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Investment Treaties and Models in 2019

(Mis)Aligned with the SDGs?

Jesse Coleman, Lise J. Johnson, Ella Merrill, and Lisa E. Sachs[*]

A. Introduction

8.01 In 2019, at least 24 new investment treaties or treaties with investment provisions were signed, involving at least 92 states.[1] While the number of treaties is significantly lower than those of the last three years, which were 40, 35, and 41 in 2018, 2017, and 2016 respectively,[2] the number of states involved is similar, as at least 79 states were party to investment treaties signed in 2018. Of those signed in 2019, 21 were concluded bilaterally, and three were concluded among three parties or more. Twelve treaties entered into force in 2019.[3] The total number of investment treaties concluded by the end of 2019 was 3,284, of which 2,658 were in force at the time of writing.[4] Of

[*] Special thanks to Yusuf Kumtepe for the invaluable research assistance provided during the preparation of this chapter.

[1] This includes Taiwan and Hong Kong SAR, China as both being separate from the Republic of China. For a list of treaties and models covered by this chapter, see Table 8.1 at the end of this chapter.

[2] Jesse Coleman, Lise J. Johnson, Nathan Lobel, and Lise E. Sachs, 'International Investment Agreements 2018: A Review of Trends and New Approaches' in Lisa Sachs, Lise Johnson, and Jesse Coleman (eds), *Yearbook on International Investment Law & Policy 2018* (OUP 2019) 107 (hereafter Coleman and others, 'International Investment Agreements 2018').

[3] Of the 12 treaties entered into force in 2019, five are included in this chapter, despite being signed in previous years. These treaties are, Agreement Between the Government of the Republic of Korea and the Government of the Republic of Armenia for the Promotion and Reciprocal Protection of Investments (signed 19 October 2018) (hereafter Armenia–Korea BIT); Agreement Between the European Union and Japan for an Economic Partnership (signed 17 July 2018) (hereafter European Union–Japan EPA); Agreement Between Japan and the Republic of Armenia for the Liberalisation, Promotion and Protection of Investment (signed 14 February 2018) (hereafter Armenia–Japan BIT); Agreement on Investment among the Governments of the Hong Kong Special Administrative Region of the People's Republic of China and the Member States of the Association of Southeast Asian Nations (signed 12 November 2017) (hereafter ASEAN–Hong Kong SAR, China Investment Agreement); Acuerdo comercial entre a República Argentina y la República de Chile) (hereafter Argentina–Chile FTA).

[4] United Nations Conference on Trade and Development (UNCTAD), International Investment Agreements Navigator <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 31 July 2020.

the treaties signed in 2019, three treaties each were signed by Australia, Brazil, and the United Arab Emirates, and two were signed by Belarus, Hungary, Hong Kong SAR, China, Singapore, and the United Kingdom.[5] Five model bilateral investment treaties (BITs) were adopted or released in 2019: the Belgium–Luxembourg Model BIT,[6] the Nepal Draft Model BIT,[7] the Morocco Model BIT,[8] the Slovakia Model BIT,[9] and the Netherlands Model BIT.[10]

8.02 Some of these agreements are traditional 'investment protection' texts. They focus primarily on setting forth state obligations regarding treatment of foreign investors and investments, and provide for dispute settlement—most commonly investor-state dispute settlement (ISDS)—for breach. However, some texts covered in this chapter follow a 'lighter' approach, at least for the present. The CARIFORUM States–United Kingdom Economic Partnership Agreement (EPA), for example, includes a number of investment-related provisions, some of which are discussed further in this chapter, but the agreement does not impose the same types of substantive obligations concerning fair and equitable treatment, expropriation, or non-discrimination commonly found in investment treaties.[11] Similarly, the European Union–Japan EPA has various investment-related provisions, including in its 'Trade and Sustainable Development' chapter. However, no investment chapter for that agreement has yet been concluded; thus, as of writing, the future and contents of substantive investment protections covered by that agreement, and dispute settlement for breach of those provisions, remains uncertain.

8.03 Twenty-eight bilateral treaties were terminated either unilaterally or by consent in 2019, including 17 treaties between Poland and other European Union-Member States,[12]

[5] Two treaties were signed by Hungary and the United Kingdom each, in addition to the one signed by the European Union, of which they are party.

[6] Belgium–Luxembourg Economic Union Model Agreement on the Reciprocal Promotion and Protection of Investments (28 March 2019) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5854/download> accessed 6 August 2020 (hereafter Belgium–Luxembourg Model BIT).

[7] Nepal Draft Model Bilateral Investment Agreement (2019) <https://www.iareporter.com/articles/nepal-round-up-government-releases-draft-model-investment-treaty-revealing-inspiration-from-indian-counterpart-arbitrators-issues-provisional-measures-in-pending-bit-case/> accessed 6 August 2020 (hereafter Nepal Draft Model BIT).

[8] Accord entre le Royaume du Maroc et. . . pour la promotion et la protection réciproques des investissements (1 June 2019) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5895/download> accessed 6 August 2020 (hereafter Morocco Model BIT).

[9] Agreement between the Slovak Republic and . . . for the Promotion and Reciprocal Protection of Investments (2019) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5917/download> accessed 6 August 2020 (hereafter Slovakia Model BIT).

[10] Netherlands Model Investment Agreement (22 March 2019) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download> accessed 31 July 2019 (hereafter Netherlands Model BIT). While the Netherlands Model BIT was released in 2018 and discussed in the previous *Yearbook*, this chapter aims to assess this and the additional four model BITs released in 2019 with a new lens in order to shed light on additional aspects of the treaties. See Coleman and others, 'International Investment Agreements 2018' (n 2).

[11] Economic Partnership Agreement Between the CARIFORUM States, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (signed 22 March 2019) arts 65–74 (hereafter CARIFORUM States–United Kingdom EPA). There are non-discrimination obligations that cover cross-border investments in services (arts 65–74) but, in contrast to the approach taken in investment treaties, provisions only cover services sectors if and to the extent scheduled.

[12] Treaties unilaterally denounced by Poland: Agreement Between the Government of the Republic of Finland and the Government of the Republic of Poland on the Promotion and Protection of Investments (signed 25

seven Indian BITs,[13] two additional Dutch treaties,[14] as well as the Bolivia–Switzerland BIT and the Czech Republic–Latvia BIT.[15] The Argentina–Chile BIT was replaced with a Free Trade Agreement, signed in 2017 and entered into force in 2019.[16] The Italy–Macedonia BIT and the Italy–South Africa BIT expired and have not been replaced.[17]

November 1996); Agreement Between the Republic of Croatia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments (signed 21 February 1995); Acordo entre o Governo da República Portuguesa e o Governo da República da Polónia sobre a promoção e protecção mútuas de investimentos (signed 11 March 1993); Agreement Between the Hellenic Republic and the Republic of Poland for the Promotion and Reciprocal Protection of Investments (signed 14 October 1992); Agreement Between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments (signed 7 September 1992); Acuerdo para la proteccion y fomento reciproco de las inversiones entre el Reino de España y la Republica de Polonia (signed 30 July 1992); Agreement Between the Republic of Cyprus and the Republic of Poland for the Promotion and Reciprocal Protection of Investments (signed 4 June 1992); Agreement Between the Government of the Kingdom of Sweden and the Government of the Polish People's Republic on the Promotion and Reciprocal Protection of Investments (signed 4 January 1989); Décret no 90-301 du 30 mars 1990 portant publication de l'accord entre le Gouvernement de la République française et le Gouvernement de la République Populaire de Pologne sur l'encouragement et la protection réciproques des investissements (ensemble un échange de lettres interprétatif) (signed 14 February 1989); Federal Republic of Germany and Poland, Treaty Concerning the Encouragement and Reciprocal Protection of Investments (with Protocol) (signed 10 November 1989); Abkommen zwischen der Republik Österreich und der Volksrepublik Polen über die Förderung und den Schutz von Investitionen (signed 24 November 1988); Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Polish People's Republic for the Promotion and Reciprocal Protection of Investments (signed 8 December 1987). Treaties terminated by consent: Agreement Between the Government of Romania and the Government of the Republic of Poland on the Promotion and Reciprocal Protection of Investment (signed 23 June 1994); Dohoda mezi Českou republikou a Polskou republikou o podpore a vzájemné ochran investic (signed 16 July 1993); Agreement Between the Republic of Estonia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments (signed 6 May 1993); Agreement Between the Government of the Republic of Latvia and the Government of the Republic of Poland on the Reciprocal Promotion and Protection of Investments (signed 26 April 1993); Agreement Between the Government of the Kingdom of Denmark and the Government of the Republic of Poland for the Promotion and the Reciprocal Protection of Investments (signed 1 May 1990).

[13] Treaties unilaterally denounced by India: Agreement Between the Government of the Republic of India and the Government of the Republic of Macedonia for the Promotion and Reciprocal Protection of Investments (signed 17 March 2008); Agreement Between the Government of the Republic of India and the Government of the Republic of Iceland for the Promotion and Protection of Investments (signed 29 June 2007); Agreement Between the Government of the United Mexican States and the Government of the Republic of India on the Promotion and Protection of Investments (signed 21 May 2007); Agreement Between Bosnia and Herzegovina and the Republic of India for the Promotion and Protection of Investments (signed 12 September 2006); Agreement Between the Government of the Republic of India and Government of the Kingdom of Saudi Arabia Concerning the Encouragement and Reciprocal Protection of Investments (signed 25 January 2006); Agreement Between the Government of the Republic of India and the Government of the Republic of Finland on the Promotion and Protection of Investments (signed 7 November 2002); Agreement Between the Republic of Turkey and the Republic of India Concerning the Reciprocal Promotion and Protection of Investments (signed 17 September 1998).

[14] Two Dutch treaties were unilaterally denounced in addition to the treaty between Poland and the Netherlands: Agreement on the Encouragement and Reciprocal Protection of Investments Between the United Republic of Tanzania and the Kingdom of the Netherlands (signed 31 July 2001); Projet-accord sur l'encouragement et la protection reciproque des investissements entre le Burkina Faso et le Royaume des Pays-Bas (signed 10 November 2000).

[15] Accord entre la Confédération Suisse et la République de Bolivie concernant la promotion et la protection réciproques des investissements (signed 6 November 1987) (unilaterally denounced); Agreement Between the Government of the Czech Republic and the Government of the Republic of Latvia for the Promotion and Reciprocal Protection of Investments (signed 25 October 1994) (terminated by consent).

[16] Tratado entre la Republica Argentina y la Republica de Chile sobre promocion y proteccion reciproca de inversiones (signed 2 August 1991) (replaced by new treaty); Argentina–Chile FTA (n 3).

[17] Agreement Between the Government of the Republic of South Africa and the Government of the Italian Republic on the Promotion and Protection of Investments (signed 9 June 1997) (expired); Agreement Between the Macedonian Government and the Italian Government on the Mutual Promotion and Protection of Investments (signed 26 February 1997) (expired).

8.04 There were notable developments in treaty negotiations around the world, including across Europe, the Americas, Asia, Australia, and New Zealand. In 2018, the Court of Justice of the European Union ruled in *Slovak Republic v Achmea* that the arbitration clause in the Netherlands–Slovakia BIT[18] was incompatible with European Union law,[19] fuelling an ongoing debate among Member States and others as to whether arbitral tribunals have jurisdiction over the interpretation and application of intra-European Union investment treaties. Following the *Achmea* decision, 22 European Union Member States issued a declaration in January 2019 announcing efforts to terminate all intra-European Union BITs,[20] and 23 Member States subsequently agreed in October 2019 on a treaty that would terminate such agreements.[21]

8.05 The European Union and MERCOSUR reached a political agreement in June 2019 on an economic partnership and trade agreement.[22] This will be the largest trade agreement concluded by the European Union to date in terms of tariff reduction.[23] The agreement's chapter on 'Trade and Sustainable Development' contains provisions that reference or reaffirm commitments in other instruments regarding sustainable development, labour rights, and protection of the environment, including a commitment to implement the Paris Climate Agreement;[24] nevertheless, the agreement has been called into question by some in the environmental policy sphere, who are especially concerned over its potential role in exacerbating deforestation in Brazil's Amazon

[18] Agreement on the Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (signed 29 April 1991).

[19] Case C-284/16 *Slovak Republic v Achmea BV* [2018] ECLI:EU:C:2018:158; Clement Fourchard and Marc Krestin, 'The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!' (*Kluwer Arbitration Blog*, 7 March 2018) <http://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/> accessed 17 June 2020; Catherine Titi, 'Recent Developments in ISDS: Jurisdiction and Admissibility—Procedure and Conduct' in Lisa Sachs, Lise Johnson, and Jesse Coleman (eds), *Yearbook on International Investment Law & Policy 2018* (OUP 2019); See also ch 18 in this volume by Hannes Lenk on Developments in International Investment Law and Policy in the European Union.

[20] Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection (Brussels, 15 January 2019) <https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en> accessed 31 July 2020. The signatories pledged efforts to terminate their respective BITs as well as to advocate to tribunals the non-arbitrability of claims between European Union Member States, including ECT claims. Damien Charlotin and Luke Eric Peterson, 'Breaking: EU Member States Announce Scheme to Terminate All Intra-EU BITs and Warn Investor Community to Not Initiate New Claims – but Views Differ with Respect to Whether Achmea Decision Applies to Energy Charter Treaty' (*Investment Arbitration Reporter*, 17 January 2019) <www.iareporter.com/articles/breaking-eu-member-state-announce-scheme-to-terminate-all-intra-eu-bits-and-warn-investor-community-to-not-initiate-new-claims-but-views-differ-with-respect-to-whether-achmea-decision-applies-to-en/> accessed 2 September 2020.

[21] European Commission, 'EU Member States Agree on a Plurilateral Treaty to Terminate Bilateral Investment Treaties' (24 October 2019) <https://ec.europa.eu/info/publications/191024-bilateral-investment-treaties_en> accessed 14 January 2020. 23 EU Member States signed the agreement to terminate intra-EU BITs in May of 2020. Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union [2020] OJ L169/1. See also UNCTAD, *World Investment Report 2020: International Production Beyond the Pandemic* (UN 2020) UNCTAD/WIR/2020, 108.

[22] The draft text of the agreement is available on the European Commission's website. See European Commission, 'EU–Mercosur Trade Agreement: The Agreement in Principle and its Texts' (12 July 2019) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2048> accessed 31 July 2020.

[23] European Commission, 'EU and Mercosur Reach Agreement on Trade' (28 June 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3396> accessed 6 September 2020.

[24] Paris Agreement to the United Nations Framework Convention on Climate Change (signed 22 April 2016, entered into force 4 November 2016) TIAS No 16-1104.

rainforest as the market opens up further to agricultural exports.[25] The agreement has also been criticized by more than 300 civil society organizations, who fear it will contribute to further displacement of indigenous peoples from their lands and exacerbate other human rights and environmental rights abuses in Brazil.[26]

8.06 In negotiations over the Regional Comprehensive Economic Partnership (RCEP), an economic agreement among ten Association of Southeast Asian (ASEAN) Member States and six partners (Australia, China, India, Japan, New Zealand, and South Korea), all 16 parties agreed to exclude ISDS provisions, and to re-evaluate their position on ISDS in two years.[27] India has since opted out of the agreement entirely, citing domestic interests.[28]

8.07 The United States–Mexico–Canada Agreement (USMCA), signed in November 2018 to replace the North American Free Trade Agreement (NAFTA),[29] was amended by states parties through a new protocol dated 10 December 2019. After more than a year and a half of discussion and debate, including on concerns raised by civil society about the labour and environmental implications of the proposed text, the United States Congress passed the USMCA in 2019.[30] The treaty was ratified by the Senate on 16 January 2020, and signed into United States law by the President the same month.[31] All three parties had ratified the agreement by March 2020, when it was passed into law by Canada.[32] Some aspects of the USMCA and the 2019 amendments to it are covered in this chapter; its notable limitations to the ISDS clause are covered in Chapter 20.[33]

8.08 In past years, this *Yearbook* chapter has largely focused on trends in the substantive standards of new treaties, developments related to ISDS, and the inclusion of provisions covering investor responsibilities and obligations. Indeed, discussions on each of

[25] Natalie Sauer, 'EU–Mercosur Trade Deal will Drive Amazon Deforestation, Warns Ex-Minister' (*Climate Home News*, 1 July 2019) <www.climatechangenews.com/2019/07/01/eu-mercosur-trade-deal-will-drive-amazon-deforestation-warns-ex-minister/> accessed 2 September 2020.

[26] 'Open Letter: 340+ civil society organisations call on the EU to immediately halt trade negotiations with Brazil' (17 June 2019) <www.fern.org/fileadmin/uploads/fern/Documents/2019/Joint-letter-Brazil-EU-Mercosur.pdf> accessed 22 June 2020.

[27] The ISDS mechanism remains in effect in coexisting treaties between parties to RCEP. Regional Comprehensive Economic Partnership (in negotiation) <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3475/rcep> accessed 27 March 2020 (hereafter RCEP); Patricia Ranald, 'Suddenly the World's Biggest Trade Agreement Won't Allow Corporations to Sue Governments' (*The Conversation*, 16 September 2019) <https://theconversation.com/suddenly-the-worlds-biggest-trade-agreement-wont-allow-corporations-to-sue-governments-123582> accessed 2 September 2020.

[28] See eg Anilesh Mahajan, 'Why India Opted Out of the Mammoth RCEP' (*India Today*, 5 November 2019) <www.indiatoday.in/india-today-insight/story/why-india-opted-out-of-the-mammoth-rcep-1615813-2019-11-05> accessed 27 August 2020.

[29] Agreement Between the United States of America, the United Mexican States, and Canada (entered into force 1 July 2020) (hereafter USMCA); North American Free Trade Agreement (entered into force 1 January 1994) (hereafter NAFTA).

[30] For a discussion of some of the concerns raised and ways they were addressed, see ch 20 in this volume by Todd Tucker, and Section E of this chapter.

[31] United States–Mexico–Canada Agreement Implementation Act HR 5430 (became Public Law No 116-113 on 29 January 2020).

[32] An Act to Implement the Agreement Between Canada, the United States of America, and the United Mexican States (entered into force 13 March 2020) (Canada–United States–Mexico Agreement Implementation Act).

[33] See ch 20 in this volume by Todd Tucker.

these themes continue in bilateral and multilateral negotiations; however, the trends in new treaties largely follow the approaches taken in recently negotiated and concluded agreements. Recent public debate surrounding the role of investment in achieving sustainable development has driven governments and other stakeholders to consider, more broadly, whether the objectives of investment treaties—to promote the well-being and sustainable economic development of signatory parties—are being achieved.[34] Moreover, those aspects of investment treaties which have been alleged to undermine sustainable development by delegitimizing the rule of law, exacerbating inequality, and contributing to the chilling of measures taken to protect the environment and human rights are under greater scrutiny. A small number of more recent treaties have begun, albeit slowly, and with undetermined success, to address some of these issues, not only through general language, but through new or altered substantive provisions and procedural tools. This chapter focuses on the extent to which treaties signed or ratified in 2019, and models adopted or published during this period, align with the sustainable development objectives of treaty partners.

B. A New Approach to International Investment Governance

8.09 In 2015, all United Nations (UN) Member States adopted the 2030 Agenda for Sustainable Development, which includes 17 Sustainable Development Goals (SDGs) that establish a detailed trajectory for global cooperation in addressing a series of societal and environmental challenges, including economic inequality and climate change. If the SDGs are to be achieved, international investment—and the legal frameworks that govern it—will need to play a supportive role.[35] Indeed, Agenda 2030 specifically indicates that 'national development efforts need to be supported by an enabling international economic environment, including coherent and mutually supporting world trade, monetary and financial systems, and strengthened and enhanced global economic governance'.[36] Moreover, Agenda 2030 sets forth world leaders' 'commit[ment] to pursuing policy coherence' in the international economic environment, and to 'respect[ing] each country's policy

[34] See eg Lise Johnson, Brooke Skartvedt Güven, and Jesse Coleman, 'Investor–State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get us There?' (*Columbia Center on Sustainable Investment*, 11 December 2017) <http://ccsi.columbia.edu/2017/12/11/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there/> accessed 8 June 2020.

[35] See eg UNGA, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (25 September 2015) UN Doc A/RES/70/1, 25 (setting forth Goal 10 and its targets) (hereafter UNGA, 'The 2030 Agenda'); see also Lise Johnson, 'Space for Local Content Policies and Strategies: A Crucial Time to Revisit an Old Debate' (July 2016) <https://academiccommons.columbia.edu/doi/10.7916/D8V40VRC> accessed 6 September 2020; Committee for Development Policy, *Expanding Productive Capacity: Lessons Learned from Graduating Least Developed Countries* (UN 2017) Policy Note <www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/2017-cdp-policy.pdf> accessed 6 September 2020 (discussing the contributions FDI can make to the SDGs).

[36] UNGA, 'The 2030 Agenda' (n 35) 28, para 63.

space and leadership to implement policies for poverty eradication and sustainable development'.[37]

8.10 International investment treaties—instruments at the heart of the United Nations Commission on International Trade Law's (UNCITRAL's) ISDS mandate[38]—play a critical role in governing international investment. In July 2018 the UN Secretary General reported that '[r]eform of international investment agreements (IIAs) remains an important area for improving the sustainable development impact of the international financial system. While foreign direct investment (FDI) remains a more stable form of cross-border financial flow, IIAs often result in unintended consequences, such as constraining regulatory space or countries becoming vulnerable to large financial penalties from arbitration panels set up to settle investor–state disputes, impeding their ability to implement policies in support of the Sustainable Development Goals.'[39]

8.11 This year, rather than looking at reforms to traditional treaties, the authors have reframed and established a new baseline for assessing treaty developments. Building on a framework developed by the Columbia Center on Sustainable Investment, this chapter takes as a starting point certain internationally recognized development objectives as shared goals of treaty partners.[40] Treaty developments in 2019 are assessed below according to a three-pillar framework designed to shed light on the following critical aspects of an investment treaty:

- Whether and how the treaty attracts and shapes sustainable investment and limits harmful investment;
- Whether and how the treaty lends itself to fostering, rather than constraining, the state's ability to advance sustainable development, and;
- Whether and how the treaty addresses issues of transnational governance that cannot be addressed by any one state on its own.

[37] ibid.

[38] In 2017, UNCITRAL Working Group III on ISDS reform was entrusted by the UNCITRAL Commission with a mandate to explore reform of the dispute settlement mechanism provided for in most investment treaties. For details of the Working Group's work and relevant meeting documents, see UNCITRAL, Working Group III: Investor-State Dispute Settlement Reform <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 31 July 2020.

[39] UNGA, 'International Financial System and Development: Report of the Secretary General' (31 July 2018) UN Doc A/73/280 para 60; 'Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the right to development; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights; the Special Rapporteur on the rights of indigenous peoples; the Independent Expert on the promotion of a democratic and equitable international order; and the Special Rapporteur on the human rights to safe drinking water and sanitation' (8 March 2019) OL ZMB/2019 <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24430> accessed 16 June 2020.

[40] The approach used in this chapter is adopted from a framework originally developed by the Columbia Center on Sustainable Investment in Lise Johnson, Lisa Sachs, and Nathan Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (2019) 58 Columbia Journal of Transnational Law (hereafter Johnson, Sachs, and Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals').

C. Pillar One: SDG-Advancing Investment

8.12 The intention of international investment agreements, often stated in the preamble, is to promote investment for the purposes of advancing economic prosperity in the respective signatory states. The Financing for Development Action Agenda identifies the need for increased investment to achieve the SDGs, particularly in infrastructure, low carbon and climate resilient development, and innovation and clean technologies, among other sectors.[41] To date, however, foreign direct investment is not being directed into the locations, sectors, or activities needed to support sustainable development outcomes,[42] and many investments create or exacerbate social and environmental harms. International investment agreements form an important part of the governance framework, providing a unique opportunity to collaborate with treaty partners to proactively shape investment flows between the treaty parties, both catalyzing SDG-aligned international investment and withholding support from investment that undermines those goals. This pillar examines how they are performing those strategic functions.

1. Provisions That Work to Actively Mobilize SDG-Aligned Investment

8.13 A number of factors contribute to investors' decisions on whether and where to invest, including opportunities available in the host market (or specific restrictions on foreign investment), availability of labour and skills, quality of infrastructure, institutional qualities, home state measures, and information asymmetries, among others.[43] States, independently and in collaboration with regional blocs and other countries, pursue tools and policies to influence the factors they can control, including through a range of economic, political, and regulatory measures.[44]

8.14 Despite the range of the diversity of factors that influence investors' decisions and the range of known barriers, international investment agreements have traditionally focused on a narrow set of commitments among treaty parties intended to promote investment flows: specifically, commitments to liberalize certain sectors for foreign

[41] United Nations Department on Economic and Social Affairs, 'Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)' (2015) paras 7, 13, 14, 17, and 60 <www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf> accessed 16 June 2020.

[42] United Nations, 'World Economic Situation and Prospects 2018: Update as of Mid-2018' (2018) 5, 20 <www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP_2018_Mid-year_Update.pdf> accessed 7 September 2020. See also United Nations, 'World Economic Situation and Prospects 2017' (2017) vii, 79 (highlighting similar issues) <www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/2017wesp_full_en.pdf> accessed 7 September 2020.

[43] See eg John H. Dunning, *Explaining International Production* (Unwin Hyman 1988); John H Dunning and Rajneesh Narula (eds), *Foreign Direct Investment and Governments: Catalysts for Economic Restructuring* (Routledge 1997).

[44] Investment incentives, for instance, may be offered in an attempt to compensate for actual or perceived weaknesses as investment destinations. See generally, Ana Teresa Tavares-Lehmann and others (eds), *Rethinking Investment Incentives: Trends and Policy Options* (Columbia UP 2016).

investment, and to provide additional protections and privileges to foreign investors to reduce the risks and costs associated with foreign investment. While proponents of traditional investment treaties contend that these investor protections and privileges are successful at catalyzing international investment flows,[45] the evidence is far from conclusive in showing that treaties have been successful at promoting investment flows, never mind in the particular sectors and activities that would most directly contribute to sustainable development.[46]

8.15 While investment agreements have the potential to include provisions and measures that more strategically promote beneficial investments, including in specific sectors or geographies and addressing sector or state-specific barriers, most of the treaties signed or ratified in 2019 largely continue traditional treaty practice of relying on general commitments to promote investment in the territory of the other treaty parties[47] and to respective commitments of liberalization and investor protection. The Belgium–Luxembourg Model treaty introduces a novel article dedicated to the contribution of investment to sustainable development, but the commitments remain vague: the parties 'affirm that investments should contribute to supporting the promotion of sustainable development objectives. Accordingly, each Contracting Party shall strive to promote investment flows and practices that contribute to enhancing sustainable development goals'. [48] The Model further suggests the parties agree 'to dialogue and consult with each other with regard to investment-related sustainable development issues of common interest', and 'are encouraged to conduct a dialogue on these issues with civil society organisations established in their territories'.[49]

8.16 While BITs have most consistently focused on protection and, to a lesser extent, liberalization provisions, integrated economic partnership agreements (EPAs) with investment chapters or provisions, and regional investment agreements, have more often included more specific commitments to shape anticipated investment flows to align with sustainable development objectives.[50] For instance, the ASEAN–Hong Kong SAR, China agreement, signed in 2017 but entered into force in 2019, includes elaborated provisions on how the parties 'shall cooperate in promoting and increasing awareness of the region as an investment area,' including through organizing investment

[45] See generally discussions in Karl Sauvant and Lisa Sachs (eds), *The Effect of Treaties on Foreign Direct Investment* (OUP 2009).

[46] See eg Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (CUP 2014) 105–109 (hereafter Bonnitcha, *Substantive Protection under Investment Treaties*); Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009).

[47] See Agreement Between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments (signed 5 April 2019) art 3 ('Each Party shall encourage and promote investments in its territory by investors of the other Party') (hereafter Australia–Uruguay BIT).

[48] Belgium–Luxembourg Model BIT (n 6) art 14.

[49] ibid.

[50] Interestingly, in contrast to studies on the effects of investment treaties on investment flows, studies have shown that bilateral and regional trade agreements do have a positive impact on FDI. Max Büge, 'Do Preferential Trade Agreements Increase Their Members' Foreign Direct Investment?' (2014) German Development Institute/Deutsches Institut für Entwicklungspolitik Discussion Paper 37/2014 <www.die-gdi.de/uploads/media/DP_37.2014.pdf> accessed 7 September 2020.

promotion events, sharing information on investment opportunities, and conducting 'information exchanges on other issues of mutual concern relating to investment promotion and facilitation'.[51] The parties also commit to 'establishing one-stop investment centres in the respective host Parties to provide assistance and advisory services' to investors.[52] Notably, the ASEAN–Hong Kong SAR, China Agreement also includes a specific provision to provide 'special and differential treatment' to the newer ASEAN members, including '(a) technical assistance to strengthen their capacity in relation to investment policies and promotion . . .; and (b) access to information on the investment policies of other Parties . . .' while '(d) recognising that commitments by each newer ASEAN Member State may be made in accordance with its stage of development'.[53]

8.17 In addition to extensive provisions on liberalization and overall enhancing the attractiveness and competitiveness of the CARIFORUM region, the CARIFORUM States–United Kingdom Economic Partnership Agreement commits treaty parties to discuss 'promotion of investment in CARIFORUM agricultural, food and fisheries sectors, including small-scale activities,' discussion of specific policy changes that would benefit those sectors as well as promote regional integration in those sectors, and an 'exchange of views on new technologies as well as policies and measures related to quality'.[54] Furthermore, while this agreement draws largely from the CARIFORUM–EC EPA,[55] one notable development is the new body established in Article 8A, The 'CARIFORUM–UK Technical Sub-Committee on Development Cooperation' which reviews and supports the implementation of the development and cooperation dimensions of the agreement.[56]

8.18 The European Union and Japan, 'recogni[zing] the importance of enhancing the contribution of trade and investment to the goal of sustainable development in its economic, social and environmental dimensions', agree in their EPA, signed in 2018 but entered into force in 2019, to promote and facilitate investment 'in environmental goods and services . . . [and] in goods and services of particular relevance to climate change mitigation, such as those related to sustainable renewable energy and energy efficient goods and services . . .'.[57] A distinct article on cooperation suggests the parties 'may' also cooperate on labelling schemes and to promote corporate social responsibility, 'notably through the exchange of information and best practices, including on adherence, implementation, follow-up, and dissemination of internationally agreed guidelines and principles'.[58] The implementation of these commitments and provisions are overseen by a Committee on Trade and Sustainable Development, established by the treaty.[59] The

[51] ASEAN–Hong Kong SAR, China Investment Agreement (n 3) art 15.
[52] ibid art 16.
[53] ibid art 18.
[54] CARIFORUM States–United Kingdom EPA (n 11) art 41.
[55] Economic Partnership Agreement between the CARIFORUM States and the European Community (signed 15 October 2008).
[56] CARIFORUM States–United Kingdom EPA (n 11) art 8A.
[57] European Union–Japan EPA (n 3) art 16.5(b) and (c).
[58] ibid art 16.12.
[59] ibid art 22.3.

treaty between the European Union and Singapore, signed in 2018, similarly prioritizes investments in environmental and climate-friendly goods and services, and seeks to promote the voluntary adoption of socially responsible practices, including through the exchange of information.[60]

8.19 Japan's EPA with the European Union also includes a chapter specifically dedicated to support small and medium-sized enterprises (SMEs) in each treaty party's respective state.[61] The chapter requires the treaty parties to maintain a website dedicated to the Agreement, including summaries of relevant provisions and other information that would be useful for SMEs to benefit from the Agreement.

8.20 Brazil's Cooperation and Facilitation Investment Agreements (CFIAs) depart from traditional investment treaties in their focus on reducing barriers to investment and establishing mechanisms to support investors in host countries.[62] The three agreements Brazil signed in 2019 (with United Arab Emirates, Ecuador, and Morocco) each follow Brazil's model agreement by establishing ombudsmen or 'Focal Points' responsible for providing support to investors from the other contracting party.[63] The Focal Point's duties include providing 'timely and useful information on regulatory issues on general investment or on special projects', fielding complaints from investors, and preventing potential conflicts.

8.21 The potential impact of these treaty provisions seems limited, including because of the limited scope of the provisions and the lack of specific mechanisms for implementation or enforcement. Nevertheless, they give an indication of the ways in which countries can designate specific sectors, activities, standards, and approaches designed to more strategically catalyse coveted investment flows between treaty parties.

2. Provisions That Work to Avoid Subsidizing Harmful Investments

8.22 In addition to provisions that encourage investment in particular sectors or geographies that align with states' development objectives, states can actively discourage and remove treaty protections and benefits from investments that negatively impact

[60] Free Trade Agreement Between the European Union and the Republic of Singapore (signed 19 October 2018) art 12.11 (hereafter EU–Singapore FTA).

[61] European Union–Japan EPA (n 3) c 20.

[62] Brazil's Cooperation and Facilitation Investment Agreements were drafted following extensive consultations with investors. Felipe Hees, Pedro Mendonça Cavalcante, and Pedro Paranhos, 'The Cooperation and Facilitation Investment Agreement (CFIA) in the Context of the Discussions on the Reform of the ISDS System' (2018) South Centre Investment Policy Brief No 11 <www.southcentre.int/wp-content/uploads/2018/04/IPB11_The-Cooperation-and-Facilitation-Investment-Agreement-CFIA-in-the-context-of-the-discussions-on-the-reform-of-the-ISDS-system_EN.pdf> accessed 7 September 2020.

[63] Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil and the United Arab Emirates (signed 15 March 2019) art 19 (hereafter Brazil–United Arab Emirates CFIA); Acordo de cooperação e racilitação de investimentos entre a República Federativa do Brasil e a República do Equador (signed 25 September 2019) art 19 (hereafter Brazil–Ecuador CFIA); Acordo de cooperação e facilitação em matéria de investimentos entre a República Federativa do Brasil e o Reino de Marrocos (signed 19 April 2019) art 15 (hereafter Brazil–Morocco CFIA).

the host, or home, states. Traditional treaty benefits offer sweeping substantive protections and procedural privileges that extend well beyond protections provided by corresponding areas of domestic and international law.[64] These are powerful regulatory incentives that could not only be tailored to support investments that meet certain criteria,[65] but also withheld from investments in particular sectors or that cause particular harms. Because the legal, reputational, and policy risks of supporting harmful investments are great, home state governments also have good reason to ensure their treaty provisions are not inadvertently privileging harm-causing investments.

8.23 Investments in sectors with clearly negative impacts such as those related to fossil fuel extraction, as well as investments resulting from illegal or corrupt deals, or that create or exacerbate human rights (including labour) violations, are all examples of harmful investments that could be discouraged or barred from treaty protections and privileges; privileges could also be conditioned on investments meeting certain criteria or compliance with domestic law and standards of responsible business conduct (RBC).[66] A more limited restriction might limit or condition access to ISDS, even if the substantive treaty protections and privileges remain.

8.24 The framework for specifying which investments qualify for treaty benefits, and which do not, has some precedent. All treaties place certain parameters around the types of investments that are protected and excluded from treaty coverage. In part, this is done through a treaty's definition of a covered 'investor' or 'investment,' which, for instance, may require that to qualify as a covered investment, an investment must contribute to the economic development of the host state. 2019 treaties contain some examples of this practice. The India–Kyrgyzstan BIT is one, requiring covered 'investments' to

[64] Lise Johnson, Lisa Sachs, and Jeffrey Sachs, 'Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law' (2015) Columbia Center on Sustainable Investment Policy Paper <http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf> accessed 7 September 2020; Lise Johnson, 'A Fundamental Shift in Power: Permitting International Investors to Convert their Economic Expectations into Rights' (2018) 65 UCLA Law Review Discourse 106 (hereafter Johnson, 'A Fundamental Shift in Power: Permitting International Investors to Convert their Economic Expectations into Rights).

[65] Government-sponsored political risk and export credit insurance schemes, for instance, often incorporate relatively robust *ex ante* screens and *ex post* exclusions designed to help ensure that beneficiaries are contributing to the development of their host countries and do not have deleterious social, environmental, and human rights impacts. See eg Multilateral Investment Guarantee Agency (MIGA), 'Operational Regulations' (2002) 31 <https://perma.cc/3ATP-C5RL> accessed 16 June 2020; Overseas Private Investment Corporation (OPIC), 'Environmental and Social Policy Statement' (2017) Appendix B, para 3 <https://perma.cc/T5YW-VBX5> accessed 16 June 2020; Deutsche Investitions -und Entwicklungsgesellschaft (DEG), 'Our Impact: We Measure Development Outcome' (2019) <https://perma.cc/ 5Q2S-2HKE> accessed 16 June 2020. Similar efforts to identify and avoid or mitigate harms from FDI are also taking place in the context of initiatives for screening inward FDI. See, eg, Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L79I/1.

[66] On business responsibilities and investment treaties, see Lise Johnson, 'IIAs and Investor (Mis) Conduct' (*CCSI Blog*, 14 January 2020) <http://ccsi.columbia.edu/2020/01/21/iias-and-investor-mis-conduct/> accessed 31 July 2020; David Gaukrodger, 'Business Responsibilities and Investment Treaties' (15 January 2020) Consultation Paper by the OECD Secretariat <www.oecd.org/investment/public-consultation-on-business-responsibilities-and-investment-treaties.htm> accessed 31 July 2020.

have 'a significance for the development of the Party in whose territory the investment is made'.[67] Some treaties include in the characteristics of the investment a requirement that investments be made or operated in accordance with the applicable laws of the host country.[68] In such cases, the benefits of the treaty are only afforded to investments that meet those criteria.

8.25 Most treaties now also include denial of benefits provisions; however, where these provisions are included, they generally only allow states to deny the benefits of the treaty to investors who seek to abuse treaty privileges for the ability to bring a claim against the host state, including by bringing a claim through a shell company in another state party.[69] The scope and evolution of these provisions in recent treaties is explored in our chapters in recent *Yearbooks*, and the 2019 treaties largely adhere to the same common language and approaches as in these past years.

8.26 Of greater relevance has been the growing number, type, and scope of provisions in recent treaties designed to encourage responsible investor conduct, including compliance with host (and sometimes home) state laws, anti-corruption provisions, and provisions on corporate social responsibility (CSR). While it has become increasingly common for recent treaties to include some provisions related to 'investor responsibilities' or (rarely) 'investor obligations', particularly with respect to compliance with host state laws but also to adhere to internationally recognized CSR standards, guidelines and principles, the scope and especially the consequences of these provisions has varied widely, and few treaties condition treaty benefits or access to ISDS on adhering to these responsibilities.[70]

[67] Bilateral Investment Treaty Between the Government of the Kyrgyz Republic and the Government of the Republic of India (signed 14 June 2019) art 1.4 (hereafter India–Kyrgyzstan BIT). Contribution to the host state's development is similarly included in the definition of an investment in the Argentina–Chile FTA (n 3) art 8.1, and the Nepal Draft Model BIT (n 7) art 1.4. For further discussion on how traditional treaties attempt to shape investments through investor and investment definitions, see Coleman and others, 'International Investment Agreements 2018' (n 2); Jesse Coleman and others, 'International Investment Agreements, 2017: A Review of Trends and New Approaches' in Lisa Sachs, Jesse Coleman, and Lise Johnson (eds), *Yearbook on International Investment Law & Policy 2017* (OUP 2019) 103–109 (hereafter Coleman and others, 'International Investment Agreements 2017').

[68] See, for example, India–Kyrgyzstan BIT (n 67) art 1.4, which requires that investments be 'operated' in accordance with laws of the host government. This language is discussed with regards to the Belarus–India BIT in Coleman and others, 'International Investment Agreements 2018' (n 2) 133. See also Rahim Moloo and Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' (2011) 34 Fordham International Law Journal 1473.

[69] See India–Kyrgyzstan BIT (n 67) art 35(ii) (allowing a Party to deny the benefits of the treaty to 'an investment or investor that has been established or restructured with the primary purpose of gaining access to the dispute resolution mechanism provided in this Treaty'). For more on denial of benefits provisions, see Coleman and others, 'International Investment Agreements 2017' (n 67) 124–27 (particularly with regards to human rights obligations); see also, Jesse Coleman and others, 'International Investment Agreements, 2015–2016: A Review of Trends and New Approaches' in Lisa Sachs and Lise Johnson (eds), *Yearbook on International Investment Law & Policy 2015–2016* (OUP 2018) 90–96 (hereafter Coleman and others, 'International Investment Agreements 2015–2016').

[70] For further discussion on investor obligations and investor conduct, see Coleman and others, 'International Investment Agreements 2018' (n 2) 132–140.

8.27 Many 2019 treaties include provisions that either suggest that investors take best efforts to incorporate such standards or require states to encourage their investors to do so.[71] For instance, Australia's agreements with Indonesia and Hong Kong SAR, China affirm 'the importance of encouraging enterprises operating within [the treaty parties' territories or subject to their jurisdiction] to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party'.[72] The CARIFORUM States–United Kingdom EPA indicates that signatory states 'shall cooperate and take . . . such measures as may be necessary, *inter alia*, through domestic legislation, to ensure that' investors do not engage in bribery or corruption, that investors 'act in accordance with core labour standards' and that they do not 'manage or operate their investments in a manner that circumvents international environmental or labour obligations' to which the state parties have agreed.[73] No treaty signed or ratified in 2019, however, conditions treaty protection or benefits on adherence to those standards or commitments. Among the texts reviewed for this chapter, the closest is a provision in the Model Morocco BIT, which indicates that if an investor (or its investment) has breached any of its obligations under the treaty (including obligations under domestic and international laws), during either the establishment or the operation of an investment, it may not bring an ISDS claim or initiate any other form of dispute settlement process provided for under the Model.[74]

8.28 The only sectoral exclusion from ISDS on the basis of its qualities and potential impact in 2019 treaties is in the Australia–Hong Kong SAR, China treaty, which provides that '[n]o claim may be brought . . . in respect of a Party's control measures of tobacco products'.[75] Surprisingly, despite both parties having faced high-profile and costly cases

[71] Brazil–United Arab Emirates CFIA (n 63) art 15; Brazil–Morocco CFIA (n 63) art 13; Brazil–Ecuador CFIA (n 63) art 14; Investment Protection Agreement Between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part (signed 30 June 2019) pmbl (hereafter European Union–Vietnam IPA); Argentina–Chile FTA (n 3) art 8.17; European Union–Japan EPA (n 3) art 16.5; Belgium–Luxembourg Model BIT (n 6) art 7; Slovakia Model BIT (n 9) pmbl; Morocco Model BIT (n 8) arts 20.3 and 20.4.

[72] Australia–Indonesia CEPA (n 69) art 14.17; Investment Agreement Between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China (signed 26 March 2019) art 16 (hereafter Australia–Hong Kong SAR, China Investment Agreement). See also the India–Kyrgyzstan BIT (n 67) art 12 ('Investors and their enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principles that have been endorsed or are supported by the parties, [which] may address issues such as labour, the environment, human rights, community relations and anti-corruption').

[73] CARIFORUM States–United Kingdom EPA (n 11) art 72. See also Morocco Model BIT (n 8) art 18.7 ('Les investisseurs devront gérer et exploiter leurs investissements en respectant les obligations internationales en matière d'environnement, de travail et de droits de l'homme auxquelles les deux Parties sont parties').

[74] Morocco Model BIT (n 8) art 28.3. The Model appears to contemplate that an investor or its investment may nevertheless seek to bring such a claim, and notes that the host state respondent may rely on this article during the jurisdictional phase of a dispute as an objection to such a claim. Curiously, art 20.5 also indicates that investors' non-compliance with these standards should be considered by tribunals when awarding compensation to investors for successful claims. The Model also provides in art 28.4 for host state counterclaims against investor claimants in ISDS.

[75] Australia–Hong Kong SAR, China Investment Agreement (n 72) s C, n 14. A similar exclusion is included in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018) art 29.5,

related to tobacco control measures (which precipitated the inclusion of such exclusions in a smattering of agreements), the 2019 Australia–Uruguay treaty does not include the same exclusion.

8.29 While some of the 2019 treaties, as noted above, specifically recognize the need to encourage investment in the energy transition, none of the treaties deny treaty protections or privileges to fossil fuel investments for climate-related reasons. In the European Union–Singapore FTA, the parties recognize a goal of progressively reducing subsidies for fossil fuels, and 'in line with global efforts to reduce greenhouse gas emissions', to promoting investments in renewable energies, but do not exclude fossil fuel companies from the privileges and protections of the treaty and its two-tier dispute settlement mechanism.[76]

D. Pillar Two: SDG-Advancing Governance

8.30 While certain sectors, geographies, and other characteristics of investments may be generally more or less desirable (and treaties can and should be tailored to attract the former and discourage the latter), the impacts of investments are shaped to a large extent by the domestic laws, policies, and institutions that regulate investments and investors, and that monitor and enforce compliance. The role and importance of domestic policy making and institutions is not only critical to shaping investment and its impacts but is itself a foundational element of sustainable development. Accordingly, SDG 16 includes targets on law and policy making for sustainable development, effective and accountable institutions, and strengthening the rule of law.

8.31 International law has the potential both to strengthen the capacity and legitimacy of domestic systems and institutions (for instance, through commitments of resources and/or recourse to stakeholders in the event of lack of due process in local courts), as well as to undermine domestic governance by circumventing or distorting domestic processes and institutions. Investment treaties have a unique opportunity to commit states to strengthening their own domestic governance structures for the benefit of all stakeholders, as well as supporting less-resourced states to do the same. This section reviews some of the ways in which 2019 treaties affect domestic governance, including domestic institutions, policy-making processes, and the fulfilment of international commitments related to sustainable development and human rights.

as well as in the Free Trade Agreement Between Australia and Singapore (signed 17 February 2003) art 22, and the Agreement Between the Government of the Republic of Kazakhstan and the Government of the Republic of Singapore on the Promotion and Mutual Protection of Investments (signed 21 November 2018) art 11.2.

[76] EU–Singapore FTA (n 60).

1. Provisions That Advance or Distort Domestic Governance and Rights

8.32 One of the purported objectives of investment treaties is to advance good governance at the domestic level in the jurisdictions of respective treaty parties,[77] with investment treaties often being cited as tools for promoting the 'rule of law'.[78] However, available evidence indicates that existing treaties and ISDS have yet to result in discernable governance improvements in domestic jurisdictions.[79] On the contrary, evidence suggests that investor protections, and in particular their enforcement through ISDS, may undermine the rule of law through, for instance, impacts on issues of equality under the law.[80] A closer examination of specific cases illustrates how the current stock of treaties, and enforcement of investor protections through ISDS in particular, has served to distort governance in favour of a particular set of corporate actors and interests, most of whom are already privileged in their access to legal and policy-making processes, while often undermining the rights of local stakeholders affected by the investments that these treaty and enforcement structures protect.[81]

8.33 Treaties concluded or ratified in 2019 generally reflect a continuation of trends identified in previous *Yearbook* chapters, namely: (i) inclusion of treaty protections (both procedural and substantive) that enable circumvention of, rather than deference to, domestic institutions; (ii) substantive standards that provide foreign firms with greater standards of protection than those available under domestic law, and therefore create systems of unequal protection under the law; and (iii) inclusion of dispute settlement provisions that provide access to dispute settlement for a privileged group of economic actors, while excluding other stakeholders. The sub-sections that follow highlight both continuation of recent trends and observed exceptions to this path dependence on treaty drafting practice.

[77] For a discussion of this issue, see eg Stephan W Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 155, 177–181.

[78] For a discussion of whether this objective is being met by investment treaties and, in particular ISDS, see Lise Johnson, Brooke Skartvedt Güven, and Jesse Coleman, 'Investor-State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get Us There?' (*CCSI Blog*, 11 December 2017) <http://ccsi.columbia.edu/2017/12/11/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there/> accessed 31 July 2020.

[79] See Joachim Pohl, 'Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence' (2018) OECD Working Papers on International Investment 2018/01, 55–69 <https://doi.org/10.1787/e5f85c3d-en> accessed 31 July 2020; Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart Publishing 2018) (hereafter Sattorova, *The Impact of Investment Treaty Law on Host States*).

[80] See, eg, Sattorova, *The Impact of Investment Treaty Law on Host States* (n 79) 58–61. See also Bonnitcha, *Substantive Protection under Investment Treaties* (n 46) 136 (discussing studies on this issue).

[81] Examples are illustrated in the following papers and presentations: Lisa Sachs and Lise Johnson, 'Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities' (April 2019) CCSI Working Paper 2019 <http://ccsi.columbia.edu/2019/04/16/working-paper-investment-treaties-investor-state-dispute-settlement-and-inequality/> accessed 31 July 2020; Lisa Sachs, Lise Johnson, and Ella Merrill, 'Environmental Injustice: How treaties undermine human rights related to the environment' La Revue des juristes de Sciences Po No 18 (Janvier 2020) <http://ccsi.columbia.edu/2020/02/11/investor-state-dispute-settlement-and-environmental-justice/> accessed 31 July 2020. For further examples, see CCSI, Access to Justice <http://ccsi.columbia.edu/work/projects/access-to-justice/> accessed 31 July 2020.

(a) Deference to domestic institutions

8.34 Under international human rights law, which—like international investment law—allows beneficiaries to seek supra-national review of government conduct, recourse to supra-national review is intended to be a last resort, with the emphasis and objective of the review mechanism to strengthen the capacity and accountability of domestic judicial systems and institutions to ensure the protection and realization of human rights. The general requirement to exhaust local remedies prior to seeking remedy before regional human rights tribunals and UN treaty bodies is intended to provide domestic judicial systems and administrative entities with both an opportunity and incentive to address human rights violations.[82] As the authors have previously argued, this intentional design of supra-national mechanisms to strengthen the capacity and accountability of domestic institutions seems to apply at least as forcefully to violations of international economic protections as it does to violations of international human rights.[83] Moreover, the intra-national inequality concerns created and exacerbated by investment treaties, which provide access to remedy only for a privileged group of claimants, do not arise in the international human rights context.[84] While investment treaties could indeed be designed both to respect the primacy and authority of domestic institutions, as well as to strengthen their capabilities to resolve disputes for all stakeholders, investment treaties traditionally do the opposite: the vast majority of treaties allow covered foreign investors privileged access to circumvent domestic judicial and administrative processes without any preliminary showing that the domestic institutions are unwilling to, or incapable of, handling the issue. Investors can simply elect to have their disputes heard outside of the domestic procedural and substantive doctrines to which other stakeholders in the country are bound.

8.35 One limited, and yet still rare, approach in recent treaties has been to at least require a certain level of 'exhaustion' of domestic remedies before an investor can bring an ISDS claim. Such exhaustion requirements remain uncommon among the 2019 treaties reviewed in this chapter. Morocco's Model BIT provides a notable exception. Claimants must first comply with consultation and negotiation requirements provided for under the Model prior to submitting the dispute to the local courts of the host state.[85] If a final

[82] Lise Johnson and others, 'Alternatives to Investor-State Dispute Settlement' (April 2019) CCSI Working Paper 2019, 12 <http://ccsi.columbia.edu/2019/04/15/alternatives-to-investor-state-dispute-settlement/> accessed 25 July 2020.

[83] Johnson, Sachs, and Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (n 40). These considerations are argued to apply 'at least as forcefully' to international economic protections because of the clear and important differences between human rights and economic protections: while the latter are specific protections that apply only to a specific set of private actors (individuals and corporations with specific economic interests), the former are enshrined in treaties that are universally applicable to all individuals (and in some cases groups of individuals).

[84] ibid. On international investment law and exacerbation of intra-national inequality, see Lisa Sachs and Lise Johnson, 'Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities' in José Antonio Ocampo (ed), *International Rules and Inequality: Implications for Global Economic Governance* (Columbia UP 2019).

[85] Morocco Model BIT (n 8) art 31.1 (requiring exhaustion of procedures outlined in art 29). Regarding exhaustion requirements included in other recently published model treaties, see also India's Model BIT, which requires exhaustion of local remedies for at least five years from the date of acquiring knowledge of the disputed measure prior to submitting a dispute to investor-state arbitration. Model Text for the Indian Bilateral Investment Treaty

judgment is not obtained from the local courts within 30 months of notification of the initiation of proceedings, the claimant may then submit the dispute to arbitration.[86] The dispute may not, however, be submitted to arbitration if the local courts have rendered a final judgment.[87] Curiously, the Model also provides in Article 32.3 that an arbitral tribunal may not be established under the agreement if a final judgment has not been rendered by the local courts of the host state.[88] This may compete with Article 31.2, which provides that an investor may proceed to arbitration if a final judgment is not rendered by the local courts within 30 months of notification of the initiation of local proceedings. As discussed further in Section D(1)(c) below, the Model also includes requirements regarding pursuit of dispute prevention procedures prior to submission of claims to ISDS.

8.36 2019 also saw two notable examples of exhaustion requirements in concluded treaties. These are in the US–Mexico Annex to the USMCA, which requires certain claimants to first initiate domestic court or administrative proceedings prior to filing an ISDS claim,[89] and the India–Kyrgyzstan BIT, which, as in the 2015 Indian Model BIT, requires recourse to domestic remedies for a period of five years before the investor may commence ISDS proceedings.[90]

8.37 Some treaties concluded or ratified in 2019 include fork-in-the-road clauses or other provisions seeking to limit the ability of investor claimants seeking to bring parallel claims before both domestic bodies and ISDS tribunals.[91] When included, these clauses may cause investors to divert their claims from domestic institutions, preventing those institutions from addressing and remedying grievances prior to, or instead of, those grievances proceeding to ISDS.

8.38 A number of agreements continue a previously identified trend of including state–state filters that can also be used to involve domestic institutions in resolution of investment

(28 December 2015) art 15.2 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download> accessed 21 August 2020 (hereafter India Model BIT).

[86] Morocco Model BIT (n 8) art 31.2.
[87] ibid art 31.3.
[88] ibid art 32.3.
[89] USMCA (n 29) annex 14-D (Mexico–United States Investment Disputes) art 14.D.5(1)(a). Specific sectors (notably, oil, gas, power generation, transport services, telecoms, and public infrastructure) are not required to first initiate domestic proceedings prior to filing an ISDS claim. See ibid annex 14-E (Mexico–United States Investment Disputes Related to Covered Government Contracts).
[90] India–Kyrgyzstan BIT (n 67) art 15; India Model BIT (n 85) art 15.2.
[91] See eg European Union–Vietnam IPA (n 71) art 3.34, annex 12 (Concurring Proceedings); Agreement Between the Government of Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments (signed 16 June 2019) art 8(6) (hereafter Hong Kong SAR, China–United Arab Emirates BIT); Agreement Between the Government of Hungary and the Government of the Republic of Cabo Verde for the Promotion and Reciprocal Protection of Investments (signed 28 March 2019) art 2(8) (hereafter Cabo Verde–Hungary); Agreement Between the Government of the Republic of Belarus and the Government of Hungary for the Promotion and Reciprocal Protection of Investments (signed 14 January 2019) art 9(4) (hereafter Belarus–Hungary BIT); Armenia–Korea BIT (n 3) art 11(4).

disputes. Several filters concern tax-related measures.[92] The Armenia–Singapore Agreement, for example, provides that, where an investor seeks to invoke the expropriation provision in the BIT with respect to a taxation measure, that investor must first refer 'the issue of whether that taxation measure involves an expropriation' to the states parties' respective ministries of finance or their authorized representatives.[93] If the authorities do not agree to consider the issue, or fail to agree on whether it constitutes an expropriation, within six months of referral, the investor may submit the matter to arbitration.[94] If the authorities agree within this timeframe that the measure does not constitute an expropriation, the investor may not invoke the expropriation provision as a basis for a claim regarding the relevant taxation measure.[95] The Australia–Hong Kong SAR, China BIT also includes a tax-related state–state filter.[96]

8.39 State–state filter mechanisms concerning tax measures are increasingly common in recently concluded treaties; when used more broadly, they can facilitate greater treaty party control over ongoing administration of treaties, including over the nature of claims that advance to international dispute settlement. The Brazil–United Arab Emirates and Brazil–Ecuador CFIAs, for example, provide that dispute prevention procedures before the respective Joint Committees established under these agreements must be exhausted prior to proceeding to state–state arbitration.[97] These mechanisms seek to support treaty party control over the interpretation, application, and use of the CFIA by requiring disputes to be filtered through committees comprised of government representatives of both the host and home states.[98]

(b) Substantive standards of protection

8.40 The substantive standards of protection afforded to investors and investments by treaty parties will shape the extent to which treaties support, or frustrate, home and host state efforts to develop, implement, and enforce laws and policies that are in the public interest.[99] Aligning substantive protections with the sustainable development objectives of treaty parties requires careful consideration of, amongst other issues: (i) which protections are included and excluded, and for whom; (ii) how the standards are drafted; (iii) whether there are exceptions to narrow the scope of state obligations; and (iv) the extent to which dispute settlement mechanisms leave states and state conduct or

[92] Similar provisions exist in older generation treaties. See eg, The Treaty Between the Government of the United States of America and the Government of the Republic of Georgia Concerning the Encouragement and Reciprocal Protection of Investment, with Annex (signed 7 March 1994, entered into force 10 August 1999) art 13.

[93] Agreement on Trade in Services and Investment Between the Republic of Armenia and the Republic of Singapore (signed 1 October 2019) art 6.6(3) (hereafter Armenia–Singapore Agreement on Trade in Services and Investment).

[94] ibid.

[95] ibid art 6.6(3).

[96] Australia–Hong Kong SAR, China Investment Agreement (n 72) art 13(5).

[97] Brazil–United Arab Emirates CFIA (n 63) art 25(1); Brazil–Ecuador CFIA (n 63) art 25(1).

[98] Under these CFIAs, the Joint Committee consists of representatives of both states parties to the agreement. Representatives are nominated by their respective governments. See Brazil–United Arab Emirates CFIA (n 63) art 18; Brazil–Ecuador CFIA (n 63) art 18.

[99] Johnson, Sachs, and Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (n 40) 105–106.

measures vulnerable to challenge.[100] 2019 drafting practice illustrates that states continue to experiment with a variety of approaches with respect to substantive protections, though a majority of treaties and models continue to include broad protections for foreign firms with enforcement in most cases through ISDS. Continuation of traditional approaches leaves considerable space for distortion and undermining of domestic governance and stakeholders' rights.

8.41 With respect to fair and equitable treatment (FET) and similar provisions, 2019 agreements tend to follow previous years' patterns. A majority of treaties and models continue to link FET to customary international law, with some of these including a set of narrowing clarifications.[101] The ASEAN–Hong Kong SAR, China Investment Agreement, for example, clarifies that the FET standard provided for in the treaty does not require treatment in addition to or beyond that required by customary international law.[102] It specifies that the FET obligation requires states parties 'not to deny justice in any legal or administrative proceedings in accordance with the principle of due process of law'.[103] It does not recognize any other element of customary international law embodied in the FET obligation.[104]

8.42 Two investment protection treaties, both of which do not provide for ISDS, exclude FET: the CFIAs concluded by Brazil with Ecuador and Morocco respectively exclude FET entirely.[105] FET is also explicitly excluded from the Brazil–United Arab Emirates CFIA, though other arguably similar standards are explicitly included.[106] The EPAs reviewed in this chapter, which include some investment-related provisions but generally exclude most traditional substantive standards of investment protection found in investment treaties and investment chapters, also exclude FET and ISDS.

8.43 Some agreements continue to include FET obligations that reflect broadly worded older models. The article on 'Promotion and Protection of Investments' in the Korea–Uzbekistan BIT, for example, requires 'fair and equitable treatment' and neither links the FET obligation to customary international law nor to a list of the types of conduct that breach, or do not breach, the obligation.[107] That article also adds to the FET obligation, including language barring the parties from taking 'any unreasonable . . . measures

[100] ibid.

[101] Examples of treaties concluded or ratified in 2019 and models published in 2019 that include narrowing clarifications include: Hong Kong SAR, China–United Arab Emirates BIT (n 91) art 3(4); Armenia–Singapore Agreement on Trade in Services and Investment (n 93) art 3(4); Armenia–Korea BIT (n 3) art 2(3); Morocco Model BIT (n 8) art 6.1; and Nepal Draft Model BIT (n 7) art 3.1.

[102] ASEAN–Hong Kong SAR, China Investment Agreement (n 3) art 5(1)(c).

[103] ibid art 5(1)(a).

[104] ibid art 5(1). Another common approach is to use an 'autonomous FET' standard which does not link the FET obligation to customary international law, and then elaborate on its components, as the EU-Vietnam IPA does, for example.

[105] Brazil–Ecuador CFIA (n 63); Brazil–Morocco CFIA (n 63).

[106] FET is excluded in Brazil–United Arab Emirates CFIA (n 63) art 4(3), though similar standards are included in art 4(2).

[107] Agreement Between the Government of the Republic of Uzbekistan and the Government of the Republic of Korea for the Reciprocal Promotion and Protection of Investments (signed 19 April 2019) art 2(2) (hereafter Korea–Uzbekistan BIT).

against the management, maintenance, use, enjoyment, and disposal of investments by the investors of the other Contracting Party'.[108]

8.44 With respect to national treatment, treaties concluded or ratified in 2019 continued to clarify that such national treatment provisions allow for differing treatment where there are legitimate justifications for a difference in treatment.[109] Nevertheless, these approaches raise questions about what constitutes a legitimate justification. Determinations of 'legitimacy' may raise policy space concerns analogous to those more commonly noted as being implicated by other provisions (including FET and indirect expropriation). Some agreements carve out certain sectors and/or areas of policy from the scope of the national treatment obligation.[110] At least one treaty omits this standard.[111] The ASEAN–Hong Kong SAR, China agreement provides in its General Exception that nothing precludes treaty parties from adopting measures inconsistent with the national treatment obligation contained in the treaty, 'provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes'.[112] It also appears that the measure would need to comply with the overarching requirement under the General Exception provision for measures to not be applied in an manner that constitutes arbitrary or unjustifiable discrimination 'where like conditions prevail'.[113] Again, this requirement of non-arbitrariness may provide tribunals grounds to scrutinize public interest measures irrespective of whether these measures create nationality-based discrimination.

8.45 Several treaties continued a previously identified trend by clarifying that most-favoured nation (MFN) provisions may not be used to import procedural and/or substantive protections from other treaties.[114] Two regional agreements provide for special and differential treatment for either new member states of regional blocs,[115] or least-developed

[108] ibid art 2(4).

[109] See eg Australia–Indonesia CEPA (n 69) art 14, n 9 ('For greater certainty, whether treatment is accorded in 'like circumstances' under Article 14.4 or Article 14.5 depends on the totality of the circumstances, including the relevant economic or business sector or sectors concerned and whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives or on the basis of nationality. Where treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives, that treatment is not inconsistent with Article 14.4 or Article 14.5.'); Australia–Hong Kong SAR, China Investment Agreement (n 72) art 4, n 3; USMCA (n 29) art 14.4(4).

[110] See eg Australia–Hong Kong SAR, China Investment Agreement (n 72) annexes AU-1 (regarding 'favourable treatment of any Indigenous person or organisation'), AU-2 (regarding certain types of Australian land), AU-3 (regarding acquisition of agricultural land of a certain monetary value), AU-4 (regarding privatization of public services and government-owned entities or assets), AU-5 (regarding social services for a public purpose); European Union–Vietnam IPA (n 71) art 2.1(2) (carves out a number of sub-sectors from the scope of the agreement's non-discrimination provisions); European Union–Vietnam IPA (n 71) annex 2 (carves out measures adopted or maintained by Vietnam concerning specific sub-sectors, including natural resource exploration and forestry, from the scope of the national treatment obligation, provided that such measures are not inconsistent with specific commitments in annex 8-B of the IPA).

[111] Australia–Uruguay BIT (n 47).

[112] ASEAN–Hong Kong SAR, China Investment Agreement (n 3) art 9(1)(d).

[113] ibid art 9(1). See also art 13 regarding non-confirming measures.

[114] See eg Cabo Verde–Hungary BIT (n 91) art 4(3) (procedural and substantive); Belarus–Hungary BIT (n 91) arts 4(3), 4(6) (procedural and substantive); Australia–Indonesia CEPA (n 69) art 14.21(1)(a) (procedural and substantive); Australia–Uruguay BIT (n 47) art 14(8) (procedural and substantive).

[115] ASEAN–Hong Kong SAR, China Investment Agreement (n 3) art 18.

economies party to the agreement.[116] At least one treaty reviewed herein excludes the MFN provision.[117]

8.46 Two CFIAs concluded by Brazil with its treaty partners provide exceptions to general trends concerning indirect expropriation. The Brazil–United Arab Emirates CFIA provides only for direct expropriation, and explicitly excludes indirect expropriation from the scope of the CFIA.[118] Similarly, the Brazil–Ecuador CFIA provides only for direct expropriation.[119] By contrast, the Brazil–Morocco CFIA's expropriation provision is broad and could be read to refer to both direct and indirect expropriation.[120] In a notable shift from past practice, the USMCA, although still containing protections against direct and indirect expropriations as part of the states' substantive obligations, significantly narrows investors' abilities to bring claims for breach of those obligations through ISDS. Only a subset of investors—Mexican investors in the US and US investors in Mexico that have government contracts in oil, gas, power generation, and several other sectors covered by Annex 14-E—can continue to invoke ISDS for claims of indirect expropriation. All other covered US investors in Mexico and Mexican investors in the US can only bring claims for direct expropriation, and only after first exhausting local remedies. No ISDS claims for direct or indirect expropriation (or other substantive obligations) can be brought by US investors against Canada, or Canadian investors against the US.[121] With the exception of EPAs reviewed herein,[122] most of the other agreements reviewed in this chapter provide ISDS access for both direct and indirect expropriation claims.

8.47 Continuing an increasingly common trend identified in past *Yearbook* chapters, several 2019 texts restrict the ability of states to use performance requirements,[123] thereby severely constraining the ability of states to use these requirements as a mechanism for capturing the benefits of covered investments. The Australia–Indonesia CEPA, for example, prohibits imposition or enforcement of a requirement to transfer technologies, production processes, or other proprietary knowledge to a person in the host state's territory.[124] The European Union–Japan EPA and the Hong Kong SAR, China–United Arab Emirates BIT also prohibit technology and certain knowledge transfers.[125] These

[116] CARIFORUM States–United Kingdom EPA (n 11) art 2(1)(d).
[117] India–Kyrgyzstan BIT (n 67).
[118] Brazil–United Arab Emirates CFIA (n 63) art 7(5).
[119] Brazil–Ecuador CFIA (n 63) art 7(5).
[120] Brazil–Morocco CFIA (n 63) art 6(1).
[121] USMCA (n 29) annex 14-D (Mexico–United States Investment Disputes) art 14.D.3. However, annex 14-E (Mexico–United States Investment Disputes Related to Covered Government Contracts) provides that claimants operating in specific sectors (notably, oil, gas, power generation, transport services, telecoms, and public infrastructure) may submit claims to arbitration under annex 14-D for 'any obligation' under c 14. Annex 14-E does not exclude indirect expropriation from the scope of such claims.
[122] CARIFORUM States–United Kingdom EPA (n 11); European Union–Japan EPA (n 3).
[123] See eg Armenia–Singapore Agreement on Trade in Services and Investment (n 93) art 3.8; Armenia–Japan BIT (n 3) art 6; Korea–Uzbekistan BIT (n 107) art 2(4).
[124] Australia–Indonesia CEPA (n 69) art 14.6(1)(f).
[125] European Union–Japan EPA (n 3) art 8.11; Hong Kong SAR, China–United Arab Emirates BIT (n 91) art 3(3)(f).

prohibitions are far-reaching, going beyond the prohibitions included in the WTO agreements.

8.48 Some 2019 treaties include (narrow) exceptions to, or carve-outs from, their (broad) prohibitions on the use of performance requirements. The Australia–Indonesia CEPA, for example, seeks to exclude its prohibition on performance requirements from ISDS.[126] It also clarifies that the prohibition will not prevent a treaty party from imposing or enforcing certain location and local content requirements, provided that these requirements are consistent with the prohibition on technology transfer.[127] A number of treaties, including the Armenia–Singapore Agreement[128] and the European Union–Japan EPA,[129] provide marginally greater flexibility for some performance requirements if they are accompanied by 'advantages' or incentives given to investors. This approach, while leaving states some latitude to adopt certain performance requirements such as technology transfer measures, raises the cost of such policies for governments.

8.49 The only agreement that appears to explicitly encourage technology transfers is the CARIFORUM States–United Kingdom EPA. Pursuant to Article 142 of that agreement, treaty parties have agreed to exchange information on policies and practices concerning technology transfer, including regarding 'the conditions necessary to create an adequate enabling environment for technology transfer in the host countries'.[130] The United Kingdom has also agreed to 'facilitate and promote the use of incentives' in its territory to encourage transfer of technology to institutions and enterprises in CARIFORUM States.[131] The agreement contains no general prohibition on performances requirements. Its explicit encouragement of technology transfers illustrates how such provisions could be used to facilitate, rather than restrict, treaty partners' ability to maximize the development benefits of inward investment.[132]

8.50 Investment treaties and models have also increasingly included provisions that seek to expand the scope of intellectual property protections beyond those granted under applicable domestic law.[133] Two agreements concluded in 2019 go against the grain: the India–Kyrgyzstan BIT and Brazil–United Arab Emirates CFIA both specify that the agreements do not apply to intellectual property rights.[134] The CARIFORUM

[126] Australia–Indonesia CEPA (n 69) art 14.6.
[127] ibid art 14.6(3).
[128] Armenia–Singapore Agreement on Trade in Services and Investment (n 93) art 3.8.
[129] European Union–Japan EPA (n 3) art 8.11(3).
[130] CARIFORUM States–United Kingdom EPA (n 11) art 142(1).
[131] ibid art 142(3).
[132] For a discussion of the connection between local content strategies (including technology transfer), investment treaties, and sustainable development, see Lise Johnson, 'Space for Local Content Policies and Strategies: A Crucial Time to Revisit an Old Debate' (2016) GIZ <http://ccsi.columbia.edu/2016/10/03/space-for-local-content-policies-and-strategies/> accessed 30 June 2020.
[133] See Johnson, Sachs, and Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (n 40) 104. For a discussion of developments in 2019 regarding the nexus of intellectual property and international investment law, see ch 12 in this volume by Rochelle Cooper Dreyfuss.
[134] India–Kyrgyzstan BIT (n 67) art 2.4(iii); Brazil–United Arab Emirates CFIA (n 63) art 2(5).

States–United Kingdom EPA also, once again, goes against the approach adopted in the vast majority of BITs and FTAs with investment chapters by, among other things: encouraging the parties to pursue levels of intellectual property protection 'appropriate to their levels of development';[135] enshrining within the text an acknowledgment by treaty parties that enforcement of intellectual property rights should consider the development needs of CARIFORUM States and provide a balance between rights and obligations of right holders and users, and allow treaty parties to protect health and nutrition;[136] providing that nothing in the agreement must be construed to impair the capacity of treaty parties to promote access to medicines;[137] and providing that treaty parties shall take measures to prevent or control licensing practices or conditions that undermine international technology transfer 'and that constitute an abuse of intellectual property rights by the right holders or an abuse of obvious information asymmetries in the negotiation of licenses'.[138]

8.51 Most texts reviewed in this chapter omit explicit umbrella clauses. There are, however, several noteworthy exceptions that seek to bind host states to specific commitments or representations made by government officials in various capacities, with those capacities at times loosely defined. The European Union–Vietnam Investment Protection Agreement, for example, provides that the tribunal, in its application of the treaty's FET provision,

> may take into account whether a Party made a specific representation to an investor of the other Party to induce a covered investment that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain that investment, but that the Party subsequently frustrated.[139]

8.52 This provision implies that frustration of 'expectations' may provide the basis for a breach of the treaty itself, effectively enabling investor claimants to estop host governments from frustrating those expectations (even when those expectations do not necessarily constitute valid contractual or other vested rights).[140] The 'expectations' that arise from these representations may not establish property rights that are valid and enforceable at the national level; and yet, an investor claimant may rely on them to seek compensation for a breach of treaty provisions at the international level, thereby arguably converting economic expectations into contractual or property rights.[141] The Agreement also includes a narrow form of the umbrella clause, specifying that treaty parties must not breach written agreements through exercise of their governmental

[135] CARIFORUM States–United Kingdom EPA (n 11) art 131.
[136] ibid art 139(2).
[137] ibid.
[138] ibid art 142(2).
[139] European Union–Vietnam IPA (n 71) art 2.5(4).
[140] See Johnson, 'A Fundamental Shift in Power: Permitting International Investors to Convert their Economic Expectations into Rights' (n 64).
[141] ibid.

authority.[142] The same provision clarifies the nature of 'written agreements' covered by the clause.[143]

8.53 The Belgium–Luxembourg Model BIT includes a similar provision regarding specific representations.[144] The Model also includes an umbrella clause.[145] Similarly, the Netherlands Model BIT, despite being widely pointed to as a progressive model, also includes language regarding specific representations and a narrow form of the umbrella clause.[146]

(c) Dispute settlement

8.54 At least 14 out of 24 treaties concluded or ratified in 2019 provide for ISDS, continuing traditional treaty drafting practice identified in past *Yearbook* chapters. These constitute a majority of the agreements reviewed in this chapter. In addition, of the five model agreements reviewed herein, all provide for ISDS, although at least one includes requirements that seek to limit access to the mechanism. Maintaining a practice that is ingrained in both 'old' and 'new' generation investment treaties, these agreements and models do not provide meaningful access to the ISDS mechanism for other stakeholders affected, either directly or indirectly, by investments underlying ISDS disputes.[147]

8.55 Agreements that depart from this entrenched approach with respect to ISDS as the chosen method for dispute settlement include Brazil's CFIAs, which continue to exclude ISDS entirely, instead favouring dispute prevention, coupled with state–state dispute settlement mechanisms as a last resort. The CFIAs concluded with Ecuador, Morocco, and the United Arab Emirates all mirror the approach provided for in Brazil's Model CFIA,[148] namely establishment of: (i) National Focal Points, or 'ombuds' mechanisms, established to support investors from the home state, including with assessing investor complaints;[149] and (ii) Joint Committees consisting of government representatives of the host and home state, charged with *inter alia* the responsibility to address alleged breaches of the CFIA brought before the committee by a Party to the

[142] European Union–Vietnam IPA (n 71) art 2.5(5).
[143] ibid art 2.5(6).
[144] Belgium–Luxembourg Model BIT (n 6) art 4(4).
[145] ibid art 12(1); art 12(2) clarifies the meaning of 'contractual written commitment' under art 12(1).
[146] Netherlands Model BIT (n 10) arts 9(4), 9(5) respectively.
[147] For further discussion of this issue, see eg Columbia Center on Sustainable Investment, International Institute for Environment and Development, and International Institute for Sustainable Development, 'Third-Party Rights in Investor-State Dispute Settlement: Options for Reform' (15 July 2019) Submission to UNCITRAL Working Group III on ISDS Reform <http://ccsi.columbia.edu/files/2019/07/uncitral-submission-third-party-participation-en.pdf> accessed 24 July 2020; Nicolás M Perrone, 'The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime' (2019) 113 AJIL Unbound 16; Lorenzo Cotula and Nicolás M Perrone, 'Reforming Investor-State Dispute Settlement: What About Third Party Rights?' (*International Institute for Environment and Development*, February 2019) <https://pubs.iied.org/17638IIED/> accessed 24 July 2020.
[148] Brazil Model Cooperation and Facilitation Investment Agreement (2015) arts 18 (Focal Points or 'Ombudsmen'), 17 (Joint Committee for the Administration of the Agreement) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download> accessed 8 September 2020.
[149] Brazil–Ecuador CFIA (n 63) art 19; Brazil–Morocco CFIA (n 63) art 15; Brazil–United Arab Emirates CFIA (n 63) art 19.

agreement.[150] Where matters cannot be resolved through these 'dispute prevention' mechanisms, disputes under these CFIAs may proceed to state–state arbitration under certain circumstances and conditions.[151] The EPA concluded between the CARIFORUM States and the UK (which, as noted in the introduction to this chapter, includes investment-related provisions but does not impose the same types of substantive obligations commonly found in investment treaties) also limits dispute resolution to state–state arbitration.[152]

8.56 Morocco's Model BIT provides for ISDS;[153] however, the Model also includes dispute prevention mechanisms that are akin to those provided for in Brazil's CFIAs. As noted in Section D(1)(a) local remedies must be exhausted prior to an investor submitting a claim to ISDS. In addition, the Model also requires that investors pursue the dispute prevention procedures provided for in Article 29 prior to submitting a claim to arbitration.[154] These procedures include: (i) amicable resolution of the dispute (through consultations and negotiations between relevant parties) facilitated by National Focal Points (or ombuds mechanisms); and (ii) meetings convened by a Joint Committee, established under the agreement, to make joint recommendations regarding the measure that is at issue and the Committee's proposed solution(s).[155]

8.57 The European Union–Vietnam Investment Protection Agreement retains ISDS through inclusion of its two-tier dispute settlement mechanism.[156] Alternative mechanisms of resolving disputes (such as through ombuds mechanisms) are not provided for under the treaty, though the agreement does require evidence of an attempt to engage in consultations prior to a claim being submitted to ISDS by the investor claimant.[157] A Committee is established under the agreement to, amongst other things: examine difficulties concerning, and consider possible improvements of, the dispute settlement mechanism established under the treaty; adopt binding interpretations of the agreement; and adopt decisions to appoint members to the dispute settlement mechanisms' first instance and appeal tribunal.[158]

8.58 With respect to inclusion of other stakeholders affected by, or concerned with, investment, the Brazil–United Arab Emirates CFIA provides that the Joint Committee 'may invite other interested stakeholders to appear before the Joint Committee and present their views' on measures being challenged.[159] This option is also available to the Joint Committee established under the Brazil–Morocco CFIA.[160] The Brazil–Ecuador CFIA

[150] Brazil–Ecuador CFIA (n 63) art 18; Brazil–Morocco CFIA (n 63) art 14; Brazil–United Arab Emirates CFIA (n 63) art 18.
[151] Brazil–Ecuador CFIA (n 63) arts 24, 25; Brazil–Morocco CFIA (n 63) arts 19, 20; Brazil–United Arab Emirates CFIA (n 63) arts 24, 25.
[152] CARIFORUM States–United Kingdom EPA (n 11) art 206.
[153] Morocco Model BIT (n 8) arts 32, 33.
[154] ibid art 32.2.
[155] ibid art 29.
[156] European Union–Vietnam IPA (n 71) c 3, sub-s 3.
[157] ibid art 3.3.
[158] ibid art 4.1.
[159] Brazil–United Arab Emirates CFIA (n 63) art 24.4.
[160] Brazil–Morocco CFIA (n 63) art 19.4.

adopts a different approach: it provides that, whenever possible, and with the objective of finding a solution, representatives of both (i) affected investors and (ii) governmental and non-governmental entities involved in the measure or situation under consultation will participate in the meetings between the treaty parties provided for under the Joint Committee mechanism.[161] Morocco's Model BIT also includes this provision, requiring that (where feasible) representatives of such entities will be invited to participate in Joint Committee meetings.[162]

8.59 All three CFIAs concluded by Brazil provide that the records of the meetings held by the Joint Committees established under these agreements will remain confidential.[163] The CFIAs concluded with Morocco and the United Arab Emirates specify that the report of the Joint Committee (identifying the submitting Party; describing the challenged measures; and identifying the findings of the Committee) shall not be considered confidential under the agreement, while the CFIA concluded with Ecuador specifies that the measures adopted by the Committee shall also remain confidential.[164] These confidentiality requirements appear to run counter to the objective of facilitating participation in the Joint Committee meetings by relevant entities.

8.60 The CARIFORUM States–United Kingdom EPA does not appear to establish a process for multi-stakeholder dialogue on investment-related matters or resolution of investment-related disputes.[165] Going beyond participation in dispute settlement to consider engagement by investors with affected rights-holders at the project level, the EPA include a provision requiring states parties to cooperate and take measures necessary, including through domestic legislation, to ensure that '[i]nvestors establish and maintain, where appropriate, local community liaison processes, especially in projects involving extensive natural resource-based activities, in so far as they do not nullify or impair the benefits accruing to the other Party under the terms of a specific commitment'.[166] The obligation is loosely defined and limited by the 'where appropriate' qualifier. Moreover, the second part of this provision qualifies the overall obligation by weighing it against 'the benefits accruing' to the *home* state 'under the terms of a specific commitment'. While this provision is noteworthy, its objective and meaning are unclear.

[161] Brazil–Ecuador CFIA (n 63) art 24.3(c).
[162] Morocco Model BIT (n 8) art 29.6.
[163] Brazil–Ecuador CFIA (n 63) art 24.4; Brazil–Morocco CFIA (n 63) art 19.5; Brazil–United Arab Emirates CFIA (n 63) art 24.5.
[164] ibid.
[165] The CARIFORUM States–United Kingdom EPA provides for written *amicus* submissions: 'Interested parties are authorised to submit *amicus curiae* briefs to the arbitration panel in accordance with the Rules of Procedure'. CARIFORUM States–United Kingdom EPA (n 11) art 217. According to art 216, the Rules of Procedure applicable in state–state disputes under the agreement are set out in annex VIII, which provides that state–state arbitral panels have the discretion to accept written submissions from natural or legal interested persons where those submissions are 'directly relevant to the issues under consideration' by the panel. Other conditions with which submissions must comply are provided for in art 11 of annex VIII.
[166] ibid art 72(d).

8.61 Beyond the choice of dispute settlement or dispute prevention mechanisms included in investment treaties or facilitation agreements, and the degree to which they facilitate (or in most cases do not facilitate) participation by other stakeholders in the determination or resolution of investment disputes, other provisions included in treaties can also provide investors with explicit or implicit leverage to shape proposed measures or actions to be adopted by host governments. In the domestic context, notice-and-comment rules typically facilitate public participation in rule-making by opening up this process to input by stakeholders and the public more generally. However, when combined with substantive provisions enshrined in investment treaties (such as FET) and with ISDS as the enforcement mechanism, both express and implied notice-and-comment obligations may increase the distortionary and/or chilling effect of investment treaties.[167] Public engagement on policy-making is critical, but without rules and processes to support engagement by all stakeholders rather than primarily private sector actors, it risks outsized representation of already powerful interests.[168] Most agreements reviewed in this chapter do not provide explicit support for developing the capacity of other stakeholders to engage in investment policy-making processes.[169]

8.62 Several treaties concluded or ratified in 2019 include both express and implied notice-and-comment provisions. The BIT signed between Armenia and Japan in 2018 and entered into force in 2019, for example, requires both the parties to 'endeavour to provide' the public with 'a reasonable opportunity' to comment on 'regulations of general application that affect any matter covered by this Agreement' prior to adoption, amendment, or repeal of those regulations.[170] The provisions usefully refer to public comments, making clear that it is not only covered foreign investors who should be able to comment; however, only investors have access to ISDS under this BIT and are able to use it, or the threat of claims, to challenge alleged breaches. The Armenia–Singapore Agreement similarly requires advance publication and provision to states parties and 'interested persons' of a 'reasonably opportunity to comment' on 'measures of general application that it proposes to adopt'.[171] The India–Kyrgyzstan BIT also includes a similar provision.[172] All three of these treaties provide for ISDS,[173] and two of the three also include FET provisions.[174] Where these three elements are present in the same

[167] Johnson, Sachs, and Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (n 40) 87–91. See also Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7 Transnational Environmental Law 229; Julia Brown, 'International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?' (2013) 3 Western Journal of Legal Studies 1; Gus Van Harten and Dayna Nadine Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada' (2016) 7 Journal of International Dispute Settlement 92.

[168] Johnson, Sachs, and Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (n 40) 91.

[169] On the impact of notice-and-comment rules in investment treaties on power dynamics, see ibid 91, 92.

[170] Armenia–Japan BIT (n 3) art 9.

[171] Armenia–Singapore Agreement on Trade in Services and Investment (n 93) art 4.2.

[172] India–Kyrgyzstan BIT (n 67) art 10.2.

[173] Armenia–Japan BIT (n 3) art 24; Armenia–Singapore Agreement on Trade in Services and Investment (n 93) art 3.15; India–Kyrgyzstan BIT (n 67) c IV.

[174] Armenia–Japan BIT (n 3) art 4; Armenia–Singapore Agreement on Trade in Services and Investment (n 93) art 3.4. While the India–Kyrgyzstan BIT (n 67) does not include an FET provision (or an MFN clause), an

agreement (ie, the transparency or notice-and-comment rules, an FET obligation, and ISDS), an investor claimant may seek to rely on the notice-and-comment obligation to support a claim for breach of the FET standard, even when the notice-and-comment provision is not directly enforceable through dispute settlement provisions.[175]

8.63 Morocco's Model BIT contains a transparency provision requiring publication of laws, regulations, and administrative decisions of general application concerning matters covered by agreements concluded on the basis of the model so as to enable interested persons to acquaint themselves with the measures.[176] The Netherlands Model BIT includes a similar requirement,[177] and the Belgium–Luxembourg Model BIT also includes a general obligation requiring prospective states parties to publish laws and regulations of general application, in addition to international agreements that may affect investors of the other contracting party.[178] While these provisions do not include an obligation to provide an opportunity to investors or other 'interested persons' to comment, they may, particularly in combination with other treaty provisions, nevertheless enable undue influence of, and the prioritized interests of, investors in regulatory rule-making, and may increase states' exposure to other substantive claims on the basis of procedural shortcomings.

8.64 The EPA concluded by the European Union and Japan also includes, in its chapter on 'Good Regulatory Practices and Regulatory Cooperation', a requirement to publish 'draft regulatory measures or consultation documents' and to provide 'on a non-discriminatory basis, reasonable opportunities for any person to provide comments'.[179] This agreement does not currently impose the types of substantive and procedural investment protection obligations found in other investment treaties; a European Union–Japan Investment Protection Agreement was under negotiation at the time of writing, and the contents of future obligations remain uncertain. However, even without inclusion of ISDS in the existing agreement, inclusion of notice-and-comment provisions within these agreements risks magnifying disparities in the voice and influence of industry actors in law-setting processes relative to public interest organizations and individuals who generally are less resourced than their private sector counterparts in participating in these law-making processes. No 2019 treaties include mechanisms to increase the inclusion and capacity of non-industry stakeholders to participate in these regulatory processes, which could help to ameliorate the imbalances created or exacerbated by these provisions.

investor may seek to rely on the notice-and-comment obligation to support a breach of other obligations under art 3 (Treatment of Investors).

[175] Johnson, Sachs, and Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (n 40) 87, 88. The authors note that such cases interpreting FET obligations to include such implied notice-and-comment requirements are controversial and have been successfully challenged. See ibid 88, n 101.

[176] Morocco Model BIT (n 8) art 16.

[177] Netherlands Model BIT (n 10) art 4.

[178] Belgium–Luxembourg Model BIT (n 6) art 22.

[179] European Union–Japan EPA (n 3) art 18.7(1).

8.65 CFIAs concluded by Brazil with Ecuador, Morocco, and the United Arab Emirates enable participation both by investors and by representatives of other stakeholders, including non-governmental organizations, in their Joint Committee meetings,[180] a novel feature of these CFIAs (and Morocco's Model BIT) not evident in most, or indeed all, other agreements reviewed in this chapter. A more meaningful balancing of power dynamics would entail requiring (rather than permitting) Joint Committees to provide for participation of stakeholders in these meetings, establishing a procedure for enabling interested stakeholders to self-identify, outlining effective means through which Joint Committees could facilitate the meaningful participation of relevant stakeholders, and requiring the Joint Committee to empower investment-affected rights-holders to assert their own rights and interests at these meetings.

8.66 The chilling effect of ISDS is exacerbated by the potential for sizable awards for monetary damages.[181] Yet, few treaties and models reviewed in this chapter that contain ISDS have advanced treaty practice regarding the discretion that arbitral tribunals retain regarding the awards they make. A majority of the agreements reviewed continued to provide that restitution can be awarded instead of monetary compensation, and that punitive damages are prohibited under the agreement.[182] These agreements do not address situations where an award made against a respondent state may be financially onerous, considering in particular situations of economic crisis or, more generally, the size of the award as compared to a respondent state's economy.

8.67 Two CFIAs reviewed herein include noteworthy provisions, particularly given that these agreements exclude ISDS in favour of resort to local courts, incorporate dispute prevention mechanisms, and confine state–state arbitration to a last resort. With respect to state–state arbitration, the Brazil–Ecuador CFIA provides that, when the amount of compensation awarded by a state–state arbitral tribunal is particularly onerous, the parties may agree on the mechanism and terms through which payment of the agreed amount is made.[183] The Brazil–Morocco CFIA includes essentially includes a filter requiring the treaty parties to agree before the state–state arbitral tribunal can award compensation.[184]

[180] Brazil–Ecuador CFIA (n 63) art 24; Brazil–Morocco CFIA (n 63) art 19; Brazil–United Arab Emirates CFIA (n 63) art 24.

[181] In cases won by investors, the average award is over US$ 120 million excluding outliers. Including outliers, the average award is over US$ 470 million. Daniel Behn and Ana Maria Daza, 'The Defense Burden in International Investment Arbitration' (2019) PluriCourts Working Paper (forthcoming). See also UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2017' (2018) IIA Issues Note 2, 5. At end-2017, the average amount awarded was US$ 504 million; the median was US$ 20 million.

[182] See eg Australia–Hong Kong SAR, China Investment Agreement (n 72) art 35; Australia–Uruguay BIT (n 47) art 14(23); Netherlands Model BIT (n 10) arts 22(3), 22(4); Morocco Model BIT (n 8) arts 42.4, 42.6. Several other treaties concluded or ratified in 2019 contain similar provisions.

[183] Brazil–Ecuador CFIA (n 63) art 25.

[184] Brazil–Morocco CFIA (n 63) art 20(2). The CFIA also provides that, if the tribunal grants compensation for harms to the investor, the state that receives it must transfer the compensation to the holder of the investment rights in question. A similar mechanism could be considered for counterclaims to promote transfer of damages for harms caused by an investor claimant to those who have actually been harmed by the investor's activities.

8.68 The European Union–Vietnam Investment Protection Agreement includes what is perhaps novel language, though the effect of the first part of provision is not immediately clear: the agreement provides that damages must be limited to 'loss suffered', and that damages will be reduced where prior compensation or damages were already awarded to the claimant or (where applicable) its locally established company.[185] The agreement provides that a claimant 'may recover only loss or damage that the investor has incurred with regards to the covered investment of that of that investor'.[186] This language tying losses to damages relating to the 'covered investment' and 'investor' may prevent situations whereby the host state would be ordered to compensate the investor for losses suffered by operations elsewhere in the corporate value chain.[187] It is not clear, however, whether the language limiting damage to 'loss suffered' is intended to, or would be effective in, preventing compensation for loss of opportunities, loss of value due to estimated future lost profits, or other forward-looking damages claims.

8.69 With respect to the models reviewed in this chapter, few provide clear guidance on the approach to be adopted by arbitrators in quantifying damages.[188] Morocco's Model BIT, which includes 'fair market value' as the compensation standard for expropriations, provides that an assessment of what constitutes 'fair and equitable compensation' must balance the public interest against the interest of the investor affected by the expropriation, while taking into account other factors listed in Article 10.3.[189] Nepal's Draft Model BIT includes a compensation standard for expropriation that refers to 'fair/ just and equitable' compensation. It directs tribunals to look at the declared tax value of relevant assets as one valuation criterion, but also enables consideration of other factors 'as appropriate'.[190]

8.70 At least three models make a connection between damages and investor conduct. As noted in last year's *Yearbook* chapter,[191] the Netherlands Model BIT provides that a tribunal is '*expected*' (not required) to take investor non-compliance with commitments under the UN Guiding Principles on Business and Human Rights and OECD Guidelines for Multinational Enterprises into account when deciding on the amount of compensation to be awarded.[192] Morocco's Model BIT provides that, in fixing the amount of damages owed to an investor, a tribunal is *required* to consider non-compliance with obligations under Article 20.4 of the Model.[193] Article 20.4 provides that investors must manage or operate their investments in

[185] European Union–Vietnam IPA (n 71) art 3.53.
[186] ibid.
[187] For further discussion of this issue, see Mark Feldman, 'Distinguishing Investors from Exporters under Investment Treaties' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nihjoff 2015) 760–88.
[188] For a discussion of various approaches and recent cases, see Toni Marzal, 'We Need to Talk About Valuation in ISDS' (*Verfassungsblog*, 5 March 2020) <https://verfassungsblog.de/we-need-to-talk-about-valuation-in-isds/> accessed 21 July 2020.
[189] Morocco Model BIT (n 8) art 10.3.
[190] Nepal Draft Model BIT (n 7) art 5.1.
[191] Coleman and others 'International Investment Agreements 2018' (n 2) 132, 134, 138–139.
[192] Netherlands Model BIT (n 10) art 23 (emphasis added).
[193] Morocco Model BIT (n 8) art 20.5.

accordance with international obligations regarding human rights, labour, responsible business conduct, health, and environmental protection.[194] The same Article also provides that investors must operate in accordance with climate change mitigation and adaptation objectives.[195] Notably, Morocco's Model Article 28.3 provides that investors (or investments) in breach of their obligations under the Model will not have access to any dispute settlement process established under the agreement (including ISDS), and that host state respondents may rely on this provision to raise jurisdictional objections.[196] It is interesting to consider whether and how this provision interacts with the tribunal's obligation to consider non-compliance with investor obligations under Article 20.4 at the damages phase. Slovakia's Model BIT provides for the submission of counterclaims where, through its conduct, negligence, or failure to take 'all reasonable steps to mitigate possible damages', the investor claimant has contributed to the damage it is seeking relief for.[197] The Model appears to envision a reduction of damages due to investor (mis)conduct on this basis. Notably, in contrast to this approach, whereby investor misconduct must have caused or contributed to the investor's harm in order to affect any damages awarded, the Dutch and Moroccan models do not appear to require such a causal link. Under those two models, damages can arguably be reduced for misconduct irrespective of whether that misconduct caused or contributed to the harms the investor alleges it suffered.

8.71 While these connections between damages and investor conduct may help to signal to investors regarding how their conduct may affect the prospect of recovery under investment treaties, they do not address the broader issue of a dispute settlement system yielding awards so onerous that even the threat of a dispute risks chilling legitimate state action. Moreover, with respect to signals sent to investors, addressing investor misconduct at the damages phase of an investment dispute, rather than conditioning treaty benefits upon investor compliance with domestic law and responsible business conduct standards, keeps the door open to ISDS threats and actions that can be used to discourage or frustrate states' efforts to challenge the very investor misconduct at issue. Additionally, it can even lead to compensation for investor misconduct or conduct that otherwise undermines the sustainable development objectives of an agreement. 'Who decides' in this context is a critical consideration in assessing whether investors will be held accountable for investor misconduct (and therefore whether damages will be appropriately reduced), and who has access to dispute settlement fora to assert their rights and interests, which may compete with those of investors and provide evidence of their misconduct, is also critical. The insular nature of ISDS, and the distorted power dynamics the current iteration of the system creates and exacerbates, suggest that these provisions tying compensation to investor misconduct—while a step forward—are

[194] ibid art 20.4.
[195] ibid.
[196] ibid art 28.3.
[197] Slovakia Model BIT (n 9) art 15.4.

insufficient to promote investor accountability. Indeed, in the few cases where egregious investor misconduct has resulted in a reduction of damages, the reduction has been partial and arguably inadequate.[198] Future provisions should be assessed against this context and past experience.

2. Provisions That Support or Distort the Ability of States to Regulate

8.72 Going beyond issues of representation, influence, and power in international and domestic governance mechanisms—namely, who is protected and represented, and why—substantive and procedural investment treaty standards also influence the ability of states to implement and enforce policies and laws in their jurisdictions designed to promote sustainable development.[199] The policy space at issue concerns the space to both regulate *investment* for sustainable development (including realizing the benefits and avoiding or minimizing the harms), and also to regulate in the interest of broader goals—including public health, the environment, and realization of other human rights obligations—that may affect an investor's operations. Regulatory flexibility also necessitates the ability to respond swiftly and effectively to crises, including those triggered by acute economic, climatic, and health events. This flexibility is relevant to all states, though even more critical for low-and middle-income economies for whom fiscal space is under immense strain under normal circumstances, and for whom crises bring grave additional economic strain.

(a) Provisions that seek to further clarify the impact on domestic regulatory space

8.73 Provisions that seek to reaffirm the ability of states to regulate have become more common in recent treaty drafting practice. Past *Yearbook* chapters have explored these provisions, noting their generally untested nature and limitations included in most provisions that create uncertainty regarding their potential effectiveness in guarding necessary policy space from undue interference and chill.[200] Treaties concluded or ratified in 2019 continue this general trend of including references to states parties' 'right to regulate', and inclusion of general exceptions that, in most cases, mirror the General Agreement on Tariffs and Trade (GATT)[201] or General Agreement on Trade in Services (GATS) formulations.[202]

[198] See eg *Copper Mesa Mining Corporation v Republic of Ecuador*, Award (Redacted), PCA Case No 2012-2, 15 March 2016.

[199] Johnson, Sachs, and Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (n 40) 94.

[200] See Coleman and others, 'International Investment Agreements 2018' (n 2); Coleman and others, 'International Investment Agreements 2017' (n 67); Coleman and others, 'International Investment Agreements 2015–2016' (n 69). See also Wolfgang Alschner and Kun Hui, 'Missing in Action: General Public Policy Exceptions in Investment Treaties' in Lisa Sachs, Lise Johnson, and Jesse Coleman (eds), *Yearbook on International Investment Law & Policy 2018* (OUP 2020).

[201] General Agreements on Tariffs and Trade (1947 and 1994) 55 UNTS 194 and 1867 UNTS 190, art XX.

[202] General Agreement on Trade in Services (1994) 1869 UNTS 183, art XIV.

8.74 A handful of treaties or models include, in their general exceptions clauses or similar provisions, explicit references to measures necessary or appropriate to protect the environment.[203] Others mention additional specific areas of public interest and policy, including: provision of essential social services, including water supply, education, and health services;[204] achievement of the SDGs;[205] consumer protection;[206] labour standards;[207] and protection of data privacy.[208] The Belgium–Luxembourg Model BIT includes one of the more novel provisions:

> Nothing in this Agreement shall in any way be construed as limiting the right of the Contracting Parties to adopt, maintain and enforce measures to pursue legitimate policy objectives such as amongst others the protection of public health, environment and public morals; the promotion of security and safety; the achievement of the sustainable development goals; social or consumer protection; the protection of labour standards; the integrity and stability of the financial system or the promotion and protection of cultural diversity.[209]

8.75 The provision is included in Article 1 of the Model, which concerns coverage and objectives. This is different from the approaches employed under the GATT and GATS, and also that used in some investment treaties, which put language seeking to protect environmental, health, and certain other policy areas in their 'exceptions' articles. The Belgium-Luxembourg Model BIT is amongst the first to refer to the SDGs within the confines of a general exception-type provision, and does not include a 'necessity' or other nexus requirement. The protective scope of the provision is not entirely clear; without a self-judging clarification, and without a clarification that compensation will not be owed for measures that fall within the scope of the provision, it may ultimately operate in a similar manner to a reaffirmation of a state's sovereign right to regulate. A similar provision is reiterated in Article 3.3 (Scope), with the addition that nothing limits the right of contracting parties 'or any of their competent authorities' to 'apply prohibitions or restrictions of any kind or take any other action directed' to pursue the non-exhaustive list of objectives outlined in the Article, which largely mirror those included in Article 1.2 above.[210]

8.76 Last year's *Yearbook* chapter noted that at least one model published in 2018 included in its general exceptions article an explicit reference to measures deemed necessary by the host state to protect human rights;[211] such a reference appears to be missing from

[203] See eg Morocco Model BIT (n 8) art 21(e); Brazil–Morocco CFIA (n 63) art 4(6) (this CFIA excludes ISDS); Brazil–United Arab Emirates CFIA (n 63) art 17 (this CFIA excludes ISDS); Belgium–Luxembourg Model BIT (n 6) art 1(2).
[204] Morocco Model BIT (n 8) art 21(d).
[205] Belgium–Luxembourg Model BIT (n 6) art 1(2).
[206] ibid.
[207] ibid; Brazil–United Arab Emirates CFIA (n 63) art 17.
[208] Armenia–Japan BIT (n 3) art 16(1)(c)(ii).
[209] Belgium–Luxembourg Model BIT (n 6) art 1(2).
[210] ibid art 3(3).
[211] See Coleman and others, 'International Investment Agreements 2018' (n 2), 145 (discussing Colombia's Model BIT).

general exception provisions contained in models published in 2019. However, the expansion of explicit references to other areas of public interest within recently drafted general exception provisions may suggest that treaty drafters are becoming increasingly aware of the intrusion of investment treaties, and ISDS claims, in to these critical areas of domestic policy space, and of the need to safeguard these areas from undue interference.

8.77 With respect to the protective scope of these general exception provisions, many newly concluded or ratified treaties continue to apply a strict nexus requirement.[212] These strict requirements may make it challenging for host state respondents to invoke general exceptions in defence of legitimate public interest measures, particularly considering how some tribunals have responded to arguments advanced by host state respondents based on general exception provisions in past claims.[213] Perhaps in an effort to address this issue, Morocco's Model BIT explicitly provides in its general exception that states parties will not be required to pay compensation as a result of adopting measures that fall within the scope of the exception; no nexus requirements are added.[214] Others agreements, continuing a relatively recent development in drafting practice, have adopted flexible nexus requirements, for example referring to measures that a state 'deems appropriate' for pursuing relevant public interest objectives.[215]

8.78 In addition to general exception-type provisions, some treaties and models clarify that environmental and other public interest measures are not breaches of substantive treaty standards. This language, which may be seen as a codification of the 'police powers' doctrine, has been included in a number of expropriation articles in recent years. Among 2019 agreements, one relevant example is the Australia–Indonesia CEPA. It specifically excludes regulatory actions 'designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety and the environment' from the scope of its expropriation provision, clarifying that such measures do not constitute indirect expropriation under the agreement.[216] This provision is also noteworthy in that it does not include the qualifier, often seen in other expropriation provisions, that in some 'rare circumstances', even measures adopted for legitimate public interest aims can breach the expropriation article. The Armenia–Korea BIT contains a provision with a similar objective of protecting public interest measures from being found to

[212] See eg Nepal Draft Model BIT (n 7) art 18.

[213] According to art 25 of the International Law Commission's Articles on State Responsibility, a measure is considered 'necessary' if it is considered 'the only way for the State to safeguard an essential interest against a grave an imminent peril'. See International Law Commission, 'Responsibility of States for Internationally Wrongful Acts' (2001) art 25(1)(a) <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 31 July 2020. With respect to interpretation and application of the defence in claims brought against Argentina concerning measures adopted in response to its economic crisis in the late 1990s/early 2000s, see Federico Lavopa, 'Crisis, Emergency Measures and the Failure of the ISDS System: The Case of Argentina' (July 2015) South Centre Investment Policy Brief No 2 <www.southcentre.int/wp-content/uploads/2015/07/IPB2_Crisis-Emergency-Measures-and-the-Failure-of-the-ISDS-System-The-Case-of-Argentina.pdf> accessed 31 July 2020.

[214] Morocco Model BIT (n 8) art 21.

[215] See eg Brazil–United Arab Emirates CFIA (n 63) art 17 (this CFIA excludes ISDS).

[216] Australia–Indonesia CEPA (n 69) annex 14-B.

breach the indirect expropriation standard; the article, however, suggests that in some 'rare circumstances', even public interest measures can give rise to a breach.[217]

8.79 Continuing a trend in recent treaty drafting practice, and as noted above, several treaties and models reviewed in this chapter also carve out specific sectors, policy aims measures, and treaty obligations from the scope of ISDS provisions included in the agreements. The Australia–Hong Kong SAR, China BIT, for example, carves out measures concerning or related to a number of pharmaceutical and health insurance schemes,[218] in addition to carving out tobacco-related measures.[219] Notably, the Australia–Uruguay BIT does not contain this tobacco carve-out, despite the experience of both treaty parties with controversial ISDS claims brought against them by Philip Morris challenging plain-packaging regulations.[220] As noted in past *Yearbook* chapters, there are risks for policy space by carving out only certain sectors, policy areas, and substantive obligations as opposed to adopting, for example, generally applicable state–state filters for all claims and alternative mechanisms for addressing investment disputes.[221]

(b) Provisions that reaffirm or compete with international obligations

8.80 Within the universe of policy space concerns generated by the traditional approach to investment treaty drafting also falls the ability of states to comply with their obligations under other sub-systems of international law, including international human rights and environmental law. Most investment treaties currently in force do not provide explicit guidance to arbitrators regarding how obligations contained in investment treaties interact with other areas of international law.[222] Many treaties also do not seek to reaffirm application of other international obligations that are relevant to the governance of international investment, creating opportunities for broad and (arguably) narrow norm conflicts between investment treaty norms and other international legal obligations.[223] Given the ongoing reliance on general rules of treaty interpretation (such as the principle of systemic integration) and applicable law clauses to address potential conflicts, 'who decides' and 'who participates' in investment disputes once again becomes critical. Owing to the insular and exclusionary nature of ISDS, environmental,

[217] Armenia–Korea BIT (n 3) annex I.

[218] Australia–Hong Kong SAR, China Investment Agreement (n 72) s C, n 13.

[219] ibid s C, n 14. See also Armenia–Singapore Agreement on Trade in Services and Investment (n 93) art 3.14(2) (carves out measures and treatment related to tobacco or tobacco-related products); Australia–Indonesia CEPA (n 69) art 14.21(1)(b) (carves out public health measures; footnote 21 provides a non-exhaustive list of 'public health measures' covered by art 14.21).

[220] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, Award, ICSID Case No ARB/10/7, 8 July 2016; *Philip Morris Asia Limited v The Commonwealth of Australia,* Award on Jurisdiction and Admissibility, PCA Case No 2012-12, 17 December 2015.

[221] See eg Coleman and others, 'International Investment Agreements 2015–2016' (n 69), 81.

[222] This discussion excludes references to WTO Agreements.

[223] On broad and narrow norm conflicts, see eg UNGA, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi' (13 April 2006) UN Doc A/CN.4/L.682 <https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> accessed 19 June 2020; Erika De Wet and Jure Vidmar, 'Introduction' in Erika De Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012).

human rights, and other public interest concerns are often not sufficiently identified, advanced, and addressed in a balanced manner under the current framework.

8.81 As with texts reviewed in past *Yearbook* chapters, most agreements concluded or ratified in 2019 do not address this issue directly. Some model agreements include reaffirmations of states parties' obligations under multilateral agreements concerning protection of the environment and human rights that continue a trend identified in last year's *Yearbook* chapter.[224] The Belgium–Luxembourg Model BIT, for example, includes a reaffirmation of prospective parties' 'commitment to respect, promote and implement' their laws and practices in their territories 'core labour standards as embodied in the fundamental ILO Conventions' those parties have ratified, and provides that '[t]he Parties shall make continued and sustained efforts to ratify the fundamental ILO Conventions if they have not yet done so'.[225] The Model also provides that, in accordance with ILO obligations, prospective parties recognize that a violation of obligations under ILO instruments cannot be used to encourage investment.[226] With respect to multilateral environmental agreements, the Model also includes a reaffirmation of commitments under 'the multilateral environmental agreements' and that parties 'shall strive to ensure that such commitments are fully recognised and implemented by their domestic legislation and shall strive to continue to improve those laws and regulations'.[227] It does not indicate whether the commitments being reaffirmed are those that either party has entered into, or those to which both parties have agreed. The approach followed on that issue can have important practical implications. Notably, specific recognition of the importance of pursuing UNFCCC objectives is also included.[228]

8.82 The Netherlands Model BIT includes a number of noteworthy provisions, profiled in last year's *Yearbook* chapter. These include: a reaffirmation of prospective states parties' obligations under multilateral human rights treaties;[229] a commitment to making 'sustained efforts towards ratifying the fundamental ILO Conventions' where parties have yet to ratify them;[230] a commitment to what the Model refers to as 'the international framework on Business and Human Rights', which it considers to include the UN Guiding Principles and OECD Guidelines for MNEs;[231] and an obligation to 'take appropriate steps to ensure' that those affected by business-related human rights abuses have access to effective remedy, with the language of this provision mirroring Principle 25 of the UN Guiding Principles.[232] The Model also reaffirms prospective parties' 'obligations under the multilateral agreements in the field of environmental protection', making specific reference to the Paris Agreement.[233]

[224] Coleman and others, 'International Investment Agreements 2018' (n 2), 143–45.
[225] Belgium–Luxembourg Model BIT (n 6) art 16(2).
[226] ibid art 16(1).
[227] ibid art 17(1).
[228] ibid art 17(2).
[229] Netherlands Model BIT (n 10) art 6(6).
[230] ibid.
[231] ibid art 7(5).
[232] ibid art 5(3).
[233] ibid art 6(6).

8.83 As discussed in previous *Yearbook* chapters, reaffirmations of multilateral environmental and labour agreements can be found more frequently in the texts of economic protection agreements (EPAs) involving the European Union, and some trade agreements with investment chapters.[234] Indeed, the European Union–Japan EPA contains several such relevant provisions.[235] These provisions typically go beyond those included in BITs in terms of the number of relevant provisions, and mechanisms and institutions established under the treaties to address environmental and labour issues. The Investment Protection Agreement concluded by the European Union and Vietnam, for example, lacks detail on multilateral environmental obligations when compared to the European Union–Japan EPA: beyond a reference to international environmental and labour standards and agreements in the preamble, it does not appear to contain any reaffirmations or other commitments regarding these agreements.[236] Unlike the European Union–Japan EPA, the European Union–Vietnam Investment Protection Agreement does not contain a sustainable development chapter, which typically (in the context of EPAs) contains provisions concerning and reaffirming or seeking to implement obligations under multilateral agreements under other areas of international law.

8.84 Other texts reviewed in this chapter that include references to obligations under other areas of international law primarily include these as reaffirmations of these obligations in the preamble of relevant agreements.[237] Overall, when combined with other continued traditional treaty drafting practice identified in this chapter, this evident and ongoing lack of clarity regarding the interaction between obligations under investment treaties and other relevant areas of public international law contributes to the risk that states may be required to compensate investors for taking measures necessary to realize international environmental or human rights obligations.

E. Pillar Three: SDG-Advancing International Cooperation

8.85 As international agreements, investment treaties could help to address challenges of investment governance that are uniquely or ideally resolved through international cooperation. These challenges include those that may be exacerbated by global corporate actors and their activities, and the increasing mobility of capital. This section focuses on three categories of associated challenges—races to the bottom, transnational governance gaps, and treaty-related effects—and steps taken in recent treaties to address them.

[234] See discussion in Coleman and others, 'International Investment Agreements 2018' (n 2) paras 7.89–7.94; Coleman and others, 'International Investment Agreements 2017' (n 67) paras 7.42–7.50.

[235] European Union–Japan EPA (n 3) art 16.4. See ibid c 16 (Trade and Sustainable Development) generally for obligations under other multilateral agreements. For a discussion of these provisions, see Coleman and others, 'International Investment Agreements 2018' (n 2) paras 7.42–7.50.

[236] European Union–Vietnam IPA (n 71) pmbl. References to WTO Agreements are made in other provisions.

[237] See eg Slovakia Model BIT (n 9) pmbl; European Union–Vietnam IPA (n 71) pmbl; Belgium–Luxembourg Model BIT (n 6) pmbl; Morocco Model BIT (n 8) pmbl (though this agreement also refers to international obligations in other sections, including those relevant to investor obligations).

1. Combatting Races to the Bottom

8.86 Through their liberalization and free-transfer provisions, investment treaties make it easier for companies not only to expand but also to move their existing investments across borders. The fact that firms can move at least some activities and operations from jurisdiction to jurisdiction has given rise to concerns about regulatory races to the bottom: fears that countries will compete for that mobile capital by adjusting their legal frameworks in ways that, in the long- if not the short-term, are not socially optimal.

8.87 This competition can come through the offering of express tax incentives to investors and investments; it can also come through regulatory incentives—such as agreements to create enclave legal regimes for investors in special economic zones or through contractual stabilization provisions. These special regulatory incentives may exempt companies from otherwise applicable fees or legal requirements with respect to labour, environmental standards, acquisition of land and other resources. Regulatory 'races to the bottom' can also come through different approaches, such as keeping requirements (whether related to tax, environmental, labour, safety, or other issues) on businesses unduly low, reducing the stringency of relevant standards, or failing to enforce laws and regulations on the books.

8.88 Although such competition can potentially help some countries 'win' investment, the price paid by the winner can reduce or even outweigh benefits received. This competition can also affect distribution of gains and losses across stakeholder groups. Gains, for instance, might be more concentrated among direct recipients of incentives, such as the firm, its owners, and some or all of its employees; losses or costs, in turn, may be experienced by others, such as the broader public due to forgone taxes, local communities due to reduced environmental standards, or workers, due to reduced social protections; moreover, the very fact of this competition can reduce gains by all countries engaged in the race.

8.89 Yet just as investment treaties seek to facilitate cross-border movement of capital, they can also then seek to govern the tools governments use to encourage that movement. Since the early 1990s, some investment treaties have included provisions restricting certain types of regulatory incentives or races to the bottom.[238] The practice of including some language directed at harmful competitions for capital continues, primarily through language prohibiting or recommending against states' efforts to attract or keep investment by lowering, derogating, and/or failing to enforce relevant laws or regulations.

8.90 Treaty approaches to this issue, however, are still not widespread or uniform. For instance, among the 2019 agreements covered by this chapter, a number of treaties do not include any non-lowering of/non-derogation-from-standards provisions. Australia's

[238] NAFTA (n 29) art 1114(2).

agreements (treaties with Uruguay, Indonesia, and Hong Kong), and the Armenia–Singapore, Hong Kong–United Arab Emirates, Hong Kong–ASEAN, and Korea–Uzbekistan texts are among those without any such provisions.

8.91 Of the treaties from 2019 that do contain relevant provisions, they continue to evidence significant variation. This section highlights some apparent patterns and notable practices, looking in particular at: (1) the scope of the provision in terms of topics covered; (2) whether the provisions focus specifically on express changes in legislation, or something broader; (3) whether the provisions only focus on domestic law, or also look at compliance with international law; (4) additional conditions, such as requirements of impact or intent, or patterns or practices, which may affect the practical significance of such provisions; and (5) mechanisms for monitoring and enforcement.

(a) Scope

8.92 Most agreements that address the issue focus on environmental and labour standards, but one can also find relevant provisions regarding competitions for capital through lowering of standards in the areas of social protection,[239] health[240] and safety,[241] and other regulatory objectives.[242] Competition through tax incentives or tax policies is generally not addressed in these provisions. The EU's agreements, however, do contain relevant articles in their 'Competition' chapters that can potentially be used to address claims by one party that it has lost or is losing investment due to specific tax other incentives offered by the other party.[243]

(b) Type of conduct addressed

8.93 Some agreements seem to focus on preventing actual changes to legislation through repeal or amendment. The treaty between Brazil and the United Arab Emirates illustrates, stating that 'each Party guarantees it shall not amend or repeal, nor offer the amendment or repeal of [relevant] legislation to encourage the establishment, maintenance or expansion of an investment in its territory, to the extent that such amendment or repeal involves decreasing their labor, environmental or health standards'.[244]

8.94 In contrast, a larger group of models and agreements seems to take a broader approach. The provisions in these treaties are not limited to changes in legislation, and may also cover changes in regulations and policies, and enforcement thereof. These types of provisions could look beyond de jure shifts to also address de facto implementation. Texts falling into this category include the Belgium–Luxembourg[245] and Netherlands Model

[239] CARIFORUM States–United Kingdom EPA (n 11) art 193.
[240] Brazil–United Arab Emirates CFIA (n 63) art 17(2); Brazil–Ecuador CFIA (n 63) art 17(2).
[241] CARIFORUM States–United Kingdom EPA (n 11) art 73; Cabo Verde–Hungary BIT (n 91) art 2(8); Belarus–Hungary BIT (n 91) art 2(7); Armenia–Japan BIT (n 3) art 21; Slovakia Model BIT (n 9) art 3(2).
[242] See eg Argentina–Chile FTA (n 3) art 8.14.
[243] See eg European Union–Japan EPA (n 3) c 12.6 (providing a mechanism for states to address allegations of harm to investment as a result of 'tax concessions' or other subsidies).
[244] Brazil–United Arab Emirates CFIA (n 63) art 17(2).
[245] Belgium–Luxembourg Model (n 6) arts 15(4), 15(5).

BITs,[246] the Armenia–Japan,[247] Japan–EU,[248] and EU–Vietnam texts,[249] the agreement between Brazil and Ecuador,[250] and the FTA between Argentina and Chile[251].

8.95 A third category appears to adopt a hybrid approach, focusing specifically on changes in legislation for some issues, and changes to the potentially wider category of 'standards' in others. The agreements Hungary concluded with Cabo Verde and Belarus are examples, stating that the 'Contracting Parties shall not encourage investment by lowering domestic environmental, labour or occupational health and safety legislation or by relaxing core labour standards'.[252]

(c) References to international law or standards

8.96 While some agreements focus solely on non-derogation from/non-lowering of domestic standards, some recent agreements, including a subset of those concluded in 2019, contain language referring to sustained adherence to, compliance with, or effective implementation of, international treaties and norms. These provisions can operate to set a threshold that domestic environmental, labour, or social standards must meet, and under which they cannot fall in form or function. Some such clauses are reaffirmations by state parties of their commitments under treaties each has already ratified,[253] or expressions of support for other internationally agreed soft-law texts.[254] Others appear to be stronger, requiring state parties to make 'sustained efforts' to ratify relevant international treaties[255] and effectively implement international norms and agreements.[256]

8.97 Notably, and as discussed further below, the issue of compliance with these commitments to make 'sustained efforts' toward ratification, and to effectively respect, promote and realize fundamental labour rights, is presently at issue in a claim brought by the EU against Korea under the EU–Korea FTA and pending as of the time of writing. The proceeding will shed initial and important light on the impacts of these provisions.[257]

[246] Netherlands Model BIT (n 10) art 6(4).
[247] Armenia–Japan BIT (n 3) art 21.
[248] European Union–Japan EPA (n 3) art 16.1.
[249] European Union–Vietnam IPA (n 71) art 13.3.
[250] Brazil–Ecuador CFIA (n 63) art 17.
[251] Argentina–Chile FTA (n 3) art 8.14.
[252] Cabo Verde–Hungary BIT (n 91) art 2(8); Belarus–Hungary BIT (n 91) art 2.7.
[253] See eg European Union–Japan EPA (n 3) art 16.4(2); USMCA (n 29) art 24.8; Netherlands Model BIT (n 10) art 6(6); Belgium–Luxembourg Model BIT (n 6) art 17.
[254] See eg Netherlands Model BIT (n 10) art 7(2).
[255] See eg European Union–Japan EPA (n 3) art 16.3(3); Netherlands Model BIT (n 10) art 6(6); Belgium–Luxembourg Model BIT (n 6) art 16(2).
[256] See eg USMCA (n 29) arts 23.3, 24.8(4), 24.9; European Union–Japan EPA (n 3) arts 16.6, 16.18(2).
[257] Other relevant provisions that extend environmental, labour, or other obligations beyond the level set domestically can be found in the USMCA. Among relevant provisions are an annex requiring Mexico to adopt domestic measures to ensure effective enjoyment of the right to collective bargaining. USMCA (n 29) c 23, annex 23-A. Moreover, the deal contains rules of origin provisions specifying that a certain percentage of a car built in North America must be made by workers earning a certain hourly wage in order to qualify for preferential treatment under the agreement.

(d) Additional requirements: impact and intent; sustained or recurring conduct

8.98 Some non-lowering/non-derogation provisions add requirements that the government's conduct impact trade or investment. Only if the derogation/lowering of laws or standards affects trade or investment will it be actionable. For instance, the EU's texts with Vietnam and Japan specify that parties are not to 'waive or derogate from, or offer to waive or derogate from, [their] environmental or labour laws in ways affecting trade and investment between the Parties'. Absent such impacts on trade and investment between the treaty parties, a violation will not be found. (The requirement for impact, however, is not an express part of the provisions requiring sustained efforts to ratify and implement international labour rights conventions, at issue in the EU–Korea dispute referred to above.)

8.99 As evidenced by the labour dispute between the US and Guatemala under the US–DR–CAFTA,[258] this requirement that regulatory races to the bottom actually impact trade and investment between the treaty parties can be difficult to satisfy in practice.[259] The dispute settlement panel in that labour case against Guatemala found proof of unremedied violations of labour law at eight worksites and involving dozens of workers; nevertheless, it concluded that those violations did not breach the FTA's labour provisions due, in part, to inadequate evidence that the violations conferred a competitive advantage on the breaching firms.[260]

8.100 In response to that case, one innovation in the USMCA as signed in 2018 was new language in the trade and environment chapters establishing a clearer and seemingly lower threshold to establish impact on trade or investment. Footnotes specified that conduct would be deemed to

> affect[] trade or investment between the treaty Parties if it involves: (i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party.[261]

8.101 That language, however, failed to resolve concerns of some stakeholders, including labour unions and members of US Congress, that the USMCA's non-lowering/non-derogation provisions were still inadequate.[262] Thus, in an effort to gain support for the text's domestic ratification, the agreement was amended in 2019 to create a rebuttable presumption of impact. The final USMCA has added language stating that '[f]or purposes of dispute settlement, a panel shall presume that a failure is in a manner affecting

[258] Dominican Republic–Central America Free Trade Agreement (signed 5 August 2004) art 16.2(1)(a).

[259] *In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of CAFTA-DR,* Final Report of the Panel, Arbitral Panel Established Pursuant to Chapter 20 of CAFTA-DR, 14 June 2017 [594] (hereafter Issues Relating to the Obligations Under Article 16.2.1(a) of CAFTA-DR).

[260] ibid.

[261] Agreement Between the United States of America, the United Mexican States, and Canada (as signed 30 November 2018) c 23, nn 7–9, c 24 nn 3, 4.

[262] US Congressional Research Service, USMCA: Labor Provisions (10 January 2020).

trade or investment between the Parties, unless the responding Party demonstrates otherwise.'[263]

8.102 Other provisions do not include language requiring impact on trade and investment, but potentially require some form of intent. These are provisions requiring that derogations, waivers, and non-enforcement be done *in order to encourage* investment.[264] As these provisions have not been tested in dispute settlement, crucial questions remain open regarding what type of proof would be required to establish breach, who would bear the burden of producing it, and how evidence of intent might be gathered.

8.103 Another aspect of non-lowering/non-derogation provisions that can significantly affect its relevance in practice is a requirement that derogations from, or non-enforcement of, laws and regulations be part of *a sustained or recurring course of action or inaction*. Among 2019 agreements, such language can be found, for instance, in the FTAs concluded by the EU with Vietnam and Japan,[265] as well as in the model developed by the Belgium–Luxembourg Economic Union.[266] As with the requirement for there to be an impact on trade and investment, the requirement to prove that conduct was 'sustained or recurring' may make the obligation difficult to enforce. Indeed, the labour case against Guatemala under the US–DR–CAFTA referred to above illustrates the issue, as the panel in that dispute also cited inadequate proof of a sustained or recurring course of conduct as another reason for its conclusion that, notwithstanding proof that relevant labour laws and rights had been breached, Guatemala had not violated the FTA.[267]

8.104 The 2018 USMCA had also attempted to address concerns magnified by that panel finding, adding footnotes to clarify that a '"sustained or recurring course of action or inaction" is "sustained" if the course of action or inaction is consistent or ongoing, and is "recurring" if the course of action or inaction occurs periodically or repeatedly and when the occurrences are related or the same in nature. A course of action or inaction does not include an isolated instance or case'.[268] Then, in 2019, as part of the effort to address US Congressional and other stakeholders' continued concerns about labour impacts of the agreement mentioned above, the 2018 text was also amended to remove the requirement that conduct be part of a 'sustained or recurring course of action or action' when violence or threats of violence against workers is at issue.[269]

[263] USMCA (n 29) c 23, nn 5, 9, 12, 14, c 34, nn 5, 7, 12, 16.

[264] See eg Brazil–Ecuador CFIA (n 63) art 17(2); Belgium–Luxembourg Model BIT (n 6) art 15(4); Netherlands Model BIT (n 10) art 6(4).

[265] European Union–Vietnam IPA (n 71) art 13.3(3); European Union–Japan EPA (n 3) art 16.2(2).

[266] Belgium–Luxembourg Model BIT (n 6) art 15(5).

[267] Issues Relating to the Obligations Under Article 16.2.1(a) of CAFTA-DR (n 259).

[268] USMCA (n 29) c 23, art 23.5 and n 8, art 23.7 and n 11.

[269] cf the text of the agreement signed in 2018, which reads: '. . . no Party shall fail to address cases of violence or threats of violence against workers, directly related to exercising or attempting to exercise the rights set out in Article 23.3 (Labor Rights), *through a sustained or recurring course of action or inaction* in a manner affecting trade or investment between the Parties' (art 23.7, emphasis added); with the final 2019 text, which reads: '. . . no Party shall fail to address violence or threats of violence against workers, directly related to exercising or attempting to exercise the rights set out in Article 23.3 (Labor Rights), in a manner affecting trade or investment between the Parties' (art 23.7).

8.105 Overall, it remains to be seen whether and how these relatively novel provisions in the USMCA will affect actual outcomes under that treaty. Other open questions include whether and how these provisions expressly clarifying the concept of 'sustained or recurring' conduct, and limiting scope of the 'sustained or recurring' element, will influence other future texts, and how they might influence interpretation and application of existing agreements without such clarifying language, such as the EU's FTAs with Japan and Vietnam.

(e) Enforcement

8.106 A key dimension of these provisions relates to who, if anyone, may allege a breach and through what processes. Treaties could, for instance, permit private parties to raise allegations of breach; or they could limit this power to state parties. They could provide for special enforcement mechanisms, or carve the issues out from the treaty's dispute settlement mechanisms entirely, permitting only consultation in circumstances of alleged breach.

8.107 The dominant approach seems to be to *not* provide for binding dispute resolution by third-party adjudicators. If a state party considers another state party to have acted inconsistently with the non-lowering/non-derogation provisions, agreements commonly state that the issue shall be resolved through state–state consultation.[270]

8.108 The EU's agreements similarly carve out their Trade and Sustainable Development (TSD) chapters, the chapters in which their environmental and labour non-lowering/non-derogation provisions are located, from the dispute settlement chapter otherwise applicable to the treaty.[271] But if state–state consultations fail to resolve the issue, the matter can be referred to a TSD-chapter-specific 'panel of experts' to prepare a report and make recommendations.[272] While the state parties are then required to '. . . discuss actions or measures to resolve the matter in question, taking into account the panel's final report and its suggestions',[273] the focus is on cooperation and dialogue to address findings and conclusions. It is not clear whether, what, and when tools—such as retaliatory measures, penalties, or remedies—are available if a breach is found and not addressed.[274]

[270] See eg Belarus–Hungary BIT (n 91) art 2(7); Cabo Verde–Hungary BIT (n 91) art 2(8); Brazil–Ecuador CFIA (n 63) art 17(2); Brazil–United Arab Emirates CFIA (n 63) art 17.2.

[271] European Union–Japan EPA (n 3) art 16.17(1); European Union–Vietnam IPA (n 71) art 13.16. Complaints about harmful use of tax incentives, however, are addressed through the chapter on competition. Article 12.6 of the European Union–Japan EPA (n 3) provides for consultation and states in relevant part that the party offering the incentives 'shall accord sympathetic consideration to the concerns' of the other party (art 12.6(5)). However, that requirement for 'sympathetic consideration' is not subject to state–state dispute settlement under the treaty (art 12.10). In the European Union–Vietnam IPA (n 71) the text similarly states that the article on consultations (art 10.8) is not subject to dispute settlement under the treaty (art 10.13).

[272] European Union–Japan EPA (n 3) art 16.18; European Union–Vietnam IPA (n 71) art 13.17.

[273] European Union–Japan EPA (n 3) art 16.18(6). See also European Union–Vietnam IPA (n 71) art 13.17(9).

[274] European Union–Japan EPA (n 3) art 16.18. See also LSE Consulting, 'Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the European Union and Mercosur, Draft Final Report' (July 2020) 65–68, 100,101 <https://trade.ec.europa.eu/doclib/docs/2020/july/tradoc_158892.pdf> accessed 9 September 2020 (hereafter LSE Consulting, 'SIA in Support').

8.109 These provisions in the EU's 2019 agreements were modelled off the approach it first began adopting in its FTA with Korea, which was signed in 2010. Notably, in July 2019, the EU requested the establishment of a panel of experts under that agreement's Trade and Sustainable Development chapter to assess Korea's alleged violations of labour-related obligations.[275] This represents the first time the EU has utilized the mechanism. The Panel of Experts was to start work in December 2019, and present a report to the parties by the end of March 2020, which the European Commission was to then publish.[276] While a hearing had also been set for April 2020,[277] it was postponed due to COVID-19. As of 1 August 2020, there was no information about rescheduling nor public reports, documents, or statements. When information becomes available, the outputs and outcomes of the consultation and panel processes will provide useful insight into the effectiveness of the European Union's approach to monitoring and enforcement of these types of provisions.

8.110 The USMCA and 2019 amendments to that agreement provide additional notable developments on the issue of enforcement. Consistent with recent US practice, the 2018 text had included provisions that made breaches of the labour and environment obligations enforceable under the agreement's dispute settlement chapter, and that provided private persons rights to file complaints (though not directly initiate formal dispute settlement against the state) through different channels.[278] But in 2019, new mechanisms and rules regarding dispute settlement were added. While as yet untested, on paper they appear to create the strongest mechanism for monitoring and enforcing labour rights in any FTA concluded to date.

8.111 A key feature is the new 'Facility-Specific Rapid Response Labor Mechanism' added as annexes to the treaty's dispute settlement chapter.[279] Under this mechanism, whenever

[275] *Republic of Korea: compliance with obligations under Chapter 13 of the EU–Korea Free Trade Agreement—Request for the establishment of a Panel of Experts by the European Union* (4 July 2019) <https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_157992.pdf> accessed 24 August 2020 (hereafter *Republic of Korea: compliance with obligations under Chapter 13 of the EU–Korea Free Trade* Agreement). The relevant obligations are contained in Free Trade Agreement Between the European Union and the Republic of Korea (signed 6 October 2010) art 13.4(3) (hereafter EU-Korea BIT).

[276] European Commission, 'Procedural Information Related to EU–Korea Dispute Settlement on Labour' (19 December 2019) <https://trade.ec.europa.eu/doclib/docs/2019/december/tradoc_158534.pdf> accessed 24 August 2020 (hereafter European Commission, 'Procedural Information Related to EU-Korea Dispute Settlement on Labour').

[277] European Commission, 'Korea Labour Commitments: Postponement of the Hearing' (31 March 2020) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2130> accessed 2 September 2020 (hereafter European Commission, 'Korea Labour Commitments: Postponement of the Hearing').

[278] For the environment, see USMCA (n 29) arts 24.27 and 24.28. Citizen submissions are through the Commission for Environmental Cooperation. The new Agreement on Environmental Cooperation continues the Commission for Environmental Cooperation, which had been established through the North American Agreement on Environmental Cooperation concluded in connection with the NAFTA (n 29). For labour, the citizen submission process is reflected in art 23.11, and further elaborated upon in national laws and regulations. See eg Office of the United States Trade Representative, 'Interagency Labor Committee for Monitoring and Enforcement Procedural Guidelines for Petitions Pursuant to the USMCA' (30 June 2020) 85 Federal Register 39257. For an overview of changes in the USMCA as compared to the NAFTA and other recent US trade and investment agreements, see eg David Gantz, 'The U.S.-Mexico-Canada Agreement: Labor Rights and Environmental Protection' (13 June 2019) Baker Institute for Public Policy <www.bakerinstitute.org/media/files/research-document/62174e56/bi-report-061319-mex-usmca-4.pdf> accessed 24 August 2020.

[279] USMCA (n 29) annexes 31-A (for US–Mexico) and 31-B (for Canada–Mexico). This mechanism does not apply as between the US and Canada.

a USMCA treaty party has a 'good faith belief' that workers in defined 'covered facilities'[280] in another state are being denied the rights of free association and collective bargaining, then that state may request review of the relevant facility by a labour panel. The agreement also contemplates that petitions alleging denials of rights may be submitted by private individuals and entities through domestic processes.[281] If a breach is found, possible remedies include suspension of preferential treatment for goods manufactured at the covered facility, imposition of penalties on the facility, and denial of entry for goods produced by the facility.[282]

8.112 While traditional state–state dispute settlement processes for violations of the labour chapter seem to focus on more systematic conduct of government, the Rapid Response Mechanism, while also still largely state–state, can address conduct of private actors and denials of particular worker rights at specific facilities.[283]

8.113 Overall, the publicly available agreements from 2019 seem to reflect some convergence around a particular approach—namely including non-lowering/non-derogation provisions addressed to implementation of domestic environmental and labour law—and preferring to resolve issues through consultations rather than formal dispute settlement. There are, however, a few notable deviations, with some countries not including any such provisions, and others both including them, tying them to an international law baseline, and making them subject to dispute settlement.

8.114 With respect to the issue of dispute settlement specifically, concerns have been widely raised about challenges in ensuring that it is invoked and is effective.[284] In this context, 2019 brought new developments—both in terms of complaints filed (for example under the European Union–Korea Free Trade Agreement)[285] and mechanisms developed (for example, the USMCA Rapid Response Mechanism)—that could strengthen enforcement.[286] Future years will enable us to better assess use of and outcomes from

[280] A 'covered facility' is defined as 'a facility in the territory of a Party that: (i) produces a good or supplies a service traded between the Parties; or (ii) produces a good or supplies a service that competes in the territory of a Party with a good or a service of the other Party, and is a facility in a Priority Sector'. USMCA (n 29) annex 31-A, art 31A.15. The Parties are to review the list of 'Priority Sectors' annually to determine whether to add any to the list (art 31-B.13). There are limitations on claims against US facilities that do not apply to claims against Mexican facilities. Footnote 2 to annex 31-B states: 'With respect to the United States, a claim can be brought only with respect to an alleged Denial of Rights owed to workers at a covered facility under an enforced order of the National Labor Relations Board. With respect to Mexico, a claim can be brought only with respect to an alleged Denial of Rights under legislation that complies with Annex 23-A (Worker Representation in Collective Bargaining in Mexico).'

[281] See eg USMCA (n 29) annex 31-A, n 3 ('The United States intends to establish such a domestic process under which the United States government will strive to complete initial reviews of complaints received by the government about a Covered Facility in the other Party in 30 days'); annex 31-B, n 6 ('Canada intends to establish such a domestic process under which the Canadian government will strive to complete initial reviews of complaints received by the government about a Covered Facility in the other Party in 30 days').

[282] USMCA (n 29) annexes 31-A and 31-B, arts 31-A.10 and 31-B.10.

[283] Kathleen Claussen, 'A First Look at the New Labor Provisions in the USMCA Protocol of Amendment' (*International Economic Law and Policy Blog*, 12 December 2019) <https://ielp.worldtradelaw.net/2019/12/a-first-look-at-the-new-labor-provisions-in-the-usmca-protocol.html> accessed 24 August 2020.

[284] See eg Franz Christian Ebert and Pedro A Villarreal, 'The Renegotiated "NAFTA": What is in it for Labor Rights?' (*EJIL: Talk!*, 11 October 2018) <www.ejiltalk.org/the-renegotiated-nafta-what-is-in-it-for-labor-rights/> accessed 24 August 2020.

[285] n 276–78 and accompanying text.

[286] n 280–83 and accompanying text.

these mechanisms, their impacts in practice, and the influence of relevant factors such as politics and resources at the domestic level in state parties, as well as substantive and procedural provisions of the international texts.

8.115 Future years will also reveal whether and to what extent some novel approaches—such as the USMCA's integration of wage thresholds in rules of origin provisions—find their way into other texts or are further developed. One could imagine, for instance, that similar approaches could be used to establish a floor for corporate conduct even when such conduct is not required by law. Companies could, for instance, be required to certify that their products (or a set portion thereof) meet certain production process standards in order to qualify for duty-free treatment. This, in turn, could be used to tie preferential treatment to emissions intensity or other GHG-related criteria in order to minimize problems of carbon leakage.

2. Closing Transnational Governance Gaps

8.116 Although complex global corporate legal structures can drive up returns to shareholders and strengthen MNEs' competitive positions, they can also have negative effects on external actors, such as by enabling tax avoidance and evasion, externalizing harms without compensating for losses caused, and unfairly tilting the playing field. Rules on corporate form, limitations on shareholder liability, and jurisdictional boundaries significantly limit the ability of governments and the public to access information about a given company, subject the company to investigation, hold it liable, and/or collect any damages awarded.

8.117 Governments have unilaterally and collectively taken some steps to address these issues. Courts in a few domestic jurisdictions, for instance, have been somewhat softening the lines between corporate affiliates by limiting the ability of parent companies to avoid liability for harms caused by their subsidiaries.[287] At the multilateral level, governments have been committing to increase cross-border information-sharing and collaboration on taxation of MNEs, and have been working together to help understand competition effects of cross-border mergers and acquisitions, enforce their anti-trust laws, and prevent abusive market practices.[288]

8.118 But there is more that could be done in terms of addressing some of the challenges arising from transnational conduct and transnational actors. Investment treaties aiming to increase international investment, support MNE activities, and improve outcomes from cross-border corporate activities should and could naturally play a role, helping to anticipate and monitor the governance gaps that MNEs fall into (or purposefully

[287] Andrew Sanger, 'Transnational Corporate Responsibility in Domestic Courts: Still Out of Reach?' (2019) 113 AJIL Unbound 4.

[288] John J Parisi, 'Cooperation Among Competition Authorities in Merger Regulation' (2010) 43 Cornell International Law Journal 55.

exploit), and supporting collaboration to close those gaps[289] or remedy their effects.[290] Relevant activities can include technical and financial support,[291] agreements to cooperate on rule-making, monitoring and enforcement relating to international corporate activities, and efforts to establish funds and mechanisms to ensure access to appropriate remedies.[292]

8.119 There are a few examples of 2019 treaties playing these roles. These primarily can be found in broad FTAs with specific chapters dedicated to a range of issues such as competition and sustainable development, and with provisions calling for, and setting up institutional mechanisms to support, continued collaboration on relevant issues addressing cross-border actors, cross-border activities, and/or cross-border impacts. There are also examples in stand-alone investment treaties. The Netherlands Model BIT offers one potential illustration, providing that '[i]nvestors shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state'.[293] This provision can potentially help address liability gaps caused by thinly capitalized subsidiaries in the host state, or subsidiaries that exit a host country after causing harm, and leave no remaining assets or actors against which those injured can effectively claim. But whether the model's provision will actually make it into an agreement, and what it actually means in practice, are significant open questions.

8.120 One important governance gap relates to governance of the global commons. In this context, the 2019 FTAs have notable features, addressing such things climate change; fisheries subsidies and illegal, un- and under-regulated fishing; protection of biodiversity; protection of the ozone layer; improvement of air quality; and reduction of marine litter and ship pollution. But commentators have raised critiques. Some of those relate to the scope of issues addressed. The USMCA's failure to mention climate change, for example, triggered strong opposition from environmental organizations in the United States.[294] Other critiques question the strength and effectiveness of commitments made

[289] For some ideas of how to close governance gaps in investment treaties to improve corporate accountability, see eg Nathalie Bernasconi-Osterwalder and Joe Zhang, 'Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements' (*International Institute for Sustainable Investment*, 29 April 2018) <www.iisd.org/library/integrating-investor-obligations-and-corporate-accountability-provisions-trade> accessed 24 August 2020.

[290] Alessandra Mistura, 'Integrating Civil Liability Principles into International Investment Law: A Solution to Environmental Damage Caused by Foreign Investors?' in Lisa Sachs, Jesse Coleman, and Lise Johnson (eds), *Yearbook on International Investment Law & Policy 2017* (OUP 2019) (hereafter Mistura, 'Integrating Civil Liability Principles').

[291] As noted by the OECD, complying with the BEPS framework requires significant capacity and resources and can be challenging for developing countries to implement. See OECD, 'Inclusive Framework on BEPS: Progress Report July 2016-June 2017' (2017) 9 <www.oecd.org/tax/beps/inclusive-framework-on-BEPS-progress-report-july-2016-june-2017.pdf> accessed 9 September 2020.

[292] Mistura, 'Integrating Civil Liability Principles' (n 290).

[293] Netherlands Model BIT (n 10) art 7(4).

[294] See eg Letter from 350.org, Earthjustice, Food and Water Action, Friends of the Earth, Greenpeace, League of Conservation Voters, Natural Resources Defense Council, Oil Change International, Sierra Club, and Sunrise Movement to Member of Congress, reported by Rachel Frazin, 'Green groups urge lawmakers to oppose USMCA' (*The Hill*, 13 December 2019) <https://thehill.com/policy/energy-environment/474504-green-groups-urge-lawmakers-to-oppose-usmca> accessed 24 August 2020.

in light of both the obligations that are set forth, how they may (or may not be) enforced, and how they are to be treated in the event of any conflict with other economic liberalization provisions and commitments.[295]

3. Anticipating, Understanding, and Addressing Treaty Effects in State Parties

8.121 An under-utilized tool for states to ensure that their investment treaties maximize intended, positive outcomes and anticipate, identify, avoid, and mitigate negative ones, are impact assessments, designed to assess environmental, social, economic, and human rights impacts of investment treaties and of the investment they support, including the factors that make those impacts more or less likely to occur. A robust impact assessment and implementation plan could map relevant environmental, health and safety standards and conditions in the treaty partners, assess changes in governance, economic activities, relevant actors, and behaviours as affected or potentially affected by the agreement, and include relevant action plans, including commitments to support treaty partners in the development and enforcement of relevant standards, including through capacity-building; commitments to support investors, including small and medium sized enterprises, to adopt best practices in their foreign investments; to share information regarding corporate violators; to develop feedback and complaint mechanisms; and to monitor changes in industries and their performance on environmental, health, social, and safety issues.

8.122 Some 2019 texts—again the FTAs—include relevant provisions aimed at improving impact assessments of, and potential consequent adjustments to, the agreements. The European Union–Japan EPA's TSD chapter notes that the parties 'recognise the importance of reviewing, monitoring and assessing, jointly or individually, the impact of the implementation of this Agreement on sustainable development through their respective processes and institutions, as well as those set up under this Agreement'.[296] The European Union–Vietnam Investment Protection Agreement states that the parties 'shall, jointly or individually, review, monitor and assess the impact of the implementation of this Agreement on sustainable development through their respective policies, practices, participative processes and institutions'.[297] These texts also require parties to establish domestic institutions (for example, 'domestic advisory groups'),[298] interstate networks with civil society (for example, 'joint dialogues'),[299] and treaty bodies (for

[295] See eg ibid; see also Ciaran Cross, 'Anchoring Climate and Environmental Protection in EU Trade Agreements' (April 2020) <https://power-shift.de/wp-content/uploads/2020/05/Anchoring-climate-and-environmental-protection-in-EU-trade-agreements-web.pdf> accessed 24 August 2020.
[296] European Union–Japan EPA (n 3) art 16.11; see also ibid arts 16.12(b) and 16.19.
[297] European Union–Vietnam IPA (n 71) art 13.13.
[298] European Union–Japan EPA (n 3) art 16.15.
[299] ibid art 16.16.

example, 'committees on trade and sustainable development')[300] to monitor and assess sustainable development-related issues and implementation of TSD chapters.

8.123 Yet questions have been raised regarding the operation and effectiveness of these mechanisms in practice.[301] Understanding the impact of treaties thus requires an examination that goes beyond looking at the text when signed, and follows agreements and their implementation over time.

F. Conclusion

8.124 In past *Yearbooks,* this chapter has taken the stock of existing treaties and traditional treaty practice as the baseline against which to assess reforms and innovations. In this chapter, we have taken the globally-agreed SDGs as the benchmark, and use it to assess covered treaties' alignment with their principles. The analysis finds that, notwithstanding some promising innovations, there remains, on the whole, a yawning gap between the objectives of the states signing investment treaties and the substantive and procedural provisions in recently concluded treaties. Indeed, 2019 treaties largely continue trends in treaty practice established over the past several years. This analysis reveals an overall mismatch between the sustainable development objectives of states and one tool governments could use—investment treaties—to meet those goals.

8.125 Negotiations over new investment treaties offer a clean slate to governments to craft new provisions, exclude traditional clauses, and bring both the substantive and procedural elements of investment treaties in line with current priorities on sustainable development; aligning new treaties is arguably more straightforward than bringing existing treaties in line, as the latter approach requires amendments and clarifications that are both difficult to realize and likely insufficient to address the systemic deficiencies evident in the current stock of treaties. The challenges posed by the global COVID-19 crisis in 2020 may bring some of these disconnects and imperatives into even sharper view, particularly as countries, individually and collectively, prioritize a sustainable and just recovery where investment is directed toward building a resilient global economy.

[300] ibid art 16.13.
[301] See also LSE Consulting, 'SIA in Support' (n 274).

Table 8.1 2019 International Investment Treaties and Models

S.No.	Full Treaty Name (when available)	Short Name *(* denotes agreement is publicly available as of 15 April 2020)*	Date Signed (Treaties); Dates Published or Approved (Models)	Date Entered into Force *(status as of 15 April 2019)*
1.	Agreement between the Slovak Republic and . . . for the Promotion and Reciprocal Protection of Investments	Slovakia Model BIT*	Adopted 2019	N/A
2.	Nepal Draft Model Bilateral Investment Agreement	Nepal Draft Model BIT	Adopted 2019	N/A
3.	Bilateral Investment Agreement between Taipei Economic and Cultural Office in Hanoi and the Vietnam Economic and Cultural Office in Taipei	Taiwan Province of China–Vietnam BIT	18 December 2019	Not in force
4.	Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Mauritius	China, People's Republic of–Mauritius FTA	17 October 2019	Not in force
5.	Bilateral Investment Treaty between Rwanda and the Central African Republic	Rwanda–Central African Republic BIT	15 October 2019	Not in force
6.	Agreement on Trade in Services and Investment between the Republic of Armenia and the Republic of Singapore	Armenia–Singapore Agreement on Trade in Services and Investment*	1 October 2019	Not in force
7.	Acordo de cooperação e facilitação de investimentos entre a República Federativa do Brasil e a República do Equador	Brazil–Ecuador CFIA*	25 September 2019	Not in force
8.	Agreement between the Government of the Republic of Singapore and the Government of the Republic of the Union of Myanmar on the Promotion and Protection of Investments	Myanmar–Singapore BIT*	24 September 2019	Not in force
9.	Economic Partnership Agreement between the Southern African Customs Union Member States and Mozambique, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part	SACU–Mozambique–UK FTA*	10 September 2019	Not in force

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Table 8.1 *Continued*

S.No.	Full Treaty Name (when available)	Short Name *(* denotes agreement is publicly available as of 15 April 2020)*	Date Signed (Treaties); Dates Published or Approved (Models)	Date Entered into Force *(status as of 15 April 2019)*
10.	Acuerdo de promoción y protección recíproca de inversiones entre el Gobierno de la República de Nicaragua y el Gobierno de la República Islámica de Irán	Iran, Islamic Republic of–Nicaragua BIT*	10 August 2019	Not in force
11.	Agreement between the Government of the Republic of Belarus and the Government of the Republic of Uzbekistan on Mutual Promotion and Protection of Investments	Belarus–Uzbekistan BIT*	1 August 2019	Not in force
12.	Bilateral Investment Treaty between Gambia and the United Arab Emirates	Gambia–United Arab Emirates BIT	15 July 2019	Not in force
13.	Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part	European Union–Vietnam Investment Protection Agreement*	30 June 2019	Not in force
14.	Agreement between the Government of Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments	Hong Kong SAR, China–United Arab Emirates BIT*	16 June 2019	6 March 2020
15.	Bilateral Investment Treaty between the Government of the Kyrgyz Republic and the Government of the Republic of India	India–Kyrgyzstan BIT*	14 June 2019	Not in force
16.	Acordo de cooperação e facilitação em matéria de investimentos entre a República Federativa do Brasil e o Reino de Marrocos	Brazil–Morocco CFIA*	13 June 2019	Not in force
17.	Accord entre le Rovaume du Maroc et. . . pour la promotion et la protection réciproques des investissements	Morocco Model BIT	Adopted 1 June 2019	N/A

18.	Agreement between the Government of the Republic of Uzbekistan and the Government of the Republic of Korea for the Reciprocal Promotion and Protection of Investments	Korea–Uzbekistan BIT*	19 April 2019	Not in force
19.	Bilateral Investment Treaty between Iraq and Saudi Arabia	Iraq–Saudi Arabia BIT	17 April 2019	Not in force
20.	Accord entre le Gouvernement du Burkina Faso et le Gouvernement de la Republique de Turquie sur la promotion et la protection reciproque des investissements	Burkina Faso–Turkey BIT*	11 April 2019	Not in force
21.	Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments	Australia–Uruguay BIT*	5 April 2019	Not in force
22.	Agreement between the Government of Hungary and the Government of the Republic of Cabo Verde for the Promotion and Reciprocal Protection of Investments	Cabo Verde–Hungary BIT*	28 March 2019	Not in force
23.	Belgium-Luxembourg Economic Union Model Agreement on the Reciprocal Promotion and Protection of Investments	Belgium–Luxembourg Model BIT*	Adopted 28 March 2019	N/A
24.	Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China	Australia–Hong Kong SAR, China Investment Agreement*	26 March 2019	17 January 2020
25.	Economic Partnership Agreement between the CARIFORUM States, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part	CARIFORUM States–United Kingdom EPA*	22 March 2019	Not in force
26.	Netherlands Model Investment Agreement	Netherlands Model BIT	Adopted 22 March 2019	N/A

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Table 8.1 *Continued*

S.No.	Full Treaty Name (when available)	Short Name *(* denotes agreement is publicly available as of 15 April 2020)*	Date Signed (Treaties); Dates Published or Approved (Models)	Date Entered into Force *(status as of 15 April 2019)*
27.	Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the United Arab Emirates	Brazil–United Arab Emirates CFIA*	15 March 2019	Not in force
28.	Australia-Indonesia Comprehensive Economic Partnership Agreement	Australia–Indonesia CEPA*	4 March 2019	Not in force
29.	Agreement between the Government of the Republic of Belarus and the Government of Hungary for the Promotion and Reciprocal Protection of Investments	Belarus–Hungary BIT*	14 January 2019	28 September 2019
30.	Agreement between the Government of the Republic of Korea and the Government of the Republic of Armenia for the Promotion and Reciprocal Protection of Investments	Armenia–Korea BIT*	19 October 2018	3 October 2019
31.	Agreement between the European Union and Japan for an Economic Partnership	European Union–Japan EPA	17 July 2018	1 February 2019
32.	Agreement between Japan and the Republic of Armenia for the Liberalisation, Promotion and Protection of Investment	Armenia–Japan BIT	14 February 2018	15 May 2019
33.	Agreement on Investment among the Governments of the Hong Kong Special Administrative Region of the People's Republic of China and the Member States of the Association of Southeast Asian Nations	ASEAN–Hong Kong SAR, China Investment Agreement	12 November 2017	17 June 2019
34.	Acuerdo comercial entre la República Argentina y la República de Chile	Argentina–Chile FTA	2 November 2017	1 May 2019