

Columbia Law School

Scholarship Archive

Columbia Center on Sustainable Investment
Staff Publications

Columbia Center on Sustainable Investment

12-2019

Aligning Investment Treaties with Sustainable Development Goals

Lise Johnson

Columbia Law School, Columbia Center on Sustainable Investment, ljj2107@columbia.edu

Lisa E. Sachs

Columbia Law School, Columbia Center on Sustainable Investment, lsachs1@law.columbia.edu

Nathan Lobel

Columbia Law School, Columbia Center on Sustainable Investment, nl2617@columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/sustainable_investment_staffpubs



Part of the Banking and Finance Law Commons, Comparative and Foreign Law Commons, Environmental Law Commons, International Law Commons, Securities Law Commons, and the Transnational Law Commons

Recommended Citation

Lise Johnson, Lisa E. Sachs & Nathan Lobel, *Aligning Investment Treaties with Sustainable Development Goals*, *Columbia Journal of Transnational Law*, vol. 58, p.58, 2019 (2019).

Available at: https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/2

This Report/Policy Paper is brought to you for free and open access by the Columbia Center on Sustainable Investment at Scholarship Archive. It has been accepted for inclusion in Columbia Center on Sustainable Investment Staff Publications by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

Aligning International Investment Agreements with the Sustainable Development Goals

LISE JOHNSON*, LISA SACHS** & NATHAN LOBEL***

International investment agreements (“IIAs”) provide enforceable protections to foreign investors in order to stimulate investment flows and therefore sustainable development. However, as understandings of both the effectiveness of these agreements as well as the effects of investment and investment governance on sustainable development have evolved, it is not clear that IIAs as currently designed are fit for that purpose. This article examines the alignment of IIAs with the 2030 Sustainable Development Agenda. It develops this examination in three ways. First, it proposes that IIAs should be designed and evaluated with respect to their ability to promote investments that advance sus-

* Lise Johnson is the Investment Law and Policy Head at the Columbia Center on Sustainable Investment (“CCSI”). Her work at CCSI centers on analyzing investment treaties and treaty-based investor-state arbitrations, and examining the implications those instruments and cases have for host countries’ domestic policies and sustainable development strategies. In addition, she concentrates on key institutional and procedural aspects of the investment law framework, including efforts to increase transparency in and legitimacy of investor-state dispute settlement. She has a B.A. from Yale University, a J.D. from the University of Arizona, an LL.M. from Columbia Law School, and is admitted to the bar in California.

** Lisa Sachs is the Director of CCSI, where she oversees three areas of focus: investments in extractive industries, investments in land and agriculture, and investment law and policy. She received a B.A. in economics from Harvard University, and earned her J.D. and M.A. in international affairs from Columbia University, where she was a James Kent Scholar and recipient of the Parker School Certificate in International and Comparative Law. She is admitted to the bar in New York.

*** Nathan Lobel is a J.D. candidate at Harvard Law School, where he focuses on climate policy and political economy. Prior to law school, he was the Special Assistant to the Director of CCSI, where his scholarship centered on international governance and the clean energy transition. He received his B.A. in political science from Yale University with high honors, during which time he also worked with the Yale Program on Climate Change Communication and as a fossil fuel divestment organizer.

tainable development goals and to withhold benefits from investments that undermine these goals. Second, it considers the effects of IIAs on policy-making processes and regulatory space, cautioning that current provisions in IIAs protect the interests of investors over those of other stakeholders and constrain states' abilities to regulate investments in conformity with the public interest. Finally, it suggests that international agreements could and should do more to address transnational governance gaps, regulatory races to the bottom, and global commons problems, where international commitments related to the governance of investment could advance development outcomes. While the authors affirm the importance of foreign direct investment and international investment governance to achieve the 2030 Agenda for Sustainable Development, they argue that existing IIAs must be meaningfully reformed and future treaties reimagined in order to align with the sustainable development goals.

INTRODUCTION60

I. THE NEED FOR NEW THINKING ON INTERNATIONAL INVESTMENT POLICY60

II. IIAs AND SDG-ADVANCING INVESTMENT65

 A. Catalyzing and Channeling Investment for the SDGs66

 B. Not Subsidizing Harmful Investments.....71

III. IIAs AND SDG-ADVANCING GOVERNANCE81

 A. IIAs and Distortion of Policy-Making Processes81

 1. Distortion Through Substantive Protections and ISDS Enforcement.....83

 2. Distortion Through Express and Implied Notice-and-Comment IIA Rules.....87

 3. Opportunities to Promote Good Governance and Mitigate Distortion Risk92

 B. IIAs and Policy Space to Regulate Investments94

 1. Constraints on Policy Space94

 2. Opportunities to Avoid Unjustified Policy Space Constraints.....105

IV. IIAs AND SDG-ADVANCING INTERNATIONAL

60 *COLUMBIA JOURNAL OF TRANSNATIONAL LAW* [58:1

COOPERATION.....107

 A. Combatting Races to the Bottom107

 B. Closing Transnational Governance Gaps111

 C. Anticipating, Understanding, and Addressing Treaty
 Effects in State Parties113

 D. Addressing Relevant Global Commons Challenges.....116

CONCLUSION119

INTRODUCTION

I. THE NEED FOR NEW THINKING ON INTERNATIONAL INVESTMENT
POLICY

In 2015, the 193 United Nations (“U.N.”) member states unanimously adopted the 2030 Agenda for Sustainable Development, including seventeen Sustainable Development Goals (“SDGs”) designed to tackle the most pressing global problems and put society on a development trajectory that is equitable and environmentally sound.¹ The goals laid out an ambitious and wide-reaching development agenda and called for unprecedented global coordination to end poverty, achieve gender equality, protect the environment and fight climate change, promote peace, and strengthen global institutions by the year 2030.

Achieving the SDGs will require the tremendous mobilization of public and private investment; estimates suggest at least a \$2.5 trillion annual investment gap in developing countries alone.² The 2030 Agenda for Sustainable Development recognized the need for governments to encourage “financial flows, including foreign direct investment, to States where the need is greatest,” and to “[a]dopt and implement investment promotion regimes for least developed countries.”³

Indeed, foreign direct investment (“FDI”) is critical to sus-

1. G.A. Res. 70/1, at 1–2, 14, Transforming Our World: The 2030 Agenda for Sustainable Development (Sept. 25, 2015) [hereinafter 2030 Agenda for Sustainable Development].

2. U.N. Conf. on Trade & Dev. [UNCTAD], World Investment Report 2014: Investing in the SDGs: An Action Plan, at 140, U.N. Doc. UNCTAD/WIR/2014 (2014).

3. 2030 Agenda for Sustainable Development, *supra* note 1, at 21, 26 (listing Goals 10.b and 17.5).

tainable development objectives because it represents real economic activity being directed into a country.⁴ FDI can be an efficient and effective way to transfer capital and technologies across borders and, when the proper policies and conditions are in place, an important means to spur environmentally sound economic growth and development through employment, infrastructure development, technology transfer, tax revenues, and other economic linkages.

However, FDI does not automatically generate positive environmental, economic, and social outcomes, and can at times harm host countries and communities. Even when FDI does generate positive outcomes, the price paid to attract FDI (e.g., in the form of direct subsidies, lost tax revenues, or relaxed or waived social or environmental regulations) may outweigh the benefits obtained. Laws, policies, and practices in host and home countries, and at the international level, instrumentally shape both whether FDI ultimately contributes to sustainable development and how it impacts affected stakeholders and the planet.

At the international level, the network of over 3,000 international investment agreements (“IIAs”) comprises a notable and potent portion of the relevant governance framework.⁵ These agreements provide protections and other benefits to foreign investors, usually enforceable through investor-state dispute settlement (“ISDS”). Support for IIAs is largely based on the premise that enforceable investor protections will stimulate greater investment flows, which in turn is assumed to promote development of the treaty parties.⁶

4. The OECD Benchmark edition of FDI explains that FDI is:

a category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise (the direct investment enterprise) that is resident in an economy other than that of the direct investor. . . . The “lasting interest” is evidenced when the direct investor owns at least 10% of the voting power of the direct investment enterprise.

ORG. FOR ECON. CO-OPERATION & DEV. [OECD], OECD BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT: FOURTH EDITION 17 (2008). FDI is distinct from other kinds of investment, such as portfolio flows, remittances, and other financial flows (e.g., bank loans).

5. By the close of 2018, 3,340 IIAs had been ratified, 2,671 of which are in force. *International Investment Agreements Navigator*, UNCTAD INV. POL’Y HUB, <https://investmentpolicyhub.unctad.org/IIA> [<https://perma.cc/HV83-BYPP>] (last accessed Dec. 27, 2018). A growing minority of these agreements also includes provisions requiring investment liberalization.

6. Joachim Pohl, *Societal Benefits and Costs of International Investment Agreements* 4–8 (OECD Working Papers on Int’l Inv., Working Paper No. 2018/01, 2018); *see also* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT (Karl Sauvant & Lisa Sachs eds., 2009).

However, the veracity of this premise is uncertain at best. First, states and other institutions have grown to appreciate that not all investments contribute to development, and that policy interventions are often needed to ensure that the benefits of investment are captured and the harms are avoided.⁷ Second, a growing body of research questions whether IIAs actually deliver on their stated promise to increase investment flows,⁸ never mind at what cost, and never mind whether those flows help or hinder the host or home countries' development. Third, new research alleges that substantive and procedural aspects of investment treaties exacerbate inequality,⁹ undermine the rule of law,¹⁰ and discourage states from adopting environmental and public health measures.¹¹ In July 2018, the U.N. Secretary General cautioned that:

international investment agreements, which are meant to support foreign investment, often result in unintended consequences, such as constraining regulations that support sustainable development when the regulations impact investor profits. Some countries have become vulnerable to large financial penalties from

7. See, e.g., OECD, FDI QUALITIES TOOLKIT: INVESTMENT FOR INCLUSIVE AND SUSTAINABLE GROWTH: PROGRESS REPORT III, at 3–4 (2019).

8. E.g., THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT, *supra* note 6; Emma Aisbett, *Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation* 1–5 (Dep't of Agric. & Res. Econ., U.C. Berkeley, Working Paper No. 1032, 2007); LISE JOHNSON ET AL., COSTS AND BENEFITS OF INVESTMENT TREATIES: PRACTICAL CONSIDERATIONS FOR STATES 4–5, 15 (2018); Pohl, *supra* note 6, at 4–8; JONATHAN BONNITCHA, INT'L INST. FOR SUSTAINABLE DEV., ASSESSING THE IMPACTS OF INVESTMENT TREATIES: OVERVIEW OF THE EVIDENCE 1–12, 15 (2017), available at <https://iisd.org/sites/default/files/publications/assessing-impacts-investment-treaties.pdf> [<https://perma.cc/BXN2-G6GR>].

9. Lisa Sachs & Lise Johnson, *Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities* 2 (Initiative for Pol'y Dialogue, Working Paper No. 306, 2018), <https://ccsi.columbia.edu/files/2017/11/ISDS-and-Intra-national-inequality.pdf> [<https://perma.cc/ZXN2-UGWV>].

10. See MAVLUDA SATTOROVA, THE IMPACT OF INVESTMENT TREATY LAW ON HOST STATES: ENABLING GOOD GOVERNANCE? 59–61 (2018); Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L. & ECON. 107, 108 (2005).

11. See Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, 7 TRANSNAT'L ENVTL. L. 229, 229–30 (2018); Julia Brown, *International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?*, 3 W. J. LEGAL STUD. 1, 24–25 (2013); Gus van Harten & Dayna Nadine Scott, *Investment Treaties and Internal Vetting of Regulatory Proposals: A Case Study from Canada*, 7 J. INT'L DISP. SETTLEMENT 92, 92–93, 108–09 (2016).

arbitration panels set up to settle investor-State disputes, impeding their ability to implement policies in support of the Sustainable Development Goals.¹²

Informed by this growing body of literature on and experience with the costs and benefits of IIAs, various governmental and civil society stakeholders have begun to discuss 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.¹³

The SDGs provide a framework against which today's analysts can evaluate the features and effects of existing IIAs, and consider the role such agreements could play. This paper argues that existing or re-imagined IIAs should be evaluated with respect to their ability to:

- encourage and channel investments that contribute to sustainable development, and withhold benefits from those that do not;
- foster, and not constrain, responsible, SDG-advancing governance at the national level; and
- promote international cooperation to overcome transnational and collective action challenges related to the governance of international investment.

This paper unpacks each of those three elements. Part II of this paper focuses on the role of IIAs in catalyzing, channeling, shaping, and/or discouraging investment flows and investment behavior, and the resulting impacts thereof. Importantly, these evaluations must consider not only IIAs' net impacts on investment flows, but al-

12. U.N. Secretary-General, *Int'l Fin. Sys. and Dev.: Rep. of the Secretary-General*, ¶ 62, U.N. Doc. A/73/280 (July 30, 2018).

13. The United Nations Commission on International Trade Law ("UNCITRAL"), for instance, has tasked one of its working groups with a mandate to catalogue concerns with investor-state dispute settlement, and discuss the desirability of reforms. U.N. GAOR, U.N. Comm'n on Int'l Trade Law [UNCITRAL], 50th Sess., Supp. No. 17 at paras. 263, 264, U.N. Doc. A/72/17 (July 3–21, 2017). Information about the working group's meetings is available at UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE, http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html [<https://perma.cc/FL5S-2P85>] (last visited Oct. 31, 2019). See also UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, at 119–74, U.N. Doc. UNCTAD/WIR/2015 (2015); Colum. Ctr. on Sustainable Inv., 10th Annual Columbia International Investment Conference: Investment Treaty Reform: Reshaping Economic Governance in an Era of Sustainable Development (Nov. 10–11, 2015); Colum. Ctr. on Sustainable Inv., 13th Annual Columbia International Investment Conference: Rethinking International Investment Governance: Principles for the 21st Century (Sept. 27–28, 2018).

so their ability to promote investments that contribute to sustainable development and to withhold benefits from those that undermine it.

Part III shifts from an analysis of IIAs' impacts on investments to IIAs' impact on domestic governance of those investments. Because the potential outcomes of investment—both positive and negative—depend to a significant extent on the regulatory frameworks that govern investor conduct, IIAs must also be evaluated in light of their impacts on domestic governance systems and their ability to promote and strengthen, and not inhibit, development-advancing governance.

Finally, Part IV argues that IIAs should be evaluated for the relevant opportunities they seize, or miss, to advance sustainable development through international cooperation. Importantly, IIAs should address issues for which international law, collaboration, and institutions are key, if not necessary. Such issues include races to the bottom on taxation and regulation as well as collective action and transnational challenges related to reducing global poverty and inequality, fighting climate change, and protecting human rights. The transnational nature of corporate actors and capital also requires international cooperation to appropriately regulate and provide redress for harms they might cause. This Part is particularly relevant in light of the existential challenges that systems of international law, governance, and cooperation are facing, and the questions being raised by domestic actors across the globe about the roles, legitimacy, and beneficiaries of international norms and institutions.¹⁴ There is a vital need for effective international governance, but also a vital need to better identify and articulate the role of these international systems and their value added for different issues and stakeholders.

While we affirm the importance of FDI and international investment governance to achieve the 2030 Agenda for Sustainable Development, we argue that existing IIAs are not designed to promote SDG-enhancing foreign investment nor to facilitate strategic international cooperation, and may in fact undermine development by supporting harmful investments and constraining governments' abilities to prevent or address those resulting harms. Existing IIAs must

14. The literature on these topics is vast. On the promise of, and challenges in achieving, global cooperation, see, e.g., TODD SANDLER, *GLOBAL COLLECTIVE ACTION* (2004); on some manifestations and causes of backlash against globalization, see, e.g., Richard Javad Heydarian, *Asian Fury: Rodrigo Duterte and the Populist Backlash Against Globalization*, 38 *HARV. INT'L REV.* 36 (2017); OECD, *Fixing Globalisation: Time to Make It Work for All* (2017), <https://doi.org/10.1787/9789264275096-en> [<https://perma.cc/2NUU-FSJY>]; Susan Franck, *International Arbitration—Between Myth and Reality: 9th John E.C. Brierley Memorial Lecture*, 5 *MCGILL J. DISP. RESOL.* 1 (2018).

be meaningfully reformed (including, potentially, through termination and replacement), and future treaties reimagined in line with this three-part analysis in order to align international investment governance to the SDGs.¹⁵

II. IIAs AND SDG-ADVANCING INVESTMENT

The 2030 Agenda for Sustainable Development recognizes the need to mobilize private investment to address key financing gaps in achieving the SDGs. Specifically, the Financing for Development Action Agenda identifies a need for increased investment in infrastructure, low carbon and climate resilient development, innovation and clean technologies, and sustainable agriculture, among other sectors.¹⁶ Yet, at present, FDI is not being directed into the locations, sectors, or activities needed to maximize impact.¹⁷ The key questions this raises are: how can international agreements help to catalyze, attract, and channel SDG-advancing investments? Should IIAs withhold benefits from investments that do *not* advance, and potentially undermine, sustainable development? And how can and should IIAs identify whether and to what extent investments are or are not SDG-advancing? This section addresses those issues.

Part A describes how IIAs could and should promote and shape FDI for sustainable development. It first synthesizes the fac-

15. LISE JOHNSON ET AL., CLEARING THE PATH: WITHDRAWAL OF CONSENT AND TERMINATION AS THE NEXT STEPS FOR REFORMING INTERNATIONAL INVESTMENT LAW 5–11 (2018).

16. Third International Conference on Financing for Development, *Addis Ababa Action Agenda*, ¶¶ 7, 13, 14, 17, 60 (July 13–16, 2015), available at https://un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf [<https://perma.cc/RJP4-HW2X>].

17. U.N. DEP'T ON ECON. & SOC. AFF. [UNDESA] ET AL., WORLD ECONOMIC SITUATION AND PROSPECTS 2018: UPDATE AS OF MID-2018, at 5, 20, U.N. Sales No. E.18.II.C.2 (2018). This report addresses, for instance, the distribution of investment across locations and sectors. *Id.* at 5 (“In many low-income countries, where the marginal return to any investment tends to be relatively high, the level of investment appears to be insufficient to achieve a more sustained and inclusive growth, especially in parts of Africa. Moreover, investment remains highly concentrated in extractive industries, rather than laying foundations for a more diversified economy.”). It also addresses patterns of investment in the energy mix and implications for climate change. *Id.* at 20 (“Renewables accounted for 61 per cent of all newly-installed net power capacity in 2017. . . . If the pace of power transition were to continue at this rate, as a conservative estimate it would take at least 55 years for the share of renewables in total capacity to reach 50 per cent. In this context, achieving the target of the Paris Agreement poses an immense challenge.”). See also UNDESA ET AL., WORLD ECONOMIC SITUATION AND PROSPECTS 2017, at vii, 79, U.N. Sales No. E.17.II.C.2 (2017) (highlighting similar issues).

tors, including government policies, that can influence investment decisions. It then summarizes research on the rather unclear connections between the current stock of IIAs and investment decisions, and offers examples of treaty practices that, as compared to practices typifying the universe of existing treaties, stand out for their more targeted efforts to catalyze SDG-advancing investment.

Then, Part B discusses the need to better ensure IIAs do not subsidize or support SDG-undermining investment. In this context, Part B also explores the gradations between SDG-advancing and SDG-undermining investment, and the role of governance in shaping investment outcomes, a theme further developed in Part III.

A. Catalyzing and Channeling Investment for the SDGs

A number of factors may prevent investments from being made. These barriers may result from explicit public policies, like host country bans or restrictions on foreign investment in particular places (e.g., border zones) or sectors (e.g., critical infrastructure). But they may also include softer barriers, such as risky or costly legal, economic, and political environments in the host country that cause uncertainty and threaten project profitability.¹⁸ Barriers can also result from factors like information asymmetries, linguistic differences, or geographical distance, which all impede identification and pursuit of economic opportunities by an investor from one country in the territory of another. Other barriers to investment include those over which individual states have little control, such as geographical features that make access to markets difficult. Barriers hindering investment may also arise from home state conduct, including through sanctions barring investment in particular destinations, or tax treatment that aims to encourage repatriation to the home state rather than reinvestment of FDI-generated profits in the host state.¹⁹

States seeking to attract investment can and do work to address some of the policy-related barriers both unilaterally and in co-

18. Literature on barriers to FDI is rich. *See, e.g.*, JOHN H. DUNNING, EXPLAINING INTERNATIONAL PRODUCTION (1988); FOREIGN DIRECT INVESTMENT AND GOVERNMENTS: CATALYSTS FOR ECONOMIC RESTRUCTURING (John H. Dunning & Rajneesh Narula eds., 1997).

19. *See, e.g.*, UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies*, at 16, U.N. Doc. UNCTAD/WIR/2018 (2018) (predicting that tax reforms in the U.S. would encourage repatriation of funds held overseas by U.S. MNEs and result in decreased inward FDI flows into other countries). Tax treatment can encourage repatriation to the home state rather than reinvestment of FDI-generated profits in the host state.

operation with other states. For instance, states may unilaterally open up sectors to foreign investment, reduce or eliminate joint venture mandates or performance requirements, provide certain types of property rights protections, improve the quality and speed of their administrative and judicial systems, invest in soft and hard infrastructure, and/or offer investment incentives.²⁰

Bilaterally and multilaterally, states may also pursue tools and agreements related to investor protection, risk mitigation, and economic and political cooperation to attract and channel FDI. These can be used, for instance, to help foreign investors better identify relevant cross-border opportunities; allow policymakers to understand and remove barriers (at home or abroad) impeding mutually beneficial investment; provide financial, technical, and other support on a special and differential treatment basis to aid public investments in the crucial soft and hard infrastructure that enable private sector investment; and mitigate currency risk to allow for crucial infrastructure investments.²¹ International instruments can also signal countries' commitments to offer certain standards of treatment or abide by certain norms; and they can include a range of mechanisms, including state-to-state peer review, informal consultations, and legalized dispute settlement, to ensure that signals align with practice and to monitor and strengthen adherence to commitments. Each of these options varies in terms of its overall effectiveness as well as its costs and benefits to investors, governments, and other stakeholders, with those costs and benefits often depending a great deal on specific context.

IIAs are designed to attract FDI by formalizing state commitments to take actions that they could undertake unilaterally in the absence of such agreements, rather than by committing to cooperative measures. For instance, some IIAs include commitments by

20. With respect to the final example, investment incentives may be offered in an attempt to compensate for actual or perceived weaknesses as investment destinations. *See generally* RETHINKING INVESTMENT INCENTIVES: TRENDS AND POLICY OPTIONS (Ana Teresa Tavares Lehmann, Perrine Toledano, Lise Johnson & Lisa Sachs eds., 2016) (exploring the use, rationales, policy considerations, and governance efforts related to investment incentives).

21. Foreign exchange risk can be a major barrier to international investment in viable and sustainable infrastructure projects, especially projects in countries without well-developed local capital markets. There are, however, ways that international cooperation can be used to help mitigate some of those risks. *See, e.g.*, Tomoko Matsukawa et al., *Foreign Exchange Risk Mitigation for Power and Water Projects in Developing Countries* 9, 19 (World Bank Energy & Mining Sector Bd., Discussion Paper No. 9) (discussing, for instance, a multilateral initiative to establish a local currency guarantee facility and a home country's establishment of an exchange rate liquidity facility).

states to liberalize investment flows and open domestic sectors to foreign investment.²² Some IIAs also include restrictions on performance requirements, giving companies freer rein to invest and operate on the terms and conditions they want, unconstrained by policies promoting domestic equity, local sourcing, and other FDI benefit capture by host countries (notably, however, the treaties generally allow home states to impose performance requirements on investment projects they support abroad).²³ And primarily, 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 achieving their promotion function by locking in, at the international level, state promises to protect foreign investors from harms or losses suffered as a result of state conduct.²⁴ States have thus committed in their treaties to provide foreign investors certain standards of treatment (with hotly contested contours), and have often coupled those protections with ISDS mechanisms that allow foreign investors to directly claim and seek remedy for breach.²⁵

Proponents of IIAs have contended that these investment protections can catalyze international investment flows.²⁶ But, although investment treaties might indeed affect how a company *structures* its investment in a host state (e.g., encouraging investors to route their investments through an intermediary state that has a strong investment treaty with the host state),²⁷ there is no clear or consistent evidence that the thousands of existing treaties have had any significant effect on investors' decisions regarding whether and how much to in-

22. See, e.g., Framework Agreement on the Promotion, Protection, and Liberalization of Investment in Asia Pacific Trade Agreement Participating States art. 3, Dec. 15, 2009, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2591/download> [<https://perma.cc/7JCG-Z6EV>].

23. See, e.g., Trans-Pacific Partnership arts. 9.10, 9.10(e), Feb. 4, 2016 (containing restrictions on performance requirements and excluding performance requirements imposed in connection with respect to export promotion and foreign aid programs, respectively), available at <https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/text-of-the-trans-pacific-partnership/> [<https://perma.cc/75C5-4CS2>].

24. Treaty for the Promotion and Protection of Investments, Ger.-Pak., Nov. 25, 1959, 457 U.N.T.S. 23.

25. OECD, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey* 8 (OECD Working Papers on Int'l Inv., Working Paper No. 2012/02, 2012).

26. THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT, *supra* note 6; Pohl, *supra* note 6, at 13, 16–17.

27. See, e.g., Pohl, *supra* note 6, at 13.

vest in particular host destinations.²⁸ As currently designed, therefore, IIAs do not seem to deliver on their policy promise of catalyzing international investment and associated benefits.²⁹

However, IIAs could employ different strategies. Rather than imposing obligations on host governments regarding treatment of investments, investment treaties could address investment governance more holistically, help to identify and overcome specific barriers to investment, and include mechanisms and commitments on the part of the home state to actively promote increased cross-border investment flows, particularly in sectors and activities consistent with the states' development objectives. Indeed, some treaties are already starting to do this.³⁰ While the provisions tend to be hortatory, and are often excluded from the treaties' formal enforcement mechanisms, they illustrate initial steps toward more impactful cooperation.

The Japan-Mexico Economic Partnership Agreement, for instance, explicitly includes state commitments to promote cross-border investment in activities designed to advance sustainable development and combat climate change through capacity and institutional building and informational exchange, including for the "identification of investment opportunities and the promotion and development of business alliances in the field of environment."³¹

Other relevant provisions are included in the Cotonou Agreement, concluded between the European Union ("EU") and the members of the African, Caribbean, and Pacific ("ACP") Group of States in 2000 and subsequently amended. This agreement provides for inter-state cooperation and EU assistance in a range of activities that aim to increase cross-border investment flows. These include

28. See, e.g., JONATHAN BONNITCHA, *SUBSTANTIVE PROTECTION UNDER INVESTMENT TREATIES: A LEGAL AND ECONOMIC ANALYSIS* 105–09 (2014); UNCTAD, *supra* note 2; THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT, *supra* note 6. 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?* (German Dev. Inst./Deutsches Institut für Entwicklungspolitik, Discussion Paper No. 37/2014, 2014).

29. See, e.g., sources cited in *supra* note 8. Moreover, and as discussed in subsequent sections, there are economic, social, and governance costs associated with the standards of protection provided to foreign investors and the ISDS mechanism used to enforce them, which may undermine progress on other SDGs.

30. See Kathryn Gordon, Joachim Pohl & Marie Bouchard, *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey* 9–17 (OECD Working Papers on Int'l Inv., 2014).

31. Agreement for the Strengthening of the Economic Partnership, Japan-Mex., art. 147(1), Sept. 17, 2009, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2696/download> [<https://perma.cc/XG2Z-GV7Y>].

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.³²

Chapter 9 of the Switzerland-China Free Trade Agreement (“FTA”) likewise sets forth areas in which the parties may cooperate to promote cross-border investment, and provides for the parties to engage in further dialogue regarding investment facilitation and liberalization.³³ The Switzerland-China FTA also has a fairly detailed chapter on economic and technical cooperation that aims, *inter alia*, to “create and enhance sustainable trade and investment opportunities by facilitating trade and investment between the parties.”³⁴

Other relevant agreements include Brazil’s Cooperation and Facilitation Investment Agreements, which the country has been negotiating from roughly 2013 onward.³⁵ Brazil’s approach, developed based on consultations with internal government entities, private sector coalitions, and other stakeholders and experts, focuses on enabling states to identify and overcome barriers to investment and solve challenges investors face. These agreements seek to advance investment promotion objectives by, for instance, establishing ombudsmen or “Focal Points” responsible for providing support to investors from the other contracting party.³⁶ The ombudsmen or Focal Point’s duties include providing “timely and useful information on regulatory issues on general investment or on special projects,” fielding com-

32. See Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part, ch. 7, June 23, 2000 (amended 2005, 2010), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2499/download> [<https://perma.cc/KWF3-JLET>].

33. See Free Trade Agreement Between the People’s Republic of China and the Swiss Confederation, China-Switz., ch. 9, July 6, 2013, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2751/download> [<https://perma.cc/BM4B-T523>].

34. *Id.* art. 13.1(b).

35. See, e.g., José Henrique Vieira Martins, *Brazil’s Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments*, INT’L INST. FOR SUSTAINABLE INV. (June 12, 2017), <https://iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins> [<https://perma.cc/VYV7-GPAP>]; Lise Johnson, et al., *International Investment Agreements, 2014: A Review of Trends and New Approaches*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2014-2015, at 15, 22–24 (Andrea Bjorklund ed., 2016).

36. Model Cooperation and Facilitation Investment Agreement, Braz., art. 18., 2015, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download> [<https://perma.cc/AX93-59F8>].

plaints from investors, and preventing potential conflicts.³⁷

The examples of investment-related treaty provisions referred to above are arguably modest in terms of their focus on and commitments to advancing investment flows for sustainable development; nevertheless, they highlight possibilities for investment treaties, if re-oriented, to more actively mobilize and shape investment for sustainable development. One could imagine more robust provisions included in IIAs, such as commitments to increase investment into the less developed country partner or to help increase investment in particular sectors or activities.

Moreover, one could envision the creation of processes and institutions to routinely evaluate the impact and effectiveness of existing treaty provisions on investment promotion and facilitation, help identify the factors relevant to those provisions' success, and inform where and how to improve treaty language, implementation and associated outcomes. These evaluations could be conducted ad hoc by treaty parties individually or together, or, preferably, be built into the treaty to support its continued relevance and utility. Overall, therefore, there is much that IIAs still can and should do to help identify and overcome barriers to SDG-supportive investment. Their present focus on disciplining state conduct is too narrow in terms of the range of policy options pursued and, as discussed below, overly broad in terms of the nature of potential investor beneficiaries covered.

B. Not Subsidizing Harmful Investments

In addition to more proactively promoting investments that contribute to the SDGs, so too should IIAs discourage—or at least not offer additional protections or support to—investments with clearly negative effects. Such investments may include, for example, investments in fossil fuel extraction and related infrastructure, investments that result from or perpetuate corrupt dealings, or those violating international labor standards.

The substantive benefits and protections offered in investment treaties, as they have been negotiated, interpreted, and applied to date, are additional to and go further than protections offered by analogous areas of domestic and international law.³⁸ The procedural

37. *Id.*

38. See, e.g., David Gaukrodger, *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law* 29 (OECD Working Papers on Int'l Inv., 2014) (discussing relative treatment of shareholders); Lise Johnson,

privileges offered through IIAs, namely the ability to sue states directly through ISDS for IIA breaches, similarly exceed those available under domestic and other areas of international law,³⁹ and magnify the strength of investors' substantive treaty protections.⁴⁰ These benefits act as regulatory incentives that, even if not effective at attracting investment, effectively subsidize foreign investments. Framed in this manner, it is uncontroversial to suggest that governments should evaluate which types of investments, investors, and activities are deserving of such subsidies, and ensure that the protections and benefits afforded under IIAs do not support investments that may undermine the SDGs.⁴¹

In conducting these evaluations, governments can break the potential impacts of international investment into four categories:

1. Impacts that are or are almost unavoidably net negative in the host country. This might include investments for trade in or production of goods or services illegal in the host state,⁴² or investments that would

Lisa Sachs & Jeffrey Sachs, *Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law* 3–5 (Colum. Ctr. on Sustainable Inv., Policy Paper, 2015) (highlighting various ways in which protections under U.S. law differ from those under investment law); Lise Johnson, *A Fundamental Shift in Power: Permitting International Investors to Convert their Economic Expectations Into Rights*, 65 UCLA L. REV. DISC. 106, 112–15 (2018) (comparing the doctrine of estoppel under domestic law with that under investment law). Additionally, the treaties may offer other benefits, such as market access rights and stronger intellectual property protections.

39. When investors sue states through ISDS, they are able to do so free from the restrictions on suit that may be relevant at the domestic level. These restrictions may relate to, for instance, limits on standing, ripeness, justiciability, and standards or availability of review. Johnson, Sachs & Sachs, *supra* note 38, at 8. Investors' abilities to sue are also strong as compared to rights available to individuals and entities to sue under other areas of international law. International economic law other than investment law establishes that disputes should be resolved at the state-to-state level. In international human rights law, for example, where direct rights of action are permitted against the state, those bringing claims must generally have exhausted domestic remedies before turning to the international forum.

40. *Id.*

41. See, e.g., Comm. on Econ., Soc. & Cultural Rights, General Comment No. 24, U.N. Doc. E/C.12/GC/24 (2017) (describing State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities and calling for similar assessments of human rights impacts by home states in certain contexts).

42. The operational regulations of the Multilateral Investment Guarantee Agency ("MIGA") of the World Bank provide that "legally prohibited activities such as narcotics production shall not be covered. MIGA shall not cover investments that do not comply with the national laws of the Host Country, including those that protect core labor standards." See Multilateral Inv. Guar. Agency [MIGA], *Operational Regulations*, at 31 (Aug. 27, 2002) https://www.miga.org/sites/default/files/archive/Documents/miga_documents/Operations-

significantly and irreversibly harm natural ecosystems, require resettlement of large numbers of people,⁴³ or otherwise impact critical ecological zones.⁴⁴

2. Impacts that are or are almost unavoidably net negative in the home country. This category includes, perhaps most clearly, outward investments made solely for the purpose of avoiding taxes otherwise due to the home country, such as “inversions,” in which companies move overseas to reduce their tax burden.⁴⁵
3. Impacts that may be positive in the home and host country (at least in the near-term), but are negative in third countries or for the global commons. The category might include investment in exploration for and extraction of new fossil fuel reserves, projects that result in major deforestation harmful to biodiversity, and production and trade of harmful products for consumption in third countries.
4. Impacts whose positive and negative effects in the home and/or host country depend on corporate con-

Regulations-030115.pdf [https://perma.cc/3ATP-C5RL].

43. The United States Overseas Private Investment Corporation (“OPIC”), for instance, will not support “[c]onstruction of dams that significantly and irreversibly: (a) disrupt natural ecosystems upstream or downstream of the dam; or (b) alter natural hydrology; or (c) inundate large land areas; or (d) impact biodiversity; or (e) displace large numbers of inhabitants (5,000 persons or more); or (f) impact local inhabitants’ ability to earn a livelihood.” OVERSEAS PRIVATE INV. CORP. [OPIC], ENVIRONMENTAL AND SOCIAL POLICY STATEMENT app. B, ¶ 3 (2017), [https://opic.gov/sites/default/files/files/final%20revised%20ESPS%201132017\(1\).pdf](https://opic.gov/sites/default/files/files/final%20revised%20ESPS%201132017(1).pdf) [https://perma.cc/T5YW-VBX5].

44. OPIC also includes on its list of Categorically Prohibited Projects those projects for “[c]onversion or degradation of . . . forest-related Critical Natural Habitats.” “Critical Natural Habitats” are defined as:

Existing internationally recognized protected areas, areas initially recognized as protected by traditional local communities (e.g., sacred groves), and sites that maintain conditions vital to the viability of protected areas (as determined by the environmental assessment procedure); and (2) Sites identified on supplementary lists by authoritative sources identified by OPIC. Such sites may include areas recognized by traditional local communities (e.g., sacred groves), areas with known high suitability for biodiversity conservation and sites that are critical for vulnerable, migratory or endangered species. Listings are based on systematic evaluations of such factors as species richness, the degree of endemism, rarity, and vulnerability of component species, representativeness and the integrity of ecosystem processes.

Id. ¶ 1.

45. The United States’ OPIC’s list of Categorically Prohibited Projects includes investments by “[c]ompanies which are treated as inverted corporations under 6 U.S.C § 395(b).” *Id.* at 40.

duct and appropriate government regulation. The impacts can result from the nature of the investment's relevant sector, activity, or project, and the way the investment is managed and governed.⁴⁶

Governments risk reputational and potentially legal consequences for affirmatively supporting outward investments that harm home⁴⁷ and host countries and communities, third countries, and the global commons.⁴⁸ Home governments are consequently increasingly assessing and addressing conduct and impacts of the firms they support overseas.⁴⁹ Some, for instance, are taking steps to ensure that they do not incentivize harm-causing investments, and that any government support for outward investing firms requires an assess-

46. For a discussion of sector-level issues and how IIAs could address them, see Section IV. Section IV.C, for instance, discusses impacts on cross-border investment in the chemicals sector as projected in the EU–China IIA Sustainability Impact Assessment.

47. OPIC, for example, implicitly recognizes the potential for negative consequences of outward-investment-promotion activities in pledging to “assesses the projected U.S. economic impact [of a given potential OPIC-supported project] to ensure it will not harm U.S. jobs or the U.S. economy” and “decline the support for any project that would result in the loss of U.S. jobs.” *Our Investment Policies: U.S. Effect*, OPIC, <https://www.opic.gov/who-we-are/OPIC-policies/US-effects> [https://perma.cc/ZQQ4-H6UC] (last visited Oct. 31, 2019).

48. See Comm. on Econ., Soc. & Cultural Rights, *supra* note 41. See also Lise Johnson & Sophie Thomashausen, *Raising the Bar, Home Country Efforts to Regulate Foreign Investment for Sustainable Development* 5–10 (Background Note to Ninth Annual Investment Conference, 2014) (noting legal and reputational arguments in favor of home state efforts to assess effects of investments they actively support).

49. Such references to the roles of home states under human rights law can be found, for instance, in the Comm. on Econ., Soc. and Cultural Rights, *supra* note 41, at 1. See, e.g., Danish Inst. for Human Rights & Int'l Corp. Accountability Roundtable, *Nat'l Action Plans on Bus. and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Bus. and Human Rights Frameworks* 18 (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.” *Id.* 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. *Id.* at 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?” *Id.* at 98. 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)?” *Id.* at 121.

ment of net-positive contribution, with an analysis of distributional effects.⁵⁰

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 and encourage optimal behavior—is political risk insurance and export credit insurance.⁵¹ These government-sponsored insurance schemes, which aim to decrease risk 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.⁵²

Policies of the World Bank’s Multilateral Investment Guarantee Agency (“MIGA”),⁵³ the United States’ Overseas Private Investment Corporation (“OPIC”),⁵⁴ Switzerland’s Export Risk Insurance (“SERV”),⁵⁵ and the OECD’s “Common Approaches”⁵⁶ are but some

50. Analogous efforts to identify and avoid or mitigate harms from FDI are also taking place in the context of initiatives for screening inward FDI. For an example of a screening framework that came into force in April 2019, see Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union, 2019 O.J. (L 79) 1, 1.

51. See, e.g., OPIC, *Environmental and Social Policy Statement*, *supra* note 43, at 37–39; see also OPIC, *Our Investment Policies: U.S. Effects*, *supra* note 47 (discussing restrictions on OPIC’s support). The German Investment Corporation offers another example of a government-owned entity using development criteria to inform, monitor and evaluate the projects it supports and try to advance positive outcomes. *Our Impact: We Measure Development Outcome*, DEUTSCHE INVESTITIONS- UND ENTWICKLUNGSGESELLSCHAFT [DEG], <https://www.deginvest.de/International-financing/DEG/%C3%9Cber-uns/Was-wir-bewirken/Wir-messen-Wirksamkeit/> [https://perma.cc/5Q2S-2HKE] (last visited Oct. 31, 2019). Other examples are included in the text, *infra* notes 53–56. See also Kernaghan Webb, *Political Risk Insurance, CSR and the Mining Sector*, 54 INT’L J. L. & MGMT 394, 404 (2012).

52. See, e.g., OPIC, *Environmental and Social Policy Statement*, *supra* note 43, at 37–39; Webb, *supra* note 51, at 404. See also discussion in text, *infra* Section II.B. In a highly visible case, OPIC cancelled the insurance policy of Freeport McMoRan’s Grassberg mine in Papua after an environmental report revealed extensive environmental violations. Jane Perlez & Raymond Bonner, *Below a Mountain of Wealth, a River of Waste*, N.Y. TIMES (Dec. 27, 2005), <https://www.nytimes.com/2005/12/27/world/asia/below-a-mountain-of-wealth-a-river-of-waste.html> [https://perma.cc/QC3D-N3XU].

53. MIGA, *supra* note 42, at 89–95.

54. OPIC, *Environmental and Social Policy Statement*, *supra* note 43, at 37–39; see also OPIC, *Our Investment Policies: U.S. Effects*, *supra* note 47 (discussing restrictions on OPIC’s support).

55. Swiss Export Risk Ins., *SERV Guidelines for Reviewing Environmental, Social, and Human-Rights Issues*, at 1, Version 4.2 (2017).

56. OECD, *Recommendation of the Council on Common Approaches for Officially*

of the examples of how governments and intergovernmental bodies have dedicated efforts to ensure that 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, typically the category 1, 2 and 3 types of projects noted above, from coverage due to the negative environmental and social impacts they may have.⁵⁷ Other *ex ante* screens relevant for some category 4-type issues 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 and knowledge transfer.⁵⁸

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.⁵⁹ MIGA’s contracts also provide that MIGA may terminate insurance contracts if the *projects* (not limited to the actions or fault of the investor contracted with MIGA) materially violate 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).⁶⁰

In addition to misconduct that constitutes an automatic or permissible ground for terminating the contract or denying coverage,

Supported Export Credits and Environmental and Social Due Diligence, at 6 (June 28, 2012). This list is not exclusive. The German Investment Corporation, for instance, is another example of a government-owned entity using development criteria to inform, monitor and evaluate the projects it supports.

57. 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*, *supra* note 43, at 37–39.

58. OPIC, ANNUAL POLICY REPORT 2011, at 38 (2011).

59. See, e.g., MIGA, *Contract of Guarantee for Loan Guarantees between the Multilateral Investment Guarantee Agency and [Guarantee Holder]*, arts. 12.1, 13.4(c) (Dec. 2012).

60. *Id.* art. 13.4.

these insurance programs often also state that a broader range of conduct can be grounds to deny coverage if it contributed to harm suffered by the investor or prompted action taken by the host state.⁶¹

Canada's approach to supporting outward investing firms further illustrates how governments could take action to avoid supporting harm-causing investments and activities. For instance, it has indicated that it may withdraw or deny trade advocacy support and/or financial assistance to companies that do not adhere to the government's environmental and social policies in their overseas activities,⁶² and that do not comply in good faith with dispute resolution mechanisms instituted to ensure the companies adhere to standards of responsible business conduct.⁶³

Together these examples highlight ways in which home states or institutions have begun developing tools to better ensure that, when actively supporting international investment, their efforts do not inadvertently cause or exacerbate harm, or aid those engaged in wrongful conduct. They also show how governments can try to encourage desired behaviors and outcomes by supported investors and projects.

The outward investment support schemes discussed above are not free from critique. Some have contended that they fail to adequately identify, prevent and address potential harms, and do not go far enough to positively contribute to sustainable development impacts and outcomes.⁶⁴ Nevertheless, they stand in marked contrast to the *laissez-faire* approach IIAs take to providing coverage and protection to investments. Although IIAs share a similar mission with other government programs supporting outward-oriented firms, raise similar concerns regarding reputational and legal risks, and are similarly subject to SDG 17's call for policy coherence across government activities, IIAs are not as discerning in terms of who and what

61. *Id.* art. 9.1.

62. Export Dev. Can., *Environmental and Social Risk Management Policy*, at 5 (Nov. 1, 2010).

63. *Responsible Business Conduct Abroad*, GLOB. AFFAIRS CAN., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse.aspx?lang=eng> [<https://perma.cc/KF6Z-39HZ>].

64. See, e.g., Oil Change Int'l, *Risking It All: How Export Development Canada's Support for Fossil Fuels Drives Climate Change*, at 4 (Nov. 2018). See also Accountability Counsel et al., Comment Letter on OPIC's Draft Revised Environmental and Social Policy Statement 4–5 (Nov. 23, 2016), available at <https://www.accountabilitycounsel.org/2016/11/accountability-counsel-and-partners-submit-comments-on-opics-draft-environmental-and-social-policy-statement/> [<https://perma.cc/H59R-7EFX>].

they protect and support.⁶⁵ Absent such nuance or consequences, IIAs will continue to subsidize harmful investments.⁶⁶

Governments wanting to ensure that their IIAs do not subsidize or support harm-causing activities could exclude certain investments or types of investments (e.g., those falling into categories 1, 2 and 3 above) from coverage, or from certain treaty protections or benefits. This can be done by enumerating exclusions in the IIA itself; designating a joint committee under the treaty that has the authority to craft and refine a list of investment projects that are clearly and categorically excluded from treaty coverage or from specific protections or benefits; and/or making clear through domestic legislation of the home state that an investor will not qualify for coverage under the home state's treaties for certain designated types of outward investments.

Exclusions could be categorical, based on the type of investment or investor activity, or could be based on subjective assessments of investments' alignment with the SDGs. Categorical exclusions from treaty coverage or specific provisions might be desirable, for instance, for governments seeking to send a clear message discouraging future investment in developing new fossil fuel reserves, the vast majority of which will not be able to be exploited if the world is to avoid warming above 2°C.⁶⁷ Governments could also categorically exclude investors that violate certain core standards of conduct mandated by the host state, home state, or beyond, through obligations not to engage in corruption and bribery, and responsibilities not to contribute to violations of human rights. While some treaties currently deny protections for *investments* that have been made in violation of the law,⁶⁸ or that were made through corruption or

65. 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 AM. U. INT'L L. REV. 829, 845 (2005).

66. Lise Johnson, *Aligning Swiss Investment Treaties with Sustainable Development: An Assessment of Current Policy Coherence and Options for Future Action* 19 (Colum. Ctr. on Sustainable Inv., 2015).

67. James Leaton, *Unburnable Carbon: Are the World's Financial Markets Carrying a Carbon Bubble* 9 (Carbon Tracker Initiative, 2011). See also Gus van Harten, *An ISDS Carve-Out to Support Action on Climate Change* 1, 2 (Osgoode Legal Stud. Res. Paper, Sept. 20, 2015).

68. See Rahim Moloo & Alex Khachaturian, *The Compliance with the Law Requirement in International Investment Law*, 34 FORDHAM INT'L L.J. 1473, 1479-80

fraud,⁶⁹ no agreement in force denies protections to specific *investors* and their investments based on previous wrongful conduct by the investor in any location (in the host state, home state, or elsewhere) or project.⁷⁰ This contrasts with other state-sponsored support schemes in which particular investors (and their affiliates) can be blacklisted and denied support for *any* project for a certain duration of time.⁷¹

In addition to categorical exclusions, IIAs could also incorporate more subjective tests in determining treaty or ISDS coverage. These include requirements that “investors” or “investments” must exhibit features or comply with standards meriting some subsequent analysis. For instance, treaties may require that investments, to be covered, be “responsible”⁷² or continue to “comply with the law of the host state”⁷³ or the home state⁷⁴ during the duration of the in-

(2011). A few texts, such as the India Model BIT in its article 1.3(i), also require that investments, to qualify as such, be “operated” in accordance with the law of the host state. Model Bilateral Investment Treaty, India, art. 1.3(i), 2015, *available at* <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download> [<https://perma.cc/KR8J-KYHK>] [hereinafter India Model BIT].

69. See, e.g., Comprehensive Economic and Trade Agreement, Can.-EU, art. 8.18(3), Oct. 30, 2016, O.J. (L11), *available at* http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [<https://perma.cc/M475-U2VW>] [hereinafter CETA] (“For greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.”). See also India Model BIT, *supra* note 68, art. 13.4 (“An investor may not submit a claim to arbitration under this Chapter if the investment has been made through fraudulent misrepresentation, concealment, corruption, money laundering or conduct amounting to an abuse of process or similar illegal mechanisms.”).

70. Some model agreements, however, seem to be taking steps in this direction. See Model Bilateral Investment Treaty, Colom., 12 (on file with authors).

71. For instance, firms or individuals found to have engaged in one of the World Bank Group’s sanctionable practices (fraud, corruption, collusion, coercion, or obstruction) are debarred, meaning that they will not be eligible for World Bank Group support for specified time periods, or conditionally debarred, meaning that they will only be eligible if certain conditions are met. Additionally, the World Bank Group’s debarments are recognized by some other multilateral development banks, and those banks’ debarments are similarly recognized by the World Bank, pursuant to the 2010 Agreement for Mutual Enforcement of Debarment Decisions. See World Bank Group [WBG], *World Bank Group Sanctions System, Annual Report, FY2018*, at 61–63 (2018).

72. See Jesse Coleman et al., *International Investment Agreements, 2017: A Review of Trends and New Approaches*, in *YEARBOOK ON INT’L INV. L. & POLICY* 99, 108 (Lisa Sachs, Jesse Coleman & Lise Johnson eds., 2018) (discussing the Colombia Model BIT).

73. As noted above, some treaties condition protection on an investment being made in compliance with the law of the host state. See Moloo & Khachaturian, *supra* note 68, at 1479–80. It is less common, however, to see requirements that such investments be maintained in accordance with the relevant laws. When investments are required to be maintained in accordance with domestic laws, questions will likely arise regarding, for

vestment. Or, IIAs could specify that covered investments entail a commitment of resources to the host state and make a contribution to its economic development. Whether an investor or investment qualifies under these criteria are issues that could then be resolved using different approaches, such as a decision by a treaty committee or by domestic officials from the relevant treaty parties. Conditioning treaty benefits on compliance with substantive norms could serve to induce compliance with those standards.⁷⁵

While treaties could usefully exclude such investors or investments from treaty coverage, treaties should at the very least limit access to dispute settlement and associated remedies for such investors or investments, even if the protections broadly remain. An IIA, for instance, could partially or entirely limit the ability of such investors to sue the state directly through ISDS or could limit the claims that can be brought and remedies or sanctions awarded. All investors could still seek protections and remedies for perceived improper conduct through other avenues, including legal actions in the domestic or other contractually specified forum, recourse under applicable human rights instruments that protect rights to property and access to justice,⁷⁶ and diplomatic protection by the home state (including through state-to-state dispute resolution) for violations of customary international law.⁷⁷ In short, there are various approaches treaties could employ to ensure that they are not supporting harmful investments that undermine, rather than advance, sustainable development

instance, how to establish breach (e.g., is a conviction required?), and whether there will be any materiality requirement relating to the nature of the breach (e.g., intentional or negligent) or the nature of the law (e.g., relating to civil or criminal offenses) that will affect whether violation warrants exclusion from protection or ISDS.

74. The authors are unaware of any treaty requiring that investors comply with the law of the home state in order to be protected by the home state's treaties, apart from requirements that the investor be a national of or incorporated in that state.

75. For an overview of how this is done in the analogous context of insurance, see, e.g., Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 198 (2012).

76. Protection for natural and legal persons, however, is not always the same under human rights instruments as it is under investment treaty law. See Lise Johnson, Jesse Coleman, Brooke Güven & Lisa Sachs, *Alternatives to Investor-State Dispute Settlement* 13 (Colum. Ctr. on Sustainable Inv. Working Paper, 2019).

77. IIAs offering broader protections than political risk insurance, which investors must purchase, might be justified if IIAs only offered government guarantees of basic protections against egregious violations of customary international law, namely, unremedied denials of justice in the host state. But, even in more recent IIAs that offer narrower investor protections relative to older treaties and interpretations thereof, the substantive and procedural benefits IIAs provide are not so limited.

objectives.

III. IIAs AND SDG-ADVANCING GOVERNANCE

The positive or negative impacts of an investment project are not necessarily inherent to the project, allowing for the specific inclusions or exclusions described in Part II, but often depend to a significant degree on the governance frameworks that shape and regulate investor practice. Whether the impacts of increased investments in certain sectors, activities, or projects are desirable or not (and in what ways) is a function of specific corporate policies and practices as informed, regulated, and enforced by relevant domestic and international governance frameworks.

Given the importance of governance to investment outcomes, and the intrinsic importance of justice, rule of law, and strong institutions (as reflected in SDG 16), it is crucial to consider how IIAs affect these instrumental and normative aspects of governance. How do IIAs affect the extent to which domestic institutions align with the governance pillars of the SDGs? How do IIAs affect the way in which governments govern investments and try to influence their economic, social, and environmental outcomes? This section examines those issues, and highlights considerations for states seeking to more proactively tailor provisions to promote good governance and preserve their abilities to regulate in the public interest. It begins in Part A by examining how IIAs may impact domestic policy-making processes and the interests they reflect. Part B then examines IIAs' effects on the policies themselves that states can adopt.

A. IIAs and Distortion of Policy-Making Processes

IIAs 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.⁷⁸ Yet, while in theory this might be plausible,⁷⁹ evidence of any improvement remains lacking.⁸⁰ Indeed, studies examining the issue have found that BITs and ISDS claims

78. See, e.g., Stephan W. Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* 155, 177–81 (Stephan Schill ed., 2010).

79. BONNITCHA *supra* note 28, at 136–39.

80. See Pohl, *supra* note 6, at 55–69.

may have negative effects on the rule of law.⁸¹ There are several theories that may explain these negative effects. For one, IIAs may reduce governments' incentives to improve their domestic governance. To the extent that IIAs make it less risky for foreign investors to invest in jurisdictions with little respect for the rule of law, governments may not face pressures to improve their investment climate and ensure that there are rules and systems in place enabling constituents, generally, to hold the government to account. Similarly, allowing foreign investors to circumvent domestic legal systems to pursue claims in international arbitration can undermine the role and perceived authority and legitimacy of domestic institutions. Investment treaties could, but do not, contain provisions or mechanisms to build capacity of and trust in courts or administrative bodies, initiatives that could better ensure that investors (both foreign and domestic) have access to fair, effective, and efficient legal systems.

This 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 review 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.”⁸² 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.”⁸³ 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 those reforms, would seem to apply as forcefully to situations involving violations of international economic rights as it does to situations involving violations of human rights.

A second reason why IIAs may negatively affect the rule of law and good governance at the domestic level is their potential to distort governance. IIAs give greater weight to the voice and inter-

81. See, e.g., MAVLUDA SATTOROVA, THE IMPACT OF INVESTMENT TREATY LAW ON HOST STATES: ENABLING GOOD GOVERNANCE? 58–61 (2018); see also BONNITCHA *supra* note 28, at 136 (discussing studies); Gulnaz Sharafutdinova & Karen Dawisha, *The Escape from Institution-Building in a Globalized World: Lessons from Russia*, 15 PERSP. ON POL. 361, 364, 369–71 (2017) (discussing international arbitration, not limited to treaty-based arbitration).

82. Bernard Robertson, *Exhaustion of Local Remedies in International Human Rights Litigation: The Burden of Proof Reconsidered*, 39 INT’L & COMP. L. Q. 191, 196 (1990).

83. *Id.*

ests of investors, potentially at the expense of other stakeholders, and provide covered investors access to privileged and powerful protections and legal mechanisms to challenge state conduct that negatively impacts the rights or expectations of their investments. These enhanced protections and powers, in turn, threaten core aspects of SDG 16,⁸⁴ including principles of equality before the law and efforts to ensure responsive, inclusive, participatory, and representative decision-making. This Part (A.1, A.2, and A.3) addresses these issues, focusing on the distortionary effects of treaties' substantive protections and enforcement mechanisms, and on the similar distortions that can be caused by IIAs' implicit and explicit notice-and-comment rules, as well as potential reforms to better align IIAs with efforts to promote good governance.

1. Distortion Through Substantive Protections and ISDS Enforcement

ISDS undermines principles of equality before the law where covered investors have, through substantive protections enforceable through ISDS, a uniquely powerful tool that can be employed at the expense of other stakeholders. We have argued that IIAs can increase inequality by:

- (1) providing unequal procedural rights for protection of wholly or partially foreign-owned firms, providing them greater power than other stakeholders both with respect to relations with the host state government, and in connection with disputes with other private parties; and (2) providing those foreign firms greater substantive standards of protection that strengthen the legal force of their economic rights and "expectations," with potentially negative impacts on competing rights and interests held by others.⁸⁵

These inequalities provided under the law can entrench and exacerbate inequalities in economic, social, and political terms. The Fair and Equitable Treatment ("FET") standard, for instance, which

84. SDG 16 commits states to "[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels." 2030 Agenda for Sustainable Development, *supra* note 1, SDG 16. Relevant targets include, "[p]romot[ing] the rule of law at the national and international levels and ensur[ing] equal access to justice for all," *id.* Target 16.3, "[e]nsur[ing] responsive, inclusive, participatory and representative decision-making at all levels," *id.* Target 16.7, and "promot[ing] and enforc[ing] non-discriminatory laws and policies for sustainable development." *Id.* Target 16 B.

85. Sachs & Johnson, *supra* note 9, at 2.

has been used to enforce protections of investors' legitimate expectations and favors stability over change, stands to significantly constrain states' abilities to adapt policy frameworks to fight inequality. Investors often have used FET provisions to challenge measures "to combat three of the most inequality-inducing effects that can arise from property rights systems—negative externalities, abusive practices of monopoly rights holders, and undue appropriation of gains."⁸⁶ Investors have also used ISDS to challenge the attempts of traditionally marginalized voices to assert legal and political power.⁸⁷ Beyond simply allocating rights unequally among stakeholders, IIAs' substantive provisions and ISDS enforcement mechanisms further entrench inequalities by protecting an unequal status quo against more equal and redistributionist structures and objectives.

Studies have noted, for instance, that indigenous peoples, and indigenous women in particular, face especially severe challenges in having their voices heard and rights protected by central governments in connection with decisions regarding development of natural resources projects.⁸⁸ While they may have formal rights to participate in governance processes and bring legal challenges to halt or shape the design and impacts of such projects, too often those rights are either practically difficult to exercise or, when asserted, not given due legal effect. In contrast, under investment treaties, a number of tribunals have ruled that, if an investor seeking to develop an extractive industry project secures favorable representations or assurances from federal or central government officials regarding the investor's proposed project, it can then use ISDS to enforce⁸⁹ those "commitments"

86. *Id.* at 2.

87. *See, e.g.*, *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, ¶¶ 152–83 (Nov. 30, 2017). *See also* *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA Case Repository No. 2012-2 ¶¶ 1.105–1.106 (2016).

88. *See generally* INDIGENOUS NAVIGATOR: ALARMING TRENDS AND CASES, <http://nav.indigenousnavigator.com/index.php/en/data-trends-and-cases> (last visited Oct. 21, 2019). *See also* Sarah Morales, *Digging for Rights: How Can International Human Rights Law Better Protect Indigenous Women from Extractive Industries?*, 31 CAN. J. OF WOMEN L. 58, 74–77 (2019) (noting particular challenges faced by women in participating in consultation and decision-making processes); Sheena Kennedy Dalseg et al., *Gendered Environmental Assessments in the Canadian North: Marginalization of Indigenous Women and Traditional Economies*, 47 N. REV. 135 (2018) (assessing the participation of indigenous women in environmental assessments of natural resource projects in Canada); Riccarda Flemmer & Almut Schilling Vacafior, *Unfulfilled Promises of the Consultation Approach: The Limits to Effective Indigenous Participation in Bolivia's and Peru's Extractive Industries*, 37 THIRD WORLD Q. 172 (2016) (reviewing challenges in participating in governance processes and articulating and securing preferred outcomes).

89. Generally, the investor's request will be for compensation in the event those "commitments" are later renege upon. Thus, the actual claim may not be for enforcement

or signals irrespective of whether they were valid and binding under domestic law.⁹⁰ These ISDS decisions fail to recognize or grapple with the implications that such heightened protection of representations to investors can have on the competing claims, rights, power, and voice of non-parties, such as indigenous communities living near the proposed project.⁹¹

Treaties thus can signal to investors that they should focus on engaging with and stockpiling evidence of affirmative support from those central agencies and officials most favorably inclined toward their proposals. Similarly, treaties can signal to governments that the “expectations” of investors demand more attention than the rights and expectations of other stakeholders. Moreover, when there is a contest among levels or branches of government (local vs. central, mining ministry vs. environmental ministry, or executive vs. judiciary) about whether to approve and how to govern such projects, these substantive and procedural aspects of investment treaties can potentially influence the outcomes of those contests in pro-investor directions. If the outcome of such contests is not what the investor desired, it can then use the treaty to challenge that outcome.

or specific performance of the commitment, but for monetary damages to compensate for non-adherence to the commitment. However, the line between enforcement of a commitment and requirement of compensation for non-adherence is not always clear. For instance, the award of compensation may cause or encourage a state to abide by the commitment. Additionally, if the commitment is to provide a financial benefit (e.g., a tax incentive) then an award of compensation may be functionally similar to an order to abide by the commitment.

90. Lise Johnson, *A Fundamental Shift in Power: Permitting International Investors to Convert their Economic Expectations into Rights*, *supra* note 38, at 118–20; *see also* Lise Johnson & Oleksandr Volkov, *Investor-State Contracts, Host-State ‘Commitments’ and the Myth of Stability in International Law*, 24 AM. REV. INT’L ARB. 361, 372–75 (2013).

91. *See, e.g.*, *Bear Creek v. Peru*, *supra* note 87. In that case, the representations consisted largely of national-level government acquiescence to the investor’s conduct in developing its mining project, and to national-level failure to challenge or contest the adequacy of the investor’s environmental and consultation plans. Because national officials had given implicit and limited explicit assurances regarding the project’s compliance with domestic law, the tribunal determined that the government was not later able to challenge the legitimacy of the project without running afoul of the investment treaty. *Id.* ¶¶ 411–14. There had been local-level challenges to the legitimacy of the project and approval process, but those did not prevent the tribunal from determining that the government had effectively acquiesced to and supported the project’s legality. *Cf. id.* ¶¶ 409, 411–14. *See also* *Copper Mesa v. Ecuador*, *supra* note 87, ¶ 5.63 (rejecting the respondent state’s unclean hands arguments on the ground that the respondent had not raised those issues until after commencement of the arbitration. Notably, however, and as the award details, allegations about the wrongful nature of the investor’s conduct and proposed project had been raised by local government officials and communities in the events leading up to the arbitration).

In the course of ISDS proceedings, individuals and communities affected by the relevant investment have no legal right to participate in or shape the proceedings. In many ISDS disputes, investors' claims can negatively affect the direct and indirect beneficiaries of the challenged government measures,⁹² and in some ISDS cases, the investors' claims for relief purposefully aim to attack the rights of non-parties.⁹³ That individuals, communities and other interested parties are not able to participate in the proceedings can cause arbitrators to base their decisions on a narrow and incomplete view of the law and facts, and produce decisions that shape the law so as to be disproportionately and unduly attentive to only investor claimants' economic interests.⁹⁴

Not only are non-parties unable to participate in the proceedings, but very often the affected individuals or communities, as well as domestic shareholders in the investment or creditors who may be affected by the treaty claims and/or their outcomes, 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. Although progress has been made to increase transparency of investor-state arbitration through adoption of the UN Commission on International Trade Law ("UNCITRAL") Rules on Transparency and United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (the "Mauritius Convention"),⁹⁵ disputes under most existing IIAs can still be litigated

92. The claims, for instance, may negatively impact users of infrastructure services when the claims are about appropriate tariffs that can be charged or similar issues; local communities living around extractive industry projects when the ISDS claim is used to challenge permit denials or conditions; and taxpayers when, for instance, the ISDS claim challenges a withdrawal or reduction in government subsidies. These are just a few examples.

93. See, e.g., Claimants' Memorial on the Merits ¶ 547, *Chevron Corp. v. Republic of Ecuador*, PCA Case Repository No. 2009-23 (Sept. 6, 2010); see also *Renco Grp. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Award, ¶ 17 (Nov. 9, 2016); *Eli Lilly & Co. v. Gov't of Can.*, UNCITRAL, ICSID Case No. UNCT/14/2, Award, ¶ 467 (Mar. 16, 2017).

94. Insulating the arbitrators in this manner from input by non-parties may also increase the likelihood that ISDS tribunals' decisions reflect economic and legal worldviews commonly shared by arbitrators, such as belief in the soundness of the policy prescriptions pronounced by the Washington Consensus. See, e.g., David Chriki, *Is the Washington Consensus Really Dead? An Empirical Analysis of FET Claims in Investment Arbitration*, 41 SUFFOLK TRANSNAT'L L.REV. 292, 304-06 (2018).

95. G.A. Res. 69/116, U.N. Convention on Transparency in Treaty-Based Investor-State Arbitration (Dec. 10, 2014). Notably, for disputes filed under treaties concluded before April 1, 2014, the Rules on Transparency 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

and resolved behind closed doors.⁹⁶ Indeed, only a handful of countries have committed to adhere to the Rules on Transparency through unilateral declarations, or ratified the Mauritius Convention, which was drafted in order to effectively and efficiently ensure application of the Transparency Rules.⁹⁷

2. Distortion Through Express and Implied Notice-and-Comment IIA Rules

The issues outlined above are compounded by investment treaties' express and implied notice-and-comment rules. Increasingly, IIAs (1) impose requirements on governments to publish advance notice of proposed actions, and (2) respond to questions and comments received from foreign investors and other constituents.⁹⁸ Such

a means to facilitate state consent to application of the Rules on Transparency.

96. Unless the relevant arbitration rules or the treaty dictates otherwise, the disputing parties can agree, and/or the tribunal can determine, how open or closed an ISDS proceeding will be. Secrecy, in whole or part, remains common. *See, e.g.*, UNCTAD, *Investor-State Dispute Settlement: Review of Developments in 2017*, in 2 INT'L INV. AGREEMENTS ISSUES NOTES 1, 2 (2018), available at https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf [<https://perma.cc/VTE2-N67V>]. Although awards are increasingly made public, the arbitration can remain shielded from public view while it is pending. Even if the existence of the claim is known prior to an award being rendered, submissions detailing the parties' factual and legal arguments commonly are not public (and commonly remain non-public even after the award has been issued).

97. As of January 21, 2019, the United Nations Treaty Collection reported that there were 23 signatories to the Mauritius Convention and 5 parties. Data on signatures and ratifications is available at *Depositary: Status of Treaties: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-3&chapter=22&clang=_en [<https://perma.cc/9J4C-PKG8>] (last updated Sept. 28, 2018).

98. *See, e.g.*, Enhanced Partnership and Cooperation Agreement Between the European Union and Its Member States, Of the One Part, and the Republic of Kazakhstan, Of the Other Part, art. 30, Dec. 21, 2015 (requiring each party to "ensure that its procedures for the development of technical regulations and conformity assessment procedures allow for public consultation of interested parties at an early appropriate stage when comments resulting from the public consultation can still be introduced and taken into account"); Agreement for the Promotion and Protection of Investments, Can.-Mong., art. 12, Sept. 8, 2016 (directing parties, to the extent possible, to publish regulatory proposals and provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures."); U.S. Model Bilateral Investment Treaty, art. 11(2)-(3), 2012, <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [<https://perma.cc/FHX8-X5Y3>] [hereinafter U.S. Model BIT]. It should be pointed out that a couple of factors soften requirements regarding advance publication of proposed rules and obligations to respond to comments. For one, several treaties only oblige governments to publish information "to the extent possible." Additionally, violations of these articles generally cannot be directly raised

codification of notice-and-comment rules in IIAs, even if not directly enforceable under the treaties,⁹⁹ can also be used to support claims for breach of other standards such as the FET obligation.¹⁰⁰ Additionally, even where not expressly incorporated into the text of the IIA, requirements of advance notice, and, in some cases, an opportunity to respond, have been interpreted as forming part of the FET obligation.¹⁰¹ On one hand, these obligations may be expected to advance the rule of law and to improve government transparency, accountability, and decision-making. On the other hand, they risk providing undue space for non-agency actors, including foreign investors, to determine the shape and fate of proposed regulatory actions through submission of public comments, private communications, and/or other lobbying activities. This, in turn, raises concerns about government capture.

There is considerable debate about the problem of government capture: where and in what circumstances it exists, how to identify it, whether and to what extent it is a problem, and, if so, how to combat it. Debates on this subject may be less straightforward than

by investors in investor-state arbitration (though they may support allegations that a country has breached another article such as the article on fair and equitable treatment. *See also* UNCTAD, SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II: TRANSPARENCY 16–30 (2012).

99. *See, e.g.*, U.S. Model BIT, *supra* note 98. The U.S. Model BIT does not permit ISDS claims for breach of the “Transparency” article (i.e., Article 11).

100. *See, e.g.*, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 76 (Aug. 30, 2000) (interpreting the NAFTA’s FET obligation as containing an obligation of transparency and determining that the government had breached that obligation). Mexico subsequently challenged the award in Canada; and the Canadian court annulled aspects of the award, determining, in relevant part, that the tribunal had exceeded its authority when interpreting the FET obligation to incorporate transparency requirements. *See* Howard Mann, *Metalclad Corp. v. United Mexican States*, in INTERNATIONAL INVESTMENT LAW AND SUSTAINABLE DEVELOPMENT: KEY CASES FROM 2000-2010, at 72, 75–80 (Nathalie Bernasconi-Osterwalder & Lise Johnson eds., 2011). While it is questionable whether transparency is an element of the FET obligation in NAFTA and other treaties similarly tying the FET obligation to the minimum standard of treatment, transparency has been considered to be an element of the FET obligation in disputes under other IIAs. *See, e.g.*, *Deutsche Telekom v. India*, PCA Case Repository No. 2014-10, UNCITRAL, Award, ¶ 336, (Dec. 13, 2017).

101. *See* UNCTAD, *supra* note 96, at 52–55. Cases interpreting the FET obligation to include such requirements of advance notice and/or an opportunity to respond are controversial, however, and have been subjected to critique and successful legal challenges. *Cf.* *Metalclad Corp.*, *supra* note 100, at 27 (finding a breach of the FET obligation based, in part, on a lack of transparency); *The United Mexican States v. Metalclad Corp.*, 2001 B.C.S.C. 664, ¶ 76 (B.C. Sup. Ct. May 2, 2001) (accepting a challenge to the tribunal’s reasoning and holding on transparency being an element of the FET standard).

they appear on their face. For example, some have argued that the business community potentially affected by a proposed measure has the most accurate information regarding the design and merits of the proposal, and therefore should have outside influence in the regulatory process. Others, however, have noted the potential for “nefarious influence by business or economic interests on regulatory outputs to the detriment of the ‘public interest’ or ‘public good.’”¹⁰² In this sense, agency capture is “shorthand for the phenomenon whereby regulated entities wield their superior capabilities to secure favorable agency outcomes at the expense of the diffuse public.”¹⁰³

To a certain extent, issues of the latter, nefarious face of agency capture are already echoed in concerns raised about the chilling effect that investment treaties may have on states. Those concerned about regulatory chill argue that foreign investors can and do use the threat of investor-state arbitration to direct regulators’ actions toward their business interests and away from the interests of the general public. For a number of reasons, evidence of the pervasiveness of this problematic practice is hard to gather; yet its existence has been documented.¹⁰⁴ Notice-and-comment requirements are likely to increase the incidence and effectiveness of “chilling” efforts.

102. Susan W. Yackee, *Reconsidering Agency Capture During Regulatory Policymaking*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 292, 296 (Daniel Carpenter & David Moss eds., 2014).

103. Nicholas Bagley, *Agency Hygiene*, 89 TEX. L. REV. 1, 2 (2010).

104. Investors can invoke the threat of an ISDS case, either subtly or directly, in private conversations with policy makers or through other non-public means, making it difficult to capture both specific instances of and the scale of such regulatory chill. Certain examples are known if, for instance, communications are leaked, a notice of claim is filed and subsequently revoked when the government reverses its policy, or a policy maker attests to the impact of such a threat. See, e.g., Mavluda Sattorova, *Investor Responsibilities from a Host State Perspective: Qualitative Data and Proposals for Treaty Reform*, 113 AJIL UNBOUND 22, 22–24 (2019); Rochelle Dreyfuss & Susy Frankel, *Reconceptualizing ISDS: When is IP an Investment and How Much Can States Regulate It?* 11–12 (N.Y.U., Pub. L. & Legal Theory Res. Paper Series, Working Paper No. 18-23, 2018); *Glivec in Colombia: New Leaked Letter from Novartis Attests to Pressure at the Highest Level*, PUBLIC EYE (Feb. 5, 2018), <https://www.publiceye.ch/en/news/detail/glivec-in-colombia-new-leaked-letter-from-novartis-attests-to-pressure-at-highest-level> [<https://perma.cc/6PE9-PN62>]; Brook Baker & Katrina Geddes, *The Incredible Shrinking Victory: Eli Lilly v. Canada, Success, Judicial Reversal, and Continuing Threats from Pharmaceutical ISDS*, 49 LOYOLA U. CHI. L. J. 479, 480 (2017); Krzysztof J. Pelc, *What Explains the Low Success Rate of Investor-State Disputes*, 71 INT’L ORG. 557, 559 (2017); van Harten & Scott, *supra* note 11, at 92. For discussions of regulatory chill, including the different forms it may take, and the methods and challenges for documenting it, see Pohl, *supra* note 6, at 55–66; Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 606, 606 (Chester Brown & Kate Miles eds., 2011).

Whatever one's view of agency capture in the domestic context, and the role of notice-and-comment procedures in that context, there are several reasons why including notice-and-comment requirements in investment treaties (or interpreting those requirements to be a part of IIAs' FET obligations) can risk exacerbating problematic patterns of corporate capture. One factor relates to the issue of regulatory chill noted above. In the domestic context, non-agency actors may be able to pursue litigation against the government to challenge an agency's final decisions regarding a rule, arguing, for instance, that the decision-making process did not comply with notice-and-comment procedures. And when deciding whether and how to adopt the rule, the likelihood of such a legal challenge can impact the agency's conduct. Nevertheless, the remedy available in such legal challenges—and therefore the force of the litigation threat—is generally restricted to a modification or rejection of the rule or rule-formulation process, not monetary damages. In contrast, in the international investment law sphere, an investor can raise the threat of investor-state arbitration (and the often-high legal fees, expenses, liability, and reputational risks associated with it) in challenges to proposed agency actions and processes of rule-formulation. The threat of financial liability that ISDS can inject into notice-and-comment procedures may influence the outcomes of rule-making processes in ways that administrative notice-and-comment mechanisms do not.

Including express or implied rules on notice-and-comment in IIAs also strengthens the tools available to investors to challenge government measures. In addition to being susceptible to claims under substantive IIA protections (such as the FET clause) on the ground that they unduly interfere with investors' economic rights, interests, or expectations, government decisions can also be subject to challenge on the ground that they were not adopted with due consideration of relevant input.¹⁰⁵ Moreover, even if an agency complied with domestic notice-and-comment rules, that would not prevent the state from being held liable on the ground that it failed to give the investor adequate notice of and opportunity to respond to the relevant

105. See, e.g., *Bear Creek v. Peru*, *supra* note 87, ¶¶ 436(iii), 526 (challenging the government's decision for, among other reasons, being taken without notice to the investor and an opportunity to be heard); *Copper Mesa v. Ecuador*, *supra* note 87, ¶ 8.8 (finding that the government had violated the treaty's expropriation and FET provisions by issuing Termination Resolutions without first giving the claimant notice of or an opportunity to challenge its intended actions; and awarding compensation for sunk costs, less 30 percent due to the investor's contributory fault); *TECO Guatemala Holdings, LLC v. Guatemala*, ICSID Case No. ARB/10/23, ¶¶ 457–58 (Dec. 19, 2013) (finding that the government violated the minimum standard of treatment by failing to give reasons for its decisions).

regulatory conduct.¹⁰⁶

A key concern about notice-and-comment rules in (or interpreted to be part of) IIA standards relates to power dynamics. Studies have shown that business interests may be particularly influential stakeholders in administrative agenda-setting and rule-making processes, and that their relative influence as compared to other groups and individuals may further expand in contexts where public interest advocates (i.e., advocates for consumer rights, environmental protection, and social justice) are less active.¹⁰⁷ Because public interest advocates in developing countries are generally weaker and less well-funded than their developed-country counterparts and regulated industry actors, these dynamics could create a situation where business interests wield a disproportionately significant and particularly undesirable degree of influence over developing country agency actors to the detriment of broader public interests. If IIAs impose notice-and-comment mandates but are not accompanied by efforts to increase the capacity and/or rights of other stakeholders to participate in those processes, then IIAs risk creating or magnifying disparities in the voice and power that private industry actors have in law-setting processes relative to public interest organizations and individuals. These disparities then grow larger when industry actors have access to ISDS.

This is not to say that international regimes on transparency and notice-and-comment systems should be avoided. To the contrary, public engagement on policy making can ensure a range of perspectives are heard and considered. However, as we have seen, with unequal resources, access, and interests—and unclear rules regarding who can provide input, when, and how—participatory processes can

106. See, e.g., *Copper Mesa v. Ecuador*, *supra* note 87, ¶ 6.69 (“It is no answer for the Respondent to assert that no such compensation, legal remedy or administrative review were permitted, in theory, under the Mining Mandate or otherwise under its national laws: the Treaty, to which the Respondent had voluntarily agreed, imposed higher standards as a matter of international law.”).

107. See, e.g., William T. Gormley, *Alternative Models of the Regulatory Process: Public Utility Regulation in the States*, 35 W. POL. Q. 297, 299 (1982); William F. West & Connor Raso, *Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control*, 23 J. PUB. ADMIN. RES. & THEORY 495, 498, 508–10 (2013); Susan Webb Yackee, *Assessing Regulatory Participation by Health Professionals: A Study of State Health Rulemaking*, 73 PUB. ADMIN. REV. 105, 106 (2013); Susan Webb Yackee, *The Politics of Ex Parte Lobbying: Pre-Proposal Agenda Building and Blocking During Agency Rulemaking*, 22 J. PUB. ADMIN. RES. THEORY 373, 377 (2012); William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC’Y 576, 578 (2009); Jason W. Yackee & Susan W. Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 128 (2006).

be captured or heavily influenced by certain more powerful economic interests.¹⁰⁸ To the extent that cooperation is considered useful for promoting open governance, careful consideration is advised as to the right instruments or modalities to support such cooperation, and how an open, participatory processes can best avoid agency capture by special interests.

3. Opportunities to Promote Good Governance and Mitigate Distortion Risk

Overall, through their privileged procedural and substantive protections for covered investors, IIAs risk distorting government policy-making in ways that are particularly responsive to the interests of foreign investors, potentially at the expense of the interests of other stakeholders. This, in turn, threatens key aspects of the SDGs and may further erode public faith in government institutions as protectors of the powerless as well as the powerful.

IIAs could, however, be designed to avoid these issues and make positive contributions to SDG 16. They could, for instance, integrate mechanisms to identify and address challenges faced both by investors and, crucially, by other stakeholders relating to governance of investments.¹⁰⁹ For instance, to the extent that governments want to bolster and regularize opportunities for input when developing regulations, mechanisms could be designed to ensure that a more diverse set of stakeholders—and not simply regulated entities—have meaningful opportunities to provide relevant information to policy-

108. Deserai A. Crow, Elizabeth A. Albright & Elizabeth Koebele, *Environmental Rulemaking Across States: Process, Procedural Access, and Regulatory Influence*, 34 ENVTL. & PLAN. C: POL. & SPACE 1222, 1223–24, 1236 (2016) (based on research on regulatory practices in several U.S. states, finding support for their hypotheses that “technical expertise, procedural access, and relationships with regulators give some stakeholders (particularly industry) greater access and influence over rulemaking.”); West & Raso, *supra* note 107, at 508 (finding that “the degree to which business and professional groups dominated other nongovernmental interests” in shaping the rulemaking agenda “is striking”); West, *supra* note 107, at 591–92 (raising concerns about informal, preliminary stages in rulemaking processes that precede formal statutory notice-and-comment procedures, and tensions with openness, inclusiveness, and democratic values that those early phases may generate); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 397 (2007).

109. See, e.g., Richard C. Chen, *Bilateral Investment Treaties and Domestic Institutional Reform*, 55 COLUM. J. TRANSNAT'L L. 547, 583 (2017) (discussing some relevant options, including using BITs to strengthen the ability of domestic legal systems to effectively resolve investment disputes, and establishing ombudsmen-type systems to identify and address investment-related challenges).

makers through context- and country-appropriate means where such input is desirable. Treaty parties could, for instance, commit to improving the capability of governments to manage robust multi-stakeholder environmental and social impact assessment processes, which can be crucial for ensuring the long-term sustainability and even basic financial viability of major investment projects.¹¹⁰ Such initiatives could include, in particular, providing support for civil society to follow and provide input into these processes, and to help monitor and enforce government and investor compliance with relevant legal requirements.¹¹¹

To the extent that investor or other stakeholder concerns relate to unduly slow administrative or judicial proceedings, parties could cooperate to identify bottlenecks and provide financial or other resources to improve efficiency for the benefit of all relevant domestic and international actors rather than supporting foreign investors to bypass domestic institutions and processes. In this context, ensuring that such initiatives consider impacts on stakeholders other than covered investors, and on interests other than covered investors' economic and property rights, is essential. Narrow agendas that do not address these broader concerns and interests have problematically plagued other international work on investment climate reform,¹¹²

110. Jesse Coleman, Brooke Güven, Lise Johnson & Lisa Sachs, *What Do We Mean by Investment Facilitation?*, COLUM. CTR. ON SUSTAINABLE INV. (Feb. 21, 2018), <http://ccsi.columbia.edu/2018/02/22/what-do-we-mean-by-investment-facilitation/> [<https://perma.cc/C7SX-GMY6>].

111. There are some examples of such activities. In connection with the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR"), for instance, the United States Environmental Protection Agency ("EPA") is working to help "strengthen the implementation of inclusive public participation and availability of information within existing national [environmental impact assessment ("EIA")] frameworks." Relatedly, the EPA had also provided technical assistance to environmental officials regarding preparation of EIAs, and supported a 2013-2018 "public participation program" aiming "to create a network of trained public participation experts in the region, and to use public participation, education and outreach to engage communities in environmental decision-making processes to help enforce environmental laws." *Capacity-Building Programs Under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/international-cooperation/capacity-building-programs-under-dominican-republic-central-america-united#pp-eia> [<https://perma.cc/B386-PPWD>] (last visited Jan. 21, 2019). See, e.g., D. Brent Edwards et al., *The National Politics of Educational Advocacy in the Context of Global Governance: International Funding and Support for Civil Society Engagement in Cambodia*, 48 COMPARE 171, 172 (2018) (discussing multilateral support of civil society in other contexts).

112. See, e.g., the report of the Independent Evaluation Group ("IEG") of the World Bank Group assessing the World Bank's Groups support for reform of business regulations. After reviewing all projects in the investment climate portfolio, the IEG concluded, among

and do not reflect the need for policy coherence called for and essential to the SDGs.

B. IIAs and Policy Space to Regulate Investments

In addition to these institutional concerns about voice, access, representation, and power in policy-making processes, IIAs' substantive and procedural investment protections hinder governments' abilities to implement and enforce policies to ensure that covered investments generate benefits, not harms, in the state parties. As explained above, whether FDI contributes to sustainable development depends on the ability of governments to adopt and enforce public interest regulations. For that reason, it is essential that states evaluate the effects of IIAs on their ability to regulate in the public interest. The following sections examine the ways in which IIAs constrain states' relevant domestic policy space (B.1) as well as opportunities for states to reform IIAs to avoid many of these concerning constraints (B.2).

1. Constraints on Policy Space

The ability to regulate has both inherent normative value—SDG 16 recognizes the need for strong and accountable democratic institutions¹¹³—as well as instrumental value to achieve all other SDGs and associated targets. Regulation is essential for sustainable development, including to ensure that investors pay their fair share in taxes, treat their workers justly and humanely, and do not have undue negative impacts on the environment. Thus, as called for by target 17.15 of SDG 17, international governance should “respect each country’s policy space and leadership to establish and implement policies for poverty eradication and sustainable development.”¹¹⁴

Governments need policy space to be able to enact, implement, revise, and refine their policies, laws, and regulations in order to achieve sustainable development objectives. Unsurprisingly, these objectives, and the optimal and feasible means for meeting them,

other things, that in that work, “[b]usiness stakeholders are treated as paramount; nonbusiness stakeholders are barely visible.” IEG, INVESTMENT CLIMATE REFORMS: AN INDEPENDENT EVALUATION OF WORLD BANK GROUP SUPPORT TO REFORMS OF BUSINESS REGULATIONS xxiv (2015). This, in turn, led to a distorted and potentially misleading assessment of the social value of the World Bank’s interventions.

113. 2030 Agenda for Sustainable Development, *supra* note 1, at 25.

114. *Id.* at 27.

may evolve over time with changing needs and circumstances, and governments need to be able to respond to these changes. Recognizing that the roles of different government actors vary between countries, this flexibility to respond may require, for example, that: legislatures be empowered to enact or amend purposeful legislation; executive officials be able to set policies and priorities and exercise discretion where appropriate; and administrative and judicial courts be free 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 or otherwise wrongful conduct.

While international law to some degree inherently constrains domestic policy space,¹¹⁵ it is important to consider carefully when, why and how international law should do so. This can be illustrated through a comparison with international trade law.¹¹⁶ The international trading system constrains domestic law and policy in order to limit protectionism.¹¹⁷ It justifies these constraints on the grounds that economic protectionism, while potentially beneficial for some countries (or certain interests within them, and over certain time horizons), is, as a general matter, unwise economic policy. International rules can help to restrain individual countries' beggar-thy-neighbor impulses and prisoners' dilemmas, and to enable governments to withstand pressure from powerful domestic special interest groups to impose self-interested protectionist measures. Thus, international trade treaties might be said to laudably constrain states' "right to regulate" in order to curb protectionism. There is some debate about when some protectionist policies may be desirable (e.g., local content measures designed to help capture gains from FDI projects, measures designed to provide public goods, or measures to support domestic industrial growth, catalyze certain methods of production, or sustain livelihoods), as well as questions about who gets to decide whether something is inappropriately protectionist and on what grounds.¹¹⁸ Nevertheless, the notion that international trade law rules are appropriate for constraining domestic protectionism is broadly and general-

115. See, e.g., Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOLUTION 588, 592–94 (2007) (discussing theories of why governments agree to and are more or less likely to commit to treaties limiting freedom to act).

116. Simon Lester, *Talk of "Right to Regulate" Is Hurting the Trade Debate*, HUFFINGTON POST (July 21, 2015), https://www.huffingtonpost.com/simon-lester/talk-of-a-right-to-regula_b_7839680.html?guccounter=1 [<https://perma.cc/K7VG-YQSQ>].

117. *Id.*

118. See, e.g., Bernard Hoekman & Niall Meagher, *China-Electronic Payment Services: discrimination, economic development, and the GATS*, 13 WORLD TRADE REV. 409, 437–38 (2014).

ly accepted.

Reflecting the difficulties in establishing the constraints on domestic policy space that are and are not desirable, the World Trade Organization's rules preventing member states from treating foreign investors less favorably than domestic investors only apply on a positive-list basis, meaning that they apply only if and to the extent that WTO member states have affirmatively agreed to abide by those national treatment rules. This positive-list approach, which is enshrined in the General Agreement on Trade in Services ("GATS"), allows member states to retain policy space to maintain measures to pursue a range of economic, social, and environmental policies that might otherwise be inconsistent with a national treatment obligation.¹¹⁹

IAs, however, go beyond those restraints. For one, the national treatment obligation applies on a negative list basis, meaning that it applies to all foreign investors in all sectors and activities unless the state parties included effective carve-outs or exceptions. Moreover, the broad protections in IAs suggest a much more expansive view of when international law should constrain domestic policy space. The provisions protecting foreign investors from discrimination on the basis of nationality are most analogous to what can be seen in the trade context (and, indeed, restrictions on discrimination against foreign investors are also included in the WTO's General Agreement on Trade in Services).¹²⁰ In other words, states and their stakeholders may accept international rules preventing them from privileging a domestically-owned company over a comparable foreign-owned one on account of its nationality.

Moreover, IAs' national treatment obligations have been interpreted to discipline domestic regulatory action and inaction even when there has been neither *de jure* nor *de facto* discrimination on account of nationality.¹²¹ Instead, investors have succeeded in arguing that host states violate the non-discrimination obligations of their IAs when states treat any covered foreign investor differently from like domestic investors, even if the disparate treatment is based on grounds *other* than the foreign investors' nationality, and did not result in enhancing the competitive position of domestic investors rela-

119. *Id.*

120. General Agreement on Trade in Services art. II, art. XVII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1144, 1167 (1994) [hereinafter GATS].

121. *See* Bilcon of Del. et. al. v. Government of Can., PCA Case Repository 2009-04, Award on Jurisdiction and Liability (Mar. 17, 2015); Occidental Exploration and Prod. Co. v. Ecuador, London Ct. Int. Arb. Case No. UN 3467 (July 1, 2004).

tive to foreign ones.¹²² In relevant cases, ISDS tribunals have closely scrutinized state policies and decisions, considering not whether the challenged treatment was intentionally based on, or even a de facto result of, the investor's nationality.¹²³ Instead, tribunals have looked at whether the host state authorities, in the tribunal's view, had valid reasons for treating one investor differently from another.¹²⁴ This reaches far into domestic policy-making and implementation without the clear justification of an anti-protectionist rule or other guiding principle.¹²⁵

Additionally, IIAs go beyond anti-protectionist rules like the national treatment obligation. They impose obligations that are much more expansive in their reach and open-ended in their content, and that rest on more controversial economic theories.¹²⁶ Perhaps the most powerful provision of IIAs, the FET obligation raises difficult questions about whether or why it justifies international disciplines

122. *Bilcon v. Can.*, *supra* note 121; *Occidental v. Ecuador*, *supra* note 121. This contrasts with the rule under the GATS. Under the GATS, measures that de facto treat foreign investors less favorably than domestic investors will violate the national treatment obligation only if they also modify the conditions of competition in favor of the domestic investors. See GATS, *supra* note 120, art. XVII; Gilles Muller, *Troubled Relationships under the GATS: Tensions between Market Access (Article XVI), National Treatment (Article XVII), and Domestic Regulation (Article VI)*, 16 *WORLD TRADE REV* 449, 463, 467 (2017).

123. GATS, *supra* note 120, art. XVII(1).

124. *Bilcon v. Can.*, *supra* note 121, ¶ 724–25. See also *Apotex Holdings v. U.S.*, ICSID Case No. ARB(AF)/12/1, Award (Aug. 25, 2014). While the tribunal ultimately sided with the United States in *Apotex Holdings*, its searching review of the justifications for the challenged measure illustrates how the non-discrimination provisions can trigger close and subjective scrutiny of the substantive merits of the government's conduct.

125. The justification for anti-protectionist rules that apply in connection with cross-border trade in goods does not necessarily apply for cross-border flows of capital. Indeed, states, which are largely interested in seeking rather than discriminating against foreign investment, do not appear to need special rules protecting foreign investors against discrimination. Lauge N. Skovgaard Poulsen & Emma Aisbett, *Relative Treatment of Aliens: Firm-level Evidence from Developing Countries* 6 (Oxford Global Econ. Governance Programme, Working Paper No. 2016/122, 2016), available at <https://www.geg.ox.ac.uk/publication/geg-wp-2016122-relative-treatment-aliens-firm-level-evidence-developing-countries> [<https://perma.cc/P6QG-J3SG>]. Indeed, investors' ISDS claims of nationality-based discrimination are relatively rare, and success on those claims even rarer. According to UNCTAD's data, as of January 21, 2019, there have only been nine successful claims based on the national treatment provision in investment treaties. The authors have analyzed those successful national treatment claims. None involved a clear finding by the tribunal that the investor had been discriminated against on account of its nationality.

126. See, e.g., David Chriki, *Is the Washington Consensus Really Dead? An Empirical Analysis of FET Claims in Investment Arbitration*, 41 *SUFFOLK TRANSNAT'L L. REV.* 291, 303–06 (2018).

and oversight of domestic policy choices and actions. As Simon Lester has explained:

[I]nvestment rules . . . require regulations to be “fair and equitable,” sometimes including an examination of whether the regulations are arbitrary. Such rules impose broad and vague constraints on how governments may act, and they do so in ways that are not very clear to regulators. . . . More importantly, the broader international rules intrude on every category of regulation. They do not simply classify one particular policy goal (protectionism) that regulations might pursue as off limits. Rather, they hold every policy goal open to review under a standard that gives international courts a good deal of leeway in their review of the regulation.¹²⁷

Such IIA-based review of measures alleged to be procedurally or substantively arbitrary¹²⁸ or unfair raises a number of concerns. In particular, it may unduly discourage new or strengthened regulations, or enforcement of existing rules. Given that such challenges can only be brought by covered investors, ISDS claims will likely only contest government action (or inaction) that is adverse to economic interests, potentially driving asymmetrical development of the law in favor of those economic interests and to the detriment of regulatory powers or agendas serving competing aims. The meanings of “arbitrariness” and “unfairness” are imprecise and subjective, giving great power to both investors to threaten suits and to the final adjudicators to determine the FET standard’s contours.¹²⁹ Tribunals have interpreted this FET obligation to allow them to scrutinize whether domestic measures are inconsistent with alleged norms of legal stability,¹³⁰ in-

127. Lester, *supra* note 116.

128. A reviewing court may determine that a decision is procedurally arbitrary if no reasons were offered by the decision-maker to evidence that it considered the relevant issues of law and fact. A reviewing court may determine that a decision is substantively arbitrary if it deems the decision to be unreasonable or irrational in light of the policy goals it considers relevant. Even scrutiny of procedural arbitrariness can have important implications for substantive regulatory outcomes, for instance by raising the cost of regulation and its vulnerability to litigation.

129. See Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 762–68 (2008).

130. See, e.g., *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012); *Eli Lilly v. Canada*, *supra* note 93, ¶¶ 387–89 (finding that the claimant had failed to provide evidence demonstrating that the change in the law had been dramatic enough to establish liability, and thereby supporting the notion that investors could prevail on claims

vestors' allegedly legitimate expectations of future business prospects, and investors' reliance on specific commitments or promises given by government officials.¹³¹

Accordingly, IIAs offer expansive opportunities for international scrutiny of domestic law, policy, action, and inaction, irrespective of the purpose of the challenged conduct. Governments can be (and have been) held liable even for good faith conduct intended to address and improve social, environmental, and economic issues when the government's conduct intentionally or unintentionally interferes with the rights or expectations of covered foreign investors. The public interest aim or intent of the measure is not a bar to claims or a defense to liability.¹³²

While investment treaties are often justified on the ground that they are needed to protect investors against intentional expropriations or discriminatory abuses by authoritarian leaders or ineffective or corrupt judicial systems,¹³³ the reality is that most treaty claims are not based on such acts. Rather, claims are frequently brought to challenge administrative decisions relating to interpretation or application of domestic law or policy, without first raising the challenge before domestic judicial or administrative systems. ISDS claims are also used to contest court decisions (even decisions where there is no suggestion of improper conduct by judicial officials) and laws. These challenges relatively rarely allege intentionally wrong-

challenging "dramatic" changes in the law, including shifts in the law produced by court decisions in common law systems).

131. Lise Johnson & Oleksandr Volkov, *Investor-State Contracts, Host-State 'Commitments' and the Myth of Stability in International Law*, 24 AM. REV. INT'L ARB. 361, 411–13 (2013); Lise Johnson, *A Fundamental Shift in Power: Permitting International Investors to Convert their Economic Expectations into Rights*, 65 UCLA L. REV. DISC. 106, 110–111, 112 (2018); Johnson et al., *supra* note 76.

132. Clear examples of this are the relatively high-profile cases Philip Morris brought against Australia and Uruguay. *See, e.g.*, Philip Morris Asia Ltd v. Austl., PCA Case Repository 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015); Philip Morris Brands Sàrl v. Uru., ICSID Case No ARB/10/7, Award (July 8, 2016). There was no suggestion that the challenged measures were adopted for anything other than a legitimate public purpose. Yet neither case was considered frivolous or easily dismissed.

133. *See, e.g.*, Shayerah Ilias Akhtar et al., *International Investment Agreements (IIAs): Frequently Asked Questions* 13 (Congressional Research Service Report R44015, May 15, 2015) (noting the importance of ISDS for relief where courts are corrupt, newly formed, or lack independence); United States Trade Representative, *The Facts on Investor-State Dispute Settlement*, TRADEWINDS BLOG (Mar. 2014), <https://ustr.gov/about-us/policy-offices/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors> [<https://perma.cc/G45J-KDVT>] (saying investment protections are needed to protect against "discrimination, repudiation of contracts, and expropriation").

ful, discriminatory or bad faith conduct by the government, and even more rarely establish that any such conduct would not have been addressed by the domestic courts or administrative processes. This suggests that rather than serving as a shield of last resort, investment treaties are frequently used as “swords” to contest constraints on private sector prerogatives, and challenge domestic law and policy outside of normal channels.

Indeed, investment treaty disputes frequently go to the heart of complex issues in domestic law and policy, including the appropriate balance between private and public rights and interests, and strategies for both ensuring that FDI (and other economic activities) is appropriately encouraged and appropriately regulated and taxed. Examples include:

- issues relating to how environmental impact assessments are conducted and to what extent concerns by local communities relating to projects are to be taken into account;
- issues relating to the processes for setting tariffs for water, electricity, or other public services, and outcomes of those processes;
- questions relating to appropriate and sustainable fiscal policies, including issues of incentives for and assessments against firms;
- decisions regarding what is and is not a protected property right;
- decisions regarding what is and is not an enforceable contract or contractual provision; and
- decisions regarding the respective protections for debtors and creditors (including involuntary creditors such as victims of environmental torts) in circumstances of insolvency.

While some recent agreements contain express provisions protecting a “right to regulate,”¹³⁴ it is unclear whether these types of provisions will have any meaningful effect in terms of narrowing in-

134. See, e.g., CETA art. 8.9(1), Oct. 30, 2016; Agreement on the Promotion and Reciprocal Protection of Investments, Rwanda-U.A.E., art. 9, Nov. 1, 2017, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5722/download> [<https://perma.cc/WR77-A4YP>]; Peru-Australia Free Trade Agreement, Austl.-Peru, art. 8.18, Feb. 12, 2018, <https://dfat.gov.au/trade/agreements/not-yet-in-force/pafta/full-text/Pages/fta-text-and-associated-documents.aspx> [<https://perma.cc/EY73-23WV>].

terpretations of IIAs' investment protections. Some of these provisions are conditioned by language saying that the "right to regulate" only protects measures "otherwise consistent with the" investment treaty's obligations.¹³⁵ Even in treaties without such self-canceling language, there are questions about whether and when "right to regulate" provisions actually *prevent* liability for regulatory measures otherwise breaching the treaty, or simply make clear that the governments may adopt and maintain the measure but still must pay compensation if it violates a treaty obligation.¹³⁶ Any "right to regulate" provision, even if not limited by an "otherwise consistent with this chapter" clause, would be subject to the subjective assessment of its legitimacy by the tribunal, especially if the measure were discriminatory in intent or effect. The lingering fundamental question, therefore, is what the limits on the "right to regulate" are.

Crucially for the issue of policy space, the balance ISDS tribunals have struck between private rights and expectations, on one hand, and public rights and interests, on the other, is often different from and more protective of private property than the balance struck in many domestic legal systems.¹³⁷ As referred to above, a growing

135. See, e.g., Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 9.16, Feb. 4, 2016, available at <https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/9.-Investment-Chapter.pdf> [<https://perma.cc/GA3M-4A6M>] [hereinafter CPTPP].

136. Compare CPTPP, *supra* note 135, art. 9.16, with CETA, *supra* note 69, art. 8.9(4). Both contain a phrase stating that nothing in the agreement shall be construed to prevent a Party from doing X. CETA Article 8.9(4) also makes clear that if a Party does X, it shall not be ordered to award compensation. This raises the question of whether the absence of such language in CPTPP article 9.16 means that compensation may still be ordered for measures covered by that right to regulate provision.

137. See, e.g., Johnson & Volkov, *supra* note 131, at 164 (stating that published cases indicate that investor-state arbitral tribunals hold governments to stricter standards of noninterference with investor-state contracts than do U.S. domestic courts); Jan Kleinheisterkamp, *Who is Afraid of Investor-State Arbitration? Or Comparative Law?* 1, 3 (LSE L. Pol'y Briefing Papers, June 2014) (claiming that if future European Union agreements are framed on the lines of existing BITs then investors could obtain damages for legislative policy decisions that might be perfectly legal under EU law); Jan Kleinheisterkamp, *Financial Responsibility in European International Investment Policy*, 63 INT'L & COMP. L.Q. 449, 474 (2014) (claiming that an implication of EU agreements being negotiated in line with existing BITs is that future EU investment treaties will permit arbitral tribunals to award damages if they find that an EU legislation does not respect the standards of protection provided by the investment treaty); Matthew C. Porterfield, *International Expropriation Rules and Federalism*, 23 STAN. ENVTL. L.J. 3, 7 (2004) (stating that the concern over expansion of property rights under NAFTA led to a provision in the Trade Act of 2002 that instructs the Office of the United States Trade Representative to ensure that expropriation provisions in future trade agreements do not provide foreign investors with greater rights than those provided to property owners under U.S. law); Trevor Zeyl, *Charting*

body of research suggests that, at least in some cases, investment treaties do in fact provide investors greater protections than are available under the law of many developed states, including those that are often considered to have strong property rights guarantees.¹³⁸ Tribunals have, for instance,

- adopted interpretations of the indirect expropriation standard that are more protective of private property than standards used in the United States, which has relatively strong protections against government interference with private property;¹³⁹
- provided shareholders greater rights to sue and recover for harm than they are entitled in most countries of the world with advanced systems of corporate governance;¹⁴⁰

the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law, 49 ALTA. L. REV. 203, 234 (2011) (arguing that the requirement of home states to maintain a predictable and stable legal framework impedes the home state's regulatory authority and creates a situation where the home state will be liable for disappointing investor's legitimate expectations in almost every case).

138. See Shawn Nichols, *Expanding Property Rights under Investor-State Dispute Settlement (ISDS): Class Struggle in the Era of Transnational Capital*, 25 REV. INT'L POL. ECON. 243, 263–64 (2018) (arguing that the definition of property adopted by arbitrators is far more expansive than that provided for in the Takings Clause of the U.S. Constitution); Dreyfuss & Frankel, *supra* note 104, at 379–92 (arguing that two investor-state arbitration awards despite ruling in favor of states provide investors with a roadmap to impede legitimate IP related regulations); Baker & Geddes, *supra* note 104, at 512 (arguing that at least three investor-state dispute cases demonstrate that investor-state arbitrations on domestic health measures are shrinking the domestic policy space); Joseph E. Stiglitz, *Intellectual Property Rights, the Pool of Knowledge, and Innovation* (Nat'l Bureau of Econ. Res., Working Paper No. 20014, 2014), available at <https://www.nber.org/papers/w20014.pdf> [<https://perma.cc/ZX7Z-VNWX>]; Lise Johnson et al., *Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law* 1, 10 (Colum. Ctr. on Sustainable Inv. Pol'y Paper, May 2015) (claiming that arbitral tribunals assume the role of interpreting judicial and administrative principles and as such afford foreign investors greater rights than are provided by domestic law); David Gaukrodger, *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law* (OECD Working Papers on Int'l Inv., Working Paper No. 2014/02, 2014), available at <http://dx.doi.org/10.1787/5jz0xvngm3-en> [<https://perma.cc/FUL8-ZF4Z>].

139. See, e.g., *Ampal-American Israel Corp. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶¶ 178–80 (Feb. 21, 2017), available at <https://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf> [<https://perma.cc/J38N-XZQ5>] (effectively permitting “conceptual severance” of the investor's assets in order to find that there had been an expropriation).

140. See, e.g., Gaukrodger, *supra* note 138, at 24–26 (arguing that permitting shareholder's reflected loss, which are generally barred under national law could result in transactional structuring to obtain foreign status).

- commonly permitted investors to hold governments to contracts or representations that are illegal, unauthorized, or otherwise unenforceable under domestic law;¹⁴¹
- recognized for investors a right to recover compensation for alleged procedural errors in government administrative or judicial decision-making (even in cases where the investors did not appeal those decisions domestically, or in cases where they had been appealed and domestic courts found the government's conduct was consistent with relevant domestic law).¹⁴²

Notably, tribunals have failed to discuss why their relatively pro-investor approaches on these issues are preferable to the domestic ones from which they depart, except to note that their approaches are more responsive to the particular interests of international capital.¹⁴³ In contrast, the competing approaches in place at the domestic law level reflect a broader balancing of interests.¹⁴⁴ Again, these issues are important to highlight because, by constraining states' regulatory powers and narrowing states' abilities to consider interests that compete with those of covered investors, IIAs make it more difficult for states to ensure that FDI aligns with their sustainable development objectives and the needs and interests of other stakeholders.

141. See generally Symposium, *A Fundamental Shift in Power: Permitting International Investors to Convert their Economic Expectations into Rights*, 65 UCLA L. REV. DISCOURSE 106 (2018) (discussing the power of investors to bind states to domestically nonbinding statements made by government officials regarding the investor's economic rights).

142. See, e.g., *Copper Mesa Mining Corp. v. Ecuador*, PCA Case Repository 2012-2, ¶ 6.127 (2016) (holding that the respondent did not provide the claimant with any effective legal or administrative remedy); *Gold Reserve Inc. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/09/1, Award, ¶¶ 600–01, 609–15, 848–56 (Sept. 22, 2014), available at <https://www.italaw.com/sites/default/files/case-documents/italaw4009.pdf> [<https://perma.cc/EV8H-ZA3T>] (finding due process violations in respondent's treatment of several mining concessions, and awarding over USD 700 million in damages plus pre- and post-award interest, compounded annually); *TECO Guat. Holdings LLC v. Republic of Guat.*, ICSID Case No. ARB/10/23, Award, ¶¶ 588, 780 (Dec. 19, 2013), available at <https://www.italaw.com/sites/default/case-documents/italaw7196.pdf> [<https://perma.cc/PRY8-FYCF>] (finding a breach due to the government's failure to give reasons for not following a non-binding recommendation) (challenge to the award rejected in Decision on Annulment, ¶¶ 285–300 (Apr. 5, 2016)).

143. See, e.g., *Telefónica SA v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision on Objections to Jurisdiction, ¶¶ 76–77 (May 25, 2006), 17 ICSID Rep. 3 (2016) (supporting decision on shareholder's claims by highlighting that the aim of the treaty is to protect and promote investment).

144. See, e.g., Gaukrodger, *supra* note 138, at 26 (discussing relative treatment of policy issues).

Additionally, because of the relatively vague nature of many investment treaty obligations, at least 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. While states may not be equally sensitive to these risks, some academics have noted that the uncertain content of treaty obligations and potential for costly 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;¹⁴⁵ and be more concerned about the reputational impacts that a dispute and/or claim could have.

IAs also impose other constraints on other domestic policy preferences. For instance, IAs have increasingly contained provisions expanding the scope of intellectual property protections beyond those granted under the treaty parties' domestic law and entrench those protections as a matter of international law;¹⁴⁶ they have also increasingly included provisions that broadly restrain countries' abilities to use performance requirements to help capture the benefits of FDI.¹⁴⁷ While potentially helping signal treaty parties' commitments to liberal economic policies, each of these categories of provisions constrain domestic regulatory freedom in ways that can have significant implications for a range of issues, including innovation policy, competition policy, health care, and equality.¹⁴⁸

145. See, e.g., BONNITCHA, *supra* note 28, at 120.

146. See, e.g., Susan Sell, *Investment, ISDS, and Intellectual Property: 2018*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY (Lisa Sachs, Jesse Coleman & Lise Johnson eds., 2019); *Corporate Rent-Seeking, Market Power and Inequality: Time for a Multilateral Trust Buster?*, UNCTAD POL'Y BRIEF, May 16, 2018, at 1, 4 [hereinafter *Corporate Rent-Seeking*] (arguing for shift in global antitrust regulations to a more comprehensive approach to prevent corporate abuses); Pierre Kohler & Francis Cripps, *Do Trade and Investment (Agreements) Foster Development or Inequality?* 29–31 (Global Dev. & Env't Inst., Working Paper No. 18-03, 2018) (demonstrating how corporations can use IPR laws to shift profits and create monopolistic rents at the expense of public finances).

147. LISE JOHNSON, SPACE FOR LOCAL CONTENT POLICIES AND STRATEGIES: A CRUCIAL TIME TO REVISIT AN OLD DEBATE 21, 23 (Deutsche Gesellschaft für Internationale Zusammenarbeit 2016).

148. See Sell, *supra* note 146; *Corporate Rent-Seeking*, *supra* note 146, at 4; Kohler & Cripps, *supra* note 146, at 31 (arguing that the largest players in international trade and finance are increasing their weight in rule making, while being less accountable to the

2. Opportunities to Avoid Unjustified Policy Space Constraints

In light of these issues, governments should assess the potential for IIAs to constrain efforts to achieve the SDGs. One way to minimize the risk of constraints might be to shift some of the responsibilities and goals of investment treaties (e.g., in terms of policies to attract, shape, and protect investment) to the realm of domestic law and policy. Several academics have argued that international investment governance should be guided by the principle of subsidiarity, which counsels that “issues should be decided only by a higher authority when the objectives of an action cannot be effectively achieved by a lower authority” because “individual human beings should be no more separated from decisions that affect them than is necessary to protect their interests.”¹⁴⁹

While increasing investment flows may be a policy objective shared among countries internationally, designing the appropriate frameworks for influencing and governing such flows is generally best done at more “responsive, inclusive, participatory and representative” levels of government, in line with SDG 16, unless and except where international cooperation is particularly valuable, such as avoiding races to the bottom, supporting the needs of poorer countries, and overcoming market failures that impede optimal cross-border flows of investments.¹⁵⁰

In order to ensure that IIAs 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:

public); JOHNSON, *supra* note 147, at 33 (claiming that the tools available to governments to promote local firms and create linkages with foreign investors has been reducing). *See also* Nichols, *supra* note 138, at 251 (claiming that political and economic elites have, through arbitration, sought to capture regulation mechanisms by propagating the view that any regulation which impedes capital accumulation represents expropriation of property); Dreyfuss & Frankel, *supra* note 104, at 393 (highlighting how the threat of ISDS disputes have led to Togo’s withdrawing its anti-tobacco measures and Colombia not issuing a compulsory license which would have made leukemia drugs more accessible to patients); Baker & Geddes, *supra* note 104, at 512–13 (stating that some ISDS claims reflect the extraordinary power investors have over domestic IP and health policy); Stiglitz, *supra* note 138, at 17 (showing that “tighter intellectual property regimes . . . may lead to lower levels of innovation, and even lower levels of investment in innovation. . .”).

149. EMMA AISBETT ET AL., *RETHINKING INTERNATIONAL INVESTMENT GOVERNANCE: PRINCIPLES FOR THE 21ST CENTURY* 86 (2018).

150. 2030 Agenda for Sustainable Development, *supra* note 1, SDG 16, Target 7 (“Ensure responsive, inclusive, participatory and representative decision-making at all levels.”).

- which substantive provisions are included in the treaty, why, and with what implications for which stakeholder groups and for each of the SDGs (e.g., fair and equitable treatment, full protection and security, non-impairment, non-discrimination, obligation against unlawful expropriation, free transfer requirements, restrictions on performance requirements, and the umbrella clause);¹⁵¹
- 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 ISDS and related provisions leave governments vulnerable to litigation for an alleged breach.

It is also critical that the treaty itself, including its dispute settlement provisions, are consistent with accepted rule of law standards and the commitments under SDG 16. In standard ISDS provisions, for instance, treaty parties delegate significant decision-making authority to three typically private party-appointed arbitrators who are not accountable to the public, whose decisions are effectively shielded from review, and who lack the guarantees of independence and impartiality typically required of judicial officials.¹⁵² Combined with the opacity of these cases and frequent inability of interested and even affected individuals and entities to access information about or participate in the proceedings or their outcomes, these dynamics raise important questions not only about the effects of IIAs and ISDS on rule of law at the domestic level, but also whether, as called for by SDG 16, the ISDS system itself is consistent with the principles of transparency, certainty, and accountability that the rule of law em-

151. In determining the proper level of investment protection to provide, Bonnitca 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.” BONNITCA, *supra* note 28, at 77–78.

152. See, e.g., Free Trade Agreement, Austl.-Peru, art. 8.2(3), Feb. 12, 2018, <https://dfat.gov.au/trade/agreements/not-yet-in-force/pafta/full-text/Documents/chapter-8-investment.pdf> [<https://perma.cc/5MXX-Q52Y>]; Free Trade Agreement, Sing.-Turk., art. 12.16, Nov. 14, 2015, <https://www.enterprisesg.gov.sg/-/media/esg/files/non-financial-assistance/for-companies/free-trade-agreements/TRSFTA/Legal-text/Chapter-12> [<https://perma.cc/AC29-WLL9>]; Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., art. 27, Nov. 4, 2005, T.I.A.S. No. 06-1101.

bodies.¹⁵³

IV. IIAs AND SDG-ADVANCING INTERNATIONAL COOPERATION

Many of the arguments in this paper have been premised upon the assumption that increased global capital flows and mobility present both opportunities and risks. Some of these risks are not well suited to be addressed by countries acting independently. In addition to their role attracting and channeling sustainable development-driving investments and promoting good governance domestically, IIAs could help to address challenges of investment governance that may be exacerbated by global corporate actors and their activities, and collective action problems.

This section briefly highlights the possibilities for enhanced global governance around these issues. It starts in Part A by examining fiscal, environmental, labor, or other policy “races to the bottom” in investment attraction and retention policies, and opportunities to combat those harmful competitions for capital; it then turns in Part B to explore problems arising from the transnational nature of economic actors that generate complexity for mechanisms of regulation and enforcement; in Part C, it discusses the need for greater efforts to anticipate, identify and address the effects of IIAs on particular populations or the environment pre- and post-negotiations; and finally, in Part D, it focuses on the role of IIAs in addressing relevant global commons challenges that may be affected by the investment activities IIAs seek to promote.

A. Combatting Races to the Bottom

Through their liberalization and free-transfer provisions, IIAs make it easier for companies not only to expand but also to move their existing investments across borders. This potentially exacerbates interjurisdictional competitions for capital, which, for example, can result in pressure on states to offer ever more generous investment incentives. Some limited legal orders have attempted to discipline these costly and undesirable competitions for capital. For instance, the Treaty on the Functioning of the European Union contains a robust set of rules preventing, with certain exceptions, EU member states from offering incentives or “State Aid” to outbid other EU

153. See GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 174 (2007).

member states in their efforts to attract and keep investment.¹⁵⁴ These rules are also accompanied by transparency requirements and enforcement mechanisms, including citizen complaint processes, which aid in the monitoring and implementation of the regime. While IIAs help promote the mobility of capital, these types of incentive disciplines are still rare in IIAs;¹⁵⁵ thus, the agreements miss a crucial opportunity to combat costly and often wasteful beggar-thy-neighbor incentive schemes that can erode the benefits FDI otherwise might offer.

A limited number of IIAs include provisions restricting certain types of regulatory incentives in order to prevent governments from creating races to the bottom by waiving or derogating from existing labor or environmental standards to attract investment.¹⁵⁶ In addition to these non-derogation provisions, the 2018 renegotiated North American Free Trade Agreement (“NAFTA”), now known as the US-Mexico-Canada Agreement (“USMCA”), also includes provisions that prohibit treaty parties from failing to enforce anti-corruption laws as encouragement for trade and investment.¹⁵⁷

While still relatively rare, these provisions that limit derogation from or lowering of standards are not new and can be found in a number of other agreements concluded over the past twenty-five years. But they have been critiqued on the ground that they are never

154. See Philippe Gugler, *Incentives in the European Union*, in RETHINKING INVESTMENT INCENTIVES: TRENDS AND POLICY OPTIONS 94, 113–14 (Ana Teresa Tavares-Lehmann et al. eds., 2016); Lise Johnson, *Regulation of Investment Incentives: Instruments at an International/Supranational Level*, in RETHINKING INVESTMENT INCENTIVES: TRENDS AND POLICY OPTIONS 264, 285–88, 294 (Ana Teresa Tavares-Lehmann et al. eds., 2016).

155. Some treaties do have relevant provisions in their competition chapters. See Free Trade Agreement, E.U.-Sing., ch. 12, Oct. 19, 2018, https://www.mti.gov.sg/-/media/MTI/Microsites/EUSFTA/EUSFTA-Full-Text_12Oct18.pdf [https://perma.cc/93JM-3QVP] [hereinafter EU-Singapore FTA]. There are also relevant provisions in recent agreements’ disciplines on state-owned enterprises that seek to discipline incentives and other supports for outward investments when those supports result certain adverse effects in the host economy. See, e.g., CPTPP, *supra* note 135, art 17.6.

156. Lise Johnson & Lisa Sachs, *International Investment Agreements, 2013: A Review of Trends and New Approaches*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2013-2014, at 25, 39 (Andrea Bjorklund ed., 2015). 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. Kathryn Gordon et al., *Investment Law Sustainable Development and Responsible Business Conduct: A Fact Finding Survey 5* (OECD Working Papers on Int’l Inv., Working Paper No. 1, 2014).

157. See *generally* Agreement Between the United States of America, the United Mexican States, and Canada, Can.-Mex.-U.S., ch. 27, Nov. 30, 2018, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [https://perma.cc/5G2W-K4EA] [hereinafter USMCA].

enforced and therefore ineffective.¹⁵⁸ In some treaties (or side agreements thereto), such as the NAFTA,¹⁵⁹ USMCA,¹⁶⁰ and other agreements concluded by the United States, private parties are empowered to file complaints alleging breach of some of those non-derogation/non-lowering of standards provisions. Yet even when private parties have raised allegations of breach through those complaint mechanisms, states—which alone hold the power to formally raise those issues through the treaty’s formal dispute settlement provisions—have almost always declined to do so: only one labor complaint of the more than 40 raised under NAFTA’s labor side agreement and other U.S. trade agreements has reached the dispute settlement stage.¹⁶¹

It is also unclear whether and what impacts labor or environmental law violations must have on trade or investment flows for those violations to be challenged under a treaty; and if proof of impact is required, what proof will suffice? These issues are relevant because treaties with such non-derogation or non-lowering-of-standards clauses often state that, in order to violate the treaty, there must be some type of connection between the low or lowered standards and trade or investment between the parties. In the lone above-referenced case that the United States has brought, in this case against Guatemala, the relevant treaty stated: “A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.”¹⁶²

158. See Franz Christian Ebert & Pedro A. Villarreal, *The Renegotiated “NAFTA”*: *What Is In It for Labor Rights?*, EJIL: TALK! (Oct. 11, 2018), <https://www.ejiltalk.org/the-renegotiated-nafta-what-is-in-it-for-labor-rights/> [<https://perma.cc/E7QC-N4CW>].

159. One of the NAFTA’s side agreements is the North American Agreement on Environmental Cooperation. Article 14 of that agreement enables citizen submissions alleging that a NAFTA party is failing to effectively enforce its environmental laws. North American Agreement on Environmental Cooperation, Can.-Mex.-U.S., Sept. 9, 1993, 32 I.L.M. 1480, 1483.

160. USMCA, *supra* note 157, arts. 24.27, 24.28 (governing the citizen submission process for environmental matters, pursuant to which “[a]ny person of any Party may file a submission [with the relevant treaty committee] asserting that a Party is failing to effectively enforce its environmental laws”); *id.* art. 23.11 (providing, in the labor chapter, that “[e]ach Party shall . . . provide for the receipt and consideration of written submissions from persons of a Party on matters related to this Chapter in accordance with its domestic procedures”).

161. Ebert & Villarreal, *supra* note 158, at 4.

162. See Dominican Republic-Central America Free Trade Agreement, art. 16.2(1)(a), Aug. 5, 2004, 119 Stat. 462, *available at* <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [<https://perma.cc/B66Y-2Y4A>].

Although the dispute settlement panel constituted to hear the case found proof of unremedied violations of labor law in Guatemala at eight worksites and involving dozens of workers, it concluded that those violations did not breach the relevant treaty because there was not adequate proof that low and lowered standards were part of a sustained and recurring course of action *and* conferred a competitive advantage on the violating firms.¹⁶³ Signaling the United States' disagreement with that panel decision, the USMCA contains new clarifying language to relevant clauses in both the labor and environment chapters giving future claims for breach a better chance of success.¹⁶⁴

Non-derogation provisions could extend to other standards or practices, including the protection of human rights, or could be more widely applied with respect to other areas like corruption, public health, and other areas of public interest regulation.

In addition to provisions seeking to maintain environmental, social, and other regulatory standards at a particular floor, some more recent IIAs include provisions that commit treaty partners to advance labor standards, human rights, and environmental protection within their territories, in line with specified international standards.¹⁶⁵ The USMCA contains provisions requiring Mexico to strengthen protections for freedom of association and collective bargaining in its labor laws, and to strengthen mechanisms for enforcing those protections.¹⁶⁶ In a first-of-its-kind approach, the USMCA further aims to combat the downward pressure on wages that capital mobility can

163. *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of CAFTA-DR: Final Report of the Panel*, ¶ 594 (Arbitral Panel Established Pursuant to Chapter 20 of CAFTA-DR) (June 14, 2017), available at [https://www.trade.gov/industry/tas/Guatemala%20%20E2%80%93%20Obligations%20Under%20Article%2016-2-1\(a\)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf](https://www.trade.gov/industry/tas/Guatemala%20%20E2%80%93%20Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf) [<https://perma.cc/K2HA-495T>].

164. USMCA, *supra* note 157, ch. 23 nn.7–9, ch. 24 nn.3–4.

165. *See e.g.*, EU-Singapore FTA, *supra* note 155, arts. 12.3(3)–(5) (reaffirming the parties' commitments to advancing labor standards and commitments in the respective countries). *See also* Agreement for the Promotion and Reciprocal Protection of Investments, Benin-Can., art. 16, Jan. 9, 2013, available at http://publications.gc.ca/collections/collection_2014/maecd-dfatd/FR4-2014-13.pdf [<https://perma.cc/3KC4-WE9V>] (“Each Contracting Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily 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 Contracting Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.”).

166. USMCA, *supra* note 157, annex 23-A.

spur, and raise pay in the auto manufacturing industry in Mexico by requiring that a certain percentage of a car built in North America be built by workers earning at least \$16 per hour in order to qualify for the USMCA's preferential treatment.¹⁶⁷

While there are questions about the practical workability of the wage-content approach used in the USMCA, its strategy for seeking to raise pay in Mexico's automobile industry offers an important precedent for other attempts to establish a floor for corporate conduct even when such conduct is not required by law. Under this approach, companies must certify that their products (or a set portion thereof) meet certain production process standards in order to qualify for duty-free treatment. One could, for instance, envision applying such an approach with respect to emissions intensity or other GHG-related criteria in order to minimize problems of carbon leakage.

B. Closing Transnational Governance Gaps

Cross-border activity by MNEs raises important governance challenges. The tasks of drafting, monitoring, and enforcing laws regulating MNE conduct are more difficult as firms are structured across borders as atomized legal entities, each with carefully crafted holdings of assets and liabilities. Although the design of those corporate legal structures can drive up returns to shareholders and strengthen MNEs' competitive positions, they often do so at the expense of others, eroding tax bases, externalizing harms without compensating for losses caused, and unfairly tilting the playing field. Moreover, while MNEs' operations spread across borders, the powers of governments and other stakeholders to combat these effects weaken. Rules on corporate form and jurisdictional boundaries significantly limit the ability of governments and the public to access information about a given company, subject the company to investigation, hold it liable, and/or collect any damages awarded.

Governments have unilaterally and collectively taken some steps to address these issues. Courts in a few domestic jurisdictions, for instance, have been somewhat softening the arguably artificial lines between corporate affiliates, limiting the ability of parent companies to avoid liability for harms caused by the subsidiaries they own and control.¹⁶⁸ At the multilateral level, governments have been committing to increase cross-border information-sharing and collabo-

167. *Id.* annex 4-B-1-27.

168. Symposium, *Transnational Corporate Responsibility in Domestic Courts: Still Out of Reach?*, 113 AM. J. INT'L L. 4, 5 (2019).

ration on taxation of MNEs so as to help prevent companies from using their global networks to evade and avoid taxes.¹⁶⁹ Governments have also been working together to help understand competition effects of cross-border mergers and acquisitions, enforce their anti-trust laws and prevent abusive market practices.¹⁷⁰

But much remains to be done. IIAs aiming to increase MNE activities should play a role, helping to anticipate and monitor the governance gaps that MNEs fall into (or purposefully exploit), and supporting collaboration (on a special and differential treatment basis) to close those gaps¹⁷¹ or remedy their effects.¹⁷² Relevant activities can include technical and financial support,¹⁷³ agreements to cooperate on rule-making, monitoring, and enforcement relating to international corporate activities, and efforts to establish funds and

169. See OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING 9–10 (2013), available at <https://www.oecd.org/ctp/BEPSActionPlan.pdf> [<https://perma.cc/EF5T-H797>] (calling for countries to establish domestic and international legal and administrative frameworks for exchange of country-by-country reports by multinational enterprises); see also OECD/G20, BASE EROSION AND PROFIT SHIFTING PROJECT, TRANSFER PRICING DOCUMENTATION AND COUNTRY-BY-COUNTRY REPORTING: ACTION 13: 2015 FINAL REPORT 10 (2015), available at <https://www.oecd-ilibrary.org/docserver/9789264241480-en.pdf?expires=1569526881&id=id&accname=ocid177456&checksum=C569710B4BFBFDAB10B0A658D45D4390> [<https://perma.cc/JEP6-AKVR>]. The Inclusive Framework on BEPS, which seeks to involve countries beyond the G20 and OECD in implementing the BEPS agenda, requires monitoring and enforcement of certain BEPS minimum standards, including Action 13. OECD, INCLUSIVE FRAMEWORK ON BEPS: PROGRESS REPORT JULY 2016-JUNE 2017, at 7–10 (2017), available at <https://www.oecd.org/tax/beps/inclusive-framework-on-BEPS-progress-report-july-2016-june-2017.pdf> [<https://perma.cc/7ZRA-YD6R>] [hereinafter INCLUSIVE FRAMEWORK ON BEPS].

170. John J. Parisi, *Cooperation Among Competition Authorities in Merger Regulation*, 43 CORNELL INT'L L.J. 55, 170 (2010).

171. For some ideas of how to close governance gaps in IIAs to improve corporate accountability, see generally Nathalie Bernasconi-Osterwalder & Joe Zhang, *Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements: Meeting Report*, INT'L INST. FOR SUSTAINABLE DEV. (Apr. 2018), <https://www.iisd.org/library/integrating-investor-obligations-and-corporate-accountability-provisions-trade> [<https://perma.cc/B35P-Y4H4>]. For a discussion of possibilities for increased bilateral or multilateral efforts to address anti-trust issues, see, e.g., *Corporate Rent-Seeking*, *supra* note 146, at 4.

172. Alessandra Mistura, *Integrating Civil Liability Principles into International Investment Law: A Solution to Environmental Damage Caused by Foreign Investors?*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 446, 481–84 (Lisa Sachs, Jesse Coleman & Lise Johnson eds., 2019).

173. As noted by the OECD, complying with the BEPS framework requires significant capacity and resources and can be challenging for developing countries to implement. See INCLUSIVE FRAMEWORK ON BEPS, *supra* note 169, at 9.

mechanisms to ensure access to appropriate remedies.¹⁷⁴

C. Anticipating, Understanding, and Addressing Treaty Effects in State Parties

Given the intention for these treaties to effect changes in investment flows and practices, states should assess the projected environmental, social, economic, and human rights impacts of investment agreements and the FDI they support, and the factors that make those impacts more or less likely to occur. While it is crucial to conduct relevant analyses before negotiating treaties, it is also important to consider impacts and develop and implement appropriate policy responses over the life of the agreement.¹⁷⁵

For example, when the EU and China commissioned a sustainability impact assessment (SIA) of their potential investment agreement, they found that, among its potential impacts, the agreement would likely increase EU investment in China's chemical industry.¹⁷⁶ The study noted that the sector was responsible for significant pollution in China, and that domestic government regulations had thus far failed to adequately address or remediate environmental harms from that industry.¹⁷⁷ Increased foreign investment, the SIA noted, potentially driven by the desire of EU firms to reduce regulatory compliance costs, could exacerbate these challenges.¹⁷⁸ The SIA, however, then dismissed concerns by noting that this increased investment would likely improve environmental outcomes because European firms could be expected to migrate their more sustainable practices and voluntary codes of responsible business conduct to China, thus remediating potential negative impacts from increased investment.¹⁷⁹ But it also noted that a significant share of the chemicals firms operating in China were already foreign-owned,¹⁸⁰ challenging the assumption that increased EU investment would improve

174. Mistura, *supra* note 172, at 489–90.

175. See Olivier De Schutter (Special Rapporteur on the Right to Food), Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, ¶ 2.1, A/HRC/19/59/Add.5 (Dec. 19, 2011).

176. ECORYS NEDERLAND ET AL., SUSTAINABILITY IMPACT ASSESSMENT (SIA) IN SUPPORT OF AN INVESTMENT AGREEMENT BETWEEN THE EUROPEAN UNION AND THE PEOPLE'S REPUBLIC OF CHINA 173–74, 223 (2017).

177. *Id.* at 171.

178. See *id.* at 169 (discussing compliance costs in the EU).

179. *Id.* at 220, 223.

180. *Id.* at 172.

environmental performance. Ultimately, the SIA's specific recommendations regarding the chemical sector did not address these issues.¹⁸¹ Similarly, its recommendations regarding environmental and cross-cutting issues of sustainability highlighted steps the state parties "could" (rather than "should") take to mitigate negative impacts, and focused on relatively light-touch solutions such as mechanisms for voluntary cooperation, dialogue, and information sharing.¹⁸²

A robust impact assessment and implementation plan could further map relevant environmental laws and gaps between EU and Chinese standards on the books and as enforced, and evaluate motives for EU investors to invest in China (such as to reduce costs of complying with environmental, health, and safety laws). The agreement could also include relevant action plans, including firm commitments by the EU to provide technical or other supports for its chemical companies, many of which, the SIA notes, are small- and medium-sized enterprises,¹⁸³ to deploy best available technologies and practices when investing in China. The treaty could also contain commitments to cooperate with Chinese officials on development and enforcement of relevant environmental, health, and safety standards; to share information regarding corporate violators; to develop complaint mechanisms where employees and citizens could report violations against firms irrespective of ownership; and to monitor changes in the industry and its performance on environmental, health and safety issues.

Some treaties include provisions that commit treaty parties to cooperate in achieving specified environmental, labor, or other goals, or in establishing mechanisms or institutions to identify priorities for future cooperation.¹⁸⁴ The US-Chile FTA, for instance, sets out a list of priority items for inter-state collaboration. These included capacity building for regulation of industrial use of chemicals and reducing pollution from mining and agriculture.¹⁸⁵ In connection with the U.S.-Peru FTA and concerns that the agreement could drive further illegal logging and trade in endangered species, the state parties con-

181. *Id.* at 223–24.

182. *Id.* at 220–21.

183. *Id.* at 223–24.

184. *See, e.g.*, Dominican Republic-Central America Free Trade Agreement art. 17.9, Aug. 5, 2004, 43 I.L.M. 514, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [<https://perma.cc/5TSQ-XCA7>].

185. United States-Chile Free Trade Agreement, Chile-U.S., annex 19.3, June 6, 2003, 42 I.L.M. 1026, *available at* <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text> [<https://perma.cc/UFC5-K2RA>].

cluded an annex on forest governance.¹⁸⁶ Given the breadth of commitments and cooperative activities envisioned in that annex, it was a groundbreaking initiative that led environmental groups—including groups that had not previously backed any free trade agreements—to support conclusion of the U.S.-Peru FTA.

Some treaties further provide for the developed country partner to provide assistance to the less developed country partner in achieving environmental, social, or other objectives.¹⁸⁷ In connection with the U.S.-CAFTA-DR, the U.S. Environmental Protection Agency provided assistance to El Salvador on a range of environmental issues, including setting standards for lead contamination, establishing a national water quality reference laboratory, establishing government units for investigation and enforcement of environmental laws, and establishing environmental tribunals.¹⁸⁸

However, even relatively strong environmental and labor provisions in these agreements have had disappointing results.¹⁸⁹ Studies, including government audits of these provisions, have found that their promise has not been fulfilled. Cited causes include: targets and commitments are not clearly stated; priorities tend to shift away from labor and environmental issues over time after the agreements are concluded and ratified; treaties often exclude relevant environmental and labor provisions from dispute settlement under the treaty and, when formal dispute settlement is available to enforce environmental and labor commitments, states appear extremely reluctant to use them; and finally, stakeholder complaint mechanisms are rarely

186. United States-Peru Free Trade Agreement, Peru-U.S., annex 18.3.4, Feb. 1, 2009, available at <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text> [<https://perma.cc/XT4N-SJPX>].

187. See e.g., Free Trade Agreement Between the States of the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland) and the Central American States, art. 9.1, June 24, 2013, available at <http://www.efta.int/free-trade/free-trade-agreements/central-american-states> [<https://perma.cc/3H3T-PNB3>].

188. See U.S. ENVTL. PROT. AGENCY, *supra* note 111; United States Government Accountability Office [USGAO], *Free Trade Agreements: Office of the U.S. Trade Representative Should Continue to Improve Its Monitoring of Environmental Commitments*, at 6, 9–10, 14–16, 22 (Report to Congressional Requesters, Nov. 2014), available at www.gao.gov/assets/670/666782.pdf [<https://perma.cc/6C3D-EVSF>].

189. See e.g., USGAO, *Free Trade Agreements: U.S. Partners Are Addressing Labor Commitments, but More Monitoring and Enforcement Are Needed*, at 23, 27–29, 46 (Report to Congressional Requesters, Nov. 2014), available at www.gao.gov/assets/670/666787.pdf [<https://perma.cc/XMP7-SH4S>]; USGAO, *Four Free Trade Agreements GAO Reviewed Have Resulted in Commercial Benefits, but Challenges on Labor and Environment Remain*, at 58–60, 68–69 (Report to the Chairman, Committee on Finance, U.S. Senate, July 2009), available at <http://www.gao.gov/new.items/d09439.pdf> [<https://perma.cc/K7LA-HM7F>].

included in agreements, and when they are included, stakeholders are inadequately informed of or responded to in the complaint process.

A large and growing body of literature can help states avoid repeating mistakes in IIA design and implementation, and better ensure those treaties support sustainable development outcomes. However, environmental and social impact assessments, even when conducted, still have room for improvement; the SDGs provide a useful set of issues, targets, and indicators to incorporate into more robust assessments.

D. Addressing Relevant Global Commons Challenges

IAs could also be mobilized to tackle global commons challenges, in which individual states have incentives to consume rivalrous and non-excludable common goods unsustainably. International cooperation, including in relation to economic policy, is necessary in these arenas to promote more sustainable production and consumption to the benefit of all countries.

Climate change is likely the most pressing and prototypical, though surely not the only, commons problem faced today. Specifically, the amount of carbon that can be released into the atmosphere before exceeding the 2°C warming target agreed to in the Paris Agreement can be considered a common pool resource, where each state has an incentive to consume as much as possible to the detriment of collective action to transition to a low-carbon society. For this reason, international cooperation on climate change has been seen to be crucial to adoption of state-level mitigation plans.¹⁹⁰

While some international agreements on climate change exist,¹⁹¹ these agreements have as yet remained insufficient to put the planet on a 2°C path.¹⁹² IAs therefore could provide complementary instruments to support responsible action on climate change by providing carrots to encourage investments that support mitigation

190. See, e.g., Daniel C. Esty & Anthony L. I. Moffa, *Why Climate Change Collective Action Has Failed and What Needs to be Done Within and Without the Trade Regime*, 15 J. INT'L ECON. L. 777, 785–86 (2012).

191. See, e.g., Paris Agreement (Dec. 12, 2015), in UNFCCC, COP Report No. 21, Addendum, at 21, U.N. Doc. FCCC/CP/2015/10/Add. 1 (Jan. 29, 2016), available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf [<https://perma.cc/4Q89-X4BR>] [hereinafter Paris Agreement]; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

192. Joeri Rogeli et al., *Paris Agreement Climate Proposals Need A Boost to Keep Warming Well Below 2°C*, 534 NATURE 631, 637 (2016).

goals—targeted supports (financial, technical, or otherwise) for energy or forest conservation or clean energy investment, for instance—as well as sticks to discipline continued fossil fuel dependence.

Mounting research has chronicled the challenges that IIAs could pose for climate change. These include: generating increased greenhouse gas (“GHG”) emissions due to increased overall economic activity, transit of goods, and liberalization of restrictions on export of fossil fuels.¹⁹³ Additionally, experts have highlighted that trade and investment disciplines may make it harder for governments to adopt and maintain climate friendly policies. Restrictions on local content requirements, for example, may prevent governments from using tools that can be crucial for securing political buy-in for renewable energy projects;¹⁹⁴ other treaty provisions can be used to challenge climate change measures such as restrictions on new fossil fuel-exploration or exploitation projects, or phase out of fossil-fuel-based infrastructure.¹⁹⁵ While commenters have highlighted these potential tensions, official state reviews of IIAs frequently fail to assess and address them.¹⁹⁶

But treaties could be designed differently. Apart from ensuring that disciplines do not unduly constrain climate policies,¹⁹⁷ IIAs could impose affirmative obligations to: cooperate on identifying opportunities for investment in clean technologies; provide, on a special and differential treatment basis, support for qualifying projects; reinforce or integrate commitments under climate change agreements; and mandate corporate disclosures of GHGs, including GHGs from outward FDI.

Additionally, IIAs could require governments to provide in-

193. Matthew C. Porterfield et al., *Assessing the Climate Impacts of U.S. Trade Agreements*, 7 MICH. J. ENVTL. ADMIN. L. 51, 53, 58–59, 79 (2017).

194. Todd Tucker, *There’s a Big New Headache for the Green New Deal*, WASH. POST, (June 28, 2019), <https://www.washingtonpost.com/politics/2019/06/28/theres-big-new-headache-green-new-deal/> [<https://perma.cc/3FBH-FRWX>].

195. *Id.*; Nathan Lobel & Matteo Fermeglia, *Investment Protection and ‘Unburnable’ Carbon: Competing Commitments in International Investment and Climate Governance*, 4 DIRITTO DEL COMMERCIO INTERNAZIONALE 945, 959–62 (2018); Lise Johnson, *International Investment Agreements and Climate Change the Potential for Investor-State Conflicts and Possible Strategies for Minimizing It*, 39 ENVTL. L. REP. 11147, 11149 (2009).

196. Porterfield et al., *supra* note 193, at 54–57.

197. James Bacchus, *The Case for a WTO Climate Waiver*, CTR. FOR INT’L GOVERNANCE INNOVATION SPECIAL REPORT 2, 5, 21 (2017), available at <https://www.cigionline.org/sites/default/files/documents/NEWEST%20Climate%20Waiver%20-%20Bacchus.pdf> [<https://perma.cc/6YN4-ZPF2>]; Gus van Harten, *An ISDS Carve-Out to Support Action on Climate Change* 3–4 (Osgoode Hall Law School, York Univ., Research Paper No. 38/2015, Sept. 20, 2015).

formation on, and commit to reduce, fossil fuel subsidies. Article 12.11 of the EU-Singapore FTA's trade and sustainable development chapter includes some relevant language—discouraging (albeit weakly) fossil fuel subsidies, while also encouraging investment to promote a shift to a low-carbon economy.¹⁹⁸ It states: “the Parties share the goal of progressively reducing subsidies for fossil fuels. . . . In addition, both Parties will actively promote the development of a sustainable and safe low-carbon economy, such as investment in renewable energies and energy efficient solutions.”¹⁹⁹

IAs 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 (the “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.”²⁰⁰ IAs could include language implementing these commitments. But to the extent IAs have included provisions on technology transfer, those provisions have tended to constrain, rather than expand, government policies to drive such transfer.²⁰¹

198. EU-Singapore FTA, *supra* note 155, art. 12.11.

199. *Id.* art. 12.11(3).

200. UNFCCC & U.N. DEP'T OF ECON. & SOC. AFFAIRS, CLIMATE CHANGE: TECHNOLOGY DEVELOPMENT AND TECHNOLOGY TRANSFER 2 (2008). 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, *supra* note 191, art. 10(c).

201. Martin D. Brauch et al., *Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation: Aligning International Investment Law with the Urgent Need for Climate Change Action*, 36 J. INT'L ARB. 7, 15–16 (2019).

CONCLUSION

Revisiting IIA design in light of the SDGs requires a thorough evaluation and retooling of investment governance, with countries conducting robust assessments of the domestic and international objectives and impacts of investment treaties, and taking relevant steps to bring treaties more in line with 21st Century goals. This is ever more important in light of the real need for international cooperation and coordination to address a number of challenges in our increasingly globalized world, and the potential for international investment governance to fill that gap.

Aligning existing treaties with the SDGs raises different opportunities and challenges than designing future treaties. For new treaties, countries have the freedom to craft new provisions, exclude more traditional clauses, and narrow or exclude ISDS. Bringing old treaties in line with current priorities, in contrast, can require termination, renegotiation, and/or interpretive clarification through exchange of diplomatic notes or other channels.²⁰² But for both existing and future treaties, some action can also be taken at the purely domestic level through, for example, conditioning treaty benefits on meeting certain obligations or criteria. Although addressing both existing and future treaties increases the complexity of a 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.

This paper advocates key considerations to better align IIAs

202. See, e.g., Lise Johnson, *Ripe for Refinement: The State's Role in Interpretation of FET, MFN, and Shareholder Rights* 21–23 (Oxford Global Econ. Governance Programme, Working Paper 2015/101, Apr. 2015); Kathryn Gordon & Joachim Pohl, *Investment Treaties Over Time – Treaty Interpretation in a Changing World* 16–39 (OECD Working Papers on Int'l Inv., Working Paper No. 2015/02, 2015); Lise Johnson & Merim Razbaeva, *State Control over Interpretation of Investment Treaties* 3–15 (Colum. Ctr. on Sustainable Inv. Pol'y Paper, 2014); Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 207–15 (2010). But see Tarald Laudal Berge, *Dispute by Design? Legalisation, Backlash and the Drafting of Investment Agreements* 6–7 (Univ. of Oslo Dept. of Pol. Sci., June 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3201306 [<https://perma.cc/U66Z-HKCL>] (noting that “a new strand of research points to the fact that arbitrators so far have been ‘insufficiently sensitive to treaty design differences when applying precedent’ and as such ‘risk rolling back state-driven innovations as new treaties are read in light of old case law.’ As such, it calls into question whether re-negotiation really matters in a regime where arbitrators interpret unlike IIAs alike.”) (quoting Wolfgang Alschner, *Changing Treaties, Changing Jurisprudence? The Impact of Treaty Design Differences on Precedential Reasoning in Investment Arbitration* 1 (working paper) (presented at the iCourts conference on Investment Courts: Challenges and Perspectives, Copenhagen, 2018)).

with the SDGs. Notably, however, IIAs are only one feature of the broader governance framework—at the national and international level—that impacts investment and investment outcomes. Future scholarship and public debate should continue to consider how states might redesign global investment governance and its various dimensions—including, but not limited to, the role of international agreements on investment—to address current challenges and goals, as well as the role of international institutions in facilitating such reform.