CHAPTER 2

INTERNATIONAL INVESTMENT AGREEMENTS, 2013: A REVIEW OF TRENDS AND NEW APPROACHES

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INTRODUCTION

In 2013 alone, countries concluded negotiations on or signed at least 30 new international investment agreements (IIAs)—defined herein as bilateral and multilateral instruments for the protection and/or promotion of foreign investment.[1] While countries from around the world at all levels of development continue to sign IIAs in 2013, certain countries were particularly active: Canada concluded negotiations on bilateral investment treaties (BITs) with nine countries—seven from Africa (Bénin, Cameroon, Cóte d'Ivoire, Guinea, Nigeria, Tanzania, and Zambia) and two from Southern Europe (Albania and Serbia)—as well as a free trade agreement (FTA) with Honduras. Colombia concluded five IIAs, two with other upper-middle-income developing economies in Latin America (Panama and Costa Rica) and three with high-income economies in Asia (Singapore, Republic of Korea, and Israel).[2] Iceland and Switzerland each concluded three IIAs, two as part of the four-member European Free Trade Association (EFTA, comprising Iceland, Switzerland, Norway, and Lichtenstein), and one each bilaterally with China. Costa Rica, Singapore and the UAE concluded three

1. These agreements are listed in Table 2.4 at the end of this chapter.

2. This is based on World Bank country classifications. Upper-middle-income economies are those with per capita gross national income (GNI) between US$4,086 to US$12,615; high-income economies are those with a per capita GNI of US$12,616 or more. See The World Bank, *Data, Country and Lending Groups*, <http://data.worldbank.org/about/country-classifications/country-and-lending-groups>.

agreements each. China, Panama, Republic of Korea, Serbia, Turkey, and the EFTA group all concluded two agreements each.

Several other IIA negotiations taking place in 2013 continued into 2014, including some attention-grabbing "mega-treaties." The European Union launched negotiations on FTAs with a number of countries including China, Japan, Malaysia, Morocco, and the United States (the Transatlantic Trade and Investment Partnership (TTIP)).[3] It also announced it had reached agreement with Canada on the key elements of their trade and investment agreement (CETA), on which the parties had begun work in 2009.[4] Negotiations continued on the 12-country Trans-Pacific Partnership (TPP) (up from the 11 reported in last year's *Yearbook* chapter with the addition of Japan)[5] and on the 16-country Regional Comprehensive Economic Partnership agreement among ASEAN member states,[6] Australia, China, India, Japan, New Zealand, and the Republic of Korea.[7]

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[8] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[9] also each gained new members. Canada, Sao Tome and Principe, and Montenegro joined the ICSID Convention; and Myanmar and Sao Tome and Principe became party to the New York Convention.[10]

As the negotiation, signing, and entry into force of new treaties continued, some countries took steps to terminate existing ones. In 2008, South Africa's Department of Trade and Industry launched a review of the country's investment treaties, an action triggered after several Italian individuals and a Luxembourg corporation sought to use investment treaties to challenge aspects of South Africa's Black Economic Empowerment Policy.[11] That review recommended that the country refrain from entering into new IIAs and seek to terminate or possibly renegotiate existing agreements.[12] Consistent with those findings, South Africa notified Belgium and Luxembourg in 2012 that it was terminating its treaty with those countries, and followed in 2013 by giving Spain, Germany, Switzerland, and the Netherlands similar notices of intent

3. See European Commission, *Overview of FTA and other Trade Negotiations* (31 March 2014), <http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf>.

4. ibid.

5. Lise Johnson and Lisa Sachs, 'Trends in international investment agreements, 2011–2012: a review of trends and new approaches' in Andrea Bjorklund (ed), *Yearbook on International Investment Law and Policy* (Oxford University Press 2014) 219.

6. The ten members of ASEAN (the Association of Southeast Asian Nations) are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

7. See Joint Declaration on the Launch of Negotiations for the Regional Comprehensive Economic Partnership, adopted by RCEP country Heads of State/Government on 20 November 2012; see also Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership (RCEP), adopted by RCEP country Economic Ministers in August 2012 at the 44th ASEAN Economic Ministers' Meeting.

8. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention).

9. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (opened for signature 10 June 1958, entered into force 7 June 1959) (New York Convention).

10. See UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

11. See Damon Vis-Dunbar, 'South African trade department critical of approach taken to BIT-making' *Investment Treaty News* (15 July 2009).

12. See Dr. Rob Davies, Minister of Trade and Industry for South Africa, 'Speech Delivered at the South African Launch of the United Nations Conference on Trade and Development (UNCTAD) Investment Policy Framework for Sustainable Development at the University of The Witwatersrand' (26 July 2012).

to terminate. Ecuador, similarly, has taken steps to terminate many of its BITs. Since 2008, the National Assembly has approved the termination of the BITs with Cuba, the Dominican Republic, El Salvador, Finland, France, Germany, Guatemala, Honduras, Nicaragua, Paraguay, Romania, Sweden, the United Kingdom, and Uruguay; the termination process is pending in the National Assembly for the BITs with Argentina, Bolivia, Canada, Italy, Peru, Spain, Switzerland, and the United States.[13] In May 2013, Ecuadorian President Rafael Correa again called on the National Assembly to move forward with these pending terminations and furthermore established the Commission for the Citizen's Integral Audit of Treaties on Reciprocal Protection of Investments and of the International Arbitral System on the Subject of Investments to review Ecuador's BITs, the negotiation processes, and the decisions of pending and final arbitral awards.[14] Early in 2014, Indonesia followed suit, announcing its intent to terminate its 67 BITs.[15]

Several other countries, unilaterally and collectively, took steps to modify and supplement existing treaties. One development is the effort of more than 20 countries to negotiate an International Services Agreement, which contemplates including provisions on investment liberalization and protection that would go beyond existing provisions in the World Trade Organization (WTO)'s General Agreement on Trade in Services.[16] Likewise, agreements such as the mega-treaties referred to above will overlap with and potentially override pre-existing bilateral agreements or agreements. A final example, discussed in more detail below, is the work of United Nations Commission on International Trade Law (UNCITRAL) to develop a Transparency Convention, providing a mechanism for existing treaties to require public access to information regarding investor-state arbitrations, to give non-disputing state parties certain clear rights of participation in those disputes, and to establish standards for amicus submissions in investor-state arbitrations. Rather than simply adding to the "spaghetti bowl" of instruments, all of these new agreements have the potential to help consolidate and harmonize the vast patchwork of existing treaties.

Against the background of these many developments in IIAs from 2013, in this year's edition of the *Yearbook*, we focus on three diverse but notable topics. The first is the conclusion of often-overlooked "protection-light" IIAs. These treaties are bilateral or multilateral agreements that, alongside relevant WTO agreements, (1) are the primary means of governing international investment flows between the state parties, or (2) complement separate investment protection agreement agreements. These "protection-light IIAs" do not inspire either the same ire or fanfare as strong-investment-protection agreements but are highlighted to illustrate the interesting approaches to international economic governance that they represent.

The second is an overview of Canada's recent and relatively active treaty practice in Africa, looking at the potential drivers behind those treaties, and whether and how those treaties differ both from other Canadian investment treaties and from modern investment treaties more generally.

13. 'Ecuador evaluates investment treaty framework,' *Latin Arbitration Law* <http://www.latinarbitrationlaw.com/ecuador-evaluates-investment-treaty-framework>.

14. Executive Decree 1506, signed 6 May 2013.

15. Ben Bland and Shawn Donnan, 'Indonesia to terminate more than 60 bilateral investment treaties' *Financial Times* (26 March 2014).

16. For more information on these negotiations, see generally Pierre Sauvé, *A Plurilateral Agenda for Services? Assessing the Case for a Trade in Services Agreement (TISA)*, (NCCR Trade Regulation Working Paper No. 2013/29, May 2013); Juan A. Marchetti and Martin Roy, 'The TISA Initiative: An Overview of Market Access Issues' (28 November 2013) World Trade Organization, Economic Research and Statistics Division, Staff Working Paper ERSD-2013-11.

These two sets of treaties alone—(1) "protection-light" IIAs and (2) treaties signed by Canada with countries in Africa—together make up more than one-third of the total number of treaties concluded in 2013 and, as is described further below, they represent the varied objectives that continue to drive, and the varied approaches that continue to define, the current universe of IIAs.

The third is the work on transparency in investor-state arbitration within UNCITRAL. In 2013, UNCITRAL adopted a set of rules on publication of information that may help address certain critiques regarding the opaqueness of investor-state arbitration, followed by the 2014 Mauritius Convention on Transparency (Transparency Convention). These Transparency Rules and the Transparency Convention could serve more generally as a model for potential broader overhauls of other aspects of investment treaties and dispute settlement.

While these three topics represent only select aspects of the evolving patchwork of IIAs, they are illustrative of broad trends on a country, regional, and global basis, and provide a glimpse into how the treaty system might evolve.

A. PUBLIC DEBATE ON INVESTMENT POLICY

In 2013, investment treaty-issues percolated into domestic discourse as public policy officials, businesses, environmental organizations, labor unions, and other stakeholders are increasingly weighing in on the agreements. In countries worldwide, debates have addressed whether governments should negotiate and ratify investment treaties and with what parties, what provisions those agreements should and should not contain, and how the processes of pre-treaty policy formation, negotiation, and then ratification should be conducted.[17]

Such a debate over investment law intensified in Europe, for instance, during the ongoing negotiations of the TTIP in 2013 and 2014. Many stakeholders have been concerned in particular about the lack of transparency of the negotiations, the risk of lowering regulatory standards in the member states, and the inclusion of investor-state dispute settlement (ISDS) in the treaty.[18] The public debate in the European Union, and particularly in Germany and the United Kingdom, was so intense in 2013 that it led to the EU Commission's launch of public consultations on the investment provisions of the TTIP in January 2014.[19] Similar debate in the United States over both the TTIP and the TPP prompted a response from the United States Trade Representative as well, reaffirming its commitment to stakeholder consultations on investment policy.[20] Moreover, both the United States and the European Union have issued

17. In terms of process, the lack of transparency surrounding the negotiations has attracted the attention of a diverse array of commentators. Particularly notable in that group are the legislators and parliamentarians from the TPP countries (see letter of 11 February 2014, by 'TPP Legislators for Transparency' and associated annexes, <http://www.tppmpsfortransparency.org>).

18. Statement by EU Commissioner Karel De Gucht on TTIP during the European Parliament Plenary Debate, 15 July 2014. Available at: <http://europa.eu/rapid/press-release_SPEECH-14-549_en.htm>.

19. European Commission, 'Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement' (21 January 2014), <http://europa.eu/rapid/press-release_IP-14-56_en.htm>.

20. Office of the United States Trade Representative, 'Stakeholder Consultations, Investment and the T-TIP' (March 2014), <http://www.ustr.gov/about-us/press-office/blog/2014/March/Stakeholder-Consultations-Investment-and-the-TTIP>.

statements seeking to ease some of the concerns about the treaties by, for instance, affirming that the protections for foreign investors in their investment treaties should not exceed those available to domestic investors under domestic law.[21]

The inclusion of ISDS in these treaties has been particularly contentious in many countries. Faced with "growing public skepticism" about the ISDS provision in the TTIP, Germany insisted in March 2014 that the TTIP should not include an ISDS provision.[22] In Australia, a change in government re-opened questions of whether its investment treaties will include ISDS. In 2011, the Gillard Government had signaled it would not include ISDS in its future treaties;[23] but in December 2013, after the Abbott Government took over, Australia concluded negotiations with Korea on an FTA, which does provide for investor-state arbitration for treaty breach as well as breaches of investment authorizations and investor-state contracts.[24] The government has since publicly stated that it will consider ISDS on a case-by-case basis, neither fully embracing nor rejecting that avenue for investor claims.[25] Indeed, an agreement concluded with Japan in 2014 (and outside the scope of this chapter) does not include investor-state arbitration, indicating that Australia is in fact taking a case-by-case approach that makes predictions about its future treaties—including the TPP—difficult.[26]

21. See Position of the European Parliament adopted at first reading on 16 April 2014 with a view to the adoption of Regulation (EU) No . . ./2014 of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party ('4. Union agreements should afford foreign investors the same high level of protection as Union law and the general principles common to the laws of the Member States grant to investors from within the Union, but not a higher level of protection. Union agreements should ensure that the Union's legislative powers and right to regulate are respected and safeguarded.'), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0419&language=EN#title1>. See also United States Trade Representative, 'The Facts on Investor State Dispute Settlement: Safeguarding the Public Interest and Protecting Investors' March 2014 ('Investment protections . . . are the same kinds of protections that are included in U.S. law . . . Our agreements provide no new substantive rights for foreign investors. Rather, they provide protections for Americans abroad that are similar to the protections we already provide Americans and foreigners alike who do business in the United States.'). Available at: <http://www.ustr.gov/about-us/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors>.

22. 'Transatlantic trade talks hit German snag' *Financial Times* (14 March 2014). Available at: <http://www.ft.com/intl/cms/s/0/cc5c4860-ab9d-11e3-90af-00144feab7de.html#axzz37kfxLBy2>.

23. See Australian Department of Foreign Affairs and Trade, 'Gillard Government trade policy statement: trading our way to more jobs and prosperity' (April 2011) 14, <http://justinvestment.org/2011/04/gillard-government-tr ade-policy-statement-trading-our-way-to-more-jobs-and-prosperity/>.

24. Korea-Australia Free Trade Agreement, Chapter 11, Section B. That agreement was signed on 8 April 2014. The negotiations had concluded in December 2013. See Hon. Tony Abbott MP, Prime Minister, and Hon. Andrew Rob AO MP, Minister for Trade and Investment Press Release, 'Australia Concludes FTA Negotiations with the Republic of Korea' (5 December 2013).

25. See Australian Government, Department of Foreign Affairs and Trade, *Frequently Asked Questions on Investor-State Dispute Settlement* ('The Government will consider ISDS provisions in FTAs on a case-by-case basis. The Australian Government, however, is opposed to signing up to international agreements that would restrict Australia's capacity to govern in the public interest—including in areas such as public health, the environment or any other area of the economy.'), <https://www.dfat.gov.au/fta/isds-faq.html>.

26. Agreement between Japan and Australia for an Economic Partnership, art. 14.19 (signed 8 July 2014). While not including investor-state dispute settlement, the treaty states that the parties shall consider whether to add the mechanism (a) five years after the treaty's entry into force (unless the parties otherwise agree to not consider the issue or to consider it at an earlier point) and (b) if Australia were to subsequently enter into any bilateral or multilateral agreement with another state or states providing for investor-state arbitration.

As noted above with the examples of South Africa, Ecuador, and Indonesia, some governments are taking even greater steps to move away from or narrow investment treaties. Following its notices on the termination of select treaties, South Africa's Cabinet released a draft "Promotion and Protection of Investment Bill" for a three-month public comment period, seeking input on that proposed framework for *domestic* regulation of foreign and local investors.[27] While that new law contains some features analogous to those in investment treaties such as protections against discrimination and uncompensated expropriations, it does not contain a "fair and equitable treatment" (FET) requirement or provision for investor-state arbitration.[28]

Other governments, however, have expanded or reaffirmed those instruments' roles: for instance, China announced that, in its negotiations with the United States on a BIT, it would agree to a "negative list"[29] approach for pre-establishment commitments on national treatment, meaning that foreign investors will be granted the same rights of entry and establishment as domestic investors unless expressly stated otherwise.[30] That is the first time China has consented to pre-establishment negative list negotiations, representing a significant departure from its previous practices.[31]

These increasing domestic discussions about IIAs are affecting not only the approach to and content of these agreements but also their path toward ratification. Although some IIAs relatively easily receive the domestic approvals necessary for entry into force, others languish for years, if not indefinitely. Indeed, one study of BIT ratification and the factors affecting it found that, although 50% of agreements signed by 2005 had been ratified by both state parties within two years of their signature date, more than 25% had not yet entered into force, with significant differences in the ratification rate among countries.[32] Japan, for example, had ratified all 15 of the BITs covered by the study; in contrast, Brazil had signed 14 such agreements but has ratified none.[33]

The study found that various related and overlapping factors seemed to influence ratification pace and success, including the legal and procedural requirements for ratification;[34] political dynamics including support for the treaty and other priorities competing for expenditures of political capital;[35] the power of the executive vis-à-vis other groups or branches whose support is needed;[36] uncertainty regarding preferences of domestic actors such as legislatures and

27. Promotion and Protection of Investment Bill, 2013, Invitation for the public to Comment on the Promotion and Protection of Investment Bill, 2013, Notice 1087 of 2013, Department of Trade and Industry, Staatskoerant, 1 November 2013.

28. ibid.

29. A 'negative list' assumes all sectors are covered unless excepted. A 'positive list' approach is one in which a state only assumes specific obligations for those sectors that it has listed or 'scheduled.'

30. Remarks by United States Secretary of Treasury Jacob Lew and Chinese Vice Premier Wang, 'The US-China Closing Statements for US-China Strategic and Economic Dialogue' (Washington, DC, 11 July 2013). In 2013, China also established the China (Shanghai) Pilot Free Trade Zone to experiment with granting pre-establishment rights of national treatment on a negative list basis.

31. ibid.

32. Yoram Z. Haftel and Alexander Thompson, 'Delayed ratification: the domestic fate of bilateral investment treaties' (2013) 67 International Organization 355, 357.

33. ibid 357.

34. ibid 360, 378.

35. ibid 360-61, 381–382.

36. ibid 361, 374, 381–382.

their reactions to negotiated agreements;[37] and the degree of pre-existing cultural and political affinity between negotiating states.[38]

When, for instance, domestic approval requires buy-in from one or more houses or chambers of parliament or congress, ratification can be lengthy and ultimately uncertain; this is particularly the case when the executive negotiating the treaty is not able to gauge or has not assessed reactions to the agreement.[39] Open, transparent, and consultative governance systems seem to facilitate ratification as they enable leaders to anticipate and overcome potential roadblocks.[40]

These findings are timely as governments are currently struggling with how to engage with the public on their investment treaties; this has been particularly apparent in some of the countries negotiating the mega-treaties. Decisions regarding whether, when, and to what extent to involve some or all of the public and lawmakers have been gaining increased attention and critique.[41]

B. THE "OTHER" IIAS

IIAs are often discussed as a general body of agreements, without distinction between the various types of IIAs and their important differences. For instance, scholars and practitioners often refer to the roughly 3,000 such agreements and note that those treaties commonly include substantive protections or rights for investors, impose obligations on the state parties, and generally contain a mechanism for investor-state arbitration. In some cases, general statements are made about the purposes of these IIAs for the contracting parties.

But it is worth paying more attention to the different types of agreements that are collectively included in the broad category of IIAs. In order to know whether a particular instrument is representative of the trend or an outlier, or whether a pattern is emerging, the first step is to have a comprehensive understanding of what the "control group" is.

This section highlights one subset of IIAs that is often omitted from generalizations about IIAs and their content, namely, the free trade agreements that have investment or "establishment" chapters but that lack one or both of the two elements that are generally considered core components of IIAs. The first of these elements is strong absolute or preferential investment protections through the FET and expropriation obligations (as opposed to relative protections pursuant to non-discrimination provisions); the second is investor-state arbitration. In lieu of these "core" elements, these FTAs contain weaker and/or only relative standards of protection for investors, and couple those protections with various strategies and mechanisms designed to facilitate and promote both investment and its potential benefits.

37. ibid 362, 378, 382.

38. ibid 363, 378.

39. See generally ibid.

40. ibid 362, 375.

41. The lack of transparency surrounding the negotiations of the TPP, for instance, has attracted the attention of a diverse array of commentators. Particularly notable in that group are the legislators and parliamentarians from the TPP countries (see letter of 11 February 2014, by 'TPP Legislators for Transparency' and associated annexes, <http://www.tppmpsfortransparency.org>).

In 2013, of the 30 new IIAs concluded, five fall within this category: the China-Switzerland FTA; the Iceland-China FTA; the EFTA-Panama-Costa Rica FTA; the EFTA-Bosnia and Herzegovina FTA; and the EU-Singapore FTA.[42] Each of these five IIAs contain a chapter or section specifically addressing investment protection and/or promotion. They also all include provisions relating to investment in other sections of the FTAs, including their preambles, articles on trade in services, and chapters on environmental issues, economic and technical cooperation and sustainable development.

Some of these agreements were signed on top of existing BITs, or were signed while work on a separate investment chapter or agreement was already pending or contemplated for future negotiation. The Iceland-China FTA and China-Switzerland FTA complement BITs that had already been negotiated between those two country pairs. The EFTA-Panama-Costa Rica FTA overlays BITs between Switzerland and Costa Rica and Switzerland and Panama. Finally, the EU-Singapore FTA should be seen in context with previous BITs concluded between Singapore and a number of European countries[43] as well as an investment protection chapter that, at the time of writing, was still being negotiated for inclusion as part of the EU-Singapore FTA.[44]

These layered instruments suggest that state parties do not view the basic BIT model—one which operates primarily by requiring host states to protect foreign investment—as being sufficient tool for either promoting cross-border investment flows, or for ensuring that foreign investments actually meet their respective domestic or collective international aims. Other complementary measures enshrined in FTAs are important, including a range of provisions designed to minimize negative effects of competition for capital and/or to promote cooperation on economic and other relevant issues.

These treaties' treatment of investment and some of their unique features are explored in further detail below.

1. INVESTOR PROTECTIONS

a. Substantive Protections

While, as noted above, the parties to the EU-Singapore FTA are currently negotiating a separate investment protection chapter, this agreement already contains provisions on both investment liberalization and protection in its chapter entitled "Services, Establishment and Electronic Commerce" (the Services Chapter). Without a concluded "Investment" chapter, this agreement may go unnoticed as an IIA because it uses the language of "establishment" and "entrepreneur" as opposed to "investment" and "investor," but the treaty effectively is using an enterprise-based definition of covered investments and providing those investments with various liberalization benefits and substantive protections.

42. This chapter covers developments from January through December 2013. As of December 2013, the EU-Singapore FTA did not contain an investment chapter, so it was included in this chapter as 'protection light.' In late 2014, however, just prior to publication of this volume, the parties concluded an investment chapter.

43. These include Belgium, Czech Republic, Luxembourg, France, Germany, Hungary, the Netherlands, Poland, Slovakia, and Slovenia.

44. As noted above in note 42, that investment chapter was ultimately concluded between the European Union and Singapore in 2014.

More specifically, the treaty defines "establishment" as:

(i) the constitution, acquisition, or maintenance of a juridical person; or
(ii) the creation or maintenance of a branch or representative office,

within the territory of a party for the purpose of performing an economic activity including, but not limited to, supplying a service.[45]

The EU-Singapore IIA also defines an "entrepreneur" as "any person of a Party that seeks to perform or performs an economic activity through establishment."[46]

Following the "positive list" approach, the treaty then provides entrepreneurs and establishments *in scheduled sectors* market access and national treatment. For entrepreneurs and establishments more broadly, the FTA enhances their ability to bring in and employ in the host state persons from the home state, and protects them against restrictions on transfers of capital. The agreement also contains various provisions on the host state's regulatory and administrative framework. It states, for example, that licensing and qualification procedures and requirements must be pre-established and clear, objective, transparent, and accessible to the public and interested persons.[47] Additionally, it requires state parties to "maintain or institute judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected entrepreneur . . . , for a prompt review of, and where justified, appropriate remedies for, administrative decisions affecting establishment. . . ."[48]

There are no specific requirements for fair and equitable treatment or protections against uncompensated expropriation; nevertheless, these may be the subject of ongoing negotiations regarding the agreement's "Investment" chapter.

The investment obligations in one of the two EFTA agreements, the EFTA-Costa Rica-Panama FTA, are similar. The investment chapter applies to "commercial presence," which is given the same definition as "establishment" in the EU-Singapore FTA quoted above.[49] It does not, however, apply to services sectors covered by the separate services chapter, nor to services that have been specifically excluded from the services chapter through reservations or exceptions.[50] The EFTA-Costa Rica-Panama IIA includes a national treatment obligation applicable to "commercial presence" and imposes requirements to permit entry and stay of key personnel associated with those enterprises.[51] It also requires, with exceptions, free transfers of capital.[52] Due to the definition of "commercial presence," these obligations extend to pre-establishment activities such as the constitution or acquisition of a firm in the host

45. EU-Singapore FTA (initialed 20 September 2013) art 8.8(d), internal footnote omitted. It also clarifies that the 'constitution' and 'acquisition' of a juridical person includes 'capital participation' aiming to 'establish[] or maintain[] lasting economic links.' Ibid, n.8.

46. EU-Singapore FTA, art 8.8(c), internal footnote omitted.

47. EU-Singapore FTA, art 8.19(1).

48. EU-Singapore FTA, art 8.19(3).

49. The Investment chapter is Chapter 5 of the EFTA-Costa Rica-Panama FTA. Article 5.2(d) applies to 'commercial presence.'

50. EFTA-Costa Rica-Panama FTA, art 5.1(1), n.8.

51. EFTA-Costa-Rica-Panama FTA, arts 5.3, 5.5.

52. EFTA-Costa-Rica-Panama FTA, arts 5.7, 5.8. Article 5.7 permits certain restrictions on transfers of capital that are consistent with rights and obligations of the state parties under the Articles of Agreement with the International Monetary Fund.

country. Nevertheless, these obligations are subject to reservations and exceptions listed in the agreement and its annexes, including various reservations to the national treatment obligations, exceptions to safeguard the balance of payments, and exceptions permitted under the general and security exceptions of the World Trade Organization's General Agreement on Trade in Services (GATS).[53]

The investment chapter in the second of the two EFTA texts, the EFTA-Bosnia and Herzegovina FTA, is stronger in terms of substantive protections, and contains four main obligations relating to protection of "investment"—using that term (as opposed to "establishment" or "commercial presence") but leaving it undefined.[54] First, it states that the parties "*shall endeavor* to provide in their territories stable, equitable and transparent investment conditions for investors of the other Parties that are making or seeking to make investments in their territories."[55] Second, it requires parties to admit investments in accordance with their laws and regulations, leaving the host state free to restrict market access but obliging it to ensure treatment is consistent with its domestic legal framework.[56] Third, all parties, except for Norway, commit to refrain from arbitrary or discriminatory measures regarding investments from their respective investors.[57] And fourth, the state parties—again except for Norway—agree to "observe obligations they have entered into with regard to specific investments" of investors of the other parties.[58]

In a separate chapter, the FTA includes a provision requiring capital for investments, returns, and liquidated sums to be freely transferrable, but then makes that requirement subject to an exception for balance of payments difficulties and other general and security exceptions permitted under the GATS.[59]

The two bilateral FTAs—the agreements between Switzerland and China and Iceland and China—address investment promotion, but not protection, in their investment chapters. But this does not mean the states have left the issue of investment protection entirely unaddressed. For one, there are provisions on national treatment, free transfers, domestic regulation of foreign-owned businesses and other relevant matters in these FTAs' (and the EFTA FTAs') chapters on trade in services, which can cover foreign direct investment in services when services trade is done through commercial presence in the host state. But more important, these investment promotion provisions in the China-Switzerland and China-Iceland FTAs supplement existing BITs between these treaty partners.

A few FTAs such as the FTA between Central American states and Mexico expressly state that they replace existing IIAs between the parties.[60] The more common pattern appears to

53. EFTA-Costa Rica-Panama FTA, arts 5.4, 5.7(2), 5.8, 5.9 and 5.10.

54. The main investment provisions in the EFTA-Bosnia and Herzegovina FTA are included in Chapter 4.

55. EFTA-Bosnia and Herzegovina FTA, art 26(1) (emphasis added).

56. EFTA-Bosnia and Herzegovina FTA, art 26(2).

57. EFTA-Bosnia and Herzegovina FTA, art 26(5). The provision states: 'Iceland, Liechtenstein and Switzerland, on the one part, and Bosnia and Herzegovina, on the other, shall refrain from arbitrary or discriminatory measures regarding investments by investors of another Party mentioned in this paragraph and shall observe obligations they have entered into with regard to specific investments by an investor of another Party mentioned in this paragraph.'

58. EFTA-Bosnia and Herzegovina FTA, art 26(5).

59. EFTA-Bosnia-Herzegovina, ch 5.

60. Free Trade Agreement among Mexico and Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua (signed 22 November 2011) arts 21.7, 21.7.

be that new FTAs are either silent regarding those pre-existing treaties or state that both will continue to operate. China's agreements with Iceland and Switzerland follow this latter, more dominant approach, accommodating and supplementing, but not replacing, those earlier BITs.

The China-Iceland FTA specifically "recognize[s] the importance" of the parties' 1994 BIT "in creating favourable conditions for investments . . . and thus . . . contribut[ing] to the creation of the free trade area" established by the FTA.[61] The 2013 FTA thus clearly signals that it intends to leave that agreement in force. Should there be an issue of inconsistency between the two texts, the FTA calls for consultations between the parties "to arrive at a mutually satisfactory resolution" in accordance with customary rules of interpretation.[62]

The China-Switzerland FTA, in contrast, does not specifically mention the 2009 BIT between the two parties. Yet like the China-Iceland text, the China-Switzerland FTA calls for consultations between the parties and in accordance with international law rules of treaty interpretation in the event of a conflict between the FTA and other agreements.[63]

Table 2.1, below, illustrates the provisions relevant to investment protection that can be found in articles and chapters on investment in these agreements, as well as in other relevant chapters such as those dedicated to transparency or payments and capital movements. In addition to the provisions included in the table, a number of rules relevant for protection of investment can, as is commonly the case in FTAs, be found in the services chapters of these agreements.

b. Procedural Protections

None of the five FTAs allow for investor-state dispute settlement (though the EU-Singapore FTA's "Investment" chapter may later contain it). Each provides for state-state dispute resolution through consultations and, failing resolution, inter-state arbitration.

The pre-existing BIT between Iceland and China does permit investor-state arbitration, but it is relatively limited:[64] it provides that an investor may submit any dispute under the treaty to domestic courts,[65] but the only type of dispute it may unilaterally submit to arbitration is a dispute regarding the *amount* of compensation due for an expropriation.[66] Any other dispute between an investor and host state under that treaty requires the consent of both disputing parties before it can go to investor-state arbitration.[67] The subsequently negotiated FTA did not create any additional avenues for investor-state arbitration.

The BIT between Switzerland and China provides the investor greater access to investor-state dispute settlement, allowing it to submit "disputes with respect to investments" to "the courts or administrative tribunals" of the host state "or to international arbitration."[68] China (but not

61. China-Iceland FTA, art 92.

62. China-Iceland FTA, art 4 ('Relation to other Agreements').

63. China-Switzerland FTA, art 1.3 ('Relationship to other Agreements').

64. Agreement between the Government of the People's Republic of China and the Government of the Republic of Iceland Concerning the Promotion and Reciprocal Protection of Investments (signed 31 March 1994) (China-Iceland BIT) art 9.

65. China-Iceland BIT, art 9(2).

66. China-Iceland BIT, art 9(3).

67. China-Iceland BIT, art 9(3).

68. Agreement between the Swiss Federal Council and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments (signed 27 January 2009) art 11(2) (China-Switzerland BIT).

Table 2.1 Investment Protection Provisions in Investment and General Chapters (Excludes Relevant Provisions in Chapters or Articles Specific to Services)

Treaty	Post-establishment national treatment	Limits restrictions on transfers	Provides for temporary entry and employment of key personnel	Obligations relating to publication of laws, regulations, and judicial decisions	Obligations relating to transparency, objectivity, fairness, and non-discrimination in treatment	Umbrella clause	Protection against uncompensated expropriation	FET clause
EU-Singapore FTA[69]	Yes, in scheduled sectors	Yes	Yes	Yes	Yes	No	No, but investment chapter not yet concluded	No, but investment chapter not yet concluded
EFTA-Bosnia and Herzegovina FTA[70]	Yes	Yes, subject to exceptions	No	Yes	Yes, all parties (except for Norway) shall refrain from arbitrary or discriminatory measures, and all parties "endeavor" to provide stable, equitable, and transparent investment conditions	Yes, except for Norway	No	No

EFTA-Costa Rica and Panama[71]	Yes, subject to exceptions	Yes, subject to exceptions	Yes	Yes	No affirmative relevant protection in investment article other than national treatment provision	No	No	No
Iceland-China FTA	Focus is on investment promotion. Various protections for certain investment are provided through the chapter on trade in services (incorporating GATS and including provisions on payments and transfers); parties also previously concluded a BIT covering a broader range of investments, which is expressly referenced in the FTA text.							
Switzerland-China FTA	Focus is on investment promotion. Various protections for certain investment are provided through the chapter on trade in services (e.g., provisions on transfers, transparency, and requirements to ensure that, in certain service sectors, each country will ensure its measures are administered in a reasonable, objective and impartial manner). The treaty also contains a general transparency obligation regarding publication of relevant laws, regulations, and decisions. The parties also previously concluded a BIT covering a broader range of investments.							

69. Section C, Establishment, of Chapter 8, Services, Establishment, and Electronic Commerce; Chapter 14, Transparency. Relevant provisions are also included in Chapter 7, Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation.

70. Article 26, Investment, of Chapter 5, Investment, Services and Government Procurement. Relevant provisions are also in Chapter 5, Payments and Capital Movements.

71. Chapter 5, Investment.

Switzerland) also inserts a weak exhaustion provision, specifying that it may require investors to first exhaust domestic administrative review procedures before proceeding to arbitration, but limiting the requirement by dictating that the "review procedure shall not exceed three (3) months."[72] As with the China-Iceland FTA, the China-Switzerland FTA does not amend or override the investor-state arbitration provisions.

2. INVESTMENT PROMOTION, ECONOMIC COOPERATION, AND SUSTAINABLE DEVELOPMENT

The FTAs in this subset of IIAs contain a relatively extensive set of provisions dealing with promotion of and cooperation on cross-border investment and, in particular, on helping to ensure that investment advances sustainable development. (See Table 2.2). In addition to relevant provisions in their preambles, the agreements contain chapters and articles dedicated to these issues that are more robust than can be found in many, if not most, other IIAs.

In the EU-Singapore FTA, EFTA-Bosnia FTA, and EFTA-Costa Rica-Panama FTA, many of the relevant provisions are contained in chapters on "Trade and Sustainable Development," which include various articles designed to ensure that international investment does not lead to a lowering of environmental and labor standards and, instead, helps elevate them.[73]

The EFTA-Costa Rica-Panama FTA has an additional chapter on "Cooperation" that sets out methods, means, and fields of collaboration agreed to by the parties in order to ensure that the agreement meets the parties' overall objectives of enhancing "trading and investment opportunities . . . and contribut[ing] to sustainable development."[74]

The two bilateral FTAs contain similar but more limited provisions on these areas. The China-Switzerland FTA includes a chapter entitled "Environmental Issues" that covers various matters relating to trade and investment. It also includes a chapter on "Economic and Technical Cooperation," setting out areas of collaboration and the means of meeting the parties' objectives of "promot[ing] sustainable economic growth and development."[75]

Likewise, the China-Iceland FTA contains a chapter on cooperation with articles addressing joint activities on environmental and labor issues, development, strengthened economic relations, and on research, science, and technology.[76] It does not, however, have a dedicated "environmental," "labor," or "sustainable development" chapter.

A more detailed discussion of these treaties' approaches to environmental, social and economic development considerations is below, highlighting the EU and EFTA states' treatment of these matters when concluding agreements with third states.

72. Protocol to the Agreement between the Swiss Federal Council and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments (signed 6 July 2013) art 11, [2].

73. EU-Singapore FTA, ch 13; EFTA-Bosnia, ch 6; EFTA-Costa Rica-Panama, ch 9. While labeled 'Trade and Sustainable Development,' the chapters' provisions also expressly cover investment.

74. EFTA-Costa Rica-Panama FTA, art 10.1(1).

75. China-Switzerland FTA, art 13.1(2)(b).

76. China-Iceland FTA, ch 9.

a. Effective Enforcement, Non-derogation, and Non-lowering of Environmental or Labor Standards

Among the relatively common labor- and environment-related provisions found in IIAs are those aiming to prevent the "race to the bottom" that can occur if low or lowered environmental or labor standards are used as a comparative advantage to keep or attract investment. These provisions generally seek to combat one or all of the following types of action or inaction: (1) governments waiving or derogating from otherwise applicable laws (e.g., through a broad contractual stabilization clause); (2) governments failing to enforce their labor or environmental laws; and (3) governments lowering their environmental or labor standards. The first two types of provisions thus address non-enforcement or non-application of existing standards, in other words, disguised or de facto deregulation. The third targets explicit changes in the law.

Of the five "protection-light" FTAs concluded in 2013 that are covered in this section, only the China-Iceland FTA lacks one of these non-lowering of standards or non-derogation clauses.

The EU-Singapore agreement contains each of these three types of provisions aiming to prevent state parties from lowering labor and environmental standards. More specifically, it has (1) a general statement in which the parties "recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labour and environment laws";[77] (2) a statement in which the parties "recognize that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage";[78] (3) a provision stating that the parties "shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, [their] environmental and labour laws, in a manner affecting trade and investment between the Parties";[79] and (4) a provision stating that the parties "shall not fail to effectively enforce [their] environmental and labour laws, through a sustained and recurring course of action or inaction, in a manner affecting trade or investment between the Parties."[80]

Several aspects of these rules and principles are worth highlighting. First, the non-derogation provisions are generally concerned with non-derogation from domestic law, as opposed to international law standards, which may be higher. The exception is the provision addressing labor which contains the parties' recognition that they cannot use lower standards than international labor law standards as a comparative advantage. Second, it appears that if the waiver or derogation from domestic law is a de facto departure from the law due to non-enforcement, as opposed to an express exemption (through, e.g., a stabilization clause), it must constitute a "sustained or recurring course of action or inaction" in order to be inconsistent with the treaty. Third, while the intent behind the action (or inaction) may be somewhat relevant, it is the effect on trade and investment that really matters. Even though the parties generally acknowledge the "inappropriate[ness]" of encouraging investment by reducing standards—an admonishment that seems to go to the issue of intent—the treaty uses stronger language when talking about effects, making clear that the parties are not to expressly or effectively waive or weaken their laws if doing so impacts trade or investment. The waiver, derogation, or non-enforcement need

77. EU-Singapore FTA, art 13.1(3).

78. EU-Singapore FTA, art 13.3(5).

79. EU-Singapore FTA, art 13.12(1).

80. EU-Singapore FTA, art 13.12(2).

not be *intended* to affect trade or investment between the parties, but, to violate the treaty's mandates, must in fact do so—an element that may require complicated evidentiary showings.

The two EFTA agreements contain comparable provisions on non-derogation, non-lowering of standards, and effective enforcement, similarly addressing concerns about a race to the bottom. But despite their overarching commonalities, the EFTA FTAs also differ from each other and, to a greater extent, the EU-Singapore FTA, in subtle but important ways.

For instance, both of the EFTA FTAs, like the EU-Singapore agreement, contain an "effective enforcement" provision.[81] But there are two notable differences between clauses in the EU-Singapore agreement and in the EFTA texts that arguably make the EFTA texts more protective of environmental and labor standards than the EU-Singapore agreement. First, the EFTA agreements require effective enforcement of "laws, regulations, and standards," whereas the EU-Singapore agreement is limited to just "laws." These additional terms in the EFTA agreements may give greater scope to the effective enforcement rule, as it means state parties cannot derogate from regulations and standards, even if such derogations are still consistent with the law; the scope of the EU-Singapore treaty's reference to "laws" is less clear.

The second way in which the two EFTA agreements are arguably stronger than the EU-Singapore FTA's "effective enforcement" provision is that they do not require non-enforcement to constitute a "sustained or recurring course of action or inaction," as the EU-Singapore FTA does.

The third way in which the EFTA texts diverge from the EU-Singapore FTA is in the agreements' respective treatment of the issue of derogation from international labor standards. All three agreements affirm in some way that countries and firms within them should not gain a competitive advantage through the violation of fundamental principles and rights at work. Yet the EFTA agreements state that the parties "shall not" violate such standards for a competitive advantage,[82] whereas the EU-Singapore FTA, as noted above, states instead that the parties "recognize" such violations "cannot" be used as a legitimate advantage.

A final point of distinction is that, while the EU-Singapore text is primarily concerned with the *effects* that lower environmental or labor standards can have on trade or investment, the EFTA texts place more emphasis on the issue of *intent*. In contrast to the EU-Singapore agreement, which is triggered when non-enforcement *impacts* trade or investment between the parties, the non-derogation and non-lowering of standards provisions in the EFTA FTAs are apparently only triggered when the government has purposefully waived or offered to waive its standards in an effort to increase or retain investment. In particular, both the EFTA-Bosnia and Herzegovina and EFTA-Costa Rica-Panama FTAs provide that the state parties "shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws, regulations or standards *in order to* encourage investment from another Party or to seek or to enhance a competitive trade advantage of producers or service providers operating in its territory."[83] Both EFTA FTAs also state that the parties "recognise that it is inappropriate to" (EFTA-Costa Rica-Panama) or "shall not" (EFTA-Bosnia and Herzegovina) "weaken or reduce the levels of environmental or labour protection provided by [their respective] laws, regulations or standards *with the sole intention to* encourage investment from another Party or to seek or to enhance a competitive trade advantage of producers or service providers operating in its territory."[84]

81. EFTA-Bosnia and Herzegovina FTA, art 36(1); EFTA-Costa Rica-Panama FTA, art 9.4(1).

82. EFTA-Bosnia and Herzegovina FTA, art 37(4); EFTA-Costa Rica-Panama FTA, art 9.5(4).

83. EFTA-Bosnia and Herzegovina FTA, art 36(2)(b); EFTA-Costa Rica-Panama FTA, art 9.4(2)(b).

84. EFTA-Bosnia and Herzegovina FTA, art 36(2)(a); EFTA-Costa Rica-Panama FTA, art 9.4(2)(a).

The fourth agreement in this group, the China-Switzerland FTA, also contains a relatively basic anti-"race-to-the-bottom" provision, stating that the parties "recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws, regulations, policies and practices."[85] Moreover, consistent with the finding in last year's *Yearbook* chapter on IIA trends that environmental provisions are found more frequently in IIAs than labor-related provisions,[86] the non-derogation provision the China-Switzerland FTA addresses only environmental and not labor issues.[87]

b. New Development: Non-Waiver of the Right to Regulate in the Public Interest

In addition to the non-derogation clauses referred to above, the EFTA-Costa Rica-Panama FTA contains a non-derogation provision in its investment chapter that seems to be relatively unique among IIAs. In its article on the "Right to Regulate," it affirms that, "[s]ubject to the provisions of this Chapter and Annex XVIII [containing reservations to the national treatment obligation], a Party may, on a non-discriminatory basis, adopt, maintain or enforce any measure that is in the public interest. . . ."[88] It then states:

> A Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such [public interest] measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of a commercial presence of persons of another Party or a non-party.[89]

Although "should not" is relatively weaker than "shall not," this clause is noteworthy in that it explicitly anticipates and allows regulations in the public interest and prevents derogation from various measures that extend beyond environmental and labor regulations. For instance, this provision could presumably include taxation or other fiscal measures which are often relaxed or modified for particular investors or investments in order to try to incentivize them to enter and/or remain in a jurisdiction. Growing concern about competition for investment spawning "races to the bottom" in areas of taxation, social welfare legislation, competition policy, or other fields of government regulation may give rise to increased use of non-derogation provisions such as these that broaden their focus beyond merely environmental and labor provisions.

85. China-Switzerland FTA, art 12.2(2).

86. See 'Trends in international investment agreements, 2011–2012: a review of trends and new approaches' in Andrea Bjorklund (ed), *Yearbook on International Investment Law and Policy* (Oxford University Press 2014) 229–237.

87. China-Switzerland FTA, art 12.2(2). The parties concluded a separate side agreement on labor issues. Agreement on Labour and Employment Cooperation between the Federal Department of Economic Affairs, Education and Research of the Swiss Confederation and the Ministry of Human Resources and Social Security of the People's Republic of China (signed 6 July 2013).

88. EFTA-Costa Rica-Panama FTA, art 5.6(1).

89. EFTA-Costa Rica-Panama FTA, art 5.6(2).

c. Strengthening of Standards and Their Implementation

In addition to those non-lowering clauses, these five FTAs also contain a number of provisions promoting upgrading of practices, standards, laws, and rules. In the EFTA treaties, for instance, the parties affirm their commitment to various international agreements, standards, and principles, including obligations owed as members of the International Labour Organization (ILO) and parties to its conventions, commitments made in international environmental agreements, and principles reflected in a number of other instruments such as the 1972 Stockholm Declaration on the Human Environment, Agenda 21 on Environment and Development, and the 2002 Johannesburg Plan of Implementation on Sustainable Development. The EFTA agreements further state that "each Party shall seek to ensure that its laws, policies and practices provide for and encourage high levels of environmental and labour protection, consistent with [those international] standards, principles and agreements . . . , and shall strive to further improve the levels of protection provided for in those laws and policies."[90]

The China-Switzerland agreement similarly requires its parties to "strive to further improve the level of environmental protection by all means, including by effective implementation of their environmental laws and regulations."[91] In contrast to the EFTA texts, however, it does not address upgrading of labor standards.

The China-Iceland FTA does not contain any provisions expressly calling for the parties to improve environmental or labor protection. Yet, as discussed further below, it (along with the other agreements) does seek to enhance cooperation between the parties on environmental, labor, and social and economic development–related issues.

Among these instruments, the EU-Singapore FTA stands out as containing a wide range of upgrading-type provisions addressing both general matters of environmental and labor standards, and specific topics like corporate social responsibility and climate change. On climate change, it states, for example:

> [The Parties] commit to work together to strengthen the multilateral, rules- based regime under the UNFCCC building on the UNFCCC's agreed decisions, and to support efforts to develop a post-2020 international climate change agreement under the UNFCCC applicable to all parties.[92]

It then adds:

> [T]he Parties share the goal of progressively reducing subsidies for fossil fuels. Such a reduction may be accompanied by measures to alleviate the social consequences associated with the transition to low carbon fuels. In addition, both Parties will actively promote the development of a sustainable and safe low-carbon economy, such as investment in renewable energies and energy efficient solutions.[93]

These provisions go beyond what is commonly seen in IIAs in terms of incorporating obligations to advance sustainable development goals, a significant development given the

90. EFTA-Bosnia and Herzegovina FTA, art 35(1); EFTA-Panama-Costa Rica FTA, art 9.3(2).

91. Switzerland-China FTA, art 12.2(2).

92. EU-Singapore FTA, art 13.6(3).

93. EU-Singapore FTA, art 13.11(3).

potential roles of trade and investment as both pathways and barriers to progress on those important and ultimate objectives.

d. Economic Development

Each of the five agreements in this group contains several provisions aiming to improve economic growth, paying special attention to sustainable development.

Among its relevant provisions, the EU-Singapore FTA contains an article in the "Trade and Sustainable Development" chapter aiming to promote trade and investment in environmental goods and services,[94] and a separate chapter targeted specifically at requiring the parties to cooperate on reducing and removing non-tariff barriers and fostering regulatory convergence to promote and increase trade and investment in renewable energy generation.[95]

The EFTA-Bosnia FTA includes an article dedicated to "Promotion of Trade and Investment Favouring Sustainable Development," which provides:

1. The Parties shall strive to facilitate and promote foreign investment, trade in and dissemination of goods and services beneficial to the environment, including environmental technologies, sustainable renewable energy, energy efficient and eco-labeled goods and services, including through addressing related non-tariff barriers.
2. The Parties shall strive to facilitate and promote foreign investment, trade in and dissemination of goods and services that contribute to sustainable development, including goods and services that are the subject of schemes such as fair and ethical trade.
3. For the purposes of paragraphs 1 and 2, the Parties agree to exchange views and may consider, jointly or bilaterally, cooperation in this area.
4. The Parties shall encourage cooperation between enterprises in relation to goods, services and technologies that contribute to sustainable development and are beneficial to the environment.[96]

The EFTA-Costa Rica-Panama FTA contains a similar article, which states:

1. The Parties shall strive to facilitate and promote foreign investment, trade in and dissemination of goods and services beneficial to sustainable development, including:
   (a) environmental technologies, sustainable renewable energy, organic production, energy efficient and eco-labelled goods and services, including through addressing related non-tariff barriers;
   (b) goods and services that are the subject of schemes such as fair and ethical trade.
2. The Parties shall endeavour to facilitate and promote the development of practices and programmes aiming at fostering appropriate economic returns from the conservation and sustainable use of the environment, such as ecotourism.
3. To this end, the Parties agree to exchange views and may consider, jointly or bilaterally, cooperation in this area.

94. EU-Singapore FTA, art 13.11(1).

95. EU-Singapore FTA, ch 7.

96. EFTA-Bosnia FTA, art 39.

4. The Parties shall encourage corporate social responsibility, as well as cooperation between enterprises in relation to goods, services and technologies that contribute to sustainable development and are beneficial to the environment.[97]

The EFTA-Costa Rica-Panama FTA then supplements that article by including a separate "Cooperation" chapter contemplating additional collaborative activities to encourage and support international investment and trade in goods and services.

The China-Switzerland FTA similarly includes an article designed to promote the dissemination of goods, services, and technologies beneficial to the environment,[98] and a separate chapter identifying the subjects on which the parties will cooperate and the means through which they may do so. That "Cooperation" chapter, the parties explain, is included to "facilitate the implementation of [the FTA] with a view to further the well-being of the peoples of the Parties," and "create and enhance sustainable trade and investment opportunities by facilitating trade and investment . . . and by strengthening competitiveness and innovation capacities, with a view to promote sustainable economic growth and development."[99] It anticipates cooperation in areas of industry, services, agriculture, sustainable development, and innovation and property rights;[100] and it lists means of cooperation as including at least the following three seemingly overlapping avenues to be pursued bilaterally or with support of other international experts, institutions and organizations: (1) exchange of information and expertise, capacity building, and training; (2) joint identification, development, and implementation of projects and initiatives; and (3) technical and administrative cooperation.[101]

The China-Switzerland FTA explains that the parties' obligations to cooperate on these matters are not equal. It includes a paragraph explaining the parties' respective duties in terms of mobilizing resources necessary to promote sustainable development:

> Recalling as decided in the Rio+20 Outcome Document the need for significant mobilisation of resources from a variety of sources and the effective use of financing, in order to give strong support to developing countries in their efforts to promote sustainable development, the necessary resources for the implementation of environmental cooperation shall be made available by the competent institutions and organisations as well as by the private sector of both Parties, subject to mutual agreement of the Parties, according to terms and conditions agreed on a project-by-project basis and taking into account the different levels of social and economic development of the Parties.[102]

The agreement's "Economic and Technical Cooperation" chapter contains a similar provision requiring joint efforts that take into account the differences between the parties in terms of their social and economic development.[103]

97. EFTA-Costa Rica-Panama FTA, art 9.7.
98. China-Switzerland FTA, art 12.3.
99. China-Switzerland FTA, art 13.1(2).
100. China-Switzerland FTA, art 13.3.
101. China-Switzerland FTA, art 13.2.
102. China-Switzerland FTA, art 12.6.
103. China-Switzerland FTA, art 13.6.

The emphasis on collaboration can likewise be found in the China-Iceland FTA, which contains a "Cooperation" chapter touching on a range of areas for joint activity. The parties each agree to work together on deepening economic relations (e.g., by encouraging and facilitating policy dialogue and information exchange between the states, and assisting the private sector in identifying opportunities for investment);[104] developing activities and programs with the public and private sector in research, science, and technology;[105] and encouraging and facilitating exchanges between their educational institutions.[106] Additionally, in the chapter's "Development" article, the parties, as in the China-Switzerland FTA, take an asymmetrical approach, "confirm[ing] their objective of cooperating in promoting the economic and social development *of China*" through such means as Iceland's provision of material resources, technical assistance, and training opportunities to China.[107]

e. Consultations, Compliance, and Enforcement

Overall, all five agreements greatly restrict access to formal dispute settlement for issues related to the environment, labor, sustainable development, or cooperation. Rather, they focus on resolving issues through consultations or referral to specific treaty-created bodies. (See Table 2.3).

Under the EFTA-Bosnia agreement, for instance, disputes regarding interpretation or application of those provisions relating to promotion of investment and sustainable development that are contained in the investment chapter can apparently be settled through state-state arbitration. This includes a non-lowering of standards clause[108] and a provision regarding cooperation on promotion of investment and technology flows.[109] Both provisions, however, are weak and vaguely worded. The content of those obligations and commitments is spelled out in more detail and in stronger language in the agreement's "Trade and Sustainable Development "chapter, but disputes under that chapter *may not* be submitted to arbitration.[110] Any issue arising under that chapter is to be resolved through the Joint Committee established under the treaty.

The EFTA-Costa Rica FTA is similar. The relatively soft "should not" waive/"right to regulate" clause in its investment chapter is arguably subject to inter-state arbitration due to its place in the "Investment" chapter.[111] However, the "Trade and Sustainable Development" chapter, which, as noted above, contains stronger and more specific non-derogation and non-modification clauses, as well as additional provisions on environmental standards, labor standards, and economic development, is not subject to inter-state arbitration. Rather, any matter arising under that chapter is, like the EFTA-Bosnia text, to be referred to the treaty's Joint Committee.

The two agreements with China are similar in that none of the obligations or commitments under the environmental (China-Switzerland FTA) or cooperation (China-Iceland FTA

104. China-Iceland FTA, art 94.

105. China-Iceland FTA, art 95.

106. China-Iceland FTA, art 98.

107. China-Iceland FTA, art 97 (emphasis added).

108. EFTA-Bosnia and Herzegovina FTA, art 26(2).

109. EFTA-Bosnia and Herzegovina FTA, art 26(3)(a).

110. EFTA-Bosnia and Herzegovina FTA, art 41(3).

111. EFTA-Costa Rica-Panama FTA, art 5.6(2).

Table 2.2 Environmental (E), Labor (L), and Cooperation (C) Provisions

Treaty	Non-lowering of E or L standards	Upgrading of E or L standards consistent with international law	Cooperation on L or E issues	Cooperation on economic growth and development	Special and differential obligations
EU-Singapore FTA	Yes; parties shall not derogate from or fail to enforce E or L laws through sustained or recurring action/inaction; focus on effect	Yes for environment, labor, climate change and CSR	Yes; provisions in chapters on "Trade and Sustainable Development" and "Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation"	Yes; provisions in chapters on "Services, Establishment and Electronic Commerce" and "Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation"	No
EFTA-Bosnia and Herzegovina	Yes; require enforcement of laws, regulations, and standards; parties "shall not" violate L standards for comparative advantage; focus on intent	Yes for environment and labor	Yes; chapter on "Trade and Sustainable Development" has provisions on cooperation on labor, environment, and sustainable development	Yes; provisions on cooperation for economic growth and development in chapter on "Investment, Services and Government Procurement"	No
EFTA-Panama-Costa Rica	Yes; require enforcement of laws, regulations and standards; parties "shall not" violate L standards for comparative advantage; focus on intent; includes unique provision on non-derogation from other public interest measures	Yes for environment and labor	Yes; chapter on "Trade and Sustainable Development" has provisions on cooperation on labor, environment, and sustainable development; "sustainable development" also to be "integrated and reflected" in general cooperative activities per chapter on "Cooperation"	Yes; provisions on cooperation for economic growth and development in chapter on "Cooperation"	Yes; chapter on "Trade and Sustainable Development" takes into account differences in levels of development

(*Continued*)

Treaty	Non-lowering of E or L standards	Upgrading of E or L standards consistent with international law	Cooperation on L or E issues	Cooperation on economic growth and development	Special and differential obligations
China-Switzerland FTA	Yes (for environmental issues, not labor); parties recognize that it is inappropriate to encourage trade/investment by weakening domestic protections	Yes for environment (not labor)	Yes; chapters on "Environmental Issues" and "Economic and Technical Cooperation" have provisions on cooperation on labor, environment, and sustainable development; FTA also refers to separate side agreement for cooperation on labor issues	Yes; provisions on cooperation for economic growth and development in chapter on "Economic and Technical Cooperation"	Yes; chapters on "Environmental Issues" and "Economic and Technical Cooperation" take into account the different levels of social and economic development of the parties
China-Iceland FTA	No	No	Yes; "Cooperation" chapter requires enhanced cooperation on both labor and environment; FTA also refers to separate side agreement for cooperation on environmental protection	Yes; provisions on cooperation for economic growth and development in chapter on "Cooperation"	Yes, in article on "Development Cooperation," parties confirm objective of promoting development in China with Iceland's assistance

or China-Switzerland FTA) chapters may be resolved through inter-state arbitration. Relevant issues are to be submitted to the treaties' respective Joint Committees.

Finally, the EU-Singapore FTA, like the other texts, provides that disagreements arising under the "Trade and Sustainable Development" chapter cannot be settled by inter-state arbitration or mediation.[112] Disputes between the states are instead to be resolved through the following means: (1) consultations between the parties or, if the parties agree, with assistance by or referral to other relevant international organizations or bodies such as the ILO;[113] (2) referral to the Board on Trade and Sustainable Development (the Board),[114] a body established by the

112. EU-Singapore FTA, art 13.16(1).

113. EU-Singapore FTA, art 13.16(2)–(3).

114. EU-Singapore FTA, art 13.16(4).

treaty to oversee implementation of the "Trade and Sustainable Development" chapter;[115] or (3) if the matter cannot be resolved through agreement by the Board, referral of the matter to a three-member Panel of Experts (the Panel, comprising individuals with specialized knowledge or expertise on relevant issues addressed in the chapter) and Board-monitored implementation of measures that take into account the report and recommendations issued by the Panel.[116]

The EU-Singapore FTA contains several other provisions requiring the Board[117] and individual state parties to establish mechanisms and meetings to consult and exchange information with stakeholders regarding implementation of the "Trade and Sustainable Development" chapter. Stakeholders are permitted to "submit views or recommendations to their respective Parties" on implementation of the chapter, and are also to be notified of decisions made or actions that will be taken by a party to respond to Panel reports and recommendations.[118] Nevertheless, there is no rule requiring the Board to seek input from relevant stakeholders regarding specific disputes, or requiring the Panel to do so when drafting reports or recommendations on those matters. Finally, although public disclosure of Board resolutions and Panel reports is the default rule, the Board is able to withhold its resolutions from the public should it decide to do so,[119] and the parties can decide that reports issued by the Panel should not be made public.[120]

None of the other agreements in this subset have similar stakeholder consultation requirements apart from the texts' more general provisions on transparency and public disclosure of laws and regulations affecting trade and investment.[121]

3. THE LARGER PICTURE

These five IIAs were concluded either on top of existing BITs (e.g., China-Switzerland and China-Iceland, and the EFTA-Panama-Costa Rica agreement supplements the Switzerland-Panama and Switzerland-Costa Rica BITs[122]) or without prejudice to future BITs that may be negotiated. They thus do not necessarily form the exclusive legal basis for governing international investment between the state signatories. Nevertheless, they form an integral part of the governance framework for foreign investment, and shed light on states' evolving views of the relationship between IIAs, international investment, and sustainable development.

115. EU-Singapore FTA, art 13.16(6).

116. EU-Singapore FTA, art 13.17.

117. EU-Singapore FTA, art 13.15(4).

118. EU-Singapore FTA, art 13.17(9).

119. EU-Singapore FTA, art 13.16(6).

120. EU-Singapore FTA, art 13.17(8).

121 See e.g., EFTA-Costa Rica-Panama FTA, art 1.7:

> 1. The Parties shall publish or otherwise make publicly available, their laws, regulations, judicial decisions, administrative rulings of general application as well as their respective international agreements, that may affect the operation of this Agreement.
> 2. The Parties shall promptly respond to specific questions and provide, upon request, information to each other on matters referred to in paragraph 1.

122. Switzerland-Costa Rica BIT (signed 1 August 2000, entered into force 19 November 2002); Switzerland-Panama BIT (signed 19 October 1983, entered into force 22 August 1985).

Table 2.3 Consultation, Cooperation, and Dispute Resolution of Issues in Sustainable Development and Cooperation Chapters

Treaty	Provision/Chapter	Inter-State Arbitration	Inter-State Consultation under Treaty Body to Resolve Issues?	Express Power of Treaty Body to Issue a Decision or Recommendation on Relevant Issue of Disagreement?	Formal mechanism or rule on stakeholder consultation and cooperation?
EU-Singapore FTA	Trade and Sustainable Development Chapter	No	Yes—consultations, with reference if needed to relevant international organizations. If issue cannot be resolved, it is referred to Board on Trade and Sustainable Development established by treaty to facilitate consultations. If no agreement reached by Board, matter is referred to a Panel of Experts.	Yes—if issue not resolved through agreement by Board, Panel of Experts may be convened to issue a report and recommendations	Chapter on transparency—including obligation to respond to requests from any interested person for information about proposed or actual measures Various processes through which the Board and Panel of Experts either have the discretion or are required to provide information to and/or seek information from stakeholders.
EFTA-Bosnia-Herzegovina FTA	Trade and Sustainable Development Chapter	No	Yes—expert consultations or consultations under "Joint Committee"	Yes—"Joint Committee" can make recommendations on any matter and is generally empowered to seek to resolve disputes regarding interpretation and application of the agreement No express provision giving "Joint Committee" authority to take decisions on relevant disputes	General rule on transparency No express provision for transparency/disclosure or participation in activities of relevant Treaty Body ("Joint Committee")
	Investment Chapter	Yes	Yes—consultations among the parties or under "Joint Committee"		

(*Continued*)

Table 2.3 Consultation, Cooperation, and Dispute Resolution of Issues in Sustainable Development and Cooperation Chapters (Continued)

Treaty	Provision/Chapter	Inter-State Arbitration	Inter-State Consultation under Treaty Body to Resolve Issues?	Express Power of Treaty Body to Issue a Decision or Recommendation on Relevant Issue of Disagreement?	Formal mechanism or rule on stakeholder consultation and cooperation?
EFTA-Costa Rica Panama FTA	Trade and Sustainable Development Chapter	No	Yes—consultations under "Joint Committee"	Yes—"Joint Committee" can make recommendations on any matter and is generally empowered to seek to resolve disputes regarding interpretation and application of the agreement No express provision giving "Joint Committee" authority to take decisions on relevant disputes	General rule on transparency No express provision for transparency/disclosure or participation in activities of relevant Treaty Body ("Joint Committee")
	Investment Chapter	Yes	No express provision for consultations under "Joint Committee"; inter-state consultation between parties is included as part of Dispute Settlement chapter, which covers the Investment chapter		
	Cooperation Chapter	No	No express provision for consultations on Cooperation chapter through "Joint Committee"; the Cooperation chapter is also carved out from inter-state consultation under Dispute Settlement chapter		

China-Switzerland FTA	Environmental Issues Chapter	No	Yes—consultations under "Joint Committee"	No express provision giving "Joint Committee" authority to issue recommendations or take decisions on relevant disputes (cf. Economic and Technical Cooperation chapter), though "Joint Committee" is generally empowered to seek to resolve disputes regarding interpretation and application of the agreement	General rule on transparency No express provision for transparency/disclosure or participation in activities of relevant Treaty Body ("Joint Committee")
	Economic and Technical Cooperation Chapter	No	Yes—consultation under "Joint Committee"	Yes—"Joint Committee" has power to make recommendations and take decisions on any issue under the Economic and Technical Cooperation chapter	
China-Iceland FTA	Cooperation Chapter	No	Yes—cooperation under "Joint Commission"	Yes—"Joint Commission" has power to encourage the parties to undertake cooperation activities and make recommendations on cooperation activities "Joint Commission" also has authority to facilitate avoidance and settlement of any disputes regarding interpretation or application of the agreement No express provision giving "Joint Commission" authority to take decisions on relevant disputes	General rule on transparency No express provision for transparency/disclosure or participation in activities of relevant Treaty Body ("Joint Commission")

Most discussions of IIAs to date have focused on the majority of IIAs that have more controversial provisions—namely strong investment protection obligations and investor-state arbitration. Yet focusing primarily on those IIAs does not present the full picture of states' practices toward international economic policy in general and the governance of investment in particular. These FTAs show the growing trend for states to conclude treaties that strive to facilitate and catalyze *quality* investment and inter-state cooperation on issues of sustainability. These new agreements are noteworthy in reflecting the directions that states may increasingly take with respect to cooperative and bilateral economic governance; already, we are seeing some of these trends reflected in model BITs, such as the Model Bilateral Investment Treaty Template of the Southern African Development Community,[123] which focus less on investor protections and more on ensuring that investment fits within the broader framework of sustainable development.

C. CANADA IN AFRICA: HEIGHTENED BIT ACTIVITY THAT TRACKS INVESTMENTS IN THE EXTRACTIVE INDUSTRIES

Over recent years, Canada has been actively negotiating investment treaties in Africa. These instruments are important to highlight for a number of reasons. For one, they represent a significant share of the treaty activity in 2013. Moreover, while it is frequently observed that the dynamics between parties to modern IIAs are more complex than the traditional treaties between developing capital importing and developed capital exporting countries, this block of agreements reflects that more traditional pattern, where the flows of investment are largely in one direction. Thus, it is interesting to assess whether and to what extent this set of treaties differs from other contemporary agreements where the negotiating parties are generally seeking to conclude agreements that meet their needs as both home and host states.

Canada's first BIT with an African country was its agreement with Egypt, which entered into force in 1997. Then a long lull followed. The next treaty with an African country did not enter into force until 2013, and was the Canada-Tanzania BIT.[124] Those two agreements were, as of January 2014, the only BITs Canada had in force with African states.[125] As of that date, Canada had no FTAs with any African countries.[126]

Over the past several years, however, Canada concluded BIT negotiations with Madagascar (2008), Mali (2011), Senegal (2012), and Bénin, Cameroon, Côte d'Ivoire, Guinea, Nigeria, Tanzania, and Zambia (2013). It is also currently engaged in BIT negotiations with Burkina Faso, Ghana, Kenya, and Tunisia, and negotiations for an FTA with Morocco.

123. For more on this model template, see Lise Johnson and Lisa Sachs (n 5).

124. This information on the status of Canada's BITs with African countries comes from Canada's website, 'Foreign Investment Promotion and Protection Agreements (FIPAs),' hosted by Canada's Department of Foreign Affairs, Trade, and Development, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng>.

125. On 12 May 2014 the BIT between Canada and Bénin entered into force.

126. The information on Canada's FTAs comes from the Department of Foreign Affairs, Trade, and Development's website, 'Canada's Free Trade Agreements,' <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng>.

A likely key driver behind Canada's push for BITs with African countries—all of which are developing countries and four of which are least developed countries—is the heavy engagement of Canadian firms in exploration and exploitation of natural resources abroad. In 2013, more than 800 Canadian firms were exploring outside of Canada in over 100 countries.[127] These firms together had interests in more than 8,000 properties, and accounted for almost half the mining and exploration activity in the world.[128] Figures for 2011 put the value of Canadian mining assets abroad at more than CA$146.2 billion.[129] Of this amount, more than CA$50 billion were assets held by more than 230 Canadian companies throughout Latin America, a region where, by 2013, Canada had already concluded bilateral investment treaties or FTAs with 12 countries.[130]

Another large share of mining and exploration activity was in Africa, where more than 150 Canadian companies were present in 48 out of 55 countries, and held over CA$31 billion in mining assets.[131] In Zambia alone, the Canadian government estimated that the mining assets of Canadian mining companies were worth roughly CA$6 billion in 2011.[132]

It is therefore not surprising that when announcing its progress negotiating and concluding IIAs with African countries, the Government of Canada routinely emphasized the importance of the relevant country for Canada's extractive industries firms, reporting on the value of assets Canadian companies already held in the territory, and highlighting potential for expanded activities.[133] Industry, in turn, commended the government's efforts. The Mining Association of Canada (MAC) declared that the "speed with which the [Canadian] government has negotiated [IIAs] has helped facilitate industry investment in key destinations."[134] The MAC paid special attention to the number of agreements recently concluded and being negotiated with African partners,[135] and recommended "expanding Canada's trade and investment regime to new Asian and African countries."[136]

As of June 2014, only four of the BITs Canada has concluded with African countries—the 1997 BIT with Egypt and the agreements concluded in 2013 with Tanzania, Cameroon, and

127. The Mining Association of Canada, 'Facts and Figures of the Canadian Mining Industry' (2013) 34.

128. ibid 6.

129. ibid 72.

130. ibid 72. By 2013, Canada had concluded BITs with Argentina, Barbados, Costa Rica, Ecuador, Trinidad and Tobago, Uruguay, Venezuela, Panama, and Peru.

131. ibid 72.

132. Department of Foreign Affairs, Trade, and Development, 'Harper Government Concludes Investment Agreements with Cameroon and Zambia' (3 March 2014).

133. The press release announcing the signing of the agreement with Cameroon, for instance, highlighted that '[i]n 2012, Canadian mining assets in Cameroon were valued at $61.3 million,' and that there 'specific opportunities for Canadian business in sectors such as infrastructure and education, as well as mining, and oil and gas.' Department of Foreign Affairs, Trade and Development Canada, Press Release, 'Minister Fast Signs Investment Agreement with Cameroon' (3 March 2014). Similarly, the press release announcing the conclusion of negotiations with Côte d'Ivoire highlighted that there was 'significant potential for increased Canadian investment in [the country] . . . especially in the mining, infrastructure, transportation and education sectors. In 2011, Canadian mining assets in Côte d'Ivoire were valued at $15 million.' Department of Foreign Affairs, Trade, and Development Canada, Press Release, 'Canada Concludes Investment Agreement with Côte d'Ivoire' (26 September 2013).

134. The Mining Association of Canada, 'Facts and Figures of the Canadian Mining Industry' (2013) 76.

135. ibid 76.

136. ibid 76.

Bénin—were publicly available. This makes it virtually impossible to draw general conclusions about current Canadian treaty practice with African countries. Nevertheless, comparing the three agreements from 2013 that are in the public domain with Canada's model and other agreements recently negotiated between Canada and other countries reveals slight but notable differences among the agreements.

Overall, Canada's agreements with Tanzania, Benin, Cameroon, and Egypt look very much like its 2004 model and the BITs it has concluded over the past decade, such as by including broad definitions of investment, an FET provision tied to customary international law, and investor-state arbitration. This means that the 2004 model appears to be the general ceiling, as opposed to the floor, in terms of investor protections, even when Canada is an important, or even the most important, capital exporter vis-à-vis its negotiating partner. It also means, however, that Canada does not make further commitments or efforts to ensure that foreign investment contributes to its treaty partners' sustainable development objectives beyond those in its model, even when its partner is a least developed country. Its treaties with developing and least developed countries in Africa do not contain strong provisions on home-country or investor conduct that can be used to ensure that foreign investment provides actual benefits to the host country. This omission is particularly notable in the agreement with Tanzania as that country is a member of the Southern African Development Community which, in 2012, finalized a Model BIT template providing for a relatively robust set of articles on investor- and home-state obligations seeking to improve the development impacts of foreign investment.[137]

Nevertheless, despite the overall similarity between Canada's treaties with African countries and its model and other previous agreements, there are slight pro-state and pro-investor ebbs and flows in Canada's agreements with African and other states regarding issues of particular relevance to the extractive industries including performance requirements, investor-state contracts, and corporate social responsibility.

1. PERFORMANCE REQUIREMENTS

"Performance requirements" are an array of tools which governments might use on a mandatory or incentive-based system in order to build and support local individuals or companies. They include requirements or incentives for foreign investors to use, or give preference to, domestic firms that provide relevant goods or services. Some of these performance requirements are barred under the World Trade Organization's Agreement on Trade-Related Investment Measures (TRIMs Agreement).[138] A number of investment treaties—albeit a minority—also contain restrictions on performance requirements, whether by incorporating the TRIMs Agreement or imposing stricter rules. Canada's 2004 model and many of Canada's agreements fall into the latter category, including restrictions on performance requirements that go beyond that which is precluded under the TRIMs Agreement.

For instance, whereas the TRIMs Agreement only bars measures relating to trade in *goods*, Canada's 2004 model also restricts the ability of host states to impose or enforce commitments to purchase local *services* (transportation services, equipment, maintenance and repair

137. For more on the SADC Model, see Johnson and Sachs (n 5).

138. Agreement on Trade-Related Investment Measures (15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: Results of the Uruguay Round of Multilateral Trade Negotiations 143 (1999), 1868 U.N.T.S. 186 (TRIMS Agreement).

of equipment, logistics, environmental monitoring, accounting, etc.),[139] and enables investors to challenge a breach of this restriction via investor-state arbitration. In contrast, under the TRIMs Agreement, allegations of unlawful performance requirements are settled on a state-to-state basis. Moreover, the 2004 model's restrictions on performance requirements do not only bar one state party to the treaty from imposing performance requirements on investors from the other state party. Rather, they multilateralize the obligation, stating that the treaty parties must not impose those requirements on *any* foreign investor, irrespective of its home state.[140]

The Canada-Bénin agreement tracks the 2004 model, restricting imposition *and* enforcement of requirements on *any* foreign investor to use or accord a preference to local goods *or* services.[141]

Canada's BITs with Cameroon and Tanzania allow host states more flexibility. While the BIT with Tanzania limits the host state's ability to impose on *any* foreign investor requirements to purchase, use, or accord a preference to local goods *or* services, thus restricting the state parties beyond the limits enshrined in the TRIMs Agreement,[142] it does not go as far as Canada's model (or the agreement with Bénin) in that it does not restrict host states' efforts to *enforce* commitments by firms to favor local providers of goods or services.[143] The Canada-Cameroon BIT likewise only expressly bars "imposition" and not "enforcement" of requirements to purchase, use, or accord a preference to local providers of goods or services. It also only restricts performance requirements on the *home* state's investors, as opposed to investors from any state.

The fact that the agreements with Cameroon and Tanzania do not contain language barring the state from "enforcing" commitments to purchase, use, or accord a preference to locally provided goods or services may be particularly important for host states that seek to secure preferences for or purchases of local goods or services through contracts agreed to with foreign investors as opposed to through imposition of requirements by law or regulation.[144] A government granting a natural resource concession, for instance, may negotiate an arrangement in which part of the deal is that the foreign investor promises to use or accord preferences to domestic suppliers of goods or services, or commits to invest in or undertake certain activities that de facto involve those local suppliers, such as development of infrastructure, investment in research and development, or provision of public services. Governments seek to include these commitments in order to ensure that the project does not follow an "enclave model," isolated from the rest of the economy, but rather is developed in a way that generates, expands, and deepens linkages with the host economy that can facilitate local growth and diversification.

If these requirements were imposed by law or regulation, they might fall afoul of the Canada-Tanzania and Canada-Cameroon BITs.[145] If, however, the investor were to commit to

139. Canada 2004 Model, art 7(1)(b) and (c).

140. Canada 2004 Model, art 7(1) ('Neither Party may impose or enforce any of the following requirements . . . in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party *or a non-Party* in its territory.') (emphasis added).

141. Canada-Bénin BIT, art 10(1).

142. Canada-Tanzania BIT, art 9(1).

143. ibid.

144. The TRIMs Agreement also prohibits certain performance requirements that are enforceable under domestic law, thus also potentially covering measures agreed to in investor-state contracts. See TRIMs Agreement, Annex, 1.

145. Whether the measure actually would breach the treaty's provision depends on various factors, including the meaning of 'services' under the investment treaty and whether the treaty included any relevant exception

them as part of contractual negotiations with a state entity or state-owned enterprise, those commitments would arguably not have been "imposed" by the government, leaving them permissible under the treaty. But if the treaty were to also preclude "enforcement" of those promises, then the investors' commitments regarding local expenditures and suppliers could be legally hollow. Consequently, the omission of the word "enforcement" in the Canada-Tanzania and Canada-Cameroon BITs appears significant.[146]

Some agreements Canada has signed relatively recently, such as its BIT with Jordan[147] and FTA with Peru,[148] are similar to the 2004 model, the agreement with Bénin, and, to a lesser extent, the BITs with Tanzania and Cameroon, containing broad restrictions on imposition and enforcement of performance requirements regarding the use of or preference for domestic suppliers of goods or services. Other IIAs Canada has concluded within the past several years, however, take a different approach. The 2011 BIT with Kuwait has weaker provisions;[149] the 2012 BIT with China merely incorporates the TRIMs Agreement;[150] the FTA with Colombia only restricts requirements to use or accord a preference to goods, not services;[151] and Canada's 2012 treaties with the Czech Republic[152] and Slovak Republic[153] do not contain any article barring performance requirements.

2. PROTECTION AGAINST BREACH OF INVESTOR-STATE CONTRACTS

Canada's 2004 model does not contain an umbrella clause requiring the host state to respect any obligation owed or commitment made to investors from the other state party. Nevertheless, it does contain a narrow type of analogous provision enabling an investor to bring a claim against the host government for any taxation measure that breaches an agreement entered into

or reservation. In *Mobil v. Canada*, one of the few cases to address the issue of performance requirements in investment treaties, the tribunal concluded that research and development (R&D) and education and training (E&T) were activities that fell within the meaning of 'services' under the agreement. To decide differently based on the non-strictly economic policy purposes behind measures designed to encourage investment in R&D and E&T would be, according to the tribunal, to give the term a 'special meaning' not justified by the text of the treaty. The tribunal then determined that the requirement to invest in R&D and E&T was effectively a requirement to purchase, use, or accord a preference to local providers of goods and services. See *Mobil v. Canada, Mobil Investments Canada v Canada* (Decision on Liability and on Principles of Quantum, 22 May 2012) ICSID Case No ARB(AF)/07/4, [99-111]. Since there is no formal system of precedent in investor-state arbitration, other tribunals might take a narrower approach to each of those issues in future cases.

146. Notably, US texts such as the 2012 Model BIT contain a provision saying that the article on performance requirements 'does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement.' (art. 8(5)). This leaves open the question of whether, under the treaty and other principles of international law, a contractual commitment required by a state-owned enterprise would be a contractual commitment required by the state party to the treaty.

147. Canada-Jordan BIT, entered into force 14 December 2009, art 7(1).

148. Canada-Peru FTA, entered into force 1 August 2009, art 807(1).

149. Canada-Kuwait BIT, art 9.

150. Canada-China BIT, signed 9 September 2012, art 9.

151. Canada-Colombia FTA, entered into force 15 August 2011, art 807(1).

152. Canada-Czech Republic BIT, entered into force 22 January 2012.

153. Canada-Slovak Republic BIT, entered into force 14 March 2012.

between the investor and the host state unless the tax authorities of the state parties jointly determine that the tax measure does not breach the investor-state contract.[154]

This provision appears in the IIAs with Cameroon, Tanzania and Bénin, though in a somewhat narrower form than in the 2004 model. In the Tanzania, Cameroon, and Bénin IIAs, investor-state contracts are only covered if they were concluded by the investor with the "central" or "national" government authorities. In contrast, the 2004 model more broadly covers contracts investors concluded with any actor whose conduct may be attributed to the state, including sub-national authorities.

Other BITs Canada has concluded, such as its relatively recent agreements with Romania (2011),[155] Jordan (2009),[156] and Latvia (2011)[157] likewise contain these tax-specific umbrella clauses covering agreements between investors and central government authorities. Some of Canada's FTAs contain similar provisions, though certain agreements are broader in that they protect stabilization of tax and non-tax issues. The FTA with Colombia, for instance, allows Canadian (but not Colombian) investors to initiate investor-state arbitration under the treaty for alleged breaches of "Juridical Stability Contracts."[158] The agreement defines "Juridical Stability Contracts" as contracts specifically provided for under Colombian law that permit the government to commit to stabilize tax and other aspects of the legal framework for qualifying investments for a period of between 3 and 20 years.[159] Although the investor rights and protections offered in many investment treaties may de facto be one-way, imposing requirements on the capital importers but not capital exporters, it is rare for them to be so expressly one-directional.

The 2013 FTA with Honduras also permits investors to bring investor-state arbitration claims under the treaty for tax and other measures that breach "legal stability agreements" between the investor and central or national officials. Claims that a tax (as opposed to non-tax) measure violates a "legal stability agreement," however, can only be brought if the agreement was concluded after the Canada-Honduras FTA enters into force.[160] The agreements with Tanzania and Bénin do not have similar time bars, thus presumably covering investor-state contracts irrespective of when they were concluded.

These examples show that it is not exceptional for Canada to include variations on umbrella clauses or express protections of stabilization commitments in its IIAs vis-à-vis its 2004 model. The agreements Canada concluded with Bénin, Cameroon, and Tanzania are thus not outliers. Nevertheless, inclusion of those provisions is not inevitable as there are various examples in which Canada has not secured those types of protections. The BIT between Canada and China signed in 2012, for instance, does not contain any express provision allowing suit under the

154. Canada 2004 Model BIT, art 16(3).

155. Canada-Romania BIT, art 12(3);

156. Canada-Jordan BIT, art 16(3).

157. Canada-Latvia BIT, art 12(3).

158. Canada-Colombia FTA, art 839, signed 21 November 2008, entered into force 15 August 2011. The treaty contains specific requirements for the conduct of these investor-state arbitrations, including a provision mandating that the arbitration be conducted in Bogotá, Colombia.

159. See Canada-Colombia FTA, art 839. These legal stability contracts are provided for in Ley 963 de 2015. For more information, see Álvaro Pereira, 'Legal stability contracts in Colombia: an appropriate incentive for investments? Historical causes and impact analysis of L 963 of 2005' (2013) 12:2 Richmond Journal of Global Law and Business 237.

160. Canada-Honduras FTA (signed 5 November 2013) art 10.19(2).

treaty for breach of an investor-state contract; nor do BITs with the Czech Republic (2012) or the Slovak Republic (2012).

3. INCORPORATING CONSIDERATIONS OF DOMESTIC POLICY AND CORPORATE SOCIAL RESPONSIBILITY IN INVESTMENT TREATIES

Canada has acknowledged the opportunities and challenges its extractive industry firms present for host countries and communities. Notably, the Canadian Government has also recognized its role as the home state in helping to ensure that the overseas activities of its extractives sector contribute to sustainable development.[161] That role entails four main types of activities: (1) building up host state capacity to manage and benefit from the development of natural resources; (2) promoting use of certain widely recognized international corporate social responsibility (CSR) performance guidelines; (3) establishing an "Office of the Extractive Sector CSR Counsellor" to assist stakeholders in the resolution of CSR issues relating to the activities of extractives industries firms; and (4) creating a CSR Centre of Excellence to assist Canadian extractives firms in implementing CSR.[162]

Despite those home country initiatives, neither Canada's 2004 model nor most of its subsequent BITs have incorporated these commitments or principles. Exceptions include the BITs with Bénin and Cameroon, which contain language on CSR. Yet even those provisions are relatively weak, stating simply that

> [e]ach Contracting Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Contracting Parties. These principles address such issues as labour, the environment, human rights, community relations and anti-corruption.[163]

The treaties carve this provision out from the investor-state dispute settlement; nevertheless, there are possibilities for matters regarding this provision to be raised at the inter-state level. Under the Canada-Bénin BIT, issues of interpretation or application of the CSR obligation can be addressed through the treaty's intergovernmental "Joint Commission"[164] and, if giving rise to a "dispute,"[165] raised in state-to-state consultations or arbitration.[166] In the

161. See Department of Foreign Affairs, Trade, and Investment Canada, 'Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector' (March 2009), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx>.

162. ibid. 'Corporate social responsibility' is defined as 'voluntary activities undertaken by a company to operate in an economically, socially and environmentally sustainable manner.'

163. Canada- Bénin BIT, art 16; Canada-Cameroon BIT, art 15(2).

164. Canada-Bénin, ch V.

165. Only 'disputes' are subject to consultation and arbitration under the treaty's state-state dispute settlement article.

166. Canada-Bénin BIT, ch III (excluding article 16 from investor-state dispute settlement) and ch IV (not containing any similar carve-out for article 16); Canada-Cameroon BIT, arts 20(1)(a), 37.

Canada-Cameroon BIT, either state can seek consultation regarding interpretation or application of the provision and, like the Canada-Bénin BIT, seek arbitration if there is a "dispute."[167]

Canada announced with the 8 January 2013, signing of the agreement with Bénin that it would seek to include such CSR provisions in all subsequent BITs.[168] Although the BIT with Cameroon thus does reflect that policy, the agreement signed with Tanzania in May of 2013 does not contain such a provision. It is unclear whether it will be found in the other agreements signed with African countries in 2013.

Although only entering its BITs in 2013, CSR provisions had already been incorporated in a number of Canada's FTAs, such as its agreements with Colombia[169] and Peru.[170] A CSR clause is likewise included in Canada's 2013 FTA with Honduras.[171] Many Canadian FTAs also contain additional side agreements contemplating home country roles in and collaboration on environmental and labor issues. Yet as Canada has been predominately pursuing BITs and not FTAs in Africa, and thus far its BITs have not included such side agreements, it appears unlikely that its agreements with African countries will similarly include these institutionalized avenues for Canada to help ensure that investments by its extractives firms promote sustainable development and advance Canada's CSR strategy.

Finally, Canada also takes a narrower approach to environmental and labor issues in its BITs with African states as compared to its own FTAs, and indeed as compared with a number of other modern texts such as those profiled in Section A, above, and policy approaches reflected in the Southern African Development Community (SADC) Model BIT template.

The review period of this chapter only covers treaties that were signed or on which negotiations officially concluded in 2013. As a result, it does not include texts that may be near final but are not yet closed, such as the investment chapter that forms part of CETA, being negotiated between Canada and the European Union.

While interpretation of CETA's investment text is outside the scope of this chapter, one question it raises is whether the features of that agreement signal a new template for Canadian negotiations for all treaty parties, will be a model only for texts when capital flows across treaty parties are relatively symmetrical, or will feature in that agreement alone.

D. THE UNCITRAL TRANSPARENCY RULES AND CONVENTION

As discussed above, discussions are escalating at the domestic level around the world about the inclusion of investor-state dispute settlement in IIAs, and the potential implications of that mechanism for state sovereignty and policy space, the consistency and quality of decisions, and principles of good governance, accountability, and the rule of law. One of the main concerns about that mechanism from critics has been the lack of transparency of these proceedings—indeed, one of the arguable benefits for the litigating parties. Critics are

167. Canada-Cameroon BIT, art 37.

168. Government of Canada, Office of the Prime Minister, Press Release, 'Canada- Bénin Foreign Investment Promotion and Protection Agreement (FIPA)' (8 January 2013).

169. Canada-Colombia FTA, art 816.

170. Canada-Peru FTA, art 810.

171. Canada -Honduras FTA, art 81010.16.

especially concerned that the closed nature of these proceedings is inappropriate since many of the disputes address issues of public interest, and keeping the cases behind closed doors may provide a shield for dishonest, substandard, or illegal conduct.

This mounting criticism, specifically about the lack of transparency in investor-state arbitration, has elicited policy responses. Some states have used interpretive agreements[172] and submissions to tribunals[173] to clarify that they do not view investment treaties as imposing a general requirement of confidentiality, precluding them from disclosing information submitted to or issued by arbitrators. Various treaties (though still a minority) now mandate transparency in investor-state arbitration, requiring disclosure of awards and other documents generated in the proceedings.[174]

Other policy responses have targeted relevant arbitration rules. In 2006, for instance, International Centre for Settlement of Investment Disputes (ICSID) revised its arbitration rules to, among other things, expressly permit tribunals to allow participation by amicus curiae, and require publication of excerpts of legal reasoning of the awards. Even after those reforms, however, criticism regarding the lack of transparency has continued as ICSID's rules do not require the briefs or awards to be made publicly available, nor do they allow open hearings without the consent of all parties.[175]

In 2008, UNCITRAL—whose arbitration rules are frequently used in commercial as well as treaty-based investor-state arbitrations (the "general UNCITRAL arbitration rules")—also took action in response to concerns about the lack of transparency in investor-state arbitration. It tasked an internal working group, Working Group II, to craft a legal standard to ensure transparency in disputes arbitrated under the UNCITRAL rules.[176] In 2013, five years after formally deciding to take up the issue, UNCITRAL adopted the Rules on Transparency in Treaty-based Investor-State Arbitration (Transparency Rules).[177] UNCITRAL also amended its general arbitration rules in 2013 to expressly incorporate those new transparency provisions.[178]

172. See NAFTA Free Trade Commission (31 July 2001) 'Notes of Interpretation of Certain Chapter 11 Provisions' (setting forth the treaty parties' understanding that '[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration' and their agreement 'that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules').

173. See e.g., *Philip Morris Asia Limited v Australia* (Procedural Order No. 5 Regarding Confidentiality, 30 November 2012) PCA Case No 2012-12, 8-13 (setting forth Australia's arguments in support of permitting disclosure).

174. For a survey of the provisions on transparency, see Nathalie Bernasconi-Osterwalder and Lise Johnson, 'Transparency in the dispute settlement process: Country best practices' (IISD & CIEL, 2011), <http://www.iisd.org/publications/pub.aspx?id=1529>; see also Johnson and Sachs (n 5) (noting the range of states that included transparency provisions in their treaties concluded in 2011 and 2012).

175. See ICSID Press Release, 'Amendments to the ICSID Rules and Regulations' (5 April 2006), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Archive_%20Announcement30_PressRelease1>; see ICSID Arbitration Rules, art 37.

176. 'Report of the United Nations Commission on International Trade Law,' 41st session (16 June–3 July 2008), Gen. Ass. 63rd session, supp. no. 17, A/63/17, [314].

177. The rules were adopted at UNCITRAL's Forty-sixth session, held 8–26 July 2013.

178. 2013 UNCITRAL Arbitration Rules, art 1(4). They came into effect 1 April 2014, and are available on UNCITRAL's website, <https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>.

1. CONTENT OF THE TRANSPARENCY RULES

The new Transparency Rules provide for a significant degree of openness throughout the arbitral proceedings.[179] At the commencement of the arbitration, even before the tribunal has been constituted, they require automatic disclosure of a basic set of facts about the dispute—the name of the disputing parties, the economic sector involved, and the treaty under which the claim is being brought.[180] Then, once the tribunal has been established, the Transparency Rules require ongoing disclosure of a broader range of information, namely, the notice of arbitration;[181] any response to the notice of arbitration; the statement of claim; the statement of defense; any additional written statements or submissions by any disputing party; any table created that lists exhibits; any written submissions by non-disputing parties to the treaty or third persons; transcripts of hearings; and orders, decisions, and awards of the arbitral tribunal.[182] If requested, expert reports and witness statements must also be made publicly available.[183] The only items that may be withheld are (1) exhibits, which the tribunal has the discretion to decide whether or not to order released;[184] (2) information that is "confidential or protected" under the Transparency Rules; and (3) information that would "jeopardize the integrity of the process" if disclosed.[185]

In addition to providing for disclosure of that broad range of information, the Transparency Rules also require hearings to be open subject to limited exceptions for logistical reasons, to prevent disclosure of confidential or protected information, or to safeguard the integrity of the process.[186]

2. APPLICATION OF THE TRANSPARENCY RULES

Whether and how the Transparency Rules apply to arbitrations largely depends on the date that the underlying investment treaty was concluded.[187]

If the relevant treaty was concluded *after* 1 April 2014, a reference to the general UNCITRAL arbitration rules in that treaty will be presumed to incorporate the Transparency Rules unless the treaty specifies otherwise (e.g., by clearly stating that the Transparency Rules do not apply or by specifying that the 1976 version of the UNCITRAL arbitration rules apply, which do not incorporate the Transparency Rules).[188] Thus, under a post–1 April 2014 treaty, if the investor

179. For more discussion of the rules, see Lise Johnson and Nathalie Bernasconi-Osterwalder, *New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps* (CIEL, IISD, VCC August 2013) 13–23.

180. Transparency Rules, art 2.

181. Transparency Rules, art 3(1).

182. Transparency Rules, art 3(1).

183. Transparency Rules, art 3(2).

184. Transparency Rules, art 3(3).

185. Transparency Rules, art 7(6)–(7).

186. Transparency Rules, art 7(2)–(3).

187. For additional discussion of the issues of applicability, see Johnson and Bernasconi-Osterwalder (n 176) 8–13.

188. Article 11.21 of the FTA signed on 8 April 2014 between Australia and the Republic of Korea includes provisions requiring transparency of investor-state arbitration. The parties, however, also exchanged side

selects the general UNCITRAL arbitration rules to govern the dispute, that selection will also presumptively include the Transparency Rules.[189] Additionally, if the underlying treaty or other applicable arbitral rules give the disputing parties the freedom to adopt or modify the procedural rules they choose to govern the proceedings, those disputing parties can agree to select the Transparency Rules to apply alongside any other institutional or ad hoc rules.[190]

If, however, the treaty is one of the thousands that were concluded *before* 1 April 2014 (an "existing treaty"), the matter is more complicated. This is due to Article 1(2) of the Transparency Rules, which prevents application of the Transparency Rules to disputes arising under existing treaties unless state parties to the treaty, or the parties to the dispute, take certain additional steps to affirm they want the Transparency Rules to apply. More specifically, in order for the Transparency Rules to apply to existing treaties, either (1) the state parties to the treaty will have to have agreed *after 1 April 2014*, that the Transparency Rules apply to disputes under that treaty; or, (2) provided that the treaty allows, the disputing parties will have to agree to the Transparency Rules' application to their particular dispute.[191]

Under either the first option (state-state agreement) or the second option (investor-state agreement), states can express the required consent through various means and at various times. Subject to treaty law, they can, for instance, issue unilateral or joint interpretations making clear that their references to the "UNCITRAL arbitration rules" in their treaties mean "the UNCITRAL arbitration rules as in force at the time of the dispute," which would incorporate the Transparency Rules for disputes initiated after 1 April 2014.[192] Provided it is consistent with the treaty, they can also make a standing offer to arbitrate under the Transparency Rules. The investor would then have the option of accepting that offer when initiating a dispute.[193]

3. THE TRANSPARENCY CONVENTION

In addition to those unilateral and bilateral options to adopt the Transparency Rules for disputes under treaties pre-dating 1April 2014, UNCITRAL recognized the importance of developing a formal and comprehensive mechanism to facilitate application of the Transparency Rules to arbitrations under the thousands of investment treaties concluded prior to 1 April 2014. In 2013, therefore, after adopting the Transparency Rules, UNCITRAL began drafting a convention on transparency to enable broader application of the new disclosure provisions.

letters confirming their understanding that the Transparency Rules would *not* apply unless subsequently otherwise agreed. See letter from Yoon Sang-jick, Ministry of Trade, Industry and Energy, Republic of Korea, to Andrew Robb, Minister for Trade and Investment, Australia, dated 8 April 2014; and letter from Andrew Robb to Yoon Sang-jick, dated 8 April 2014. These are available on the website of Australia's Department of Foreign Affairs and Trade, <http://www.dfat.gov.au/fta/kafta/>.

189. 2013 UNCITRAL Arbitration Rules, art 1(4).

190. Transparency Rules, art 1(9).

191. Transparency Rules, art 1(2).

192. See Johnson and Bernasconi-Osterwalder (n 176) 23–24.

193. Illustrating this approach, the parties to the North American Free Trade Agreement issued declarations providing unilateral offers of consent to open hearings. See Canadian Department of Foreign Affairs and International Trade, Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations, 7 October 2003; NAFTA Free Trade Commission Joint Statement: A Decade of Achievement, 16 July 2004.

The convention, which UNCITRAL adopted in July 2014, is formally titled the Mauritius Convention on Transparency (Transparency Convention).[194] It establishes two main routes through which the Transparency Rules will or may apply.

The first, which is set forth in Article 2(1) of the Transparency Convention, involves a situation in which both the respondent state and the home state of the claimant are parties to the Transparency Convention (and have not taken relevant reservations, described further below). In that case, any arbitration initiated by the claimant—whether initiated under the UNCITRAL arbitration rules or not—will be governed by the Transparency Rules.

The second, which is governed by Article 2(2) of the Transparency Convention, involves a unilateral offer to arbitrate under the Transparency Rules by the respondent host state. If the respondent state is a party to the Transparency Convention but either (1) the home state of the investor is not a party to the convention, or (2) the home state is a party to the Transparency Convention, but has taken a reservation for the relevant treaty, the Transparency Rules will apply if the investor consents to their application.

As noted above, the Transparency Convention allows state parties to take certain reservations. For one, pursuant to Article 3(1)(a), a state party to the Transparency Convention can identify particular treaties that it does not intend to be covered. It is only when both state parties to a BIT are also party to the Transparency Convention, and neither state has carved out that treaty from the Transparency Convention's coverage, that the Transparency Rules will govern on a mandatory basis in all disputes under that BIT and irrespective of the investor's consent to the rules.

Additionally, under Article 3(1)(b), a state party to the Transparency Convention can clarify under the convention that, when it is a respondent state, it will still only be required to arbitrate under the Transparency Rules *if* the dispute is governed by the general UNCITRAL arbitration rules. Thus, if the investor selects any other arbitral rules from the menu of options typically offered by investment treaties to govern the dispute, such as the ICSID arbitration rules, the respondent state will not be bound to arbitrate under the Transparency Rules. Under this scenario, the respondent state opens the door to the possibility of the Transparency Rules applying, but gives the investor—which typically has the ability to select which procedural rules will govern the dispute when initiating the arbitration—the power to ultimately determine whether or not the Transparency Rules will apply in a particular case.

The third core reservation permitted under the treaty, which is set forth in Article 3(1)(c), allows states to opt out of the "unilateral offer" provided under the Transparency Convention. This means that if a respondent state has signed onto the Transparency Convention, and has not taken a reservation for a particular treaty or for any non-UNCITRAL arbitration rules, an investor whose home state is either (1) not a party to the Transparency Convention, or (2) is a party but has carved out the relevant treaty, cannot compel the respondent to arbitrate under the Transparency Rules. If it wished, the respondent state could consent to apply the Transparency Rules in that dispute, but would not be bound to do so upon the investor's election.

Pursuant to Article 3(4), those three reservations are the only reservations that are permitted from the Transparency Convention.

In summary, under the Transparency Convention, full reciprocity—that is, where both state parties to the investment treaty are party to the convention and neither has reserved the relevant

194. The text was adopted at the 47th Session of the UNCITRAL Commission, place in New York, New York, from 7–25 July 2014. Report of the United Nations Commission on International Trade Law, forty-seventh session (7–18 July 2014), General Assembly, 69th Session, Supp. 17, A/69/17, [106].

treaty—is required for the convention to apply and supplant the dispute resolution provisions otherwise applicable in the underlying investment treaty. Yet even when the investor's home state is not party to the Transparency Convention, the text enables the investor and respondent host state to "opt into" the system on a case-by-case basis. Where the investor's home state is not a party to the Transparency Convention, any agreement between the investor and respondent host state to "opt in" cannot be inconsistent with the underlying investment treaty. Nevertheless, treaty provisions such as those giving the disputing parties the ability to modify applicable arbitration rules permit significant flexibility.

4. A MODEL FOR BROADER REFORM?

The Transparency Convention provides a mechanism for retrofitting a potentially large set of existing investment treaties with mandatory or "opt-in" procedural requirements regarding disclosure of information and participation by nonparties to the dispute. In so doing, both the reciprocal and nonreciprocal approaches of the Transparency Convention also provide a useful blueprint for how willing states might be able to accomplish other institutional reforms of existing treaties.

One can envision, for instance, a similar multilateral instrument through which states seeking reform can create a standing body to hear investment disputes on a first instance or appellate basis. They can either reserve treaties which they wish to exclude from the convention, or adopt a "positive list" through which only specific investment treaties are covered. Use of that mechanism can be obligatory when parties to the investment treaty are also party to the new convention, and have not taken any relevant reservations. There could also be a mechanism through which investors or states retain the ability chose to use either the traditional investor-state arbitration under the investment treaty or the new body. Similarly, such a convention may be used to secure agreement on the meaning of certain common BIT obligations, limiting the scope for interpretation by tribunals.

Although design options are varied, numerous, and outside the scope of this paper to explore, the Transparency Convention is an important illustration of the potential templates states can create and subscribe to in order to try to address some of the critiques and concerns surrounding investor-state arbitration.

CONCLUSION

The year 2013 was an active year for treaty negotiations, domestic policy discussions about the governance of foreign investment, and institutional discussions about reforms of the international investment regime.[195] As shown above, some of the policy discussions have already influenced treaty practice, through unilateral terminations, FTAs that integrate investment protections with broader development aims, and amendments to arbitration rules to allow for

195. See e.g., Karl P. Sauvant and Federico Ortino, *Improving the International Investment Law and Policy Regime: Options for the future* (Helsinki: Ministry for Foreign Affairs of Finland 2013), and Jean Kalicki and Anna Joubin-Bret, "Reform of investor-state dispute settlement: in search of a roadmap" (2014) TDM Special Issue.

Table 2.4 2013 International Investment Agreements

	Full treaty name (when available)	Short name ** denotes agreement is public	Date signed and/or date negotiations concluded	Date entered into force (status as of September 2014)
1	Canada-Honduras Free Trade Agreement	Canada-Honduras FTA**	Signed 5 November 2013	Not in force.
2	Free Trade Agreement between the Swiss Confederation and The People's Republic of China	China-Switzerland FTA**	Signed 6 July 2013	1 July 2014
3	Colombia-Costa Rica Free Trade Agreement	Colombia-Costa Rica FTA**	Signed 22 May 2013	Ratified by Costa Rica on 5 May 2014; approved by Colombian Senate 8 April 2014
4	Colombia-Israel Free Trade Agreement	Colombia-Israel FTA	Signed 30 September 2013	Not in force
5	Free Trade Agreement between the Republic of Colombia and the Republic of Panama	Colombia-Panama FTA**	Signed 20 September 2013	Not in force
6	Free Trade Agreement between the Republic of Colombia and the Republic of Korea	Colombia-Republic of Korea FTA**	Signed 21 February 2013	Not in force
7	Free Trade Agreement between the EFTA States and the Central American States	EFTA-Costa Rica-Panama FTA**	Signed 24 June 2013	19 August 2014 for Costa Rica, Panama, and Norway; 29 August 2014 for Liechtenstein and Switzerland; 5 September 2014 for Iceland
8	Agreement between The Republic of Serbia and The Kingdom of Morocco on the Reciprocal Promotion and Protection of Investments	Morocco-Serbia BIT**	Signed 6 June 2013	Not in force
9	Agreement between The Republic of Serbia and The United Arab Emirates on the Promotion and Reciprocal Protection of Investments	Serbia-UAE BIT**	Signed 17 February 2013	Not in force
10	Agreement between the Government of the Republic of Singapore and the Government of the Republic of Colombia on the Promotion and Protection of Investments	Colombia-Singapore BIT**	Signed 16 July 2013	Not in force
11	Agreement between the Government of the Republic of Djibouti and the Government of the Republic of Turkey for the Promotion and Protection of Investments	Djibouti-Turkey BIT	Signed 25 September 2013	Not in force

(*Continued*)

	Full treaty name (when available)	Short name ** denotes agreement is public	Date signed and/or date negotiations concluded	Date entered into force (status as of September 2014)
12	Bilateral Investment Treaty between Guinea and Turkey	Guinea-Turkey BIT	Signed 18 June 2013	Not in force
13	Agreement between the Government of Japan and the Government of the Republic of Mozambique for the Liberalization, Promotion and Protection of Investment	Japan-Mozambique BIT	Signed 1 June 2013	Not in force
14	Free Trade Agreement between the EFTA States and Bosnia and Herzegovina	EFTA-Bosnia and Herzegovina FTA**	Signed 24 June 2013	Pending
15	Free Trade Agreement between the Government of Iceland and the Government of the People's Republic of China	China-Iceland FTA**	Signed 15 April 2013	1 July 2014
16	Canada-Albania Foreign Investment Promotion and Protection Agreement	Canada-Albania BIT	Negotiations concluded 27 November 2013	Not in force
17	Agreement Between the Government of Canada and the Government of the Republic of Bénin for the Promotion and Reciprocal Protection of Investments	Canada-Bénin BIT**	Signed 9 January 2013	12 May 2014
18	Canada-Cameroon Foreign Investment Promotion and Protection Agreement	Canada-Cameroon BIT	Negotiations concluded 4 March 2013; signed 3 March 2014	Not in force
19	Canada-Côte d'Ivoire Foreign Investment Promotion and Protection Agreement	Canada-Côte d'Ivoire BIT	Negotiations concluded 26 September 2013	Not in force
20	Canada-Guinea Foreign Investment Promotion and Protection Agreement	Canada-Guinea BIT	Negotiations concluded 5 December 2013	Not in force
21	Canada-Nigeria Foreign Investment Promotion and Protection Agreement	Canada-Nigeria BIT	Negotiations concluded 1 May 2013; signed 6 May 2014	Not in force
22	Canada-Serbia Foreign Investment Promotion and Protection Agreement	Canada-Serbia BIT	Negotiations concluded 17 September 2013	Not in force
23	Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments	Canada-Tanzania BIT**	Signed 16 May 2013	9 December 2013

(*Continued*)

	Full treaty name (when available)	Short name ** denotes agreement is public	Date signed and/or date negotiations concluded	Date entered into force (status as of September 2014)
24	Canada-Zambia Foreign Investment Promotion and Protection Agreement	Canada-Zambia BIT	Negotiations concluded 4 March 2013	Not in force
25	Free Trade Agreement between the European Union and the Republic of Singapore	EU-Singapore FTA**	Initialed 20 September 2013	Not in force
26	India-United Arab Emirates Bilateral Investment Protection Agreement	UAE-India BIT	Signed 12 December 2013	Not in force
27	Agreement on Encouragement and Reciprocal Protection of Investment between the Kingdom of the Netherlands and the United Arab Emirates	UAE-Netherlands BIT**	Signed 26 November 2013	Not in force
28	Bilateral Investment Treaty between Guatemala and the Russian Federation	Guatemala-Russian Federation BIT	Signed 27 November 2013	Not in force
29	Agreement between the government of Japan and the government of the Republic of the Union of Myanmar for the liberalization, promotion and protection of investment	Japan-Myanmar BIT	Signed 15 December 2013	Not in force
30	Korea-Australia Free Trade Agreement (KAFTA)	Korea-Australia FTA**	Negotiations concluded December 2013; signed 8 April 2014	Not in force

**Publicly available as of August 2014.

broader access and accountability in the arbitration system. It is quite likely that the phenomena recounted above are indicative of future trends that will become even more pronounced and developed in treaty practice in 2014 and beyond.

One of the major stories of 2014 will surely be the continued negotiations of the mega-treaties (TTIP, TPP, CETA, and the Regional Comprehensive Economic Partnership Agreement), including both the contents of the treaties as well as the process of their negotiation. In terms of the content, it will be interesting to see whether, as in the case of the Canadian treaties discussed above, the interests of the home countries' investors drive the negotiations, and to what extent commitments to sustainable development or at least to the protection of environmental, labor, and other public interest concerns are explicitly addressed in the treaties. Whether and in what form the treaties incorporate investor-state dispute settlement and the new standards for disclosure, public participation, and transparency will also be decisive in terms of future treaty practice. In terms of process, there will be much to analyze in terms of the drivers (both in terms of stakeholders and interests) of the negotiations, whether and how public consultations are held and meaningfully considered, and how the respective legislative processes consider any final agreements. Early indications show that while some of the 2013 developments are indicative of evolving trends, and indeed trends toward multilateralization in some respects, the investment treaty regime—both in content and in process—has not yet coalesced around a coherent path.