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Agricultural Investments under International Investment Law

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Sustainable Development



AGRICULTURAL INVESTMENTS

UNDER INTERNATIONAL INVESTMENT LAW

BRIEFING OCTOBER 2018

Workers harvest
oil palm fruit in
Malaysia.

AGRICULTURAL INVESTMENTS

UNDER INTERNATIONAL INVESTMENT LAW

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INTRODUCTION

Increased investment in large-scale **agricultural, forestry, and fishing projects**¹ has raised concerns about pressures on lands and natural resources, and the negative impacts these investments can have when poorly regulated and irresponsibly operated. New disputes between investors and states concerning these investments have sparked commentary regarding the potentially chilling effects they may have on effective regulation of inward investment. At the same time, public and private investments in agriculture are identified as global priorities in the Sustainable Development Goals. Policy-makers are therefore seeking to facilitate investments in agriculture to advance food security, nutrition, equality, climate and other sustainable development objectives.

FOOTNOTES

1. Referred to collectively herein as “agricultural” investments.

International investment law plays an important role in the governance of foreign investment, including investment in agricultural industries. More than 3,300 investment treaties have been concluded, and over 2,500 such treaties are currently in force.² The obligations established by these treaties, and enforced by means of investor–state arbitration, can present challenges for policy-makers and others seeking to ensure that investments are sustainable, including by affecting the ways in which the costs and benefits of investments are distributed among different actors.

WHAT IS INTERNATIONAL INVESTMENT LAW?

International investment law is primarily based on **binding treaties** between two or more states aimed at protecting foreign investments in the host state. While the content and scope of a specific investment treaty will vary depending on the text of the agreement itself, treaties commonly require that states treat foreign investors no differently to national investors and no less favourably than other foreign investors. States are often required to compensate investors when they expropriate an investment or adopt measures that may have a significant impact on an investment (“indirect expropriation”). The public purpose of a measure does not generally affect whether compensation is due. Importantly, treaties often provide that states must treat foreign investors “fairly and equitably,” an obligation generally left without any additional guidance on its meaning.

In addition to these protections, treaties increasingly include liberalization elements in the form of “pre-establishment” obligations. Among other things, such treaties disallow the use of so-called performance requirements, and require that potential foreign investors have the same access to markets as national investors.³

BILATERAL INVESTMENT TREATIES AND TREATIES WITH INVESTMENT PROVISIONS

Bilateral investment treaties (BITs) are agreements concluded between two state parties concerning the promotion and protection of investment. **Treaties with investment provisions** are agreements that include provisions on the promotion and protection of investment alongside provisions concerning other issues. They can be bilateral (concluded by two states) or multilateral (concluded by more than two states). For example, investment chapters are often found within free trade agreements.

WHO AND WHAT DO INVESTMENT TREATIES PROTECT?

Investment treaties are intended to protect “investors” of one state party making “investments” in another state party. In many cases, the “investor” will be the parent company of a multinational enterprise, and the “investment” will be its foreign subsidiary.

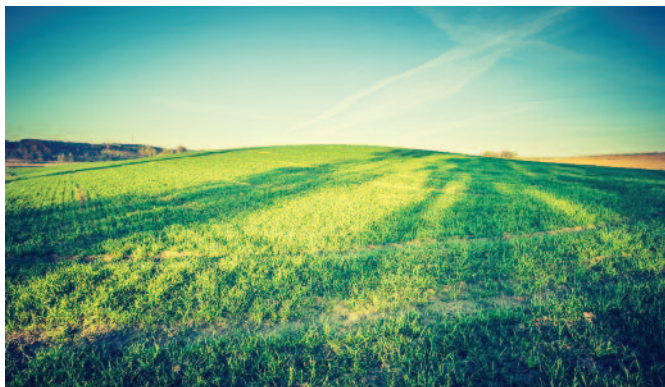
What constitutes a **covered investment** under a specific treaty will vary according to the text of the agreement, and states have adopted different approaches to defining covered investments. In general, treaties tend to define “investment” broadly, and most agricultural projects are likely to be covered.

2. Last checked October 1, 2018. UNCTAD, *Investment Policy Hub*, <<http://investmentpolicyhub.unctad.org/IIA>>. In most cases, investment treaties must be ratified in order to become effective (i.e., come into force). The text of the investment treaty itself will generally describe the acts or measures required for a treaty to become effective.

3. For brief explanations of these treaty standards, see the Glossary below, starting at p. 12. See also Lorenzo Cotula, “Investment Treaties and Sustainable Development: Investment Liberalisation” (IIED Briefing, May 2014) <<http://pubs.iied.org/17239IIED/>>.

HOW ARE INVESTMENT TREATIES ENFORCED?

Most investment treaties, and many international investment contracts, include a **dispute settlement** provision allowing investors to bring claims against host states directly before **international arbitral tribunals** (also commonly referred to as a mechanism for “investor–state dispute settlement,” or ISDS). This mechanism can enable foreign investors to bypass domestic court systems, to bring parallel claims at the same time as domestic court proceedings, or even to challenge those proceedings. The final decisions of investor–state arbitral tribunals (“awards”) are binding, and they can generally be enforced in the domestic courts of any state party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)⁴ or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),⁵ depending on the rules applicable to the arbitration. The decisions of investment tribunals can be challenged only on specific and very narrow grounds.



WHY DOES THIS MATTER FOR AGRICULTURAL INVESTMENTS?

The **number of known investor–state claims** concerning agricultural investments has grown in recent years, with the number of disputes concerning agricultural investments growing more rapidly since 2003.⁶ Since 2004, at least one claim concerning these investments has been initiated each year, with six cases initiated in 2010, and three in the first half of 2018 alone. The majority of cases have been brought by investors from high-income countries against low- or middle-income country governments, with investors being awarded an average of almost USD 100 million. According to the UNCTAD and ICSID databases, the total number of known cases brought in the sector is 47; 42 cases brought under investment treaties and five under investment contracts. For further statistics on investor–state claims in respect of agricultural investments, see pages 5-6.⁷

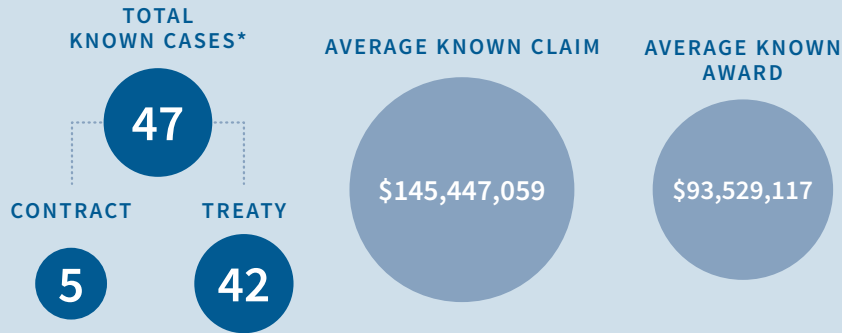
As the number of agricultural investments increases, or as existing investments move into implementation phases, the number of known investor–state claims **will likely increase**. A study conducted in 2015 found that a majority of large-scale agribusiness investments initiated in low and middle-income countries since 2000 were protected by at least one investment treaty.⁸ This creates at least the potential for investor–state claims arising from such investments to increase in the future. This potential may be heightened by the reportedly rising total number of failed agribusiness projects: between 2007 and 2017, at least 135 such projects were reported to have failed.⁹

Agricultural landscape.

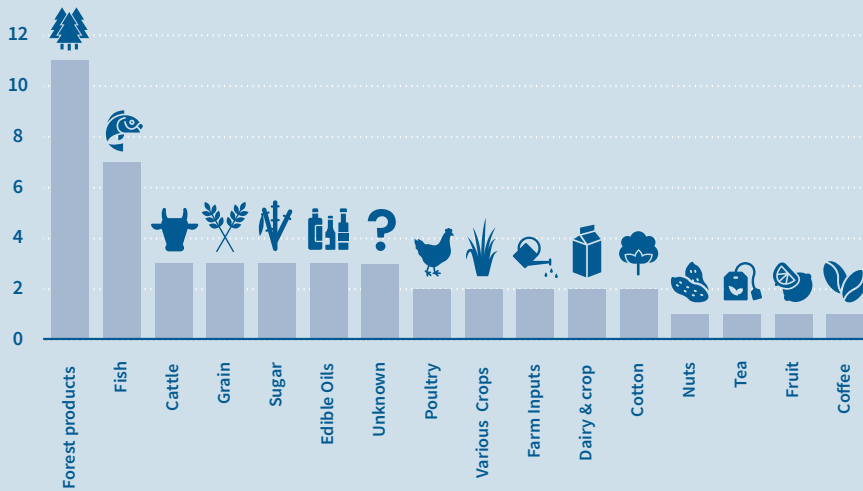
4. Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), entered into force on October 14, 1966. As of October 1, 2018, 154 states had ratified the ICSID Convention. See ICSID, *ICSID Convention*, <<https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx>>.
5. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), entered into force on June 7, 1959. As of October 1, 2018, 159 states were party to the New York Convention. See UNCITRAL, *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.
6. Lorenzo Cotula and Thierry Berger, “Land Deals and Investment Treaties: Visualizing the Interface” (International Institute for Environment and Development, 2015), p. 14 <<http://pubs.iied.org/125861IED/>>.

7. The Infographics at p. 5 and cases listed in Table 1 reflect (i) treaty and contract cases tagged as “Agriculture, Fishing and Forestry” in the ICSID case database (<<https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx> - last accessed July 19, 2018); and (ii) treaty cases tagged as “Agriculture, Forestry and Fishing” in the UNCTAD case database (<<http://investmentpolicyhub.unctad.org/ISDS/FilterByEconomicSector> - last accessed July 19, 2018). The Table and related Infographics included in this briefing note do not include all investor–state claims concerning secondary agricultural industries (e.g., those tagged as cases relating to “Manufacture of food products” or “Manufacture of beverages” in the UNCTAD case database). As noted in the text below, these cases can impact governments’ use of “downstream” policies that may be designed to support certain types of “upstream” agricultural operations (such as small-scale domestic farms).
8. Cotula and Berger (n 6).
9. GRAIN, “Failed Farmland Deals: A Growing Legacy of Disaster and Pain” (June 2018) <<https://www.grain.org/article/entries/5958-failed-farmland-deals-a-growing-legacy-of-disaster-and-pain>>.

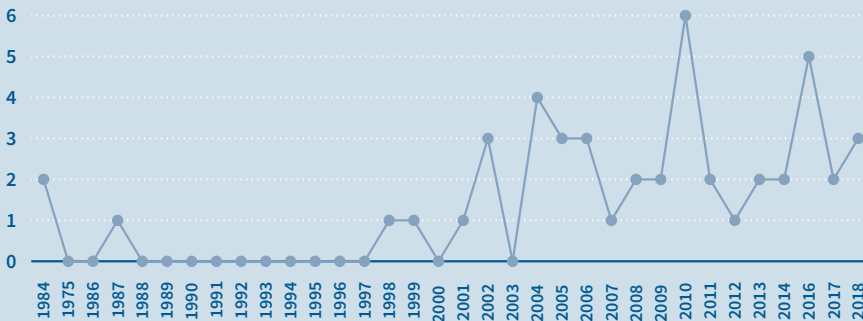
ISDS CASES IN AGRICULTURE, FORESTRY & FISHING



NUMBER OF CASES BY COMMODITY



CASES INITIATED

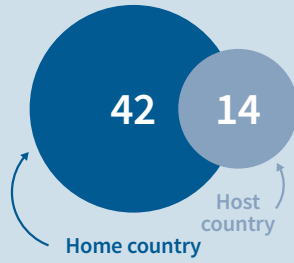


* Treaty and contract cases tagged as 'Agriculture, Fishing and Forestry' in the ICSID case database - <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx> - last accessed 19 July 2018; and treaty cases tagged as 'Agriculture, Forestry and Fishing' in the UNCTAD case database - <http://investmentpolicyhub.unctad.org/ISDS/FilterByEconomicSector> - last accessed 19 July 2018.
Other source: Itlaw - <https://www.italaw.com/> - last accessed 19 July 2018.

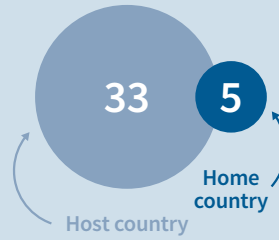
Source: International Institute for Sustainable Development (IISD)

ISDS CASES IN AGRICULTURE, FORESTRY & FISHING - CONTINUED

DEVELOPED COUNTRIES

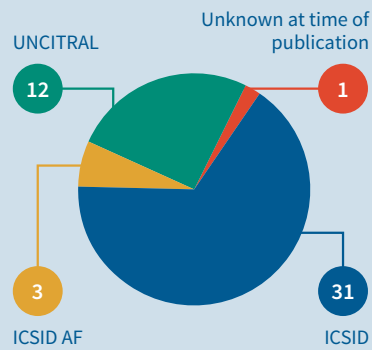


DEVELOPING COUNTRIES

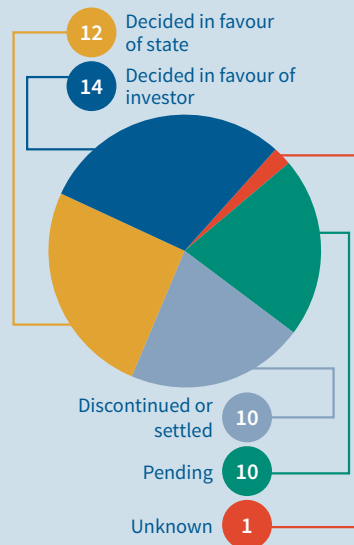


Classified according to the UN's 'World Economic Situation and Prospects' 2018.

RULES USED



CASE OUTCOMES



Source: International Institute for Sustainable Development (IISD)

EXAMPLES OF MEASURES CHALLENGED IN INVESTOR–STATE ARBITRATIONS CONCERNING AGRICULTURAL INVESTMENTS

- » Termination of a lease agreement (e.g., *Grot and others v. Moldova*; *Almås v. Poland*; *Inicia and others v. Hungary*);
- » Cancellation of an investment project (e.g., *Agro EcoEnergy and others v. Tanzania*; *Africom Commodities Pty Ltd v the Democratic Republic of Congo*);
- » Denial of tax exemptions and other financial benefits (e.g., *Longyear v. Canada*; *Albacora v. Ecuador*; *Champion Trading and Ameritrade v. Egypt*);
- » Import bans intended to protect animal health (e.g., *Canadian Cattlemen v. USA*);
- » Reduction, cancellation, or changes to allocation of fishing quotas (e.g., *Besserglik v. Mozambique*; *Greiner v. Canada*; *Vieira v. Chile*);
- » National courts' refusal to enforce arbitral awards under a private commercial contract (e.g., *Romak v. Uzbekistan*; *Western NIS v. Ukraine*);
- » Claims arising out of countervailing duties and antidumping measures (e.g., *Tembec v. USA*; *Terminal Forest v. USA*; *Canfor v. USA*);
- » Alleged failure to enforce laws for the protection of private property (e.g., *Quadrant Pacific v. Costa Rica*; *Olguin v. Paraguay*);
- » Seizure of property in the context of land reform (*von Pezold and others v. Zimbabwe*; *Funnekotter v. Zimbabwe*; *Border Timbers and others v. Zimbabwe*); and
- » Nationalization (*Western African Aquaculture Ltd, Kurt Lennart Hansson and Martje Bolt Hansson v. Republic of The Gambia*; *Longreef v. Venezuela*).



Agricultural crops below the U-Bein teak bridge in Mandalay, Myanmar.

WHAT IMPACT CAN INVESTMENT TREATIES HAVE?

Obligations established by investment treaties and enforced by investor–state arbitration can have profound implications for **state parties, investment-affected rights holders and the general public interest**.

These obligations can restrict the host state’s **ability to regulate** investment in agriculture by effectively precluding the adoption of new laws or regulations and judicial or administrative decisions. This can include measures concerning: meaningful consultation with (and participation) of affected communities in decision making regarding investments; protection of the environment, including water sources; and the carrying out of environmental and social or human rights impact assessments. Investment treaties may limit use of government subsidies or taxes to support domestic producers and can bar restrictions on exports aimed to promote domestic food security.

Where a host state’s measures negatively impact an investor’s operations, that investor may make a number of claims at investor–state arbitration. The investor may claim that its investment was indirectly expropriated, or that the host state violated its obligation to provide fair and equitable treatment by undermining the investor’s “legitimate expectations” with respect to its investment. The investor could also claim that the measures treated it less favourably than other similar investors of different nationalities, or that the measures violated the treaty’s rules against performance requirements.

Investment treaties may also restrict the ability of host states to **renegotiate investor–state contracts**: tribunals have faulted governments for seeking alteration of previously agreed terms when circumstances surrounding investment deals had fundamentally changed, and for

failing to adequately respond to investors’ similar efforts to renegotiate their contracts.¹⁰ These treaties could also require a host state to compensate an investor for **cancelling an illegal investment** or voiding a contract that was entered into through an act that was beyond the host government’s power or authority¹¹ or in violation of international norms and standards.¹²

Investment treaties may impede government efforts or policies aiming to ensure that agricultural contracts between private parties are fair and balanced. Consider, for instance, if a court determined that the terms in an agreement between a foreign investor and domestic business were **unenforceable because they were impermissibly unbalanced, asymmetrical or unjust**. That court decision could be the subject of an investment treaty claim by the foreign buyer.

Investment treaties can create state obligations that **compete with obligations** under domestic law and other bodies of international law, including human rights law.¹³ While international investment law and international human rights law do not inherently conflict with one another, the obligations arising from these regimes can directly clash. This requires a state to choose between fulfilling one obligation, or another, or one obligation may limit the policy space required by the state to comply with another obligation.¹⁴

Investment treaties can hinder government use of **“downstream” policies**, such as taxes, incentives or regulations applied to food manufacturers that purchase agricultural inputs. These types of policies may be designed to support certain types of **“upstream” agricultural operations** (such as small-scale domestic farms) or processes (such as organic farming), but may have negative impacts on “downstream” manufacturers. While not encompassed within data on agricultural investor–state

10. For examples of cases relevant to other sectors, see e.g., *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (January 19, 2007); *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability (December 29, 2014); *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award (June 11, 2012); *National Grid plc v. The Argentine Republic*, UNCITRAL, Award (November 3, 2008).

11. Lorenzo Cotula, “Land Rights and Investment Treaties: Exploring the Interface” (International Institute for Environment and Development 2015), pp. 31-33 <<http://pubs.iied.org/12578IIED/>>.

12. *Ibid* (n 11), pp. 19-20.

13. For further discussion of competing obligations that can arise in the context of international investment, see Kaitlin Y. Cordes, Lise Johnson, and Sam Szoke-Burke, “Land Deal Dilemmas: Grievances, Human Rights, and Investor Protections” (Columbia Center on Sustainable Investment, 2016) <<http://ccsi.columbia.edu/2016/03/10/land-deal-dilemmas-grievances-human-rights-and-investor-protections/>>.

14. See Jesse Coleman, Kaitlin Cordes, and Lise Johnson, “Human Rights Law and the Investment Treaty Regime” in *Research Handbook on Human Rights and Business* (forthcoming 2019); Lorenzo Cotula, “Rethinking Investment Treaties to Advance Human Rights” (International Institute for Environment and Development, 2016), <<http://pubs.iied.org/17376IIED/>>.

INVESTMENT TREATIES AND RESPONSIBLE INVESTMENT IN AGRICULTURE AND FOOD SYSTEMS

The **Committee on World Food Security’s Principles for Responsible Investment in Agriculture and Food Systems** (CFS-RAI) provide guidance to stakeholders, and in particular to policy-makers, on how to establish an enabling environment that promotes responsible investment in agriculture and food systems. Endorsed by the CFS in 2014, their core objective “is to promote responsible investment in agriculture and food systems that contribute to food security and nutrition, thus supporting the progressive realization of the right to adequate food in the context of national food security.”¹⁵

The CFS-RAI highlights key principles that should inform the development of policy and legal frameworks designed to enable and govern responsible investment in agriculture and food systems. The principles address a range of issues, including: (i) safeguarding of legitimate tenure rights; (ii) strengthening of opportunities for small-scale producers to benefit from investment; (iii) promotion of meaningful participation of all relevant stakeholders in decision making regarding investments, and in policy-making; and (iv) establishing of mechanisms for impact assessments. To implement the CFS-RAI, states should apply the principles throughout the development, adaptation and implementation of relevant policies and laws.¹⁶

Implementing the CFS-RAI implies changes to existing policies and laws, or adoption of new policies and laws, applicable to investment in agriculture and food systems. **The level of policy space required to make these changes can, however, be constrained by investment treaty obligations.** Changes in existing laws, or adoption of new laws, may give rise to alleged breaches of investor–state contracts or investment treaties: publicly known investor–state claims have, for example, been lodged regarding changes to environmental laws, royalty levels and zoning laws applicable to investments.¹⁷ Due to vague standards enshrined in most treaties currently in force, and the discretion afforded to investment tribunals, it is often difficult to assess with certainty in advance of adopting a new measure whether that measure will be considered a breach of treaty obligations.¹⁸ Moreover, if an investor–state contract includes a stabilization clause,¹⁹ this can further expose host states to liability for exercise of normal regulatory powers regarding agricultural and other types of investment.²⁰

For these and other reasons, the CFS-RAI themselves underscore the importance of protecting domestic policy space when considering conclusion of investment treaties and investor–state contracts.²¹

15. Committee on World Food Security, *Principles for Responsible Investment in Agriculture and Food Systems* (2014), para. 10 <<http://www.fao.org/3/a-au866e.pdf>>.

16. See e.g., CFS-RAI (n 15), para. 36.

17. Carin Smaller and Howard Mann, “A Thirst for Distant Lands: Foreign Investment in Agricultural Land and Water” (International Institute for Sustainable Development 2009), p. 17 <<https://www.iisd.org/library/thirst-distant-lands-foreign-investment-agricultural-land-and-water>>.

18. Smaller and Mann (n 17), p. 17.

19. For examples of investor-state contracts for agricultural, forestry, and other land-based investments containing stabilization clauses, see [OpenLandContracts.org](https://openlandcontracts.org/search?q=&annotation_category%5B%5D=Stabilization) https://openlandcontracts.org/search?q=&annotation_category%5B%5D=Stabilization.

20. Smaller and Mann (n 17), p. 18.

21. CFS-RAI (n 15), para. 33, provides, for example, that “[s]tates should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.”

disputes concerning primary industries, these types of cases related to food manufacturing can nevertheless have important implications for agricultural policies.²²

By enabling enforcement of investment treaty obligations through investor–state arbitration, states can attract

significant **financial liability** for treaty violations. Even the threat of being faced with having to pay the legal fees and sizeable awards may be sufficient to pressure a host state to abandon new laws or policies aimed at promoting more responsible, sustainable investment in agriculture.

INVESTMENT TREATIES AND RESPONSIBLE GOVERNANCE OF TENURE

The **Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security** (VGGT) provide guidance to policy-makers and other stakeholders on the responsible governance of tenure. Endorsed by the CFS in 2012, their overarching goal is to achieve food security and support the progressive realization of the right to adequate food in the context of national food security.

The VGGT set out principles for the responsible governance of tenure, including guidance on land tenure reform. A core component of the VGGT is the safeguarding and legal protection of all “legitimate tenure rights,” including customary rights that may not be documented or legally recognized.²³ The VGGT also reinforce existing obligations regarding the protection of the rights of indigenous peoples to their lands and natural resources.²⁴

Some states are now seeking to align their national legal frameworks with the VGGT. In undertaking land tenure reform, foreign investors or their investments may be affected. Land tenure reform can, for example, require adjustment of compensation requirements applicable to expropriations for investment projects, or alter the nature of land rights held by investors already operating in a host state or seeking to establish an investment in that state.²⁵ In these and other ways, investment treaties may enable investors to challenge measures adopted in good faith to align national frameworks with best practice regarding good governance of tenure, or may restrict the reforms states can confidently pursue without attracting liability.

Implementation of the VGGT also requires states to provide access to justice for infringement of legitimate tenure rights and resolution of tenure disputes where they arise.²⁶ Obligations that arise from investment treaties, enforceable through investor–state arbitration, can create tensions between the rights of legitimate tenure holders and investor protections. Where investors are not open to adjusting their operations, addressing the land grievances of legitimate tenure holders may expose a state to liability under an investment treaty.²⁷ Due to the costly nature of investor–state arbitration (even in cases where a state successfully defends itself against the claim), the state may be inclined to resolve the dispute in favour of investor interests to the detriment of legitimate tenure rights holders.

22. See e.g., *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2 (2005) (challenging adoption of a tax on beverages containing high fructose corn syrup); *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2 (2004) (challenging imposition of quotas on a sweetener); *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24 (2007) (concerning alleged breaches of a joint venture agreement to renovate a cocoa bean processing factory).

23. See e.g., Food and Agriculture Organization of the United Nations and Committee on World Food Security, *Voluntary Guidelines on the Responsible Governance of Tenure of Land,*

Fisheries and Forests in the Context of National Food Security (2012) paras. 3A, 4.4, 4.5, 5.3, 7.1-7.6, 8.2, 10.1-10.6, 12.4, 12.6 <<http://www.fao.org/docrep/016/i2801e/i2801e.pdf>>.

24. See e.g., VGGT (n 23), paras. 7.3, 9.1-9.12.

25. Cotula (n 11), p. 19-20.

26. See e.g., VGGT (n 23), paras. 3A, 7.3, 21.

27. Cordes, Johnson, and Szoke-Burke (n 13).

DOES INVESTOR–STATE ARBITRATION PROPERLY CONSIDER LOCAL PERSPECTIVES?

While investor–state arbitration focuses on the bilateral relationship between the investor and the state, many investments in agricultural sectors affect a much **wider range of actors**. This includes people whose land and resource rights are expropriated in or around the project area, and people adversely affected by the environmental impacts of the project (e.g., pollution, water abstraction). In many cases, action by these groups is at the root of the investor–state dispute, for example where the arbitration claim challenges: i) measures that public authorities took in response to pressure from local groups, or ii) the inability of those authorities to protect the investment against local protests or occupations.²⁸

Over the years, reforms to investor–state arbitration have created new opportunities for local groups to bring

issues to the attention of the arbitral tribunal, particularly by seeking the tribunal’s authorization to make “**amicus curiae**” (“friend of the court”) submissions. Such submissions generally aim to provide a different perspective from the ones advanced by the investor and the state. However, even when tribunals have accepted such submissions, their influence on the outcome of arbitrations has tended to be limited.²⁹ In agriculture, where investment-related disputes often involve tensions linked to the local impacts of investments, the narrow investor–state framing of dispute settlement creates real challenges in ensuring that all relevant rights are properly considered. Moreover, investment treaties and investor–state arbitration can undermine **access to justice** pursued by local groups in other fora.³⁰ In one recent case, for example, an investor sought and obtained an award requiring the state to shield it from liability for environmental harms caused by its investment and to prevent enforcement of a domestic award obtained by local communities regarding those harms.³¹



Local women fishing in Morondava, Western Madagascar.

28. See Lorenzo Cotula and Mika Schröder, “Community Perspectives in Investor-State Arbitration” (International Institute for Environment and Development, 2017), <<http://pubs.iied.org/12603IIED/>>.

29. Ibid (n 28).

30. For a discussion of these issues, see “Impacts of the International Investment Regime on Access to Justice: Roundtable Outcome Document (Columbia Center

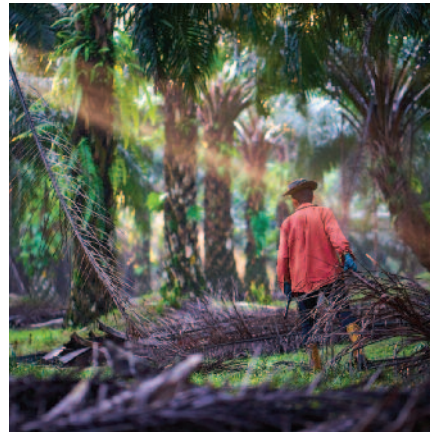
on Sustainable Investment and UN Working Group on Business and Human Rights, 2018) <<http://ccsi.columbia.edu/2018/09/27/ccsi-and-unwgbrh-international-investment-regime-and-access-to-justice/>>.

31. *Chevron Corporation and Texaco Petroleum Company and The Republic of Ecuador (II)*, PCA Case No. 2009-23, Second Partial Award on Track II (August 30, 2018), paras. 9.22, 9.24.

INVESTMENT TREATIES AND RESPONSIBLE BUSINESS CONDUCT

Due to the profound influence and impact of businesses on local lives and livelihoods, emphasis is increasingly placed on the responsibilities and, depending on the applicable laws, obligations of businesses to behave responsibly in the context of international investment. The link between responsible business conduct and the viability of investments is also being increasingly recognized by a broader group of stakeholders. As investors and financing institutions recognize that failure to conduct business responsibly brings material risk, greater emphasis is placed on implementing best practices for responsible business conduct.

Most investment treaties do not require investors to comply with minimum standards of responsible conduct in order to benefit from legal protections and remedies.³² In fact, investor protections enshrined in investment treaties—and interpreted and applied by investment tribunals—**can send the wrong signals to investors and host states regarding responsible business conduct.** Investment tribunals have interpreted and applied investment treaty standards to, in some cases, reward investors who ignore potential or actual risks associated with investments rather than conduct robust due diligence. By insuring investors against the risk of inadequate due diligence, and incentivizing investors to proceed without meeting their responsibilities (or in some cases obligations), the investment treaty regime undermines efforts to advance responsible and sustainable investment.³³



Oil palm plantation in Malaysia.

32. Lorenzo Cotula, “Raising the Bar on Responsible Investment: What Role for Investment Treaties?” (International Institute for Environment and Development, 2018) <<http://pubs.iied.org/17454IIED/>>.
33. See Kaitlin Cordes and Lise Johnson, “Sending Mixed Signals: Responsible Business Conduct and Investment Treaties” (Columbia Center on Sustainable Investment, forthcoming 2019).

34. See e.g., Lise Johnson, Lisa Sachs, Brooke Güven and Jesse Coleman, “Costs and Benefits of Investment Treaties: Practical Considerations for States” (Columbia Center on Sustainable Investment, March 2018) <<http://ccsi.columbia.edu/2018/04/20/costs-benefits-iias/>>; 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. 2018/1) <<https://doi.org/10.1787/e5f85c3d-en>>; Jonathan Bonnitche, “Assessing the Impacts of Investment Treaties: Overview of the evidence” (International Institute for Sustainable Development, September 2017) <<https://www.iisd.org/sites/default/files/publications/assessing-impacts-investment-treaties.pdf>>.

HOW CAN POLICY-MAKERS ADDRESS THESE CHALLENGES?

As the costs associated with investment treaties—and investor–state arbitration in particular—are increasingly realized, policy-makers are exploring a spectrum of revised approaches to international investment governance. The specific options available to policy-makers will vary depending on the policy objectives and individual circumstances of the state.

In general, policy-makers should:

- » Carefully assess the costs and benefits associated with investment treaties, and consider whether those costs and benefits are fairly distributed.³⁴
- » Consider whether investment treaties provide the best way to realize priorities concerning responsible investment in agriculture and sustainable development objectives.
- » Engage in reform processes regarding investor–state arbitration, including discussions taking place at the United Nations Commission on International Trade Law (UNCITRAL)³⁵ and at ICSID.³⁶
- » Enhance the capacity of policy-makers, negotiators and those involved in reform discussions.
- » Create greater awareness of the implications of investment treaties among other policy-makers whose responsibilities are affected by, or should inform, investment policy.
- » Establish processes that promote transparent and meaningful participation of all relevant stakeholders in the formulation of investment policy and dialogue on reform of the international investment regime.

If considering new treaties:

- » Create space for meaningful public consultation and participation in investment policy processes. This should include defining and assessing policy objectives and priorities for international investment, and determining whether concluding new treaties is an appropriate means of meeting those objectives.³⁷
- » If entering into negotiations for new investment treaties is considered the most appropriate mechanism for meeting policy objectives: i) assess the provisions, protections and obligations that should be included in new treaties on the basis of sustainable development objectives; and ii) develop a model on the basis of this assessment that can be used during negotiations.
- » Reinforce state commitments to responsible investment within the texts of new treaties by, for example, committing state parties to implementing the CFS-RAI and VGGT.³⁸
- » Consider integrating binding investor obligations within the texts of investment treaties.³⁹ These obligations should at a minimum make treaty protection contingent on compliance with domestic law. They could also require compliance with standards relevant to responsible investment, including the OECD Guidelines for Multinational Enterprises⁴⁰ and the UN Guiding Principles on Business and Human Rights.⁴¹

35. See UNCITRAL, *Working Group III: Investor-State Dispute Settlement Reform* http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html.

36. See ICSID, *ICSID Rules and Regulations Amendment Process* <https://icsid.worldbank.org/en/amendments>.

37. See Johnson, Sachs, Güven and Coleman (n 34), p. 18.

38. See Cotula (n 11), p. 47.

39. See e.g., “Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements” (International Institute for Sustainable Development, January 2018); Cotula (n 32).

40. OECD Guidelines for Multinational Enterprises <http://www.oecd.org/investment/mne/>.

41. UN Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

42. See Johnson, Sachs, Güven and Coleman (n 34), p. 17.

With respect to existing treaties:

- » Establish a multistakeholder review process to take stock of existing treaties and evaluate whether and how they might undermine sustainable development objectives, including regarding investment in agriculture.⁴² This review process should also consider how obligations under existing treaties align with or impact obligations under domestic law and other bodies of international law.
- » On the basis of this review and the costs and benefits associated with existing treaties, assess whether existing treaties should be terminated or renegotiated.
- » Where the review process indicates that agreements should be terminated, consider options for withdrawal of consent to investor-state arbitration and joint termination of investment treaties.⁴³
- » Clarify the scope of vague, far-reaching treaty provisions by adopting unilateral or joint interpretative statements.

















These recommendations are not exhaustive. They highlight some of the steps that can be taken by policy-makers seeking to better understand and address the implications of investment treaties for the range of policy objectives, priorities and stakeholders affected by these agreements.



Collecting drinking water from wells in Lalitpur city, Katmandu, Nepal.

43. See e.g., Lise Johnson, Lisa Sachs, Brooke Güven and Jesse Coleman, "Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law" (Columbia Center on Sustainable Investment, April 2018) <<http://ccsi.columbia.edu/2018/04/24/clearing-the-path-withdrawal-of-consent-and-termination-as-next-steps-for-reforming-international-investment-law/>>.

TABLE 1: ISDS CASES IN AGRICULTURE, FORESTRY & FISHING - AS AT 19 JULY 2018*

| Year | Country | Claimant | Claim Value (USD) | Outcome | Award (USD) | Sub-sector | Commodity | Case type | Home country | Host country | Rules |
|------|------------|---|-------------------|-------------------------------|-------------|----------------------|---|-----------|--------------|--------------|----------|
| 2018 | The Gambia | Western African Aquaculture Ltd | 30,000,000 | Pending | n/a | Fishing | Fish  | Contract | Developed | Developing | ICSID |
| 2018 | DRC | Africom Commodities Pty Ltd | 20,000,000 | Pending | unknown | Agro-processing | Unknown  | Treaty | Developing | Developing | - |
| 2018 | Serbia | Rand Investments Ltd. & others | unknown | Pending | n/a | Agro-processing | Unknown  | Treaty | Developed | Developing | ICSID |
| 2017 | Tanzania | Agro EcoEnergy & others | 500,000,000 | Pending | n/a | Food crops; biofuels | Sugar  | Treaty | Developed | Developing | ICSID |
| 2017 | Hungary | Inicia & others | unknown | Pending | n/a | Dairy; food crops | Dairy & crop  | Treaty | Developed | Developed | ICSID |
| 2016 | Moldova | Grot & others | 10,000,000 | Decided in favour of investor | 400,000 | Food crops | Various Crops  | Treaty | Developed | Developing | ICSID |
| 2016 | Venezuela | Agroinsumos Ibero-Americanos & ors | unknown | Pending | n/a | Agricultural inputs | Farm Inputs  | Treaty | Developed | Developing | ICSID |
| 2016 | Ecuador | Albacora | 20,000,000 | Pending | n/a | Fishing | Fish  | Treaty | Developed | Developing | UNCITRAL |
| 2016 | Egypt | Champion Holding Company & others | 100,000,000 | Pending | n/a | Non-food crops | Cotton  | Treaty | Developed | Developing | ICSID |
| 2016 | Indonesia | Oleovest Pte. Ltd | unknown | Discontinued or settled | n/a | Non-food crops | Edible Oils  | Treaty | Developed | Developing | ICSID |
| 2014 | Mozambique | Besserglik | 91,000,000 | Pending | n/a | Fishing | Fish  | Treaty | Developing | Developing | ICSID AF |
| 2014 | Canada | Longyear | 12,000,000 | Discontinued or settled | unknown | Forestry | Forest products  | Treaty | Developed | Developed | UNCITRAL |
| 2013 | Poland | Almás | 24,800,000 | Decided in favour of state | n/a | Dairy; food crops | Dairy & crop  | Treaty | Developed | Developed | UNCITRAL |
| 2013 | Venezuela | Valores Mundiales, S.L. & Consorcio Andino S.L. | unknown | Decided in favour of investor | 430,000,000 | Agro-processing | Grain  | Treaty | Developed | Developing | ICSID |
| 2012 | Croatia | Georg Gavrilovic & Gavrilovic d.o.o. | 210,600,000 | Pending | n/a | Agro-processing | Cattle  | Treaty | Developed | Developed | ICSID |
| 2011 | Poland | Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC | unknown | Decided in favour of state | n/a | Agro-processing | Edible Oils  | Treaty | Developed | Developed | ICSID AF |

* The cases listed in Table 1 reflect (i) treaty and contract cases tagged as "Agriculture, Fishing and Forestry" in the ICSID case database (<https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx> - last accessed July 19, 2018); and (ii) treaty cases tagged as "Agriculture, Forestry and Fishing" in the UNCTAD case database (<http://investmentpolicyhub.unctad.org/ISDS/FilterByEconomicSector> - last accessed July 19, 2018). The Table and related Infographics included in this briefing note do not include all investor-state claims concerning secondary agricultural industries (e.g. those tagged as cases relating to "Manufacture of food products" or "Manufacture of beverages" in the UNCTAD case database).

TABLE 1: ISDS CASES IN AGRICULTURE, FORESTRY & FISHING - AS AT 19 JULY 2018 - CONTINUED
































| Year | Country | Claimant | Claim Value (USD) | Outcome | Award (USD) | Sub-sector | Commodity | Case type | Home country | Host country | Rules |
|------|----------------|--------------------------------------|-------------------|-------------------------------|-------------|----------------------------|---|-----------|--------------|--------------|----------|
| 2011 | Venezuela | Longreef Investments A.V.V. | 500,000,000 | Decided in favour of investor | 43,000,000 | Non-food crops | Coffee  | Treaty | Developed | Developing | ICSID |
| 2010 | Zimbabwe | von Pezold & ors | unknown | Decided in favour of investor | 65,000,000 | Food crops; non-food crops | Nuts  | Treaty | Developed | Developing | ICSID |
| 2010 | Zimbabwe | Border Timbers & others | unknown | Decided in favour of investor | unknown | Forestry | Forest products  | Treaty | Developed | Developing | ICSID |
| 2010 | Rwanda | Olyana Holdings LLC | unknown | Discontinued or settled | unknown | Non-food crops | Tea  | Contract | Developed | Developing | ICSID |
| 2010 | Canada | Greiner | 8,000,000 | Discontinued or settled | unknown | Fishing | Fish  | Treaty | Developed | Developed | UNCITRAL |
| 2010 | Turkmenistan | Bozbey | 60,000,000 | Discontinued or settled | n/a | Agro-processing | Unknown  | Treaty | Developing | Developing | UNCITRAL |
| 2010 | Canada | AbitibiBowater Inc | 535,000,000 | Decided in favour of investor | 130,050,000 | Forestry | Forest products  | Treaty | Developed | Developed | UNCITRAL |
| 2009 | Turkmenistan | Dogan | 45,000,000 | Decided in favour of investor | n/a | Poultry | Poultry  | Treaty | Developed | Developing | ICSID |
| 2009 | Ukraine | Global Trading | 35,000,000 | Decided in favour of state | n/a | Poultry | Poultry  | Treaty | Developed | Developing | ICSID |
| 2008 | Czech Republic | InterTrade | 105,500,000 | Decided in favour of state | n/a | Forestry | Forest products  | Treaty | Developed | Developed | UNCITRAL |
| 2008 | Costa Rica | Quadrant Pacific | 20,000,000 | Discontinued or settled | n/a | Food crops | Fruit  | Treaty | Developed | Developing | ICSID |
| 2007 | CAR | Shareholders of SESAM | unknown | Unknown | unknown | Forestry | Forest products  | Contract | Developed | Developing | ICSID |
| 2006 | Canada | Merrill & Ring | 51,200,000 | Decided in favour of state | n/a | Forestry | Forest products  | Treaty | Developed | Developed | ICSID |
| 2006 | Venezuela | Vestey | 157,400,000 | Decided in favour of investor | 98,100,000 | Livestock | Cattle  | Treaty | Developed | Developing | ICSID |
| 2006 | Uzbekistan | Romak | 10,000,000 | Decided in favour of state | n/a | Food crops | Grain  | Treaty | Developed | Developing | UNCITRAL |
| 2005 | Zimbabwe | Bernardus Henricus Funnekotter & ors | 15,600,000 | Decided in favour of investor | 10,600,000 | Various | Various Crops  | Treaty | Developed | Developing | ICSID |
| 2005 | US | Canadian Cattlemen | 235,000,000 | Decided in favour of state | n/a | Livestock | Cattle  | Treaty | Developed | Developed | UNCITRAL |
| 2005 | Mexico | Bayview | 667,600,000 | Decided in favour of state | n/a | Agricultural inputs | Farm Inputs  | Treaty | Developed | Developing | ICSID AF |
| 2004 | Chile | Sociedad Anónima Eduardo Vieira | 22,000,000 | Decided in favour of state | n/a | Fishing | Fish  | Treaty | Developed | Developing | ICSID |

TABLE 1: ISDS CASES IN AGRICULTURE, FORESTRY & FISHING - AS AT 19 JULY 2018 - CONTINUED

| Year | Country | Claimant | Claim Value (USD) | Outcome | Award (USD) | Sub-sector | Commodity | Case type | Home country | Host country | Rules |
|------|-----------|-------------------------------------|-------------------|-------------------------------|-------------|-----------------|---|-----------|--------------|--------------|----------|
| 2004 | US | Tembec | 200,000,000 | Decided in favour of investor | 242,000,000 | Forestry | Forest products  | Treaty | Developed | Developed | UNCITRAL |
| 2004 | US | Terminal Forest | 90,000,000 | Discontinued or settled | unknown | Forestry | Forest products  | Treaty | Developed | Developed | UNCITRAL |
| 2004 | Ukraine | Western NIS Enterprise Fund | unknown | Discontinued or settled | unknown | Agro-processing | Edible Oils  | Treaty | Developed | Developing | ICSID |
| 2002 | Mexico | GAMI | 27,800,000 | Decided in favour of state | n/a | Food crops | Sugar  | Treaty | Developed | Developing | ICSID |
| 2002 | US | Canfor | 250,000,000 | Discontinued or settled | unknown | Forestry | Forest products  | Treaty | Developed | Developed | UNCITRAL |
| 2002 | Egypt | Champion Trading and Ameritrade | 365,000,000 | Decided in favour of state | n/a | Non-food crops | Cotton  | Treaty | Developed | Developing | ICSID |
| 2001 | Guyana | Booker | 9,900,000 | Discontinued or settled | n/a | Food crops | Sugar  | Treaty | Developed | Developing | ICSID |
| 1999 | Canada | Pope & Talbot | 507,500,000 | Decided in favour of investor | 460,000 | Forestry | Forest products  | Treaty | Developed | Developed | ICSID |
| 1998 | Paraguay | Eudoro A. Olguín | 1,300,000 | Decided in favour of state | n/a | Agro-processing | Grain  | Treaty | Developing | Developing | ICSID |
| 1987 | Sri Lanka | AAPL | 8,000,000 | Decided in favour of investor | 460,000 | Fishing | Fish  | Treaty | Developed | Developing | ICSID |
| 1984 | Liberia | Liberian Eastern Timber Corporation | unknown | Decided in favour of investor | 8,750,286 | Forestry | Forest products  | Contract | Developing | Developing | ICSID |
| 1984 | Guinea | Atlantic Triton Company Limited | unknown | Decided in favour of investor | unknown | Fishing | Fish  | Contract | Developed | Developing | ICSID |



Oil palm plantation in Goa, India.

GLOSSARY

This glossary defines key terms used in the briefing note, or generally relevant to understanding international investment treaties and investor–state arbitration.

1. **Asset-based definition of investment:** This type of definition often allows for any type of asset owned or controlled by a covered investor to fall within the treaty’s scope of protection. Asset-based definitions can also include exhaustive or illustrative lists of items that qualify as covered investments under the relevant treaty, alongside characteristics of covered investments.
2. **Enterprise-based definition of investment:** This type of definition allows for protection of investments that constitute an enterprise. It can therefore exclude certain assets, and so is more closely aligned with the notion of a foreign direct investment, which typically requires acquisition of a lasting interest in the host state.⁴⁴
3. **Expropriation:** Investment treaties commonly establish conditions for the lawfulness of expropriation, or “takings” of property. Direct expropriation generally involves physical confiscation, nationalization or another form of transfer of ownership to the state. Indirect expropriation refers to acts or measures that deprive the investor from enjoying actual or expected benefits of an investment. Treaties often state that if a government expropriates an investor’s property, or adopts measures that have the effect of an expropriation, the state must fully, fairly and promptly compensate the investor.
4. **Fair and equitable treatment (FET):** This vague standard has been subject to different interpretations that range along a spectrum of stringency. Some tribunals have interpreted the standard relatively narrowly, determining that only conduct that is egregious and shocking will breach the obligation to accord FET. Others have applied a far higher standard that requires host states not to undermine the “legitimate expectations” of an investor with respect to its investment. The FET obligation has been relied upon extensively by investors to challenge a range of host state acts and omissions.
5. **Full protection and security (FPS):** This obligation requires host states to protect covered investors and their investments from harm or damage. According to some tribunals, this entails an obligation to provide only protection against physical harm (e.g., destruction of buildings and property). Other tribunals have interpreted it more broadly, concluding that it also requires protection against harm caused by changes in the law or government policies.
6. **Non-discrimination:** Most investment treaties require host states not to discriminate: i) between foreign and domestic investments (“national treatment” obligation); and ii) among foreign investors from different home countries (“most-favoured nation,” or MFN, obligation). MFN has been interpreted as allowing investors to “cherry-pick” more favourable commitments or procedural rules from other treaties, resulting in an unintended multilateralization of treaties intended to be bilateral only.
7. **Pre- and post-establishment phases:** Investment treaties can require application of relevant obligations during both the pre-establishment phase (i.e., the phase during which an investor makes, or seeks to make, an investment) and the post-establishment phase (i.e., the phase during which an investor implements its project or begins operations).
8. **Umbrella clause:** An umbrella clause is an investment treaty provision that requires the host state to comply with commitments or obligations owed to covered investors and their investments. Depending on the specific provision and how it is interpreted, umbrella clauses can be used to enforce contractual commitments made by states, or even obligations the state has assumed under its general laws.
9. **Restrictions on performance requirements:** Certain investment treaties restrict or entirely prohibit the introduction and/or enforcement of performance requirements, which are conditions “that investors must meet in order to establish or operate a business, or to obtain some advantage offered by the host state.”⁴⁵ Performance requirements can be used to strengthen linkages between a foreign investment and the domestic or local economy.⁴⁶

44. UNCTAD, *Foreign Direct Investment (FDI)*, <[https://unctad.org/en/Pages/DIAE/Foreign-Direct-Investment-\(FDI\).aspx](https://unctad.org/en/Pages/DIAE/Foreign-Direct-Investment-(FDI).aspx)>.

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& Answers” (International Institution for Sustainable Development, 2012), p. 27 <http://www.iisd.org/pdf/2011/investment_treaties_why_they_matter_sd.pdf>.

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