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## INTERNATIONAL INVESTMENT AGREEMENTS, 2017

### A Review of Trends and New Approaches

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A. Introduction	7.01	D. Protecting Public Interest	
B. Covered Investors and Investments	7.09	Objectives?	7.36
C. Substantive Obligations: Focus on Fair and Equitable Treatment	7.20	E. Conclusion	7.59

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#### A. Introduction

In 2017, at least twenty-two new investment treaties were signed, down from the thirty-five, thirty-four, and thirty-seven treaties concluded in 2014, 2015, and 2016, respectively (see Table 7.1).<sup>1</sup> While the United Nations Conference on Trade and Development (UNCTAD) reports that 2017 saw the lowest number of concluded investment treaties since 1983, four of these treaties were multilateral agreements (although none included investor–state dispute settlement provisions), involving around eighty countries total in all concluded agreements. Thirteen of the new agreements were bilateral investment treaties (BITs) and nine were other agreements, including free trade agreements (FTAs) or multilateral agreements on investment, bringing the total number of treaties concluded and

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<sup>1</sup> Investment treaties, or international investment agreements (IIAs), are defined herein as bilateral and multilateral instruments for the protection and/or promotion of foreign investment. A complete list of the IIAs concluded in 2017 is provided in Table 7.1 at the end of this chapter.

in force to 3,322 by the end of 2017.<sup>2</sup> At least sixteen treaties entered into force in 2017.<sup>3</sup>

- 7.02** A number of notable regional developments in treaty-making are covered in other chapters. In Chapter 16, Catharine Titi provides an overview of Europe's negotiations regarding the creation of an investment court system, which was successfully included in several 2017 agreements (although Belgium has requested an opinion on the legality of such a court under the laws of the European Union from the Court of Justice of the European Union<sup>4</sup>). The European Union will also have to further consider its future approach to investment protection and investor–state dispute settlement (ISDS) after the Court of Justice ruled in May 2017 that the European Union does not have exclusive competence to enter into agreements including portfolio investment and ISDS clauses in the context of the European Union (EU)–Singapore Comprehensive Free Trade Agreement.<sup>5</sup>
- 7.03** The outlook is similarly uncertain in the United States, where the Trump Administration has initiated renegotiation of the North American Free Trade Agreement (NAFTA)<sup>6</sup> with Mexico and Canada, and is more generally changing course on decades-long investment policies including, in particular, its stance on ISDS. Indeed, the only investment treaty concluded by the United States in the review period is the Trade and Investment Facilitation Agreement with Paraguay, a text without ISDS provisions. David Schneiderman covers related developments in Chapter 18. Many Latin American countries might also be moving away from ISDS, following the lead of famously ISDS-averse Brazil. In Chapter 17, Facundo Perez Aznar discusses MERCOSUR's new Protocol for Cooperation and the Facilitation of Investment that excludes ISDS and narrows substantive protections for investors.

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<sup>2</sup> This figure represents the total number of treaties concluded and in force at the end of 2017. UNCTAD, 'Recent Developments in the International Investment Regime' <<http://investmentpolicyhub.unctad.org/Upload/IIA%20Issues%20Note%20May%202018.pdf>> accessed 4 June 2018. In addition, UNCTAD's Navigator indicates that the total number of treaties terminated or replaced by the end of 2017 is 243. UNCTAD's Navigator indicates that the total number of treaties concluded by 2017 year-end (including treaties signed, in force, and terminated, and not excluding treaties replaced by other treaties) is 3,616. See UNCTAD, *International Investment Agreements Navigator* <<http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBITResults>> accessed 4 June 2018.

<sup>3</sup> UNCTAD, *International Investment Agreements Navigator* (n 2).

<sup>4</sup> Kingdom of Belgium, 'Belgian Request for an Opinion from the European Union Court of Justice' <[https://diplomatie.belgium.be/sites/default/files/downloads/ceta\\_summary.pdf](https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf)> accessed 4 June 2018.

<sup>5</sup> European Union Court of Justice, 'Opinion 2/15 of the Court' (16 May, 2017) <<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d6ac64193d4a9542d581fa98233892177f.e34KaxiLc3eQc40LaxqMbN4Pax4Se0?text=&docid=190727&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=650959>> accessed 4 June 2018; European Union–Singapore Comprehensive Free Trade Agreement (EU–Singapore FTA).

<sup>6</sup> North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (NAFTA).

These conversations have spread to many international fora as well. In Chapter 3, Taylor St John highlights the multilateral negotiations and discussions related to the procedural and substantive standards of these treaties, as well as the rules of arbitration, facilitated by UNCTAD, the United Nations Commission on International Trade Law (UNCITRAL), the Organisation for Economic Co-operation and Development (OECD), and the International Centre for Settlement of Investment Disputes (ICSID). The World Trade Organization (WTO) also touched upon international investment policy in 2017; as Reji Joseph discusses in Chapter 5, several states have requested that the WTO host a discussion on global policy for investment facilitation.<sup>7</sup> **7.04**

While many changes in investment treaty policy have taken place on the regional or international stage, a number of countries continue to take unilateral action to change their investment commitments. At least twenty-two terminations went into effect in 2017.<sup>8</sup> India formally terminated seventeen of its treaties, at the time of writing making effective about one third of its nearly fifty notices of intent to terminate issued in 2016,<sup>9</sup> and seeking renegotiations based on its revised model BIT (published in December 2015). In Europe, after the European Commission recommended that member states terminate intra-EU BITs and, in 2015, initiated infringement actions against five of the twenty-six European Union member states with intra-European Union treaties,<sup>10</sup> Romania and Poland took strides to exit such treaties. Romania, one of the five states targeted by the infringement action, terminated its BIT with Denmark,<sup>11</sup> and the Romanian parliament **7.05**

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<sup>7</sup> Sidhartha, 'China, Pak, Others Seek Talks on Investment at WTO' *The Times of India* (Buenos Aires, 11 December 2017) <<https://timesofindia.indiatimes.com/business/international-business/china-pak-others-seek-talks-on-investment-at-wto-meet/articleshow/62025120.cms>> accessed 4 June 2018.

<sup>8</sup> UNCTAD, 'Recent Developments in the International Investment Regime' (n 2) 2.

<sup>9</sup> Prabhakar Ranjan and Pushkar Anand, 'More Than a BIT of Protectionism' *The Hindu* (14 December 2016) <[www.thehindu.com/opinion/op-ed/More-than-a-BIT-of-protectionism/article16801222.ece](http://www.thehindu.com/opinion/op-ed/More-than-a-BIT-of-protectionism/article16801222.ece)> accessed 4 June 2018. It has also begun to negotiate new treaties based on its December 2015 model BIT, which limits investor protections, requires exhaustion of local remedies for five years before the initiation of ISDS proceedings, and precludes arbitral review of domestic judicial decisions. Jesse Coleman and Kanika Gupta, 'India's Revised Model BIT: Two Steps Forward One Step Back?' (Columbia Center on Sustainable Investment, 4 October 2017) <[http://ccsi.columbia.edu/files/2017/10/Investment-Claims\\_-\\_India%E2%80%99s-Revised-Model-BIT\\_-\\_Two-Steps-Forward-One-Step-Back\\_.pdf](http://ccsi.columbia.edu/files/2017/10/Investment-Claims_-_India%E2%80%99s-Revised-Model-BIT_-_Two-Steps-Forward-One-Step-Back_.pdf)> accessed 4 June 2018; 'India, Peru to Start FTA Negotiations This Week' *The Times of India* (7 August 2017) <<https://timesofindia.indiatimes.com/business/india-business/india-peru-to-start-fta-negotiations-this-week/articleshow/59957621.cms>> accessed 4 June 2018; Amiti Sen and Surabhi, 'India May Deviate from Model BIT to Meet Canada's Demands' *The Hindu Business Line* (New Delhi, 4 August 2017) <[www.thehindubusinessline.com/economy/policy/india-may-deviate-from-model-bit-to-meet-canadas-demands/article9803014.ece](http://www.thehindubusinessline.com/economy/policy/india-may-deviate-from-model-bit-to-meet-canadas-demands/article9803014.ece)> accessed 4 June 2018.

<sup>10</sup> European Commission Press Release, 'Commission Asks Member States to Terminate their Intra-EU Bilateral Investment Treaties' (18 June 2015) <[http://europa.eu/rapid/press-release\\_IP-15-5198\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5198_en.htm)> accessed 25 June 2018. The infringement proceeding initiated in 2015 targeted Austria, the Netherlands, Romania, Slovakia, and Sweden.

<sup>11</sup> UNCTAD, *International Investment Agreements Navigator* (n 2).

encouraged the president to terminate the twenty-two BITs with other European Union members,<sup>12</sup> while the Polish parliament considered a bill to terminate its BIT with Portugal.<sup>13</sup> Denmark also terminated its agreement with Estonia.<sup>14</sup> Other terminations included the Germany–Indonesia BIT, the Argentina–South Africa BIT, and the Ecuador–Peru BIT.<sup>15</sup>

- 7.06** The termination of the Ecuador–Peru BIT follows several other terminations by Ecuador in prior years, since the new constitution in 2008 prohibited the state from entering into treaties that yield sovereign jurisdiction to ISDS.<sup>16</sup> Like India, Ecuador terminated these agreements unilaterally, thereby triggering sunset clauses of five to twenty years.<sup>17</sup> Ecuador also issued notices of termination for its remaining fifteen treaties in May 2017 in the midst of a political transition.<sup>18</sup> However, the subsequent Ecuadorian government has also pledged to renegotiate these treaties, potentially foretelling the emergence of a new investment policy in the years to come.
- 7.07** Argentina and Colombia also developed new model BITs in 2017, and South Africa and the Dominican Republic continued work to develop new treaty models.
- 7.08** This background suggests an evolving landscape, with several states changing their approach to investment protection. Yet a number of states continued to sign agreements in 2017, some with innovations in treaty practice and others reflecting a degree of path dependency and a relatively consistent approach to investment protection. This chapter examines these agreements and specific developments in treaty drafting practice that took place over the course of 2017. It reviews publicly available investment treaties concluded and published in 2017, with some developments through May 2018 noted where relevant, in addition to one model BIT that was not publicly available at the time of writing but is on file with the authors.<sup>19</sup> Section B explores the modest but still isolated innovations in treaty definitions of ‘investor’

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<sup>12</sup> Volterra Fietta ‘Romania Set to Terminate its Intra EU BITs’ (*Volterra Fietta Client Alert*, 27 March 2017) <[www.voltterrafietta.com/romania-set-to-terminate-its-intra-eu-bits/](http://www.voltterrafietta.com/romania-set-to-terminate-its-intra-eu-bits/)> accessed 4 June 2018.

<sup>13</sup> Marcin Orecki, ‘Let the Show Begin: Poland Has Commenced the Process of BITs’ Termination’ (*Kluwer Arbitration Blog*, 8 August 2017) <<http://arbitrationblog.kluwerarbitration.com/2017/08/08/let-show-begin-poland-commenced-process-bits-termination/>> accessed 4 June 2018.

<sup>14</sup> UNCTAD, *International Investment Agreements Navigator* (n 2).

<sup>15</sup> *ibid.*

<sup>16</sup> Christian Leathley and Daniela Paez, ‘Ecuador’s Legislative Branch Approves Termination of 12 Bilateral Investment Treaties’ (Herbert Smith Freehills LLP, 5 May 2017) <[www.lexology.com/library/detail.aspx?g=eefa16ea-93e5-44e2-b36f-1b64cdbc8bd4](http://www.lexology.com/library/detail.aspx?g=eefa16ea-93e5-44e2-b36f-1b64cdbc8bd4)> accessed 4 June 2018.

<sup>17</sup> International Institute for Sustainable Development, ‘Ecuador Denounces its Remaining 16 BITs and Publishes CAITISA Audit Report’ *Investment Treaty News* (12 June 2017) <<https://www.iisd.org/itn/2017/06/12/ecuador-denounces-its-remaining-16-bits-and-publishes-caitisa-audit-report/>> accessed 4 June 2018.

<sup>18</sup> *ibid.*

<sup>19</sup> The chapter focuses on texts published in English, with more limited consideration also given to agreements published in Spanish.

and ‘investment’. Section C illustrates the limited evolution and experimentation in treaties’ core substantive obligations by focusing on developments in 2017 texts regarding the fair and equitable treatment (FET) obligation. Lastly, in Section D, we examine treaty drafting developments concerning three thematic areas: (1) sustainable development and the public interest; (2) climate change and environmental measures; and (3) human rights and investor obligations.

## **B. Covered Investors and Investments**

The most elemental component of investment treaties, defining the scope and application of investment protections and access to investor–state dispute settlement, are the treaties’ definitions of covered investors and investments. As treaty practice has evolved, two opposing dynamics are at play with respect to these definitions. On the one hand, recognizing that ‘capital is fungible and investment of capital takes a multitude of forms in the world today’, governments seeking to provide protections to ‘foreign investment in all its forms’ continue to include definitions of investment in their treaties that are ‘broad and open-ended, with a list of specific types of covered investments that is indicative rather than definitive’.<sup>20</sup> Indeed, consistent with past practice, all of the publicly available 2017 treaties include the traditionally broad definition of ‘investment’, covering, in most cases, ‘every asset that an investor owns or controls, directly or indirectly’, including shares, stocks, intellectual property rights, licences, and loans, among other forms of tangible and intangible assets.<sup>21</sup> Despite the varied contribution of different forms of investment to economic development, treaties concluded in 2017 continue to define investment in the broadest way, for the purposes of affording protections. **7.09**

On the other hand, some governments have taken steps to clarify criteria for investors and investments that are covered under their treaties.<sup>22</sup> As with many **7.10**

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<sup>20</sup> Barton Legum, ‘Defining Investment and Investor: Who is Entitled to Claim?’ (2006) 22(4) *Arbitration International* 521, 522–23.

<sup>21</sup> See eg Investment Agreement between the Government of the Hong Kong Special Administrative Region of the People’s Republic of China and the Government of the Republic of Chile (signed 18 November 2016) (Chile–Hong Kong BIT); China–Hong Kong Comprehensive and Enhanced Partnership Agreement (signed 28 June 2017, entered into force 28 June 2017) (China–Hong Kong CEPA); Investment Promotion and Protection Agreement between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore (signed 4 November 2016) (Nigeria–Singapore BIT); Agreement between Japan and the State of Israel for the Promotion and Protection of Investment (signed 1 February 2017, entered into force 5 October 2017) (Japan–Israel BIT); Agreement between the Republic of Rwanda and the United Arab Emirates on the Promotion and Reciprocal Protection of Investments (signed 1 November 2017) (Rwanda–UAE BIT); and the Pacific Agreement on Closer Economic Relations Plus (signed 14 June 2017) (PACER Plus), among others.

<sup>22</sup> For instance, it has become standard treaty practice to exclude from the definition of an ‘investment’ for the purposes of treaty coverage sovereign debt or claims to money arising from commercial contracts for the sale of goods (see eg Japan–Israel BIT (n 21); Bilateral Investment

other treaty protections, the evolution of the definitions of covered investors and investments has been incremental and innovation limited: most of the 2017 treaties remain in lock-step with one another and with older generation treaties. Nevertheless, the slight divergences in the 2017 treaties merit a closer look. The definitions of investors and investments in the 2017 treaties are as notable for their innovations as they are for their adherence to traditional treaty practice despite growing concerns about ISDS practices and outcomes.

- 7.11** Of particular concern to many respondent governments have been the increased practices of round-tripping, whereby a domestic investor gains treaty protections by routing an investment through a foreign subsidiary or other economic vessel,<sup>23</sup> and treaty-shopping, whereby a foreign investor either not covered by an investment treaty or covered by a weaker agreement uses a subsidiary or shareholder from a third country to gain stronger protections.<sup>24</sup> As noted by a tribunal, ‘it is not uncommon in practice and—absent a particular limitation—not illegal to locate one’s operation in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT’.<sup>25</sup> By this

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Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the United Arab Emirates (signed 13 November 2017) (Colombia–UAE BIT); Rwanda–UAE BIT (n 21); and PACER Plus (n 21); see also UNCTAD ‘Recent Developments in the International Investment Regime’ (n 2)), as well orders or judgments entered in judicial or administrative actions (see eg China–Hong Kong CEPA (n 21); Agreement on Investment Among the Governments of the Hong Kong Special Administrative Region of the People’s Republic of China and The Member States of The Association of Southeast Asian Nations (signed 12 November 2017) (Hong Kong–ASEAN FTA); Free Trade Agreement between Argentina and Chile (signed 2 November 2017) (Argentina–Chile FTA); and the Colombia model BIT).

<sup>23</sup> See *Tokios Tokelés v Ukraine* Case No ARB/02/18 (29 April 2004); *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility (18 April 2008) <<http://italaw.com/documents/RomPetrol.pdf>> accessed 4 June 2018; *Société Ouest Africaine des Bétons Industriels v Senegal* (1994) Decision on Jurisdiction of 1 August 1984, 2 ICSID Reports, 175, 182–83; *Autopista Concesionada de Venezuela v Venezuela* (2004) Decision on Jurisdiction of 27 September 2001, 6 ICSID Reports, 419, 442–43; *Wena Hotels Limited v Egypt* (2004) Decision on Jurisdiction of 29 June 1999, 6 ICSID Reports, 67, 81–84; *Champion Trading Company and Ameritrade International, Inc v Egypt* (2004) Decision on Jurisdiction of 21 October 2003, 19 ICSID Rev—FILJ, 275, 290.

<sup>24</sup> See *Saluka Investments BV v The Czech Republic*, under UNCITRAL Rules, Partial Award 17 March 2006; *Lauder v Czech Republic* (2001) Final award, Ad hoc—UNCITRAL Arbitration Rules <[www.mfcr.cz/scripts/hpe/default.asp](http://www.mfcr.cz/scripts/hpe/default.asp)> accessed 4 June 2018; *Plama Consortium Limited v Bulgaria*, Decision on Jurisdiction of 8 February 2005, 20 ICSID Rev—FILJ (2005) 262; *Aguas del Tunari SA v Bolivia*, Decision on Jurisdiction of 21 October 2005, 20 ICSID Rev—FILJ (2005) 450; *ADC Affiliate Limited and ADC & ADMC Management Limited v Hungary*, Award of 2 October 2006 <<https://www.italaw.com/documents/ADCvHungaryAward.pdf>> accessed 4 June 2018.

<sup>25</sup> *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent’s Objections to Jurisdiction (21 October 2005) para 330.

logic, ‘a restructure solely for the purpose of taking advantage of a dispute settlement clause in an IIA is not illegal or abusive merely for that reason’.<sup>26</sup>

In order to limit the ease of treaty shopping, many more modern treaties require some combination of incorporation and substantial business activity in the home country and/or effective control of the investment in order for an investor to be covered under the treaty. These limitations can be found both in the definition of (covered) investors as well as in denial of benefits provisions, which each publicly available 2017 treaty contains. **7.12**

The Rwanda–Turkey agreement, for instance, defines an investor as a legal entity ‘incorporated or constituted under the law in force of a Contracting Party and having [its] registered offices together with substantial business activities in the territory of that Contracting Party’.<sup>27</sup> The Argentina–Qatar BIT clarifies that ‘a company formed under the legislation of such Contracting Party shall not be deemed an “investor” under this treaty where it does not conduct substantial business activities within the territory of such Contracting Party’.<sup>28</sup> Given the latitude afforded to tribunals in interpreting ‘substantial business activity’ in clauses like those discussed in this chapter,<sup>29</sup> the Colombia model BIT notably includes clear criteria for establishing the existence of substantial business activity, giving guidance to tribunals in their determination of such.<sup>30</sup> These definitions limit the ability of investors to set up or use shell companies to benefit from investor protections. **7.13**

One innovative provision of the Colombia model BIT further limits the ability of investors to treaty-shop by requiring not only substantial business activities in the **7.14**

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<sup>26</sup> Vidushi Gupta, ‘Exclusion From Within the Ambit of a Protected Investor, a Fair Price to Pay for the Act of Abusive Treaty Shopping?’ (2014) 1 *Transnational Dispute Management* 9.

<sup>27</sup> Article 1(2)(b). See also Rwanda–UAE BIT (n 21).

<sup>28</sup> The Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar (signed 6 November 2016) (Argentina–Qatar BIT), art 1d.

<sup>29</sup> See *Masdar Solar & Wind Cooperatief v Spain*, ICSID Case No ARB/14/1, Award (16 May 2018) paras 252–56.

<sup>30</sup> Substantial business activity requires all of the following:

- a. The nature and scope of business conducted by the Enterprise, including the amount and type of clients and contracts, the amount of sales, turnover declared in tax returns, payment of taxes, years of establishment in the Contracting Party;
- b. The activities developed in the Home Party’s Territory are similar to those developed by the entity operating in the Host Party’s Territory, or are directly related to the active holding of shares in subsidiaries operating in the Host Party’s Territory;
- c. The Enterprise’s employee structure in the Home Party’s Territory (number of employees, share of employees in respect to global operations of the Enterprise who work in the Home Party’s Territory; permanent staff);
- d. The continuous physical presence of the Enterprise in the Home Party’s Territory (ownership or rental of premises, costs related to the maintenance of physical location, phone, fax and mailing information offered to clients and third parties for contact with the Enterprise).

home country but also that the covered investor meet certain criteria to establish effective control of the covered investment in the host country:

the holding of majority ownership or voting rights that allow for a decisive position in, or the right to select or exercise substantial influence over the selection of, the entity's managing bodies; the ability to effectively decide and implement the key decisions of the business activity of an enterprise; and participation in the day-to-day management of the entity.<sup>31</sup>

This type of provision presumably limits the treaty's protection to majority or controlling shareholders, precluding protection of minority or non-controlling investors and the parallel claims that protection of such investors can enable.

- 7.15** In addition to circumscribing the definition of covered investors, all of the publicly available 2017 treaties that include ISDS include a 'denial of benefits' provision, allowing the host state effectively to deny the benefits of the treaty protections to some or all 'shell companies owned by nationals of a third-country or the host State and companies owned by enemy aliens'.<sup>32</sup> The scope of this provision, however, varies among treaties. The scope of the provision in the Japan–Israel agreement is extremely limited, limiting the ability of a Contracting Party to deny benefits only in cases in which persons of a non-Contracting Party own more than 50 per cent of equity interest in the investor or have the power to legally direct its action, and only if the denying Party '(a) does not maintain diplomatic relations with the non-Contracting Party; or (b) adopts or maintains measures with respect to the non-Contracting Party . . . that would prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprise or to its investments . . .'.<sup>33</sup> On the other hand, the Colombia model includes an extensive denial of benefits clause, which allows contracting states also to deny benefits to an investor of the other contracting party if 'an international court or a judicial or administrative authority of any State with which the Contracting Parties have diplomatic relations has proven that such investor has directly or indirectly' committed human rights violations, caused environmental damage, committed serious fraudulent actions against the tax laws, committed corruption, violated the host state's labour laws, or other enumerated violations.<sup>34</sup>
- 7.16** A recurring issue facing arbitral tribunals is whether a respondent state may invoke a denial of benefits clause after an arbitration has been commenced. Some tribunals have agreed with respondent states (and intervening non-disputing state

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<sup>31</sup> Colombia model BIT, Definitions.

<sup>32</sup> Legum (n 20) 524.

<sup>33</sup> Japan-Israel BIT (n 21) art 21.

<sup>34</sup> Colombia model BIT, Denial of Benefits.



parties) that pre-dispute denial would be impractical and is not required.<sup>35</sup> In a number of other cases, tribunals have declared that denial of benefits provisions cannot be invoked ‘retrospectively’ after the ISDS claim has been launched,<sup>36</sup> although no treaty expressly supports that conclusion. Only a few treaties covered in this review period clarify the issue by stating explicitly that a party may deny the benefits of the agreement to an investor of the other party on specified grounds even after the institution of arbitral proceedings.<sup>37</sup>

The China–Hong Kong agreement includes a notably lengthy annex, seemingly to address the persistence of round-tripping and shell companies more generally. Annex 1 includes complex provisions on the requirements and criteria for an investor, particularly from Hong Kong, to benefit from the protections in the agreement. For instance, one footnote in Annex 1 states that ‘[a]ny overseas company, representative office, liaison office, “mail box company” and company specifically established for providing certain services to its parent company, which is registered in Hong Kong, is not a Hong Kong investor under this Annex’. The annex specifies that for an investor to be covered under the agreement, it must be ‘1.1. incorporated or established pursuant to the Companies Ordinance or other relevant laws of the Hong Kong Special Administrative Region, and have obtained a valid Business Registration Certificate; and 1.2. engage in substantive business operations in Hong Kong’, with additional criteria relating to the years engaged in substantial business operations, having paid profits taxes, having substantial business premises, and employing Hong Kong residents. **7.17**

A final consideration with respect to covered investors and investments is the nature of the investment in the host country, and the scope and nature of assets and interests in the host country afforded treaty protections. As noted, all of the publicly available 2017 treaties continue to afford protection to a broad range of tangible and intangible assets; however, some treaties add certain additional criteria for an investment to qualify as such under a treaty and to be afforded the respective protections. Several treaties and the Colombia model BIT, for instance, apply a partial *Salini* test,<sup>38</sup> defining an investment as one that includes **7.18**

<sup>35</sup> See *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on Jurisdictional Objections (1 June 2012) paras 4.83–4.90.

<sup>36</sup> See eg *Khan Resources Inc v Mongolia*, UNCITRAL, Decision on Jurisdiction (25 July 2012) paras 425–29; *Ampal-American Israel Corporation v Egypt*, ICSID Case No ARB/12/11, Decision on Jurisdiction (1 February 2016) paras 124–73.

<sup>37</sup> See eg China–Hong Kong CEPA (n 21), Hong Kong–ASEAN FTA (n 22), and Argentina–Chile FTA (n 22). Although in some cases, those grounds may be difficult to establish; for instance, the Colombia–UAE agreement denies benefits of the treaty ‘if the main purpose behind the acquisition of the nationality of [the] Contracting Party was to obtain benefits under this Agreement that would not otherwise be available to such Investor’ (art 25 (1)) arguably requiring a host country to prove ‘main purpose’. The Rwanda–UAE BIT (n 21) also mirrors this language.

<sup>38</sup> Alex Grabowski, ‘The Definition of Investment Under the ICSID Convention: A Defense of *Salini*’ (2014) 15(1) *Chicago Journal of International Law* (2014) 287.

‘the commitment of capital, the expectation of gain or profit, or the assumption of risk’.<sup>39</sup> A few treaties have taken the further step of explicitly requiring that an investment contributes ‘to the economic development’ of the host state, rounding out the requirements of the *Salini* test, though this remains rare.<sup>40</sup> Some treaties further require ‘the objective of establishing a lasting interest’ in the host country,<sup>41</sup> seem to protect only ‘responsible’ investors,<sup>42</sup> or require that an investment be ‘made in accordance with applicable laws and regulations’.<sup>43</sup> (The latter two requirements are discussed later in this chapter.)

- 7.19** Surprisingly, little has been included in treaties to prevent the increasing incidence of shareholder claims for reflective loss, whereby a foreign shareholder, even if minority and non-controlling, is able to bring a claim for relief based on harm to the company in which they hold shares.<sup>44</sup> The Rwanda–Turkey agreement excludes portfolio shareholders from coverage;<sup>45</sup> Argentina’s agreements with Chile and Qatar contain provisions similar to those found in agreements such as the NAFTA and the Trans-Pacific Partnership (TPP), which attempt to exclude claims by minority or non-controlling shareholders for reflective loss;<sup>46</sup> and the Colombia model BIT limits protected investors to majority or controlling shareholders.<sup>47</sup> However none of the other 2017 treaties reviewed take steps to limit this type of claim, despite the growing frequency with which states have critiqued multiple claims by non-controlling minority shareholders and the extensive work

<sup>39</sup> Nigeria–Singapore BIT (n 21). See also Rwanda–UAE BIT (n 21); Hong Kong–ASEAN FTA (n 22); PACER Plus (n 21); Protocol for Cooperation and Investment Facilitation Between the Members of MERCOSUR (signed 7 April 2017) (MERCOSUR Investment Protocol); and the Colombia model BIT.

<sup>40</sup> Argentina–Chile FTA (n 22); see also Turkey’s treaties with Burundi, Mozambique, and Ukraine as referenced in UNCTAD, ‘Recent Developments in the International Investment Regime’ (n 2).

<sup>41</sup> MERCOSUR Investment Protocol (n 39). See also, Rwanda–Turkey BIT (‘... acquired for the purpose of establishing lasting economic relations ...’ art 1(1)); Rwanda–UAE BIT (n 21) (requiring ‘certain duration’); Colombia model BIT (noting in its ‘Definitions’ article that the investment must reflect ‘an intention to maintain a long-term presence in the Host Party’).

<sup>42</sup> Colombia–UAE BIT (n 22).

<sup>43</sup> Japan–Israel BIT (n 21). See also eg Rwanda–UAE BIT (n 21). Some treaties further indicate that licenses, authorizations, permits, and similar rights are only deemed to be investments insofar as they are conferred pursuant to the host country’s laws. See eg China–Hong Kong CEPA (n 21); Argentina–Chile FTA (n 22); and PACER Plus (n 21). Other treaties require that for intellectual property rights to be protected, they must be recognized as such under domestic law. See eg Hong Kong–ASEAN FTA (n 22) and Colombia model BIT.

<sup>44</sup> See *Saluka Investments BV v The Czech Republic*, under UNCITRAL Rules, Partial Award (17 March 2006); *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction (3 August 2004) paras 137–144.

<sup>45</sup> The treaty states that ‘investments are not in the nature of acquisition of shares or voting power amounting to, or representing of, less than ten (10) per cent of a company through stock exchanges which shall not be covered by this Agreement’ (art 1(e)).

<sup>46</sup> Argentina–Chile FTA (n 22) art 8.25, Argentina–Qatar BIT (n 28) art 5.4.

<sup>47</sup> Colombia model BIT, definition of ‘covered investor’.

on this issue by the OECD,<sup>48</sup> as well as model language that has been used in other treaties that limit shareholders to bringing such claims only if the company itself provides a waiver of other litigation options, and if any damages awarded revert to the company.

### **C. Substantive Obligations: Focus on Fair and Equitable Treatment**

While there are multilateral negotiations focused on procedural reform now taking place in UNCITRAL, there is no ongoing multilateral process focused on reforming or harmonizing substantive standards. And in this respect, while we have witnessed convergence among groups of states in connection with negotiation of mega-regionals such as the TPP, now the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the Regional Comprehensive Economic Partnership (RCEP), we continue to see a range of approaches and experimentation. Nevertheless, such experimentation seems to be confined within a certain set of parameters regarding investment protection, with standard definitional approaches and core substantive obligations largely continuing to characterize investment treaties. **7.20**

A key theme defining the 2017 treaties' approaches to questions of scope also applies to issues of substance: as with the limited evolution and experimentation in states' definitions of covered investors and investments, so too do the 2017 treaties' core substantive obligations, including decisions to exclude certain provisions, largely follow the path of previous agreements, with certain limited innovations. This section illustrates these patterns by focusing on the FET obligation, an arguable proxy for states' overall approaches to investment treaty policy. **7.21**

Notably, all agreements covered by this chapter included the FET obligation, except the Protocol for the Cooperation and Facilitation of Investment within the MERCOSUR (MERCOSUR Investment Protocol). That agreement clearly expresses the treaty parties' desire to exclude the FET standard.<sup>49</sup> This does not mean that the state parties declined to reference any standards of treatment that may also form part of the FET obligation. Rather, it means that they clearly sought to distance themselves from the 'FET' concept and the myriad interpretations it has been given, and instead provide specific guarantees against denials of **7.22**

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<sup>48</sup> David Gaukrodger, 'Investment Treaties and Shareholder Claims: Analysis of Treaty Practice' (2014) OECD Working Papers on International Investment <<http://www.oecd.org/daf/inv/investment-policy/WP-2014-3.pdf>> accessed 4 June 2018.

<sup>49</sup> MERCOSUR Investment Protocol (n 39) art 4(3). ('Para mayor certeza, los estándares de "trato justo y equitativo", de "protección y seguridad plena" ... no son cubiertos por el presente Protocolo'). See ch 17 in this volume by Facundo Pérez-Aznar.

justice and of due process.<sup>50</sup> This is similar to approaches taken by countries such as India and Brazil in their models.<sup>51</sup>

**1. (How) does FET relate to the customary international law minimum standard of treatment?**

**7.23** Of the publicly available 2017 treaties with FET obligations, most link the FET obligation to the minimum standard of treatment under customary international law.<sup>52</sup> The nature and significance of the link between the FET obligation and the minimum standard of treatment, however, is not always clear. The agreement between Hong Kong and China, for instance, only references customary international law in the relevant article's title, labelling it 'Minimum Standard of Treatment'.<sup>53</sup> It does not otherwise specify the relationship between the concepts, namely whether the FET obligation is meant to be an element of, synonymous with, or additive to customary international law rules.<sup>54</sup> The Japan–Israel treaty raises similar questions: the treaty requires state parties to provide investors the 'customary international law standard of treatment including fair and equitable treatment'. This phrasing is akin to that used in the NAFTA's Article 1105 and the NAFTA parties' subsequent clarification of that article,<sup>55</sup> as well as approaches used in more modern agreements such as the TPP,<sup>56</sup> the post-TPP CPTPP,<sup>57</sup> and 2017's Pacific Agreement on Closer Economic Relations (PACER) Plus<sup>58</sup> and the Argentina–Chile<sup>59</sup> agreement.<sup>60</sup> Nevertheless, the Japan–Israel BIT lacks some

<sup>50</sup> *ibid* art 4.

<sup>51</sup> Jesse Coleman, Lise Johnson, Lisa Sachs, and Kanika Gupta, 'International Investment Agreements, 2015–2016: A Review of Trends and New Approaches' in Lisa Sachs and Lise Johnson (eds), *Yearbook on International Investment Law & Policy 2015–2016* (OUP 2018).

<sup>52</sup> This pattern is consistent with the observation that states appear to be increasingly tying the FET obligation to the minimum standard of treatment. See David Gaukrodger, 'Addressing the Balance of Interests in Investment Treaties: The Limitation of Fair and Equitable Treatment Provisions to the Minimum Standard of Treatment under Customary International Law' (2017) OECD Working Papers on International Investment 2017/03, 18–20 <<http://dx.doi.org/10.1787/0a62034b-en>> accessed 26 June 2018.

<sup>53</sup> China–Hong Kong CEPA (n 21) ch 1, art 4.

<sup>54</sup> *ibid*.

<sup>55</sup> On 31 July 2001, the Free Trade Commission (FTC), comprising the NAFTA Parties' cabinet-level representatives, issued an interpretation reaffirming that 'Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party'. (NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, para B.1 (31 July 2001) (FTC Interpretation)). The FTC further stated that the FET obligation does 'not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens'. (*ibid* para B.2).

<sup>56</sup> Trans-Pacific Partnership (signed 4 February 2016) (TPP), art 9.6(1).

<sup>57</sup> Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018) (CPTPP), art 9.6(1).

<sup>58</sup> PACER Plus (n 21) art 9(1).

<sup>59</sup> Argentina–Chile FTA (n 22) art 8.7.

<sup>60</sup> The Hong Kong–ASEAN FTA (n 22) similarly links the FET obligation to customary international law, but does not state that customary international law *includes* fair and equitable

potentially significant clarifying features that those other agreements possess including, in particular, any clause expressly clarifying that the FET obligation is not intended to go beyond the customary international law minimum standard of treatment, or create any additional substantive rights.<sup>61</sup> Without such a clarification, it is arguable that the Japan–Israel BIT (1) represents a concession by these two states that they view customary international law as including an FET obligation, an otherwise disputed proposition,<sup>62</sup> and (2) may give rise to interpretations more favourable to investors than treaties more clearly limiting the FET obligation to obligations under customary international law.

The Colombia–United Arab Emirates (UAE) BIT represents a different approach: it states that ‘[e]ach Contracting Party shall accord to investments of investors of the other Contracting Party “fair and equitable treatment” and “full protection and security” in accordance with the law and regulations of the Host State, and the customary or international law standard of treatment and protection.’<sup>63</sup> In this agreement, one interpretation is that customary international law is treated not as a cap on the meaning of the FET obligation (as under, for instance, the NAFTA, TPP, PACER Plus, Hong Kong–Association of Southeast Asian Nations (ASEAN), and Argentina–Chile agreements’ vision of that provision), but as one of several sources for understanding the FET obligation and what it requires. The treaty also arguably suggests that either a breach of domestic law or the ‘international law standard of treatment and protection’ can give rise to an FET violation. **7.24**

Some agreements, following a model advanced by the European Union in its agreements, do not connect the FET obligation to the minimum standard of treatment but instead seek to identify its components. The treaty between the UAE and Rwanda is an example, opting not to reference customary international law and instead stating the obligation (‘Each Contracting party shall accord fair and equitable treatment’) and then elaborating on the types of conduct that will constitute a breach (discussed further in this chapter).<sup>64</sup> Colombia’s model BIT is similar.<sup>65</sup> **7.25**

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treatment. The Hong Kong–ASEAN FTA states in art 5(1), ‘Treatment of Investment’: ‘Each Party shall accord to covered investments fair and equitable treatment and full protection and security ... [T]he concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights.’

<sup>61</sup> Japan–Israel BIT (n 21) art 4; cf TPP (n 56) art 9.6(2); CPTPP (n 57) art 9.6(2); PACER Plus (n 21) art 9(2); Hong Kong–ASEAN FTA (n 22) art 5(1)(c); Argentina–Chile FTA (n 22) art. 8.7(2).

<sup>62</sup> See Patrick Dumberry, ‘Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?’ (2016) 8(1) *Journal of International Dispute Settlement* 155. See also n 53 (representing an approach in which the FET obligation is tethered to customary international law, but not described as being an element of it).

<sup>63</sup> Colombia–UAE BIT (n 22) art 5(1).

<sup>64</sup> Rwanda–UAE BIT (n 21) art 4.

<sup>65</sup> Colombia model BIT, Fair and Equitable Treatment.

## 2. What is the content of ‘FET’ and how is a breach established?

- 7.26** The treaties adopt (or allow) different approaches to deciphering the precise meaning of FET.
- 7.27** In the treaties explicitly linking the FET obligation to customary international law, such as the PACER Plus, Hong Kong–ASEAN, and Argentina–Chile texts, the treaties indicate expressly<sup>66</sup> or implicitly<sup>67</sup> that the tribunal must approach the question of the meaning of the FET obligation by determining whether there is a relevant customary international law rule arising from a ‘general and consistent practice of States that they follow from a sense of legal obligation’.<sup>68</sup> Tribunals evaluating whether the FET standard has been breached would presumably then need to decide first whether a relevant rule of customary international law exists, and then whether that rule has been breached.
- 7.28** How to establish that a rule of customary international law exists is a complex topic, one under study in recent years by the International Law Commission, among others.<sup>69</sup> In addition to the question of how a rule of customary international law is established, another important question with implications for ISDS case outcomes is *who* has the burden of establishing such a rule in the context of a dispute. This has been a recurring issue in the context of the NAFTA, with the state parties unanimously and routinely arguing that the burden of establishing a rule of customary international law falls on the investor,<sup>70</sup> and tribunals offering competing views.<sup>71</sup>
- 7.29** A more recent development, which can be seen in the TPP/CTPPP<sup>72</sup> and in 2017’s Argentina–Chile FTA,<sup>73</sup> is for state parties to attempt to preempt litigation

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<sup>66</sup> PACER Plus (n 21) art 2, n 6; Argentina–Chile FTA (n 22) art 8.7, n 4.

<sup>67</sup> Hong Kong–ASEAN FTA (n 22) art 5(1).

<sup>68</sup> PACER Plus (n 21) art 2, n 6; Argentina–Chile FTA (n 22) art 8.7, n 4.

<sup>69</sup> For an overview, see International Law Commission, ‘Analytical Guide to the Work of the International Law Commission: Identification of Customary International Law’ <[http://legal.un.org/ilc/guide/1\\_13.shtml](http://legal.un.org/ilc/guide/1_13.shtml)> accessed 4 June 2018. For a review of the NAFTA parties’ views on this, see Gaukrodger, ‘Addressing the Balance of Interests’ (n 52) 27–35.

<sup>70</sup> See eg *Apotex Holdings Inc and Apotex Inc v United States*, ICSID Case No ARB(AF)/12/1 (*Apotex II*), Counter-Memorial on Merits and Objections to Jurisdiction of Respondent United States of America (14 December 2012) para 354; *Windstream Energy LLC v Canada*, PCA Case No 2013-22 (*Windstream*), [Non-disputing State Party] Submission of the United States of America (12 January 2016) para 20; *Windstream*, Government of Canada Rejoinder Memorial (6 November 2015) para 199; Gaukrodger, ‘Addressing the Balance of Interests’ (n 52) 34.

<sup>71</sup> *Apotex II* (n 70) Award (25 August 2014) para 9.6 (noting that the claimants bear the burden of proving their case, and ultimately rejecting the claimants’ contention regarding the existence of relevant rules of customary international law on certain administrative procedural matters); cf *Windstream* (n 70) Award, para 350 (‘The Tribunal is . . . unable to accept the Respondent’s argument that the burden of proving the content of the rule falls exclusively on the Claimant. In the Tribunal’s view, it is for each Party to support its position as to the content of the rule with appropriate legal authorities and evidence.’).

<sup>72</sup> TPP (n 56) art 9.23(7).

<sup>73</sup> Argentina–Chile FTA (n 22) art 8.36(3).

of these issues by clarifying in the treaty text that the investor bears the burden of all elements of its claim including, presumably, the content of customary international law.

Several treaties have nevertheless provided tribunals guidance on related issues. For instance, the PACER Plus, Hong Kong–ASEAN, and Argentina–Chile texts indicate what their contracting states consider a customary international law-tethered FET obligation to mandate, saving tribunals some of the work of deciding whether a relevant rule exists. In an approach similar to that employed in the TPP/CTPPP,<sup>74</sup> the PACER Plus,<sup>75</sup> Hong Kong–ASEAN,<sup>76</sup> and Chile–Argentina<sup>77</sup> agreements state that the customary international law-tied FET obligation ‘includes the obligation not to deny justice ... in accordance with the principle of due process ...’.<sup>78</sup> By using the word ‘includes’, the state parties to these three agreements leave open the possibility that the customary international law notion of FET includes other obligations regarding treatment of aliens, but do not list any elements other than the denial of justice in accordance with due process. Those elements will need to be determined in accordance with methods for determining the content of customary international law. **7.30**

Some treaties that are more ambiguous than the PACER Plus, Hong Kong–ASEAN, and Chile–Argentina IIAs on the relationship between the FET obligation and the customary international law standard of treatment contain additional language providing guidance to tribunals regarding what FET means and/or does not mean. Common elements are protection against denials of justice<sup>79</sup> and guarantees of due process.<sup>80</sup> Several texts also state the FET obligation protects against ‘manifestly **7.31**

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<sup>74</sup> TPP (n 56) art 9.6(2)(a).

<sup>75</sup> PACER Plus (n 21) art 9(2)(a).

<sup>76</sup> Hong Kong–ASEAN FTA (n 22) art 5(1)(a) (‘‘fair and equitable treatment’’ requires each Party not to deny justice in any legal or administrative proceedings in accordance with the principle of due process of law’).

<sup>77</sup> Argentina–Chile FTA (n 22) art 8.7(2)(a) (‘‘Trato justo y equitativo’’ incluye la obligación de las Partes de no incurrir en una denegación de justicia en procedimientos penales, civiles o contencioso administrativos, de acuerdo con el principio del debido proceso incorporado en los principales sistemas legales del mundo’).

<sup>78</sup> The wording varies slightly between some of these agreements, with potential substantive significance. For instance, the Hong Kong–ASEAN FTA (n 22) explains denial of justice by reference to due process ‘in accordance with the principle of due process of law’. In contrast, the PACER Plus (n 21) refers to ‘the principle of due process embodied in *the principal legal systems of the world*’ (emphasis added).

<sup>79</sup> Colombia–UAE BIT (n 22) art 5(2)(a); Rwanda–UAE BIT (n 21) art 4(2)(a); China–Hong Kong CEPA (n 21) ch 1, art 4(2)(i).

<sup>80</sup> Colombia–UAE BIT (n 22) art 5(2)(b); Rwanda–UAE BIT (n 21) art 4(2)(b). Notably, in apparent contrast to the PACER Plus (n 21), Hong Kong–ASEAN, and Argentina–Chile (n 22) IIAs, which seem to link determinations of whether there has been a denial of justice with breach of due process, some of the list-based IIAs, such as Colombia–UAE (n 22), Rwanda–UAE (n 22), and the CETA, seem to treat issues of denial of justice and breach of due process as being separate elements of the FET obligation (cf China–Hong Kong CEPA (n 21) ch 1, art 4(2)(i)).

arbitrary' treatment, a concept that is similarly expressly reflected in texts concluded by the European Union, such as the Comprehensive Economic and Trade Agreement (CETA),<sup>81</sup> but that has given rise to controversial decisions in cases such as *Bilcon v Canada*.<sup>82</sup> The Colombia model BIT,<sup>83</sup> Colombia–UAE BIT,<sup>84</sup> and China–Hong Kong Comprehensive and Enhanced Partnership Agreement (CEPA),<sup>85</sup> for instance, each specify that the FET obligation protects against manifestly arbitrary conduct. In a slightly different approach, the Rwanda–UAE treaty does not include 'manifestly arbitrary' conduct among the list of measures that are said to constitute FET violations,<sup>86</sup> but adds a separate provision in the FET article stating, 'Neither Contracting Party shall hamper, by arbitrary or discriminatory measures, the development, management, use, expansion, sale and the liquidation of [covered] investments.'<sup>87</sup>

- 7.32** 'Manifestly arbitrary' conduct has been cited by various tribunals as conduct amounting to a breach of FET;<sup>88</sup> thus, some of the 2017 treaties seem to reflect such arbitral decisions. In this context, it is interesting to note that those treaties following a list-based approach to defining the content of the FET obligation have not similarly seemed to accept and restate an understanding of the FET obligation as requiring 'transparency', 'proportionality', or an adherence to 'specific commitments',<sup>89</sup> elements some tribunals have identified as also being a part of the FET obligation.<sup>90</sup>
- 7.33** Finally, among the group of treaties reviewed in this chapter, the agreement between Israel and Japan follows a minority approach of declining to provide any further elaboration on the meaning of FET, other than, as noted, briefly connecting it to customary international law.

### 3. A note on other substantive standards

- 7.34** As with the FET obligation, a similar degree of limited experimentation can be seen in states' approaches to other substantive obligations such as the

<sup>81</sup> CETA, art 8.10(2)(c).

<sup>82</sup> *Bilcon of Delaware v Canada*, UNCITRAL, PCA Case No 3009-04, Award on Jurisdiction and Liability (17 March 2015) paras 442–43, 591.

<sup>83</sup> Colombia model BIT, Fair and Equitable Treatment, 2(c).

<sup>84</sup> Colombia–UAE BIT (n 22) art 5(2)(c).

<sup>85</sup> China–Hong Kong CEPA (n 21) ch 1, art 4(2)(i).

<sup>86</sup> Rwanda–UAE BIT (n 21) art 4(2).

<sup>87</sup> Rwanda–UAE BIT (n 21) art 4(5).

<sup>88</sup> See eg *Bilcon* (n 82) and cases cited therein.

<sup>89</sup> The investment chapter of the EU–Singapore FTA (n 5) had originally stated that a breach of the FET obligation would arise from 'a breach of the legitimate expectations of a covered investor arising from specific or unambiguous representations from a Party so as to induce the investment and which are reasonably relied upon by the covered investor'. (art 9.4(e)) (footnotes omitted). The text as released in 2018 no longer lists such breach of legitimate expectations as a standalone basis for an FET violation.

<sup>90</sup> It may be that elements of transparency are considered to be subsumed within notions of due process, or that a breach of a 'specific commitment', or conduct that is disproportionate, are considered to be examples of conduct that is 'manifestly arbitrary'.



expropriation obligation (with treaties, for instance, adopting different formulas to guide tribunals in determining whether an indirect expropriation has occurred,<sup>91</sup> or in assessing compensation for expropriations<sup>92</sup>); the most favoured nation (MFN) obligation (with treaties differing on whether procedural and/or substantive provisions can be imported<sup>93</sup>); and overarching provisions, such as a provision in the Hong Kong–ASEAN FTA ‘recognizing that commitments by each newer ASEAN Member State may be made in accordance with its stage of development’.<sup>94</sup> These differences may be traced to diverse causes, including states’ priorities domestically as well as in relation to their negotiating party(ies), negotiating capacities, power dynamics among negotiating parties, and experiences with investment treaties and dispute settlement to date.

Overall, it appears that, notwithstanding convergence obtained in some mega-regionals, and the relatively limited number of negotiations ongoing and treaties being concluded (as compared to patterns in the 1990s in particular), there are interesting variations in current approaches to investment protection, as agreements are typically more specific and precise than their predecessors of a decade or more ago. Nevertheless, it also appears that the diversity that exists within the substantive provisions of the treaties covered in this chapter still fits within a basic trajectory. In the context of the FET obligation, this means that, based on the sample of publicly available treaties reviewed for this chapter, the treaties concluded generally opt to link the obligation to customary international law and/or specify what the FET obligation means or does not mean. These approaches find precedent in **7.35**

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<sup>91</sup> cf eg the Colombia–UAE BIT (n 22) art 7 (requiring the tribunal to examine the ‘scope’, and ‘economic impact’ of the measure(s), and its/their ‘level of interference on the reasonable and distinguishable expectations concerning the investment’), and not including a ‘police powers’ provision, with the Hong Kong–ASEAN FTA, annex 2 (requiring examination of, among other factors, the ‘economic impact’ and ‘character’ of the government action, and whether it ‘breaches the government’s prior binding written commitment to the investor ...’, and including a ‘police powers’ clarification).

<sup>92</sup> cf eg PACER Plus (n 21) art 13(2) (noting compensation shall be determined in accordance with the generally recognized principles of valuation and *equitable principles*) (emphasis added), with the Colombia–UAE BIT (n 22) (noting that ‘[w]here the fair market value cannot be ascertained, the compensation shall be determined *in equitable manner*’), and the Hong Kong–ASEAN FTA (n 22) art 10(2), 10(4), and n 10 (providing for different compensation depending on whether the expropriating party is an ASEAN member state (fair market value) or Hong Kong (real value), connecting compensation standards for expropriation ‘relating to land’ to domestic laws and regulations, and specifying that for certain ASEAN member states, payment of interest is also subject to non-discriminatory domestic laws, regulations and policies).

<sup>93</sup> See eg Hong Kong–ASEAN FTA (n 22) art 4(3) (preventing importation of obligations from other existing and some future treaties), and art 4(5) (clarifying that the most favoured nation (MFN) obligation does not permit importation of any dispute resolution proceedings found in other treaties); and Colombia–UAE BIT (n 22) (adding that ‘[f]or greater clarity’, the MFN obligation does not encompass the treaty’s sections on definitions or dispute settlement, an approach that prevents investors or investments otherwise not covered from seeking protection, and prevents those investors and investments that are covered from accessing more favourable dispute resolution mechanisms).

<sup>94</sup> Hong Kong–ASEAN FTA (n 22) art 18(d).

the NAFTA and therefore largely follow established patterns in terms of the core investment protections offered, but also reflect some more recent practices that have emerged and spilled over from European Union treaty practice.

#### D. Protecting Public Interest Objectives?

**7.36** As noted in past *Yearbook* chapters, global and national dialogue on reform of the investment treaty regime has included calls from a range of stakeholders for negotiating states to improve protection of policy space and measures adopted in pursuit of public interest objectives.<sup>95</sup> However, in addition to varying refinements and innovations in substantive host state obligations, other provisions included in ‘new generation’ treaties that purport to better protect policy space appear to vary in terms of their explicit reference to public interest objectives. Moreover, while it is too soon to assess their effectiveness in practice, some provisions may be limited by their conditionality, lack of specificity, or non-binding nature. This section explores treaty drafting developments in 2017 with respect to three thematic areas: (1) sustainable development and the public interest; (2) climate change and environmental measures; and (3) human rights and investor obligations.

##### 1. Sustainable development and the public interest

**7.37** Of the treaties reviewed in this chapter, several include explicit references to sustainable development in their preambles and/or in operative provisions. The Rwanda–UAE BIT, for example, contains a number of preambular references to sustainable development, though it does not refer to sustainable development in its operative text.<sup>96</sup> PACER Plus also refers to sustainable development in its preamble, underscoring the character of the agreement as a ‘development tool’ and reaffirming the parties’ commitments to *inter alia* ‘sustainable development agreements’.<sup>97</sup> References to sustainable development can also be found in the preamble of the MERCOSUR Investment Protocol, which recognizes the role of investment in the promotion of sustainable development, poverty reduction, and expansion of human capacity and development.<sup>98</sup> The Protocol’s preamble also provides that investors and their investments should behave in a socially responsible manner, and contribute to the sustainable development of state parties.<sup>99</sup> Colombia’s model BIT explicitly links investment promotion and protection with

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<sup>95</sup> See eg Coleman, Johnson, Sachs, and Gupta (n 51); Lisa Sachs, Lise Johnson, and Jesse Coleman, *International Investment Agreements, 2014: A Review of Trends and New Approaches* (OUP 2016).

<sup>96</sup> Rwanda–UAE BIT (n 21) preamble.

<sup>97</sup> PACER Plus (n 21) preamble.

<sup>98</sup> MERCOSUR Investment Protocol (n 39) preamble.

<sup>99</sup> *ibid.*

sustainable development, with the model's preamble noting that the parties are '[s]eeking to promote and protect foreign investments that favour the prosperity and the sustainable development of both Parties'.<sup>100</sup>

Some of the texts reviewed in this chapter also include references to sustainable development within the operative portions of their respective texts. The stated objective of the MERCOSUR Investment Protocol is to promote cooperation amongst state parties in order to facilitate investment that enables the sustainable development of state parties.<sup>101</sup> The Protocol's corporate social responsibility (CSR) provision also provides that investors and their investments shall endeavour to achieve the highest possible level of contribution to sustainable development in the host state by adopting the voluntary standards outlined in that provision.<sup>102</sup> In conditioning access to dispute settlement, Colombia's model BIT provides that protection under the agreement to covered investors and investments 'stems from the Covered Investor's contribution to the sustainable development and welfare of their Host Party'.<sup>103</sup> The specific mechanism or means for assessing this contribution is not outlined in the treaty. BITs concluded by Turkey in 2017 also reportedly condition treaty protection on the basis of covered investors' or investments' contribution 'to the host State's economy or sustainable development'.<sup>104</sup> **7.38**

While these examples expand the set of 'new generation' treaties that explicitly link investment promotion and protection to sustainable development within the treaty texts, they seem by comparison less powerful than the references to sustainable development found in recently concluded FTAs. The European Union–Armenia CEPA,<sup>105</sup> which does not contain substantive obligations regarding investment protection, contains an explicit commitment by state parties to principles of sustainable development,<sup>106</sup> along with a confirmation of the parties' **7.39**

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<sup>100</sup> Colombia model BIT, preamble.

<sup>101</sup> MERCOSUR Investment Protocol (n 39) art 1.

<sup>102</sup> *ibid* art 14.

<sup>103</sup> Colombia model BIT, Section DD (Dispute Settlement), art X(3) (Scope of Application of ISDS).

<sup>104</sup> UNCTAD, 'Recent Developments in the International Investment Regime' (n 2) 5, referring to Bilateral Investment Treaty Between Burundi and Turkey (signed 14 June 2017) (Burundi–Turkey BIT); Bilateral Investment Treaty between Mozambique and Turkey (signed 24 January 2017) (Mozambique–Turkey BIT); Bilateral Investment Treaty between Turkey and Ukraine (signed 9 October 2017) (Turkey–Ukraine BIT). These treaties were not publicly available at the time of writing; the authors were therefore unable to verify the manner in which protection is conditioned in the texts of these agreements.

<sup>105</sup> The Comprehensive & Enhanced Partnership Agreement between the European Union and Armenia (signed 24 November 2017) (EU–Armenia CEPA). The European Union–Armenia CEPA does not contain substantive obligations on investment (though it does contain, in art 203, a commitment to 'review the environment and legal framework for investment, no later than three years after the entry into force of' the agreement to consider opportunities for including provisions on investment). That it and similar trade and broader economic partnership agreements contain more advanced provisions concerning matters of public interest is noteworthy.

<sup>106</sup> *ibid* art 2 (General Principles).

‘commitment to enhance the contribution of trade to the goal of sustainable development’.<sup>107</sup> The latter provision lists specific steps that the parties will take in this regard, including seeking greater policy coherence between labour and trade policies; striving to facilitate and promote trade and investment in environmental goods and services; striving to remove obstacles to trade or investment concerning goods and services of relevance for climate change mitigation and adaptation; promoting ‘trade in goods that contribute to enhanced social conditions and environmentally sound practices’; and promoting CSR.<sup>108</sup> While these commitments remain broad in their scope and content, they appear more concrete and tailored towards achieving certain sustainable development objectives than those found in other recently concluded texts.<sup>109</sup> The extent to which these provisions may be enforced by state parties may, however, be limited by the application of Article 285, which provides that provisions regarding compliance in the dispute settlement chapter do not apply to Chapter 9 (Trade and Sustainable Development), including the provisions referred to previously in this chapter.<sup>110</sup>

**7.40** In addition to explicit references to sustainable development, investment treaties concluded in 2017 include general provisions that seek to protect policy space and measures adopted in pursuit of public interest objectives, including promotion of sustainable development. Most treaties reviewed in this chapter contain a version of a right to regulate provision (whether implicit or explicit), along with non-lowering of standards provisions and general exceptions.<sup>111</sup> As the authors reported last year,<sup>112</sup> it is too soon to tell whether these provisions will have a tangible impact on protection of measures adopted by host states in pursuit of public interest objectives. Moreover, the strength of these provisions continues to vary across agreements.<sup>113</sup> Indeed, as discussed further in Chapter 9 and Chapter 19, early signs from the interpretation and application of existing exceptions indicate that they may narrow, rather than expand, states’ defences.<sup>114</sup> It is, however,

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<sup>107</sup> *ibid* art 276 (Trade and Investment Favouring Sustainable Development).

<sup>108</sup> *ibid* art 276 (a)–(e) (Trade and Investment Favouring Sustainable Development). See also art 284 (Working Together on Trade and Sustainable Development).

<sup>109</sup> Some recent BITs, including the Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (signed 3 December 2016) (Morocco–Nigeria BIT), provide noteworthy exceptions to this general trend. The Morocco–Nigeria BIT contains several references to sustainable development in its preamble and art 1(3) links the definition of a covered investment to that investment’s contribution to sustainable development.

<sup>110</sup> European Union–Armenia CEPA (n 105) art 285 (Dispute Settlement).

<sup>111</sup> UNCTAD also reports that several treaties not reviewed in this chapter (as they were not public at the time of writing) also contain non-lowering of standards provisions and general exceptions. See Table 1 in UNCTAD, ‘Recent Developments in the International Investment Regime’ (n 2) 4.

<sup>112</sup> Coleman, Johnson, Sachs, and Gupta (n 51).

<sup>113</sup> For example, the general exception included in the Colombia model BIT is explicitly self-judging, while the general exception included in the Japan–Israel BIT (n 21) (art 15) is not.

<sup>114</sup> See ch 9 by Jarrod Hepburn and ch 19 by Tania Voon, Andrew Mitchell, and James Munro.

difficult to draw this conclusion with certainty, given the discretion available to investor–state tribunals.

Lastly, two unique provisions that seek to protect public interest objectives should be highlighted. The first is a broad provision that seeks to address the potential impact of investments on the public interest: the China–Hong Kong CEPA provides that ‘[o]ne side reserves the right to establish or maintain any restrictive measures relating to investors and covered investments of the other side in the event that the implementation of this Agreement causes substantial impact on its sectors or public interests’.<sup>115</sup> The second is an exception included in PACER Plus, which explicitly provides that nothing in the agreement ‘shall preclude the adoption by New Zealand of measures *it deems necessary* to accord more favourable treatment to Māori in respect of matters covered by this Agreement including in fulfilment of its obligations under the Treaty of Waitangi’.<sup>116</sup> This provision is self-judging and does not contain language requiring the measures adopted to otherwise comply with the provisions of PACER Plus, implying that it will provide stronger protection for the measures it seeks to cover than certain right to regulate or exception provisions found in other treaties. For avoidance of doubt, it also specifically states that the measures adopted by New Zealand may concern matters covered by PACER Plus, precluding confusion regarding whether specific trade and investment-related measures come within the scope of the provision, or whether only general measures regarding rights and obligations arising from the Treaty of Waitangi can be covered. However, although self-judging, and while the ‘otherwise compliant with’ language is absent from the provision, the use of ‘necessary’ means that the exception maintains a stricter nexus requirement. 7.41

## 2. Climate change and environmental measures

During the review period, one economic partnership agreement that refers to climate objectives was signed, and negotiations regarding a second were concluded. Although these agreements do not, for the moment, include provisions on investment protection, their inclusion of these explicit references to climate change is noteworthy, and they provide a valuable (though distinct) benchmark against which investment treaty developments can be compared. In November 2017, the European Union–Armenia CEPA was signed.<sup>117</sup> One month later, negotiations on the European Union–Japan Economic Partnership Agreement (EPA) were finalized, though the agreement has not yet been signed.<sup>118</sup> Both of these treaties explicitly refer to state parties’ commitment to implement the objectives of the 7.42

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<sup>115</sup> China–Hong Kong CEPA (n 21) art 22(6).

<sup>116</sup> PACER Plus (n 21) ch 11, art 6 (emphasis added).

<sup>117</sup> EU–Armenia CEPA (n 105).

<sup>118</sup> European Union–Japan Economic Partnership Agreement (EU–Japan EPA) <<http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/>> accessed 4 June 2018.

United Nations Framework Convention on Climate Change (UNFCCC)<sup>119</sup> and the Paris Agreement.<sup>120 121</sup>

- 7.43** In addition to general obligations regarding multilateral environmental agreements (discussed further in this chapter), Article 275 of the European Union–Armenia CEPA provides:<sup>122</sup>

The Parties reaffirm their commitment to implementing and reaching the objectives of the United Nations Framework Convention on Climate Change of 1992 (UNFCCC), the Kyoto Protocol thereto of 1998 and the Paris Agreement of 2015. They commit to work together to strengthen the multilateral, rules-based regime under the UNFCCC and to cooperate on the further development and implementation of the international climate-change framework under the UNFCCC and agreements and decisions related thereto.

- 7.44** This provision is complemented by a full chapter dedicated to Climate Action.<sup>123</sup> The chapter contains, among other things, commitments by state parties to: strengthen cooperation to address climate change;<sup>124</sup> promote measures at domestic, regional, and international levels address to climate change;<sup>125</sup> exchange information and expertise to achieve climate objectives;<sup>126</sup> and engage in a regular dialogue on matters covered by the Climate Action chapter.<sup>127</sup> The current draft of the European Union–Japan EPA does not contain a ‘climate action’ chapter; however, the language used to refer to the UNFCCC and Paris Agreement is marginally more decisive than that used in the European Union–Armenia CEPA.<sup>128</sup>

<sup>119</sup> United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

<sup>120</sup> Paris Agreement (adopted 12 December 2015, opened for signature on 22 April 2016, entered into force on 4 November 2016).

<sup>121</sup> See eg EU–Armenia CEPA (n 105) art 275(4); European Union–Japan EPA (n 118) art 16.6(4). Note with respect to the European Union–Japan EPA that this is referred to on the European Commission’s website as the text of the agreement as it stands (after legal revision), but which may undergo further modifications. See European Commission, ‘EU–Japan Economic Partnership Agreement: Texts of the Agreement’ <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1684>> accessed 4 June 2018. The ‘Key Elements’ of the treaty are listed here: European Commission, ‘Key Elements of the EU–Japan Economic Partnership Agreement: Fact Sheet’ (18 April 2018) <[http://europa.eu/rapid/press-release\\_MEMO-18-3326\\_en.htm](http://europa.eu/rapid/press-release_MEMO-18-3326_en.htm)> accessed 4 June 2018.

<sup>122</sup> EU–Armenia CEPA (n 105) art 275(4).

<sup>123</sup> *ibid* ch 4 (Climate Action).

<sup>124</sup> *ibid* arts 51 and 54. Article 54 mentions specific objectives cooperation should to address.

<sup>125</sup> *ibid* art 52.

<sup>126</sup> *ibid* art 53.

<sup>127</sup> *ibid* art 55.

<sup>128</sup> European Union–Japan EPA (n 118), ch 16 (Trade and Sustainable Development), art 16.4(4) provides:

The Parties recognize the importance of achieving the ultimate objective of the United Nations Framework Convention on Climate Change, done at New York on 9 May 1992 (hereinafter referred to as “UNFCCC”), in order to address the urgent threat of climate change, and the role of trade to that end. The Parties reaffirm their commitments to effectively implement the UNFCCC and the Paris Agreement, done at Paris on 12 December 2015 by the Conference of the Parties to the UNFCCC at its 21st session. The

Other texts reviewed for the purposes of this chapter do not include comparable references to climate change, the UNFCCC, or the Paris Agreement. Three additional features of texts concluded in 2017 are worth highlighting with respect to how they address—or do not address—state parties’ environmental obligations and measures adopted in pursuit of those obligations. **7.45**

First, in addition to the provisions explicitly dealing with climate change, the European Union–Armenia CEPA contains more general provisions regarding state parties’ obligations arising from multilateral environmental agreements. These provisions: explicitly recognize the links between trade and environmental issues; stress the importance of multilateral environmental governance in addressing these impacts; reaffirm parties’ commitments to implementing ‘in their laws and practices the multilateral environmental agreements (MEAs) to which they are party’; commit the parties to regularly exchanging information about progress regarding ratification of these MEAs; and provide that nothing in the CEPA prevents state parties ‘from adopting or maintaining measures to implement the MEAs to which they are party, provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade’.<sup>129</sup> Similar general commitments to multilateral environmental obligations are also contained in the current draft text of the European Union–Japan EPA,<sup>130</sup> and in the concluded China–Georgia FTA.<sup>131</sup> **7.46**

By contrast, most other treaties concluded in 2017 do not contain comparable commitments to multilateral environmental obligations. Although PACER Plus includes a preambular reference to state parties’ commitments regarding multilateral (and sustainable development) agreements,<sup>132</sup> none of the other agreements reviewed in this chapter contain a similar express acknowledgment or affirmation of these obligations, either in the preamble or operative portion of the texts. **7.47**

Second, some general exceptions contained in the treaties reviewed herein explicitly note that environmental measures come within the scope of the provision. For example, the Japan–Israel BIT’s general exception explicitly covers ‘environmental measures necessary to protect human, animal or plant life or health’.<sup>133</sup> The general exception in the China–Hong Kong CEPA covers environmental measures **7.48**

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Parties shall cooperate to promote the positive contribution of trade to the transition to low greenhouse gas emissions and climate-resilient development. The Parties commit to working together to take actions to address climate change towards achieving the ultimate objective of the UNFCCC and the purpose of the Paris Agreement.

<sup>129</sup> EU–Armenia CEPA (n 105) art 275.

<sup>130</sup> EU–Japan EPA (n 118) ch 16 (Trade and Sustainable Development), art 16.4.

<sup>131</sup> See eg Free Trade Agreement Between China and Georgia (signed 13 May 2017, entered into force 1 January 2018) (China–Georgia FTA), arts 9.1–9.3 in ch 9 (Environment and Trade).

<sup>132</sup> PACER Plus (n 21) preamble.

<sup>133</sup> Japan–Israel BIT (n 21) art 15(1)(a).

necessary to achieve other stated objectives in the exception, which mirror those commonly found in such provisions regarding compliance with laws, protection of life, and conservation of natural resources.<sup>134</sup> PACER Plus also explicitly provides that environmental measures necessary to achieve the other stated objectives in the provision are covered by the exception.<sup>135</sup> The Colombia–UAE BIT provides that measures *appropriate* ‘to protect human, animal, or plant life, health, or the environment’ are covered by the exception.<sup>136</sup> This provision therefore both includes environmental measures in the list of objectives covered by the exception, and contains a slightly more flexible nexus requirement than that usually found in general exceptions modelled on General Agreement on Tariffs and Trade (GATT) Article XX<sup>137</sup> or General Agreement on Trade in Services (GATS) Article XIV.<sup>138</sup> Colombia’s model BIT, by contrast, includes the ‘necessary’ nexus, but the exception is self-judging.<sup>139</sup>

- 7.49** Lastly, as noted with respect to sustainable development, right to regulate and non-lowering of standards provisions are increasingly found in more recently negotiated treaties. Where they are included, they often refer to environmental measures or protection of the environment. However, the strength of their wording varies, and it is difficult to assess at this stage in the development of investment law whether they will be effective.
- 7.50** Looking ahead, it will be interesting to observe whether states’ commitments to addressing climate change objectives will shape, in a more decisive and concrete manner, the provisions included in future trade and investment agreements. Growing interest in ‘climate-friendly’ approaches to trade and investment are spurring the development by non-state entities of new models that could promote more creative thinking on these issues. In late 2016, the Sierra Club outlined a model that, if adopted by negotiating states, would require the inclusion of more concrete and specific provisions capable of guarding the regulatory space needed to protect and implement climate policies.<sup>140</sup> In 2017, the Stockholm Chamber of Commerce launched the ‘Stockholm Treaty Lab’, a competition designed to promote development of innovative model investment treaties to encourage investment in climate change mitigation and adaptation.<sup>141</sup> It remains

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<sup>134</sup> China–Hong Kong CEPA (n 21) art 22(1).

<sup>135</sup> PACER Plus (n 21) ch 11, art 1(6) (which applies to ch 9 on investment).

<sup>136</sup> Colombia–UAE BIT (n 22) art 11(b) (emphases added).

<sup>137</sup> General Agreements on Tariffs and Trade (1947 and 1994) 55 UNTS 194 and 1867 UNTS 190, art XX.

<sup>138</sup> General Agreement on Trade in Services (1994) 1869 UNTS 183, art XIV.

<sup>139</sup> Colombia model BIT, General Exceptions.

<sup>140</sup> Sierra Club, ‘A New, Climate-Friendly Approach to Trade’ < [www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/climate-friendly-trade-model.pdf](http://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/climate-friendly-trade-model.pdf) > accessed 4 June 2018.

<sup>141</sup> Stockholm Treaty Lab, ‘The Prize’ < <http://stockholmtreatylab.org/the-prize/> > accessed 4 June 2018.



to be seen whether this growing interest will influence ongoing and future treaty negotiations.<sup>142</sup>

### 3. Human rights and investor obligations

As reported in previous *Yearbook* chapters, explicit references to human rights within the texts of investment treaties are rare: most of the treaties concluded to date, and the vast majority of those in force, do not contain explicit references to human rights (as the obligations of states, the responsibility of investors to respect human rights, or to the human rights of investment-affected rights holders).<sup>143</sup> The texts concluded in 2017 continued this general trend. Where treaties concluded in 2017 included non-lowering of standards provisions, right to regulate provisions, and/or general exceptions, most of these provisions did not include explicit references to human rights. Additionally, when non-lowering of standards provisions were included in the treaties, those provisions covered environmental measures, but did not always cover labour law or enforcement.<sup>144</sup> 7.51

However, a small number of texts reviewed in this chapter provide an exception to the continued general trajectory of limited explicit reference to human rights. The MERCOSUR Investment Protocol refers explicitly to human rights in Article 14(2), where the Protocol provides that investors and their investments must commit their best efforts to comply with principles and voluntary standards concerning respect for the human rights of investment-affected rights holders.<sup>145</sup> The Argentina–Chile FTA’s Investment Chapter includes a provision on CSR wherein the parties reaffirm their commitment to CSR standards approved by the parties, including those addressing human rights, and ‘endeavour to encourage investors’ to incorporate these standards into their policies and practices.<sup>146</sup> PACER Plus also reaffirms the importance of state parties encouraging investors to voluntarily 7.52

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<sup>142</sup> While beyond the scope of the review period for this chapter, the European Union announced in early 2018 that it would conclude trade agreements only with states that ratified the Paris Agreement. See eg EA Crunden, ‘EU Will Only Make Trade Deals with Nations that Ratify Paris Climate Agreement’ *Think Progress* (6 February 2018) <<https://thinkprogress.org/eu-paris-us-decd4aad9145/>> accessed 4 June 2018.

<sup>143</sup> For discussion of past treaty drafting practice, see eg Coleman, Johnson, Sachs, and Gupta (n 51) 90–96. See also Johnson, Sachs, and Coleman (n 95) and Jesse Coleman, Kaitlin Cordes, and Lise Johnson, ‘Human Rights Law and the Investment Treaty Regime’ in Surya Deva (ed), *Research Handbook on Human Rights and Business* (Edward Elgar, *forthcoming*).

<sup>144</sup> cf China–Hong Kong CEPA (n 21) art 25 (which limits the non-lowering of standards to environmental measures, and there is no other non-lowering of standards provision that addresses labour measures) and PACER Plus (n 21) art 19(1) (which refers to non-enforcement of environmental, health, labour, safety, or other regulatory standards). The non-lowering of standards provision in the Investment Chapter of the Argentina–Chile FTA (n 22) (art 8.14) also refers explicitly to environmental and health objectives, but not to labour.

<sup>145</sup> MERCOSUR Investment Protocol (n 39) art 14(2).

<sup>146</sup> Argentina–Chile FTA (n 22) art 8.17. Other references to human rights may be included in the full FTA; this chapter reviewed explicit references to human rights in the Investment Chapter only.

incorporate into their policies internationally recognized CSR standards, guidelines, and principles.<sup>147</sup> All three of these provisions mirror the approach adopted by Brazil in the CSR provision of its Cooperation and Facilitation of Investment Agreements (CFIAs) with certain states.<sup>148</sup>

- 7.53** Colombia's model BIT includes several explicit references to human rights. The model's reaffirmation of state parties' right to regulate, which appear both in the preamble and the operative portion of the text, explicitly refers to human rights as one of the listed legitimate public welfare objectives.<sup>149</sup> Measures deemed by the adopting state necessary to protect human rights are also explicitly listed as being covered by the general exception included in the model.<sup>150</sup> The model further provides that state parties may: (1) condition or prevent a transfer of funds to enforce investor compliance with judicial, arbitral, or administrative decisions concerning *inter alia* human rights obligations;<sup>151</sup> and (2) deny the benefits of the treaty where an international court or judicial or administrative authority of any state with which the state parties have diplomatic relations has proven that the investor, directly or indirectly, *inter alia* 'committed serious human rights violations' or sponsored others to do so, 'caused serious environmental damage in the Territory of the Host Party', or 'caused grave violations of the Host Party's labour laws'.<sup>152</sup> These references to human rights in the context of conditioning transfers and denying treaty benefits are unique amongst recently reviewed texts.
- 7.54** Related to the promotion of sustainable and human rights-compliant trade and investment, at least two agreements are worth highlighting for their inclusion of specific provisions or chapters concerning gender. The Argentina–Chile FTA reportedly includes a full chapter on trade and gender.<sup>153</sup> Canada and Chile also signed an amendment to the existing Canada–Chile FTA<sup>154</sup> to incorporate a trade

<sup>147</sup> PACER Plus (n 21), ch 9 (Investment), art 5(2).

<sup>148</sup> See eg Agreement on Cooperation and Facilitation of Investments between the Federal Republic of Brazil and the Republic of Colombia (signed 9 October 2015), art 13 (hereafter Brazil–Colombia CFIA). Note that Brazil adopted a more decisive approach in its model and in certain other treaties. See eg Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Malawi (signed 25 June 2015), art 9 (Brazil–Malawi CFIA).

<sup>149</sup> Colombia model BIT, preamble and Chapeau on Investment and Regulatory Measures.

<sup>150</sup> *ibid*, General Exception.

<sup>151</sup> *ibid*, Freedom of Transfers.

<sup>152</sup> *ibid*, Denial of Benefits.

<sup>153</sup> Ministerio de Relaciones Exteriores de Chile, 'Chile and Argentina sign a trade agreement: "There are many countries in our region that talk about integration, we are achieving integration"' (2 November 2017) <<https://minrel.gob.cl/chile-and-argentina-sign-a-trade-agreement-there-are-many-countries-in/minrel/2017-11-03/152244.html>> accessed 4 June 2018.

<sup>154</sup> Government of Canada, 'Canada Chile FTA' <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/background-contexte.aspx?lang=eng>> accessed 4 June 2018; Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile (signed 5 December 1996, entered into force 5 July 1997) (Canada–Chile FTA).

and gender chapter into that agreement.<sup>155</sup> The chapter *inter alia*: reaffirms state parties' commitment to implementing obligations under the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)<sup>156</sup> and other international agreements addressing gender equality and women's rights;<sup>157</sup> outlines areas of cooperation to promote women's participation in national and international economies;<sup>158</sup> and establishes a trade and gender committee to support implementation of the chapter.<sup>159</sup> Canada and Chile also updated the investment chapter of the FTA by, among other things, reaffirming state parties' right to regulate, including a CSR provision, and clarifying other existing treaty standards.<sup>160</sup>

While references to explicit human rights obligations and responsibilities remained rare in 2017,<sup>161</sup> treaties concluded during the review period do include several noteworthy provisions that seek to strengthen the connection between the responsibility of investors for their conduct and protection under the relevant treaty. First, several treaties seek to, in different ways, condition protection on compliance with host state laws, which could include human rights obligations. The Colombia–UAE BIT, for example, defines an 'investor' as a state party, state enterprise, or an enterprise or national of a state party that has made an investment 'in accordance with the law of the other Contracting Party'.<sup>162</sup> Similarly, the Rwanda–UAE BIT includes compliance with the laws and regulations of the host state as a characteristic of the definitions of 'investor' and 'investment' under the treaty.<sup>163</sup> PACER Plus emphasizes compliance with host state laws in a separate provision, with state parties explicitly acknowledging in the treaty 'that investors of a Party and their investments are subject to the laws, regulations and standards

<sup>155</sup> Government of Canada, 'Highlighting Gender in Trade' <[http://international.gc.ca/gac-amc/publications/blueprint\\_2020-objectif\\_2020/highlighting\\_gender\\_trade-mettre\\_accent\\_sur\\_genre-commerce.aspx?lang=eng](http://international.gc.ca/gac-amc/publications/blueprint_2020-objectif_2020/highlighting_gender_trade-mettre_accent_sur_genre-commerce.aspx?lang=eng)> accessed 4 June 2018.

<sup>156</sup> Convention on the Elimination of All Forms of Discrimination against Women (opened for signature 1 March 1980, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

<sup>157</sup> Canada–Chile FTA (n 151) appendix II, ch N bis (Trade and Gender), art N bis-02 (International Agreements).

<sup>158</sup> *ibid* appendix II, ch N bis (Trade and Gender), art N bis-03 (Cooperation Activities).

<sup>159</sup> *ibid* appendix II, ch N bis (Trade and Gender), art N bis-04 (Trade and Gender Committee).

<sup>160</sup> UNCTAD 'Recent Developments in the International Investment Regime' (n 2) 7.

<sup>161</sup> A 2014 study of 2,107 investment treaties found that only 0.5 per cent of treaties included in the study contained references to human rights, with a majority of those references falling within the preambles of the texts studied. The sample included all treaties concluded by countries invited to participate in OECD-hosted investment dialogue (fifty-four countries, in addition to the European Commission) with other countries, provided that the text of the agreement was available in early 2014. The study indicates that the sample covered 'more than 70% of the global investment treaty population' at the time. See Kathryn Gordon, Joachim Pohl, and Marie Bouchard, 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey' OECD Working Papers on International Investment 2014/01, 10–18 <http://dx.doi.org/10.1787/5jz0xvqx1zlt-en>.

<sup>162</sup> Colombia–UAE BIT (n 22) art 2.1(b). See also the definition for 'enterprise' in art 2.1(c).

<sup>163</sup> Rwanda–UAE BIT (n 21) arts 1.1 and 1.2.

of the host state Party'.<sup>164</sup> As noted with respect to human rights, the Colombia model BIT includes two provisions (the first regarding free transfers and the second concerning denial of benefits) designed to encourage responsible investor conduct and compliance with host state laws.<sup>165</sup>

- 7.56** Second, some treaties appear to condition protection on other defined characteristics that seek to promote responsible or sustainable investment. The Colombia–UAE BIT provides that an ‘investor’ refers to an enterprise or national of a state party ‘that has made a *responsible* investment’.<sup>166</sup> The meaning of the term ‘responsible’, and the process for determining whether an investment is ‘responsible’, does not appear to be explicitly outlined in the text of the treaty; however, the phrasing suggests that whether or not an investment is ‘responsible’ seems to be a threshold question for determining whether the investor is covered by the treaty. As noted above, other treaties reportedly condition treaty coverage on the basis of investors’ contribution to sustainable development.<sup>167</sup>
- 7.57** Lastly, at least one treaty explicitly establishes a mechanism for obtaining covered investors’ consent for the submission of counterclaims. The Colombia–UAE BIT provides that, in order for a covered investor to submit a claim to arbitration under the dispute resolution section of the BIT, the investor must submit its consent to ‘the possibility of facing claims by the Respondent against them’.<sup>168</sup> While allowing the submission of counterclaims has, in recent cases, enabled states to raise environmental and human rights issues in the context of investor–state disputes,<sup>169</sup> submission of these claims is not without its challenges for host states and the public interest, particularly where the rights of investment-affected individuals and communities are affected by the dispute and/ or underlying investment.<sup>170</sup>
- 7.58** What these developments regarding human rights and investor obligations more generally might mean for the interpretation and application of investment treaty standards remains unclear. As further explored in Chapters 10 and 24 of this *Yearbook*, investment tribunals have in many cases been reluctant to interpret and apply human rights law in investment disputes. Whether or how that position

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<sup>164</sup> PACER Plus (n 21) ch 9 (Investment), art 5(1).

<sup>165</sup> Colombia model BIT, Freedom of Transfers and Denial of Benefits.

<sup>166</sup> Colombia–UAE BIT (n 22) art 2.1(b) (emphasis added).

<sup>167</sup> UNCTAD, ‘Recent Developments in the International Investment Regime’ (n 2) 5.

<sup>168</sup> Colombia–UAE BIT (n 22) art 13(3).

<sup>169</sup> See eg *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case No ARB/07/26; *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5 (formerly *Burlington Resources Inc and others v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*).

<sup>170</sup> See eg Lise Johnson and Brooke Skardvedt Güven, ‘The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest’ *Investment Treaty News* (13 March 2017) <<https://www.iisd.org/itn/2017/03/13/the-settlement-of-investment-disputes-a-discussion-of-democratic-accountability-and-the-public-interest-lise-johnson-and-brooke-skardvedt-guven/>> accessed 4 June 2018.

would shift with the inclusion of more explicit references to human rights within the four corners of investment treaties, and with greater emphasis on the obligations of investors, has yet to be determined.

## **E. Conclusion**

The political landscape that underpins the formulation of investment law and policy is changing: debates regarding the merits of investment treaties, and the impacts of international investment more generally, have attracted the attention of broader stakeholder groups, and the long-established public-facing positions of capital-importing and capital-exporting states appear, at least on the surface, to be shifting. Some of this shifting landscape can be seen in recent terminations and in the evolution of model treaties. The treaties reviewed in this chapter are, therefore, a narrow subset—including only countries who continue to pursue treaty making and who have concluded texts in 2017. **7.59**

Of this small selection, however, it is perhaps notable that in the midst of the broader public policy discussions, and discontent, with certain substantive and procedural aspects of investment treaties and investor–state arbitration, many of the 2017 texts seem to be taking more time than one might expect to incorporate reforms. Although certain texts, some of which are highlighted herein, stand out for their attempts to integrate sustainability and protection of policy space into their revised provisions, most seem to reflect a degree of path dependency with respect to investment protection. Exploring why this might be the case, and the specific factors that may be influencing the slower pace of textual change (including, for example, path dependency and pressure groups, negotiating leverage, lack of awareness of challenges and best fit reforms) would require further inquiry. Identifying which factors, if any, may be at play could be instructive for those international organizations and others working to reform investment governance. Moreover, as the impacts of global challenges affecting international investment become more tangible, it will be interesting to observe whether negotiating states act with greater urgency to formulate investment laws at the global and national levels that effectively promote sustainable investment. **7.60**

**Table 7.1 2017 International Investment Agreements**

S No	Full treaty name (when available)	Short name (* denotes agreement is publicly available as of May 2018)	Date signed	Date entered into force (status as of May 2018)
1.	Indonesia–Chile Comprehensive Economic Partnership Agreement	Chile–Indonesia CEPA	Signed 15 December 2017	Not in force
2.	The Comprehensive & Enhanced Partnership Agreement between the European Union and Armenia	EU–Armenia CEPA*	Signed 24 November 2017	Not in force
3.	Bilateral Investment Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the United Arab Emirates	Colombia–United Arab Emirates BIT*	Signed 13 November 2017	Not in force
4.	Agreement on Investment Among the Governments of the Hong Kong Special Administrative Region of the People’s Republic of China and The Member States of The Association of Southeast Asian Nations	Hong Kong, China SAR–ASEAN (Association of South-East Asian Nations) Investment Agreement*	Signed 12 November 2017	Not in force
5.	Free Trade Agreement between Argentina and Chile	Argentina–Chile FTA	Signed 2 November 2017	Not in force
6.	Agreement between the Republic of Rwanda and the United Arab Emirates on the Promotion and Reciprocal Protection of Investments	Rwanda–United Arab Emirates BIT*	Signed 1 November 2017	Not in force
7.	Bilateral Investment Treaty between Turkey and Uzbekistan	Turkey–Uzbekistan BIT	Signed 25 October 2017	Not in force
8.	Bilateral Investment Treaty between the United Arab Emirates and the Maldives	United Arab Emirates–Maldives BIT	Signed 17 October 2017	Not in force
9.	Bilateral Investment Treaty between Turkey and Ukraine	Turkey–Ukraine BIT	Signed 9 October 2017	Not in force
10.	Mainland and Hong Kong Closer Economic Partnership Agreement	China–Hong Kong CEPA Investment Agreement*	Signed 28 June 2017	28 June 2017

*International Investment Agreements, 2017*

**Table 7.1: Continued**

S No	Full treaty name (when available)	Short name (* denotes agreement is publicly available as of May 2018)	Date signed	Date entered into force (status as of May 2018)
11.	Bilateral Investment Treaty Between Burundi and Turkey	Burundi–Turkey BIT	Signed 14 June 2017	Not in force
12.	The Pacific Agreement on Closer Economic Relations Plus	PACER Plus*	Signed 14 June 2017	Not in force
13.	Free Trade Agreement Between China and Georgia	China–Georgia FTA*	Signed 13 May 2017	1 January 2018
14.	Agreement Between the Government of the Republic of Mauritius and the Government of the Republic of Cabo Verde for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income	Cabo Verde–Mauritius BIT*	Signed 13 April 2017	Not in force
15.	Protocol for Cooperation and Investment Facilitation Between the Members of MERCOSUR	Intra-MERCOSUR Investment Facilitation Protocol*	Signed 7 April 2017	Not in force
16.	Bilateral Investment Treaty between Angola and the United Arab Emirates	Angola–United Arab Emirates BIT	Signed 5 April 2017	Not in force
17.	Bilateral Investment Treaty between Jordan and Saudi Arabia	Jordan–Saudi Arabia BIT*	Signed 27 March 2017	Not in force
18.	Bilateral Investment Treaty between the Islamic Republic of Iran and Luxembourg	Iran, Islamic Republic of–Luxembourg BIT	Signed 14 February 2017	Not in force
19.	Bilateral Investment Treaty Between the United Arab Emirates and Burundi	United Arab Emirates–Burundi BIT	Signed 6 February 2017	Not in force
20.	Agreement Between Japan and The State of Israel for The Liberalization, Promotion And Protection of Investment	Israel–Japan BIT*	Signed 1 February 2017	5 October 2017
21.	Bilateral Investment Treaty between Mozambique and Turkey	Mozambique–Turkey BIT	Signed 24 January 2017	Not in force
22.	Trade and Investment Framework Agreement Between Paraguay and the United States of America	Paraguay–United States of America TIFA	Signed 13 January 2017	Not in force