



The Commitment to Development Index: 2017 Edition¹

Methodology to analyze pro-development content in International Investment Agreements (IIA)

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A. Clarifications:

What types of agreements are being analyzed?

The agreements analyzed are international investment agreements (IIAs), which are mainly Bilateral Investment Treaties (BITS) but also including 'other IIAs' (Free Trade Agreements, Economic Partnership Agreements, etc.) with *BIT-equivalent provisions*². When analyzing regional agreements, the score is extended to all the parties involved as if it was a bilateral agreement.

What countries are included in the analysis?

The IIAs analyzed are those in which the parties are, on one side, one of the 27 developed countries selected by the Center for Global Development (CGD) for the Commitment with Development Index (CDI) and, on the other hand, a developing country. The criteria to establish if a country is a developing country in terms of the analysis is the OECD's list of ODA recipient countries³. For each of the 27 developed countries, the analysis includes the following IIAs:

- The latest three IIAs that have entered into force (and that fulfill the 'developing country' criteria).
- The three most recent IIAs that entered into force prior to 2014 (and that fulfill the 'developing country' criteria).
- The three most recent IIAs that entered into force prior to 2018 (and that fulfill the 'developing country' criteria).
- The three most recent IIAs that entered into force prior to 2004 (and that fulfill the 'developing country' criteria).

What approach has been taken towards the role of IIAs in development?

Today, the international community recognizes sustainable development, social well-being or the promotion and protection of human rights as guiding principles for all policymaking in developing and developed countries, including in investment policymaking (Hindelang et al., 2015). Today, it is no longer enough that investment

¹ This paper has been published as part of the Center for Global Development's Methodological overview paper done for the 2017's Edition of the Commitment to Development Index, which can be consulted here: https://docs.google.com/document/d/1xoMYuccl3CVwiY1K2CmYzXdkiCUM4Y_MtBiV9BV8T5k/edit#heading=h.zdkejwgg0yt

² These "other IIAs" (sometimes named as Treaties with investment provisions) encompass a variety of international agreements with investment protection, promotion and/or cooperation provisions, including: free trade agreements (FTA), regional trade and investment agreements, economic partnership agreements (EPAs), cooperation agreements, association agreements, economic complementation agreements, closer economic partnership arrangements and trade and investment framework agreements (TIFAs). Out of these, we are only analyzing those that include obligations commonly found in BITS, specifically substantive standards of investment protection and Investor-State Dispute Settlement (ISDS) system.

³ The OECD's Development Assistance Committee (DAC) list of ODA Recipients, effective as at 1 January 2015 for reporting on 2014, 2015 and 2016 ODA flows, can be consulted here: <http://www.oecd.org/dac/stats/documentupload/DAC%20List%20of%20ODA%20Recipients%202014%20final.pdf>

creates jobs, contributes to economic growth or generates foreign exchange. Countries increasingly look for investment that is not harmful for the environment, which brings social benefits, promotes gender equality, and which helps them to move up the global value chain. Countries are also more conscious and aware about the economic and social costs of unregulated market forces (UNCTAD, 2015a: 127-128⁴). Therefore, IIAs need to find an equilibrium between ensuring that countries retain their right to regulate for pursuing public policy interests (including sustainable development objectives) while contributing to a favorable investment climate and protecting foreign investors from unjustified discrimination measures by the host State. This approach to IIAs is the one defended today by many individual States and has also been endorsed recently by some of the most relevant international organizations and multilateral forums (explicitly in the 2012's UN Guiding Principles on Business and Human Rights, the 2015's Addis Ababa Action Agenda on Financing for Development and UNCTAD's Investment Policy Framework for Sustainable Development and implicitly in the 17th Goal of the UN 2030 Agenda for Sustainable Development).

What dispositions of the IIAs are being analyzed?

The preamble, the Fair and Equitable Treatment (FET) clause and the investor-state dispute settlement system (ISDS) are the dispositions analyzed. Any other clause which content applies to the whole treaty (including these three dispositions) will also be analyzed⁵.

What criteria have been followed for the selection of clauses?

When selecting which IIA's clauses to analyze, the goal has been to find certain clauses that could serve as general indicators of how much has 'sustainable development content' be included in the whole agreement, in order to add in this perspective into the 'Investment Component' of the Commitment to Development Index. Although the three selected clauses (the Preamble, Fair and Equitable Treatment and ISDS) represent a very relevant part of the content of IIAs and are sufficient to characterize the whole agreement in terms of sustainable development, with this selection the author doesn't pretend to describe what a 'pro development' IIA model would look alike. In fact:

- This analysis has left out some very common and relevant IIA clauses (National Treatment, MFN, Performance Requirements, Expropriation...).
- In the selected clauses, some very relevant issues (such as the decision of including or not an ISDS system in the treaty) are not included in the analysis as there are no clear conclusions on their impact on development.

What score is given?

Following the criteria explained below, each of the three dispositions analyzed is given a score ranging from 0 to 2 depending on how much their content contributes to the capacity of the agreement to promote pro sustainable development foreign investments and to protect the State's right to regulate for pursuing legitimate sustainable development objectives.

Defining the boundaries of sustainable development.

⁴ UNCTAD (2015a): *World Investment Report 2015*. United Nations Conference on Trade and Development. Geneva.

⁵ For example, article 14 of Finland-Panama BIT states that "Nothing in this Agreement shall be construed as preventing a Contracting Party from taking any action necessary for the protection of (...) human, animal or plant life or health".

Increasingly, IIAs permit public policy measures, otherwise inconsistent with the treaty, to be taken under specified and exceptional circumstances. They do so by including safeguards or policy space exceptions related with 'public policy objectives'. Most of these public policy objectives could potentially be considered as related with and constitutive of sustainable development. In order not to arrive to an absurd criteria according to which if you don't say the magic words ('sustainable development' or 'human rights') no score is deserved, this methodology establishes a distinction among the most commonly used 'public policy' wording, based on how strong their ties are with the protection and promotion of human rights and sustainable development objectives, in the context of foreign investments.

Applying this criteria, the following objectives are considered to be 'more closely related' with sustainable development and, therefore, deservers of scoring: the establishment and promotion of internationally recognized labor rights and environmental standards; the promotion of public health; the protection of human life or health; the provision of essential social services; and the conservation of living or non-living exhaustible natural resources. On the other hand, these other objectives have been considered as only indirectly related with sustainable development and they don't deserve scoring when included alone in the treaty's social safeguards: the prevention of diseases and pests in animals or plants; the protection of animal or plant life; the maintenance of public order; the protection of public morals; the protection of national treasures of artistic, historic or archaeological value; the preservation of cultural or linguistic diversity; and some national security exceptions (the protection of essential security interests or the maintenance of international peace and security).

Interpreting circular arguments in IIAs.

Some IIAs include provisions with the following (or similar) formula: "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure consistent with this Chapter that is in the public interest, such as measures to meet health, safety or environmental concerns or reasonable measures for prudential purposes". This formula generates a circular argument (the Chapter allows the adoption of measures consistent with the Chapter) and a conditionality that hinders the evaluation of the recognition of the State's right to regulate contained in that provision. It is considered that this provision doesn't provide any added value and, therefore, the score of the Preambles and FET clauses containing that formula will be determined based on the content of rest of the Chapter, as if this provision didn't exist.

B. Analyzed dispositions:

1. Preamble:

Justification:

The preamble is a non-dispositive part of IIAs and, therefore, doesn't set out binding obligations for the parties. However, it plays a significant role in interpreting substantive IIA provisions⁶ and even filling the gaps that might exist elsewhere in a treaty⁷. By identifying and clarifying the objectives of the treaty on the preamble, parties provide transparency on their intentions, predictability on the scope of the agreement and important guidance for tribunals in investment disputes. These transparency, predictability and guidance are very much needed in IIAs, as experience shows that a vague and broad formulation of its provisions has allowed expansive, unexpected and inconsistent interpretations by arbitral tribunals; and it has also facilitated investors to challenge core domestic policy decisions of the host State in areas such as environment, energy or public health (UNCTAD, 2015a: 125-126, 142).

As UNCTAD puts it in the 2015 review of their IPFSD: "When a preamble refers to the creation of 'favourable conditions for investments' as the sole aim of the treaty, tribunals will tend to resolve interpretive uncertainties in favour of investors. In contrast, where a preamble complements investment promotion and protection objectives with other objectives such as sustainable development or the Contracting Parties' right to regulate, this can lead to more balanced interpretations and foster coherence between different policy objectives/bodies of law" (UNCTAD, 2015b: 92)⁸.

This methodology is applied to the analysis of Free Trade Agreements (FTAs) and other agreements that include other chapters not related with investment protection and promotion. In these cases, the following criteria has been followed to determine what preamble content had to be analyzed:

- If the 'investment chapter' has its own preamble, this should be the analyzed text and the treaty's preamble would only be analyzed in the case it includes any interpretation rule that applied to the whole treaty. For example, the Preamble of the New Zealand – Malaysia FTA establishes "the rights of their Governments to regulate in order to meet national policy objectives".
- If the 'investment chapter' hasn't got its own preamble, the treaty's preamble is the one analyzed (together with the section where the FTA objectives are listed). If the FTA includes a detailed list of objectives, this will be the text used to evaluate the references of the Preamble to sustainable development and human rights (see, for example, the Preamble and article 1.2 of the Canada-Hondura's FTA).
- In any of the two previous cases, the content of the preamble would only be considered as relevant if it refers concretely to the objectives of the treaty or if it establishes specific rules to interpret its content (for example, "Parties are determined to implement this Agreement with the objectives to preserve and protect the environment and to ensure the use of natural resources in accordance with the objective of sustainable development"). In contrast, generic

⁶ The interpretative value of the preamble of an international convention is beyond question. Article 31 of the 1969 Vienna Convention on the Law of Treaties states that 'the context for the purpose of the interpretation of a treaty shall comprise', in particular, 'the text, including its preamble and annexes'.

⁷ See M. K. Yasseen (1976): L'interprétation des traités d'après la Convention de Vienne sur le droit des traités, Académie de droit international (Excerpt from the Recueil des cours, Volume III-1976), A. W. Sijthoff, Leyden, p. 35.

⁸ UNCTAD (2015b): *Investment Policy Framework for Sustainable Development 2015 review*. United Nations Conference on Trade and Development. Geneva.

statements without that specific approach wouldn't be considered as relevant and, therefore, wouldn't be analyzed (for example, "the Parties aim to create new employment opportunities, and improve health and living standards in their respective territories")⁹. The reason is that, as preambles do not directly establish rights and obligations of the Parties but are only aspirational statements and as preambles can never take precedence over the treaties' dispositive provisions¹⁰, in order to be potentially relevant (providing transparency on the intentions of the parties, predictability on the scope of the agreement and important guidance for tribunals in investment disputes) its content must be specific and unambiguous, or at least shed some light on the intention of the Parties in case of conflict between the IIA's obligations and sustainable development objectives or other human rights obligations.

Score criteria

- Zero points if:
 - o The preamble doesn't specify the treaty's objectives or if specifying them it doesn't mention any public policy or general interest objectives; or
 - o The preamble mentions public policy or general interest objectives, but does it without the required concretion or precision, in a way that cannot be used as a guiding principle for the treaty's interpretation in case of conflict between the IIA's obligations and the State's sustainable development objectives. Examples of language that lack the required precision are:
 - Parties recognize that the promotion and the protection of investments of investors of one Party in the territory of the other Party 'will be conducive' to the promotion of sustainable development.
 - Parties recognize that the development of economic and business ties can promote respect for internationally recognized labour rights.

- One point if:
 - o The preamble recognizes, through ambiguous language, the parties' right to regulate, even if it does it mentioning sustainable development objectives or human rights. We will consider the following expressions as 'ambiguous language':
 - The parties should not derogate from their international obligations in order to promote and protect investment;
 - Parties reaffirm their commitment to observe internationally recognize labour standards.
 - The treaty's objectives can be achieved without relaxing health, environmental or other public policy objectives
 - Nothing in the Agreement shall prevent either Parties or its investors to take advantage of whichever international agreements (to which both Parties are signatories) that are more favourable to their case. Or

⁹ Both examples belong to the Preamble of the EFTA-Ukraine FTA.

¹⁰ See M. K. Yasseen (1976), op cit. p. 35.

- The preamble recognizes, in a clear and explicit manner, the parties' right to regulate, but without mentioning any public policy objective that can be considered as equivalent to sustainable development.
- Two points if:
 - The preamble explicitly clarifies that the IIA is not only intended to protect and promote investment, but also to serve other public policy interests (explicitly mentioning sustainable development and human rights, or any of the public policy objectives that have been considered as equivalent). Or,
 - The preamble includes a clear affirmation that the agreement guarantees, together with the States obligations, the State's right to regulate for pursuing legitimate sustainable development objectives (explicitly mentioning sustainable development and human rights, or any of the public policy objectives that have been considered as equivalent). We also consider the following expressions as 'clear affirmation' of the State's right to regulate (as it provides arbitrators with clear indications of the 'high value' that Parties give to sustainable development objectives¹¹):
 - The treaty is not intended to override the parties' national sustainable development or human right promotion objectives.
 - The treaty is meant to be in line with the parties' international sustainable development or human rights obligations.
 - Parties wish to achieve the objectives of the Agreement in a way consistent with [the promotion of sustainable development and the protection of human rights].
 - Parties are determined to implement this Agreement with the objectives to [preserve and protect the environment and to ensure the use of natural resources in accordance with the objective of sustainable development].
 - Parties may adopt measures to protect human, animal or plant life (for example) if the measure is not arbitrary or unjustifiably discriminatory and is not a disguised restriction to trade or investment.

¹¹ See, for example, Adel A Hamadi Al Tamimi v. Sultanate of Oman (ICSID Case No. ARB/11/33), Award, 3 November 2015.

2. **Fair and Equitable Treatment (FET):**

Justification: the FET clause was originally designed to protect foreign investors from government misconduct not captured by other standards of protection. However, due to its largely undefined nature (what does 'unfair' or 'inequitable' mean exactly?) and the ambiguous way it has been traditionally drafted, the FET clause has turned into an all-encompassing provision that investors have used to challenge any type of governmental conduct that they deem unfair, leaving the task of determining the meaning of the FET standard to arbitral tribunals (UNCTAD, 2015a: 137). A particularly challenging issue that has arisen through arbitral practice relates to the use of the FET standard to protect investors' 'legitimate expectations', restricting countries' ability to introduce or change investment-related policies (including those for the public good and related with sustainable development) if they have a negative impact on individual foreign investors.

Score criteria:

- Zero points: given the background of this clause and its potential effects, a zero will be given to:
 - o Any IIA that includes an unqualified FET standard guaranteeing a 'fair and equitable treatment' to the foreign investor with the usual generic and imprecise drafting, without detailing the reach of the obligation or establishing any limits to its application.
 - o Some IIAs state as 'inappropriate to override environmental or labour regulation to promote or protect investment' and compromise that Parties 'shall strive to ensure that they do not waive or otherwise derogate from such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an investment'. This is not considered a sufficient improvement due to the following reasons: naming it as 'inappropriate' is a much softer language than the one used in the FET provision; the main concern with the FET provisions is not related with the overriding of legislation to attract investment, but with the pressure they exert over the host state's policy space; and, finally, because many other wording options are being considered as valid under this methodology (recognizing the right to regulate, for example).
- One point:
 - o If the IIA qualifies the FET standard by reference to the minimum standard of treatment of aliens under customary international law (MST/CIL). This approach may raise the threshold of State liability and help to preserve States' ability to adapt their policies to pursue public policy objectives (UNCTAD, 2015a:137). The reason why this option doesn't deserve 2 points already is that it isn't precise enough yet and hasn't prevented arbitrators making expansive, unexpected and inconsistent interpretations. A mere reference to 'commonly accepted rules of international law' will not be considered worthy 2 points either.
Or,
 - o If the FET clause clarifies the obligations that States assume through an open-ended list of obligations. The formulation may be 'positive', specifying what the standard includes (e.g. the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings), or 'negative', explaining what the standard does not include (e.g. establishing that the FET standard does not include a stabilization

obligation that would prevent the host State from changing its legislation) (UNCTAD, 2015a:138). The reason why this option doesn't deserve 2 points is that an open-ended/indicative list of obligations, by its own nature, leaves open the potential for expansion of the meaning of FET through subsequent arbitral interpretations. Or

- If the IIA includes a clear and unambiguous affirmation that the FET clause is not intended to override the State's right to regulate for pursuing national public policy objectives or that the parties preserve the right to regulate for legitimate policy objectives, but without mentioning sustainable development objectives or human rights (or any of the public policy objectives that have been considered as equivalent to sustainable development¹²). Or
 - If States decide omitting the FET clause. Although it is impossible to establish a direct correlation between this decision and a greater commitment of States with development, given the 'dark history' of the use of this clause and that the desired protection and promotion of foreign investments can be achieved through other clauses, the withdraw of the FET clause should be interpreted as an indication that parties have tried to find a better equilibrium between the investor's protection and the State's right to regulate.
- Two points:
- If the FET clause clarifies with an exhaustive/closed list the State's specific obligations (e.g. a prohibition to deny justice or flagrantly violate due process, engage in manifestly abusive or arbitrary treatment). To be reliably exclusive i.e. closed as a list, the treaty would need to say something similar to: 'requires each party ONLY not to deny... etc.'¹³
 - If the IIA includes a clear and unambiguous affirmation that the FET clause is not intended to override the State's right to regulate for pursuing legitimate sustainable development or human right promotion objectives. As seen for the Preamble, the following expressions will be consider 'clear affirmations' of the State's right to regulate:
 - The treaty is not intended to override the parties' national sustainable development or human right promotion objectives.
 - The treaty is meant to be in line with the parties' international sustainable development or human rights obligations.
 - Parties wish to achieve the objectives of the Agreement in a way consistent with [the promotion of sustainable development and the protection of human rights].
 - Parties are determined to implement this Agreement with the objectives to [preserve and protect the environment and to ensure the use of natural resources in accordance with the objective of sustainable development].
 - Parties may adopt measures to protect human, animal or plant life (for example) if the measure is not arbitrary or unjustifiably discriminatory and is not a disguised restriction to trade or investment.

¹² For a precise description of what public policy objectives can be considered ad equivalent to 'sustainable development' see the last paragraph of the introduction to this paper.

¹³ This last clarification was included after consulting with professor Gus Van Harten, Osgoode Hall Law School of York University, gvanharten@osgoode.yorku.ca.

3. Investor-State Dispute Settlement System (ISDS):

Justification: The existence of a system that effectively solves the controversies that may occur between a foreign investor and the host State (known as 'Investor-State Dispute Settlement' or ISDS) should be considered, in the context of this analysis, as positive as long as it contributes to promote and protect investments with a positive impact in a sustainable and inclusive development of the host State and to protect foreign investors against States measures that are unjustified and undoubtedly discriminatory. However, from the standing point of public policy objectives, there are no grounds to justify per se the granting of greater rights to foreign investors than those recognized to the rest of the affected parties (host States, domestic enterprises or other affected parties) or the privileged protection of property rights and commercial interests above any other rights and interests at play (including those public interest objectives related with sustainable development and human rights).

Precisely, the investor-State arbitration (the ISDS system included in most of the current IIAs) suffers from a serious legitimacy crisis due to significant drawbacks in its substance, procedure and functioning. The following common flaws of the ISDS system could be highlighted (UNCTAD, 2015a:128 and 147, except when indicated):

- It grants foreign investors greater rights than those of domestic investors and a privileged status relative to anyone else in international law.
- It provokes expansive, unexpected and inconsistent interpretations by arbitral tribunals.
- It can threaten democratic choices, judicial independence, regulatory flexibility and public budgets (Van Harten, 2015)¹⁴.
- It exposes host States to legal and financial risks unforeseen for the parties and beyond clear-cut infringements of private property, without bringing any clear additional benefits.
- It elevates property rights over the State's right to regulate and other human rights.
- It can create the risk of a 'regulatory chill' on legitimate government policymaking.
- In most of the cases, it allows for fully confidential arbitration and denies the right to intervene to all parties with a direct and existing interest in the outcome of the dispute.
- It lacks sufficient legitimacy (in terms of transparency, independence, impartiality or due process).
- It does not allow for correcting erroneous decisions.
- It is highly expensive for users.

It would be too pretentious (and beyond the scope of this methodology) to try to establish what ISDS system would be the most adequate to promote sustainable development (in terms of guaranteeing the proper equilibrium between the promotion and protection of responsible investments and the protection of the State's right to regulate for pursuing public policy objectives). In any case, it seems correct to state that any reform introduced with the objective of moving the existing system towards a more independent, fair and open model (Van Harten, 2015:7), would help tackling the mentioned weaknesses. By making the ISDS process more elaborated, predictable and transparent (UNCTAD 2015a:124) it would make IIAs better equipped to promote the foreign investments that can foster sustainable development.

¹⁴ Van Harten, Gus (2015): *A Parade of Reforms: The European Commission's Latest Proposal for ISDS*. Osgoode Legal Studies Research Paper Series, 102. Ontario.

The three mentioned principles – *independence, fairness and openness* – plus *subsidiarity* (Van Harten, 2015:7), will be the criteria used by this methodology to analyze and evaluate the ISDS model included in each IIA. In order to provide some light into the interpretation on how ISDS can fulfill these four principles, the following paragraphs illustrate some dispositions which content should be consider as positive under each of them¹⁵:

- a) Independent: understood as institutional safeguards to enhance the impartiality of arbitrators and to reduce the risk of conflict of interests. An ISDS system will be considered independent when the IIA includes measures such as:
- An objective and secure method of case assignment (arbitrators to be chosen from a roster pre-established by parties, for example) instead of a case-by-case appointment; or
 - Prohibitions on double dipping as a lawyer and arbitrator; or
 - The introduction of a code of conduct for arbitrators.
- b) Fair: understood as equitable treatment to all affected parties in the dispute, both prior to and during the proceeding. An ISDS system will be considered fair when the IIA includes measures such as:
- The inclusion of a 'right of standing' to all affected parties¹⁶. The recognition of this right should come together with the requirement of the public notice of disputes, in order to allow the affected parties to apply¹⁷.
 - Allow States to exclude from ISDS certain sectors considered particularly sensitive (due to, for example, their relevance for sustainable development objectives) in order to narrow the range of situations in which foreign investors may resort to international arbitration and to reduce their exposure to legal and financial risks.
 - The recognition of the State's right to initiate the arbitration procedure. This recognition would only be considered an improvement if the treaty includes provisions of foreign investors responsibilities. Without obligations for foreign investors included under the IIA, the agreement wouldn't be recognizing any interest that States could claim to the arbitration tribunal. An example of these provisions would be (UNCTAD, 2015a: 159-160): to require investors to comply with laws of the host State when making an investment; to stipulate that the investor could be held legally responsible for damage caused to human health, human rights or the environment; or to require tribunals to consider an investor's compliance with CSR standards when deciding an ISDS case.
 - Introduce an appeals mechanism (bilateral, regional or multilateral) in ISDS that would be able to review arbitral awards as regards errors of law and in the assessment of facts (UNCTAD, 2015a: 150).
 - Include measures to moderate the remedial powers of tribunals in ISDS. For example: limiting the available remedies to monetary damages and restitution of

¹⁵ The definitions of the concepts 'independent, fair, open and subsidiary' used in this methodology are based in the ones proposed at (Van Harten, 2015).

¹⁶ A 'right of standing' means you are a full party alongside the claimant and respondent: you have all rights to participate in the proceedings by accessing all documents, receiving notice as part of the proceedings, submitting evidence, making full legal arguments, proposing witnesses, questioning witnesses to the extent of your interest, etc. This clarification of the 'right of standing' concept was obtained by the author from its conversations with professor Gus Van Harten, Osgoode Hall Law School of York University, gvanharten@osgoode.yorku.ca.

¹⁷ The 'right to intervene' (amicus or intervenor status) is a lesser right of participation than the 'right of standing', and therefore cannot be considered sufficient for a party with a direct interest in the proceeding. According to the adopted methodology, the 'right to intervene' will be considered and analyzed under the 'openness' category.

- property or excluding the order to withdraw or amend a measure (UNCTAD, 2015a: 144-145).
- Allow the State parties to issue binding interpretations on how the provisions should be interpreted, making the tribunal obliged to respect them (these interpretations can also be done with respect to on-going ISDS cases).
- c) Open: understood as measures to guarantee a public system (in the manner of an open court) and away from the large-scale secrecy in ISDS. It will be considered that the ISDS system is open when the IIA includes measures such as:
- Make documents (submissions by disputing parties, decisions of the tribunal, etc.) publicly available (even if they are subject to certain safeguards on confidential information).
 - Hearings to be public and the 'right to intervene' (amicus or intervenor status) recognized to all interested parties (which allows them to make submissions, for example).
 - Some IIAs offer the claimant the possibility of submitting their claim under the UNCITRAL Arbitration Rules (UNCITRAL, 2014a)¹⁸, as an alternative to the ICSID Convention or any other arbitration institutions¹⁹. This provision will not be considered enough improvement under this methodology. Despite the improvements that these Rules introduce in terms of transparency and openness on ISDS procedures, the fact that these improvements would only be applied in a dispute if the claimant decides so, greatly reduces the relevance of the reform.
 - If the State has adhere to the UN Convention on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL, 2014b)²⁰, it will be consider as sufficient under this methodology with independence to the content of a particular IIA. The difference with the previous case is that the adherence to this Convention implies that UNCITRAL Transparency Rules would be directly applicable (see art.2.1 of the Convention), in the case of a dispute in which the claimant is national of a State also party to the Convention²¹.
- d) Subsidiary: it will be considered an improvement the inclusion of any measure that obliges the investor to make use of local remedies before initiating ISDS proceedings (i.e: exhausting local remedies or a certain period of time of litigation) or any measure which reduces the privileged procedural treatment given to foreign investors by, for example, preventing investors from seeking relief for the same violation in multiple forums (UNCTAD, 2015b:107)²². It is

¹⁸ UNCITRAL (2014a): *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*. United Nations Commission on International Trade Law. New York.

¹⁹ Since April 1st 2014, UNCITRAL Transparency Rules (UNCITRAL, 2014a) entered into effect and apply to investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a IIA concluded after that date. For these Rules to be applied in arbitrations pursuant IIAs concluded before 1st April 2014, both 'disputing parties' have to agree to their application (art.1.2 of the UNCITRAL Transparency Rules).

²⁰ UNCITRAL (2014b): *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency")*. United Nations Commission on International Trade Law. New York.

²¹ As at February 24th 2017, the signatory countries to the Convention are: Belgium, Canada, Congo, Finland, France, Gabon, Germany, Italy, Iraq, Luxembourg, Madagascar, Mauritius, Netherlands, Sweden, Switzerland, Syrian Arab Republic, United Kingdom and the US. More information at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html

²² The decision of considering this principle as positive from the standing point of sustainable development is made with the understanding that: 1) from the perspective of public policy objectives, the priority must be to promote and facilitate that States count with a judiciary system capable to solve in an effective and impartial manner and in application of the law any conflict under its jurisdiction; 2) On the other side, one of

understood that the subsidiarity principle has been satisfied if the IIA includes measures such as:

- Require foreign investors to exhaust local remedies unless they show that they are manifestly ineffective or not reasonably available.
- Require foreign investors to litigate the dispute in domestic courts for a certain period of time (i.e: 18 months) before being able to recourse to international investment.
- Condition the initiation of the ISDS proceedings to the investor's waiver of any right to start proceedings under national courts or tribunals.
- Impede the investor to initiate an international arbitration if a court in the first instance in either Contracting Party has rendered its final decision on the merits.
- Impede the investor to submit for resolution under courts of Justice (or administrative tribunals) the same investment dispute that has been submitted under the ISDS arbitrations.

Score criteria:

- Zero points: a treaty would obtain zero points if it has introduced dispositions in 1 or less out of the abovementioned categories.
- One point: a treaty would obtain one point if it has introduced dispositions in 2 or 3 out of the abovementioned categories.
- Two points: a treaty would obtain two points if it has introduced dispositions in all 4 of the abovementioned categories.

the main functions of the International arbitration system is to protect foreign investors from situations of lack of effective judicial protection; 3) that, in certain occasions, national tribunals are not capable or not willing to provide effective judicial protection to foreign investors; 4) and that, finally, access to the international arbitration system as a claimant is a privilege only recognized to foreign investors, but not to any of the other interested parties.