

BRIEFING NOTE: MODERN PROVISIONS IN INVESTMENT TREATIES

July 2020

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Why reform?

Governments are pursuing substantive and procedural reform of the international investment regime in recognition that there are fundamental, systemic, and interrelated concerns about current approaches to investment governance,¹ and that current approaches have failed to meet their purported objectives.²

A vast majority of the 1,023 publicly-known treaty-based claims have been brought under “old-generation” treaties.³ In 2018, for example, 60% of such claims were brought under treaties originally concluded in the 1990s or earlier, and all but one was filed under a pre-2011 treaty.⁴ These old-generation treaties⁵ include vague and far-reaching obligations for states, generally do not include any reference to investor responsibilities (even in non-binding terms) or obligations, and rarely include provisions that seek to meaningfully reaffirm and protect the ability of states to regulate without having to pay compensation for adoption or enforcement of legitimate regulatory measures. Effective environmental, human rights, gender, health, labor, and other public interest provisions are generally absent from these agreements.

Without provisions that effectively protect regulatory space and flexibility, and meaningfully advance sustainable development objectives of states parties, respondent host states have been left exposed to costly investor-state dispute settlement (ISDS) proceedings and claims challenging public interest measures.⁶ Investor claimants have also relied on investment treaties and ISDS to make threats of claims in order to distort government measures or conduct in foreign investors’ favor.⁷ In the context of COVID-19, for example, some law firms seized on the pandemic to advise multinationals on strategies for relying on investment treaties and ISDS to bring claims against governments on the basis of COVID-related measures.⁸

1 Governments are engaged in various processes to reform the system. These include multilateral reform efforts, including at UNCITRAL’s Working Group III on ISDS Reform <https://uncitral.un.org/en/working_groups/3/investor-state>.

2 For a discussion of the extent to which ISDS has not met its purported objectives, see Johnson et al. (2017). See also the following papers for discussions of the costs and benefits associated with investment treaties: Bonnitcho (2017); Pohl (2018); Johnson et al. (2018a); Borga et al. (2019).

3 Known treaty-based ISDS cases per UNCTAD Navigator, updated as of December 31, 2019 <<https://investmentpolicy.unctad.org/investment-dispute-settlement>>.

4 UNCTAD, “Fact Sheet on Investor-State Dispute Settlement Cases in 2018” (IIA Issues Note Issue 2, May 2019) 3 <https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf>.

5 UNCTAD refers to “old-generation” treaties as those concluded before 2010, noting that these “[o]ld treaties ‘bite’: as of end-2016, virtually all known investor-State dispute settlement (ISDS) cases were based on those treaties”. UNCTAD, “Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties (IIA Issues Note Issue 2, June 2017) 1 <https://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf>. Phase 2 of UNCTAD’s Road Map for IIA Reform proposes options for modernizing these treaties. CCSI has also elaborated on some of these options; see Johnson et al. (2018b).

6 Average awards are US \$120 million excluding outliers and US \$500 million including outliers (Behn and Daza, forthcoming). Proceedings cost on average US \$5 million per side, and tribunals often require respondent host states to pay their own fees even when the investor’s claim is dismissed.

7 On regulatory chill, see e.g., Van Harten and Scott (2016); Kelsey (2017); Tienhaara (2018); Sachs et al. (2020).

8 Eberhardt (2020). In light of the risk posed by ISDS to the ability of governments and the global community as a whole to confront the COVID-19 pandemic, experts called for a moratorium on ISDS claims during the pandemic and a permanent restriction on ISDS claims for COVID-19-related measures: CCSI, “Call for ISDS Moratorium During COVID-19 Crisis and Response” (May 6, 2020) <<http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/>>.

Options for approaching treaties

Beyond the specific substantive and procedural standards enshrined in a treaty, some governments are carefully reconsidering the structure and form of treaties that govern international investment, and whether/ how to expand and contract different parts of these agreements in order to achieve the development objectives being pursued. Governments are stepping back and asking a series of questions, including:

1. What do we want from international investment? And what aspects/impacts of international investment do we want to avoid?
2. What are the policy tools available to help us get what we want?
3. What role can treaties usefully play, or play better, than other tools?
4. How can treaties be designed to help us achieve our aims?
5. How can treaties be designed to minimize our costs and risks?
6. What is the overall balance of costs and benefits struck by our “model” approach, and how is that balance distributed (e.g. do foreign investors reap the benefits and domestic actors the costs?)
7. (How) can the state ensure that the balance struck in the “model” is secured in practice (i.e. in negotiations and resulting treaties)?

Questions 4, 5, and 6 go to the design of a “model”, while 7 relates to what a state will get in practice when negotiating based on that model. In each context, treaty designers can use a variety of different levers to shape the agreement – expanding or narrowing who and what they are willing to protect, the scope of protections they are willing to provide, and financial exposure they are willing to in turn assume.⁹ These considerations require looking at the contents of provisions defining covered investors and covered investments; which substantive obligations are included and what they require of the state parties; whether there are exceptions to excuse breach; who can bring claims against whom; and what relief is available.

Key takeaway: *When identifying objectives and designing desired provisions, it is crucial to take a holistic view of the model (and any eventual treaties negotiated on the basis of a “model” approach) and how its parts – substantive and procedural – work together.*

How are treaty designers currently seeking to address these provisions in modern treaties?

To address the cross-cutting issues flagged below, treaty designers are integrating provisions into models and treaties that impact who is protected, the scope of obligations benefiting investors (e.g. the scope of indirect expropriation), the scope of obligations towards treaty partners (e.g. in non-lowering of standards provisions), exceptions from breach, dispute settlement, and investor responsibilities or obligations. This briefing note does not focus on issues of scope of protections (e.g. definition of investor or investments) or the nature of investor protections (fair and equitable treatment, indirect expropriation, national treatment, most-favored nation, etc.) per se, but looks at: (1) how approaches to those obligations affect a number of cross-cutting issues; and (2) how certain treaty provisions have sought to specifically address certain cross-cutting issues.

Cross-cutting issues

Environment

In newer-generation treaties and models, references to environmental obligations and protection of the ability to regulate can be found in the following types of provisions: preambles, reaffirmations of the sovereign right of states to regulate, and commitments to non-lowering of environmental standards in order to attract investment. In some cases, they can also be found in provisions concerning investor responsibilities (to, for example, conduct environmental impact assessments) and in general exception provisions. These references appear in newer treaties and models with varying frequency. The extent to which these provisions advance environmental objectives or effectively protect host state measures in practice remains unclear.

The Southern African Development Community (SADC) Model, for example, requires that investors and their investments comply with

⁹ Coleman et al. (2019: 148-149).

applicable environmental and social impact assessment processes.¹⁰ The Morocco–Nigeria Bilateral Investment Treaty (BIT) contains a similar provision,¹¹ as does the draft Pan-African Investment Code (PAIC).¹² The SADC Model also includes a more unique provision, requiring that investors not operate “in a manner inconsistent with international environmental, labor, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher”.¹³ With respect to state obligations, the SADC Model includes a non-lowering of standards provision,¹⁴ and refers explicitly to environmental measures in its general exception.¹⁵

Colombia’s revised Model BIT, like the SADC Model, refers explicitly to environmental measures in its general exception.¹⁶ While Colombia’s general exception is self-judging, meaning that the provision intends for states parties to determine whether a measure falls within the scope of the exception, it nevertheless requires the measures to be “necessary” (often a high bar for a measure to meet if challenged in ISDS proceedings).

Notably, even very recent treaties and models fail to specifically include explicit references to climate change including, for example, how state’s obligations under international investment law might interact with climate objectives or obligations.¹⁷

Key takeaway: *Despite clear and profound links between investment governance and realization of climate objectives, even recent models fail to address this link, and therefore risk opening states up to ISDS claims challenging actions taken in good faith and consistent with climate mitigation and adaptation commitments and objectives. Treaty designers may wish to consider how investment treaties can be tailored to promote climate-friendly investment, deny protection to investments that undermine climate objectives, and play a role in addressing climate mitigation and adaptation challenges that require global cooperation.*

Human rights

A 2014 study published by the Organisation for Economic Co-operation and Development (OECD) found that only 0.5% of the 2,107 treaties included in the study contained references to “human rights”, and a majority of those references were found in the preambles of the relevant agreements.¹⁸ Developments in more recent drafting practice indicate some improvement, meaning that more recent treaties include some explicit references to: (1) the human rights obligations of states in the context of investment governance; and/ or (2) the human rights responsibilities of investors. However, these references remain rare and their effectiveness is generally untested and/ or limited.

With respect to investor responsibilities, which can in some cases permit states to counterclaim for investor wrong-doing or to deny certain treaty protections in some cases, the draft PAIC includes a chapter on investor obligations.¹⁹ Some of the provisions enshrined therein are mandatory, while others are enshrined in “best efforts” terms. The PAIC includes a provision on counterclaims, which would enable a prospective respondent state to bring a counterclaim against an investor where they have failed to comply with obligations under the Code or “other relevant rules and principles of domestic and international law”.²⁰ Brazil’s Model Cooperation and Facilitation Investment Agreement (CFIA) adopts a “best efforts” approach to corporate social responsibility.²¹ While the Model represent a step forward as compared to old-generation agreements, it does not condition receipt of treaty benefits on compliance with those standards.

10 SADC Model art 13.

11 Morocco–Nigeria BIT art 14.

12 Draft PAIC art 37.4.

13 SADC Model art 15.

14 SADC Model art 22.

15 SADC Model art 25.

16 Colombia revised Model BIT art [XX] General Exceptions.

17 By comparison, some FTAs and Economic Partnership Agreements (EPAs) without investor protections do contain such references. The European Union’s EPAs with Armenia and Japan, for example, include reaffirmations of the parties’ commitments to implementation of the objectives of the UN Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, and the Paris Agreement, and to further cooperation and implementation of international climate change frameworks. Some FTAs also include provisions that recognize the links between trade and environmental obligations, and reaffirm commitments to implementing (in national laws and practices) multilateral environmental agreements to which states are party.

18 Gordon et al. (2014: 18). The study examined a sample of all investment treaties that 54 countries plus the European Commission had concluded with any other country “provided that the full text was electronically available in early 2014”, which meant that it covered 2,107 treaties and “more than 70% of the global investment treaty population”. See Gordon et al. (2014: 10).

19 Draft PAIC ch 4. Most treaties currently in force do not include any investor responsibilities or obligations, meaning that states are often unable to advance counterclaims against investors, or deny treaty protections, even in cases of investor wrongdoing.

20 Draft PAIC art 43.

21 Brazil Model CFIA art 14.

The Netherlands Model (2019) includes ISDS, though it seeks to curtail access to the mechanism.²² The Model also includes some notable references to the human rights responsibilities of investors and obligations of states. For example, it requires prospective states parties to “take appropriate steps” to ensure that those affected by business-related human rights abuse have access to effective remedy.²³ This mirrors the wording of Principle 25 of the United Nations Guiding Principles on Business and Human Rights (UNGPs),²⁴ seeking to reinforce that principle within the text of the Model; however, its practical effects remain unclear. The Model also provides that an ISDS tribunal determining a claim “*is expected* to take into account non-compliance” by an investor claimant with commitments under the UNGPs and OECD Guidelines for Multinational Enterprises.^{25,26} This is unique amongst other models, but it raises the question, for consideration by treaty designers, of whether non-compliance with human rights norms should be addressed by an ISDS tribunal through a reduction of damages (which still permits an investor to advance claims and a state to spend the time and cost of defending against them), or whether receipt of treaty benefits, and thus the ability to bring a claim in the first place, should be conditioned upon the responsible business conduct of an investor.

A handful of recent agreements include specific exceptions or reservations concerning the ability of host governments to take measures to protect the rights of indigenous peoples over their lands and natural resources. Examples include the Argentina–Japan BIT,²⁷ Canada–Moldova BIT,²⁸ the United States–Mexico–Canada Agreement (USMCA),²⁹ and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).³⁰ The extent to which these exceptions and reservations effectively guard the policy space necessary to preserve indigenous rights remains unclear owing to the limiting language included in some of these provisions. The CPTPP, for example, includes a self-judging exception concerning measures that New Zealand “deems necessary to accord more favourable treatment to Māori in respect of matters covered by” the treaty and to fulfill obligations under the Treaty of Waitangi; requirement measures to be “necessary” rather than desirable or appropriate creates a strict nexus requirement that limits the utility of this exception.³¹

These newer generation models represent a step forward as compared to the dearth of references to human rights obligations and responsibilities in texts reviewed by the OECD in its 2014 study. However, the examples referred to above remain the exception rather than the rule. Moreover, the effectiveness of these provisions remains broadly untested, and many recent examples appear to fall short of what would be necessary to preserve the ability of states to comply with their human rights obligations and condition receipt of treaty benefits upon responsible business conduct by investors.³²

Key takeaway: Consider whether human rights provisions will be effective in protecting the state’s ability to regulate in practice, and how to condition treaty benefits upon compliance by investors with investor obligations in order to promote responsible business conduct.

Gender

While the intersection of gender and trade is more frequently addressed in recently concluded trade agreements, it is less frequently an issue area that is explicitly addressed in investment treaties and investment chapters within Free Trade Agreements (FTAs). The Brazil–Chile FTA, concluded in 2018, includes a chapter on gender that reaffirms and incorporates a number of international human rights obligations relating to this issue area.³³ The chapter also provides for review, within two years, of implementation of the chapter,

22 The Netherlands model BIT limits access to ISDS by, for example, specifying that arbitral tribunals “shall decline jurisdiction” where an investor “has changed its corporate structure with a main purpose to gain the protection of this Agreement at a point in time where a dispute had arisen or was foreseeable”. Netherlands Model BIT art 16.3.

23 Netherlands Model BIT art 5.

24 UN Guiding Principles on Business and Human Rights <https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf>.

25 Netherlands Model BIT art 23 (emphasis added).

26 OECD Guidelines for Multinational Enterprises <<https://www.oecd.org/corporate/mne/>>.

27 Argentina–Japan BIT annex II (Non-Conforming Measures, Schedule of the Argentine Republic).

28 Canada–Moldova BIT annex I (Reservation for Future Measures, Schedule of Canada).

29 USMCA art 32.5. For Canada, the “legal obligations” referred to in this provision include the rights of indigenous peoples covered by section 35 of the Constitution Act of 1982 and those set out in self-government agreements. The that were ultimately included in USMCA did not meet expectations outlined in Canada’s negotiating objectives for the revised NAFTA, which included a specific chapter dedicated to indigenous rights. See Coleman et al. (2019: 145-148).

30 CPTPP art 29.6(1).

31 For further discussion of this exception and other exceptions concerning the rights of indigenous peoples, see Coleman et al. (2019: 145-148).

32 For further discussion of the merits of various approaches, see Johnson (2020).

33 Brazil–Chile FTA ch 8.

and national contact points are to be established to support cooperation regarding its implementation.³⁴

Health

As with environmental provisions, references to the ability of states to regulate with respect to the health of their populations are found in some newer treaties and models. General exception provisions, where included, tend to provide that the treaty shall not preclude adoption or enforcement of measures relating to protection of human health. Such exceptions often require that measures be “necessary”;³⁵ justified, proportionate to the objectives pursued, and/ or that they not be discriminatory or arbitrary.³⁶ Where a treaty includes ISDS, a tribunal will have the discretion to assess the government’s conduct against these standards.

Labour

Labor issues are dealt with in some recent treaties and models in provisions addressing: (1) the state’s ability to regulate and its obligations under other international agreements; and (2) investor obligations or (non-binding) responsibilities.

With respect to (1), these references appear in a similar manner to those concerning the environment and health, and could be strengthened accordingly. Regarding (2), recent provisions vary considerably in terms of frequency and strength. Colombia’s Model BIT, for example, provides that an investor may be denied the benefits of the treaty if “an international court or a judicial or administrative authority of any State with which the Contracting Parties have diplomatic relations has proven that” the investor directly or indirectly violated the host state’s labor laws, amongst other things.³⁷ The Draft PAIC contains several labor-specific provisions, including that investors shall “adhere to socio-political obligations” including those concerning “respect for labor rights”.³⁸ Elimination of forced and compulsory labor is also listed as one of the principles governing “compliance by investors with business ethics and human rights” under the Draft PAIC.³⁹

In general, labor provisions in models and treaties could be strengthened by a minimum requirement to comply with the international labor standards adopted by the host and home state (whichever are higher), and by reference to existing state obligations and investor standards under the International Labour Organization’s framework.⁴⁰ Going beyond explicit references to labor obligations, provisions concerning performance requirements and compliance with domestic law (among other areas) are also closely connected to this issue area and should be considered alongside those concerning labor obligations specifically (of both states parties and investors).

Sustainable development

Broader references to the sustainable development objectives of states parties are found in the preambles of some newer texts and (less frequently) in some operative provisions. The draft PAIC contains references to sustainable development and the Sustainable Development Goals (SDGs) in its preamble, and the Code’s stated objective is “to promote, facilitate and protect investments that foster the sustainable development of each Member State, and in particular, the Member State where the investment is located”.⁴¹ The Code also provides that “[i]nvestors shall contribute to the economic, social and environmental progress with a view to achieving sustainable development of the host State”.⁴² Similarly, the MERCOSUR Investment Protocol also recognizes, in its preamble, the role of investment in the promotion of sustainable development and poverty reduction, and also provides that investors and their investments should operate in a socially responsible manner.⁴³ The stated objective of the Protocol is to promote cooperation amongst states parties in order to facilitate investment that enables sustainable development.⁴⁴ Colombia’s revised Model BIT conditions access to dispute

34 Brazil–Chile FTA arts 18.4(9) and 18.5. For further discussion of this agreement and other provisions concerning gender in recently concluded agreements, see Coleman et al. (2019: 144-146).

35 A tribunal assessing whether a measure was “necessary” will review the government’s conduct and, amongst other things, assess whether less restrictive measures could have been adopted by the government. Necessity is a difficult test to satisfy.

36 The Draft PAIC (art 14), for example, does not require that measures be “necessary” but it does require that measures “are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investors in like circumstances or a disguised restriction on investment flows”.

37 Colombia Model BIT (2017) art [xx] Denial of Benefits.

38 Draft PAIC art 20.

39 Draft PAIC art 24.

40 For further discussion, see Bernasconi-Osterwalder et al. (2018: 11-13).

41 Draft PAIC art 1.

42 Draft PAIC art 22.3.

43 MERCOSUR Investment Protocol preamble.

44 MERCOSUR Investment Protocol art 1.

settlement under the agreement on the “[i]nvestor’s contribution to sustainable development and welfare of their [H]ost Party”,⁴⁵ though the mechanism for assessing this is not outlined within the text of the Model.

Beyond these references, more could be done to design agreements that *encourage and channel* investments that contribute to sustainable development, and to withhold treaty benefits from those investments that undermine or do not contribute to sustainable development.⁴⁶

Key takeaway: *Recent models and treaties may contain noteworthy provisions when compared to “old-generation” agreements. However, it is critical to investigate and assess whether these new provisions are sufficient to achieve the sustainable development objectives policymakers are seeking to realize with the conclusion of investment treaties. Even “new-generation” provisions continue to fall short.*

What steps are currently being proposed at multilateral levels?

Fundamental and systemic concerns about ISDS have prompted a number of reform processes at regional and multilateral levels. At the multilateral level, the UN Commission on International Trade Law’s (UNCITRAL’s) Working Group III on ISDS Reform has “a broad mandate to work on possible reform of investor-State dispute settlement”,⁴⁷ though this mandate has been interpreted to limit work to procedural aspects of ISDS rather than substantive treaty provisions. States have reiterated in their submissions and interventions that reform of ISDS will require addressing substantive provisions, including those concerning the ability to regulate, in order to meaningfully reform ISDS. The International Centre for the Settlement of Investment Disputes (ICSID) is also undertaking a rule reform process, which is unlikely to directly address the substantive cross-cutting issues covered in this briefing note.

The European Union’s proposed Investment Court System, also being discussed through UNCITRAL’s Working Group III on ISDS Reform, similarly seeks to pursue procedural changes to dispute settlement. It does not directly address the cross-cutting matters raised in this briefing note.

Dispute settlement

The interpretation and application of treaty provisions is significantly shaped by dispute settlement including, in particular, who has power to bring and frame claims. Excluding ISDS from models and treaties is an effective way of limiting direct exposure of states parties to future ISDS claims.⁴⁸ Other, less effective, procedural mechanisms for limiting exposure to ISDS claims challenging environmental, human rights, and other public interest measures include: (1) state-state filters;⁴⁹ and (2) not providing advance consent to ISDS.⁵⁰

Consider also who has power to participate as a third party in dispute settlement processes. Affected third parties are currently excluded from meaningfully participating in ISDS; their ability to effectively raise environmental, human rights, and other public interest issues is therefore undermined. Where ISDS, ombuds, or other dispute settlement mechanisms are provided for in a model or treaty, providing for meaningful participation by affected third parties enables relevant public interest matters to be heard and relevant rights and interests

45 Colombia Model BIT section DD (dispute settlement) art X(3) (scope of application of ISDS).

46 For further discussion, see Johnson et al. (2019).

47 UNCITRAL Working Group III (2017).

48 Brazil’s model Cooperation and Facilitation of Investment Agreement (CFIA), for example, excludes ISDS and focuses more on attracting and retaining investment, instead favouring establishment of ombuds mechanisms to address investor grievances if/ when they arise. State-state dispute settlement is provided for as a last resort where disputes cannot be addressed through the domestic courts or through the ombuds mechanism. It also includes fewer traditional “investor protection” standards. States have also reportedly chosen to exclude ISDS from RCEP. ISDS was also limited in scope in USMCA: (1) As between the US and Mexico, ISDS was retained for certain breaches, after exhaustion of domestic remedies. Exceptions are made for a number of sectors (including oil, gas, power generation, transport services, telecoms, and public infrastructure) where investors have covered government contracts – these claimants are not required to first exhaust local remedies; (2) Canada and the US have removed ISDS from relations between those parties. Investors from these treaty parties will be able to bring ISDS claims against their host states for 3 years during a NAFTA/ USMCA transition period, after which ISDS will no longer be available to them.

49 State-state filters help to ensure that treaty parties have ongoing control over management of their treaties in ensuring that claims falling within the scope of protection are advanced, and that clear outliers cannot bring opportunistic or abusive claims (e.g. those challenging environmental and human rights measures) under the auspices of the treaty. These filters could be applied to a wide range of measures or, indeed, to all claims.

50 In nearly all existing investment treaties, the state parties give consent in the treaty itself to be sued in arbitration by any investor who qualifies for treaty protections. In other words, the state gives “advance consent” to any future claim at the time it ratifies the treaty. A different approach, and one that would give greater control to respondent states to limit claims for public interest measures, would be to provide treaty-based investor-protections, but not to grant consent in advance to arbitrate with the investor; rather, the state could give that consent on a case-by-case basis as claims arise.

to be represented in the dispute/ process.⁵¹

Key takeaway: *When evaluating how to effectively preserve regulatory space and flexibility, consider how environmental, human rights, gender, health, labor, and other public interest provisions will interact with dispute settlement provisions and the broader nature and form of an investment treaty.*

How could treaty designers be thinking about what is needed/ desired?

Questions that may support evaluation of the effectiveness of environmental, human rights, gender, health, labor, and other public interest provisions include:

- Are the provisions aligned with the objectives sought by treaty parties?
- Do the provisions clarify the interaction between state obligations under other areas of international, regional, and national law (such as environmental and human rights law) and investment law?
- Do the provisions clearly and effectively protect host state measures adopted to comply with environmental, human rights, gender, labor, health, and other public interest obligations or objectives?
- What signals do the provisions send to investors, states, and other stakeholders? Do these signals promote or undermine responsible business conduct?
- Do they address pressures that can result in investment obligations taking precedence over public interest obligations in practice?

More broadly, existing treaties must be reformed and reimagined to achieve deeper alignment with Agenda 2030 and the SDGs. Most investment treaties continue to be far off this mark. The sustainable development objectives sought by policymakers should be at the center of any new negotiations, and at the center of reviews of existing agreements. New and existing agreements could be assessed against their ability to:⁵²

- Encourage and channel investments that promote, rather than undermine, sustainable development;
- Foster, rather than constrain, SDG-advancing governance at the national level; and
- Promote international cooperation to overcome collective action challenges related to the governance of international investment.

Creating space for reform also requires addressing the existing stock of treaties. Various options have been advanced to address the existing stock, including termination of treaties and withdrawal of consent to ISDS.⁵³ Most recently, in May 2020, 23 Member States of the European Union signed an agreement to terminate intra-EU BITs due to the incompatibility of ISDS with EU law.⁵⁴ This most recent development further opens the door for much needed creativity in addressing the large stock of old-generation treaties, and in further innovating the provisions enshrined in future agreements.

Key takeaway: *To align investment treaties with Agenda 2030 and the SDGs, evaluate new and existing treaties against the sustainable development objectives these agreements are seeking to realize. Various options exist for dealing with the existing stock of “old-generation” treaties.*

About

This briefing note was authored by Jesse Coleman, Senior Legal Researcher at the Columbia Center on Sustainable Investment (CCSI). It was adapted from a briefing note prepared by the same author for the “Negotiating and implementing investment policies in the AfCFTA: Online Capacity building May/June 2020”.

⁵¹ For approaches to consider, see CCSI et al. (2019).

⁵² This framework is outlined in the following paper: Johnson et al. (2019).

⁵³ See e.g., Porterfield (2014); Johnson et al. (2018b); Bernasconi-Osterwalder et al. (2020).

⁵⁴ European Commission “European Union Member States sign an agreement for the termination of intra-EU bilateral investment treaties” (Press Release, 5 May 2020) <https://ec.europa.eu/info/files/200505-bilateral-investment-treaties-agreement_en>.

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