal

rejected the claimant's claims on the ground that the treaty's umbrella clause did not elevate contract claims to treaty claims. A settlement was ultimately reached under which SGS would pay Pakistan USD 2 million and provide the country a written apology.

**Transparency**

The decision on jurisdiction is publicly available.

**Other**

Swiss authorities subsequently indicated their disagreement with the tribunal's narrow interpretation of the umbrella clause.

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**Case Name**

**SGS Société Générale de Surveillance S.A. v. Paraguay, ICSID Case No. ARB/07/29**

**Date initiated**

Case registered at ICSID November 19, 2007

**Project/Investment**

Contract for overseas inspection of goods being shipped to Paraguay

**Nature of Claim**

Contract dispute

**Outcome**

In an award issued February 10, 2012, the tribunal determined that the government violated the treaty's umbrella clause due to failure to observe contractual commitments; the tribunal also determined that the claimant did not have to first pursue relief pursuant to the contractual forum selection clause.

**Transparency**

The existence of the case is known as per ICSID rules; the award has also been made public.

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**Case Name**

**SGS Société Générale de Surveillance S.A v. Philippines, ICSID Case No. ARB/02/6**

**Date initiated**

Case registered at ICSID June 6, 2002

**Project/Investment**

Contract for inspection of goods to be shipped

**Nature of Claim**

Contract-related dispute resulted in claims for breach of FET, uncompensated expropriation, and violation of the umbrella clause.

**Outcome**

In a decision on jurisdiction issued on January 29, 2004, the tribunal determined that the claimant should pursue dispute resolution under the applicable forum selection clause in the contract; only when the scope of contract-related rights and obligations were determined in that contractually specified forum would the claims be admissible under the BIT.

The parties ultimately settled their dispute.

**Transparency** The existence of the case is known as per ICSID rules; the award has also been made public.

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**Case Name** **Swiss investor v. South Africa, UNCITRAL**

**Date initiated** 2001

**Project/Investment** Conference center and game farm

**Nature of Claim** The claimant alleged that south Africa failed to provide the investor's investment FPS. It is unclear whether there were other bases for the investor's claims.

**Outcome** The claimant prevailed in its claim and, in an award dated October 19, 2004, was awarded 6.6 Million South African Rand, plus interest.

**Transparency** The award and other documents are not publicly available; the identity of the claimant is unknown.

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**Case Name** **Swisslion DOO Skopje v. Macedonia, ICSID Case No. ARB/09/16**

**Date initiated** Case registered at ICSID August 21, 2009

**Project/Investment** Investment in a formerly socially owned and nearly bankrupt food products company.

**Nature of Claim** The dispute alleged out of failed agreement under which the claimant would purchase shares in and take over operation of a Macedonian food products company. The investor (who was also being investigated by Macedonian authorities) sought over 21 million euros in damages for alleged breaches of the FET obligation, non-impairment provision, prohibition on uncompensated expropriation, and umbrella clause.

**Outcome** In an award dated July 6, 2012, the tribunal determined that certain aspects of the government's conduct amounted to a "composite" breach of the FET obligation. The tribunal rejected the claimant's other claims. Although the claimant prevailed on its FET claim, it was only awarded \$350,000 in damages.

**Transparency** The existence of the dispute is known as per ICSID rules; the arbitration award has also been made public.

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## **Annex IV. Data on Swiss FDI Flows and BIT Signatures**

As noted above in the text, one rationale often given for IIAs is that they help promote flows of investment between partner countries. Various empirical studies have been conducted to test this theory of IIAs. Thus far, such studies have arrived at different conclusions and do not provide any clear or consistent evidence that IIAs will in fact cause increased FDI between signatory states.

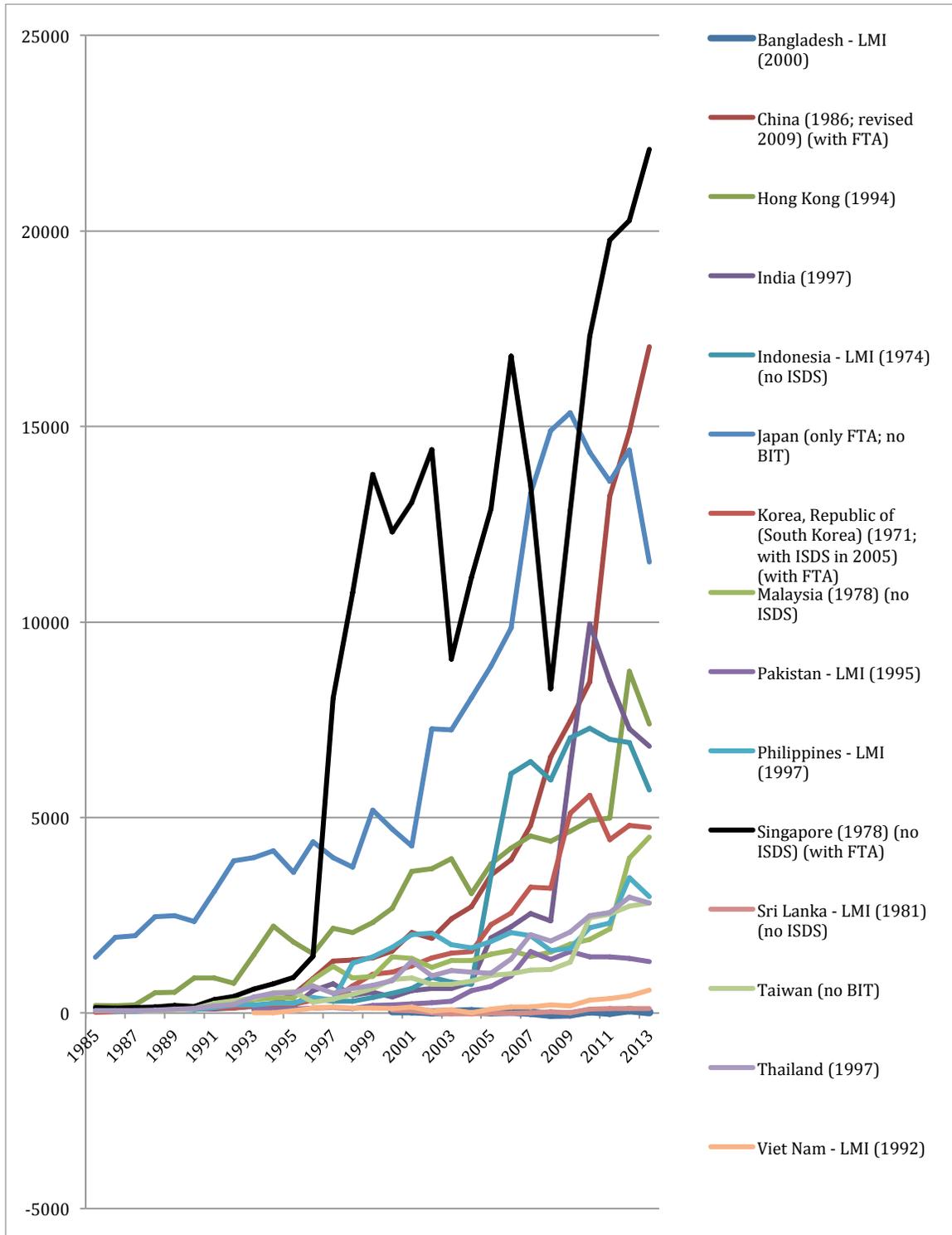
One often cited problem with such studies is that, even if they may be able to identify correlation between IIAs and increased investment flows, it is much more difficult for them to reliably identify causation. Many IIAs, for example, are signed as countries are undergoing broader policy shifts toward trade and/or investment liberalization; in such cases, open markets rather than investor protections may be behind any increased investment activity. Similarly, countries may prioritize negotiation of investment treaties with major existing or potential future host or home countries as opposed to with countries where there are no existing or foreseeable prospects for significant cross-border investment.

While recognizing both the challenges and importance of distinguishing between correlation and causation, this annex shows trends in Swiss FDI stocks in the economies of various countries, and notes whether there is an IIA with that country and, if so, when the IIA was signed and whether it includes ISDS. The annex also notes whether Switzerland also has an FTA with the partner country, which may include liberalization commitments. The charts included plot data from the Swiss National Bank on Swiss stocks of FDI in Asian, African, and Latin American countries.

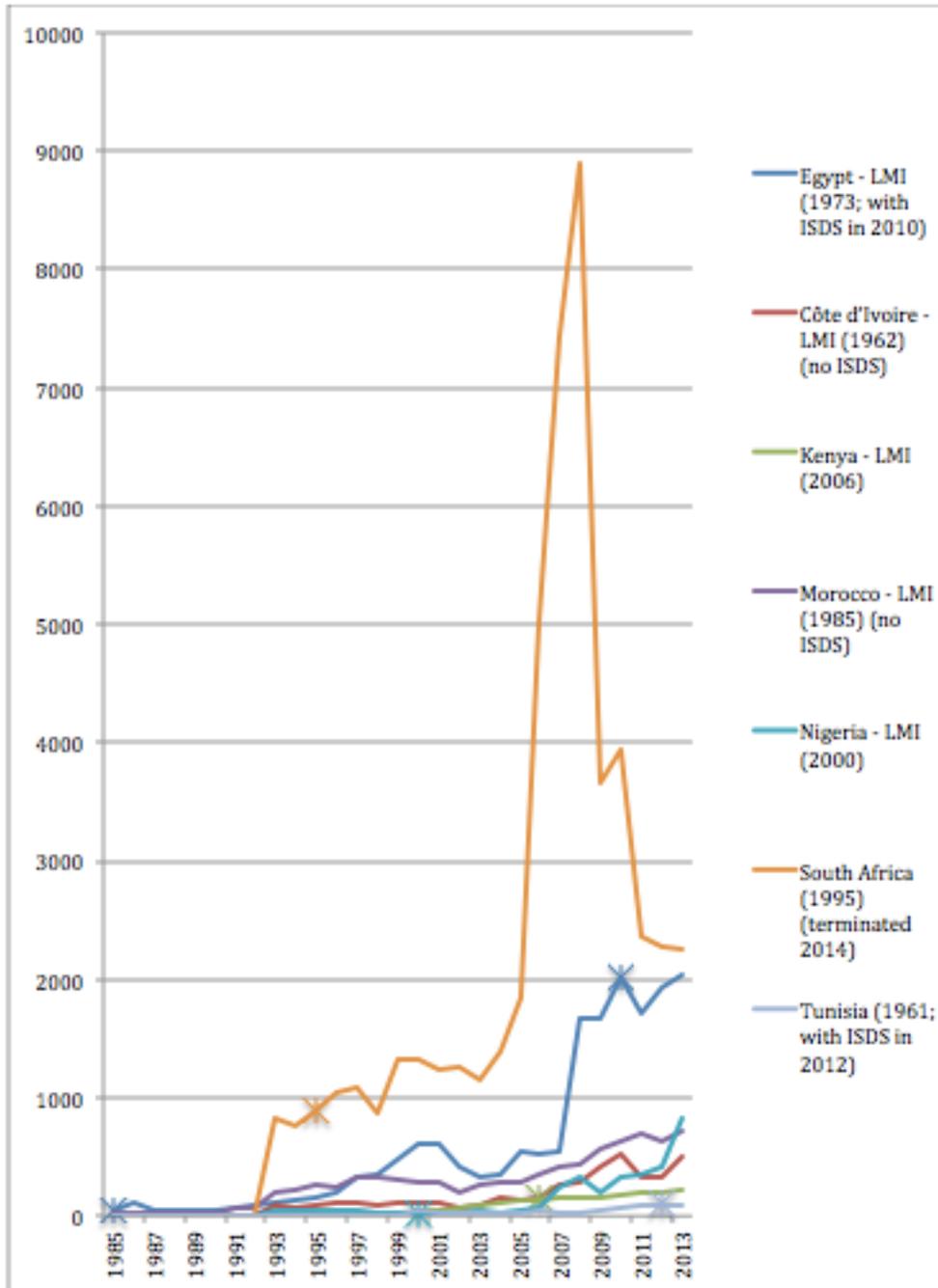
This data from the Swiss National Bank's website are not available for all countries. Data for low-income countries, in particular, are not included. For each country, there is a note ("LMI") indicating if the country is a lower-middle income country. If there is no such notation, the country is an upper-middle or high-income economy.

Absent more sophisticated analysis of this data, reliable conclusions regarding the role of IIAs in Swiss FDI flows are impossible to draw. Nevertheless, some trends arguably relevant to questions regarding the role of IIAs are that (1) relatively significant amounts of Swiss FDI have been invested in countries without IIAs (e.g., Brazil), or with IIAs that lack ISDS (e.g., Singapore), and (2) notwithstanding the existence of IIAs with ISDS, investment in many lower-middle income countries (e.g., Bangladesh, Pakistan, Viet Nam, Egypt, Kenya, Tunisia, Bolivia, and Guatemala) has remained relatively low.

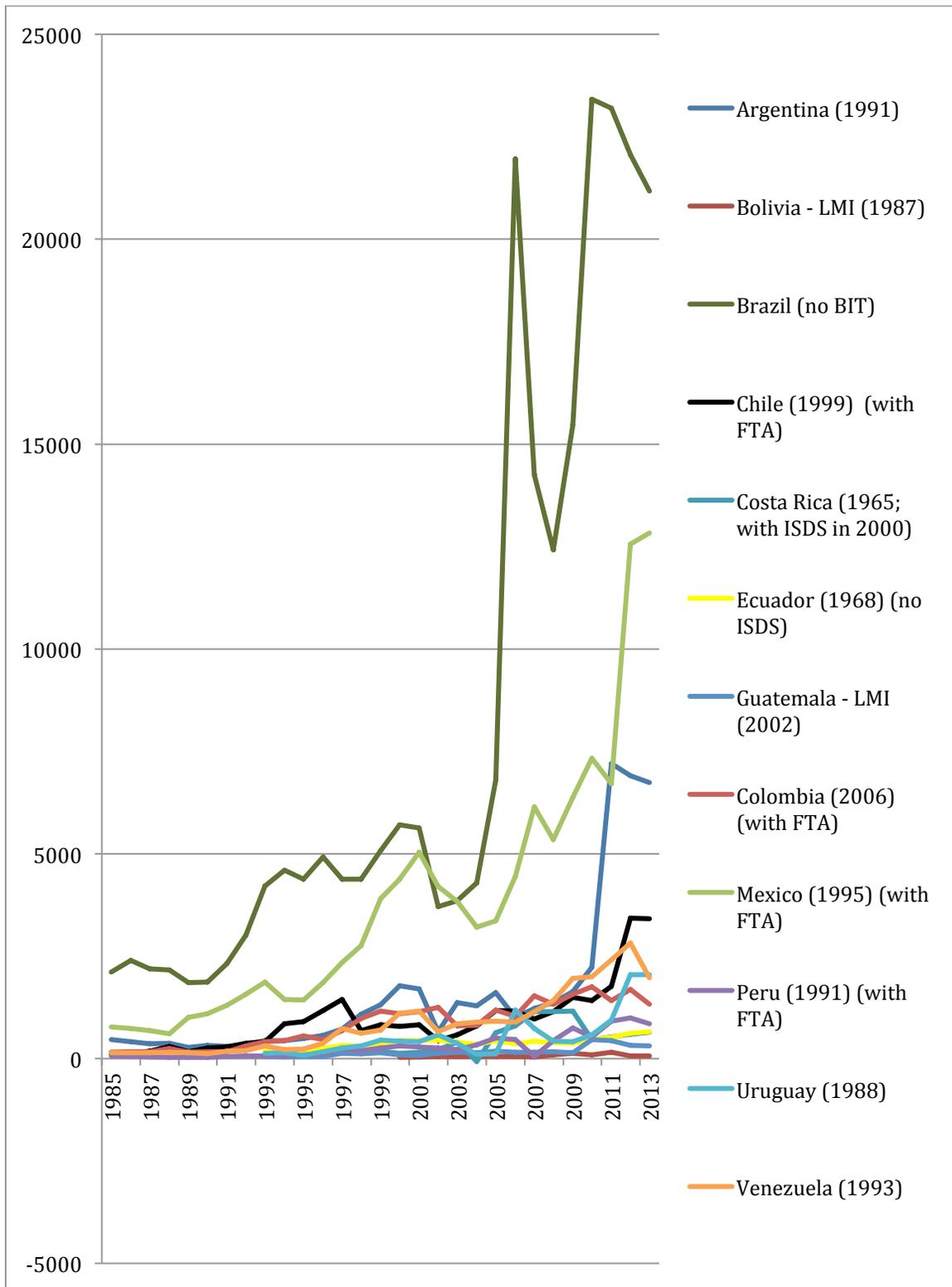
Annex Figure 1 Swiss FDI Stocks in Asian Countries (CHF millions)



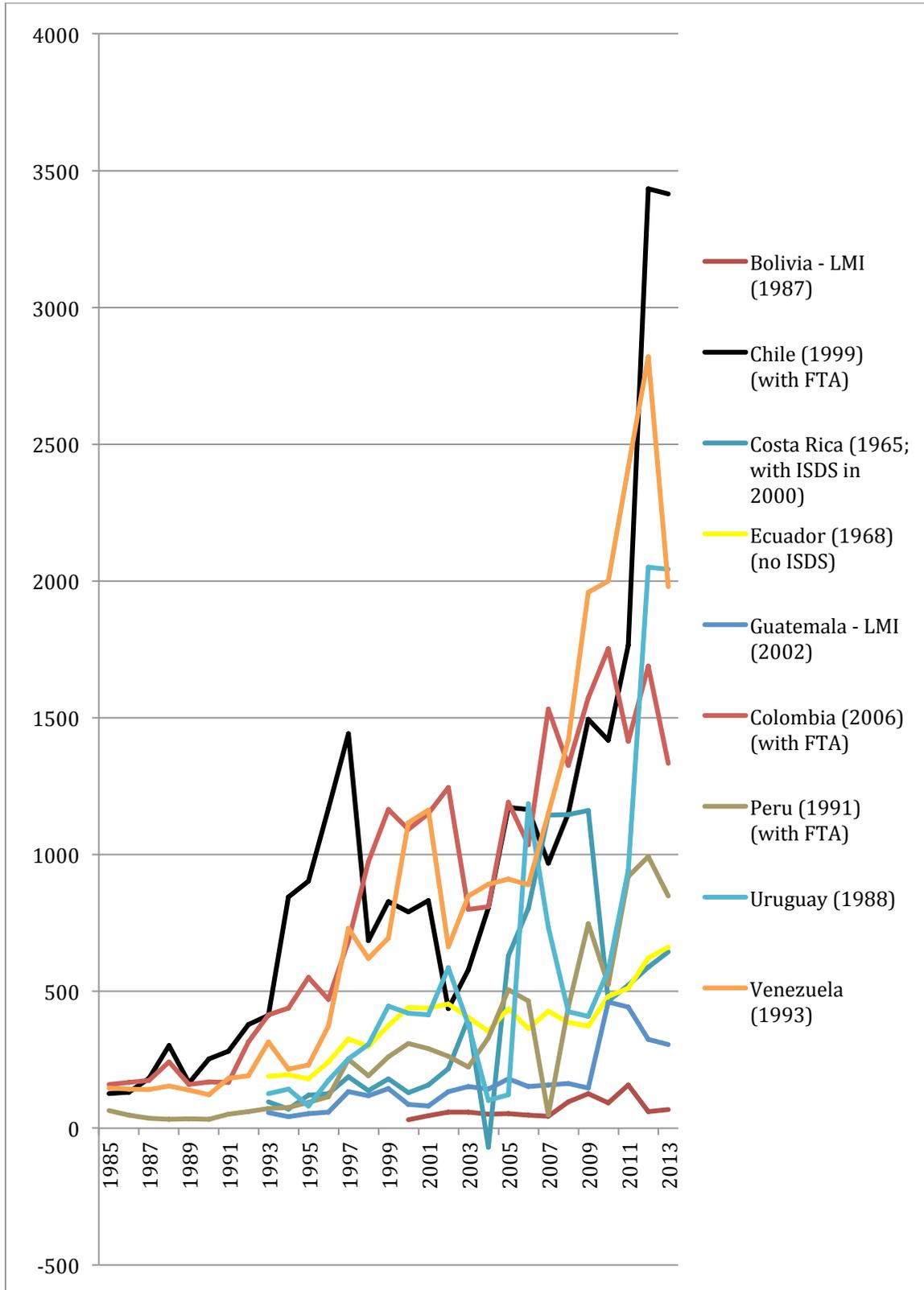
Annex Figure 2 Swiss FDI Stocks in African Countries (CHF millions)



Annex Figure 3 Swiss FDI Stocks in Latin American Countries (CHF millions)



**Annex Figure 4 Swiss FDI in Latin American Countries (excluding Argentina, Brazil and Mexico) (CHF millions)**





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<sup>1</sup> See, e.g., United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2015*, ch. 4, “Reforming the International Investment Regime: An Action Menu,” see also Columbia Center on Sustainable Investment 10<sup>th</sup> Annual Columbia International Investment Conference: “Investment Treaty Reform: Reshaping Economic Governance in an Era of Sustainable Development,” New York, New York, November 10-11, 2015.

<sup>2</sup> See, e.g., preambles of Swiss BITs with Bolivia; Hungary; Uruguay; Albania; Paraguay; Vietnam; Romania; Mexico; Moldova; Pakistan; Ukraine; Cambodia; Laos; Macedonia; Mongolia; Philippines; Kyrgyzstan; Bangladesh; Costa Rica; Mozambique; Tanzania; Serbia; Colombia; Kenya; China; Tajikistan; Egypt; Trinidad & Tobago; Georgia. Examples where such references to economic development of both states are rare, and include Switzerland’s BIT with China, signed in 1986. The BIT with India, signed in 1997, notes that promotion and protection of foreign investment is done with the aim of increasing economic prosperity “in both states”, which may have a different meaning that increasing prosperity “of both states”.

<sup>3</sup> Transforming our world: the 2030 Agenda for Sustainable Development (Draft resolution submitted by the President of the General Assembly, A/69/L.85, August 12, 2015, Annex) (hereinafter the “2030 Agenda for Sustainable Development”).

<sup>4</sup> The principles identified here are similar to the principles identified by UNCTAD in its 2015 *World Investment Report* as the five priority considerations that should guide IIA reform. These are (1) safeguarding the right to regulate; (2) reforming investor-state dispute settlement; (3) promoting and facilitating investment; (4) ensuring responsible investment; and (5) enhancing systemic consistency. See UNCTAD, *World Investment Report 2015*, ch. 4, “Reforming the International Investment Regime: An Action Menu,” p. 128.

<sup>5</sup> If a reference to a BIT in the text includes a reference to a specific year (e.g., “China (1986)”) that is because the set of reviewed treaties contains another BIT with that same country (e.g., “China (2009)”).

<sup>6</sup> See, e.g., Lise Johnson, “Ripe for Refinement: The State’s Role in Interpretation of FET, MFN, and Shareholder Rights,” *Oxford Global Economic Governance Programme Working Paper 2015/101* (April 2015); Kathryn Gordon and Joachim Pohl, “Investment Treaties Over Time – Treaty Interpretation in a Changing World,” *OECD Working Papers on International Investment 2015/02* (OECD 2015); Lise Johnson & Merim Razbaeva, “State Control over Interpretation of Investment Treaties,” *Columbia Center on Sustainable Investment Policy Paper* (2014); Anthea Roberts, “Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States,” 104 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 179 (2010).

<sup>7</sup> Investment arbitration tribunals interpreting the “fair and equitable treatment” provision – a common obligation in IIAs – commonly interpret that provision as protecting investors’ “legitimate expectations”. See, e.g., Rudolf Dolzer, “Fair and Equitable Treatment: Today’s Contours,” 12 *SANTA CLARA JOURNAL OF INTERNATIONAL LAW* 7 (2014); UNCTAD, *Fair and Equitable Treatment: A Sequel* (2012).

<sup>8</sup> See, e.g., *In re Attorney General of Canada v. Clayton*, Notice of Application, Court File No.: T-1000-15, June 16, 2015. In this filing, the government of Canada argued that the tribunal’s decision against it in *Bilcon v. Canada* “usurp[ed] the judicial review function of Canadian courts.”

<sup>9</sup> See, e.g., Jan Kleinheisterkamp, “Who is Afraid of Investor-State Arbitration? Or Comparative Law?”, Policy briefing papers, 4/2014, LSE Law, London (2014); Jan Kleinheisterkamp, “Financial Responsibility in European International Investment Policy,” 63 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 449 (2014); Lise Johnson and Oleksandr Volkov, “Investor-State Contracts, Host-State ‘Commitments’ and the Myth of Stability in International Law,” 24 *AMERICAN REVIEW OF INTERNATIONAL ARBITRATION* 361 (2013); Trevor Zeyl, “Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law,” 49 *ALBERTA LAW REVIEW* 203 (2011) (discussing the difference between the standard of “legitimate expectations” as adopted by tribunals and that applied in various domestic jurisdictions).

<sup>10</sup> See, e.g., sources cited *supra* n.9.

<sup>11</sup> The United States frequently provides non-disputing party submissions in NAFTA disputes to, e.g., clarify that the FET is intended to be tied to the MST. The United States only rarely provides such submissions in disputes arising under bilateral investment treaties with other states. Consequently, there are a number of examples of cases filed under US treaties that apply (often over the host state’s objection), a

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broad, autonomous interpretation of the FET obligation that stands in notable contrast to the narrower interpretation of the FET obligation given to tribunals in disputes under the NAFTA. *See, e.g.*, *Occidental v. Ecuador*, LCIA Case No. UN3467, Award, July 1, 2004; *PSEG v. Turkey*, ICSID Case No. ARB/02/5, Award, Jan. 19, 2007.

<sup>12</sup> Santiago Montt, *State Liability in Investment Treaty Arbitration* 22 (Hart 2009).

<sup>13</sup> *See, e.g.*, Jonathan Bonnitcha, *A Framework for Evaluating Levels of Investment Protection* 120 (Cambridge University Press 2014).

<sup>14</sup> Treaties with this mechanism include the US-Peru BIT, art. 10.20; US-CAFTA-DR, art. 10.20; and CETA, ch. 10, “Investment”, arts. X.29 & X.30.

<sup>15</sup> One approach suggested in the 2015 proposed German model BIT is to include a specific requirement for exhaustion of remedies. Article 27 of the text states, “An investor may only submit a claim to the dispute settlement mechanism after all domestic remedies have been exhausted, according to the generally recognised rules of international law. The exhaustion of domestic remedies is not required if such remedies are not available or manifestly ineffective / domestic courts are unable or unwilling to provide legal protection.

<sup>16</sup> *See, e.g.*, CETA, ch. 32, “Exceptions,” art. X.06(7) (establishing a mechanism whereby state authorities (rather than a tribunal) have the opportunity to determine whether a challenged taxation measure has violated the investment treaty); NAFTA, art. 1132 (giving the NAFTA Free Trade Commission – an inter-state entity – the right to issue an interpretation on whether certain treaty exceptions invoked by the respondent state apply; any interpretation made by the Free Trade Commission is to be binding on an investor-state tribunal).

<sup>17</sup> In determining the proper level of investment protection to provide, Bonnitcha has concluded that “from the perspective of encouraging efficient investment decisions, it is preferable that investment treaty protections err by under-protecting rather than over-protecting foreign investment.” Bonnitcha, p. 78.

<sup>18</sup> Annex II contains examples of agreements containing an “untethered standard”, agreements in which the FET is tied to the MST and EU texts, which adopt a different approach.

<sup>19</sup> *See, e.g.*, Colombia-France BIT, art. 4(2) (2014); some treaties similarly state that FPS requires the level of “police protection” mandated under international law. *See, e.g.*, Canada-Korea FTA, art. 8.5(3)(b) (2014).

<sup>20</sup> *See, e.g.*, *Saluka v. Czech Republic*, Partial Award, March 17, 2006, paras. 458-461; *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, para. 290. To be “discriminatory” under this standard, tribunals have determined that disparate treatment of the claimant/investor is sufficient; the discrimination need not be intentional, nor based on the investor’s nationality. *See, e.g.*, *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law, and Liability, Nov. 30, 2012, para. 7.152.

<sup>21</sup> The expropriation provisions also often set out other criteria for a lawful expropriation, including that it be done for a public purpose, on a non-discriminatory basis, and in accordance with due process of law.

<sup>22</sup> UNCTAD, “Policy Options for IIA Reform: Treaty Examples and Data” (Working Draft, June 24, 2015).

<sup>23</sup> *See* Michael Schmid, “Switzerland,” in *Commentaries on select Model Investment Treaties*, 657 (Chester Brown, ed. 2013).

<sup>24</sup> *See* “Mapping BITs”, the project available at <http://mappinginvestmenttreaties.com>. Switzerland’s profile is available at <http://mappinginvestmenttreaties.com/country?iso=CHE>. From their mapping, outliers include treaties concluding with Hong Kong (1994), Mexico (1995), India (1997), and Kuwait (1998). The agreements with Mexico and India are also part of the sample analysis for this report. The analysis conducted for this report confirms that the agreements with Mexico and India differ in notable ways from other Swiss BITs.

<sup>25</sup> Agreements that do contain exceptions/carve-outs include the Switzerland-Japan FTA (2009); Switzerland-Mexico BIT (1995); Switzerland-Ukraine BIT (1995); Switzerland-India BIT (1997); Switzerland-Tanzania (2004); Switzerland-Kenya (2006); Switzerland-China (2009).

<sup>26</sup> Among the set of BITs reviewed, the agreement with Colombia, which was signed in 2006, contains among the broadest set of exceptions to the free transfer requirement. Some other BITs contain more limited exceptions or clarifications, most commonly related to tax measures. *See, e.g.*, BITs with Vietnam

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(1992); Moldova (1995); Kyrgyzstan (1999); Tanzania (2004); Serbia (2005); Kenya (2006); Tajikistan (2009); and Georgia (2014).

<sup>27</sup> As noted below in note 35, the agreement with Mexico has provisions aiming to limit multiple claims.

<sup>28</sup> See, e.g., examples cited *supra* n.16.

<sup>29</sup> The 2014 BIT with Georgia is an outlier on transparency in that it requires transparency pursuant to the UNCITRAL Rules on Transparency in Investor-State Arbitration. Previously concluded Swiss BITs do not contain provisions requiring transparency. Cf. US Model BITs (2004 & 2012); Canada Model BIT (2004).

<sup>30</sup> See nn. 35 & 36 and associated text.

<sup>31</sup> There are, however, exceptions to this pattern. The 1995 BIT with Mexico includes TRIMs+ restrictions on performance requirements (art. 5); and the 2009 FTA with Japan incorporates the TRIMs Agreement (and makes violations subject to ISDS) (arts. 94 & 96).

<sup>32</sup> Exceptions are the 2014 BIT with Georgia and 2009 FTA with Japan, discussed in the text at pp. 14-15.

<sup>33</sup> There are exceptions. The FTA signed in 2000 between the EFTA states and Macedonia, for example, contains a provision in which the parties (except for Norway) commit to “refrain from arbitrary or discriminatory measures regarding investment by investors of another Party” and to “observe obligations they have entered into with regard to specific investments by an investor of another Party...” Art. 26. These obligations are not subject to ISDS.

<sup>34</sup> The 2009 agreement with Colombia, for example, includes in its investment chapter a national treatment obligation and provisions requiring free transfers of payments. Both are subject to general and specific exceptions/reservations; neither is subject to ISDS, and there are no other investment protections provisions like an FET obligation, protections against expropriation, or an umbrella clause. Additionally, the services chapter imposes certain obligations regarding investment in services sectors. This chapter, like the investment chapter, contains articles on national treatment and free transfers; it also contains obligations on most-favored nation treatment, market access, domestic regulation, transparency, and other issues. It does not, however, include FET, expropriation, or umbrella clause articles, and has no provision for ISDS. The EFTA agreement with Colombia was concluded after and sits alongside the BIT between Switzerland and Colombia.

<sup>35</sup> The treaty has a standard exception for rights granted pursuant to customs unions, free trade zones, a common market, and double taxation agreements. These are relatively common features of IIAs (Swiss and other), and were not counted as “exceptions” to the MFN obligation. Exceptions to the MFN obligation were included if they were exceptions for domestic measures, or exceptions relating to the substantive and procedural aspects of IIAs.

<sup>36</sup> The project, Mapping BITs, seems to illustrate a similar picture. Compare the image of Swiss BITs over time (<http://mappinginvestmenttreaties.com/country?iso=CHE> , showing variations, but no identifiable point of change) with the image of US’s treaties over time (<http://mappinginvestmenttreaties.com/country?iso=USA> , showing shifts in 1994 and 2004).

<sup>37</sup> In two agreements, the BIT with China signed in 1986 and the BIT with Georgia signed in 2014, the obligation is phrased as a commitment to endeavor to provide permits or to regard applications favorably. This obligation is not as strong as the strict requirement to provide permits, and so was not counted among the group of treaties that mandate domestic provision of licenses.

<sup>38</sup> These are the BITs with Hungary; Romania; Mexico; Ukraine; Philippines; Kyrgyzstan; Costa Rica; Mozambique; Tanzania; Serbia; Colombia; Kenya; China (2009); Tajikistan; Egypt; and Trinidad and Tobago.

<sup>39</sup> These issues of disparate remedies available from domestic courts and have arisen in *Bilcon v. Canada*, an ISDS case filed under the NAFTA in which the investor prevailed on the merits.

<sup>40</sup> BITs with Bolivia; Uruguay; Albania; Paraguay; Vietnam; Moldova; Pakistan; Cambodia; Laos; Macedonia; Mongolia; and Bangladesh.

<sup>41</sup> BITs with Bolivia; Hungary; Albania; Paraguay; Vietnam; Romania; Mexico; Moldova; Cambodia; Laos; Mongolia; Kyrgyzstan; Bangladesh; Costa Rica; Mozambique; Tanzania; Kenya; Trinidad & Tobago.

<sup>42</sup> BITs with China (1986); Uruguay; Pakistan; Ukraine; Macedonia; India; Serbia; Colombia; China; Tajikistan; Egypt; and Georgia.

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<sup>43</sup> See Michael Schmid, “Switzerland,” in *Commentaries on select Model Investment Treaties*, 657 (Chester Brown, ed. 2013). Earlier agreements provided for ISDS, but made the mechanism conditional on both parties’ consent. See, e.g., Switzerland-Sri Lanka BIT, which was signed in 1981 and entered into force in 1982.

<sup>44</sup> An exception is the Swiss BIT with Mexico, signed in 1995. See, e.g., Art. 2(2); Art. 6. It contains restrictions on parallel shareholder/company claims, and provides for consolidation of claims.

<sup>45</sup> See, e.g., “Trans-Pacific Partnership treaty: Advanced Investment Chapter working document for all 12 nations,” art. II.22(4); European Commission, “Commission Draft Text TTIP – Investment,” arts. 16 & 17.

<sup>46</sup> NAFTA, art. 1132.

<sup>47</sup> CETA, ch. 15, “Financial Services,” art. X.20; ch. 32, “Exceptions,” art. X.06(7).

<sup>48</sup> See, e.g., BIT with Mozambique (2002); BIT with Kenya (2006).

<sup>49</sup> Art. 6(2).

<sup>50</sup> See, e.g., David Gaukrodger, “Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law” (OECD 2014); David Gaukrodger, “Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency: A preliminary framework for policy analysis,” *OECD Working Papers on International Investment 2013/3* (OECD 2013).

<sup>51</sup> See art. 1116 (providing for shareholder claims arising out of harms suffered by shareholders as such); art. 1117 (allowing investors who own or control companies in the host country to bring claims arising out of harms suffered by those companies, and providing, as a default rule, for consolidation of those claims with any claims brought by minority shareholders under article 1116); and art. 1121 (requiring investors who bring claims seeking relief for harms to the company to provide a written waiver from the company of its rights to pursue other relief).

<sup>52</sup> See art. 10.16(1)(a) (providing for shareholder claims arising out of harms suffered by shareholders as such); art. 10.16(1)(b) (allowing investors who own or control companies in the host country to bring claims arising out of harms suffered by those companies); art. 10.18(2)(b)(i) (requiring shareholders bringing claims under art. 10.16(1)(a) to submit a written waiver waiving their rights to pursue other relief); and art. 10.18(2)(b)(ii) (requiring shareholders bringing claims under art. 10.16(1)(b) to submit written waivers on their behalf and on behalf of the enterprise for which they are seeking relief).

<sup>53</sup> Art. 6.

<sup>54</sup> See e.g., *Alps Finance v. Slovakia*, Award, March 5, 2011 (ordering the claimants to pay Slovakia for its legal and arbitration costs); *Konsortium Oeconomicus v. Czech Republic*, Case No. NN 452/FM, Decision for Termination of the Proceedings, December 5, 2011 (as discussed in Jarrod Hepburn, “After Swiss Consortium Failed to Disclose its Members, UNCITRAL BIT Tribunal Held Consortium’s Representatives Personally Liable to Reimburse Host State’s Costs,” *IAReporter*, February 24, 2015, the claimant is to pay the Czech Republic’s legal and arbitration fees after the Consortium failed to disclose its members to the tribunal); *Cervin Investissements and Rhone Investissements v. Costa Rica*, ICSID Case No. ARB/13/2, Decision on Jurisdiction, December 15, 2014 (upholding jurisdiction over companies beneficially owned by a Mexican parent company after internal restructuring caused the claimant/companies to be registered in Switzerland; the treaty required the “seat” to be in the home country); *Swisslion v. Macedonia*, ICSID Case No. ARB/09/16, Award, July 6, 2012 (upholding jurisdiction over claims by company incorporated in Macedonia, and owned by a company registered in Switzerland; the beneficial owner of the Swiss company was a Serbian national; it is unclear what activities the Swiss company had in Switzerland other than holding the Macedonian company).

<sup>55</sup> See, e.g., The Swiss BIT with Colombia contains a provision requiring investors to provide proof that they control the investment at issue in an investment dispute. (Ad art. 1, para. 2(c)). A similar provision could be included in other IIAs (or potentially in Swiss company law), requiring firms to submit such evidence of ties to/activities in Switzerland when invoking ISDS.

<sup>56</sup> Art. 12(2) & (3).

<sup>57</sup> Art. 12(4).

<sup>58</sup> See art. 95(1) (incorporating the GATS’ general and security exceptions for obligations “[i]n respect of the making of investments.”). For investments that have been made, art. 95 only incorporates the GATS’ security exceptions. Switzerland-Japan FTA, art. 95(2).

<sup>59</sup> Art. 9.

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<sup>60</sup> See, e.g., European Commission, “Commission Draft Text TTIP – Investment,” art. 2(1) (“The provisions of this section shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity.”). See also *id.*, art. 5 & Annex I.

<sup>61</sup> NAFTA, art. 1114(1) (emphasis added).

<sup>62</sup> NAFTA art. 1114(1) has never been successfully relied upon as the sole basis for shielding an environmental measure against claims. Evidencing the little importance states place upon it as a protective tool, the United States cited the provision only once and only in a footnote in its written submissions to the tribunal in the NAFTA dispute *Glamis Gold v. United States*, a case challenging environmental restrictions on a proposed mining operation. See *Glamis Gold v. United States*, Counter-Memorial of the Respondent United States of America, September 19, 2006, n.580.

<sup>63</sup> Another potential issue is that the “right to regulate” article states that the BIT should not be interpreted as preventing states from *adopting, maintaining, or applying* measures in the public interest. One common position taken by governments, however, is that IIAs do not prevent states from taking such actions. Rather, IIAs require that if a government does adopt, maintain, or apply a measure that violates the treaty, the government pay the covered foreign investor compensation. Thus, it is unclear whether the wording of this right to regulate clause will be effective in actually preventing state liability for public interest measures. An alternative way of phrasing the provision, which is arguably clearer, would state that measures adopted, maintained, or applied in the public interest “do not constitute a breach of the treaty.”

<sup>64</sup> For more on this approach, see sources cited *supra* n.6.

<sup>65</sup> See CCSI, *Raising the Bar: Home country efforts to regulate foreign investment for sustainable development – Background Note* (2014), pp. 5-10 (and sources cited therein).

<sup>66</sup> See, e.g., The Danish Institute for Human Rights and International Corporate Accountability Roundtable, “National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks” (June 2014). This Toolkit states that “for States that function as headquarters for companies operating abroad, a key component of NAPs must also be addressing the extraterritorial impacts of such companies and how those impacts can be addressed by the application of national laws and policies.” (18). Some of the Scoping Questions that are used in the Toolkit to assess “how far current, law, policy and other measures at the national level give effect to the State’s duty to protect human rights under the [UN Guiding Principles on Business and Human Rights] and other international business and human rights standards” are relevant for IIAs (vii). For example, the Toolkit lists the following as a “Scoping Question” for assessing compliance with UN Guiding Principle 2: “Do State institutions that support overseas investment have and enforce performance standards that support the protection and promotion of human rights?”. A Scoping Question for UN Guiding Principle 7 is whether the State has “a procedure for follow-up on issues identified through the investigative process (for example, through the denial or withdrawal of existing public support or services to business enterprises that are involved in human rights abuse or other crimes)?”

<sup>67</sup> SERV, “SERV Guidelines for Reviewing Environmental, Social, and Human-Rights Issues,” version 4.1, September 18, 2015.

<sup>68</sup> See *infra* nn.74-76.

<sup>69</sup> See *infra* nn.72-73.

<sup>70</sup> “Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence,” adopted by the OECD Council on June 28, 2012.

<sup>71</sup> These may include projects that require displacement of large numbers of inhabitants; projects involving production of materials subject to international phase-outs or bans; transboundary trade in waste or waste products; extractive industry projects in natural parks, and fisheries investments harmful to vulnerable and protected species or damaging to biodiversity. See, e.g., OPIC, *Environmental and Social Policy Statement*, Annex B.

<sup>72</sup> See OPIC, “Annual Policy Report 2011,” Exhibit 5: OPIC’s Development Matrix Explained.

<sup>73</sup> See, e.g., Contract of Guarantee for Loan Guarantees between the Multilateral Investment Guarantee Agency and [Guarantee Holder], Sample, December 2012, arts. 12.1 and 13.3(c).

<sup>74</sup> *Id.*, art. 13.4.

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<sup>75</sup> *Id.*, art. 9.1.

<sup>76</sup> Importantly, incorporating these provisions and mechanisms does not necessarily leave investors without any protection in the host country. The home state may still exercise diplomatic protection or state-to-state dispute resolution if there is a violation of the treaty that affects an investor engaged in misconduct in the host state. Aleksandr Shapovalov, “Should a Requirement of ‘Clean Hands’ Be a Prerequisite to the Exercise of Diplomatic Protection? Human Rights Implications of the International Law Commission’s Debate,” 20 AMERICAN UNIVERSITY INT’L L. REV. 829, 841 (2005).

<sup>77</sup> These features are generally referred to as forming part of the “*Salini*” criteria, based on the approach taken by the tribunal in *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001, 42 ILM 609 (2003).

<sup>78</sup> *Romak v. Uzbekistan*, Award, Nov. 26, 2009.

<sup>79</sup> *Alps Finance v. Slovakia*, Award on Jurisdiction, March 5, 2011.

<sup>80</sup> Some commentators disagree on whether fraud or corruption in the establishment/acquisition of an investment will cause the tribunal to deny jurisdiction over the investor/investments claims, or whether it is an issue that will result in an adverse finding on the merits. The more common view is the former.

<sup>81</sup> See, e.g., *Hulley Enterprises Limited v. Russian Federation*, UNCITRAL, PCA Case No. AA 226, Final Award, July 18, 2014, para. 1352.

<sup>82</sup> *Yukos Universal Limited v. Russian Federation*, PCA Case No. AA 227, Final Award, July 18, 2014, paras. 430-431. The principle of “unclean hands” has been developed to protect the integrity of courts and tribunals by permitting it to avoid enforcing rights or settling matters that arise from misconduct or tainted dealings. See, e.g., “Beyond Chafee: A Process-Based Theory of Unclean Hands,” 47 AMERICAN BUSINESS LAW JOURNAL 509, 540

<sup>83</sup> See, e.g., *Yukos v. Russian Federation*, UNCITRAL, PCA Case No. AA-227, Award, July 18, 2014.

<sup>84</sup> See, e.g., *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, August 11, 2015. *But see* *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, December 7, 2011, para. 876 (rejecting the respondent’s attempt to bring a counterclaim).

<sup>85</sup> See, e.g., Art. 10.3 (stating that corruption in the establishment of an investment or thereafter will constitute a breach of the host state’s domestic law regarding admission/establishment; investments must be made in accordance with the host state’s domestic law regarding admission/establishment in order to be considered an “investment” under the Model).

<sup>86</sup> Author’s files.

<sup>87</sup> Article X.17(3) states, “For greater certainty, an investor may not submit a claim to arbitration under this section where the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.”

<sup>88</sup> See, e.g., CETA, ch. 10, “Investment”, art. X.17 (“For greater certainty, an investor may not submit a claim to arbitration under this Section where the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.”).

<sup>89</sup> See Chairman of the Negotiation Grp. on the Multilateral Agreement on Inv., Multilateral Agreement on Investment, at 2, OECD Doc. DAF/MAI(98)9/FINAL (Apr. 20, 1998) (quoted in Rainer Geiger, “Coherence in Shaping the Rules for International Business: Actors, Instruments, and Implementation,” 43 GEO. WASH. INT’L L. REV. 295 (2011)). See also Rainer Geiger, “Towards a Multilateral Agreement on Investment,” 31 CORNELL INT’L L.J. 467 (1998).

<sup>90</sup> European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM (2010) 343, p. 9.

<sup>91</sup> Kathryn Gordon, Joachim Pohl and Marie Bouchard, *Investment Law Sustainable Development and Responsible Business Conduct: A Fact Finding Survey* (OECD 2014), p. 5.

<sup>92</sup> *Id.*

<sup>93</sup> Canada-Peru FTA, Annex II.

<sup>94</sup> Canada-Peru FTA, Annex II.

<sup>95</sup> NAFTA, art. 1114(2).

<sup>96</sup> EU-Singapore FTA, art. 13.3, paras. 3-5. In some agreements, such provisions are not contained in the investment chapter, but are set forth in chapters on sustainable development (as in this agreement), the environment, or labor issues.

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<sup>97</sup> Canada-Benin BIT, art. 16.

<sup>98</sup> US-DR-CAFTA, art. 17.9.

<sup>99</sup> EFTA-Costa Rica-Panama FTA, art. 9.1. This provision is not contained in the investment chapter, but is set forth in a separate chapter on “Trade and Sustainable Development”. Although the title of the chapter suggests that it only deals with trade and not investment, article 9.2 clarifies that it “applies to measures adopted or maintained by the Parties affecting trade-related and investment-related aspects of labour and environmental issues.”

<sup>100</sup> 2030 Agenda, para. 10.b.

<sup>101</sup> 2030 Agenda, para. 17.5.

<sup>102</sup> 2030 Agenda, para. 7.a.

<sup>103</sup> UNFCCC, United Nations Department of Economic and Social Affairs. “Climate Change: Technology Development and Technology Transfer.” Page v. (2008) (emphasis added). Similarly, in 1997, signatories of the Kyoto Protocol affirmed that all Parties “taking into account their common but differentiated responsibilities” must “[c]ooperate in the promotion of effective modalities for the development, application and diffusion of, and take all practicable steps to *promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies, know-how, practices and processes pertinent to climate change, in particular to developing countries*, including the formulation of policies and programmes for the effective transfer of environmentally sound technologies that are publicly owned or in the public domain and the creation of an enabling environment for the private sector, to promote and enhance the transfer of, and access to, environmentally sound technologies.” Kyoto Protocol to the United Nations Convention on Climate Change, 11 December 1997, 2303 U.N.T.S. 148 (entered into force 16 February 2005) (emphasis added).

<sup>104</sup> See, e.g., Jonathan Bonnitcha, *A Framework for Evaluating Levels of Investment Protection* 105-109 (Cambridge University Press 2014) (reviewing studies); Karl Sauvant and Lisa Sachs, eds., *The Effect of Treaties on Foreign Direct Investment* (Oxford University Press 2009) (collecting studies).

SECO reports that “Switzerland's policy on international agreements reaps dividends. In the period between 1988 and 2007, Swiss direct investment grew by an average of 12.6% annually. In the 31 partner countries that signed free trade agreements, direct investment grew by an average of 18% annually in the first four years after the free trade agreement came into effect.” (SECO, “Switzerland’s Investment Treaty Policy,” available at <http://www.seco.admin.ch/themen/00513/00594/04450/index.html?lang=en> ). This data appears to examine the effects of free trade agreements, not solely BITs. In contrast to studies on the effects of IIAs on investment flows, studies have shown that bilateral and regional trade agreements do have a positive impact on FDI. Max Büge, “Do Preferential Trade Agreements Increase Their Members’ Foreign Direct Investment?” (Discussion Paper 37/2014). Bonn: German Development Institute/Deutsches Institut für Entwicklungspolitik.

Annex IV includes charts showing data collected on Swiss flows of FDI into countries in Africa, Asia, and Latin America. It also indicates whether there is an investment treaty and when it was signed. Such charts are too simplistic to identify whether IIAs have any effect on investment flows and, if so, why and to what extent. Nevertheless, they are included here for illustrative purposes.

<sup>105</sup> See *supra* n.104; see also UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* 128, 155-158 (2015).

<sup>106</sup> See Cotonou Agreement (signed in Cotonou June 23, 2000 and amended in 2005 and 2010), ch. 7.

<sup>107</sup> Japan-Mexico EPA, art. 147(1).

<sup>108</sup> See, e.g., *id.*, art. 148.

<sup>109</sup> EU-Singapore FTA, art. 13.15.

<sup>110</sup> Cf. EFTA-Macedonia FTA (2000) with the Switzerland-China FTA (2013). The Switzerland-China FTA (2013) also contains more detailed provisions on this than the Switzerland-Colombia FTA (2008).

<sup>111</sup> Ch. 9.

<sup>112</sup> Art. 13.1(b).

<sup>113</sup> Swiss Position on a Framework for Sustainable Development Post 2015 (2014), p. 11, available at [https://www.eda.admin.ch/dam/post2015/en/documents/recent/Position\\_CH\\_Post-2015\\_EN.pdf](https://www.eda.admin.ch/dam/post2015/en/documents/recent/Position_CH_Post-2015_EN.pdf).

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<sup>114</sup> Cf. United States Overseas Private Corporation (OPIC), Draft Contract of Insurance, Art. IX(1)(15) (requiring covered investors to ensure their investments comply with all applicable laws of the home and host state, including laws against corruption) and Art. IX(2) (stating that OPIC is entitled to deny or recover compensation, and to terminate the insurance contract, if the investor materially breaches its obligations under the contract).

<sup>115</sup> Michael Goldhaber, “Poetic Justice in Yukos Arbitration,” *THE NATIONAL LAW JOURNAL*, August 4, 2014; *Yukos v. Russian Federation*, UNCITRAL, PCA Case No. AA-227, Award, July 18, 2014.

<sup>116</sup> See *Bernard Black, Reinier Kraakman & Anna Tarassova, Russian Privatization and Corporate Governance: What Went Wrong*, 52 *STAN. L. REV.* 1731, 1742-50, 1769-1771 (2000) (discussing privatization of and consolidation of control over Yukos); Michael Goldhaber, Poetic Justice in Yukos Arbitration, *The National Law Journal*, August 4, 2014; *Yukos v. Russian Federation*, UNCITRAL, PCA Case No. AA-227, Award, July 18, 2014.

<sup>117</sup> See, e.g., Stephan Schill, “Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law,” in *International Investment Law and Comparative Public Law* (Oxford University Press 2010).

<sup>118</sup> Bonnitche, pp. 136-39.

<sup>119</sup> See, e.g., Bonnitche, p. 136 (discussing studies).

<sup>120</sup> Bernard Robertson, “Exhaustion of Local Remedies in International Human Rights Litigation: The Burden of Proof Reconsidered,” 39 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 191, 196 (1990).

<sup>121</sup> *Id.*

<sup>122</sup> Notably, for disputes filed under treaties concluded before April 1, 2014, the Transparency Rules only apply if (1) the investor and state have agreed to the Rules’ application, or (2) the two state parties to the underlying treaty have agreed to the Rules’ application. The Mauritius Convention on Transparency was drafted as a means to facilitate state consent to application of the Transparency Rules. Switzerland signed the Mauritius Convention on March 27, 2015, but has not yet ratified it. The Mauritius Convention will come into force when three states have become party to it. As of September 1, 2015, there was only one party to the treaty, Mauritius.

<sup>123</sup> Some of the cases listed in Annex III show that ISDS can still largely proceed in secrecy.

<sup>124</sup> See Gus van Harten, *Investment Treaty Arbitration and Public Law* 174 (Oxford University Press 2007).

<sup>125</sup> According to the UN, the rule of law is:

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decisionmaking, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

Delivering Justice: Programme of action to strengthen the rule of law at the national and international levels, Report of the Secretary-General (2012), A/66/749, para. 2.

<sup>126</sup> See *supra* n.7. This approach is dominant in disputes arising under a treaty that does not expressly tether the FET obligation to the minimum standard of treatment under customary international law.

<sup>127</sup> See discussion in Lise Johnson and Oleksandr Volkov, “Investor-State Contracts, Host-State ‘Commitments’ and the Myth of Stability in International Law,” 24 *AMERICAN REVIEW OF INTERNATIONAL ARBITRATION* 361 (2013).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> This provision is included in an article on “exceptions”, but seems more appropriately characterized as a clarification than an exception.

<sup>131</sup> Additionally, while the treaty parties incorporated environmental and other exceptions from Article XX of the GATT into the CETA, they only did so partially. The GATT’s exceptions do not apply to CETA’s FET or expropriation obligations. CETA, art. X.02.

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