

# *How Sustainable Development Can Drive a Change in the Paradigm Underlying Investment Treaties*

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# Paradigms underlying the design of an investment treaty (I)

- Investor and investment protection:
  - *Broadly worded and all-encompassing definitions of covered investment;*
  - *Focus on standards of protection (fair and equitable treatment, expropriation standard etc.);*
  - *Dispute resolution clauses giving the investor access to arbitration against the host state etc.*

# Paradigms underlying the design of an investment treaty (II)

- Reassertion of control and sovereignty by host states:
  - *Limiting the scope of protection standards (e.g., FET not protecting legitimate expectations);*
  - *Reinforcing the state's right to regulate;*
  - *Non-precluded measures;*
  - *Removing non-discriminatory public interest regulation from the ambit of standards of protection (e.g., expropriation).*

# Paradigms underlying the design of an investment treaty (III)

- Extended exceptions/carve-outs *still* underlie an investment protection paradigm (enabling host state action);
- However...some treaties display patterns of regulating investment flows transnationally. Unlike traditional international investment instruments, this involves:
  - *Abstract principles v. specific regulatory commitments;*
  - *Managerial approach to regulating transnational investment flows (dictating behaviour in detail);*
  - *Addressing a (key) public interest (internationally, common concern of humankind/commons etc.);*
  - *Establishing minimum baselines below which no action is permitted;*
  - *Often a risk-based approach;*
  - *Internationally, such public interests will (ideally) be addressed multilaterally (e.g., Paris Agreement).*

# Examples of instruments displaying such a regulatory paradigm:

- Non-regression clauses (environmental interests and human rights etc.);
- (Environmental) impact assessments (investors to observe impact assessment obligations – e.g., Rwanda-Central African Republic BIT);
- Involvement of stakeholders (e.g. EU-Angola SIPA);
- Commitments to labour, human rights, environmental standards (usually hortatory language) and to implement obligations pursuant to specific treaty regimes;
- Commitment to improve enforcement action (e.g., through inspections);
- Corporate social responsibility and responsible business conduct;
- Synergies with other chapters in a free trade agreement (interpretation of a provision in its context and in accordance with the object and purpose of the treaty).

# Challenges to the successful implementation of a regulatory paradigm

- Are investment treaties the proper tools for such goals?
- Enforcement considerations (beyond the hortatory/mandatory dichotomy);
- Who can rely on such instruments before dispute settlement bodies (e.g., investor-state arbitration) (suggestions to reform investment arbitration and give stakeholders, such as local communities, a right of action);
- Effectiveness might entail multilateral action (or at least plurilateral concessions?);
- Geopolitical fragmentation;
- Unilateral international/transnational economic law.