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Costs and Benefits of Investment Treaties: Practical Considerations for States

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COSTS AND BENEFITS OF INVESTMENT TREATIES

PRACTICAL CONSIDERATIONS FOR STATES

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Cover image View over a sulphur mining site from Mount Ijen, East Java, Bondowoso, Indonesia. © RXFPhoto.
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Open pit copper mine
Atalaya, Rio Tinto, Spain.

PART I

INTRODUCTION

Many governments around the world are thinking critically about their international investment treaties and international investment policy, spurred in part by growing public pressure and debate about how to best attract and govern multinational enterprises.

Several phenomena are driving this heightened attention: One is that investor-state dispute settlement (ISDS) claims brought under international investment treaties have been on the rise, involving a broadening set of claims, and seeking millions, or even billions, of dollars in damages for alleged breaches of fairly open-ended treaty standards. As of July 31, 2017, 817 known ISDS claims had been filed, and at least 114 states had faced formal claims.[1] This is particularly staggering given that the first ISDS case was filed only 30 years ago and fewer than 50 cases had been filed before the year 2000.[2] This means that the implications of investment treaties and ISDS have really only become apparent in the last 15 years.

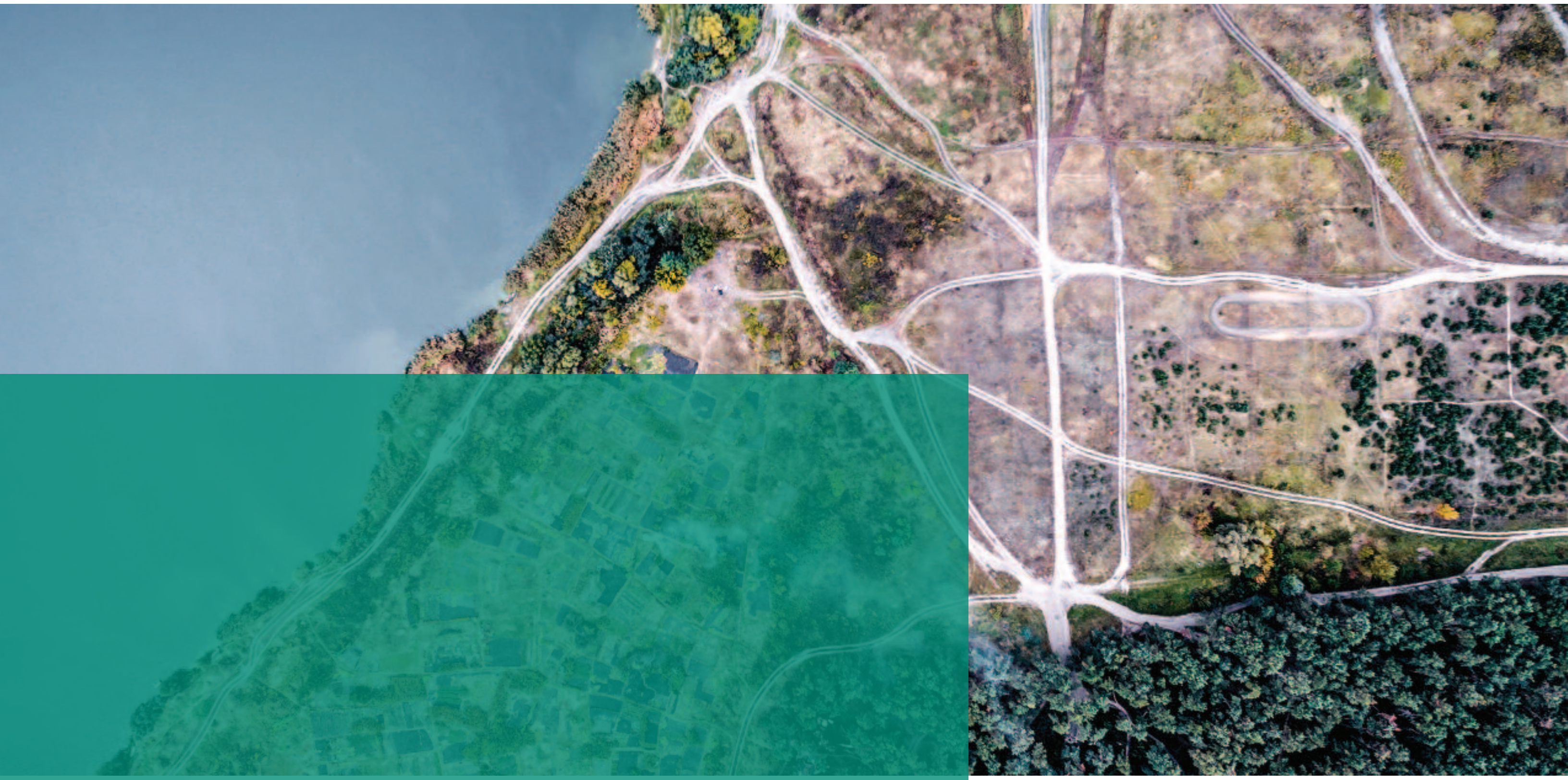
A second and related factor is that negotiations of new treaties have attracted greater public attention. Some of these new agreements are unprecedented in terms of the breadth of investment they cover, the restraints they place on countries' powers to regulate investors and investments and the complexity of their provisions; others, such as the texts concluded by Brazil, are also attracting attention for their decision to eschew strong investor protections in favor of a more pragmatic focus on investment promotion.[3]

A third factor is that states are focused on attracting investment that will help propel their sustainable economic growth and development and, in that context, are evaluating the policies and tools that are effective and efficient in advancing that aim. As part of that evaluation, they are reassessing whether investment treaties do in fact help increase investment flows and, more specifically, whether induced flows are the types of investment they want. States are also considering whether any potential benefits in terms of investment flows outweigh the costs of these treaties in terms of litigation expenses, potential liability, reduced policy space, or other considerations; and whether there are other policies that are better tailored to meet their investment attraction and development objectives. Some traditionally capital exporting states are also assessing whether their investment treaties are consistent with their stated development policies toward their capital importing partners.[4]

Accordingly, states increasingly recognize the importance of taking stock of existing investment treaties as well as policies regarding future texts, and are more strategically considering the advantages and disadvantages of these agreements, and whether, when and on what terms to sign, maintain, or amend them. This research paper aims to help that analysis by (1) providing an overview of literature on the costs and benefits of investment treaties with ISDS, and (2) examining policy implications and conclusions.

In summary, this paper highlights that the costs of investment treaties are increasingly apparent, but the benefits largely unproven; thus, it is an opportune time for countries to review their policies and practices regarding these instruments. The conclusion of this paper also suggests practical steps that states can take to assess these costs and benefits, and identifies considerations and strategies relevant for managing obligations contained in existing treaties and shaping future agreements.

Farmers working in onion plantations in Argapura, Indonesia.



Aerial view of terrain with access to water.

PART II

COSTS & BENEFITS OF INVESTMENT TREATIES

INSIGHTS FROM RESEARCH

EXPECTED BENEFITS

Increased inward investment

A common rationale offered for investment treaties is that they and their ISDS provisions can encourage investment. Evidence that investment treaties have the effect of increasing investment flows is, however, inconclusive.[5] In short,

'common assumptions about the role of [bilateral investment treaties (BITs)] in attracting foreign investment are unsupported by a considerable amount of quantitative and qualitative evidence. For the vast majority of investors, BITs do not appear to be important – directly or indirectly – when determining where, and how much, to invest abroad'.[6]

Studies on determinants of foreign direct investment (FDI) confirm that other factors – such as market size and growth, the availability of natural resources, and the quality of hard and soft infrastructure – tend to be far more important to investors than investment treaties when making the decision to invest.[7] This helps explain why, for example, investment flows between the United States and China are high despite the absence of an investment treaty, and why Brazil has continued to be a major destination for foreign investment despite having ratified no investment treaties with ISDS. Similarly, it helps explain why countries that have stepped away from investment treaties do not appear to have suffered losses of FDI:

» South Africa announced several years ago that it would be terminating its BITs, and has since terminated almost all of its agreements with capital exporting states;[8] yet it has continued to be the top African destination for FDI projects through 2016;[9]

» Indonesia announced in 2014 that it would terminate its BITs and has since terminated 27 of 53 BITs previously in force;[10] nevertheless, in 2016, 'FDI into Indonesia by capital investment increased by 130% to $38.5 billion as a result of multiple metals, chemicals and coal, oil and natural gas projects';[11] and

» India, which released a new model BIT in 2015 that was notably narrower in its protections than its previous agreements, became the leading destination for FDI in Asia.[12] That spot was previously held by China,[13] a country which, in contrast to India, has been expanding its BIT network and increasing the breadth and strength of its commitments in those agreements.

While these examples are anecdotal, empirical evidence that BITs lead to increased foreign investment is also inconclusive.[14] Overall, available evidence does not support the hypothesis that BITs result in higher investment flows than in the counterfactual case.

Moreover, while an investor may naturally want the strong substantive and procedural protections that an investment treaty can provide, and may therefore structure its investment so as to ensure that it is covered by a favorable investment treaty (e.g., by establishing an affiliate in a nominal "home" country, and routing its investment through that affiliate),[15] that does not mean that the investor would not have made its investment in a particular host state, absent the investment treaty or with an investment treaty offering weaker protections. Thus, even if investment treaties and ISDS were found to influence whether FDI flows originate in or flow through a particular "home" country, that does not mean that those treaties actually affect investors' decisions on whether or how much to invest in a particular host country. At most, we may be able to say that investors will often seek to take advantage of all available legal protections when making their investment decisions, including how to structure their investments.

To the extent that political risk is a limiting factor hindering foreign investment, other means are available to investors to protect themselves against some of the risks associated with investing abroad. Various public and private risk insurers, for example, provide coverage that supports outward investment by reducing exposure to political risks.[16] But, more broadly, it is exceedingly unclear that investment treaties (which effectively act as free political risk insurance and provide compensation when certain kinds of political risks materialize) address many of the conditions and limiting factors that are hindering investment. The World Economic Forum's Global Competitiveness Index, for example, considers factors such as corruption, crime, theft, tax rates and other issues that hinder investment; those factors are not specifically addressed by investment treaties.[17]

Importantly, even if there were a link between investment treaties and FDI flows, investment agreements and their protections can potentially undermine investment and its intended benefits.

For one, there is evidence that the mere initiation of an ISDS claim against a country can result in a drop in FDI into that country; and, if the country loses that ISDS case, that the drop is even more significant.[18] Thus, even if ISDS were to spur additional FDI, those positive effects might later be negated by an ISDS claim – which is easy for an investor to file – or loss of an ISDS dispute.

A second issue is that some early-stage investors have reportedly used the threat of ISDS claims as a bargaining tool in order to secure an investment in the host state. In *Bear Creek v Peru*, for example, the investor appears to have used its ISDS claims in order to press the host government to approve the investor's controversial mining projects that the government had rejected.[19] Investments that a government allows in order to settle or avoid a potentially costly ISDS claim technically count as investment inflows but may not be the type of FDI that brings benefits to the host country.

A third consideration is that, while investment treaties may be seen as favorable by some investors, they may also reduce the host country's ability to secure ample revenues desirable for other investors (and other stakeholders). Wellhausen, for example, highlights that many investors use investment treaties to challenge measures that were taken by the government in order to raise revenues or reduce costs, such as decisions to impose new taxes or terminate incentives or subsidies. 'Because sovereign bondholders ultimately care most about debt serviceability', they may be 'indifferent to – or even rewarding of' such revenue-raising or cost-reducing measures.[20] Nevertheless, those are precisely the types of measures that have come under repeated attack through ISDS claims. Thus, investment treaty rules, which can reduce governments' willingness or ability to adopt new revenue-raising or cost-saving policies, may ultimately make it more difficult for governments to raise funds through issuing sovereign bonds.[21] More generally, by reducing or threatening governments' powers to increase their revenue, investment treaties can also reduce the amount of government resources available for public investments in education and infrastructure that are in fact crucial for domestic and international investors and the country's sustainable development.

Work by the Organisation for Economic Co-operation and Development (OECD) has similarly questioned whether the special rights given to some investors under investment treaties may discourage support from other potential project funders. Examining the implications of shareholder claims for reflective loss, which are only exceptionally allowed in advanced systems of corporate law[22] but are now commonly permitted in ISDS cases,[23] the OECD notes that such shareholder claims may have a range of impacts harmful to companies, including potentially increasing risks for, and, consequently the cost of capital offered by, creditors.[24]

A fourth issue, and one which is discussed further below in the discussion on costs, is that even if the protections offered by investment treaties were found to be effective in increasing FDI flows, those protections may come at a high cost as judged both by what is actually necessary, and by impacts on other economic, social, and/or environmental goals. Governments could, in theory, guarantee investors protections against all future losses caused by technological change, new environmental regulations, or evolving societal demands. Such policies insulating the investors from risks might well induce their investment. But is that a good policy? Protections of such broad scope may encourage investment, but tie the government's hands when it comes to advancing the country's development goals and/or could drain public budgets when investors suffer relevant losses. Moreover, such government-provided insurance could give rise to moral hazards, encouraging undesirable risk-taking by companies and weakening investors' incentives to reduce risks by striving to meet societal demands, staying ahead of regulation, and driving innovation. While the protections offered by investment treaties may not be as broad as those offered in this hypothetical, it is offered to highlight the importance of examining both benefits and costs. Effectiveness in terms of increased investment cannot be the only measure of "success". The price paid in terms of liabilities assumed by the public and undesirable behavioral signals sent to the investors must also be taken into account.

Fifth, the investment covered by investment treaties is not necessarily beneficial for the host state. While it is well known that international investment – in particular FDI – can produce wide-ranging benefits in host countries (e.g., bringing jobs, technology, know-how, and capital across borders), it is also well known that those positive effects do not always materialize. Research indicates that in certain contexts FDI can crowd-out domestic firms,[25] contribute to inequality,[26] worsen corruption,[27] facilitate tax evasion and avoidance,[28] and generate food insecurity.[29] Research also shows that the impact of FDI on the environment can be good or bad.[30] There is evidence that FDI creates "pollution halos" and enables environmental "leapfrogging" – phenomena whereby foreign investors bring newer, cleaner technologies to the host country, thereby improving the environmental performance of companies in that country.[31] But in other cases, FDI can leave a major environmental footprint, exacerbate pre-existing environmental challenges and/or discourage environmental policymaking.[32] Depending on factors such as the type of investment, the corporate culture of the investor and the institutional and regulatory framework of the home and host countries, outcomes will vary. It is important to remember that the potential benefits of FDI are not automatic and that FDI can also result in economic, environmental and social damage in the host country and to its citizens, and its foreign origin can make it difficult to secure redress for harms caused.[33]

Investment treaties, however, generally protect investors irrespective of the nature of the relevant investment, the conduct of the investor, or the impacts of the investment.[34] Tribunals have tended to reject the argument that investment must contribute to economic development in the host state in order to benefit from the treaty protections.[35] As one arbitrator has described it, this means that even an 'entity which is systematically earning its wealth at the expense of the development of the host State' can benefit from the protections of investment treaties.[36]

In conclusion, it is crucial for states to not only examine whether investment treaties result in increased investment into the host country (which is itself inconclusive), but also (1) whether that increased investment is induced investment or investment merely structured to benefit from the treaty; (2) whether the investment is actually desirable; and (3) whether any benefits of the investment outweigh the price paid for the investment in terms of lost policy space or other costs (more of which are discussed below). When conducting that cost-benefit analysis, it is also important to assess distributional consequences of relevant gains and losses. Evidence available to date counsels that countries examining their investment treaty policies should not assume positive outcomes in terms of investment flows or that ultimate benefits will flow from investment treaties.

Increased outward investment

Countries may also conclude investment treaties in order to benefit their outward investors, based on the assumption that supporting outward investment by those entities will produce benefits that flow back into the home country. This raises two key issues that are similar to the issues discussed in the context of inward investment. One is whether the benefits offered by standard investment treaties are what the home country's outward investors truly want or need. What are the barriers those individuals and firms face that limit their investments abroad? Do the treaties help them overcome those barriers? Outward investing firms, like inward investing firms, may very much like to use the added leverage provided by investment treaties to bring or threaten to bring a claim against their "host" states. But this does not mean that the treaty will be influential in, much less essential to, the companies' investment decisions in the first place (or worth the costs the home country has assumed so as to provide its investors that leverage).[37]

The other question is whether, in what ways, and under what conditions the home country actually benefits from the outward investment it supports. While some studies show that outward FDI can benefit the home country (e.g., helping home country firms to expand, access resources, technology, and other assets, and become more efficient, thereby increasing the strength, competitiveness, and profitability of the home country's economy), actual outcomes may vary.

FDI motivated by an effort to take advantage of low labor standards and weak environmental regulation, for instance, can hollow out industry in the home country, place downward pressure on environmental regulation and labor standards and wages, and, depending on the tax planning of the outward investing firm, leave the home (and host countries) unable to use their tax policies to capture benefits of the firm's increased efficiency and profitability. FDI may result from a company shutting down manufacturing in the home country and moving to another country, lured to that new location by generous incentives, low labor costs, lax environmental regulations, or other advantages. That move may make the home country firm more competitive, enabling it to increase its profitability and invest more in research and development or other high-skilled activities in the home country. While this can have beneficial impacts in the home country in terms of increased tax revenue and creation of high-quality jobs, those positive impacts do not necessarily materialize if, for instance, profits are held offshore in tax havens rather than reinvested at home.[38] Moreover, those who benefit from FDI are often not the same as those who are negatively impacted, an outcome that can, without effective policies in place, generate within-country inequalities and discord.[39]

Notably, there are other ways to support outward investment that can be tailored to try to avoid negative impacts at home and abroad. The United States Overseas Private Investment Corporation (OPIC), for example, offers various kinds of financial products to assist United States outward investors. Unlike investment treaty protection that is provided to an investor regardless of the impacts of the investment, OPIC's eligibility criteria are designed to ensure that investment projects demonstrably benefit the host country and do not harm the US home economy.[40]

It is thus important to distinguish between the benefits investment treaties offer to the outward investing firm and those received by the home country, and then compare whether the costs borne by the home country (and its constituents) outweigh their benefits. Just as the amount of inward FDI is not an accurate proxy for measuring the benefits investment treaties provide to host countries, the amount of outward FDI (or even the amount of outward FDI actually induced by the investment treaty) is not an accurate proxy for assessing whether and to what extent the treaties benefit the home country.

For countries assessing their outward investment policies, it is therefore crucial to (1) consider whether, what types, and under what circumstances outward investment provides positive spillovers into the domestic economy, (2) identify (through, for example, the use of surveys) limiting factors that are hindering optimal amounts and types of outward investment, (3) consider what policy tools the government has to help overcome those limiting factors and which are the most appropriate tools to use, and (4) assess what complementary measures the government might want to adopt to anticipate and address negative effects the home country may experience – such as a reduced tax base or increased unemployment among workers of certain skill-sets – as a result of overseas investment promotion efforts.

Finally, it is important for home countries to consider how increased investment may affect host countries, and to ensure that the investors and projects the home countries support do not undermine sustainable development abroad.

"Depoliticization" of disputes

Another key purported benefit of investment treaties is that, by enabling investors to bring claims directly against the states in which they have invested, the treaties "depoliticize" those disputes.[41] From the perspective of the host state, this appeals to the host state's desire to be free from "gunboat diplomacy", diplomatic protection, or other political or economic sanctions imposed by the investor's home state as a result of the host state's alleged mistreatment of the investor.[42] Depoliticization from the home state's perspective appeals to the home state's desire to avoid muddying its diplomatic relations with the host state by getting involved in disputes between the home state's investors and their foreign host governments.[43] The theory is that by providing investors the ability to bring arbitration claims directly against their host governments, the home state need not be involved. Additionally, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[44] – a treaty governing enforcement of international arbitration awards – bars the home state from 'giv[ing] diplomatic protection, or bring[ing] an international claim, in respect of a dispute' already initiated by its investor against the host state under the ICSID Convention.[45]

However, as discussed below, in both theory and practice, the specific contribution of investment treaties and, more specifically, ISDS, to the objective of depoliticizing investment disputes is uncertain. Moreover, "politicization" may not be as much of a problem as it is often portrayed to be and, in fact, may in some cases and from some perspectives even be preferable to more legalistic forms of dispute resolution.

Treaty provisions and related legal rules on depoliticization

From the host state's perspective, investment treaties and the rules governing ISDS do not necessarily provide any practical or legal shields from involvement in the dispute by the home state. This is because:

» In all investor-state disputes, the home state is able to involve its political machinery both before any arbitration has been initiated (so as to influence a host state's actions toward an investor)[46] and after an award has been issued if the host state fails to comply with that ISDS award;[47]

» In all non-ICSID investor-state disputes (e.g., investor-state arbitrations under the New York Convention, unless the investment treaty states otherwise), the home country can pursue diplomatic relief on behalf of its investor while the dispute is pending;

» Restrictions that are included in the ICSID Convention or in the underlying investment treaty on the use of diplomatic protection can be undermined through treaty shopping and parallel claims;[48]

- The home state can still make political decisions regarding whether and/or how to get involved in an ISDS dispute through such means as providing (or deciding not to provide) a tribunal with its interpretation of the underlying investment treaty,[49] or through other means, such as being more or less willing to provide evidence relevant to the dispute; and
- The home state may be able to pursue action against the host state under the investment treaty irrespective of whether an investor has already initiated a claim.[50]

Moreover, it is likely giving investment treaties and ISDS too much credit to trace the decline of "gunboat diplomacy" to ISDS's mere existence. If ISDS were unavailable, we cannot assume that home states would resort to force in violation of other norms of international law.

Similarly, from the perspective of the *home state*, even when investment treaty protection and ISDS are available to its investors, the home state possesses numerous opportunities to exercise discretion and determine whether and how to become involved in disputes between those investors and their host governments. The availability of ISDS may give home states an excuse to deflect those investors that solicit government assistance in resolving a dispute, but it does not require the home government to always adopt a hands-off approach, a fact that investors may be likely to highlight when pressing their home governments for support.

Evidence of impacts of depoliticization

While very little is known about the extent to which the availability of ISDS actually impacts home state and host state experiences of politicization, studies that have been done suggest that the presence or absence of an investment treaty with ISDS does not seem to influence whether or not the investor's home state is likely to place diplomatic pressure on – or take adverse diplomatic action against – the host state in connection with an investor-state dispute.[51]

More specifically, a recent analysis of United States practices regarding concerns of its investors concluded the following:

> Whether or not an investor has access to treaty-based investment arbitration appears to make little difference to how strongly the US government applies diplomatic pressure to resolve the dispute. Just as the FDI-impact of the treaties has been disappointing, the de-politicization promise of the investment treaty regime may have failed [to deliver] as well. This could be important for developing countries seeking to revisit their investment protection policies, as it raises questions [about] whether the use of inter-state dispute settlement may not be a better alternative to investor-state arbitration, as this at least has the promise of less controversial and adventurist legal claims.
>
> …
>
> [O]ur results indicate that even for such a highly legalized regime, diplomatic considerations still play core functions in the settlement of disputes. This is as expected in realist approaches to international relations and warrants the question, whether the promise of depoliticization from international legalization may be more fiction than fact.[52]

Other studies have also questioned the underlying objective of depoliticizing disputes. As Yackee has stated:

> Politicized dispute settlement need not entail, or even risk, resort to force. Indeed, it can be apparently successful, especially where home and host state governments, and perhaps also the investor, perceive mutual gains from continued cooperation. This does not mean that investors get everything they want, when they want it. In politicized dispute settlement the investor does not control the process—though he can certainly influence it—and the investor's interests are not the only ones in play.[53]

In other words, according to Yackee, political resolution of investor-state disputes at the state-to-state level can moderate the investor's claims, while also helping to find an effective solution acceptable to the home state, host state, and investor.

For countries assessing their investment policies, these issues and experiences highlight the need to carefully assess whether "politicization" is a warranted concern or may in fact be more desirable than investors' untethered access to legal recourse. States can then consider what tools are effective to achieve the desired outcomes in terms of (de)politicization (for example, by considering what role ISDS has played, and whether and how legalized state-state dispute settlement may differ) and at what cost.

Oil palm plantation in Malaysia.

COSTS

This section briefly summarizes the costs of investment treaty protection and ISDS. It provides an overview of seven main categories of costs. These are: (1) costs of litigation; (2) costs of liability; (3) reputational costs; (4) costs in terms of reduced policy space; (5) costs in terms of reduced power in contractual relations; (6) costs in terms of a reduced role for domestic law-making; and (7) costs in terms of generating uncertainty in the law.

Litigation

The costs of defending treaty claims brought by investors can be significant. Studies have estimated that it costs each disputing party roughly USD 5 million per case on average to cover legal fees and the costs of the arbitral tribunal.[54] Given that those are average figures, there are of course examples of disputes in which the costs were lower and those in which they were higher. In 13 of the 56 ICSID cases concluded between 2011 and 2015 for which data is available, the respondent's legal expenses were less than USD 1 million.[55] But in some cases, costs have vastly exceeded USD 5 million. In the *Yukos* arbitration disputes, for instance, the respondent state's costs were USD 27 million (and the claimant's costs roughly USD 80 million).[56] Additionally, in *Libananco v Turkey*, the respondent's costs were nearly USD 36 million (while the claimant's were roughly USD 24 million).[57]

Even if a state successfully defends the case brought against it, it may still have to pay those expenses.[58] While tribunals sometimes order investor/claimants that lose their ISDS claims to compensate respondent states for the states' legal expenses, this happens infrequently (in 38% of the cases that investor/claimants lose), and less frequently than the percentage of cases (53%) in which tribunals require losing states to compensate successful investor/claimants for their legal expenses.[59] Moreover, even when tribunals order unsuccessful investor/claimants to compensate the government for its legal expenses and costs, states may face challenges recovering those orders against the investor. If the investor refuses or fails to pay voluntarily,[60] the state will need to take enforcement action, requiring additional commitments of time and resources. The state may ultimately be unable to recover from the investor if the investor is insolvent or structures its holdings in order to make its assets judgment-proof.[61]

Liability

A second category of costs is actual liability. Based on publicly available information, the average amount claimed by investors as of the end of 2016 was $1.4 billion, and the average amount awarded was $545 million, plus interest.[62] Most awards are under $100 million, but there have been a number of large awards, including some awards for multiple billions of dollars.

Trends over time indicate that amounts awarded have been rising.[63] This may be due in part to the fact that '[t]ribunals are increasingly willing to accept income based approaches … which capture future profits or returns'.[64] Additionally, tribunals have been increasingly willing to award compound interest, a practice which can significantly increase the amount the state is ordered to pay.[65] In cases decided before 2000, tribunals awarded compound interest in roughly 40% of the cases. In cases decided between 2011 and 2015, that number had risen to 86%.[66]

Overall, potential liability under investment treaties can be significant for governments. Especially for emerging economies, and when the claim arises out of an extractive industry project involving valuable natural resources, liability can amount to a sizeable proportion of government budgets. These considerations are highly relevant for countries when considering the potential liability that they are willing and able to assume.

Reputational costs

In addition to the costs of litigation and liability, states may also face reputational costs as a result of ISDS claims. As noted above, one study found that the mere filing of an ISDS claim against a state is connected with reduced inward FDI flows, and that inward FDI flows drop even further when the state loses an ISDS case.[67] For governments seeking and competing for foreign capital, this may be especially disconcerting.

Reduced policy space

Another set of costs investment treaties and their ISDS mechanisms impose on states is the cost of reduced policy space.[68] Given their range of responsibilities, governments need policy space to ensure that they are able to enact, implement, revise, refine, and enforce their laws, policies and practices in order to achieve public interest objectives, and to do so in light of changing circumstances, evidence, needs and priorities. Policy space enables legislatures to adopt new laws and amend or terminate existing legislation; it enables executive officials to set policies, refine them over time, and exercise discretion as appropriate; and it enables administrative tribunals and judicial courts to perform the roles assigned to them under domestic law in interpreting, applying, and even crafting the law, ruling on the scope of public and private rights and obligations, and invalidating or imposing penalties on illegal or undesirable conduct. This policy space can be especially important for governments whose legal frameworks are still evolving and developing to reflect best international practice.

Such policy space is, of course, not unlimited. Even absent investment treaties and ISDS, it is constrained, for example, by domestic norms of due process and separation of powers, and international customary and treaty law on human rights. Thus, the objection with investment treaties is not that they limit government power, but that they do so in ways that go beyond those other constraints, and that they unduly discourage or require compensation for good faith action taken in the public interest to achieve economic, social, and environmental aims.

Some arbitral tribunals have interpreted investment treaty standards to offer investors expansive protections for their property rights and expectations that many countries at the national level have long been unwilling to provide.

One example arises out of the protection for "indirect expropriation." While the domestic laws of many countries require governments to compensate individuals/entities for "direct" expropriations (e.g., nationalizations of property in which the government actually appropriates the investor's property), they do not always specifically protect against or require compensation for "indirect expropriations" or "regulatory expropriations" (e.g., good faith regulatory measures adopted by the government that have the effect of reducing the value of an individual or entity's private property). Furthermore, determinations in domestic jurisdictions as to whether and under which circumstances such compensation is warranted are based on legal, political and sociological determinations that often ebb and flow over time. In the United States, for example, the doctrine of regulatory takings/indirect expropriation is infamously complex and controversial, and has generated significant academic literature and policy debate regarding whether and, if so, property owners should be compensated for executive, legislative, or judicial conduct that negatively impacts those property owners' rights or interests. The United States Supreme Court is frequently called upon to guide the evolution of this area of law, and in so doing must carefully consider nuanced legal principles that require balancing among competing interests and obligations.

Arbitral tribunals have generally interpreted investment treaties to require governments to pay compensation for direct and indirect expropriations (even if the treaty does not specifically refer to indirect expropriation), an interpretation that can give rise to significant potential liability for a wide range of actions taken by the government to resolve matters of public interest. Arbitral tribunals are not required to consider competing governmental obligations or interests that may have led to certain actions. Measures that can be challenged on the ground that they constitute an "indirect expropriation" include adoption of zoning regulations that limit a potential property developer's options; deregulation of industries that aims to increase competition but hurts the position of former monopolies; restrictions or bans on mining; adoption of requirements for companies to pay employees health and safety benefits; and regulation of pricing for a wide range of goods and services such as crops, energy, water, and pharmaceuticals.

Arbitrators are not bound by domestic law or policy on these issues, and have interpreted treaties to provide even stronger levels of protection against indirect takings than afforded under the laws of many domestic jurisdictions, even when they have domestic laws covering indirect takings.[69] In addition to these protections against indirect expropriation, investment treaties typically provide strong protections for economic rights and expectations through their "fair and equitable treatment" clauses, clauses that impose standards of conduct on states and offer remedies to investors that may go well beyond what is otherwise available domestically.[70] As Santiago Montt has noted:

> It is shocking to consider that a United States investor may lose a case against its government in the United States Supreme Court, a German investor may lose the same case in the Bundesverfassungsgericht (Constitutional Court), and a French investor may lose it in the Conseil d'État, but, nevertheless, that any of them may win it against a Sri Lanka or Bolivia on the basis of such open-ended [IIA] principles as no expropriation without compensation or [fair and equitable treatment].[71]

While there is considerable disagreement in domestic laws and international law as to whether and in what circumstances government-caused changes to property rights or expectations trigger a duty of compensation, the fact that government actions or omissions regularly cause changes in property rights protections is undeniable. Indeed, even among Western nations that are considered to have relatively clear and strong property rights rules, change has long been endemic. As David Kennedy has highlighted:

> In the history of the West, one has repeatedly started over, inventing new kinds of property, eliminating or qualifying old property rights and reallocating obligations and entitlements with respect to resources. The invention of the limited liability corporation, the abolition of slavery, the establishment – or later privatization – of state enterprises or quasi-public institutions to manage new modes of infrastructure, the establishment of zoning regulations, changing rules about securitization, the invention of commodity futures, or the changes in intellectual property rules which have accompanied technological changes over the last century are among the most common examples. Changes in modes of economic activity have as often destroyed entitlements and settled expectations about access to resources and the value of assets as they have given rise to new rights, new duties, new privileges and new obligations. New modes of property have continually been devised to empower new types of actors in new kinds of economic relationships, exploiting new forms of knowledge or new resources. Existing entitlements can and often have been reallocated, either slowly or quite precipitously as part of a conscious project of social and historical renewal or struggle.[72]

Contrary to these patterns, and irrespective of how domestic laws and institutions have decided to approach these issues, investment law as interpreted through ISDS decisions has tended to disfavor change and reallocations and emphasizes instead the importance of ensuring that investors and their investments are able to enjoy stability in legal rules (when such stability benefits them).[73] That the government was acting in good faith, for the public interest, and in compliance with domestic law is not generally a defense.[74]

Provisions in investment treaties imposing restrictions on "performance requirements" can further prevent governments from using policy tools designed to ensure the host country effectively leverages foreign investment for long-term and inclusive economic growth;[75] and provisions preventing discrimination can give rise to liability for development and implementation of crucial domestic policies when those policies have a disparate impact on foreign investors.[76] Investment treaties therefore place on governments an unprecedented set of constraints limiting their ability to regulate domestic economic activity.

In addition to limiting government action, investment treaties also have been interpreted to impose mandates regarding what affirmative conduct is expected of the state, and how it must allocate its often scarce resources. For instance, in *Ampal-American Israel Corp* *v Egypt*, the tribunal concluded that Egypt's failure to protect the investor's investment against terrorist attacks violated the investment treaty's "full protection and security" obligation.[77] That decision, involving a relatively common provision in investment treaties, effectively imposed on the host state a duty to provide the investor an expansive 'insurance policy for terrorism'.[78] According to Howse, the implications are troubling:

> Failed or fragile states can scarce afford to indemnify investors, often in the [hundreds] of millions of dollars for risks they can far from fully control. … In effect, the consequence of this decision is that investors would likely be put above all other victims of terrorism and related political violence in conflict areas. That is shocking from the perspective of international justice.[79]

However shocking, arbitral decisions are binding; thus, states that face terrorist attacks may also face significant liability for failing to take action to prevent those attacks. For many states, this is a risk that should be considered, particularly when one such claim has already been successful.

States have also been found liable for failing to take adequate action to halt protests that disrupt investment projects. In *Copper Mesa v. Ecuador*, for instance, the tribunal determined that the government violated the fair and equitable treatment standard and the full protection and security obligation for not doing enough to protect the claimant's proposed mining project from disruptions caused by local community members concerned about the mine's potential impacts. According to the three arbitrators deciding the ISDS case, "Plainly, the Government in Quito could hardly have declared war on its own people. Yet, in the Tribunal's view, it could not do nothing."[80]

Overall, the implications of investment treaties for a state's domestic policy space are broad: the treaties generally govern conduct by all levels (local, provincial, and federal) and branches (executive, legislative and judicial) of government. States can even be held liable for acts of state-owned enterprises (e.g., related to the state-owned enterprises' handling of disputes with foreign shareholders or joint venture partners) or based on their failure to adequately prevent, remedy, or otherwise address acts of private parties. While some treaties attempt to preclude or limit arbitral tribunal review of certain types of measures (e.g., taxation measures or measures taken in emergencies), investment treaties typically allow claims against government conduct in all policy spheres, from financial regulation to environmental protection.

Due to the breadth of actions and inactions vulnerable to claims, fully assessing costs in terms of possible challenges to government policy space is particularly difficult. Nevertheless, governments ought to understand the extent to which investment treaties, as they have been interpreted by arbitral tribunals, give covered investors/investments protections that go beyond domestic law (covering indirect or regulatory takings, guaranteeing legal and regulatory stability, protecting the expectations of investors including with respect to receiving permits and future profits, insuring investors against attacks of third parties including local communities, etc.).

Even in cases in which an action may have also been improper under domestic law, the remedies under international law may be more onerous. In many jurisdictions, for example, individuals and enterprises are able to challenge administrative conduct as being wrongful, but the remedy may be procedural or an award of declaratory relief, not compensation. Additionally, awards of compensation, if available under domestic law, may be limited to sunk costs, or may be capped. Under investment law, those same rules and restrictions on remedies do not apply, and governments may be liable for millions or billions of dollars, including for future lost profits. Countries should carefully assess the strength of their treaties' requirements and remedies as compared to domestic law and whether the treaties' stronger protections and greater remedies for investors are justified.[81]

Distorted power dynamics

Certain sectors and types of investments appear to give rise to a significant proportion of claims. These include investments in exploration for or exploitation of natural resources and investments in infrastructure and public services that are governed by investor-state contracts, permits or licenses.[82] There are a number of likely reasons for this:

» such investments are often of major public importance and may have substantial impacts on the environment, society or public services. These investments therefore warrant robust roles for government regulators and regulations, which in turn can give rise to increased opportunities for investor-state disagreements;[83]

» such investments are often long-term and so can be impacted by changing circumstances and knowledge causing the government and/or the investor to seek to modify the original terms of the investment or contents of the governing legal framework. When the modification is sought by the government, and would have a negative impact on the investment, that can also trigger ISDS claims;[84]

» investments in infrastructure and provision of public services often are made in connection with complex privatization schemes involving previously unknown private sector partners, new government institutions and governance regimes, and heightened uncertainty and public concern about such issues as the future of employment in state-owned entities and the price and quality of goods and services produced. The number and nature of unknowns associated with major privatizations increase the likelihood that things will not proceed as originally planned or hoped by at least some stakeholders, and the political and public sensitivities involved raise the stakes of failure or dashed expectations. As noted above, through investment treaties and ISDS, investors are given strong powers to protect their expectations and resist any public- or government-requested change to what are frequently nascent and sensitive privatization schemes when such change would disadvantage those investors; additionally, investment treaties and ISDS give investors powerful tools to push the government to modify the framework when such changes are sought by the investors;

- investments in natural resources, infrastructure, and public services are often governed by contracts or quasi-contractual instruments such as permits or licenses. Investment treaties give investors strong powers to enforce the beneficial terms of those deals as strictly written, while also enabling them to contest enforcement and seek renegotiation of unfavorable provisions; investors are also able to claim that they are entitled to transparent and good faith conduct from their government counterparty to the contract even if underlying contract law does not impose such obligations and therefore does not entitle the government to benefit from the same treatment from the private sector party;[85] and
- the amounts claimed in ISDS cases relating to these types of investments often reach into the hundreds of millions if not billions of dollars, making the cases, though expensive to pursue, worthwhile to bring. This also attracts the attention and support of third party funders, whose backing may result in claimant/investors pursuing claims they would otherwise have been too risk averse to pursue.[86]

The power given to the private party in these cases to opt out of the governing legal framework (e.g., the contract and the law of the host state, a third state, and/or international law) and out of the dispute resolution forum otherwise provided for in law or in the contract (e.g., domestic arbitration or dispute resolution in domestic courts) can enable the investor to effectively secure a deal it had not, in fact, originally obtained from the government, and hold governments to exacting standards of conduct in highly complex and high-stakes scenarios.[87] This grants investors disproportionate power vis-à-vis government partners and makes it especially difficult for governments to appreciate fully or limit liabilities they have assumed under investor-state contracts or quasi-contractual arrangements.[88] This outcome - in which investors are given greater powers in their relations with host country governments -- is often argued to be justified and important in light of investors' general vulnerability to host state actors. Indeed, one common narrative characterizing infrastructure investments points to the phenomenon of the "obsolescing bargain," in which an investor, once it has significant fixed assets in a country, is considered to be at the whim of host government power and discretion. Based on that narrative, it is contended that, in order to ensure a level playing field, investors should seek international legal protection by structuring their investments so as to take advantage of a favorable investment treaty. However, some evidence suggests that rather than exploiting evolving power dynamics, government parties to infrastructure contracts with private entities may more commonly be the victims of power shifts and investor-initiated efforts to change the terms of the deal after it has been agreed.[89]

Reduced role for domestic law-making

Since investment treaties typically permit investors to bring investor-state arbitration claims in addition to or instead of pursuing relief before domestic courts, arbitral tribunals, as opposed to domestic courts, often have key powers to determine important issues of domestic law that relate to the dispute, including issues of first impression on questions of domestic law or the meaning of contractual provisions.

In many jurisdictions, domestic courts play a fundamental role in determining issues such as the conditions that need to be satisfied in order for valid investor-state contracts to be formed, and whether certain provisions contained in investor-state contracts are enforceable (or, for example, whether they are void due to being *ultra vires* or inconsistent with public policy).[90] When investors take their claims directly to arbitration, however, it is the arbitrators, not the courts, that rule on those important issues of contract law and policy and may come to dramatically different conclusions than domestic courts regarding the meaning or legitimacy of a given contractual provision. The state thus loses its power to shape and interpret its law.

Similarly, to the extent that investors take their general grievances regarding host state conduct to ISDS tribunals rather than domestic courts, tribunals usurp the roles of those domestic courts (or administrative agencies) in interpreting and applying domestic law on issues of both substance and procedure.[91]

Uncertainty in the law

A final set of costs are those that arise from uncertainty in the law. Due to several factors including vague language used in investment treaties and the non-precedential nature of ISDS decisions, it is extremely difficult to understand with certainty whether or not a given claim has merit and, if so, what the damages awarded might be. Indeed, both investors and states have spent years litigating relatively simple issues of jurisdiction, requiring expenditures of time and legal fees. The uncertainty makes it extremely difficult and costly for governments to assess the likelihood that their conduct conflicts with treaty standards, and communicate relevant information about investment treaty standards to the diverse range of government actors whose conduct could potentially give rise to claims. The uncertainty and corresponding costs could also discourage states from adopting or maintaining contested measures.[92] As academics have explained:

> [I]nvestment treaty protections that provide decision-makers with greater certainty about how the protection would apply to government measures will reduce the chilling of permissible measures. Investment treaty protections that give arbitrators unstructured discretions or that turn on ex post judgments that decision-makers cannot easily predict when considering the adoption of measures prospectively are likely to be associated with greater uncertainty and greater chilling of measures that would have been permissible.[93]

Some governments may be more sensitive to regulatory chill than others. In particular, those with limited resources to fund potential liabilities, provide required defenses, and risk reputational costs, and those dependent on other countries for development assistance, economic relations or diplomatic support, may be less willing to ultimately maintain the measures that have been challenged and spend the years and millions of dollars typically required to counter ISDS claims.[94]

Oil palm plantation
in Goa, India.

CONCLUDING REMARKS ON COSTS & BENEFITS

As states look back over decades of treaty practice, the expected benefits have not clearly materialized, whereas the costs have been unexpectedly high. These costs are particularly high for countries with foreign investment in long-term, strategic and/or lucrative industries; those with developing legal systems or pre-existing government challenges requiring ongoing regulatory reforms; and those with complex diplomatic relationships with more powerful countries; among others. Absent evidence that:

1. treaty protections benefiting investors and investments are causing increased investment flows,
2. those increased flows due to the investment treaties (inward or outward) are beneficial to the home country, and
3. the benefits outweigh the treaties' costs,

it is hard for states to justify the continuation of their investment agreements or the conclusion of any new similar agreements.

Solar and wind renewable energy in Okinawa, Japan.

PART III

NEXT STEPS

Many countries around the world are taking stock of and reassessing policies toward their *existing* and *future* agreements. These steps enable governments to ensure that current and future investment treaties provide desired benefits without unexpected and high costs.

With respect to existing agreements, some governments have decided to terminate, amend, and/or clarify their previously concluded texts. These steps are not mutually exclusive. Some governments, for instance, have first agreed to amend their treaties to exclude the "survival clause", and then terminate the text.[95] States have also sought to use their interpretive powers under international law to clarify certain broad and vague provisions in their investment treaties,[96] while also providing notice to terminate the agreements.[97]

EXISTING TREATIES

For existing treaties, steps for states to consider include:

1. Taking stock of existing treaties, including identifying for each treaty
    a. the treaty counter-party,
    b. the treaty status (whether or not entered into force),
    c. termination/renewal date and whether renewal is automatic absent a notice to terminate,
    d. length of survival clause,
    e. amount and nature of investments covered,
    f. whether consent to ISDS is given and, if so, how broad that consent is, and
    g. content of substantive obligations.

For treaties covering significant amounts of investment, it is crucial to assess whether the treaty contains certain core provisions that give rise to heightened risks, including broad, vaguely worded FET obligations, protections against indirect expropriation, umbrella clauses, and unrestricted transfer obligations. Treaties concluded a decade or more ago in particular may have relatively strong and potentially costly versions of these provisions.

2. Developing a multi-stakeholder approach to gather input and evaluate the treaties, assess their costs and benefits to different constituencies, and formulate policy objectives. This includes assessing how the obligations under the treaties compare with those under domestic law,[98] the extent of potential liability generated by investment treaties due to the obligations' strength and remedies for breach, and whether/what aspects of the investment environment are important for investors' decisions; and
3. Assessing whether, based on an analysis of the costs and benefits of those agreements and its domestic policy objectives, a state should maintain the agreements, renegotiate them, seek to clarify them through interpretation of vague/broad provisions, withdraw consent to ISDS, and/or terminate (on or before the renewal/termination date).

FUTURE TREATIES

Additionally, governments are rethinking strategies regarding *future* agreements, including the design of fundamentally different models or moratoria on new texts. For future agreements, important steps for states to consider include:

1. Developing a multi-stakeholder approach to evaluate policy objectives and priorities regarding inward and outward investment, and to assess the relative effectiveness and costs and benefits to different constituencies of using investment treaties as a means of achieving those objectives; and
2. If entering into negotiations for new investment agreements is determined to be an appropriate means of meeting policy objectives,
    a. identifying criteria to assess whether and in what circumstances to engage in negotiations with another country;
    b. determining the provisions, protections, and obligations that are desirable to include, following consideration of their costs and benefits; and
    c. formulating a model to be used as the basis of those negotiations, as well as internal guidance regarding whether and under what circumstances deviations from different aspects of that model might be appropriate.

Transparent and multi-stakeholder processes are important: as the complexity and costs of investment treaties have become more apparent, officials have increasingly communicated with and sought input from a broader range of constituents inside and outside the government. These consultations can help states formulate investment treaty policies that incorporate lessons learned and meet modern objectives. They can enable states to:

» identify risks of treaties (e.g., helping officials responsible for environmental protection, health policy, taxation, financial services regulation, energy regulation, and monetary policy understand whether and in what contexts their actions may give rise to liability under certain interpretations of the treaties),[99]

» hear concerns of a range of investors and evaluate possible policy interventions that can be adopted through treaty or unilateral actions by home or host states,[100]

» understand priorities and concerns of parliament and/or other governing bodies, which will likely need to be considered and addressed in order to secure approval of treaties and amendments and minimize the political costs of such agreements,[101] and

» appreciate the perspectives and concerns of the broader public regarding the implications of investment treaties for such issues as property rights and democratic governance.[102]

These processes are not necessarily fast.[103] Yet in light of the long lifespans and substantial implications of the treaties, and the importance of having an effective investment attraction and governance framework, it is crucial to take the necessary time to fully deliberate and engage diverse perspectives regarding future courses of action.

ANNEX I. SELECT BIBLIOGRAPHY OF STUDIES ON INVESTMENT TREATIES AND INVESTMENT FLOWS

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Agricultural landscape.

ENDNOTES

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2. This data is available from UNCTAD at http://investmentpolicyhub.unctad.org/ISDS/FilterByYear.

3. See, e.g., Lise Johnson, et al., "International Investment Agreements, 2014: A Review of Trends and New Approaches" in Andrea Bjorklund (ed) *Yearbook on International Investment Law and Policy* (Oxford University Press 2016) 15 (discussing, among other agreements, Brazil's approach to investment treaties).

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5. Annex I contains a list of articles looking at the connections between investment treaties and investment flows. Some studies find evidence of a correlation between investment flows and investment treaties, while others do not. It is important to note, however, that not all studies are of the same quality. Lauge N Poulsen discusses a number of them and their results in Lauge N Poulsen, 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence' in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2009-2010* (Oxford University Press, 2010) 539-574 (hereafter, Poulsen, 'The Importance of BITs'). Most studies on the connection between investment treaties and investment flows have looked specifically at whether the conclusion of such treaties had an impact on flows of foreign direct investment (FDI) (as opposed to other types of international investment). As has been remarked by several scholars, these types of studies are problematic for a number of reasons, including that data on FDI flows is often inaccurate or inadequately disaggregated, and that, even if one were to find correlation between investment treaties and FDI flows, it would be extremely difficult to establish that the treaties actually caused those investments. See Poulsen, 'The Importance of BITs'"; Emma Aisbett, 'Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus causation' in Karl P. Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009) 395; Jason W Yackee, 'Bilateral Investment Treaties, Credible Commitment, and The Rule of (International) Law: Do BITs promote foreign direct investment?' (2008) 42 Law and Society Review 805. The methodological limitations of existing studies are also explored in Joachim Pohl, 'Societal Benefits and Costs of International Investment Agreements: A critical review of aspects and available empirical evidence,' (*OECD Working Papers on International Investment, No. 2018/01*, 2018) < https://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en>. That study, published after this paper was completed, finds as this paper does that the benefits of international investment agreements are inconclusive, while evidence of the costs are mounting.

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7. Lisa E Sachs and Karl P Sauvant, 'BITs, DTTs, and FDI flows: An Overview' in Sauvant and Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009) ('It is clear, then, that no individual factor, such as an investment treaty, could move FDI flows by itself, and it is equally clear that it is very difficult to isolate the importance of any particular factor. To put it differently: if BITs and DTTs affect FDI flows, they do so in the context of a host of other determinants, with a number of them considerably more important than individual aspects of the regulatory framework.').

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24. ibid, 224, 239-43.

25. The literature on impacts is too voluminous to cite here. Nevertheless, some research highlighting challenges and complexities in terms of effects on the host country's domestic industry include the following: Nigel Driffield and Dylan Hughes, 'Foreign and Domestic Investment: Regional Development or Crowding Out?' (2003) 37 Regional Studies 277; George Chen, Yao Yao and Julien Malizard, 'Does FDI Crowd In or Crowd Out Private Domestic Investment in China? The Effect of Entry Mode' (2017) 61 Economic Modelling 409. Some of the negative impacts of FDI may be felt in the short term, with positive effects materializing over the longer term: Jennifer W Spencer, 'The Impact of Multinational Enterprise Strategy on Indigenous Enterprises: Horizontal Spillovers and Crowding Out in Developing Countries' (2008) 33 Academy of Management Review 341.

26. Florence Jaumotte, Subir Lall and Chris Papageorgiou, 'Rising Income Inequality: Technology or Trade and Financial Globalization?' (2008) IMF Working Papers 08/185 < https://www.imf.org/external/pubs/ft/wp/2008/wp08185.pdf> accessed 27 February 2018.

27. See e.g., Pablo M. Pinto and Boliang Zhu, 'Fortune or Evil? The Effect of Inward Foreign Direct Investment on Corruption' (2016) 60 International Studies Quarterly 693 (arguing that whether FDI impacts corruption depends on the institutions and level of development in the host country, with risks that FDI will worsen corruption being greater for less developed countries than for developed countries).

28. See e.g., Sung Jin Park and others, 'Is Foreign Direct Investment Effective from the Perspective of Tax Avoidance? An Analysis of Tax Avoidance Through the International Transfer Pricing Behaviors of Korean Corporations' (2016) 32 The Journal of Applied Business Research 917.

29. Andreea Michalache-O'Keef and Quan Li, 'Modernization vs. Dependency Revisited: Effects of FDI on Food Security in Less Developed Countries' (2011) 55 International Studies Quarterly 71; Mehdi Ben Slimane, Marilyne Huchet-Bourdon and Habib Zitouna, 'The role of sectoral FDI in promoting agricultural production and improving food security' (2015) 145 International Economics 50.

30. See e.g., Jiajia Zheng and Pengfei Sheng, 'The Impact of FDI on the Environment: Market Perspectives and Evidence from China' (2017) 5 Economies 8; Tomasz Kozluk and Christina Timiliotis, 'Do Environmental Policies Affect Global Value Chains?' (2016) OECD Economic Department Working Papers 1282 <http://www.oecd-ilibrary.org/docserver/download/5jm2hh7nf3wd-en.pdf?expires=1519755869&id=id&accname=guest&checksum=BECE4907CCA13FB61C0BB444A6BF55FB> accessed 27 February 2018; Steven Poelhekke and Frederick van der Ploeg, 'Green Havens and Pollution Havens' (2015) 38 The World Economy 1159; Natalia Zugravu-Soilita, 'How Does FDI Affect Pollution? Toward a Better Understanding of the Direct and Conditional Effects' (2017) 66 Environmental Resource Economics 293.

31. Kozluk and Timiliotis (n 30).

32. See e.g., Matthew Cole and Per Fredricksson, 'Institutionalized Pollution Havens' (2008) 68 Ecological Economics 1239; Matthew Cole, Robert Elliott and Per Fredriksson, 'Endogenous Pollution Havens: Does FDI Influence Environmental Regulations?' (2006) 108 Scandinavian Journal of Economics 157; Kozluk and Timiliotis (n 30); Yuquing Xing and Charles D Kolstad, 'Do Lax Environmental Regulations Attract Foreign Investment?' (2002) 21 Environmental and Resource Economics 1.

33. On this point, see for example, Office of the UN High Commissioner for Human Rights, *Guide to Implementing the UN Guiding Principles on Business and Human Rights in Investment Policymaking* (LSE Investment and Human Rights Project, Centre for the Study of Human Rights at London School of Economics, 2016) 18; Office of the United Nations High Commissioner for Human Rights, 'Progress Report of the United Nations High Commissioner for Human Rights on Legal Options and Practical Measures To Improve Access to Remedy for Victims of Business-Related Human Rights Abuses', (Annual report of the United Nations High Commissioner for Human Rights A/HRC/2/39, 7 May 2015) < http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Pages/ListReports.aspx> accessed 27 February 2018.

34. Exceptions to this principle are few. One includes arbitral decisions and a few recently negotiated texts such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA) that preclude investors from turning to ISDS if they have *procured* their investment through fraud or corruption. (See e.g., CETA, art. 8.18(3)). These decisions and treaties, however, generally do permit investors to bring claims if they have engaged in fraud or corruption during the life of the investment. Another exception to that general rule that investors can invoke ISDS irrespective of their conduct or impacts is the language in the Trans-Pacific Partnership (TPP) that bars investors from challenging tobacco control measures. (TPP, art. 29.5).

35. See e.g., *Philip Morris Brand Sàrl (Switzerland) v Uruguay*, ICSID Case No ARB/10/7, Decision on Jurisdiction (2 July 2013), paras 193-210; Quiborax SA v Bolivia, ICSID Case No ARB/06/2, Decision on Jurisdiction (27 September 2012), paras 220, 235-237; Victor Pey Casado and President Allende Foundation v Chile, ICSID Case No ARB/98/2, Award (8 May 2008), para 232.

36. *Malaysian Historical Salvors v Malaysia*, ICSID Case No ARB/05/10, Dissenting Opinion to Decision on Annulment (16 April 2009), para 22.

37. Additionally, it is unclear whether a significant share of outward investors from developing countries will be able to benefit from investment treaty protection. Studies repeatedly find that most claimants in investor-state arbitration are from developed countries and that, while the system of investor-state arbitration is technically open to all investors, the costs are high – averaging nearly USD 6 million per side – and could be prohibitive, especially for small firms without high-value claims that can make incurring those expenses worthwhile, or that can attract a third-party funder to finance the arbitration. See, among others, Jeffrey P Commission, 'How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years' (*Kluwer Arbitration Blog*, 29 February 2016) http://kluwerarbitrationblog.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/ accessed 27 February 2018.

38. See e.g., Mona Ali, 'Dark matter, black holes and old-fashioned exploitation: transnational corporations and the US economy' (2016) 40(4) Cambridge Journal of Economics, 997; OECD, *Addressing Base Erosion and Profit Shifting* (OECD 2013), 17-18; Alexander Bulatov, 'Offshore Orientation of Russian Federation FDI' (2017) 24 Transnational Corporations 71.

39. Lisa Sachs and Lise Johnson, 'Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities', in José Antonio Ocampo (ed.), *International Rules and Inequality: Implications for Global Economic Governance* (Columbia University Press, forthcoming, 2018).

40. 'Insurance Eligibility Checklist' (OPIC) <https://www.opic.gov/doing-business-us/applicant-screener/insurance-eligibility-checklist> accessed 27 February 2018.

41. See e.g., discussion in Jason Webb Yackee, 'Politicized Dispute Settlement in the Pre-Investment Treaty Era: A Micro-Historical Approach' (2017) University of Wisconsin Law School, Legal Studies Research Paper Series 1412 < http://ssrn.com/abstract=2968988 > accessed 1 June 2017; Martins Paparinskis, 'The Limits of Depoliticisation in Contemporary Investor-State Arbitration' (2010) Select Proceedings of the European Society of International Law < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1716833> accessed 15 February 2017. Paparinskis explains that one can view the goal of depoliticization from four perspectives: from the perspective of the home state, the host state, the investor, and the system of dispute resolution. This note focuses on depoliticization as viewed from the perspective of the home and host states.

42. Paparinskis (n 41) 5-9.

43. ibid 9-12.

44. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, August 25, 1965, 17 UST 1270, TIAS. No 6090, 575 UNTS 159 (entered in force October 14, 1966).

45. Ibrahim FI Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1(1) ICSID Review—Foreign Investment Law Journal 1.

46. See e.g. Zoe Williams, 'Investigation: As Colombia Pushes for Cancer Drug Price-Cut and Considers Compulsory Licensing, Novartis Responds with Quiet Filing of an Investment Treaty Notice' (IAReporter 30 November 2016) < https://www.iareporter.com/articles/investigation-as-colombia-pushes-for-cancer-drug-price-cut-and-considers-compulsory-licensing-novartis-responds-with-quiet-filing-of-an-investment-treaty-notice/> accessed 27 February 2018 (discussing a letter sent by the head of the Bilateral Economic Relations Division of the Swiss State Secretariat for Economic Affairs to the Colombian ministry of health linking the issuance of a compulsory license to expropriation and mentioning relevant trade and investment agreements, and also discussing alleged pressure from U.S. Congressional staff and other officials regarding a compulsory license move and linking such move to funding for the Paz Colombia process.).

47. 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 U.N.T.S. 159, 4 I.L.M. 532 (1965) art 27 (ICSID Convention).

48. In some cases, a multinational enterprise based in Country A, which has routed its investment in Country C through Country B, has had the home state of Country A place diplomatic pressure on the government in Country C, while also bringing an ISDS claim against Country C under the Country B-Country C investment treaty. See, e.g., *ADC v Hungary*, ICSID Case No ARB/03/16, Award (2 October 2006).

49. In *SGS v Pakistan*, for example, Switzerland submitted a letter to the tribunal regarding its interpretation of the umbrella clause between Switzerland and Pakistan. It did this after the tribunal had issued its award rejecting jurisdiction: Note on Interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan in the light of the Decision of the Tribunal on Objections to Jurisdiction of ICSID in Case No. ARB/01/13 SGS *Societe Generale de Surveillance v Pakistan*, 19 Mealey's International Arbitration Reporter E3 (February 2004). In other cases, the home state has made submissions while the dispute is pending. This happens frequently, for example, in disputes that arise under the North American Free Trade Agreement though, when the non-disputing state parties to that treaty make submissions, those submissions often weigh in favor of a narrow interpretation of

the treaty, as opposed to one that necessarily benefits their respective investors. See also discussion in Gabrielle Kaufmann-Kohler, 'Non-Disputing State Submissions in Investment Arbitration' in Laurence Boisson de Chazournes (ed) *Diplomatic and Judicial Means of Dispute Settlement* (Martinus Nijhoff 2013) 316-319.

50. While that action may be a "legal" action pursued under the treaty's dispute settlement mechanisms, the decision regarding whether to pursue that action is arguably "political", as are issues of what arguments the state will make or not make. Additionally, that "legal" claim, once brought, may also be settled through a political or diplomatic process.

51. Srividya Jandhyala, Geoffrey Gertz and Lauge N Skovgaard Poulsen, 'Legalization and Diplomacy: American power and the investment regime' (preliminary draft, 6 April 2016) <https://www.princeton.edu/politics/about/file-repository/public/Legalization-and-diplomacy_Poulsen.pdf> accessed 1 March 2017.

52. ibid 28-29.

53. Jason Yackee, 'Politicized Dispute Settlement in the Pre-Investment Treaty Era: A Micro-Historical Approach' (2017) University of Wisconsin Law School Legal Studies Research Paper Series 1412, 3.

54. See e.g., Commission (n 37); Matthew Hodgson, 'Costs in Investment Treaty Arbitration: The Case for Reform' in Jean E. Kalicki and Anna Joubin-Bret (eds) *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 2014) 748, 756.

55. Commission (n 37).

56. The *Yukos* cases are: *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, UNCITRAL, PCA Case No AA 226, Final Award (18 July 2014); *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 227, Final Award (18 July 2014); *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, UNCITRAL, PCA Case No AA 228, Final Award (18 July 2014). This sum does not include any post-award costs incurred by Russia in challenging the awards or resisting enforcement.

57. The tribunal rejected the investor/claimant's claims and ordered it to cover some (USD 15 million) of Turkey's defense costs: *Libananco Holdings Co Limited v Turkey*, ICSID Case No ARB/06/8, Award (2 September 2011), paras 559-569. The claimant subsequently sought to annul the award and was again unsuccessful. Turkey incurred additional costs in these annulment proceedings, but the annulment committee decided it should bear those costs, rejecting Turkey's request that the claimant/investor reimburse the government for having to defend itself again. The publicly available portions of the decision on annulment do not indicate how much either party spent in connection with the annulment proceedings: *Libananco Holdings Co Limited v Turkey*, ICSID Case No ARB/06/8, Excerpts of Decision on Annulment made pursuant to Rules 48 (4) and 53 of the ICSID Arbitration Rules of 2006 (22 May 2013).

58. See e.g., *Renco Group, Inc v Peru*, ICSID Case No UNCT/13/1, Final Award (9 November 2016). In this case, which arose when Peru imposed sanctions on a company for allegedly failing to comply with environmental standards, the tribunal noted that, under the applicable arbitration rules, the principle was that the "costs follow the event" – that is, the losing party should pay the prevailing party's litigation expenses. Although the tribunal had dismissed the claimant's claims, the arbitrators decided to depart from that general rule that the loser should pay the winner's costs, and required Peru to bear its own costs (roughly USD 8.4 million) as well as 50% of the roughly USD 850,000 in costs, fees and expenses for the arbitration and arbitrators. Thus, Peru faced a USD 9 million dollar bill for an action taken to address environmental and health concerns.

59. Hodgson (n 54) 756.

60. This is not hypothetical: One study of cases in which investor/claimants were ordered to pay all or some of the respondent's legal costs found that the investor only paid the awards in full in 49% of those cases found that investors had only paid cost awards in full in 49% of cases. The investors paid a portion of the cost award in 14% of the cases studied, but had refused or failed to pay cost awards in 37%. See Iván Zarak A, 'Effective Protection for Respondent States Against Judgment-Proof Claimants' (Memorandum, 12 September 2016), 2-3 (citing relevant studies) < http://res.cloudinary.com/lbresearch/image/upload/v1477064514/rop_memorandum_to_icsid_administrative_council_re_effective_protection_english_version_2_219116_1641.pdf> accessed 27 February 2018.

61. ibid 4-6.

62. UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2016 [2017] 1 IIA Issues Note < http://unctad.org/en/PublicationsLibrary/diaepcb2017d1_en.pdf> accessed 27 February 2018.

63. PricewaterhouseCoopers, '2015 – International Arbitration Damages Research' (2015) Arbitral Awards In Focus 3 <https://www.pwc.com/sg/en/publications/assets/international-arbitration-damages-research-2015.pdf> accessed 27 February 2018. ibid 9

64. ibid.

65. ibid.

66. ibid.

67. Allee and Peinhardt (n 18).

68. While, in general, ISDS tribunals award monetary damages against states, and do not compel them to take or not take regulatory measures, those awards of monetary damages can make pursuing certain regulatory policies or practices cost prohibitive.

69. See e.g., *Ampal-American Israel Corp v Egypt*, ICSID Case No ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017). In *Ampal-American*, the tribunal adopted a 'conceptual severance' approach that has been rejected by the US Supreme Court its regulatory takings/indirect expropriation cases. By 'conceptually severing' property rights, courts and tribunals make it easier for claimants/plaintiffs to establish that a regulation amounts to an expropriation.

70. See e.g., Jan Kleinheisterkamp, 'Who is Afraid of Investor-State Arbitration? Or Comparative Law' (2014), LSE Policy Briefing Paper No. 4 <https://dx.doi.org/10.2139/ssrn.2483775> accessed 31 March 2018; Lise Johnson and Alexander Volkov, 'Investor-State Contracts, Host-State "Commitments" and the Myth of Stability in International Law' (2013) 24 American Review of International Arbitration 361.

71. Santiago Montt, *State Liability in Investment Treaty Arbitration* (Hart 2009) 22.

72. David Kennedy, 'Some Caution about Property Rights as a Recipe for Economic Development' (2011) 1 Accounting, Economics, and Law 1, 11.

73. The cases on this issue are numerous. For one relatively recent award, see, e.g., *Murphy Exploration and Production Co v Ecuador*, PCA Case No 2012-16, Partial Final Award (6 May 2016), para. 206.

74. See e.g., *Murphy v Ecuador* (n 73) para 206 (noting that the issue of whether or not there has been a breach of the fair and equitable treatment (FET) obligation does not depend on whether the government was acting in good faith); *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan*, ICSID Case No ARB/03/29, Award (27 August 2009), para 181.

75. Lise Johnson, 'Space for Local Content Strategies: A Crucial Time to Revisit an Old Debate' (GiZ 2016)].

76. ibid.

77. *Ampal-American Israel Corp* (n 69).

78. Rob Howse, 'ICSID Arbitrators Turn Investment Treaty into Insurance Policy Against Terrorism' (*International Economic Law and Policy Blog*, 7 March 2017) <http://worldtradelaw.typepad.com/ielpblog/2017/03/icsid-arbitrators-turn-investment-treaty-into-insurance-policy-against-terrorism.html> accessed 27 February 2018.

79. ibid.

80. *Copper Mesa Mining Corporation v Ecuador*, PCA Case No. 2012-2, Award (15 March 2016), para. 6.83. See also Columbia Center on Sustainable Investment, 'Input to the UN Working Group on Business and Human Rights Regarding Guidance on Human Rights Defenders and the Role of Business' (15 March 2018) <http://ccsi.columbia.edu/files/2016/05/Input-regarding-guidance-on-human-rights-defenders-and-the-role-of-business-REV.pdf> accessed 31 March 2018.

81. Providing foreign investors special protections, access to arbitration, and potential recourse to monetary damages may distort conditions of competition relevant for foreign and domestic investors, favoring the former but not the latter. This is arguably inconsistent the investment policies of many governments, which frequently aim to ensure equal treatment is provided to foreign and domestic investors alike.

82. For a discussion of ISDS cases related to the extractive industries, see, e.g., Lise Johnson and Jesse Coleman, 'International Investment Law and the Extractive Industries' (2016) CCSI Briefing Note < http://ccsi.columbia.edu/files/2016/01/2016-01-12_Investment-Law-and-Extractives_Briefing-Note_1.pdf> accessed 27 February 2018; for a discussion of ISDS cases related to infrastructure investments, see e.g., Lise Johnson, 'The Impact of Investment Treaties on Governance of Private Investment in Infrastructure' (2014) EUI Working Papers, RSCAS 2014/32. See also UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2016' (n 62).

83. *PSEG v Turkey*, ICSID Case No ARB/02/5, Award (19 January 2007); *Bilcon of Delaware v Canada*, Permanent Court of Arbitration (PCA) Case No 2009-04, Award on Jurisdiction and Liability (17 March 2015); *Windstream Energy LLC v Canada*, PCA, Award (27 September 2016).

84. A number of cases raising this issue arose from Ecuador's efforts to impose "windfall profits taxes" on oil companies during the time of soaring oil prices. Even though the underlying contracts did not contain stabilization provisions, a number of tribunals concluded that changes in the fiscal framework above a certain point violated the fair and equitable treatment obligation. See e.g., *Murphy Exploration & Production Company International v Ecuador*, Case No AA434 (2012-16), PCA, Final Award (10 February 2017) and Partial Final Award (6 May 2016); *Occidental Petroleum Corp v Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012); *Perenco Ecuador Ltd v Ecuador*, ICSID Case No ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability (12 September 2014). Other relevant cases arose in the context of Argentina's financial crisis. See discussion of cases in Lise Johnson and Alexander Volkov, 'Investor-State Contracts, Host-State "Commitments" and the Myth of Stability in International Law' (2013) 24 American Review of International Arbitration 361.

85. See e.g., *Occidental Petroleum Corp* (n 84) (holding that government's termination of contract in accordance with contractual provisions violated the investment treaty's requirement of proportionality).

86. *Report of the ICCA-Queen Mary Task Force on Third-Party Funding* (International Council for Commercial Arbitration, forthcoming) ch 8.

87. See, e.g., *Occidental Petroleum Corp* (n 84) (allowing the investor/claimant to avoid the consequences of a contractual provision enabling the government to terminate the contract, and to benefit from an implied stabilization clause which effectively capped the government's windfall profit tax); *Teco Guatemala Holdings v Guatemala*, ICSID Case No ARB/10/23, Award (19 December 2013) and Decision on Annulment (5 April 2016) (in the award, the tribunal found a procedural violation in the method in which the tariffs were calculated but then awarded the claimant the value of its requested tariffs as if its rights under the concession were to receive those rates. The decision was upheld on annulment).

88. Governments often sign investor-state contracts with companies, which if covered by investment treaties, can bring ISDS claims; importantly, investors in those companies can also potentially bring their own investor-state claims, resulting in multiple claims arising out of the same concession and the same government conduct. See e.g., *Urbaser SA v Argentina*, ICSID Case No ARB/07/26, Award (8 December 2016); *Impregilo v Argentina*, ICSID Case No ARB/07/17, Award (21 June 2011). Both cases arose out of the same water services concession in Argentina and the government's treatment of that concession. The concession contract had been signed between Aguas del Gran Buenos Aires (AGBA) and the Province of Buenos Aires. Urbaser and Impregilo were both shareholders in AGBA.

89. See discussions in Brooke Guven and Lise Johnson, 'PPPs and ISDS: A Risky Combination' (forthcoming) UNCTAD Investment Policy Blog; Lise Johnson, 'The Impact of Investment Treaties on Governance of Private Investment in Infrastructure' (2014) Robert Schuman Centre for Advanced Research Studies, Research Paper No. RSCAS 2014/32.

90. Johnson and Volkov (n 84) (discussing how US courts would, for example, refuse to enforce promises of future regulatory treatment or outcomes if those promises were not substantively and procedurally valid under domestic law).

91. See e.g., *In re Attorney General of Canada v Clayton*, Notice of Application, Court File No: T-1000-15 (16 June 2015). In this filing, the government of Canada argued that the tribunal's decision against it in Bilcon v Canada (n 83) 'usurp[ed] the judicial review function of Canadian courts'.

92. See e.g., *Philip Morris Asia Limited v Australia*, PCA Case No. 2012-12, Award on admissibility and jurisdiction (17 December 2015). See also Ashurst, 'Developments in Investor-State Arbitration: Thinking Outside the Box' (*Arbflash*, 1 May 2016) < https://www.ashurst.com/en/news-and-insights/legal-updates/developments-in-investor-state-arbitration-thinking-outside-the-box-arbflash-may-2016/> accessed 27 February 2018 ('[I]t took four and a half years to obtain a decision on jurisdiction alone. While many of the materials are not public, a review of the Procedural Orders shows that a huge amount of time was spent on resolving a preliminary issue. That time and cost may itself be a disincentive for States (particularly smaller States) to adopt regulatory measures which could trigger claims: it is perhaps unlikely to prevent States adopting measures of political/national significance but more modest/technical reforms may be affected.').

93. Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2014) 127 (citing Kyla Tienharra, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 606, 615).

94. This issue has also been raised by Bonnitcha (n 92) 118-127.

95. See e.g., Agnieszka Zarowna, 'Termination of BITs and Sunset Clauses – What Can Investors in Poland Expect?' (Kluwer Arbitration Blog, 28 February 2017)<http://kluwerarbitrationblog.com/2017/02/28/booked-22-february-polish-bits/> accessed 20 August 2017 (noting that the Czech Republic, Indonesia, and Peru have terminated at least some of their treaties along with the treaties' survival clauses).

96. This power is recognized under the Vienna Convention on the Law of Treaties, art 31(3). It is also provided for in IIAs that expressly give state parties to the treaty the right to make submissions in disputes (see e.g., NAFTA art 1128) and to issue binding interpretations (see e.g., NAFTA arts 1131, 1132), and in some arbitral rules, most notably the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration: Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 3311 (VCLT); North American Free Trade Agreement, Can-Mex-US, 8, 11, 14 & 17 December 1992, 32 ILM 289 & 605 (NAFTA); UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (2014) art 5. For discussions of these issues, see e.g., Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 American Journal of International Law 179; Kathryn Gordon and Joachim Pohl, 'Investment Treaties Over Time – Treaty Practice and Interpretation in a Changing World' (2015) OECD Working Papers on International Investment 2015/02 <http://www.oecd.org/investment/investment-policy/WP-2015-02.pdf> accessed 20 August 2017; Lise Johnson, 'Ripe for Refinement: The State's Role in Interpretation of FET, MFN, and Shareholder Rights' (2015) GEG Working Paper 2015/101 <http://ccsi.columbia.edu/files/2015/05/GEG-WP_101-Ripe-for-Refinement-The-States-Role-in-Interpretation-of-FET-MFN-and-Shareholder-Rights-Lise-Johnson_0.pdf> accessed 20 August 2017.

97. India has taken these actions, seeking both to clarify treaties through interpretations and terminate existing treaties: Government of India, Ministry of Finance, 'Issuing Joint Interpretative Statements for Indian Bilateral Investment Treaties' (Office Memorandum, 8 February 2016), <http://indiainbusiness.nic.in/newdesign/upload/Consolidated_Interpretive-Statement.pdf> accessed 27 February 2018. For commentary, see e.g., Sarthak Malhotra, 'India's Joint Interpretive Statement for BITs: An Attempt to Slay the Ghosts of the Past' (Investment Treaty News 12 December 2016), https://www.iisd.org/itn/2016/12/12/indias-joint-interpretive-statement-for-bits-an-attempt-to-slay-the-ghosts-of-the-past-sarthak-malhotra/ accessed 27 February 2018.

98. See e.g., Johnson and Volkov (n 84).

99. Anecdotal evidence indicates that it is not common for governments to involve officials from "non-economic" agencies or ministries in developing investment treaty policy or shaping negotiations. There are, however, some examples of countries such as the United States who do provide for such input.

100. When formulating its investment treaty policy, Brazil consulted with its investors, and ultimately adopted a model that does not include ISDS, protections against expropriation, or requirements of FET, but does include other features such as an ombudsman to identify and resolve barriers faced by foreign investors.

101. Yoram Z Haftel and Alexander Thompson, 'Delayed ratification: the domestic fate of bilateral investment treaties' (2013) 67 International Organization 355.

102. See Lise Johnson, Lisa Sachs, and Jeffrey Sachs, 'Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law' (*CCSI Policy Paper* May 2015) <http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf> accessed 27 February 2018.

103. The United States, for instance, recently took three years to review its Model BIT. Initiative undertaken by South Africa, Brazil, Ecuador, India, and the EU similarly involve multi-year efforts and have used various strategies for engaging different stakeholders.

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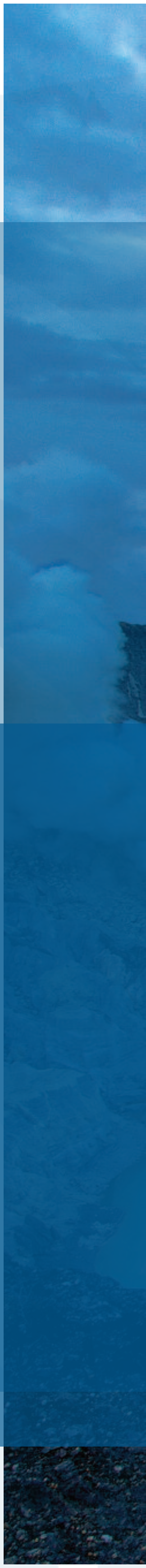

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