

## The international financial architecture as a global public good

### Weaknesses of this framing, and suggestions for improvements and strategy

Reflections about the framework of “global public goods” may help the High-Level Advisory Board on Global Public Goods (HLAB) avoid mistaken diagnoses and incomplete prescriptions, and toward some negotiation advise.<sup>1,2</sup> The legitimacy challenges of international financial institutions are *not* primarily failures to strengthen and protect global public goods<sup>3</sup> – be it “pure” non-rival and non-excludable public goods in Samuelson’s sense,<sup>4</sup> - or in the broader sense of the *Common Agenda*: Pareto improved outcomes with cross-border benefits to some without loss to anyone.<sup>5</sup> *Disagreements about standards for an equitable distribution of benefits and burdens is an urgent and important topic that may hinder progress.*

- HLAB should encourage other UN bodies to advance discussion on collective goals
- HLAB should help stakeholders and states identify common objectives and policies
- HLAB can raise awareness of the financial architecture as a public good in relevant ongoing negotiating venues, including UNCITRAL and the WTO

The “international financial architecture” may include only banking and financial regulation. I here also include investment treaties and arbitration, as a legalized system that is hotly contested – and which thus may be a suitable topic for the HLAB. Four main points:

### 1 International financial institutions are not global public goods, and were never so intended

Talk of ‘global public goods’ suggests that international financial institutions were either *intended* or at least *may be or provide* “global public goods.” We may be misled to use such a label from the belief that investment protection stimulates investment of mutual interest, in turn fostering economic development.<sup>6</sup>

Those assumptions have three flaws:

- These was not the objectives of the prime movers for investor–state arbitration, who were not investors but officials of the World Bank.<sup>7</sup>
- it is at best an open question whether investment treaties lead to more investment, notwithstanding the beliefs of some tribunals and negotiators at the UNCITRAL and ISDS Reform process.<sup>8</sup>
- The evidence is not clear whether such investments increase economic development. Investments may even hamper such efforts.

So claims that these arrangements are or should be a public good may be false: they do not actually benefit all, and may never have been intended to. They are rather club goods that may impose externalities on non-members. The HLAB should not provide and protect these existing arrangements, but contribute to reform to make them more fair, and reduce suspicion that they are not.

### 2 Objective: More equitable distribution

It is important to change the financial architecture. But the label “public good” hides the distributive conflicts involved in making it *more* like public goods in the sense of the *Common Agenda*, to make the global economy more *equitable* and *sustainable*.<sup>9</sup> A more equitable distribution may be difficult from the status quo: *Pareto improvements are neither necessary nor sufficient*. And the standards of global distributive justice are contested, yet may fuel current populist reactions to multilateral arrangements.

Any change toward more equitable distribution may burden some current parties relative to their current situation. So changes cannot ensure gains for some without making anyone worse off. The distribution of advantages and burdens must be more equitable, and shown to be so, for all states *and for*

*their populations*, lest they continue to regard the system as exploitative, fueling destabilizing and justified mistrust.<sup>10</sup>

There are at least two disconcerting topics that merit careful, empirically and normatively informed scrutiny.

- Does the present architecture unduly privilege some (Northern) investors and their states, perpetrating global injustice?<sup>11</sup> This is in part a question of whether arbitral tribunals are biased and arbitrary,<sup>12</sup> possibly remedied by more diversity among the arbitrators on a permanent tribunal.<sup>13</sup> But the substantive and systemic effects of the treaties and architecture themselves may also reflect and perpetuate unfair power imbalances.<sup>14</sup>
- Secondly, critics charge that the financial regimes, combined with other international regulations, hamper domestic authorities' policy space and political will to promote development, poverty alleviation or redistribution.<sup>15</sup> Such negative impacts – and even mistaken suspicion thereof – have dire consequences for trust in domestic politicians, possibly fueling populist anti-elitist calls to renationalize authority.

### 3 Negotiation challenges

The problem structure of improving the international financial architecture is not one of economists' 'pure public goods' accounts, which cast recalcitrant states as shirking free riders, and prescribe direct or indirect sanctions, shaming or outcasting. The negotiation strategies, mediators' tasks and contributions of the HLAB and the UN are different – and more difficult.<sup>16</sup>

Three main challenges are

- to secure sufficient agreement among several veto players and others on what would be permissible and complex distributive issues;
- agree on how to move toward such common solutions;
- with mechanisms that promote sufficient compliance.

Note that disagreement on the first issue - how to allocate future benefits and burdens – often hinders movement toward mutually beneficial common solutions:<sup>17</sup> Disagreements about location on the Pareto frontier often prevent parties moving toward it.<sup>18</sup>

Two further confounding factors merit mention:

- the *existing* financial systems may enhance but also constrain the solutions and processes. Existing institutions and regimes may at best be reformed rather than replaced. Regional agreements/clubs, or sector/issue area regimes may be sufficiently workable second best.<sup>19</sup> There is strong path dependency, partly since several veto player among the institutional designers can predict the impact on themselves. We must rebuild the ship at open sea, rather than reuse the best parts in dry dock.<sup>20</sup>
- The *Common Agenda* urges "Inclusive multilateralism" – but must still avoid deadlock and contested multilateralism. Negotiations should include private sector, non-state actors, parliaments and subnational public actors<sup>21</sup> – and some may "add various vested interests, including practitioners of international investment law (i.e. the international investment arbitration profession), parliamentarians, and various non-governmental organizations."<sup>22</sup> This *may* reduce the risk that international agreements shifts domestic agendas and bargains away from the powerless, and may ensure that domestic actors can mobilize. The benefits notwithstanding, two risks should temper the drive to inclusiveness. The risk of deadlock increases with the number of disagreeing de facto veto players and with the complexity of issues. A further constraint on getting to a more equitable solution is that if sufficiently many able states become sufficiently dissatisfied with the results, they may exit and instead agree alternative institutions – adding to the risks of forum shopping.<sup>23</sup>

## 4 Some negotiation suggestions

These perspectives yield some recommendations for the HLAB, frequently reinforcing observations in the background paper and Common Agenda.

1 HLAB should encourage other UN bodies to advance discussion on collective goals

2 HLAB should help stakeholders and states identify common objectives and policies

3 HLAB can raise awareness of the financial architecture as a public good in relevant ongoing negotiating venues, including UNCITRAL and the WTO

-UN bodies may contribute in several ways “to support global discussion, negotiation, progress, solutions and action to address our most urgent collective goals,”<sup>24</sup> at the proposed Biennial Summit<sup>25</sup> and elsewhere.

- help stakeholders determine and revise their own preferences about new options, and help states identify possible common objectives and policies, exploring ‘yesable proposals.’ HLAB may contribute at existing arenas, and convene new ones, for well informed preference formation by states and other central actors, based on public information about what games the different states play, and the domestic and international distributive impact of the financial regimes.<sup>26</sup> UN bodies may also foster more international and domestic transparency and monitoring, crucial inter alia for domestic actors to affect states’ standards of fair distribution and policy objectives, and to stabilize ‘assurance games’ among those who prefer to do their share as long as the rules are fair and they are convinced that others do likewise.<sup>27</sup> The tools and policies of the ‘Compliance and Implementation Mechanism’<sup>28</sup> (‘Compliance Committee’) of the Paris Agreement may offer lessons.<sup>29</sup>

Some salient existing arenas may benefit from such crucial input:

\* The HLAB may have an important task to lift this topic on the agenda of the UNCITRAL and ISDS reforms. These processes focus on how to make the arbitral process more transparent and impartial, e.g. questioning party appointed arbitrators; and the perception of inconsistent outcomes, and discussing whether to have a permanent investment court.<sup>30</sup> A further core objectives *should* be to ensure that the regime, including the BITs and the arbitral bodies, visibly contribute to a more equitable international and domestic distribution of the benefits and burdens of international trade. Such calls may appear beyond the proper tasks of the investment regime, better handled by other parts of the international financial architecture. But that is implausible absent a global well-functioning allocation of responsibilities, especially if the regime constrains states’ policy space.

\* WTO reforms should adopt welfare improving practices and reinstate “an effective dispute settlement mechanism to be able to address trade tensions.”<sup>31</sup> If the WTO secures more equitable distribution of benefits and burdens, or the WTO AB engages in more expansive interpretations e.g. of the exception clauses, the dispute settlement mechanism will be even more susceptible to powerful states who veto, exit, or close it down. One important design challenge is therefore to reduce such vulnerability while maintaining sufficient accountability. The EU may offer lessons, in its reliance on a carefully calibrated qualified majority voting procedure instead of unanimity, allowing threshold number of states and populations to move forward – but also to block proposals.<sup>32</sup>

## References

- Beckman, R, L Bernard et al. (2016). *Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments*. Cambridge, Cambridge University Press.
- Behn, D, OK Fauchald et al. (2021). "A global public good? An empirical perspective on international investment law and arbitration". *The Protection of General Interests in Contemporary International Law : A Theoretical and Empirical Inquiry*. M Iovane, FM Palombino, D Amoroso & G Zarra. Oxford, Oxford University Press.
- Cali, B (2013). "The Legitimacy of Human Rights Treaty Bodies: An Indirect Instrumentalist Defense". *The Legitimacy of International Human Rights Regimes*. A Follesdal, J Schaffer & G Ulfstein.
- Chesterman, S, H Owada et al., Eds. (2019). *The Oxford Handbook of International Law in Asia and the Pacific*. Oxford, Oxford University Press.
- Choudhury, B (2013). "International Investment Law as a Global Public Good." *Lewis & Clark Law Review* 17(2): 481-520.
- Follesdal, A (2009). "When 'Common Interests' are not Common: why the 'Global Basic Structure' should be democratic." *Indiana Journal of Global Legal Studies* 16(2): 585-604.
- Follesdal, A (2011). "The Distributive Justice of a Global Basic Structure: A Category Mistake? ." *Politics, Philosophy and Economics* 10(1): 46-65.
- Follesdal, A (2018). "Toward a more just WTO: Which justice, whose interpretation?". *The Legitimacy of International Trade Tribunals*. R Howse, HR Fabri, Q Zang, OK Fauchald & G Ulfstein. Cambridge, Cambridge University Press: 479-.
- Follesdal, A (2021). "Pure Public Goods and Beyond: How Legitimate International Courts Can Help Secure Global Public Goods Worth Having". *Protecting Community Interests through International Law*. G Zyberi. Cambridge, Intersentia: 59-98.
- Ginsburg, T (2005). "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance." *International Review of Law and Economics* 25.
- Goh, G (2003). "The 'ASEAN Way': Non-intervention and ASEAN's role in conflict management." *Stanford Journal of East Asian Affairs* 3.
- Kaul, I, D Blondin et al. (2016). "Understanding Global Public Goods: Where We Are and Where to Next". *Global Public Goods*. I Kaul. Cheltenham, UK, Elgar: xiii-xcii.
- Keller, H & G Ulfstein, Eds. (2012). *UN Human Rights Treaty Bodies*. Cambridge, Cambridge University Press.
- Krasner, SD (1991). "Global Communications and National Power: Life on the Pareto Frontier." *World Politics* 43(3): 336-366.
- Langford, M & D Behn (2018). "Managing backlash: the evolving investment arbitrator?" *European Journal of International Law* 29(2): 551-580.
- Levi, M (1998). "A state of trust". *Trust and governance*. M Levi & V Braithwaite. New York, Russell Sage: 77-101.
- Linarelli, J, M Salomon et al. (2018). *The Misery of International Law: Confrontations with injustice in the global economy*. Oxford, Oxford University Press.
- Moran, TH, EM Graham et al., Eds. (2005). *Does Foreign Direct Investment Promote Development?* New York, Columbia University Press.
- Morse, JC & RO Keohane (2014). "Contested multilateralism." *The review of international organizations* 9(4): 385-412.
- Neumayer, E & L Spess (2005). "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?" *World Development* 33.
- Neurath, O (1932). "Protokollsätze." *Erkenntnis* 3: 204-214.
- Paine, J (2019). "International adjudication as a global public good?" *The European Journal of International Law* 2019(4).
- Ratner, S (2018). "Survey Article: Global investment rules as a site for moral inquiry." *Journal of Political Philosophy* 27(1): 107-135.
- Roberts, A & T St John (2020). "UNCITRAL and ISDS Reform: Plausible Folk Theories". *eJIL:Talk - Blog of the European Journal of International Law*.
- Ruggie, JG (2003). "Taking embedded liberalism global: The corporate connection". *Taming globalization*. D Held & M Koenig-Archibugi. Cambridge, Cambridge University Press: 93-129.
- Samuelson, PA (1954). "The Pure Theory of Public Expenditure." *Review of Economics and Statistics* 36(4): 387-389.
- Samuelson, PA (1955). "Diagrammatic exposition of public expenditure." *Review of Economics and Statistics* 21(May): 350-356.

- Sauvant, Karl P (2016). "Lessons from the negotiations of the United Nations Code of Conduct on Transnational Corporations and related instruments". *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah*. CL Lim. Cambridge, Cambridge University Press: 186-194.
- Schefer, KN, Ed. (2013). *Poverty and the international economic legal system: duties to the world's poor*, Cambridge University Press.
- St John, T (2018). *The rise of investor-state arbitration*. Oxford, Oxford University Press.
- St John, T, D Behn et al. (2018). "Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration." *Pluricourts working paper*.
- Suttle, O (2015). "Equality in global commerce." *European Journal of International Law* 25(4): 1043-1070.
- Suttle, O (2018). *Distributive justice and world trade law: A political theory of international trade regulation*. Cambridge, Cambridge University Press.
- Ulfstein, G (2018). "International Courts and Tribunals and the Rule of Law in Asia". *Global Constitutionalism from European and East Asian Perspectives* T Suami, A Peters, D Vanoverbeke & M Kumm. Cambridge, Cambridge University Press: 518-530.
- UN Secretary General (2021). "Our Common Agenda".
- Usha Natarajan, LB-R, Amar Bhatia, John Reynolds, Ntina Tzouvala & Sujith Xavie (2020). "Third World Approaches to International Law Review: A Journal for a Community." *Third World Approaches to International Law Review*:(1): 7-13.
- van Aaken, A (2011). "Opportunities for and Limits to an Economic Analysis of International Law." *Transnational Corporations Review* 3(1): 27-46.
- Voigt, C (2016). "The Compliance and Implementation Mechanism of the Paris Agreement." *Review of European, Comparative and International Environmental Law* 2: 1-13.

---

<sup>1</sup> E.g. the arbitrary interpretations by the ad hoc international investment arbitral tribunals (Choudhury 2013, 313).

<sup>2</sup> Several points here develop and supplement Kaul's important insights: analyzing reality in light of the theoretical prediction of free-riding risks misinterpreting noncooperation as free riding when, in fact, it might be motivated by other factors, including psychological and cognitive barriers, capacity constraints, and contextual barriers." Kaul, Blondin and Nahtigal 2016. Cf. also Follesdal 2021; Follesdal 2009.

<sup>3</sup> "The High-Level Advisory Board will consider: (a) What new governance regimes are suitable for existing and new global public goods; (b) What gaps exist in existing global governance approaches to global public goods; and (c) How we might retool existing governance regimes to strengthen/protect global public goods."

<sup>4</sup> Samuelson 1954; Samuelson 1955; Paine 2019.

<sup>5</sup> Divergent definitions of 'global public goods' in the *Common Agenda* (2021) are important, but not for this point: global public good are of interest across borders, and has nonrival and nonexcludable features. Cf. "global public goods, those issues *that benefit humanity as a whole and that cannot be managed by any one State or actor alone*" (para 12) Public goods are understood as *those goods and services provided to and benefiting all of society*," (para 61)

<sup>6</sup> van Aaken 2011: investment protection is the object of such treaties, while states' purpose is to foster economic development.

<sup>7</sup> St John 2018.

<sup>8</sup> "to protect investments is to protect the general interest of development," *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 23 (Sept. 25, 1983), 1 ICSID Rep. 377 (1993); and "the promotion and protection of such investments by means of a treaty may serve to stimulate private initiative and improve the well being of both peoples," *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, ¶ 290 (Feb. 6, 2007), 14 ICSID Rep. 518 (2009). – references from Choudhury 2013. Cf Roberts and St John 2020; Moran, Graham and Blomström 2005; Neumayer and Spess 2005; van Aaken 2011 .

<sup>9</sup> *Common Agenda* para 73.

<sup>10</sup> to ensure that it promotes stability both in the Global North and South - on equitable terms. Such fair terms are crucial to entice contingent compliers to participate in Assurance games (Levi 1998).

<sup>11</sup> Linarelli, Salomon and Sornarajah 2018.

<sup>12</sup> Behn, Fauchald and Langford 2021; Langford and Behn 2018.

<sup>13</sup> St John, Behn, Langford et al. 2018.

<sup>14</sup> Ratner 2018; Usha Natarajan 2020.

<sup>15</sup> Ratner 2018; Ruggie 2003; Schefer 2013; Ginsburg 2005; Follesdal 2011; Follesdal 2018.

<sup>16</sup> Some sources: the Harvard [Program on Negotiation](#); Sauviant 2016.

<sup>17</sup> Krasner 1991.

<sup>18</sup> This is one reason *Common Agenda* is correct to insist that "In the absence of solidarity, we have arrived at a critical paradox: international cooperation is more needed than ever but also harder to achieve." (para 8).

<sup>19</sup> Sauviant 2016, 188.

<sup>20</sup> Neurath 1932.

<sup>21</sup> *Common Agenda* para 106.

<sup>22</sup> Sauviant 2016, 188.

<sup>23</sup> Morse and Keohane 2014 discussed in [Global Constitutionalism 2016 3](#)

<sup>24</sup> *Common Agenda* para 109.

<sup>25</sup> *Common Agenda* para 73.

<sup>26</sup> *Common Agenda* para 118.

<sup>27</sup> This supports *Common Agenda*'s claim that "Justice is an essential dimension of the social contract. In all parts of the world, distrust is fuelled by people's experience of inequality and corruption, and by their perception that the State and its institutions treat them unfairly. The 2030 Agenda promises to promote the rule of law and provide access to justice for all (target 16.3 of the Sustainable Development Goals" (Para 23)

<sup>28</sup> Paris Agreement (adopted 12 December 2016, entered into force 4 November 2016) UN Registration No I-54113, art 15.2; cf. Voigt 2016

<sup>29</sup> Other bodies with somewhat similar 'weak' powers and less legal authority than ICs, with important differences among them, are various UN human rights treaty bodies, and ASEAN instruments. Cf. Cali 2013; Keller and Ulfstein 2012; Goh 2003; Beckman, Bernard, Phan et al. 2016; Ulfstein 2018; Chesterman, Owada and Saul 2019.

<sup>30</sup> [V1706748.pdf \(un.org\)](#)

<sup>31</sup> *Common Agenda* para 74. Cf Suttle 2015; Suttle 2018.

<sup>32</sup> Art 16 TEU: 55% of member states and supported by member states representing at least 65% of the total EU population; a blocking minority must include at least four states representing more than 35% of the EU population.