

## CHAPTER 3

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# INTERNATIONAL INVESTMENT AGREEMENTS, 2011–2012: A REVIEW OF TRENDS AND NEW APPROACHES

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## INTRODUCTION

In 2011 and 2012, states actively continued to negotiate and sign new investment treaties, announcing the successful conclusion of negotiations on 40 agreements on investment liberalization and/or protection.<sup>1</sup> Other negotiating activity launched during the 2011/2012 period continues, with some agreements under discussion involving major capital exporting and importing countries or groups

1. The agreements reviewed for this chapter were those publicly available bilateral investment treaties (BITs) and free trade agreements (FTAs) with investment protection chapters that were signed in 2011 and 2012 and that had been identified by the authors and UNCTAD as of January 15, 2013. They are the following: Costa Rica-Peru FTA; Panama-Peru FTA; Guatemala-Peru FTA; Mexico-Peru FTA; Albania-Malta BIT; Australia-New Zealand Investment Protocol; Malaysia-Australia FTA; Azerbaijan-Czech Republic BIT; Bahrain-Turkmenistan BIT; Bangladesh-United Arab Emirates BIT; Bosnia and Herzegovina-San Marino BIT; Central America-Mexico FTA; China-Japan-Republic of Korea Trilateral Investment Agreement (TIA); Japan-Colombia BIT; Czech Republic-Sri Lanka BIT; India-Japan Economic Partnership Agreement (EPA); India-Lithuania BIT; India-Malaysia Comprehensive Economic Cooperation Agreement (ECA); India-Nepal BIT; India-Slovenia BIT; Japan-Papua New Guinea BIT; Japan-Kuwait BIT; Republic of Korea-Peru FTA; Nigeria-Turkey BIT; Tanzania-Turkey BIT; Canada-China BIT; Canada-Kuwait BIT; Switzerland-Kosovo BIT; EFTA-Montenegro FTA; EFTA-Hong Kong FTA; and Japan-Iraq BIT. Other investment protection treaties that were signed in the covered period, but are not yet publicly available and so are not discussed include: Columbia-Korea FTA; Gabon-Turkey BIT; Russian Federation-Zimbabwe BIT; China-Taiwan BIT; Morocco-Vietnam BIT; Canada-Mali BIT; Canada-Senegal BIT; and Canada-Tanzania BIT. Other texts reviewed in this chapter are the 2012 Southern African Development

of countries,<sup>2</sup> and an apparent trend toward negotiations by and among regional organizations.<sup>3</sup> Thus, although the number of treaties being concluded annually has dropped from peak levels seen from the mid-1990s to the early 2000s,<sup>4</sup> the coverage of individual agreements continues to grow.<sup>5</sup>

Yet as the investment treaty network continues to expand, there are manifestations of dissatisfaction with aspects of the current investment regime, and efforts to (re)assess both the objectives of these treaties and how to best ensure that those objectives are advanced. Some states have declared their intention to terminate investment treaties,<sup>6</sup> to exit the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),<sup>7</sup> or to back away from investor-state arbitration.<sup>8</sup> Even for countries that continue to embrace, or at least accept, investment protection treaties and investor-state dispute settlement, there have been signs of dissatisfaction with various substantive and procedural elements of that model. The North American Free Trade Agreement (NAFTA) parties, for instance, who have increasingly found themselves in the position of respondent states, are reacting to arbitral

Community (SADC) Model BIT Template, with Commentary, and the 2012 U.S. Model BIT. The authors are particularly grateful to UNCTAD for sharing with the authors its collection and analysis of the investment treaties.

2. Examples include ongoing negotiations between Canada and the European Union on a comprehensive FTA, and in connection with efforts of 11 countries (Australia, Brunei Darussalam, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam) toward the Trans-Pacific Partnership Agreement. For more on those negotiations, see Chapter 13 by David Gantz in this volume of the *Yearbook*.

3. Evidence of this trend includes the recently signed Central America-Mexico and ASEAN-India agreements; negotiations led by the European Union with third states and groups of states including Canada, Japan, and the Mercosur countries; and the launch of talks between the United States and the East African Community (EAC) on a US-EAS Trade and Investment Partnership. See UNCTAD, *World Investment Report 2012* (New York: United Nations, 2012), pp. 18–19; UNCTAD, *Investment Policy Monitor*, No. 8 (November 2012), pp. 6–7; see also European Commission, “External Sources of Growth: Progress report on EU trade and investment relationship with key economic partners,” Commission Staff Working Document (July 2012), pp. 14–15.

4. See UNCTAD, *World Investment Report 2012*, *op. cit.*, pp. 18–19.

5. UNCTAD, *World Investment Report 2011* (New York: United Nations, 2011), pp. 102–103.

6. South Africa is one example, communicating in 2012 its intent to terminate the treaty with Belgium and Luxembourg that was nearing the end of its ten-year term and would have automatically been renewed for another ten years unless one of the parties to the treaty notified the others that it intended to terminate the treaty six months before the end of the ten-year period. Because the treaty was unilaterally terminated, its protections of investments made prior to the termination period will extend another ten years. See Belgium-Luxembourg-South Africa BIT (August 14, 1998), art. 12 and annex. See also Luke Eric Peterson, “South Africa pushes phase-out of early bilateral investment treaties after at least two separate brushes with investor-state arbitration,” *Investment Arbitration Reporter* (September 23, 2012).

7. In 2012, Venezuela denounced the ICSID Convention. See República Bolivariana de Venezuela Ministerio del Poder Popular para Relaciones Exteriores, Comunicado, “Gobierno bolivariano denuncia convenio con CIADI” (January 25, 2012), available at: [http://www.mre.gov.ve/index.php?option=com\\_content&view=article&id=18939:mppre&catid=3:comunicados&Itemid=108](http://www.mre.gov.ve/index.php?option=com_content&view=article&id=18939:mppre&catid=3:comunicados&Itemid=108) (last visited September 19, 2013). With this move, it joined Ecuador and Bolivia to become the third country to seek to exit the ICSID Convention. See Sergey Ripinsky, “Venezuela’s withdrawal from ICSID: What it does and does not achieve,” *Investment Treaty News*, April 13, 2012, available at: <http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/> (last visited September 15, 2013).

8. Australia has stated that it will no longer seek investor-state dispute settlement in treaties. See Australian Department of Foreign Affairs and Trade, “Gillard Government trade policy statement: Trading our way to more jobs and prosperity” (April 2011), p. 14, available at: <http://justinvestment.org/2011/04/gillard-government-trade-policy-statement-trading-our-way-to-more-jobs-and-prosperity/> (last visited September 22, 2013). The SADC Model BIT also recommends against including investor-state dispute settlement. See SADC Model BIT, p. 55.

awards and decisions by fine-tuning the language in their treaties, and investing resources to state the intended meanings of the treaty terms in more specific terms.<sup>9</sup> Moreover, the European Union, which is currently actively engaged in negotiating new investment protection agreements, has nevertheless been signaling that it sees the need for changes in the conduct of investor-state arbitrations.<sup>10</sup>

The changing attitudes toward investment treaties and their provisions by states is reflected in new national and regional model treaties and policies, including the Southern African Development Community's promulgation of a model template for bilateral investment treaties (BITs) for use by its member states,<sup>11</sup> efforts within the European Union to formulate policies that will guide its future investment treaties,<sup>12</sup> and the United States' revision of its Model BIT.<sup>13</sup> These national and regional initiatives have been bolstered by the United Nations Conference on Trade and Development (UNCTAD)'s launch of its Investment Policy Framework for Sustainable Development (IPFSD),<sup>14</sup> and the Commonwealth Secretariat's development of its text, "Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators,"<sup>15</sup> as well as a public consultation and analysis more narrowly focused on investor-state dispute settlement by the Organisation for Economic Co-operation and Development (OECD).<sup>16</sup>

This chapter focuses on the major areas of policy development and refinement in treaties negotiated and concluded in 2011 and 2012 and what they might signal for future investment treaties.

9. These states' investment in the "front-end" transaction costs involved in drafting and negotiating more precise terms reflect an intent to reduce their "back-end" enforcement costs arising through litigation of the disputes. Parallel trade-offs can be seen in contract drafting. See, e.g., Robert E. Scott and George G. Triantis, "Anticipating Litigation in Contract Design," 115 *Yale Law Journal* 814 (2006). Uncertainties in rules of evidence, burdens of proof, standards of review, and applicable laws are aspects of arbitrations that can contribute to higher enforcement costs, and increase the incentives to invest *ex ante* in the front-end elements of treaty design so as to avoid those *ex post* costs.

10. See, e.g., Nathalie Bernasconi-Osterwalder, "Analysis of the European Commission's Draft Text on Investor-State Dispute Settlement for EU Agreements" (Investment Treaty News, July 19, 2012).

11. SADC Model BIT, 2012, *op. cit.*

12. See, e.g., European Commission, "External Sources of Growth: Progress report on EU trade and investment relationship with key economic partners," Commission Staff Working Document (July 2012).

13. See 2012 U.S. Model BIT, available at: <http://www.state.gov/documents/organization/188371.pdf>.

14. UNCTAD, *Investment Policy Framework for Sustainable Development* (New York: United Nations, 2012). UNCTAD's *Investment Policy Framework for Sustainable Development* (IPFSD) was launched in July 2012, as part of UNCTAD's annual *World Investment Report* (WIR). It aims to provide a comprehensive guide for national and international investment policy-making that places inclusive growth and sustainable development at the heart of efforts to attract and benefit from foreign investment. The IPFSD is available at: [http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf) (last visited September 16, 2013).

15. J. Anthony VanDuzer, Penelope Simons and Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (Commonwealth Secretariat, May 2013).

16. OECD, *Investor-State Dispute Settlement* (OECD, 2012) (draft for public consultation), available at: <http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/50291642.pdf> (last visited September 16, 2013); David Gaukrodger and Kathryn Gordon, "Investor-state dispute settlement: A scoping paper for the investment policy community," OECD Working Papers on International Investment No. 2012/3, available at: [http://www.oecd.org/daf/inv/investment-policy/WP-2012\\_3.pdf](http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf) (last visited September 16, 2013).

It reviews apparent trends in investment treaties signed over the relevant period, focusing on five different themes: (1) the shifting balance of power between states and tribunals in investment treaties; (2) the declining role of the umbrella clause; (3) increasing integration of labor and environmental issues into investment treaties; (4) developments and trends in provisions governing investor-state arbitration, including transparency of the proceedings; and (5) emerging issues relating to treaty termination, renewal and renegotiation.

It then reviews the particular features of the South African Development Community Model BIT Template (SADC Model BIT), discusses select developments in emerging EU policy on international investment, and highlights new issues raised by the U.S. 2012 Model BIT.

## A. AN INDUCTIVE VIEW OF SELECTED TRENDS

The task of analyzing trends in investment treaties is an enviable one, as it allows editorial discretion to identify and select the trends to highlight and discuss.<sup>17</sup> Here, featured trends were selected based on their links to key themes – some emerging and some recurring – in discussion and analysis of investment treaties.

### 1. THE STATE-TRIBUNAL BALANCE OF POWER

As the number and frequency of investor-state disputes continues to grow,<sup>18</sup> investor-state tribunals are increasingly being called on to interpret the intent and meaning of various standards of investment treaties, determine whether certain state measures give rise to liability, and declare what remedies or damages should be awarded. In performing these functions, the often vague standards used in treaties have afforded tribunals a substantial degree of latitude. As a result, one trend that is notable in investment treaties signed in 2011 and 2012 is states increasingly wresting control back from tribunals over the interpretation of the treaties' standards and the determination of states' liability.

One way that states have been curtailing the broad interpretive powers of tribunals is by adding language to their treaties to clarify the intent and scope of specific provisions. Of the investment treaties signed in 2011 and 2012, the majority contained additional language seeking to clarify the expropriation and fair and equitable treatment (FET) obligations – the two standards that have been the dominant bases of investor-state claims.<sup>19</sup> Appearing either in the text of the article, a note to it, or an annex, new language on expropriation tended to elaborate upon the obligation and explain that regulatory measures of general applicability taken in pursuit of

17. Stephen W. Schill and Marc Jacob have previously noted the inherently subjective nature of this exercise in their chapter on trends in investment treaties in the 2011/2012 edition of the *Yearbook*. See Stephan W. Schill and Marc Jacob, "Trends in international investment agreements, 2010/2011: The increasing complexity of international investment law," in Karl Sauvant, ed., *Yearbook on International Investment Law & Policy 2011–2012* (New York: Oxford University Press, 2013), pp. 141–142.

18. UNCTAD, "Recent developments in investor-state dispute settlement (ISDS)," *IIA Issues Note*, No. 1 (May 2013), p. 3.

19. UNCTAD, *Fair and Equitable Treatment: Series on Issues in International Investment Agreements II* (New York: United Nations, 2012), pp. 10, 60. See also UNCTAD, *World Investment Report 2012*, *op. cit.*, p. 90.

legitimate welfare objectives will rarely, if ever, constitute an indirect expropriation.<sup>20</sup> Similarly, new provisions on FET explained that the standard required no more than the minimum standard of treatment of aliens required under customary international law.<sup>21</sup>

These clarifications do not ostensibly change the meaning of the original language; rather, they limit the interpretive power of tribunals by clarifying the original intent of the state parties vis-à-vis certain obligations. In this manner, by giving content to the standards, states are limiting tribunals' authority to decide what core treaty provisions mean.

A second way that states are reclaiming more of their interpretative powers from tribunals is by expressly reserving to themselves the power to interpret and decide various issues related to the meaning and application of treaty provisions. Specifically, states are reserving to themselves (1) a “self-judging” mechanism for certain measures; and the powers (2) to assess the applicability of reservations or carve-outs at issue; (3) to clarify the impact of state parties' interpretations on any investor-state tribunal; and (4) to address the impact of state-state disputes regarding treaty interpretation and/or application to investor-state tribunals.

First, the majority of treaties signed in 2011 and 2012 adopted a “self-judging” approach to the essential security exception, shielding each contracting party from liability for those measures “it considers necessary for the protection of its essential security interests.”<sup>22</sup> Through this

20. For examples of agreements with this clarifying text, see, e.g., the Costa Rica-Peru FTA; Panama-Peru FTA; Australia-New Zealand Investment Protocol; Central America-Mexico FTA; China-Japan-Korea TIA; Japan-Colombia BIT; India-Japan EPA; India-Lithuania BIT; India-Malaysia ECA; India-Nepal BIT; India-Slovenia BIT; Korea-Peru FTA; Turkey-Nigeria BIT; Tanzania-Turkey BIT. UNCTAD's *World Investment Report 2012* contains a chart noting agreements signed in 2011 that contain language linking the FET obligation to the minimum standard of treatment. See UNCTAD, *World Investment Report 2012*, *op. cit.*, p. 90. See also UNCTAD, *Investment Policy Framework for Sustainable Development*, 2012, *op. cit.*, p. 52, option 4.5.1 (suggesting options for clarifying the FET obligation). Agreements without similar text include the Guatemala-Peru FTA; Mexico-Peru FTA; Albania-Malta BIT; Azerbaijan-Czech Republic BIT; Bahrain-Turkmenistan BIT; Bangladesh-UAE BIT; Bosnia and Herzegovina-San Marino BIT; Czech Republic-Sri Lanka BIT; and Japan-Papua New Guinea BIT.

21. Article 4(2) of the Japan-Colombia BIT contains a clarification that appears unique. It states that, “[f]or greater certainty, a change of the regulation of a Contracting Party does not constitute by itself a violation of” the minimum standard of treatment under customary international law, which includes fair and equitable treatment. For other clarifications developed over the review period, see, e.g., UNCTAD, *Investment Policy Framework for Sustainable Development*, 2012, *op. cit.*, p. 51, option 4.3.3. Some commentators have suggested that investor-state decisions indicate there is no practical difference between the minimum standard of treatment and the FET obligation, or that, to the extent there is a difference, tribunals may be narrowing the gap. See, e.g., Andrea Menaker, “The fair and equitable treatment debate: More theoretical than practical?” (February 28, 2013) (lecture given as part of the International Investment Law and Policy Speaker Series), recording available at: <http://www.vcc.columbia.edu/content/spring-2013-international-investment-law-and-policy-speaker-series> (last visited September 16, 2013); see also UNCTAD, *Fair and Equitable Treatment: Series on Issues in International Investment Agreements II*, 2012, *op. cit.*, pp. 59–60. Nevertheless, statistics indicate that whether states have taken steps to clarify or narrow the FET obligation by explicitly linking it to minimum standard of treatment does have an impact on whether a violation will be found. See UNCTAD, *Fair and Equitable Treatment: Series on Issues in International Investment Agreements II*, 2012, *op. cit.*, p. 61 (“By October 2010, tribunals addressed the merits of FET claims in 84 treaty-based disputes. Of this overall number, the FET claim was accepted in 45 cases and rejected in 39 cases. There is a significant statistical difference between NAFTA disputes and BIT disputes. In NAFTA cases, only 22 per cent of those claims were accepted (4 out of 18); in BIT cases, 62 per cent were accepted (41 out of 66).” (footnotes omitted)).

22. Agreements that did not incorporate the self-judging approach include those between Bosnia and Herzegovina and San Marino, 2011, *op. cit.*; India and Nepal, 2011, *op. cit.*; India and Lithuania, 2011, *op. cit.*; and Japan and Papua New Guinea, 2011, *op. cit.*



provision, the contracting parties restrict tribunals' power to review the appropriateness of the measure.<sup>23</sup>

Additionally, for measures taken in some policy areas, treaties refer questions of liability to competent domestic authorities. For instance, the Canada-China BIT and the 2012 U.S. Model BIT channel away from tribunals the question of whether measures taken for "prudential reasons" relating to financial services can give rise to liability through an investor-state arbitration. When the issue arises in a dispute, it is first mandatorily referred to domestic financial service authorities from each country, which are given an opportunity to come to a joint decision on whether the challenged action is governed by the prudential measures exception. Their conclusion, should they reach one, will be binding on the investor-state tribunal.

In the Canada-China BIT, if the domestic authorities fail to come to an agreement, one of the state parties can refer the issue to a state-state panel and the decision of that body will be binding on the investor-state tribunal. The investor-state body will thus only have independent authority to decide the issue if (1) the domestic authorities fail to agree on the applicability of the exception, and (2) neither state party refers the matter to a state-state tribunal.<sup>24</sup> More specifically, the treaty states:

2.(a) Where an investor submits a claim to arbitration under this Article [on investor-State arbitration], and the disputing Contracting Party invokes Article 33(3), the investor-State tribunal established pursuant to this Part *may not decide* whether and to what extent Article 33(3) is a valid defence to the claim of the investor. It shall seek a report in writing from the Contracting Parties on this issue. The investor-State tribunal may not proceed pending receipt of such a report or of a decision of a State-State arbitral tribunal, should such a State-State arbitral tribunal be established.

(b) Pursuant to a request for a report received in accordance with subparagraph (a), the financial services authorities of the Contracting Parties shall engage in consultations. If the financial services authorities of the Contracting Parties reach a joint decision on the issue of whether and to what extent Article 33(3) is a valid defence to the claim of the investor, they shall prepare a written report describing their joint decision. The report shall be transmitted to the investor-State tribunal, and shall be binding on the investor-State tribunal.

(c) If, after 60 days, the financial services authorities of the Contracting Parties are unable to reach a joint decision on the issue of whether and to what extent Article 33(3) is a valid defence to the claim of the investor, the issue shall, within 30 days, be referred by either of the Contracting Parties to a State-State arbitral tribunal established pursuant to Article 15. In such a case, the provisions requiring consultations between the Contracting Parties in Article 15(1) and (2) shall not apply. The decision of the State-State arbitral tribunal shall be transmitted to the investor-State tribunal, and shall be binding on the investor-State tribunal. All of the members of any such State-State arbitral tribunal shall have expertise or experience in financial services law or practice, which may include the regulation of financial institutions.<sup>25</sup>

23. Views differ regarding whether the clause can remove the issue entirely from the tribunal's review or whether, instead, the tribunal is able or required to perform a "good faith review" of the respondent state's invocation of the defense. The answer to that question will likely depend on the precise wording of the treaty, which may contain safeguards against misuse of the exception. For a review of this issue, see Stephan Schill and Robyn Briese, "If the state considers: Self-judging clauses in international dispute settlement," in Armin von Bogdandy and Rüdiger Wolfrum, eds., *Max Planck Yearbook of United Nations Law*, Vol. 13 (Leiden: Martinus Nijhoff Publishers, 2009).

24. Canada-China BIT, art. 20(2).

25. Canada-China BIT, art. 20(2) (emphasis added).

Through this provision, the states get the first right to determine the issue in question; then, if they cannot settle it, it becomes an issue to be decided by the state-state tribunal. Thus, the state-state tribunal possesses key decisional authority. Interestingly, in presenting its arguments to the tribunal, the nondisputing state may be mindful that its arguments can be used against it in future disputes based on its own tax measures.

In the 2012 U.S. Model BIT, if the financial authorities of the state parties fail to agree, there is no explicit reference to the possibility of referral to a state-state tribunal; nevertheless, the nondisputing state party has an opportunity to make a submission to the investor-state tribunal on the topic. The text also notes that silence of the nondisputing state party “shall be presumed, for the purposes of the arbitration, to [constitute] a position . . . not inconsistent with that of the respondent.”<sup>26</sup> While these features were also present in the 2004 U.S. Model BIT,<sup>27</sup> the 2012 U.S. Model BIT adds language further protecting the respondent state by stating that the “tribunal shall draw no inference regarding the application of a [prudential measures defense] from the fact that the competent financial authorities have not made” the requested determination.<sup>28</sup>

Several treaties prescribe a similar process for determining whether liability for tax measures can exist under the treaty.<sup>29</sup> The Canada-China BIT, like a number of the others, provides that taxation measures are not actionable except to the extent that they constitute expropriation.<sup>30</sup> The treaty then contains a provision that, similar to the prudential measures exception, gives relevant domestic authorities the automatic first right to determine whether the tax measures are excepted from the agreement’s disciplines, or can support a treaty claim. It states:

5. No claim may be made by an investor pursuant to paragraph 4 [allowing a claim for expropriation] unless:
  - (a) the investor provides a copy of the notice of claim to the taxation authorities of the Contracting Parties; and
  - (b) six months after receiving notification of the claim by the investor, the taxation authorities of the Contracting Parties fail to reach a joint determination that the measure in question is not an expropriation.
6. The taxation authorities referred to in this Article shall be the following until otherwise notified by a Contracting Party:
  - (a) for Canada: the Assistant Deputy Minister, Tax Policy, of the Department of Finance Canada;
  - (b) for China: the Ministry of Finance and State Administration of Taxation or an authorized representative of the Ministry of Finance and State Administration of Taxation.<sup>31</sup>

In accordance with this provision, if the domestic tax authorities of each party agree that the challenged measure did not give rise to an expropriation, the claim cannot proceed. Absent

26. 2012 U.S. Model BIT, art. 20(3)(c)(iv).

27. 2004 U.S. Model BIT, art. 20(3)(c)(iii), available at: <http://www.state.gov/documents/organization/117601.pdf> (last visited September 17, 2013).

28. 2012 U.S. Model BIT, art. 20(3)(c)(iii).

29. See, e.g., China-Japan-Republic of Korea TIA, art. 21; Australia-New Zealand Investment Protocol, art. 21; but see Switzerland-Kosovo BIT (no carve-out for taxation measures except those relating to double taxation treaties).

30. Canada-China BIT, art. 14.

31. Canada-China BIT, art. 14.

such agreement, it may go ahead and the investor-state tribunal will have the power to decide whether or not the tax measure constitutes an expropriation and can give rise to liability under the treaty. There is no provision regarding constitution of a state-state tribunal (though neither is there any express preclusion of that option).<sup>32</sup>

States have reclaimed interpretive authority from tribunals in other ways as well, for instance by providing for the state parties to have the opportunity to agree on the applicability of scheduled reservations. For instance, the Canada-China BIT has a provision in the treaty's article on "governing law" that applies to the situation in which a respondent state seeks to defend a measure on the ground that it is a scheduled "non-conforming measure" and is thereby protected from claims that it violated the agreement's nondiscrimination obligations.<sup>33</sup> When such measures are challenged, the respondent state may make a motion for the tribunal to request the interpretation of the contracting parties on whether the reservation applies.<sup>34</sup> If they reach an agreement on the issue, the investor-state tribunal will be bound by that agreement. Yet if the contracting parties fail to timely submit their agreement to the tribunal in writing, the tribunal is to decide the issue.<sup>35</sup> In contrast to the examples above, therefore, the tribunal's referral of the issue to the contracting parties is not automatic; it need only be done when requested by the respondent state party. Here, as well, there is no express provision for referral to a state-state panel.

Finally, the agreement's "governing law" article also states that "an interpretation by the Contracting Parties of a provision of this Agreement shall be binding on a Tribunal established under this Part [on investor-state arbitration], and any award under this Part shall be consistent with such interpretation."<sup>36</sup> There is no provision stating that to be authoritative the "interpretation" has to be issued by any specific authorities or joint body, or pursuant to any set of procedures.

Other recent agreements contain similar features, with some interesting differences. The Central America-Mexico Free Trade Agreement (FTA), for instance, contains articles that, like the Canada-China BIT, provide for the state parties to issue binding interpretations of the treaty and determine the applicability of reservations scheduled in the agreement's annexes.<sup>37</sup> Yet the Central America-Mexico FTA, in comparison, provides that the relevant decisions on interpretation are to be made by a specific "Administrative Commission" established and operating under a different chapter of the FTA.<sup>38</sup> According to that chapter, the Administrative Commission, which is to be composed of ministerial level officials from the state parties,<sup>39</sup> is to make all decisions "by consensus."<sup>40</sup>

32. The state-state arbitration provision is set forth in art. 15.

33. Canada-China BIT, art. 30. The obligations narrowed by these reservations are limited to the national treatment and most-favored nation standards, market access provisions, prohibitions on performance requirements, and provisions on senior management and boards of directors.

34. Canada-China BIT, art. 30(2).

35. Canada-China BIT, art. 30(2).

36. Canada-China BIT, art. 30(1).

37. Central America-Mexico FTA, arts. 11.26 and 11.27.

38. Central America-Mexico FTA, arts. 11.26 and 11.27; See also art. 19.1.3(c) (stating that the Administrative Commission shall "issue interpretations of the provisions of [the] Agreement").

39. Central America-Mexico FTA, art. 19.1.1.

40. Central America-Mexico FTA, art. 19.1.7; see also art. 19.1.3(c).



The powers of states over the interpretation and application of their treaties is an issue that has been gaining increased attention from commentators,<sup>41</sup> and is having practical implications, as is evidenced by the *US v. Ecuador* dispute.<sup>42</sup> The approaches described above form but a part of this emerging theme, and appear likely to play growing roles as “rebalancing” tools in the continued refinement and/or (re)structuring of the roles and rights of investors, states and tribunals.

## 2. THE DISAPPEARING UMBRELLA CLAUSE?

Only a minority of 2011/2012 agreements contain some type of umbrella clause. Of 31 agreements signed during those years that were publicly available as of January 15, 2013, 11 contain a variation of the provision. Six of those 11 count Japan as a treaty party.<sup>43</sup> The other texts are the Albania-Malta BIT, Bahrain-Turkmenistan BIT, Bangladesh-United Arab Emirates (UAE) BIT, Switzerland-Kosovo BIT, and European Free Trade Association-Montenegro FTA.<sup>44</sup>

Of these 11 agreements, the type of broad umbrella clause provision seen in “older” European-style treaties is present in seven (Albania-Malta, Bahrain-Turkmenistan, Japan-India, Japan-Papua New Guinea, Japan-Kuwait, Japan-Iraq, and EFTA-Montenegro). These clauses require each contracting party to “observe any obligation it may have entered into” with regard to “investments”<sup>45</sup> and/or “investment activities”<sup>46</sup> of foreign investors from the other contracting party.

The umbrella clause provision in Japan’s treaty with Colombia and Switzerland’s treaty with Kosovo are somewhat narrower, more clearly specifying the range of obligations that are covered. The Japan-Colombia BIT states:

Each Contracting Party shall observe any obligation deriving from a written agreement concluded between its central government or agencies thereof and an investor of the other Contracting Party

41. See, e.g., Anthea Roberts, “Power and persuasion in investment treaty interpretation: The dual role of states,” 104 *American Journal of International Law* 179 (2010); Anthea Roberts, “State-to-State investment treaty arbitration: a hybrid theory of interdependent rights and shared interpretive authority,” 55 *Harvard International Law Journal* (Forthcoming Winter 2014); UNCTAD, “Interpretation of IIAs: What states can do,” *IIA Issues Note*, no. 3 (December 2011), available at: [http://unctad.org/en/Docs/webdiaeia2011d10\\_en.pdf](http://unctad.org/en/Docs/webdiaeia2011d10_en.pdf) (last visited September 17, 2013). A panel discussion titled “State-to-state investment arbitration: Dead end or new frontier?” hosted by the Vale Columbia Center on Sustainable International Investment and the Center for International Commercial and Investment Arbitration at Columbia Law School on November 29, 2012, also focused on these issues. See: <http://www.vcc.columbia.edu/content/state-state-investment-treaty-arbitration-dead-end-or-new-frontier> (last visited September 23, 2013).

42. *Ecuador v. United States*, PCA Case No. 2012-5. More documents and information relating to this case are available from the website of the Permanent Court of Arbitration (PCA).

43. For more on Japan’s practices regarding the umbrella clause, see Shotaro Hamamoto and Luke Nottage, “Japan,” in Chester Brown, ed., *Commentaries on Selected Model Investment Treaties* (New York: Oxford University Press, 2013), pp. 346, 362.

44. In the EFTA-Montenegro FTA, Iceland, Liechtenstein, Switzerland, and Montenegro committed to “observe obligations they have entered into with regard to specific investments by” covered investors. Norway did not subscribe to that commitment. EFTA-Montenegro FTA, art. 24(5).

45. Albania-Malta BIT, art. 2.2; Bahrain-Turkmenistan BIT, art. 2.2; Japan-Iraq BIT, art. 5(3); EFTA-Montenegro FTA, 2011, art. 24(5) (except Norway, see note 44).

46. Japan-Papua New Guinea BIT, art. 4(3); Japan-India EPA, art. 87(2); Japan-Iraq BIT, art. 5(3).

with regard to specific investments by the investor, which the investor could have relied on at the time of establishment, acquisition or expansion of such investments.<sup>47</sup>

The provision suggests that only *contracts* regarding “specific investments” (as opposed to laws of general applicability) will serve as the “obligations” enforceable under this provision, an approach that can help the government assess, track and limit its umbrella clause liability. The commitment is further narrowed by limiting the relevant contracts to those entered into by officials and agencies of the central government, carving out promises and commitments by subnational officials from the scope of the umbrella clause obligation.

The BIT between Switzerland and Kosovo and the tripartite agreement among China, Japan and the Republic of Korea similarly limit the umbrella clause to specific written contracts between the investor and state, but cover agreements beyond just those entered into by the federal or central government.<sup>48</sup> To illustrate, the agreement between Switzerland and Kosovo states:

Each Contracting Party shall observe any written commitment, including commitments of its sub-federal entities, local authorities and other entities acting in the exercise of public authority, specifically entered into with regard to an investment of an investor of the other Contracting Party, which the investor could rely on in good faith when making or modifying the investment.<sup>49</sup>

Notably, both the Japan-Colombia and Switzerland-Kosovo texts protect commitments on which the investors “could rely,” while other texts make no reference to reliance or to whether or not actual reliance is required.<sup>50</sup>

Rather than the “substantive” umbrella clause provisions noted above, some states use “procedural” umbrella clauses to expressly bring contractual obligations under the scope of an investment treaty, but control how breach of those obligations will be resolved. The 2012 U.S. Model BIT, for instance, permits investors to bring claims for breaches of an “investment authorization” or “investment agreement” and explicitly distinguishes those claims from claims alleging a breach of other treaty obligations such as those in the articles on nondiscrimination, minimum standard of treatment (MST), and expropriation.<sup>51</sup> The 2012 U.S. Model then adds provisions limiting those “investment authorization” and “investment agreement” claims and governing their resolution. It requires that the investor’s claims and damages *directly relate* to an investment made (or sought to be made) *in reliance* on the investment agreement.<sup>52</sup> It then specifies the law that is to govern resolution of these particular disputes, stating that such law shall be:

- (a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or
- (b) if the rules of law have not been specified or otherwise agreed:
  - (i) the law of the respondent, including its rules on the conflict of laws; and
  - (ii) such rules of international law as may be applicable.<sup>53</sup>

47. Japan-Colombia BIT, art. 4(3).

48. Switzerland-Kosovo BIT, art. 10; China-Japan-Republic of Korea TIA, art. 5(2).

49. Switzerland-Kosovo BIT, art. 10.

50. An agreement that does not mention reliance is the China-Japan-Republic of Korea TIA, art. 5(2).

51. 2012 U.S. Model BIT, art. 24(1).

52. 2012 U.S. Model BIT, art. 24(1).

53. 2012 U.S. Model BIT, art. 30(2).

In contrast, claims based on breaches of treaty obligations are to be decided “in accordance with [the] Treaty and applicable rules of international law.”<sup>54</sup> Pursuant to this approach, and to the extent that a *contractual* obligation owed by the host state is defined by the host state’s domestic law, interpretation of the scope of that obligation and whether it has been breached will also be governed by domestic law, reducing opportunities for “internationalization” of the obligation.<sup>55</sup>

Notwithstanding the apparent fade-out of broad umbrella clauses,<sup>56</sup> tribunals’ interpretations of the FET standard, which increasingly proclaim that host states are bound to the “specific commitments” made to investors, may be giving rise to a “de facto” umbrella clause even where the agreements omit the provision.<sup>57</sup> This raises the question about whether the enforcement of those promises or undertakings via the FET obligation contravenes state party intent as manifested through the noninclusion of the umbrella clause. This issue could be addressed through interpretive statements or clarifications by governments seeking *ex ante* to clarify the scope of their treaty obligations as many have already done for the FET and expropriation obligations.

## B. ATTENTION TO OTHER POLICY CONSIDERATIONS: LABOR AND ENVIRONMENTAL PROVISIONS

### 1. INVESTMENT AND LABOR

Only a minority (4 out of 20) of publicly available BITs concluded in 2011 and 2012 have articles specifically addressing issues of labor standards (excluding references to the issue in the agreement’s preamble).<sup>58</sup> Where included, the provisions are generally limited to statements by the

54. 2012 U.S. Model BIT, art. 30(1).

55. Professor Sornarajah called this process of “internationalization” “a transmogrification which enables it to move [an investor-State contract] out of the sphere of the domestic law of the host State onto a higher plane of supranational law, variously identified as transnational law, general principles of law and international law.” See M. Sornarajah, *The International Law on Foreign Investment*, 3rd ed. (Cambridge: Cambridge University Press, 2010), pp. 288–289. See also Richard Lillich, “The law governing disputes under economic development agreements: Reexamining the concept of internationalization,” in Richard Lillich and Charles Brower, eds., *International Arbitration in the 21st Century: Towards “Judicialization” and Uniformity?* (New York: Transnational Publishers, 1994), pp. 68–69; Derek William Bowett, “State contracts with aliens: Contemporary developments on compensation for termination or breach,” 59(1) *British Yearbook of International Law* 49 (1988); George W. Haight, “The internationalization of development contracts,” 3 *Public Law Forum* 69 (1983), p. 78.

56. In what may counteract that trend, the European Commission has indicated that umbrella clauses will be part of the protections it would seek in future investment agreements. It is unclear whether those clauses will be procedural or substantive and, if substantive, narrow or broad. See Colin Brown and Maria Alcover-Llubià, “The external investment policy of the European Union,” in Karl Sauvant, ed., *Yearbook on International Investment Law & Policy 2010–2011* (New York: Oxford University Press, 2012), p. 161.

57. See, e.g., *Enron Creditors Recovery Corporation & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, *award* (May 22, 2007); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, *decision on liability* (October 3, 2006); *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, *award* (May 12, 2005); *EDF International S.A. et al. 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); *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, *final award* (December 24, 2007). See also Lise Johnson and Alexander Volkov, “Specific Commitments and Regulatory Change: The Myth of Stability,” 24 *American Review of International Arbitration* 3 (2013).

58. For BITs that have references to labor, see Japan–Colombia BIT, art. 21; Japan–Papua New Guinea BIT, art. 22; Japan–Kuwait BIT, art. 23; Japan–Iraq BIT, art. 22.

contracting parties that they should not waive or otherwise derogate from their domestic labor laws in order to encourage or retain foreign investment.<sup>59</sup> Both the 2012 U.S. Model BIT and the SADC Model BIT also contain these “non-derogation” provisions.<sup>60</sup>

Similarly, most investment chapters in FTAs are silent on the issue of labor standards. In some cases, however, the FTA contains a separate chapter devoted to labor matters in relation to both trade and investment.<sup>61</sup> Several of the FTAs with such labor chapters that were signed<sup>62</sup> or entered into force<sup>63</sup> in 2011 and 2012 contain provisions that go beyond what is generally found in actual and Model BITs. These FTA provisions (1) affirm the state parties’ obligations as members of the International Labour Organization (ILO)<sup>64</sup> and other international commitments;<sup>65</sup>

59. Japan-Colombia BIT, 2011, art. 21; Japan-Papua New Guinea BIT, 2011, art. 22; Japan-Iraq BIT, art. 22; Japan-Kuwait BIT, art. 23.

60. The 2012 U.S. Model BIT notes that it is “inappropriate to encourage investment by weakening the protections in domestic labor laws,” and identifies those “labor laws” as statutes or regulations directly related to (1) the “core” labor standards (i.e., freedom of association and the effective recognition of the right to collective bargaining; elimination of all forms of forced or compulsory labor; effective abolition of child labor; and elimination of discrimination in respect of employment and occupation), and (2) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. Yet the model only states that parties “shall not” derogate from labor laws relating to that first category – the “core” labor standards. Its prohibition on waiving or derogating from labor laws thus does not explicitly apply to laws relating to conditions of work. See 2012 U.S. Model BIT, art. 13. The SADC text likewise states that parties “shall not” derogate from their “labor legislation” in order to encourage investment, but does not define that “labor legislation.” Other provisions in the text indicate that states are free to determine domestically how to craft and enforce their “labor legislation,” but “shall strive to ensure . . . high levels of protection, taking into account internationally accepted standards.” SADC Model BIT, 2012, *op. cit.*, art. 22.

61. See, e.g., Korea-Peru FTA, chapter 18. Examples of treaties using a similar approach that predate the review period covered by this chapter include the following: Free Trade Agreement between the United States of America and the Republic of Korea (June 30, 2007), ch. 19, available at: <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> (last visited September 19, 2013) [herein *Korea-U.S. FTA*]; Colombia-U.S. FTA (November 22, 2006), ch. 17.

62. Korea-Peru FTA, ch. 18; EFTA-Montenegro FTA, art. 35; EFTA-Hong Kong FTA, art. 11.3; Agreement on Labour between the EFTA States and Hong Kong, China (June 21, 2011), available at: <http://www.efta.int/~media/Documents/legal-texts/free-trade-relations/hong-kong-china/Agreement%20on%20Labour.pdf> (last visited September 19, 2013) [herein *EFTA-Hong Kong Agreement on Labour*]. Regarding the relationship between the EFTA-Hong Kong FTA and the EFTA-Hong Kong Agreement on Labour, Article 11.3 of the FTA provides that its parties “shall enhance their dialogue and co-operation on labour matters through the Agreement on Labour between Hong Kong, China and the EFTA States concluded by the Parties separately from but alongside this Agreement.”

63. Korea-U.S. FTA, ch. 19; Colombia-U.S. FTA, ch. 17. As noted above in note 61, these agreements were signed prior to the review period covered by this chapter, but entered into force during it and are included here for reference.

64. Korea-Peru FTA, art. 18; Korea-U.S. FTA, arts. 19.1, 19.2; Colombia-U.S. FTA, arts. 17.1, 17.2; EFTA-Montenegro FTA, art. 35; EFTA-Hong Kong FTA, Preamble and art. 11.3; EFTA-Hong Kong Agreement on Labour, art. 2. FTAs without references to labor issues include the India-Japan EPA; India-Malaysia FTA; and Central America-Mexico FTA.

65. EFTA-Montenegro FTA, art. 35(2) (“The Parties reaffirm their commitment, under the Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work of 2006, to recognising full and productive employment and decent work for all as a key element of sustainable development for all countries and as a priority objective of international cooperation, and to promoting the development of international trade in a way that is conducive to full and productive employment and decent work for all.”).

(2) bar<sup>66</sup> or restrain<sup>67</sup> state parties from waiving, derogating from, or failing to enforce their labor laws in ways that (substantially) affect trade or investment or depart from ILO principles;<sup>68</sup> (3) set forth the parties' commitments to consult and cooperate on relevant issues, and establish an institutional mechanism to further those efforts;<sup>69</sup> but (4) limit or bar the availability of investor-state and/or state-state arbitration for resolution of issues arising under the labor chapter.<sup>70</sup>

A few FTA labor chapters contain additional provisions, such as clauses requiring states to provide effective access to justice and remedies under domestic labor laws,<sup>71</sup> or to strive to promote foreign investment that “contribute[s] to sustainable development, including goods and services that are the subject of schemes such as fair and ethical trade.”<sup>72</sup>

While these are the most direct “investment and labor” articles in the agreements, there are other provisions in BITs and FTAs that are relevant to countries' labor markets and working conditions, such as those that affirm or carve out states' rights to develop and implement measures addressing the health and safety of workers, and worker hiring and training.

With respect to the “clarifications” affirming states' rights to regulate in this respect, there are the increasingly common explanatory notes and annexes stating that measures of general applicability that are “designed and applied to protect legitimate public welfare objectives, such as public health and safety,” do not, “except in rare circumstances,” constitute indirect expropriations.<sup>73</sup> Other clarifying provisions more generally reining in the scope of treaty obligations, such as those tethering the fair and equitable treatment standard to the minimum standard of treatment under international law, can also arguably shield governments' authority to develop and implement labor and other public policy measures to some extent.<sup>74</sup>

With respect to the exceptions, 2011/2012 treaties continue to adopt a variety of approaches that aim to protect different policy areas or investment activities, apply to some or all of the text, and require different degrees of connection between the measure and policy goal. Some of these relate to labor measures. Treaties concluded by Canada in 2011 and 2012, for instance,

66. EFTA-Montenegro FTA, 2011, art. 34 (using the words “shall not”).

67. Korea-U.S. FTA, art. 19.2; Colombia-U.S. FTA, art. 172(2).

68. Korea-Peru FTA, art. 18.2; Korea-U.S. FTA, arts. 19.2, 19.3; Colombia-U.S. FTA, arts. 17.2, 17.3.

69. Korea-Peru FTA, arts. 18.4–18.6 and annex 18A; Korea-U.S. FTA, arts. 19.5–1.97 and annex 19-A; Colombia-U.S. FTA, arts. 17.5–17.7 and annex 17.6; EFTA-Montenegro FTA, arts. 37–40; EFTA-Hong Kong Agreement on Labour, arts. 5 and 6.

70. Korea-Peru FTA, art. 18.7; Korea-U.S. FTA, art. 19.7(5); Colombia-U.S. FTA, art. 17.7(7); EFTA-Montenegro FTA, arts. 39 and 42 (allowing for state-state consultations but not arbitration); EFTA-Hong Kong Agreement on Labour, art. 6.2 (stating that differences between the parties shall be settled through consultations and negotiations, and may not be referred “to any third party or international tribunal for settlement”).

71. Korea-Peru FTA, art. 18.3. The Korea-U.S. FTA, art. 19.4, and Colombia-U.S. FTA, art. 17.4, both of which were signed before the relevant 2011/2012 review period covered by this chapter, also contain these provisions. Although included in recent U.S. FTAs, this provision was not included in the 2012 U.S. Model BIT.

72. EFTA-Montenegro FTA, art. 37.

73. Canada-Kuwait BIT, art. 17; China-Japan-Republic of Korea TIA, Protocol, para. 2(c); see also Nigeria-Turkey BIT, art. 7 (omitting the “except in rare circumstances” language and stating less equivocally that “[n]on-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriations.”).

74. See, e.g., Japan-Colombia BIT, art. 4(2). But see note 21 (noting the disparate views on whether there is a significant difference between the fair and equitable treatment obligation and the minimum standard of treatment).



continue the country's preexisting practice of carving out from the agreements' articles on non-discrimination and performance requirements measures designed to promote hiring of people from socially or economically disadvantaged groups.<sup>75</sup> Canada has also continued its practice of "reserv[ing] the right to adopt or maintain any measure" relating to "social services" such as income security or insurance, social welfare, public training, and health and child care.<sup>76</sup> Such measures, however, remain subject to other treaty obligations such as the FET requirement.

Similarly, in 2011/2012 treaties that contain restrictions on performance requirements, there are commonly exceptions<sup>77</sup> from some of the restrictions for measures (1) requiring the use of a particular technology to meet health or safety requirements;<sup>78</sup> (2) necessary to protect the life or health of humans;<sup>79</sup> or (3) implemented to promote hiring and job training.<sup>80</sup> These measures, nevertheless, also may remain subject to other treaty obligations like the FET standard.

The growing practice of including specific exceptions for certain treaty obligations continues to raise questions about whether and to what extent those carve-outs will impact interpretations of other treaty standards not expressly covered by the exceptions. At least one decision, *Lemire v. Ukraine*, has addressed that issue and determined that specific exceptions should remain compartmentalized and not impact interpretations of other treaty provisions. In that case, the governing treaty contained an annex specifying that the contracting state parties did not intend certain areas, including radio broadcasting, to be covered by the national treatment obligation. According to the majority of the tribunal, that exception to the national treatment obligation was "irrelevant" to their analysis of the investor's (ultimately successful) claim for a breach of the FET standard.<sup>81</sup>

The third arbitrator, however, dissented, stating that the provision in the annex protecting states' rights to favor domestic investors in radio broadcasting was relevant to the state parties' understandings and intentions regarding the scope and meaning of the agreement, and should therefore have informed (and narrowed) the tribunal's interpretation of the FET standard. He explained that although

[t]he drafting of the BIT ... reflects the undisputed fact that the Reservation directly applies to national treatment only[,] ... [t]his does not ... preclude its consideration in the interpretation of the FET standard in accordance with Article 31 of the Vienna Convention. The BIT had been signed in March 1994, i.e. before the proliferation of international investment claims under the FET standard (see paras. 139–145 supra). When they negotiated the Reservation, the State Parties had focused on national treatment only, because they had not foreseen the implications for the FET standard. While the Reservation cannot be retroactively applied to the FET standard, it still must be taken into account in interpreting the latter with a view to an unprecedented scenario.<sup>82</sup>

75. Canada-Kuwait BIT, annex I; Canada-China BIT, annex B.8 (incorporating annex II from the Canada-Peru FTA), May 29, 2008, available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/peru-toc-perou-tdm.aspx> (last visited September 21, 2013).

76. See, e.g., Canada-Kuwait BIT, annex I.

77. But see Japan-Papua New Guinea BIT, art. 6 (containing performance requirements applying to goods and services and only setting forth limited exceptions to those requirements).

78. Central America-Mexico FTA, art. 11.7(2); Canada-Kuwait BIT, art. 9(4).

79. Central America-Mexico FTA, art. 11.7(5); Japan-Colombia BIT, art. 5(6).

80. Central America-Mexico FTA, art. 11.7(4); Japan-Colombia BIT, art. 5(5).

81. *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, *award* (March 28, 2011), para. 47.

82. *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, *dissenting opinion of Dr. Jürgen Voss* (March 1, 2011), n. 338.



Thus, while the majority's decision provoked dissent, *Lemire v. Ukraine* illustrates the risk that carve-outs for labor-related measures that apply only to expressly identified treaty obligations (such as prohibitions on performance requirements and the nondiscrimination provisions) may be effective at narrowing the scope of liability under some provisions, but may not fully shield those measures from an investor's claim of breach under other treaty provisions such as the FET requirement.

A number of states address that risk to some extent by inserting more general exceptions relevant to labor and other public policy issues into their treaties. Rather than linking the exceptions to specific *obligations*, they link them to the state's furtherance of specific *policy goals*, such as measures, including labor-related measures, "necessary"<sup>83</sup> or "designed and applied"<sup>84</sup> to "protect human, animal or plant life or health." To determine whether that exception will protect a challenged labor-related measure, a tribunal will have to assess whether the measure is sufficiently designed to serve the stated policy goal.<sup>85</sup>

The practical consequence of that approach is that states have to take care not to inadvertently exclude the policy goals they wish to protect: if, for instance, an agreement specifically carves out financial-related "prudential measures" from its scope, but does not accord similarly specific protection to other public interest measures, such as those designed to improve working conditions, that silence could potentially be deemed a purposeful omission, possibly leaving even bona fide labor measures unintentionally exposed to investors' claims.

In an apparent response to this issue, some states such as Canada have adopted a practice of including broad lists of general exceptions to the treaty. The 2012 BIT between Canada and China, for instance, excepts, among other measures, environmental measures that are "necessary to protect human, animal or plant life or health" and, more broadly, "necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions" of the treaty.<sup>86</sup> The use of the word "necessary," however, implies that there must be an objectively extremely close fit between the measure and its purpose. In contrast, the treaty does not impose a similarly strict "nexus" requirement for other policy aims; for instance, the agreement protects each treaty party's right to take "reasonable" measures for prudential reasons<sup>87</sup> and to take measures it "considers" necessary to further its essential security interests.<sup>88</sup>

83. Japan-Colombia BIT, art. 15(1).

84. Nigeria-Turkey BIT, art. 6(1)(a).

85. These issues of "nexus" and the fit between the measure and its aim are familiar to WTO law, having been the subject of a number of disputes examining the scope and application of exceptions under the General Agreement on Tariffs and Trade and General Agreement on Trade in Services. See, e.g., Brazil—Measures affecting imports of retreaded tyres, WT/DS332/AB/R, *appellate body report* (December 3, 2007), paras. 117(a)(i), 133-83, 210-11, 258(a)(i); United States—Measures affecting the cross-border supply of gambling and betting services, WT/DS285/AB/R, *appellate body report* (April 7, 2005), paras. 311–322; European communities—measures affecting asbestos and asbestos-containing products, WT/DS135/AB/R, *appellate body report* (March 12, 2001), paras. 167–172; Korea—Measures affecting imports of fresh, chilled and frozen beef, WTS/DS161/AB/R, *appellate body report* (December 11, 2000), paras. 161–161; United States—Import prohibition of certain shrimp and shrimp products, WT/DS58/AB/R, *appellate body report* (October 12, 1998), paras. 136–141.

86. Canada-China BIT, art. 33(2). In accordance with this provision, the test would be whether the law or regulation was consistent with the treaty, and whether the measure was necessary to implement the law or regulation. If the answer to both questions is yes, then the measure could survive even if otherwise inconsistent with the treaty.

87. Canada-China BIT, art. 33(3).

88. Canada-China BIT, art. 33(5).

## 2. INVESTMENT AND THE ENVIRONMENT

In contrast to the relatively small number of investment treaties that directly address the subject of investment and labor, the vast majority of 2011/2012 investment treaties – both BITs and FTAs with investment chapters – *do* contain a number of provisions specifically addressing the issue of investment and the environment.<sup>89</sup> Whether in the BIT or FTA, treaties commonly (1) contain the refrain that countries “should”<sup>90</sup> or “shall”<sup>91</sup> not relax their environmental standards in order to attract or retain investment; and/or (2) clarify that nothing in the investment treaty should be construed to prevent a party from adopting, maintaining or enforcing any measure “otherwise consistent with” the agreement that it considers appropriate to address environmental concerns.<sup>92</sup>

The first type of provision, analogous to treaties’ “non-derogation” provisions related to labor conditions, sets domestic and, less commonly, international standards as a baseline for states’ policies.<sup>93</sup>

The 2012 U.S. Model BIT contains a new feature not present in earlier models that attempts to prevent the “non-derogation” obligation from being read as unduly restricting state parties’ discretion to take environmental enforcement actions. There are a number of bases upon which governments may exercise “prosecutorial discretion” to choose when, against whom,

89. UNCTAD’s IPFSD encourages inclusion of provisions on investment and the environment. See, e.g., UNCTAD, *Investment Policy Framework for Sustainable Development*, 2012, *op. cit.*, p. 59, options 9.1.1 and 9.1.2. Agreements that did not include express references to the environment (excluding references in the preamble) were two BITs concluded by the Czech Republic (with Azerbaijan and Sri Lanka), and the BITs between Bosnia and San Marino; Switzerland and Kosovo; Albania and Malta; and Bahrain-Turkmenistan. The large number of investment treaties that did include explicit references to the environment appears to confirm the trend noted by the OECD in its 2011 report regarding states’ increasing practice of including environmental provisions in their investment treaties. See Kathryn Gordon and Joachim Pohl, “Environmental concerns in international agreements: A survey,” OECD Working Papers on International Investment No. 2011/1 (2011), available at: <http://www.oecd.org/daf/inv/investment-policy/48083618.pdf> (last visited September 21, 2013).

90. See, e.g., India-Japan EPA, art. 99; Japan-Colombia BIT, 2011, art. 21(1); Japan-Papua New Guinea BIT, art. 22; Canada-Kuwait BIT, art. 15; Mexico-Peru FTA, art. 11.17(2); China-Japan-Republic of Korea TIA, art. 23. The Canada-China BIT states in Article 18(3) that the “Contracting Parties recognize that it is inappropriate to encourage investment by waiving, relaxing, or otherwise derogating from domestic health, safety or environmental measures.”

91. Central America-Mexico FTA, art. 11.16(2); Korea-Peru FTA, art. 19.5; EFTA-Montenegro FTA, art. 34; EFTA-Hong Kong FTA, art. 8.4. In the EFTA-Montenegro FTA, and EFTA-Hong Kong FTA, the text states that parties “will not” weaken or derogate from their environmental laws, regulations or standards for the “sole intention” of encouraging investment. Similar language was used with reference to labor and investment. The “sole intention” requirement seems to have the impact of weakening the mandatory “will not” language.

92. Central America-Mexico FTA, art. 11.16(1); Japan-Colombia BIT, art. 21(2); Korea-U.S. FTA, art. 11.10; Colombia-U.S. FTA, art. 10.11; India-Malaysia FTA, art. 10.20; Australia-New Zealand Investment Protocol, art. 24; Mexico-Peru FTA, art. 11.17(1). One agreement that does not have these provisions is the BIT between Bangladesh and the UAE. Nevertheless, it does contain a provision on the environment which is targeted at investors, not states. It specifies that an “[i]nvestor of a Contracting Party as far as possible shall comply with the international laws and regulations of the other Contracting Party in relation to public health and/or environmental policies.” See Bangladesh-UAE BIT, art. 3(5).

93. With respect to the “international floor,” some agreements affirm each party’s obligations under the treaties binding it (see, e.g., EFTA-Hong Kong FTA, art. 8.5; SADC Model BIT, art. 15.3 (requiring compliance with the higher of the standards binding on either party)); others affirm obligations commonly binding both of them (2012 U.S. Model BIT, art. 12(1)); others *also* (e.g., EFTA-Hong Kong FTA, art. 8.1; EFTA-Montenegro FTA, art. 31) or *only* (Korea-U.S. FTA, art. 20.2, annex 20-A) affirm commitments under specific listed agreements.

and through what actions to enforce laws and regulations. Relevant considerations may include potential political costs and benefits, likelihood of success, availability of resources for prosecuting violators, and relative “example setting” potential of the enforcement action.<sup>94</sup> The “non-derogation” provisions, however, could be read as limiting such discretion. The 2012 U.S. Model BIT preempts that interpretation by expressly safeguarding the exercise of prosecutorial discretion for enforcement of environmental laws, stating:

The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with [the treaty] where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.<sup>95</sup>

The Korea-Peru FTA has a similar provision in its environment chapter, which applies to both trade and investment.<sup>96</sup>

Interestingly, neither the 2012 U.S. Model BIT nor the Korea-Peru FTA contains a similar express protection of prosecutorial discretion for enforcement of labor or other public interest laws or regulations, potentially affecting tribunals’ review of prosecutorial decisions and resource allocation related to other public interest objectives.

The second type of provision which protects environmental measures “otherwise consistent with the agreement” does not have a parallel in articles on investment and labor, arguably giving a stronger degree of cover to environmental measures than labor measures. The requirement that environmental measures be “otherwise consistent” with the investment treaty, however, undermines the effectiveness of that shield. Notably, the protections offered to measures taken to further other specified policy objectives are not subject to the same condition. For instance, a number of texts such as the 2012 U.S. Model BIT, Canada-China BIT, and Japan-Colombia BIT, shield measures relating to financial services that are adopted or maintained for “prudential reasons,” irrespective of whether those measures are consistent with the treaty.<sup>97</sup> The treaties thus arguably establish a hierarchy of protected policy areas.

Some NAFTA disputes illustrate the impact of the “otherwise consistent with” language. The NAFTA contains a clause stating that nothing in the investment chapter “shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”<sup>98</sup> Although a number of NAFTA

94. See, e.g., Richard A. Posner, *Economic Analysis of Law*, 5th ed. (New York: Aspen Publishers, 1998), pp. 664–670.

95. One may question what is and is not a “bona fide” decision. It is unclear, for instance, whether and when actions taken in response to public sentiment and resulting political pressure may fall within that category.

96. Korea-Peru FTA, art. 19.1(3).

97. 2012 U.S. Model BIT, art. 20(1); Canada-China BIT, art. 33(3); Japan-Colombia BIT, art. 17. Some of those texts specify that the measures protected by that exception should not be taken as a means of avoiding the treaty’s obligations.

98. North American Free Trade Agreement, 32 *International Legal Materials* 289 (1993), art. 1114 [herein *NAFTA*].

cases have arisen in which the host state's environmental measures were the subject of the investor's challenge, that environmental exception has played only an extremely peripheral role, if any at all, in the respondent state's defense of those measures.<sup>99</sup> Illustrating the provision's ambiguity, in at least one case, *Methanex v. United States*, both the investor and the respondent state cited the provision in support of their positions: the claimant relying on the requirement that the measure be "consistent with" the agreement, and the state relying on it as evidence that the state parties intended to safeguard their right to protect the environment.<sup>100</sup> The tribunal did not rely on or cite the provision when issuing its award rejecting the investor's claims.<sup>101</sup>

In addition to the "non-derogation" and "otherwise consistent with" types of environmental provisions noted above, there are other clauses clarifying the scope of, and carving out measures and policy areas from, all or some treaty obligations that provide cover for environmental measures. These include explanatory notes on expropriation and fair and equitable treatment standards;<sup>102</sup> exceptions to specific treaty articles such as the restrictions on performance requirements and nondiscrimination obligations;<sup>103</sup> and more general exceptions from the treaty's disciplines such as exceptions for measures necessary for or related to the conservation of exhaustible natural resources.<sup>104</sup>

Finally, some agreements contain language specifically designed to promote investment that would achieve environmental aims. In the EFTA-Montenegro agreement, for instance, the parties commit to "strive to facilitate and promote foreign investment . . . beneficial to the environment, including environmental technologies [and] sustainable renewable energy."<sup>105</sup> To further that and related objectives, they agree to exchange views, strengthen inter-state cooperation, and

99. See *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, award (August 3, 2005) [herein *Methanex v. United States*]; and *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, award (June 8, 2009) [herein *Glamis v. United States*]. In *Glamis v. United States*, the only reference to the provisions seems to have been in a footnote in a counter-memorial filed by the United States. See *Glamis v. United States*, NAFTA/UNCITRAL, U.S. Counter-Memorial (September 19, 2006), n. 580.

100. *Methanex v. United States*, NAFTA/UNCITRAL, *Methanex reply to U.S. amended Statement of Defense* (February 19, 2004), para. 211, n. 285; *Methanex v. United States*, NAFTA/UNCITRAL, *United States amended Statement of Defense* (December 5, 2003), para. 41.

101. *Methanex v. United States*, NAFTA/UNCITRAL, *first partial award* (August 7, 2002); and *Methanex v. United States*, NAFTA/UNCITRAL, *final award of the tribunal on jurisdiction and merits* (August 3, 2005).

102. These explanatory notes are sometimes set forth within the relevant article, as a separate article, as a footnote to the relevant clause, or as an annex or protocol. In contrast to clarifying statements on expropriation provisions, clarifications regarding the fair and equitable treatment requirement generally do not address environmental measures specifically, but can cover them indirectly through, for example, noting that changes in domestic regulatory frameworks do not, alone, constitute violations of the FET obligation. See Japan-Colombia BIT, art. 4(2).

103. As with explanatory notes, exceptions may also be included in various parts of the text or appended to it. The Japan-Colombia BIT is an example of an agreement that contains certain carve-outs for discriminatory measures that can be taken for environmental purposes through, for instance, restricting access to and use of resources. These include measures relating to rights and preferences to use "communal lands held by ethnic groups" and to investment in fisheries and aquatic resources. See Japan-Colombia BIT, annex II.

104. See, e.g., Nigeria-Turkey BIT, art. 6(1)(b) (covering measures "related to the conservation of living or non-living exhaustible natural resources"); Malaysia-Australia FTA, art. 12.18 (covering measures "necessary to protect human, animal or plant life or health" or "to conserve exhaustible natural resources").

105. EFTA-Montenegro FTA, art. 37(1). The EFTA-Hong Kong FTA, 2011, *op. cit.*, contains the same provision in Article 8.6(1). The environment chapter (Chapter 19) of the Korea-Peru FTA also contains relevant language, setting forth in Article 19.9, for example, the parties' agreement "to promote the development, diffusion, access, use, adequate management, and maintenance of clean and efficient technologies, including those reducing toxic chemical emissions."

encourage cooperation between relevant enterprises.<sup>106</sup> Similarly, the Korea-Peru FTA contains in its environment chapter commitments to promote foreign direct investment in environmental goods and services<sup>107</sup> and, in particular, “joint measures to limit or reduce the adverse effects of . . . climate change;”<sup>108</sup> and exchange information on and promote foreign investors’ compliance with domestic environmental guidelines.<sup>109</sup>

The provisions and features of investment treaties that safeguard labor- and environment-related policy measures suggest two conclusions: First, there appears to be a growing recognition of the implications of both foreign investment and treaties on several domestic policy areas, including, but not limited to, the environment and labor conditions; this heightened awareness, in turn, is leading countries to clarify and carve out their policy space to take measures in pursuit of those public objectives. Second, countries have carved out the most protection for measures related to natural security and, increasingly, financial regulation, followed by the environment, and then finally, labor and other public policy areas.

One arguable reason that investment treaties provide more protection for environmental measures than for measures related to labor could be that countries view their labor markets as being more significant and politically sensitive determinants for outward and/or inward investment flows than their environmental regulations.<sup>110</sup> Consequently, they may perceive more defensive labor provisions as potentially impacting the competitive advantages that enable them to attract and/or retain firms. Treaties with labor provisions may also reflect the strength of the capital exporting states’ domestic labor unions and their concerns about domestic firms moving facilities – and jobs – overseas.

## C. INVESTOR-STATE DISPUTE SETTLEMENT AND TRANSPARENCY

Agreements signed in 2012 continue to reflect emerging concerns about the current “system” of investor-state dispute settlement.<sup>111</sup> A number of factors are contributing to the growing dissatisfaction: more countries are being sued in an increasing number of cases, the disputes are costly

106. EFTA-Montenegro FTA, arts. 37(3), (4), 38; see also EFTA-Hong Kong FTA, arts. 8.6, 8.7.

107. Korea-Peru FTA, art. 19.4(1).

108. Korea-Peru FTA, art. 19.8(1).

109. Korea-Peru FTA, art. 19.7.

110. A number of articles and studies have discussed and debated the impact of host countries’ labor and environmental standards on their receipt of FDI. Both examining those issues and presenting a list of sources is outside the scope of this chapter. Nevertheless, some relevant articles include the following: David Kucera, “Core labour standards and foreign direct investment,” 141 *International Labor Review* 31 (2002); Kenneth J. Vandeveld, “The political economy of bilateral investment treaty,” 92 *American Journal of International Law* 621 (1998), p. 641, n. 186; Gregory Shaffer, “WTO blue-green blues: The impact of U.S. domestic politics on trade-labor, trade-environment linkages for the WTO’s future,” 24 *Fordham International Law Journal* 608 (2000), p. 620; OECD, *International Trade and Core Labour Standards* (OECD, 2000).

111. In addition to the agreements addressing these concerns relating to investor-state dispute settlement that are cited in this chapter, UNCTAD’s IPFSD also reflects and aims to address these issues, and notes various potential drafting options for addressing them. UNCTAD, *Investment Policy Framework for Sustainable Development*, 2012, *op. cit.*, p. 56, option 6.2.



for respondent states, awards have been inconsistent and unpredictable, and the cases often deal with issues of domestic public policy, among others.<sup>112</sup>

As discussed in last year's update,<sup>113</sup> in 2011, the Gillard Government issued a Trade Policy Statement sharply critical of investor-state dispute settlement, announcing:

In the past, Australian Governments have sought the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice. If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries.<sup>114</sup>

Consistent with that policy, the Investment Protocol signed in 2011 between Australia and New Zealand does not contain a provision on investor-state dispute settlement,<sup>115</sup> nor does the FTA between Australia and Malaysia, which was signed in 2012.<sup>116</sup> Australia has also indicated it will not commit to investor-state dispute settlement in the ongoing negotiations of the Trans-Pacific Partnership.<sup>117</sup> The SADC Model BIT likewise states that the preferred option of its Drafting Committee was to exclude investor-state dispute settlement from investment treaties. Nevertheless, the SADC Model BIT does provide guidance on the possible features of such a mechanism should a state wish to negotiate for it.<sup>118</sup>

112. These concerns have been raised and noted in a number of sources. See, e.g., UNCTAD, *World Investment Report 2012*, *op. cit.*, pp. 86–92; Joachim Karl, “Investor-state dispute settlement: A government’s dilemma,” *Columbia FDI Perspectives*, No. 89 (February 18, 2013); Chris Campbell, Sophie Nappert and Luke Nottage, “Open letter: Assessing treaty-based investor-state dispute settlement” (July 28, 2012), available at: <http://sydney.edu.au/law/about/staff/LukeNottage/OpenLetterOnChangingISDS28072012.pdf> (last visited September 21, 2013); “An open letter from lawyers to the negotiators of the Trans-Pacific Partnership urging the rejection of investor-state dispute settlement” (May 8, 2012), available at: <http://tpplegal.wordpress.com/open-letter/> (last visited September 21, 2013).

113. Stephan W. Schill and Marc Jacob, “Trends in international investment agreements, 2010/2011: The increasing complexity of international investment law,” in Karl Sauvant, ed., *Yearbook on International Investment Law & Policy 2011–2012* (New York: Oxford University Press, 2013), pp. 158–159.

114. Department of Foreign Affairs and Trade, “Gillard government trade policy statement: Trading our way to more jobs and prosperity” (April 2011), p. 14, available at: <http://pdf.aigroup.asn.au/trade/Gillard%20Trade%20Policy%20Statement.pdf> (last visited September 21, 2013).

115. Australia-New Zealand Investment Protocol, 2011, *op. cit.* The text also clarifies that the MFN provision does not apply to dispute settlement (Australia-New Zealand Investment Protocol, 2011, *op. cit.*, art. 6(2)).

116. Investors may, however, be able to use the investment chapter (chapter 11) of the ASEAN-Australia-New Zealand FTA to pursue investor-state dispute settlement for a breach of investment obligations. See Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area (February 27, 2009), ch. 11, available at: <http://www.asean.fta.govt.nz/assets/Agreement-Establishing-the-ASEAN-Australia-New-Zealand-Free-Trade-Area.pdf> (last visited September 21, 2013).

117. Australia’s policy on investor-state arbitration has generated significant attention from commentators both in favor of and critical of the policy. See, e.g., Jürgen Kurtz, “Australia’s rejection of investor-state arbitration: Causation, omission and implication,” 27 *ICSID Review* 65 (2012); Luke Nottage, “The rise and possible fall of investor-state arbitration in Asia: A skeptic’s view of Australia’s ‘Gillard Government Trade Policy Statement,’” Sydney Law School Research Paper No. 11/32 (June 2011), available at: <http://ssrn.com/abstract=1860505> (last visited September 21, 2013); Leon E. Trakman, “Investor state arbitration or local courts: Will Australia set a new trend?” 46 *Journal of World Trade* 83 (2012); Leon E. Trakman, “Choosing domestic courts over investor-state arbitration: Australia’s repudiation of the status quo,” 35 *University of New South Wales Law Journal* 979 (2012).

118. SADC Model BIT, art. 29.



Additionally, some other agreements that focus less on investment protection and more on trade liberalization and investment promotion, such as the agreements entered into by the European Free Trade Association (EFTA),<sup>119</sup> do not include investor-state dispute settlement mechanisms.<sup>120</sup> Recent examples are agreements EFTA signed with Hong Kong, China<sup>121</sup> and Montenegro.<sup>122</sup>

Yet despite the small but growing number of treaties without investor-state dispute settlement provisions, the majority of treaties continue to provide for investor-state arbitration. However, those provisions increasingly include clarifications as to governing law and available remedies,<sup>123</sup> restrictions on access to the mechanism,<sup>124</sup> and procedural specifications regarding how the arbitrations are to be conducted.<sup>125</sup>

Among the procedural developments are provisions on transparency in dispute resolution.<sup>126</sup> Most treaties continue to be generally silent on the issue of transparency or confidentiality of investor-state dispute settlement; nevertheless, expanding on the practice initially advanced by the NAFTA parties roughly a decade ago,<sup>127</sup> a growing number of countries are now including

119. EFTA states are Iceland, Liechtenstein, Norway, and Switzerland.

120. This is similar to the approach that has been taken by the European Union. See, e.g., Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, OJ L289/I/3, 2008 (October 30, 2008); Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L127/6, 2011 (May 14, 2011), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:127:0006:1343:EN:PDF>.

121. Signed June 21, 2011; entered into force October 1, 2012 for Hong Kong, Iceland, Liechtenstein, and Switzerland and November 1, 2001 for Norway.

122. Signed November 14, 2011; entered into force September 1, 2012 for Montenegro, Liechtenstein, and Switzerland, October 1, 2012 for Iceland, and November 1, 2012 for Norway.

123. See, e.g., Japan-Colombia BIT, art. 31 (specifying government law), 35 (allowing for certain interim measures but precluding tribunals from ordering attachment or enjoining application of challenged measures); Central America-Mexico FTA, art. 11.26; India-Japan EPA, art. 96(17), (18) (addressing available interim relief and remedies that may be granted in awards).

124. Some restrictions relate to the relevant policy goal targeted by the measure. See, e.g., Canada-China BIT, annex D.34 (barring investor-state claims regarding decisions whether to approve or permit investments subject to review); Canada-China BIT, art. 22; Japan-Colombia BIT, arts. 25 and 29 (restricting preestablishment claims in certain policy areas); Nigeria-Turkey BIT, art. 11(4)(b) (restricting investor-state arbitration of disputes relating to “the property and real rights upon the real estates”); Tanzania-Turkey BIT, art. 10(4). Other restrictions include limitations periods. See, e.g., Japan-Colombia BIT, art. 29(4); Central America-Mexico FTA, art. 11.22(1); India-Japan EPA, art. 96(9); India-Malaysia FTA, art. 10.14(9); Japan-Papua New Guinea BIT, art. 16(6); Korea-Peru FTA, 2011, art. 9.16(5).

125. A number of treaties, for example, are including provisions on consolidation. These include the Canada-Kuwait BIT, art. 27; Japan-Colombia BIT, art. 37; Central America-Mexico FTA, art. 11.29.

126. In addition to the issue of transparency, some procedural issues being proposed as possible mechanisms for reforming investor-state dispute resolution include the creation of specialized courts or appellate mechanisms, and the promotion of investor-state mediation. On the issue of mediation, for instance, see, e.g., IBA Rules for Investor-State Mediation (October 4, 2012), available at: [http://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Mediation/Default.aspx](http://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/Default.aspx) (last visited September 21, 2013); Micah Burch, Luke R. Nottage and Brett G. Williams, “Appropriate treaty-based dispute resolution for Asia-Pacific commerce in the 21st century,” 35 *University of New South Wales Law Journal* 1013 (May 2012).

127. Some early state commitments to transparency in investor-state arbitrations were made through unilateral offers by states to open the proceedings. See, e.g., Canadian Department of Foreign Affairs and International Trade, “Statement of Canada on open hearings in NAFTA chapter eleven arbitrations,” (October 7, 2003), available

clauses providing for greater openness. Countries that included provisions on transparency in investor-state dispute settlement in agreements signed in 2011 and 2012 were Canada, Bahrain, China, Costa Rica, El Salvador, Guatemala, Honduras, India, Kuwait, Malaysia, Mali, Mexico, Nicaragua, Panama, Peru, Senegal, and Tanzania.<sup>128</sup> The SADC Model BIT,<sup>129</sup> 2012 U.S. Model BIT<sup>130</sup> and EU policy on future treaties<sup>131</sup> also provide for transparency in investor-state arbitration.<sup>132</sup>

All of the 2011/2012 treaties and models providing for some mandatory disclosure require that awards be made public.<sup>133</sup> Some treaties and models additionally ensure public disclosure of a broader set of documents issued by or submitted to the tribunal, and do not permit the disputing parties to block publication either by unilateral veto or joint decision;<sup>134</sup> some provide for open hearings irrespective of whether either or both disputing parties object.<sup>135</sup> In other texts, such as the Canada-China BIT, the respondent state party has the right to determine whether transparency would be extended beyond the award to cover hearings and submissions.<sup>136</sup> And

at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/open-hearing.aspx?lang=en> (last visited October 28, 2013); “NAFTA Free Trade Commission joint statement: A decade of achievement,” July 16, 2004, available at: [http://www.ustr.gov/archive/Document\\_Library/Press\\_Releases/2004/July/NAFTA\\_Free\\_Trade\\_Commission\\_Joint\\_Statement\\_-\\_A\\_Decade\\_of\\_Achievement.html](http://www.ustr.gov/archive/Document_Library/Press_Releases/2004/July/NAFTA_Free_Trade_Commission_Joint_Statement_-_A_Decade_of_Achievement.html) (last visited October 28, 2013).

128. See, e.g., Canada-China BIT, arts. 27, 28 (requiring only awards to be mandatorily disclosed to the public, but more comprehensive disclosure to the non-disputing state party). Central America-Mexico FTA, arts. 11.24, 11.25.

129. As stated in the commentary to Article 29 of the SADC Model BIT, the SADC Drafting Committee recommends against including investor-state dispute settlement. If, however, it is included, transparency is also incorporated. See SADC Model BIT, commentary to art. 29 and art. 29.17.

130. 2012 U.S. Model BIT, art. 29.

131. See, e.g., “Statement of the European Union and the United States on shared principles for international investment,” available at: [http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc\\_149331.pdf](http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf) (last visited September 21, 2013) (stating that “[g]overnments should provide access to effective dispute settlement procedures, including investor-to-State arbitration, and ensure that such procedures are open and transparent, with opportunities for public participation”); Nathalie Bernasconi-Osterwalder, “European Commission’s draft text on dispute settlement for EU agreements,” *Investment Treaty News*, July 19, 2012; Luke Eric Peterson, “EU and Member States find common ground on roster-system for arbitrators, heightened ethics rules, and broader transparency,” *Investment Arbitration Reporter*, October 22, 2012.

132. Other policy documents, such as the IPFSD, also suggest increasing transparency. That text, for instance, suggests “foster[ing] accessibility of documents” and “public participation” as options for “improv[ing] the institutional set-up of ISDS.” UNCTAD, *Investment Policy Framework for Sustainable Development*, 2012, *op. cit.*, p. 57. Campbell, Nappert and Nottage, “Open letter: Assessing treaty-based investor-state dispute settlement,” 2012, *op. cit.*, also noted significant support for transparency among its survey respondents.

133. See, e.g., Central America-Mexico FTA, art. 11.25; SADC Model BIT, art. 29.17; 2012 U.S. Model BIT, art. 29; Canada-China BIT, art. 27; Canada-Kuwait BIT, art. 30(1). But see India-Malaysia FTA, art. 10.14(19) (“[T]he disputing Party may make publicly available all awards and decisions made by the tribunal.”).

134. See, e.g., Central America-Mexico FTA, art. 11.25 (requiring publication of information and open hearings); SADC Model BIT, 2012, art. 29.17 (same); 2012 U.S. Model BIT, art. 29 (same).

135. See, e.g., Central America-Mexico FTA, art. 11.25 (requiring publication of information and open hearings); SADC Model BIT, art. 29.17(b) (same); 2012 U.S. Model BIT, art. 29(2) (same); Canada-Kuwait BIT, art. 30(2).

136. Canada-China BIT, arts. 27, 28. That text grants the *non-disputing state party* the right to obtain information submitted to and issued by the tribunal, attend hearings, and make submissions on “question[s] of interpretation” (art. 27). In contrast, rights of the *public* to access information are much narrower. The agreement with China only guarantees public disclosure of awards. For all other aspects of the proceedings, the respondent state has

yet other treaties require as the general rule that all documents submitted to or issued by the tribunal be publicly disclosed, but allow the disputing parties to agree to restrict access to all such information with the exception of awards.<sup>137</sup>

When the treaties are silent on the issue of transparency and confidential information – as is currently the case for the vast majority of existing treaties – determinations about the openness of investor-state (and state-state) arbitral proceedings fall, depending on the relevant factual and legal context, to the applicable arbitral rules, agreements of the parties, orders of the tribunal, and/or applicable law, with varied outcomes. Individuals and some organizations have increasingly requested host government agencies and/or courts to release information relating to investor-state arbitrations under domestic freedom of information laws.<sup>138</sup> In 2012, the United Nations Commission on International Trade Law (UNCITRAL) was still moving forward on its multiyear effort to develop a legal standard on transparency in investor-state arbitration;<sup>139</sup> and much information continues to pour into the public domain due to unilateral and joint disclosures.<sup>140</sup> Yet there is still some reluctance to have open proceedings be the default rule. For instance, the Permanent Court of Arbitration's rules for investor-state arbitration issued in 2012 require the consent of *both* disputing parties to open hearings and disclose awards.<sup>141</sup>

the right to dictate the degree of openness, and is only required to disclose documents and open hearings if it “determines that it is in the public interest to do so.” This approach is similar to that taken by Canada in several other investment treaties. See, e.g., Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments (November 14, 2006), art. 38 (mandating open hearings and disclosure of awards; requiring disclosure of all other documents submitted to or issued by the tribunal unless both disputing parties agreed otherwise); Agreement between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments (June 24, 2009), art. 38; Agreement between the Government of Canada and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investment (November 15, 1990), annex B (giving the respondent state party the right to determine whether there would be open hearings and mandating disclosure of all documents submitted to or issued by the tribunal unless the disputing parties agreed otherwise).

137. Canada-Kuwait BIT, art. 30(1)

138. See, e.g., Jarrod Hepburn and Filip Balcerzak, “Polish court rules on release of investment arbitration awards under freedom of information law,” *Investment Arbitration Reporter*, January 2, 2013, available at: [http://www.iareporter.com/articles/20130102\\_3](http://www.iareporter.com/articles/20130102_3) (last visited September 21, 2013).

139. See, e.g., CIEL, IISD and VCC, “Submission to UNCITRAL working group II on international arbitration” (submitted at the session in Vienna, October 1–5, 2012), available at: [http://www.vcc.columbia.edu/files/vale/content/CIEL\\_IISD\\_VCC\\_UNCITRAL\\_Background\\_Note\\_Sept.\\_2012.pdf](http://www.vcc.columbia.edu/files/vale/content/CIEL_IISD_VCC_UNCITRAL_Background_Note_Sept._2012.pdf) (last visited September 21, 2013). UNCITRAL adopted its Rules on Transparency in July 2013, after the review period covered by this chapter. They were adopted in August 2013. UNCITRAL is still continuing work on developing instruments to facilitate broad application of those new transparency rules. See CIEL, IISD and VCC, “New UNCITRAL Arbitration Rules on Transparency: Application, Content, and Next Steps” (August 2013), available at: [http://www.vcc.columbia.edu/files/vale/content/UNCITRAL\\_Rules\\_on\\_Transparency\\_commentary\\_FINAL.pdf](http://www.vcc.columbia.edu/files/vale/content/UNCITRAL_Rules_on_Transparency_commentary_FINAL.pdf).

140. See, e.g., Philip Morris Asia Ltd. v. Australia, PCA Case No. 2012-12, *procedural order no. 5 regarding confidentiality* (November 30, 2012).

141. Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State, art. 32, available at: [http://www.pca-cpa.org/showpage.asp?pag\\_id=1188](http://www.pca-cpa.org/showpage.asp?pag_id=1188) (last visited September 21, 2013). The lack of transparency in the rules may not reflect states' position on the issue as the drafting committee of the rules does not appear to have had government officials as members (though some members were former government officials). See Permanent Court of Arbitration, “New PCA Arbitration Rules adopted” (2012), available at: [http://www.pca-cpa.org/shownews.asp?ac=view&pag\\_id=1261&nws\\_id=347](http://www.pca-cpa.org/shownews.asp?ac=view&pag_id=1261&nws_id=347) (last visited September 21, 2013) (listing the members of the Drafting Committee).

## D. NEW DEVELOPMENTS TO WATCH: TERMINATION, RENEWAL AND RENEGOTIATION

Understanding trends in investment agreements requires, in addition to examining new agreements, assessing terminations, renewals and renegotiations of existing agreements.

The number of BITs signed annually peaked between 1992 and 2003; as many BITs have a lifespan of ten years, many of these treaties will reach the end of their first or second lifecycle in the coming years. Some may automatically renew; some may be renewed and/or renegotiated by the parties; and others may be terminated. For the terminated agreements, the parties may negotiate a replacement agreement; and either way, pursuant to investment agreements' survival clauses, the protections of the terminated text may (or may not)<sup>142</sup> continue for a number of years to protect investments existing when the treaty was in force.

Similarly, as countries conclude agreements that are broader in terms of state parties (i.e., moving from bilateral to multilateral treaties) and/or broader or different in terms of coverage (e.g., moving from an investment liberalization agreement to protection and liberalization treaties), questions arise about the fate of the treaties that are being "taken over," and the protections granted under them. This may garner particular attention, for instance, when a new multilateral treaty purports to replace an existing bilateral agreement, and the new text provides narrower or more tailored substantive protections, and/or more restricted options for investor-state dispute settlement. The relationship between the BIT's termination provision and survival clauses, and the new agreement's management of preexisting treaty obligations, will impact the scope and enforceability of investor protections; given the growing trend toward regional agreements,<sup>143</sup> governments will likely have to grapple with this issue more frequently. Some of these debates are playing out in Europe, with different interpretations of the legal impact of European Union integration on intra-EU investment treaties.<sup>144</sup>

142. The Czech Republic has reportedly adopted a two-part treaty termination strategy whereby it seeks to escape the impact of survival clauses extending the protections of treaties beyond their actual life by agreeing with the other state party to (1) amend the relevant treaty to say that such clauses no longer apply, and (2) then terminate the treaty. See Luke Eric Peterson, "Czech Republic terminates investment treaties in such a way as to cast doubt on residual legal protection for existing investments," *Investment Arbitration Reporter*, February 1, 2011. As Professor Anthea Roberts has pointed out, that two-step process may not be necessary to avoid the impact of survival clauses as many of them provide that investors will be protected for a period of time in the event of *unilateral* termination by one of the treaty parties, but do not similarly explicitly provide a survival clause in the event of a joint decision by the parties to terminate the agreement. For an illustration, see, e.g., 2012 U.S. Model BIT, art. 22 (stating the legal impact of termination by one party, but not joint termination); China-Japan-Republic of Korea TIA, art. 27(5) – (6) (same).

143. See, e.g., UNCTAD, Investment Policy Monitor No. 8 (November 26, 2012), p. 7, available at: [http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d5\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d5_en.pdf) (last visited September 21, 2013); UNCTAD, *World Investment Report 2012*, *op. cit.*, pp. 84–86.

144. As a snapshot of this issue which has gotten much coverage by commentators and been the subject of a number of legal disputes, varying arguments put forth by the European Commission and respondent member states have taken the position that protections granted in intra-EU BITs are inconsistent with, have been superseded by, and are unenforceable under EU law. In arbitrations decided by the time of publication (e.g., *Eastern Sugar v. Czech Republic*, SCC No. 088/2004, *partial award* (March 27, 2007), paras. 119–181; *Ostergetel and Laurentius v. Slovakia*, UNCITRAL, *decision on jurisdiction* (April 30, 2010), paras. 64–109; *Eureko v. Slovakia*, PCA Case No. 2008-13, *decision on jurisdiction* (October 26, 2010)), tribunals have implicitly or explicitly rejected those arguments. Domestic courts have also come to the same conclusion: After the decision was rendered in

Finally, agreements may also be renegotiated or terminated based on countries' dissatisfaction with the perceived imbalance of costs and benefits they provide.<sup>145</sup> This has become a notable trend, beginning in 2008, when Ecuador<sup>146</sup> and Venezuela<sup>147</sup> started to terminate their BITs. Bolivia terminated its BIT with the United States, effective June 10, 2012,<sup>148</sup> and in September 2012, South Africa announced its intention to terminate its BIT with the Belgo-Luxembourg Economic Union when it expired in March 2013.<sup>149</sup> South Africa has also announced that it does not plan to renew 12 other existing BITs with EU member states.<sup>150</sup>

*Eureko v. Slovakia*, Slovakia appealed it to the Frankfurt Court of Appeals. In May 2012, that court issued a decision rejecting Slovakia's contentions regarding the alleged termination of the intra-EU BIT (case no. 26 SchH 11/10). (But see *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, *decision on jurisdiction, applicable law, and liability* (November 30, 2012) (raising new questions about the impact of EU law on intra-EU BIT protections)). Some of these issues have also been considered among ASEAN countries in relation to their adoption of the 2009 ASEAN Comprehensive Investment Agreement, February 26, 2009, available at: [http://www.asean.org/images/2012/Economic/AIA/Agreement/ASEAN%20Comprehensive%20Investment%20Agreement%20\(ACIA\)%202012.pdf](http://www.asean.org/images/2012/Economic/AIA/Agreement/ASEAN%20Comprehensive%20Investment%20Agreement%20(ACIA)%202012.pdf) (last visited September 21, 2013). Article 47 of that agreement provides:

Transitional Arrangements Relating to the ASEAN [Investment Guarantee Agreement (“ASEAN IGA”)] and the [Framework Agreement on the ASEAN Investment Area (“AIA Agreement”)]:

1. Upon entry into force of this Agreement, the ASEAN IGA and the ASEAN AIA shall be terminated.
2. Notwithstanding the termination of the AIA Agreement, the Temporary Exclusion List and the Sensitive List to the AIA Agreement shall apply to the liberalization provisions of the ACIA mutatis mutandis, until such time that the Reservation List of the ACIA comes into force.
3. With respect to investments falling within the ambit of this Agreement as well as under the ASEAN IGA, or within the ambit of this Agreement and the AIA Agreement, investors of these investments may choose to apply the provisions, but only in its entirety, of either this Agreement or the ASEAN IGA or the AIA Agreement, as the case may be, for a period of 3 years after the date of termination of the ASEAN IGA and the AIA Agreement.

145. In addition to the examples cited in this chapter, see generally Anthea Roberts, “Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States,” 104 *American Journal of International Law* 179 (2010), pp. 191–192 (discussing the role of “exit” in the investment treaty context).

146. See Sachet Singh and Sooraj Sharma, “Investor-state dispute settlement mechanism: The quest for a workable roadmap,” 29 *Utrecht Journal of International and European Law* 88 (2013), p. 93 (noting that Ecuador terminated its BITs with nine countries: Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania, and Uruguay). But see United States Department of State, Bureau of Economic and Business Affairs, “Investment climate statement: Ecuador” (June 2012), available at: <http://www.state.gov/e/eb/rls/othr/ics/2012/191141.htm> (last visited September 21, 2013) (noting that in September 2009 the Ecuadorian Government requested approval from the country's National Assembly to terminate 13 of its BITs, but, as of June 2012, only one had been formally terminated).

147. See, e.g., Luke Eric Peterson, “Venezuela surprises the Netherlands with termination notice for BIT; Treaty has been used by many investors to ‘Route’ investments into Venezuela,” *Investment Arbitration Reporter*, May 16, 2008.

148. See United States Department of State, Bureau of Economic and Business Affairs, “Investment climate statement: Bolivia” (June 2012), available at: <http://www.state.gov/e/eb/rls/othr/ics/2012/191112.htm>.

149. “Termination of the Bilateral Investment Treaty with the Belgo-Luxembourg Economic Union,” from Maite Nkoana-Mashabane, Minister of International Relations and Co-operation, to the Ambassador of the Kingdom of Belgium to South Africa, Johan Maricou, on 7 September 2012; Peter Leon, Jonathan Veeran and Erin Warmington, “South Africa: South Africa declines to renew Bilateral Investment Treaties with European Union member states” (October 5, 2012), available at: <http://www.mondaq.com/x/199586/international+trade+investment/South+Africa+Declines+To+Renew+Bilateral+Investment+Treaties+With+European+Union+Member+States> (last visited September 21, 2013).

150. See note 149.



These various terminations, renegotiations and new regional agreements make it difficult to predict what the “spaghetti bowl” of investment treaties will look like in terms of numbers and scope in the coming years. Since investors could argue that they made their investments on the basis of protections contained in BITs at the time of the investment, one might expect tribunals to be asked to decide whether treaties themselves, and the specific provisions in them, form part of the undertakings states give to investors that tribunals have found enforceable under the FET standard, particularly as the treaties were designed specifically to attract foreign investment. Along these lines, one expert opinion filed in 2010 in the state-to-state treaty-based arbitration between Ecuador and the United States asserted that investment treaties create third-party beneficiary rights for investors and that state parties may not have unfettered authority to interfere with those rights after an investor has invested.<sup>151</sup> This view, which many states would likely contest, might prompt states in future treaties to disclaim that the treaties create such rights or declare that they reserve the power to amend, terminate and issue binding interpretations of their treaties.<sup>152</sup>

## 1. GOVERNMENTAL AND INTERGOVERNMENTAL POLICY ASSESSMENTS: DEVELOPING NEW APPROACHES AND RAISING NEW ISSUES

The year 2012 was an active one for treaty policy assessment and formulation. UNCTAD, for instance, released its Investment Policy Framework for Sustainable Development in early 2012, promoting a move toward a new generation of investment policies.<sup>153</sup> The OECD adopted a different focus, issuing a scoping paper and initiating a consultation process dealing with the narrower issue of investor-state dispute settlement.<sup>154</sup>

Several countries also embarked on *ex ante* efforts to develop a model or template agreement, or parts thereof. The processes reflect domestic and regional efforts to think carefully about the design, provisions and implications of investment treaties before entering into and concluding negotiations. Through that process, countries can identify domestic priorities and concerns, evaluate potential costs and benefits of the agreements, and isolate which items are and are not negotiable. Notable examples include the adoption and release of the SADC Model BIT, continued efforts within the European Union to develop its policies toward investment treaty negotiations, and the adoption of the 2012 U.S. Model BIT.

This section explores these developments and the implications they may have for future investment treaties.

151. Ecuador v. United States, *expert opinion of Prof. Reisman, op. cit.*

152. As an example of this type of reservation, the Canada-China BIT, art. 18(2), states that “[f]urther to consultations under this Article, the Contracting Parties may take any action as they may jointly decide, including making and adopting rules supplementing the applicable arbitral rules under Part C of this Agreement and issuing binding interpretations of this Agreement.” Notably, the parties expressly reserve their rights to issue binding *interpretations*, but not to amend the treaty. *Cf.* Nigeria-Turkey BIT, art. 15 (“This Agreement may be amended by mutual written consent of the Contracting Parties at any time. The Amendments shall enter into force in accordance with the same legal procedure prescribed under Article 13 of this Agreement [on entry into force].”).

153. UNCTAD, *Investment Policy Framework for Sustainable Development*, 2012, *op. cit.*

154. See note 16.



## 2. A NEW TEMPLATE AND POLICY RECOMMENDATIONS FOR THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

The South African Development Community (SADC) Protocol on Finance and Investment includes as one of its objectives the goal of harmonizing its member states' investment policies and laws.<sup>155</sup> In furtherance of that objective, SADC embarked on an effort to develop a “model bilateral investment treaty template” which SADC member states could then use as a guide for “developing their own specific Model Investment Treaty or as a guide through any given investment treaty negotiation.”<sup>156</sup> To facilitate its guidance, SADC also drafted commentary to accompany and explain the purpose behind the proposed text in each article.<sup>157</sup> The template offers recommendations but is not prescriptive, nor is it meant to be binding on any member state; rather, it aims to serve as a tool for individual countries to refer to and draw from as desired.<sup>158</sup>

### a. Standard Elements

The SADC Model BIT sets out options for many traditional features of investment treaties, and then briefly describes the rationales behind the possible selections and SADC recommendations. The text addresses the standard core elements of the agreements. These are provisions that (1) determine the agreements' scope (e.g., the definition of an “investor” and “investment” and the issue of preestablishment and postestablishment coverage); (2) address host-state duties (e.g., the text and possible implications of nondiscrimination requirements, provisions on expropriation, and the FET and MST obligations); (3) create limitations on or exceptions from those duties; and (4) provide guidance on investor-state and state-state dispute settlement. With respect to each of those standard elements of investment treaties, the SADC text advises approaches that are relatively protective of host states' policy space, while still aiming for a reasonable measure of investor protection.

This means, for instance, that for the definition of a covered investment, the preferred option is to use an “enterprise-based definition” akin to what is used in the General Agreement on Trade in Services (GATS) for international investment through “Mode 3.”<sup>159</sup> The text also recommends limiting treaty commitments to postestablishment protections.<sup>160</sup>

With respect to substantive obligations on host states, the text highlights options that best accommodate states' continued efforts to develop policies to further legitimate policy goals. In doing so, it notes at various points that obligations are expressly narrowed in order to react to and minimize “creative” interpretations by tribunals. The text, for example, recommends against

155. Protocol on Finance and Investment (August 18, 2006), available at: [http://www.sadc.int/files/4213/5332/6872/Protocol\\_on\\_Finance\\_Investment2006.pdf](http://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance_Investment2006.pdf) (last visited September 21, 2013) (signed August 18, 2006; entered into force April 16, 2010); see also SADC Model BIT, p. 3.

156. SADC Model BIT, p. 3.

157. SADC Model BIT, p. 3.

158. SADC member states are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia, and Zimbabwe.

159. SADC Model BIT, art. 2 and commentary.

160. SADC Model BIT, art. 4 and commentary.

including a most-favored nation (MFN) obligation.<sup>161</sup> It explains that this is in part a precautionary approach based on the observation that tribunals had interpreted the provision “very broadly, and on several occasions unexpectedly . . . making it very unpredictable in practice.”<sup>162</sup>

The SADC text also counsels against including a FET obligation. It explains that if one is included, it should be expressly tethered to the MST and the well-known *Neer* standard, and preclude only conduct that is “an outrage, in bad faith, a willful neglect of duty or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency.”<sup>163</sup> The Commentary explains that although “[s]ome States may find this too high a standard to be meaningful to investors today[,] . . . it is clear that this was the intended standard when the original treaties were drafted and that the expansive interpretations since provided by some tribunals had not been anticipated.”<sup>164</sup> The recommended text is thus explained not as a narrowing of previous commitments reflected in international investment agreements (IIAs) or a “rebalancing” of IIA obligations, but as an effort to constrain tribunals’ interpretations of treaty standards.

Notably, the SADC Model BIT offers an alternative to the FET standard which shifts interpretation and application of that standard from one that emphasizes protection of investors’ expectations to one that emphasizes ensuring that governments comply with procedural due process. Procedural due process, in turn, is used as a prophylactic tool for indirectly protecting the rights and interests of investors. This FET alternative, labeled, “Fair Administrative Treatment,” reads as follows:

- 5.1. The State Parties shall ensure that their administrative, legislative, and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural [justice] [due process] to investors of the other State Party or their investments [taking into consideration the level of development of the State Party].
- 5.2. Investors or their Investments, as required by the circumstances, shall be notified in a timely manner of administrative or judicial proceedings directly affecting the Investment(s), unless, due to exceptional circumstances, such notice is contrary to domestic law.
- 5.3. Administrative decision-making processes shall include the right of [administrative review] [appeal] of decisions, commensurate with the level of development and available resources at the disposal of State Parties.
- 5.4. The Investor or Investment shall have access to government-held information in a timely fashion and in accordance with domestic law, and subject to the limitations on access to information under the applicable domestic law.
- 5.5. State Parties will progressively strive to improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial processes in accordance with their respective domestic laws and regulations.<sup>165</sup>

The Commentary explains that the “Drafting Committee was unanimous in believing this could be a constructive alternative approach” to FET, providing “useful protection for investors, while

161. The commentary on the nondiscrimination article states, “The Drafting Committee noted that these should be bilateral treaties and that, as such, they should not establish unintended multilateralization through the MFN provision.” See SADC Model BIT, p. 22.

162. SADC Model BIT, p. 22.

163. SADC Model BIT, p. 23.

164. SADC Model BIT, p. 24.

165. SADC Model BIT, art. 5.

limiting the risks of the expansive rulings associated with the FET standard in a number of arbitral awards.<sup>166</sup>

The SADC text likewise contains recommended versions of the other provisions commonly found in IIAs, including those on expropriation and transfers of assets. The recommendations clarify the scope of those obligations, and adopt approaches similar to what has been seen in some texts such as Model BITs adopted by the United States and Canada, and the regional investment agreements of the Common Market for Eastern and Southern Africa (COMESA)<sup>167</sup> and Association of Southeast Asian Nations (ASEAN).<sup>168</sup>

The scope of treaty obligations on host states is narrowed further through clarifications, reservations and exceptions, affirming and shielding host states' rights to take measures in support of a range of policy goals.

For one, the SADC Model BIT seeks to entrench host states' "right to regulate" in Article 20. This article declares that state parties retain rights and powers that they have not expressly limited through the treaty; by including this language, the article could impact tribunals' interpretations of the scope of states' obligations under their investment treaties and the burden on investors to establish that those obligations have been breached.

The Model BIT then goes further and claws back some of the protections granted by its articles on host-state obligations. In Article 21 on the "Right to Pursue Development Goals," the Model BIT exempts what could be a range of measures from the national treatment requirement and other provisions, including the types of measures that were challenged in *Foresti v. South Africa*.<sup>169</sup> It states:

ARTICLE 21 •• Right to Pursue Development Goals

21.1. Notwithstanding any other provision of this Agreement, a State Party may grant preferential treatment in accordance with their domestic legislation to any enterprise so qualifying under the domestic law in order to achieve national or sub-national regional development goals.

21.2. Notwithstanding any other provision of this Agreement, a State Party may

- (a) support the development of local entrepreneurs, and
- (b) seek to enhance productive capacity, increase employment, increase human resource capacity and training, research and development including of new technologies, technology transfer and other benefits of investment through the use of specified requirements on investors made at the time of the establishment or acquisition of the investment and applied during its operation.

21.3. Notwithstanding any other provision of this Agreement, a State Party may take measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Agreement.<sup>170</sup>

166. SADC Model BIT, p. 24.

167. COMESA includes Angola, Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe. The COMESA Investment Agreement was adopted in May 2007 at the Twelfth Summit of COMESA Authority of Heads of State and Government.

168. ASEAN includes Brunei, Cambodia, Indonesia, Laos, Malaysia, Burma, Philippines, Singapore, Thailand, and Vietnam.

169. Piero Foresti, Laura de Carli and others v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1, *award* (August 4, 2010), available at: [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1651\\_En&caseId=C90](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1651_En&caseId=C90) (last visited September 21, 2013).

170. SADC Model BIT, art. 21.

The text also includes a more general article on exceptions (Article 25) that contains provisions drawing on language that can be found in the General Agreement on Tariffs and Trade (GATT) and a growing number of investment treaties including, for example, exceptions for measures to protect “human, animal or plant life or health”<sup>171</sup> and taken for “prudential reasons.”<sup>172</sup> Yet the SADC Model BIT deviates from more common articles on exceptions in two significant ways. First, whereas in many existing texts measures are covered by the exception if they are “necessary” to achieve the stated legitimate policy aim, the SADC Model BIT takes a more flexible stance, providing coverage if the measures are “taken in good faith and designed and applied to” achieve the protected policy goal.<sup>173</sup>

Second, it clarifies that if measures fall within these exceptions, no compensation is required to be paid under the treaty. This provision is based on the fact that investment treaties traditionally do not *preclude* a state from taking measures in the public interest, but may require payment of compensation for the impacts of the measures on the protected investments. In the context of an expropriation, for example, the public interest purpose of a measure is an *element* of a legal expropriation, under which an obligation to pay compensation may still be owed. Whether and in what circumstances a measure’s public interest purpose will be interpreted to guard a state against treaty liability and a duty to pay compensation is a complex and unsettled question.<sup>174</sup> This text preemptively addresses that issue, giving added protections to state parties.

With respect to dispute resolution, as noted above, the SADC Model BIT recommends against including investor-state arbitration as a mechanism for resolving treaty disputes. It does, however, include sample text to provide guidance for SADC states that choose to include the option. Among the features suggested in the text for clarifying the rights under investor-state arbitration are provisions requiring exhaustion of domestic remedies,<sup>175</sup> imposing a limitations period for claims;<sup>176</sup> attempting to ensure the effectiveness of contractual dispute resolution clauses;<sup>177</sup> providing for transparency in the arbitration process;<sup>178</sup> and addressing arbitrator conflicts of interest by requiring arbitrators to meet standards of independence and impartiality and precluding them from concurrently sitting as counsel in other investor-state arbitrations.<sup>179</sup>

The text also provides for state-state consultation, mediation and arbitration in order to resolve disputes regarding interpretation and/or application of the treaty.<sup>180</sup> The power of home

171. SADC Model BIT, art. 25.1(b).

172. SADC Model BIT, art. 25.2.

173. SADC Model BIT, art. 25.1.

174. The treaties often reflect this uncertainty when they note, in the context of an expropriation, that “[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party to achieve legitimate public welfare objectives, such as protection of public health, safety, and the environment, do not constitute indirect expropriations.” See, e.g., Australia-New Zealand Investment Protocol, 2011, *op. cit.*, art. 14(1), n. 7.

175. SADC Model BIT, art. 29.4(b).

176. SADC Model BIT, art. 29.4(d).

177. SADC Model BIT, art. 29.9(b) provides, “Where an investment authorization or a contract includes a choice of forum clause for the resolution of disputes pertaining to that investment or the authorization or contract, no arbitration under this Agreement may be initiated by the Investor when the underlying measure in the arbitration would be covered by such a choice of forum clause.”

178. SADC Model BIT, art. 29.17.

179. SADC Model BIT, art. 29.13. This provision bars arbitrators from acting “concurrently as counsel in another actual or potential treaty-based arbitration involving a foreign investor and a State.”

180. SADC Model BIT, art. 28.

states to bring claims on behalf of their investors is expressly recognized.<sup>181</sup> The treaty states that any award issued by a tribunal in these state-state proceedings will be binding on the state parties. While the language used for investor-state disputes notes that awards shall only be binding on the disputing parties and in connection with the particular dispute, the language used for state-state arbitrations states more simply that the decisions “shall be binding on both State Parties,” suggesting that the state-state decisions can have potentially precedential effect.<sup>182</sup>

## b. New Provisions: Investor Obligations and Home-State Duties

Much of the SADC Model BIT’s innovation is its expansion of the traditional model to also include investor obligations and home-state responsibilities, in order to both promote the flow of international investment and better ensure that it contributes to sustainable development.<sup>183</sup>

There are eight core provisions on investor obligations. These are obligations (1) against corruption;<sup>184</sup> (2) to comply with host state laws;<sup>185</sup> (3) to provide the host state information on itself and its prospective or existing investment;<sup>186</sup> (4) to prepare environmental and social assessment reports in accordance with the precautionary principle and in compliance with standards selected by the treaty parties, whether based on host-state, home-state, or international requirements;<sup>187</sup> (5) to maintain and implement environmental management plans, and to ensure those plans provide for continuous efforts to improve environmental performance and remain consistent with relevant best practices;<sup>188</sup> (6) to comply with relevant standards for human rights, labor rights, and environmental protection, and ensure that investments are not established, managed, or operated in a manner inconsistent with the higher of the international

181. SADC Model BIT, art. 28.3(a).

182. SADC Model BIT, art. 28.7 (relating to state-state arbitration: “The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both State Parties”); *cf.* the much narrower language in Article 29.19(d) relating to investor-state arbitration, restricting the award to the narrow confines of the particular case: “An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.” The 2011 BIT between Turkey and Nigeria offers another basis for comparison as it contains more information regarding the relationship between the investor-state and state-state tribunal. It expressly says that no state-state dispute may be submitted to an international arbitration tribunal “if a dispute on the same matter has been brought before” an investor-state tribunal “and is still before the tribunal.” (art. 12(8)). It then adds that that restraint is not to “impair the engagement in direct and meaningful negotiations between both Contracting Parties.” (art. 12(8)).

183. While, as discussed in this section, the SADC text contains a number of innovations in terms of investor and home-state obligations, some of the features and underlying principles can also be found in existing agreements. The issue of corruption, for instance, is one that is addressed in several of the 2011/2012 treaties. The parties to the EFTA-Montenegro FTA affirm through the agreement’s preamble their “commitment to prevent and combat corruption in international trade and investment, and to promote the principles of transparency and good public governance.” Article 8 of the Japan-Colombia BIT similarly requires contracting parties to “ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations.” As discussed in the text, many investment treaties also address issues of the environment, health and safety.

184. SADC Model BIT, art. 10.

185. SADC Model BIT, art. 11.

186. SADC Model BIT, art. 12.

187. SADC Model BIT, art. 13.

188. SADC Model BIT, art. 14.



environmental, labor and human rights obligations binding on the host or home state;<sup>189</sup> (7) to adhere to or exceed national and international corporate governance standards and ensure that transactions among affiliates are at fair market price;<sup>190</sup> and (8) to publish relevant contracts with and payments to the host state.<sup>191</sup>

The SADC Model BIT strengthens those obligations by specifying avenues for enforcement and certain penalties for noncompliance. Article 10, which imposes obligations against corruption, makes clear that *any* breach by the investor of that article will be “deemed to constitute a breach of the domestic law of the Host State Party concerning the establishment and operation of an investment.” This is designed to remove the offending investment from the definition of a covered “investment”<sup>192</sup> and thereby deny it protections under the treaty.<sup>193</sup> A “material breach” of the requirement to provide truthful and not misleading information to the host state regarding the investment carries the same consequence.<sup>194</sup>

For other investor obligations, the consequence of a breach is less immediate but still present. The SADC Model BIT notes that if a host state raises the issue of an investor’s breach of an obligation before an investor-state or state-state tribunal in the context of a dispute, the tribunal must assess whether the alleged breach is relevant to issues of merit or damages in the dispute.<sup>195</sup> The SADC Model BIT also provides that in an investor-state arbitration initiated by the investor, the respondent host state may initiate a counterclaim against the investor for breach of its obligations under the agreement, and may seek “damages or other relief” as a remedy.<sup>196</sup>

In addition to the possibility of raising counterclaims of an investor’s breach of its obligations in connection with an arbitration proceeding, the SADC Model BIT also expressly permits the host state, “including political subdivisions and officials thereof,” to raise civil claims relating to the alleged breach before the courts of the home or host state.<sup>197</sup> “[P]rivate persons” and “private organizations,” are also given that same right.<sup>198</sup> The nature and availability of relief, however, will be determined based on the law of the jurisdiction where the claims are brought.<sup>199</sup>

In that context, the SADC Model BIT introduces a new feature designed to limit the situations in which investors’ multinational operations make it difficult to subject them to suit. The Model BIT seeks to knock down hurdles, such as the *forum non conveniens* doctrine, which may

189. SADC Model BIT, art. 15

190. SADC Model BIT, art. 16.

191. SADC Model BIT, art. 18.

192. The SADC Model BIT contains three different possible definitions of a covered “investment,” each of which contains the requirement that the investment be “admitted or established in accordance with the laws and regulations of the Party in whose territory the investment is made.” See SADC Model BIT, art. 2.

193. SADC Model BIT, art. 10. The commentary to this article notes that by falling outside the definition of a covered “investment” the investment will lose “dispute settlement rights.” Although not stated, it appears that the consequences would not be limited to loss of dispute settlement rights to enforce the treaty protections, but also the loss of substantive protections under the agreement.

194. SADC Model BIT, art. 12.3.

195. SADC Model BIT, art. 19.1.

196. SADC Model BIT, art. 19.2.

197. SADC Model BIT, arts. 19.3, 19.4.

198. SADC Model BIT, arts. 19.3, 19.4.

199. SADC Model BIT, arts. 19.3, 19.4.

prevent individuals and organizations in the host state from bringing claims against investors in their home states. It does this, in part, by requiring home states to

ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of investors and investments for damages resulting from alleged acts, decisions or omissions made by investors in relation to their investments in the territory of the Host State.<sup>200</sup>

Through this provision, the home state is enlisted to help ensure enforcement of its investors' obligations.

Home state assistance is further required in other areas. The SADC Model BIT imposes obligations on home states to help combat corruption,<sup>201</sup> and to cooperate with the host state in investment promotion activities.<sup>202</sup>

Taken together, the provisions of the SADC Model BIT thus present a new form of investment treaty that go beyond earlier BIT models. The traditional "BIT 1.0" models impose broad obligations solely on host states, with much of the scope of those obligations left to interpretation. The newer "BIT 2.0" models clarify those obligations, providing more room for host-state regulation and limiting tribunals' discretion. This SADC Model BIT heralds a new approach in which the scope of treaty obligations goes beyond host state obligations to include also the conduct of home states and investors in order to impact both the quantity and quality of foreign investment.

It remains to be seen whether and to what extent SADC and other states will incorporate these provisions in future treaties. One might view the text as representing a consensus among countries with shared interests, which would arguably be difficult to incorporate into agreements between states with more complex relationships such as between predominantly capital-exporting and capital-importing states. Yet such a view would ignore the relevant intra-SADC dynamics – e.g., the roles of South Africa and Mauritius as significant capital exporters to a number of other SADC states with smaller economies – which indicate that development of the SADC text itself reflects an interesting and replicable consensus among states with disparate interests and unequal economic and political power.

## E. DEVELOPMENTS IN THE EUROPEAN UNION: FORMULATING THE VARIOUS PIECES OF EU POLICY

In 2011/2012, the European Union was active in taking steps to implement its new role as the leader in foreign direct investment between EU member states and third countries. Prior to the Treaty of Lisbon's entry into force on December 1, 2009, the European Union was responsible for negotiating and concluding international agreements on trade and goods, services, commercial aspects of intellectual property, and government procurement, while the member states and the European Union held shared competence over international agreements relating to foreign

200. SADC Model BIT, art. 17.2.

201. SADC Model BIT, art. 10.

202. SADC Model BIT, art. 23.

investment.<sup>203</sup> The member states negotiated investment protection treaties, and the European Union negotiated investment liberalization agreements.<sup>204</sup> The Lisbon Treaty transferred to the European Union exclusive competence over foreign direct investment (FDI) and the investment treaties governing it.<sup>205</sup> The years since have witnessed (1) the European Union and its member states wrangling over what, exactly, that transition will mean for their respective rights and obligations relating to foreign investment; (2) the European Union working to assess what its policies toward investment liberalization and protection should be; and (3) developments in negotiations on new investment treaties between the European Union and third states.

The European Parliament and Council gave some answers to the first issue in December 2012, adopting a new regulation on the fate of the roughly 1,200 BITs concluded by member states with non-EU countries (the “extra-EU BITs”). Pursuant to that regulation, the European Union authorized the continued existence of those extra-EU BITs concluded by member states prior to December 1, 2009, allowing them to stay in effect unless and until they were replaced by a new EU investment agreement.<sup>206</sup> The regulation also will allow member states some latitude to renegotiate or amend existing treaties, and to conclude new investment treaties with countries that the European Union does not immediately plan to target for similar negotiations.<sup>207</sup> In each of those situations, however, the Commission must grant *ex ante* approval for the negotiations and approve the amended or new agreements.<sup>208</sup>

Representing another shift of power from member states to the Commission, the regulation requires each member state to notify and secure approval from the Commission if it intends to

203. The European Union’s competence for its Common Commercial Policy began with competence over trade in goods, but then expanded over time. In 1994, the European Court of Justice (ECJ) issued an opinion concluding that the European Union’s competence includes trade in services, but only trade in services through mode 1 as defined under the World Trade Organization’s General Agreement on Trade in Services (cross-border supply of services). (ECJ, Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property—Article 228(6) of the EC Treaty, 1994 E.C.R. I-5267 (November 15, 1994), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61994CV0001:EN:HTML> (last visited September 22, 2013)). Trade in services through mode 3 (establishment of commercial presence or foreign investment) was not covered until the day before the Lisbon Treaty entered into force. (ECJ, Opinion 1/08, Opinion pursuant to Article 300(6) EC, 2009 E.C.R. I-11129 (November 30, 2009)). See also Colin Brown and Maria Alcover-Llubia, “The external investment policy of the European Union,” 2011, *op. cit.*

204. See generally Colin Brown and Maria Alcover-Llubia, “The external investment policy of the European Union,” 2011, *op. cit.*

205. Consolidated Version of the Treaty on the Functioning of the European Union, [2010] OJ C83/47 (March 30, 2010), arts. 206, 207, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF> (last visited September 22, 2013) [herein *TFEU*]; see also *TFEU*, arts. 3(1)(e) and 2(1). Although the treaty only expressly refers to “foreign direct investment,” which generally is not defined to include “portfolio investment,” the Commission has stated that it also has exclusive competence over “portfolio investment” due to its exclusive competence over capital movement. (European Commission, “Towards a comprehensive European international investment policy,” COM (2010) 343 (July 7, 2010), p. 8, available at: [http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc\\_147884.pdf](http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147884.pdf) (last visited September 22, 2013)).

206. Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, [2012] OJ L351/40 (December 12, 2012), art. 2, available at: <http://new.eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012R1219&qid=1379856715195&from=EN> [herein *Regulation (EU) No. 1219/2012*]

207. Regulation (EU) No. 1219/2012, *op. cit.*, arts. 7–11.

208. Regulation (EU) No. 1219/2012, *op. cit.*, arts. 7–11.

initiate a consultation or dispute resolution process against its treaty counterparty; it must also notify the Commission of claims filed against it by foreign investors.<sup>209</sup>

This regulation may have been welcomed by some member states and their investors who wanted to entrench existing and even negotiate additional protections for investments abroad.<sup>210</sup> Investors from third countries may also benefit, as they can structure their investments through a member state in order to take advantage of the protections offered by these extra-EU BITs.<sup>211</sup>

With respect to the issue of policy formulation for new investment treaties between the European Union and other countries, documents published officially and leaked texts indicate that there has been a significant degree of activity on matters of both substance and process, and provide insight on the outlines of EU approaches to these issues.<sup>212</sup> In terms of substance, the European Union and the United States issued in April 2012 a statement of their seven “Shared Principles for International Investment.”<sup>213</sup> These principles are intended to (1) promote broad market access, (2) encourage restraint on “national security” reviews of foreign investments, (3) advocate “competitive neutrality,” (4) call for strong protections for investors and investments, (5) recommend binding dispute settlement (including investor-state arbitration) to enforce those protections, (6) promote the “highest levels” of transparency and public participation in development of investment-related laws, and (7) urge governments to encourage their investors to adhere to standards of responsible business conduct.<sup>214</sup> The principles of the European Union and the United States thus heavily emphasize liberalization and investment protection, but are also prefaced with the declaration that such principles could be implemented by governments “while still preserving the authority to adopt and maintain measures necessary to regulate in the public interest to pursue certain public policies.”<sup>215</sup>

209. Regulation (EU) No. 1219/2012, *op. cit.*, art. 13(b)–(c).

210. The adopted regulation shrinks the grounds upon which the Commission can withdraw authorization for a treaty from four to one. See Luke Eric Peterson, “Fate of more than a thousand Bilateral Investment Treaties is sealed in latest deal,” *Investment Arbitration Reporter*, November 14, 2012. See also Colin Brown and Maria Alcover-Llubià, “The external investment policy of the European Union,” 2011, *op. cit.*, p. 155.

211. See, e.g., Crowell and Moring, “The EU regulation on bilateral investment treaties: A victory for certainty” (December 20, 2012), available at: <http://www.crowell.com/NewsEvents/AlertsNewsletters/all/The-EU-Regulation-on-Bilateral-Investment-Treaties-A-Victory-for-Certainty> (last visited September 22, 2013) (noting that “the benefits [of the EU regulation] flow to three categories of companies in particular[:] Member State firms investing outside of the EU; companies outside the EU investing in EU Member States; and companies outside the EU investing through EU Member States into third countries”). The future of protections under “intra-EU BITs” – BITs between EU member states – is, however, less clear. The regulation does not address the issue of intra-EU BITs, of which there are roughly 200; and the Commission has long maintained that those agreements are inconsistent with EU law. See generally Steffen Hindelang, “Member state BITs,— There’s still (some) life in the old dog yet,” in Karl Sauvant, ed. *Yearbook on International Investment Law & Policy 2010–2011* (New York: Oxford University Press, 2012) (discussing the issue of intra-EU BITs under EU law).

212. The Commission has indicated that it does not intend to develop and negotiate based on a “Model BIT,” but will shape its treaty policy and objectives based on the country with which it is negotiating. Colin Brown and Maria Alcover-Llubià, “The external investment policy of the European Union,” 2011, *op. cit.*

213. “Statement of the European Union and the United States on shared principles for international investment,” *op. cit.*

214. “Statement of the European Union and the United States on shared principles for international investment,” *op. cit.*

215. “Statement of the European Union and the United States on shared principles for international investment,” *op. cit.*

In terms of substance on liberalization and protection, the ongoing nature of many negotiations makes it difficult to draw any conclusions, but there are signs that the European Union is pushing on these objectives, requesting, for instance, investment protection and enforcement standards that appear to be more protective of investors (and risky for host states) than the relatively guarded approaches adopted by the United States and Canada.<sup>216</sup> In its negotiations with Canada, for instance, the Commission sought stronger protections in a number of treaty obligations than Canada has wanted to give. In particular, the Commission has reportedly resisted Canada's request to include language in the definition of an indirect expropriation that would limit compensation for losses arising from measures taken to pursue legitimate policy objectives.<sup>217</sup> The Commission has also been seeking, and Canada objecting to, inclusion of a broad umbrella clause that would protect "any undertaking" a state has entered into toward an investor.<sup>218</sup> Further, while Canada has been advocating linking the fair and equitable treatment obligation to the "treatment required by the customary international law minimum standard of treatment," the Commission has responded that such a position is "problematic for the EU, as it may significantly reduce the level of treatment afforded by the FET standard itself."<sup>219</sup>

While seeking strong protections for its investors, the European Union has also considered that such protections can be invoked against itself. In this regard, the Commission has drafted a proposal for a regulation that would dictate how to handle investor-state arbitration proceedings brought against the European Union and/or its member states, and allocate responsibility for defense and payment of claims.<sup>220</sup> The "central organizing principle" underlying the proposed regulation is that "financial responsibility flowing from investor-state dispute settlement cases should be attributed to the actor which has afforded the treatment in dispute."<sup>221</sup> If this regulation were to be adopted, it could have important implications for member states' views of EU negotiating stances: If the European Union concludes agreements with strong investor protection provisions, each of its member states will similarly be bound by, and can be individually liable for, costs of defending cases and paying claims for breach of those agreements, even if the

216. See Memo from European Commission to Trade Policy Commission regarding EU Canada Comprehensive Economic and Trade Agreement: Landing zones (November 6, 2012), available at: [http://www.lapresse.ca/html/1633/Document\\_UE\\_2.pdf](http://www.lapresse.ca/html/1633/Document_UE_2.pdf) (last visited September 22, 2013) (noting, for example, that the European Union was seeking stronger protections under the FET and expropriation standards than were being proposed by Canada).

217. Memo from European Commission to Trade Policy Commission regarding EU Canada Comprehensive Economic and Trade Agreement: Landing zones, 2012, *op. cit.*, p. 9.

218. Memo from European Commission to Trade Policy Commission regarding EU Canada Comprehensive Economic and Trade Agreement: Landing zones, 2012, *op. cit.*, p. 10.

219. Memo from European Commission to Trade Policy Commission regarding EU Canada Comprehensive Economic and Trade Agreement: Landing zones, 2012, *op. cit.*, p. 9.

220. European Commission, "Proposal for a regulation of the European Parliament and of the Council Establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is a party," COM (2012) 335 (June 21, 2012), available at: [http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc\\_149567.pdf](http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf) (last visited September 22, 2013).

221. European Commission, "Proposal for a regulation of the European Parliament and of the Council Establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party," 2012, *op. cit.*, p. 1.



obligations assumed under the treaties concluded between the European Union and third states went beyond what the member state might have committed to through its own treaties.<sup>222</sup>

On the matter of procedure, the European Union seems to have committed to investor-state dispute settlement.<sup>223</sup> But there are indications that it sees a need to adjust the way the “system” has been generally operating by, for example, requiring transparency in investor-state arbitration and including a code of conduct for arbitrators.<sup>224</sup>

On the third issue of negotiating partners, at the end of 2012 the European Commission was involved in negotiating investment treaties (generally lodged in broader trade agreements)<sup>225</sup> with Canada, India, Singapore, and Tunisia; anticipated opening negotiations with Morocco, Jordan and Egypt; and was exploring future negotiations with China.<sup>226</sup>

## F. THE 2012 U.S. MODEL BIT: NEW TRENDS IN TRANSPARENCY AND STANDARD SETTING AND POSSIBLE IMPLICATIONS

In April 2012, three years after the Obama Administration launched its formal review of the 2004 U.S. Model BIT, the United States released an updated version of its Model BIT.<sup>227</sup> During the review process, the shape of the new Model BIT was subjected to interagency review, public notice and comment, and expert consultation to identify issues and consider potential reforms.<sup>228</sup>

Overall, the new model text continues the approach taken by the United States in its investment treaties over at least the past decade, indicating the U.S. Government’s continued

222. European Commission, “Proposal for a regulation of the European Parliament and of the Council Establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is a party,” 2012, *op. cit.*, pp. 19–20. These pages set out the content of Chapter II of the proposed regulation, which deals with apportionment of financial responsibility. Proposed Article 3 states in relevant part that “the Union shall bear the financial responsibility arising from treatment afforded by the institutions, bodies or agencies of the Union” while the “Member State concerned shall bear the financial responsibility arising from treatment afforded by that Member State, except where such treatment was required by the law of the Union.”

223. Nathalie Bernasconi-Osterwalder, “Analysis of the European Commission’s Draft Text on Investor-State Dispute Settlement for EU Agreements,” *Investment Treaty News* (July 19, 2012), available at: <http://www.iisd.org/itn/2012/07/19/analysis-of-the-european-commissions-draft-text-on-investor-state-dispute-settlement-for-eu-agreements/> [herein *Bernasconi-Osterwalder, Analysis of EU ISDS*].

224. Bernasconi-Osterwalder, *Analysis of EU ISDS*, *op. cit.*

225. Colin Brown and Maria Alcover-Llubià, “The external investment policy of the European Union,” 2011, *op. cit.*, p. 161.

226. European Commission, “EU takes key step to provide legal certainty for investors outside Europe,” press release (December 12, 2012), available at: [http://europa.eu/rapid/press-release\\_IP-12-1362\\_en.htm](http://europa.eu/rapid/press-release_IP-12-1362_en.htm) (last visited September 22, 2013).

227. U.S. Department of State and Office of the U.S. Trade Representative, “United States concludes review of model Bilateral Investment Treaty” (April 20, 2012), available at: <http://www.ustr.gov/about-us/press-office/press-releases/2012/april/united-states-concludes-review-model-bilateral-inves>.

228. U.S. Department of State and Office of the U.S. Trade Representative, “Joint Statement, United States concludes review of model Bilateral Investment Treaty,” 2012, *op. cit.*

satisfaction with both its undefeated record as a respondent state in investor-state arbitrations, and the protection its investment treaties have given to U.S. investors abroad. But some clarifications and changes were made: The chapter on financial services added explanatory text to remove doubt as to the scope of protected measures;<sup>229</sup> language was inserted to make it clearer when actions by state enterprises and other persons who have been delegated authority by a treaty party are also covered by the treaty;<sup>230</sup> restrictions on performance requirements were expanded;<sup>231</sup> and the 2012 U.S. Model BIT somewhat strengthened the labor and environmental provisions in comparison to the 2004 U.S. Model BIT<sup>232</sup> (though the text adopted in 2012 was not as strong as that which can be found in some earlier U.S. FTAs).<sup>233</sup>

One area where rather significant changes appeared was in the model's article on transparency of government measures. The 2004 U.S. Model BIT had imposed on state parties the duty to, to the extent possible, publish in advance any laws, regulations, procedures, and administrative rulings of general application that they proposed to adopt if those measures were related to issues covered by the treaty.<sup>234</sup> It also required, again to the extent possible, that state parties provide each other and "interested persons" with a reasonable opportunity to comment on the proposed measures.<sup>235</sup> The 2012 U.S. Model BIT retains those provisions, and supplements them with provisions governing the timing and content of the procedures for publication and receipt of comments on those proposed measures. It adds, for example, that when publishing its proposal, the state party must also provide an "explanation of the purpose of and rationale" behind it;<sup>236</sup> then, at the time of adopting the final regulation, it must publicly disclose its responses to "significant, substantive comments" received regarding the proposed measure, explain "substantive revisions" it made to the regulation as it had been proposed, and publish the purpose and rationale behind the measures that are adopted.<sup>237</sup>

229. 2012 U.S. Model BIT, art. 20(1), n. 18; *cf.* 2004 U.S. Model BIT, *op. cit.*, art. 20(1), n. 14; see also 2012 U.S. Model BIT, art. 20(8).

230. 2012 U.S. Model BIT, art. 2(2)(a), n. 8.

231. 2012 U.S. Model BIT, art. 8(1), (2).

232. For example, in the 2012 U.S. Model BIT, Article 13 on investment and labor included an affirmation of the state parties' obligations as members of the ILO, and expanded the scope of "labor laws" covered by the provision to cover laws related to "elimination of discrimination in respect of employment and occupation." (2012 U.S. Model BIT, art. 13(1) and (3)). The article on the environment likewise contained an affirmation of the roles of domestic environmental laws and policies, and multilateral agreements to which they are *both* a party. (2012 U.S. Model BIT, *op. cit.*, art. 12(1)). Both the labor and environment articles also changed language stating that the each party should "strive to ensure" to ensure that it did not derogate from domestic labor laws in order to attract investment, to text stating that each party "shall not" do so. (2012 U.S. Model BIT, art. 13(2); *cf.* 2004 U.S. Model BIT, *op. cit.*, art. 13(1)). The labor and environment articles also confirmed that each party had the right to "as appropriate, provide opportunities for public participation regarding any matter arising under" those articles. (2012 U.S. Model BIT, art. 12(7), 13 (5)).

233. See, e.g., Korea-U.S. FTA, 2007, *op. cit.*, ch. 19; Colombia-U.S. FTA, 2006, *op. cit.*, ch. 17.

234. 2004 U.S. Model BIT, *op. cit.*, art. 11(2)(a). A separate article, "Publication of laws and decisions respecting investment," required prompt disclosure of laws, regulations, procedures, administrative rulings of general application, and adjudicatory decisions "respecting any matter" covered by the treaty. (2004 U.S. Model BIT, *op. cit.*, art. 10(1)). That same requirement is contained in Article 10(1) of the 2012 U.S. Model BIT.

235. 2004 U.S. Model BIT, *op. cit.*, art. 11(2)(b).

236. 2012 U.S. Model BIT, art. 11(3)(c).

237. 2012 U.S. Model BIT, art. 11(3)(d), 11(4)(b).

The burden of these requirements on host states is not insubstantial;<sup>238</sup> however, there are some mitigating factors for governments. First, as noted above, the requirements for governments to publish proposed regulations, and publicly address comments received on and revisions made to those proposals, apply “to the extent possible.”<sup>239</sup> (In contrast, that qualifier does not apply to the new requirement for governments to publish an explanation of the purpose and rationale for the *adopted* regulations). Moreover, the new requirements only apply to relevant proposed or adopted *regulations of general application* that are issued by the state party’s *central or federal* level of government.<sup>240</sup>

In addition to those new provisions on proposals for and adoption of regulations, Article 11 on transparency adds a new discipline on standard setting. Specifically, Article 11(8) includes an *absolute* obligation requiring each state party to allow individuals and entities<sup>241</sup> from the other state party to participate in development of standards and technical regulations promulgated by central government bodies. A footnote clarifies that a state “may satisfy this obligation by, for example, providing interested persons a reasonable opportunity to provide comments on the [proposed] measure” and “taking those comments into account in the development of the measure.”<sup>242</sup> If standards and technical regulations are not developed by central government bodies, but by nongovernmental standardizing bodies, each state party is to “recommend” that those bodies likewise allow participation by individuals and entities from the other state party.<sup>243</sup> The text also adds a *relative* obligation pursuant to which state parties must allow such participation by foreign persons on *at least* the same terms as permitted for their domestic citizens and firms, providing absolute procedural rights for foreign investors.<sup>244</sup> By contrast, with respect to the development of mechanisms for assessing conformance with standards and technical regulations, the 2012 Model only contains the relative (and not the absolute) obligation, stating that treaty parties must allow participation by foreign persons on the same terms as permitted for their domestic persons (or recommend to nongovernmental standardizing bodies that foreign persons be able to participate on the same terms as domestic persons).<sup>245</sup>

The text adds some limitations to the standard setting clauses, stating that they (1) do not apply in connection with the supply of a service; (2) do not apply to purchasing specifications that are used by government bodies in connection with their own consumption and production;

238. This issue has been noted by UNCTAD in its *Investment Policy Framework for Sustainable Development*, 2012, *op. cit.*, p. 53.

239. That limitation is incorporated via Article 11(3)’s reference to Article 11(2)(a), which contains the “to the extent possible” qualification. But if a proposed measure is published in accordance with Article 11(2)(a), it appears that all of the requirements of Article 11(3) thereby apply without any separate “to the extent possible” limitation.

240. 2012 U.S. Model BIT, art. 11(3), (4).

241. Article 11(8) of the 2012 U.S. Model BIT requires state parties to grant “persons” the ability to participate in standard setting. Thus, the benefits of the standard-setting provisions are not limited to the narrower concept of “investors of a Party.” Both concepts are defined in the Model BIT. “Persons” is defined as a “natural person or enterprise.” An “investor of a Party” is defined, in part, as a “Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party” (2012 U.S. Model BIT, art. 1).

242. 2012 U.S. Model BIT, art. 11(8), n. 14.

243. 2012 U.S. Model BIT, art. 11(8)(b).

244. 2012 U.S. Model BIT, art. 11 (8)(a). This would also be consistent with the national treatment requirement.

245. 2012 Model BIT, art. 11(8)(a), (b).

and (3) do not apply to sanitary and phytosanitary measures defined in Annex A of the World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures (i.e., certain food safety or other measures taken to protect human, animal and plant life or health).<sup>246</sup>

None of the new or old provisions in Article 11 on regulatory transparency are subject to investor-state dispute settlement.<sup>247</sup>

On one hand, these provisions requiring governments to publish advance notice of proposed actions, provide for input into development of standards and regulations, and respond to comments received on proposed measures can be seen as important advances in investment treaties that will help improve government transparency and accountability, and advance the rule of law. On the other hand, they may enhance the risk of agency or regulatory “capture” by opening up a wide window for foreign investors to influence proposed regulatory actions through submission of public comments, private communications and/or other lobbying activities.

This issue of “capture,” or the “control of agency policy decision-making by a subpopulation of individuals or organizations outside the agency,”<sup>248</sup> has attracted much attention in recent years due to its alleged role in major and widespread disasters such as the global financial crisis<sup>249</sup> and the oil spill in the Gulf of Mexico.<sup>250</sup>

There is considerable debate surrounding the problem of capture – where and in what circumstances it exists, how to identify it, whether and to what extent it is a problem, and, where it is a problem, how to address it.<sup>251</sup> Some, for example, argue that when a government is contemplating the regulation of business, it is the business community that is potentially affected by the proposed measures that has the best information regarding the design and merits of the proposal.<sup>252</sup> Thus, a heavy hand by affected interests in the standard setting may be desirable.<sup>253</sup> Others, however, note

246. 2012 Model BIT, art. 11(8)(c), (d).

247. 2012 Model BIT, art. 24(1). The Article 10 requirement that each party publish or make publicly available any of its laws, regulations, procedures, administrative rulings of general application, and adjudicatory decisions that relate to any matter covered by the treaty is, however, covered by investor-state dispute settlement. See 2012 U.S. Model BIT, arts. 10, 24.

248. This definition is taken from Susan Webb Yackee in her article “Reconsidering agency capture during regulatory policymaking,” in Daniel Carpenter and David Moss, eds., *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge: Cambridge University Press, 2013); see also George J. Stigler, “The theory of economic regulation,” 2 *Bell Journal of Economic & Management Science* 3 (1971).

249. See, e.g., James Kwak “Cultural capture and the financial crisis,” in Daniel Carpenter and David Moss, eds., *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge: Cambridge University Press, 2013); Lawrence G. Baxter, “Capture in financial regulation: Can we channel it toward the common good?” 21 *Cornell Journal of Law and Public Policy* 175 (2011).

250. See, e.g., Christopher Carrigan, “Minerals management service and deepwater horizon: What role should capture play?” in Daniel Carpenter and David Moss, eds., *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge: Cambridge University Press, 2013); Wilma A. Lewis, Mary L. Kendall and Rhea S. Suh, “U.S. Department of the Interior Outer Continental Shelf Safety Oversight Board Report to Secretary of the Interior Ken Salazar” (September 1, 2010), available at: <http://www.doi.gov/news/pressreleases/upload/OCS-Safety-Oversight-Board-Report.pdf> (last visited September 22, 2013).

251. See, e.g., Michael E. Levine and Jennifer L. Forrence, “Regulatory capture, public interest, and the public agenda: Toward a synthesis,” 6 *Journal of Law, Economics, and Organization* 167 (1990); Dan Carpenter and David Moss, eds., *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge: Cambridge University Press, 2013)

252. See, e.g., Dorit R. Reiss, “The Benefits of Capture,” 2 *Wake Forest Law Review* 47 (2012).

253. Dorit R. Reiss, “The Benefits of Capture,” 2012, *op. cit.*; James R. Barth, Gerard Caprio and Ross Levine, *Guardians of Finance: Making Regulators Work for Us* (Cambridge, MA: MIT Press, 2012); Ross Levine, “The

the potential for “nefarious influence by business or economic interests on regulatory outputs to the detriment of the ‘public interest’ or ‘public good.’”<sup>254</sup> In this sense, “capture” happens, which is “shorthand for the phenomenon whereby regulated entities wield their superior capabilities to secure favorable agency outcomes at the expense of the diffuse public.”<sup>255</sup>

Whatever one’s view of capture in the domestic context, there are two factors that may make the threat of that phenomenon more pressing in international investment law if investment treaties increasingly guarantee foreign investors input into rule-making and standard setting. First is the risk of “regulatory chill”: In the domestic context, nonagency actors that disagree with the agency may be able to pursue litigation against the government to challenge the agency’s final decisions regarding the crafting or rejection of the rule.<sup>256</sup> Thus, when deciding whether and how to adopt the rule, the likelihood of such legal challenge is one factor that can impact the agency’s ultimate approach.<sup>257</sup> Nevertheless, the remedy available in such legal challenges – and therefore the force of the litigation threat – is generally restricted to a modification or rejection of the rule, not monetary damages.<sup>258</sup> In contrast, in the international investment law sphere, an investor can raise the threat of investor-state arbitration (and the often high legal fees, expenses, liability, and reputational risks associated with it) in conjunction with its comments on proposed government action.<sup>259</sup>

A second issue relates to power dynamics. Studies have shown that business interests are more influential in states where public interest advocates are not active.<sup>260</sup> Because public interest advocates (i.e., advocates for consumer rights, environmental protection, and social justice) in developing countries are generally less strong and well-funded than their developed-country counterparts,<sup>261</sup> one may worry that foreign business interests can wield disconcerting degrees of influence or control over developing country agency actors to the detriment of broader public interests.

This is not to suggest that the growth of international standards on transparency and notice and comment procedures be avoided. (Indeed, one might query whether these sections should be expanded to include standards not just for regulations but also for government tenders,

governance of financial regulation: Reform lessons from the recent crisis,” Bank for International Settlements Working Paper No. 329 (November 2010).

254. Susan Webb Yackee, “Reconsidering agency capture during regulatory policymaking,” *op. cit.*

255. Rachel E. Barkow, “Insulating agencies: Avoiding capture through institutional design,” 89 *Texas Law Review* 15 (2010); see Nicholas Bagley and Richard L. Revesz, “Centralized oversight of the regulatory state,” 106 *Columbia Law Review* 1260 (2006), pp. 1284–1292 (providing a brief intellectual history of capture theory).

256. Chester Brown and Kate Miles, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011).

257. Chester Brown and Kate Miles, *Evolution in Investment Treaty Law and Arbitration*, 2011, *op. cit.*

258. Eric Neumayer, *Greening Trade and Investment: Environmental Protection without Protectionism* (London: Earthscan Publications, 2001).

259. Neumayer, *Greening Trade and Investment: Environmental Protection without Protectionism*, 2001, *op. cit.*; Stephan W. Schill, “Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?,” 24(5) *Journal of International Arbitration* 469 (2007).

260. See, e.g., William T. Gormley, “Alternative models of the regulatory process: Public utility regulation in the states,” 35 *The Western Political Quarterly* 297 (1982); Jason W. Yackee and Susan W. Yackee, “A bias towards business? Assessing interest group influence on the bureaucracy,” 68(1) *The Journal of Politics* 128 (2006).

261. Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics*, 3rd ed. (Cambridge: Cambridge University Press, 2011).



bidding, and contracting). As these provisions on transparency and standard setting are now being included in investment treaties, however, they raise relatively unexplored questions of whether such agreements are the right place for these provisions and what these requirements might mean for regulatory capture (particularly when they are coupled with treaty provisions providing for investor-state arbitration and practices of tribunals to award monetary damages for treaty breach).

## CONCLUDING REMARKS

The year 2011 saw the highest number of known investor-state arbitration cases filed, continuing an explosive decade of investor-state disputes.<sup>262</sup> These cases are increasingly filed against developed countries, although developing and transition countries remain the most frequent respondents. The trends witnessed in 2011/2012 treaties may be seen largely as a response to the growing body of investor-state jurisprudence, comprised of diverse, and at times conflicting, arbitral awards.

Generally speaking, there were no substantially divergent developments in treaty practice over this period from previous years; many of the new treaties and the new model templates continued the more traditional models for treaties but added important clarifications, exceptions, reservations and annotations, largely to the treaty provisions that have been featured in investor-state arbitration.

In some cases, the intent of the new provisions, clarifications and exceptions is to limit the state measures that can give rise to liability under the treaty, such as the refined language in some treaties excepting from treaty protection measures taken in the public interest or in pursuit of legitimate policy objectives, such as environmental protection. This may be in response to the increased number of cases in which foreign investors “challenge host countries’ regulatory activities, such as environmental policies, energy policies, health policies, and policies related to economic crises.”<sup>263</sup> In many of these cases, the arbitrators in an investor-state dispute are grappling with issues of public policy and domestic law, and at times awarding substantial damages for such measures that are deemed to have interfered with the performance or expectations of a foreign investor.

In other cases, the intent of the new provisions is to limit the interpretive latitude that arbitral tribunals have afforded themselves in recent years; when confronted with complex claims of indirect expropriation or breach of fair and equitable treatment, tribunals have made divergent and arguably subjective determinations with far-reaching consequences for state parties’ potential liability for any change to the legal framework in place at the time of an investment. Thus we have seen, for instance, clarification in some treaties that the FET standard should be understood to prohibit only the most objectively egregious behavior, or, in the case of the SADC Model BIT, the removal of the FET standard altogether, due to its unpredictable interpretation by several tribunals.

262. UNCTAD, “Latest developments in investor-state dispute settlement,” *IIA Issues Note*, No. 1 (April 2013), available at: [http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf) (last visited September 22, 2013).

263. Joachim Karl, “Investor-state dispute settlement: a government’s dilemma,” *Columbia FDI Perspectives*, No. 89, 2013, *op. cit.*

Still other developments seem to reflect such discontent with investor-state dispute settlement generally that new provisions either circumvent investor-state dispute settlement (for instance, by referring certain disputes to state-state panels or domestic authorities); limit the claims that can be brought under the dispute settlement provisions; or impose rules on the process itself, such as rules against conflict of interest among the arbitrators or that mandate that the hearings be open to third parties. Still other treaties, like Australia's recent agreements have dropped investor-state dispute settlement altogether.

The perceived costs of investor-state arbitration – including the legal costs, potential for massive damages, and the “chill” on domestic regulatory space – may ultimately have more far-reaching implications for the future of investment treaties. As previously mentioned, Bolivia and South Africa have followed in the footsteps of Ecuador and Venezuela in terminating some of their BITs altogether. As more treaties come up for renewal or renegotiation, we may see more terminations, especially in the absence of reforms to the investor-state dispute process.

Nevertheless, for the time being, many capital importing and exporting countries continue to sign new treaties. In fact, though the volume of treaties concluded annually has dropped substantially from its peak, the treaties that are currently under negotiation or are being discussed include some of the most important importers and exporters of FDI; these include the continued negotiations over the Trans-Pacific Partnership, negotiations between the European Union and Japan, and plans for future agreements between the European Union and the United States, between the United States and China, and within the “ASEAN+6”<sup>264</sup> group. Some of those negotiations, including those with countries that are more reticent about aspects of investment treaties (a dynamic that is apparent in the Trans-Pacific Partnership negotiations), could push the resulting agreements to include more progressive approaches that address issues of sustainable development, introduce caveats to investor protections and are more explicitly protective of states' rights and powers vis-à-vis investors and tribunals, such as those reflected in the SADC Model BIT. The discussions around EU investment policy and the 2012 U.S. Model BIT, however, indicate that both the European Union and the United States generally seek to continue traditional treaty practice with their new treaty partners (albeit with some of the amendments mentioned above), decreasing the likelihood of substantial change. Consequently, due to the different positions, concerns and objectives of the states currently engaged in these negotiations, the notion of a harmonized international investment “regime” may remain elusive for the coming years.

264. The countries involved in these negotiations, announced in 2012, are the ten ASEAN members – Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam – as well as ASEAN FTA partners, Australia, China, India, Japan, New Zealand, and South Korea.