



# Rethinking Investment Treaties

A roadmap

EXECUTIVE  
SUMMARY



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## Executive Summary

Investment treaties' roles, objectives, and functions are a topic of ongoing policy discussions. Understandably, these discussions tend to take the problems with existing investment treaties as their starting point. This document aims to contribute to the dialogue by asking a different—and more foundational—question:

**If we were building the investment treaty regime from scratch today, what policy problems should the regime seek to solve, and how should it contribute to solving them?**

We aim to assist policy-makers in designing practical solutions by reversing the common inquiry that starts from the issues with the existing regime. Instead, this document first identifies the most pressing policy problems of international investment governance and then considers whether addressing each of these problems through a treaty can help solve the problem in question.

Designed as a roadmap, the first section of the paper explains our methodology and briefly introduces our categorization of the main investment governance policy problems. The next three parts represent the core of the paper and contain discussions on specific policy problems identified within each of the three following categories:

- issues related to the encouragement and support of sustainable investment
- issues related to the impacts of investment projects
- cross-cutting issues of investment governance, institutions, and international cooperation.

### Policy Problems Related to Encouragement, Incentivization, and Promotion of Sustainable Investment

The first category groups policy problems related to the central challenge of encouraging and supporting sustainable investment. For developing countries specifically, sustainable investment is needed to help poverty alleviation, creation of decent work, and industrialization. What is more, this group of policy problems is particularly relevant in the current context of climate action, in which the need for investment and divestment for climate mitigation, adaptation, and just transition toward a green economy is significant. Could investment treaties be useful instruments to achieve these twin policy objectives? Our analysis of this category reveals the following points.

Sustainable investment may be encouraged and supported by various tools. In investment policy-making, these tools have been typically discussed under four broad headings.

- **investment liberalization and market access:** There are clear policy rationales for removing restrictions that prevent foreign investors from making sustainable investments—for example, domestic laws that prohibit foreign shareholding in firms



that produce green technologies. However, it is much less clear that treaties have a role to play. States can remove restrictions on sustainable foreign investment themselves, without any need for a treaty.

- **investment promotion and incentivization:** Treaties may not be ideal vehicles for directly incentivizing foreign investment through a grant of benefits to investors. They may, however, be useful for tackling the issue indirectly. This can be done by creating platforms for international cooperation on collective action problems related to sustainable investment incentivization (and unsustainable investment disincentivization), for instance, in the context of subsidies or by addressing the issue of high borrowing costs in developing countries.
- **investment facilitation:** The need for regulation of sustainable investment facilitation at the treaty level is likely limited to a narrow set of measures. These relate to commitments to technical assistance, cooperation, and investors' home country participation. These areas represent policy issues that individual countries are unable to solve on their own. Future investment facilitation treaty frameworks should also strive to ensure that they maximize the achievement of SDGs and that the facilitated investment (and reinvestment) does not undermine them. For developing countries, in particular, the implementation costs of any international facilitation frameworks must be carefully considered.
- **investment protection:** Given the known inefficacy of international investment protections in achieving their stated goals and the known additional problems and costs associated with the investment protection model, the policy case for the continuing relevance of the treaty protection model is doubtful. If states decide, nevertheless, to continue granting such protection, they should do so only with respect to some foreign investments, i.e., only sustainable investments, and they should limit the protection only to minimal constraints on opportunistic conduct by the host state.

If future investment treaties deal with any of the above areas of sustainable investment encouragement, they will have to address a distinctively legal question:

### How should a treaty determine which investment is sustainable and which is not?

Such a determination cannot be made in the abstract, but only after the previous question about the tools the treaty uses to encourage investment is answered. In other words, treaty determination of what constitutes sustainable investment can only be made when the treaty parties know which purpose this determination serves at the treaty level. For this reason, we do not propose a particular way of defining sustainable investments. Instead, we highlight different options and tools that may be available.

Overall, we see encouraging sustainable investment (while discouraging unsustainable investment) as a central policy challenge for states but also an area where treaties have only a limited role to play. National and regional legal frameworks are better suited.



## Policy Problems Related to Impacts of Foreign Investment Projects

The second category deals with the policy problems that arise in implementing and operating investment projects in the host state. Here, the identified policy problems deal principally with regulating foreign investment projects. The issue is ensuring that investment projects have the highest possible impact on achieving sustainable development and do not harm the realization of any recognized values and rights. Our analysis of this category highlights the following points.

### Averting Negative Social and Environmental Impact of Investment Projects

Various instruments regulate human rights, public health, labour, safety, and environmental impacts of foreign investment. These instruments must be a starting point in the discussions about investor treaty obligations.

Domestic law should be the primary level of regulation, and treaties should be used in a complementary role. National legal frameworks are more appropriate to provide comprehensive, nuanced, and dynamic regulation of foreign investment. Treaties should, thus, clearly establish that investors must continuously comply with national laws.

In some cases, direct investor treaty obligations may improve the quality of investment, positively influence investor behaviour, and contribute to the promotion of sustainable development. However, whether a direct treaty obligation is the most appropriate tool depends on several factors, such as

- existence and appropriateness of existing national laws,
- existence and appropriateness of existing regional and international norms,
- existence and appropriateness of available remedial and enforcement mechanisms.

The interaction between investor treaty obligations and the existing national and international frameworks and enforcement mechanisms must be carefully considered. Treaty regulation should support the development of and reinforce strong national regulatory frameworks.

As existing remedies and avenues to access justice for individuals and communities affected by investor misconduct are limited and costly, treaties should focus on addressing this issue. To that effect, treaties could play a role in ensuring that states have or make their legal systems available for tort and civil liability actions for conduct breaching either the applicable laws of home or host states, or the treaties themselves.

### Ensuring Positive Social and Environmental Impact of Investment Projects

Treaties should also strengthen the host state's capacity to reap the benefits of increased sustainable investment. They should not hamper national developmental policies by prohibiting performance requirements but rather facilitate productive industrialization



through technology transfers, productive linkages with local economies, and creation of decent work.

## Policy Problems Related to Investment Governance and International Cooperation

The third and final category deals with the cross-cutting issue of investment governance and cooperation and addresses, in particular, the institutional issues that arise therein. Here, we discuss specific collective action problems of international investment governance that relate to the improvement of institutional frameworks in which investment projects unfold. Our analysis foregrounds the following points.

Treaties may be useful to address the collective action problems of international investment governance and improve the institutional frameworks in which investment projects unfold. Increased international cooperation may benefit international investment governance in several areas:

- addressing the high costs of capital in developing countries through a multilateral platform;
- phasing out fossil fuel investments, ending public subsidies for their support, and creating funds to help alleviate the costs of just energy transition;
- addressing the obstacles to and creating incentives for technology and knowledge transfers to developing countries;
- enhancing regulatory cooperation, technical assistance, and capacity building.

Treaties could also foster sustainable national investment governance frameworks without aiming at their substitution or replacement. This can be done in the following areas:

- transparency, monitoring, and anti-corruption
  - government contracts transparency
  - transparency of national incentive frameworks
  - common beneficial ownership registries
  - due diligence reporting
- wide stakeholder participation in decisions about investment projects.
- access to justice and remedies, especially for actors affected by investors' misconduct.
  - improving national legal frameworks by making remedies for investor misconduct available via civil and tort liability claims.
  - investigating options for grievance and dispute prevention mechanisms.

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