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INTERNATIONAL INVESTMENT AGREEMENTS, 2015–2016

A Review of Trends and New Approaches

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A. Introduction

2.01 In 2015 and 2016, at least thirty-four and thirty-seven international investment agreements (IIAs) were signed respectively, compared to at least thirty-five in 2014.[1] Conclusion of these agreements brought the total number of IIAs to 3,592 by the end of 2016,[2] with fifty-two of the newly signed agreements being bilateral

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[1] International investment agreements (IIAs) are defined herein as bilateral and multilateral instruments for the protection and/or promotion of foreign investment. A complete list of the IIAs concluded in 2015 and 2016 is provided in Table 2.1 at the end of this chapter.

[2] This refers to the total number of IIAs signed by 31 December 2016, which includes: agreements that are signed but not in force; agreements that are signed and in force; and agreements that have been terminated or replaced. See United Nations Conference on Trade and Development

investment treaties (BITs) and nineteen being other types of international agreements with investment provisions or chapters. Turkey was the most active in concluding agreements during this period, signing eleven IIAs in 2015–2016, including ten BITs and one free trade agreement (FTA) with investment provisions. Brazil signed seven IIAs, all with states in Latin America and Africa. China and the United Arab Emirates signed six agreements each during the course of the review period; Mauritius and Morocco each signed five agreements; and Canada, Iran, Japan, Mexico, and the Republic of Korea each signed four agreements over the course of 2015 and 2016.

2.02 During the period under review,[3] public debate and political discourse regarding the implications of the international investment regime increased significantly. Several 'mega-regional' agreements formed the focus of increased attention. In November 2015, seven states concluded the Trans-Pacific Partnership (TPP),[4] and the text of the agreement was finally released.[5] The TPP featured prominently in public discourse around the United States presidential election of 2016. Draft chapters of the EU's proposed text for the Transatlantic Trade and Investment Partnership (TTIP) were published in 2016 by Greenpeace International.[6] While the fifteenth round of negotiations took place in New York in October 2016, the agreement's future is uncertain given inter alia the potential for a revised approach under the Trump administration in the United States.

2.03 Also in 2016, negotiations on the Comprehensive Economic and Trade Agreement (CETA) finally concluded.[7] However, signature of the agreement was momentarily stalled due to opposition from the Walloon regional government.[8] CETA

(UNCTAD), *International Investment Agreements Navigator*, <http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBITResults>.

[3] This chapter covers IIAs and models concluded and published during the course of 2015 and 2016. Developments through May 2017 related to treaties concluded during the review period are noted. The chapter focuses on agreements and models published in English; more limited consideration is also given to agreements and models published in Spanish and Portuguese.

[4] Trans-Pacific Partnership Agreement (signed 4 February 2016) (hereafter TPP).

[5] For the full text of the agreement, see Office of the United States Trade Representative (USTR), *Trans-Pacific Partnership* <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

[6] See Greenpeace, *Trade-Leaks* <https://ttip-leaks.org/>. See also Greenpeace Press Release, 'Greenpeace Netherlands releases TTIP documents' (2 May 2016) <http://www.greenpeace.org/international/en/press/releases/2016/Greenpeace-Netherlands-releases-TTIP-documents/>.

[7] Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States (signed 30 October 2016) (CETA). For the full text of the agreement, see European Commission, *In Focus: Comprehensive Economic and Trade Agreement (CETA)* <http://ec.europa.eu/trade/policy/in-focus/ceta/>.

[8] See eg Barrie McKenna, 'What's Wallonia's deal? A Primer on its Role in CETA's Crisis' *The Globe and Mail* (5 January 2017) <https://www.theglobeandmail.com/report-on-business/international-business/european-business/explainer-ceta-wallonia-europe-and-canada/article32489554/>; Jennifer Rankin, 'EU–Canada Free Trade Deal at Risk after Belgian Regional

also featured as a core issue in political discourse at the national and sub-national levels in the Netherlands, Germany, and elsewhere in Europe.[9] Despite opposition, the agreement was ultimately signed on 30 October 2016. CETA's signature was accompanied by thirty-eight statements or declarations,[10] including a Belgian Declaration that facilitated Wallonia's consent to Belgium's signature,[11] and a Joint Interpretative Instrument concerning inter alia the right to regulate.[12] CETA's designation as a 'mixed' agreement will require ratification of the agreement by all European Union Member States.[13] Until the agreement is ratified, certain portions will be provisionally applied.[14] The outcome of the referendum

Parliament Vote' *The Guardian* (14 October 2016) <https://www.theguardian.com/business/2016/oct/14/eu-canada-free-trade-deal-ceta-in-jeopardy-belgium-wallonia-parliament-vote>.

[9] In 2016, civil society groups in the Netherlands sought to gather the signatures needed to petition for a referendum on CETA. In Germany, a constitutional complaint sought temporary legal protection against the agreement. See Jelena Bäumler, 'Only a Brief Pause for Breath: The Judgment of the German Federal Constitutional Court on CETA' *Investment Treaty News* (12 December 2016) <https://www.iisd.org/itn/2016/12/12/only-a-brief-pause-for-breath-the-judgment-of-the-german-federal-constitutional-court-on-ceta-jelena-baumler-baeumler/>.

[10] Guillaume Van der Loo, 'CETA's Signature: 38 Statements, a Joint Interpretative Instrument and an Uncertain Future' *Thinking Ahead for Europe* (31 October 2016) <https://www.ceps.eu/publications/ceta%E2%80%99s-signature-38-statements-joint-interpretative-instrument-and-uncertain-future>.

[11] For an 'informal translation' of excerpts from the Belgian Declaration, see Rob Howse, 'Belgian CETA Declaration Informal English Translation' *International Economic Law and Policy Blog* (28 October 2016) <http://worldtradelaw.typepad.com/ielpblog/2016/10/belgian-ceta-declaration-informal-english-translation-from-french-version-opening-procedural-paragra.html>. See also Council of the European Union, Statements to the Council Minutes (27 October 2016), <http://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf>. To address Walloon opposition, Belgium will seek an opinion from the Court of Justice of the European Union regarding the legality under EU law of provisions concerning investor–state dispute settlement in CETA. See eg Laurens Ankersmit, 'Investment Court System in CETA to be Judged by the ECJ' *European Law Blog* (31 October 2016) <http://europeanlawblog.eu/2016/10/31/investment-court-system-in-ceta-to-be-judged-by-the-ecj/>.

[12] Council of the European Union, Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States (27 October 2017) Doc 13541/16 <http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf> (Joint Interpretative Instrument CETA). See also Section C(2) below (Right to Regulate).

[13] Designation as a mixed agreement itself has resulted from political pressures. In July 2016, European Union Commissioner for Trade, Cecilia Malmström, stated: 'From a strict legal standpoint, the Commission considers this agreement to fall under exclusive EU competence. However, the political situation in the Council is clear, and we understand the need for proposing it as a "mixed" agreement, in order to allow for a speedy signature.' European Commission Press Release, 'European Commission Proposes Signature and Conclusion of EU–Canada Trade Deal' (5 July 2016) <http://europa.eu/rapid/press-release_IP-16-2371_en.htm>. While it is beyond the scope of review, it is useful to note that the European Parliament voted in favour of CETA on 15 February 2017. See European Commission Press Release, 'European Commission welcomes Parliament's support of trade deal with Canada' (15 February 2017) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1624>.

[14] While mixed agreements require ratification by Member States of the European Union, certain portions of mixed agreements can be applied on a provisional basis. Most of CETA became provisionally applicable following the European Parliament's vote on 15 February 2017; however,

on the United Kingdom's departure from the European Union ('Brexit') has also raised questions regarding whether the United Kingdom could continue to be bound by CETA following its exit from the European Union.[15]

2.04 Moreover, CETA's designation as a mixed agreement has also raised the issue of whether the European Union–Singapore FTA will require ratification by Member State parliaments: the question of whether conclusion of this agreement falls within the exclusive competence of the European Commission, and therefore does not require ratification by Member States, was referred to the Court of Justice of the European Union. Advocate General Sharpston issued her Opinion in the matter in December 2016, concluding that the European Union–Singapore FTA could 'only be concluded by the European Union and the Member States acting jointly'.[16] In May 2017, outside the scope of this review period but a development important to note nonetheless, the Court of Justice determined that three investment-related issues belonged to the shared competence of the European Union and the Member States: (1) the provisions of the investment chapter (chapter 9), as they relate to portfolio investment and other types of international investment other than foreign direct investment; (2) the provisions on investor–state dispute settlement (ISDS); and (3) the provisions on state–state dispute settlement as they relate to issues of shared competence (such as disputes under chapter 9 relating to portfolio investment). As explored further in section C, this decision has important implications for whether and when the text (and similar agreements such as the CETA) will ultimately be ratified.[17]

sections concerning investor protection and investor–state dispute settlement are excluded from provisional application of the agreement. European Commission, *CETA Explained* <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/>. See also European Commission Press Release, 'European Commission welcomes Parliament's support of trade deal with Canada' (15 February 2017) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1624>.

[15] Guidance on the implications of CETA for Brexit, and vice versa, has been sought by the European Scrutiny Committee. See Dominic Webb, 'CETA: the EU–Canada Free Trade Agreement' *House of Commons Library* (3 February 2017).

[16] Court of Justice of the European Union, Press Release, 'Advocate General Sharpston Considers that the Singapore Free Trade Agreement Can Only Be Concluded by the European Union and the Member States Acting Jointly' (21 December 2016) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-12/cp160147en.pdf>. For commentary, see eg Laurens Ankersmit, 'The Power to Conclude the New Generation of EU FTAs: AG Sharpston in Opinion 2/15' *Investment Treaty News*, (13 March 2017); Jennifer Rankin, 'EU Lawyer Says All Members Must Approve Sweeping Trade Deals' *The Guardian* (21 December 2016) <https://www.theguardian.com/politics/2016/dec/21/eu-lawyer-members-must-approve-sweeping-trade-deals-brexit>.

[17] Opinion 2/15 of the Court (16 May 2017) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=415687>. For commentary, see eg Anthea Roberts, 'A Turning of the Tide against ISDS?' *EJIL: Talk!* (19 May 2017); Damien Charlotin, 'EU Court Determines that Some Key Aspects of Signature-EU FTA Investment Chapter, Including ISDS, Require that it Be Submitted for Ratification in All EU Member-States' *IA Reporter* (16 May 2017).

2.05 Other developments led by the European Union include the European Commission's efforts to promote a multilateral approach to investor–state dispute settlement. In December 2016, the European Commission launched a public consultation on its proposed Multilateral Investment Court (MIC) and Multilateral Appeal Tribunal (MAT), an initiative that sought to build on the inception impact assessment published by the European Commission in August of the same year.[18] The proposal has been developed alongside bilateral systems enshrined in recently negotiated agreements between the European Union and other states, including CETA and the European Union–Vietnam FTA. With respect to CETA, the Joint Interpretative Instrument agreed upon by the European Union and Canada refers to the MIC, stating that the parties will 'work expeditiously toward the creation of a Multilateral Investment Court', which 'should be set up once a minimum critical mass of participants is established, and immediately replace bilateral systems such as the one in CETA, and be fully open to accession by any country that subscribes to the principles underlying the Court'.[19] Following publication of the statement in October 2016, the European Union and Canada subsequently co-hosted an intergovernmental expert meeting of policymakers in December 2016 to discuss the 'establishment of a multilateral investment dispute settlement system'.[20]

2.06 In addition to developments concerning regional agreements, negotiation and conclusion of bilateral agreements also continued. As discussed below, Iran and Slovakia concluded a BIT that seeks to limit investor access to investor–state dispute settlement in cases where the investor or investment violates the host state law,[21] and allows for host state respondents to 'assert as a defense, counterclaim, right of set off or other similar claim that the claimant has not fulfilled its

[18] European Commission, 'Questionnaire on Options for a Multilateral Reform of Investment Dispute Resolution' <http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233>. European Commission, Inception Impact Assessment: Establishment of a Multilateral Investment Court for Investment Dispute Resolution (1 August 2016) <http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf>. For further information regarding the Commission's consultation strategy for the MIC, see eg European Commission, Consultation Strategy: Impact Assessment on the Establishment of a Multilateral Investment Court for Investment Dispute Resolution (October 2016) <http://trade.ec.europa.eu/doclib/docs/2016/october/tradoc_154997.pdf>; European Commission, *The Multilateral Investment Court Project* <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>.

[19] Joint Interpretative Instrument CETA (n 12) s 6(i).

[20] European Commission and the Government of Canada, 'Discussion Paper: Establishment of a Multilateral Investment Dispute Settlement System' (13, 14 December 2016) <http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf>.

[21] Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (signed 19 January 2016) art 14(2) (Slovakia–Iran BIT).

obligations under this Agreement to comply with the Host State law or that it has not taken all reasonable steps to mitigate possible damages'.[22] Also discussed further below,[23] Morocco and Nigeria concluded an agreement that contains several provisions regarding pre- and post-establishment investor obligations, including with respect to: environmental and social impact assessments;[24] anti-corruption;[25] environmental management, labour standards, and human rights.[26] The agreement also provides for civil claims in the home state of the investor regarding 'acts or decisions made in relation to the investor where such actors or decisions lead to significant damage, personal injuries or loss of life in the host state'.[27]

2.07 Other prominent negotiations continued in 2015 and 2016, including negotiation of the Regional Comprehensive Economic Partnership (RCEP) and the Continental Free Trade Agreement (CFTA). With respect to RCEP, the unwillingness on the part of the Trump administration in the United States to submit TPP for ratification by Congress may increase RCEP's prominence. The fourth ministerial meeting regarding RCEP was held in the Lao People's Democratic Republic in August 2016.[28] Other relevant developments that took place during the review period include: the reported reviewing by COMESA countries of their 2007 Investment Treaty; the development of a Pan-African Investment Code; ongoing negotiations around the Trade in Services Agreement (TiSA); and the review of the Caribbean Community Market (CARICOM) draft template for Investment Chapters.[29]

2.08 With respect to broader developments affecting the stock of IIAs that is currently in force, Canada became the second state to ratify the Mauritius Convention, signing the agreement on 12 December 2016. The Convention will enter into force upon ratification by a third state.[30] By the end of 2016, the Convention had been signed by seventeen states.[31]

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[22] ibid.

[23] See Section D(3) (Investor Obligations).

[24] Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (signed 3 December 2016) art 14 (Morocco–Nigeria BIT).

[25] ibid art 17.

[26] ibid art 18.

[27] ibid art 20.

[28] UNCTAD, 'Investment Policy Monitor No 16' (November 2016) <http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d2_en.pdf> (Investment Policy Monitor No 16) 7.

[29] ibid 8–9.

[30] United Nations Convention on Transparency in Treaty-based Investor–state Arbitration (2014) art 9. Note that in 2017, Cameroon and Iraq signed the agreement, and Switzerland became the third state to ratify the agreement. The Convention will thus enter into force on 18 October 2017. See UNCITRAL, *Status: United Nations Convention on Transparency in Treaty-based Investor–State Arbitration (New York 2014)* <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html>.

[31] See UNCITRAL, *Status: United Nations Convention on Transparency in Treaty-based Investor–State Arbitration (New York 2014)* <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html>.

2.09 As previously reported in last year's *Yearbook* chapter, states continue to reassess their engagement with the current investment regime: several states have sought to renegotiate existing IIAs, while others have published revised model agreements. During the review period, Russia established new guidelines for the negotiation and contents of its future IIAs,[32] and Poland announced its intention to terminate its twenty-three BITs with other Member States of the European Union.[33] Following approval of its revised model BIT,[34] the Indian government wrote to forty-seven countries indicating its intention to terminate existing BITs and negotiate new agreements.[35] In December 2016, India signed what appears to be the first agreement concluded on the basis of its revised model: the agreement, which had not been published at the time of writing, was concluded with Brazil.[36] As reported in last year's *Yearbook* chapter, the revised model BIT that was ultimately approved by the Indian government took several steps back from the more progressive approach displayed in the March 2015 draft of the revised model.[37] However, given the alternative approach adopted by Brazil in its model CFIA, there is perhaps potential for the Brazil–India BIT to implement the steps India had sought to take in the March 2015 draft of its revised model.

2.10 Also in 2016, India published a Joint Interpretative Statement in an effort to clarify its understanding of key provisions in IIAs that can give rise to significant uncertainty and often generate repeat litigation.[38] This represents an attempt by a government to more proactively shape the substantive content of investment treaties, a power held by states under international law.[39] This strategy is not

[32] Joel Dahlquist, 'Russia Sets out New Guidelines for Contents of Future Investment Treaties' *Investment Arbitration Reporter* (26 October 2016) <https://www.iareporter.com/articles/russia-sets-out-new-guidelines-for-negotiation-of-future-investment-treaties/>.

[33] UNCTAD, 'World Investment Report 2016: Investor Nationality—Policy Challenges' (2016) Sales No E.16.II.D.4, 102 (World Investment Report 2016).

[34] For commentary, see eg Grant Hanessian and Kabir Duggal, 'The 2015 Indian Model BIT: Is This Change the World Wishes to See?' (2015) 30(3) ICSID Review 729, 731.

[35] See eg Deepshikha Sikarwar, 'India Seeks Fresh Treaties with 47 Nations' *The Economic Times* (27 May 2016) <http://economictimes.indiatimes.com/news/economy/foreigntrade/india-seeksfreshtreatieswith47nations/articleshow/52458524.cms>.

[36] Joel Dahlquist, 'Brazil and India Conclude Bilateral Investment Treaty' *Investment Arbitration Reporter* (28 November 2016).

[37] See Lise Johnson, Lisa Sachs, and Jesse Coleman, 'Trends in International Investment Agreements, 2014: A Review of Trends and New Approaches' in Andrea K Bjorklund (ed), Yearbook on International Investment Law & Policy 2014–2015 (Oxford University Press 2016).

[38] Government of India, Ministry of Finance, 'Office Memorandum: Issuing Joint Interpretative Statements for Indian Bilateral Investment Treaties' (8 February 2016) <http://indiainbusiness.nic.in/newdesign/upload/Consolidated_Interpretive-Statement.pdf>. For commentary, see eg Sarthak Malhotra, 'India's Joint Interpretive Statement for BITs: An Attempt to Slay the Ghosts of the Past' *Investment Treaty News* (12 December 2016), <https://www.iisd.org/itn/2016/12/12/indias-joint-interpretive-statement-for-bits-an-attempt-to-slay-the-ghosts-of-the-past-sarthak-malhotra/>.

[39] This power is recognized under the Vienna Convention on the Law of Treaties, art 31(3). It is also provided for in IIAs that expressly give state parties to the treaty the right to make submissions in disputes (see eg NAFTA art 1128) and to issue binding interpretations (see eg NAFTA arts 1131, 1132), and in some arbitral rules, most notably the UNCITRAL Rules on

unprecedented in the investment treaty realm: Other countries, such as the parties to the North American Free Trade Agreement (NAFTA), Canada, Mexico, and the United States, have similarly used their interpretive powers to exercise control over the NAFTA's meaning by consistently making submissions to tribunals on issues of interpretation in NAFTA cases when those cases are brought against any one of the three NAFTA parties.[40] The NAFTA, however, is relatively unique in that it is a single investment treaty that has given rise to scores of disputes, which, in turn, has given the NAFTA treaty parties scores of opportunities to exercise their respective voices by explaining to tribunals what they understand that treaty to mean. Many other states such as India do not similarly have a multitude of opportunities to clarify how to interpret a given treaty. Perhaps more importantly, India and many other states do not similarly have many opportunities to provide that input to tribunals as non-disputing state parties rather than as respondent states.[41] For such states, while there are no guarantees, *ex ante* statements on interpretation like the one issued by India outside the context of a particular dispute may be the most effective way for them to try to ensure their voices are heard and given adequate weight, and that tribunals' readings of the governments' treaties align with the treaty parties' intentions.

2.11 Rather than seeking to negotiate or renegotiate IIAs on the basis of new models, some states have chosen to reform their approach to investment promotion and protection by means of revising domestic legislation. Following termination of its BITs, the Indonesian government is taking steps to draft and adopt a domestic regulation to provide for settlement of disputes between investors and the state.[42]

Transparency in Treaty-Based Investor–State Arbitration. See Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 3311 (hereafter VCLT); North American Free Trade Agreement, Canada–Mexico–US, 8, 11, 14, and 17 December 1992, 32 ILM 289, 605 (hereafter NAFTA); UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (2014) art 5. For discussions of these issues, see eg Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 American Journal of International Law 179 (hereafter Roberts, 'Power and Persuasion'); Kathryn Gordon and Joachim Pohl, 'Investment Treaties Over Time—Treaty Practice and Interpretation in a Changing World' (2015) OECD Working Papers on International Investment 2015/02 <http://www.oecd.org/investment/investment-policy/WP-2015-02.pdf> accessed 28 June 2017; Lise Johnson, 'Ripe for Refinement: The State's Role in Interpretation of FET, MFN, and Shareholder Rights' (2015) GEG Working Paper 2015/101 <http://ccsi.columbia.edu/files/2015/05/GEG-WP_101-Ripe-for-Refinement-The-States-Role-in-Interpretation-of-FET-MFN-and-Shareholder-Rights-Lise-Johnson_0.pdf> accessed 28 June 2017.

[40] The submissions are routinely disclosed by the state parties to the NAFTA, and posted on government websites, websites hosted by arbitral institutions, or on sites such as italaw.com.

[41] See eg Roberts, 'Power and Persuasion' (n 39) 212–13 (suggesting interpretations given by states as respondents may be differently weighted and deemed less reasonable by tribunals than ex ante interpretations given as non-disputing state parties).

[42] Republic of Indonesia, Ministry of Finance, Press Release, 'Government Currently Preparing Draft of Government Regulation on Settlement of Investment Dispute' (21 June 2016) <https://www.kemenkeu.go.id/en/Berita/government-currently-preparing-draft-government-regulation-settlement-investment-dispute>.

This regulation will provide for settlement of disputes involving both domestic and foreign investors. South Africa also recently adopted the Protection of Investment Act, which inter alia allows South Africa to consent to international arbitration for the resolution of investment disputes, but requires investors to exhaust local remedies before investment disputes can be addressed by means of arbitration conducted between South Africa and the home state of the relevant investor.[43]

2.12 Where states have chosen to continue engaging with the present regime, some have sought to address the shortcomings of the current approach to investment protection by: (1) constraining investor access to dispute settlement and limiting arbitral discretion; (2) better protecting the right to regulate; (3) establishing investor obligations; and (4) introducing codes of conduct for decision makers in investment disputes. This chapter focuses on select developments in 2015 and 2016 that illustrate these trends and features in recent treaty drafting. Section B provides a brief discussion of the expanded awareness of, and interest in, the investment regime that has emerged in recent years; this awareness has perhaps placed increased pressure on negotiating states to address concerns regarding the implications of IIAs for the rights of third parties. In section C, we discuss the role of ratification in the context of investment treaty drafting and policy. Section D provides a discussion of the four drafting trends referred to above. Lastly, in section E, we provide a brief overview of new provisions regarding the conduct and qualifications of arbitrators, including a glimpse at the EU proposal for a multilateral court. The chapter does not provide a comprehensive review of all developments in investment treaty drafting and policy that took place in 2015 and 2016; rather, it seeks to highlight some noteworthy developments and provide brief commentary on the extent to which ongoing rhetoric regarding reform of the investment regime is encouraging tangible improvements of the substance of the agreements and models themselves.

B. Expanded Awareness and Interest

2.13 Public discourse regarding the legitimacy of the existing international investment regime intensified over the course of 2015 and 2016 as compared to previous years. Increased attention from mainstream media and the public more generally continued to focus in large part on regional agreements between developed economies, with the increase in popular debate fuelled in part by election campaign rhetoric in the United States and elsewhere. A heightened interest in the need for wholesale reform of the existing regime has also developed on the basis

[43] South Africa Protection of Investment Act 22 of 2015 (15 December 2015) s 12, para 5. See Roberts, 'Power and Persuasion' (n 39).

of concerns regarding the implications of international investment for the rights of third parties, and for the duty of states to regulate pursuant to their human rights obligations.

2.14 In this context, several United Nations (UN) human rights experts have made public their strong criticisms of the established approach to investment promotion and protection. For example, the UN Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas, has underscored the paradox created by the current regime whereby states with binding human rights obligations enter into investment (and trade) agreements 'that hinder, delay or render impossible the fulfillment of their human rights treaty obligations, thus violating the rule *pacta sunt servanda*'.[44] With respect to investor–state dispute settlement, de Zayas has suggested that mechanisms established under most IIAs constitute 'a privatized system of dispute settlement'.[45] At least three of de Zayas' more recent reports to the UN General Assembly and Human Rights Council have focused in part on the adverse human rights impacts of IIAs and the need for comprehensive, meaningful reform that goes beyond the European Commission's proposed multilateral reforms.[46] The UN Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, has highlighted the specific implications of IIAs for the rights and interests of indigenous peoples, and has made concerted efforts to increase awareness of these

[44] UN Office of the High Commissioner for Human Rights, Statement of Mr Alfred-Maurice de Zayas, Independent Expert on the promotion of a democratic and equitable international order, at the Human Rights Council 30th Session, (Geneva 16 September 2015) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16461&> (Statement of Mr Alfred-Maurice de Zayas, 16 September 2015).

[45] ibid.

[46] See UN Human Rights Council (UNHRC), Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred Maurice de Zayas, UN Doc A/HRC/33/40 (12 July 2016); UN General Assembly, Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order on the Impact of Investor-State-Dispute-Settlement on a Democratic and Equitable International Order, UN Doc A/70/285 (5 August 2015); UN General Assembly, Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order on the Impact of Investor-State-Dispute-Settlement on a Democratic and Equitable International Order, UN Doc A/70/285 (5 August 2015), Corrigendum; UNHRC, Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order, Alfred Maurice de Zayas, UN Doc A/HRC/30/44 (15 July 2015); UNHRC, Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order, Alfred Maurice de Zayas, UN Doc A/HRC/30/44 (15 July 2015), Corrigendum. With respect to the Independent Expert's report to the General Assembly in August 2015, note that resolution 70/149 of the UN General Assembly, adopted in December 2015, '[t]akes note of the report of the Independent Expert of the Human Rights Council on the promotion of a democratic and equitable international order (A/70/285), and notes in this regard its focus on the adverse human rights impact of international investment agreements, bilateral investment treaties and multilateral free trade agreements on the international order'. The resolution was adopted without a vote, ie by consensus. See UN General Assembly Res 70/149 (17 December 2015) UN Doc A/RES/70/149.

implications among indigenous groups and their representatives.[47] Notably, in 2015, a group of UN human rights experts issued a joint statement articulating their concerns regarding the potentially 'retrogressive effects' of trade and investment agreements for the protection and promotion of human rights, and calling for greater participation from all relevant stakeholders in the negotiation of trade and investment agreements, in addition to *ex ante* and *ex post* human rights impact assessments of proposed and existing agreements.[48]

2.15 Even more recently, the UN Committee on Economic, Social and Cultural Rights highlighted the obligations of host and home states under the International Covenant on Economic, Social and Cultural Rights (ICESCR) as they relate to the international investment regime. In its draft General Comment on State Obligations under the ICESCR in the Context of Business Activities, the Committee noted that investment and trade agreements 'must be designed in a way that the increase in trade volumes and investment flows improve, rather than risk undermining, the rights protected under the Covenant'.[49] The draft General Comment provides that states parties to the ICESCR 'should identify any potential conflict between their obligations under the Covenant and subsequent trade or investment agreements, and *refrain from entering into such agreements where such conflicts are found to exist*'.[50] The Committee also explicitly referred to the extraterritorial obligations of home states with respect to the human rights of project-affected communities in host states, noting that the extraterritorial obligation to respect, which requires states parties 'to refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territories', is particularly pertinent 'to the negotiation and conclusion of trade and investment agreements'.[51]

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[47] See eg UNHRC, Report of the Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, UN Doc A/HRC/33/42 (11 August 2016); UN General Assembly, Report of the UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, UN Doc A/70/301 (7 August 2015).

[48] UN OHCHR Press Release, 'UN Experts Voice Concern over Adverse Impacts of Free Trade and Investment Agreements on Human Rights' (Geneva 2 June 2015) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031>.

[49] UN Committee on Economic, Social and Cultural Rights, Draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (draft prepared by Olivier De Schutter and Zdzislaw Kedzia, Rapporteurs) UN Doc E/C.12/60/R.1 (17 October 2016) (hereafter UN CESCR Draft General Comment) para 20. See also UNHRC, Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum, UN Doc A/HRC/19/59/Add.5 (19 December 2011) (hereafter De Schutter, Addendum); Columbia Center on Sustainable Investment, Submission on the draft General Comment on 'State Obligations under the ICESCR in the Context of Business Activities' (January 2017) <http://ccsi.columbia.edu/2017/01/23/submission-on-the-draft-general-comment-on-state-obligations-under-the-icescr-in-the-context-of-business-activities/>.

[50] UN CESCR Draft General Comment (n 49) para 20 (emphasis added), referring to the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

[51] UN CESCR Draft General Comment (n 49) para 34. See also De Schutter, Addendum (n 49).

2.16 The concerns voiced by UN experts have been raised by other stakeholders in various fora;[52] they are reflective of an ongoing expansion of awareness and interest in IIAs, and of the need for meaningful reform of the present regime. Changes in the negotiating statements of certain states may indicate an acknowledgment of this expanded awareness and/or of the potential political costs associated with failing to engage with calls for reform: the need to protect states' right to regulate, for example, has featured more frequently in recent statements made by the European Commission, the United States Trade Representative (USTR), and the German government.[53] Yet the extent to which increased public discourse and accompanying political pressure have yielded, or are in the process of yielding, meaningful substantive and procedural reforms remains unclear.

[52] See eg Joint Statement by Several Human Rights, Environmental and Development Organizations, 'Human rights must be integrated into international investment agreements' (14 November 2016) <https://business-humanrights.org/sites/default/files/documents/Human-rights%2Binvestment-agreements-statement-14-Nov-2016.pdf>.

[53] The European Commission's proposed reform project, for example, centred in part on the need to better protect states' right to regulate. See eg European Commission, 'Investment in the TTIP and beyond—the path to reform', Concept Paper (2015), <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF>. The European Parliament has also referred to the need to 'ensure that the Union's legislative powers and right to regulated are respected and safeguarded' in future agreements. See European Parliament, 'Position of the European Parliament, adopted at first reading on 16 April 2014', EP-PE_TC1-COD(2012)0163 (16 April 2014), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TC+P7-TC1-COD-2012-0163+0+DOC+PDF+V0//EN>, 4. In a 2011 resolution, the European Parliament also stressed 'that future investment agreements concluded by the EU must respect the capacity for public intervention' and called 'on the Commission to include in all future agreements specific clauses laying down the right of parties to the agreement to regulate, inter alia, in the areas of protection of national security, the environment, public health, workers' and consumers' rights, industrial policy and cultural diversity'. See European Parliament, Resolution of 6 April 2011 on the future of European international investment policy (2010/2203(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0141+0+DOC+XML+V0//EN> paras 23–26. The European Commission's 'Shared Principles for International Investment of April 2012' also include reference to the need to ensure that the principles of international investment are implemented 'while still preserving the authority [of governments] to adopt and maintain measures necessary to regulate in the public interest to pursue certain public policies'. European Commission, 'Statement of the European Union and the United States on Shared Principles for International Investment' (2012) <http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf> 1. In addition, Germany's memorandum regarding a model agreement 'for developed countries with a functioning legal system' also 'intends to safeguard the State's right to regulate through public policy exceptions and provide options for conferring on foreign investors rights no greater than those enjoyed by domestic investors'. See UNCTAD, 'World Investment Report 2015: Reforming International Investment Governance' (2015) Sales No E.15.II.D.5, (World Investment Report 2015) 109. Lastly, the United States Trade Representative (USTR) has also referred to TPP as including language that 'underscores that countries retain the right to regulate in the public interest'. See USTR, 'Upgrading and Improving Investor-State Dispute Settlement' (2015),

C. Negotiation and Ratification

2.17 It is hard to overstate the way in which the treaty landscape changed over the review period. One mega-regional, the TPP, was signed in 2015 then collapsed roughly one year later. The Obama Administration—one of the key architects and promoters of the mega-regional deal—never sent the TPP to Congress for a vote due to concerns that it was too controversial for the election season. And, both before the election and after it during the 'lame duck' session, there did not appear to be enough support in the US Congress to secure its passage. Once President Trump assumed office, buoyed by the anti-TPP sentiment that had seemed to help explain the new president's victory, he promptly declared the agreement dead.[54] CETA also faced an acute threat when a subnational region in Belgium threatened to hold the approval necessary under Belgian law for the country as a whole to approve the treaty.[55] While the region ultimately gave its consent,[56] CETA and the trade and investment treaty between Singapore and the European Union still face an uncertain future. One significant issue is that, due to the fact that some aspects of the agreements including, in particular, the controversial ISDS provisions, are within the competence of European Union Member States, the agreements will have to make their way through ratification processes in all European Union countries.[57] Thus, in the cases of both the TPP and CETA, blows to these agreements came from public opposition driven by diverse concerns. And the fact that future IIAs to which European Union Member States are party will have to pass domestic ratification processes implies that there is even greater space for exercise of democratic voice.

2.18 These events are momentous in the trajectory of international economic governance. They put speedbumps, if not roadblocks, in front of a neoliberal path that intense activity on treaty negotiation seemed to have nearly cemented. In addition to raising new and important questions about the future of investment law, these events provide essential material to help policymakers, citizens, academics, and others understand the dynamics that generate and shape economic (and other) treaties, and elements that influence their fate.

<https://ustr.gov/sites/default/files/TPP-Upgrading-and-Improving-Investor-State-Dispute-Settlement-Fact-Sheet.pdf> 2.

[54] Donald J Trump, Memorandum for the United States Trade Representative, Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement (23 January 2017).

[55] Jennifer Rankin (n 8).

[56] Robert J Bartunek and Philip Blenkinsop, 'Belgium Breaks Deadlock over EU-Canada Trade Pact' *Reuters* (27 October 2016) <available atwww.reuters.com/article/us-eu-canada-trade-idUSKCN12R0XQ> accessed March 15, 2017.

[57] Opinion 2/15 of the Court (16 May 2017) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=415687>.

One issue raised by these events is the role of ratification: investment treaty policy development, negotiation, and signature are increasingly covered in the literature, but issues of ratification have received relatively little attention by comparison. This is striking due to the fact that ratification is what generally gives the treaties their legal life.[58] Questions regarding the issue of ratification that recent events show to be particularly important include: What are the rates of ratification of international investment treaties? How likely, and for how long, are treaties to lay dormant after being negotiated by the executive? What factors influence whether a treaty will or will not be ratified? And what are the implications of past experiences with ratifications for future negotiations of treaties and efforts to secure (or contest) their entry into force? **2.19**

We highlighted some of these issues in the 2013–14 edition of the *Yearbook*, as negotiations on the TPP, TTIP, and other mega-regionals were underway, and public attention—both in favour and against the agreements—was beginning to rise.[59] Given recent events highlighting the rise of ratification as a crucial issue, this section revisits and updates that discussion. **2.20**

1. Trends and impacts

Beginning with patterns of ratification, **2.21**

> [a]lthough some IIAs relatively easily receive the domestic approvals necessary for entry into force, others languish for years, if not indefinitely. Indeed, one study of BIT ratification and the factors affecting it found that, although 50% of agreements signed by 2005 had been ratified by both state parties within two years of their signature date, more than 25% had not yet entered into force, with significant differences in the ratification rate among countries. Japan, for example, had ratified all 15 of the BITs covered by the study; in contrast, Brazil had signed 14 such agreements but has ratified none.[60]

As Figure 2.1 shows, there appears to have been a slight downward trend regarding the rates or speed of BIT ratification over roughly the past fifteen years. Figure 2.1 compares data on (1) (a) the number of treaties that had been signed each year from 2000 to 2005, and (b) the number of treaties signed in 2000–2005 that **2.22**

[58] Some treaties provide for provisional ratification prior to the date on which they enter into force. Under international law, states may also owe certain obligations with respect to treaties they have signed but not ratified. As one scholar has put it, the 'majority view is that 'mere' signatories (states that have signed but not yet ratified the treaty in question) assume an intermediate, interim obligation to refrain from frustrating the treaty's object and purpose.' Edward T Swaine, 'Unsigning' (2003) 55 Stanford Law Review 2061, 2065.

[59] Lise Johnson and Lisa Sachs, 'International Investment Agreements, 2013: A Review of Trends and New Approaches' in Andrea Bjorkland (ed), *Yearbook on International Investment Law and Policy 2013–2014* (Oxford University Press 2015) 30–31.

[60] ibid (citing Yoram Z Haftel and Alexander Thompson, 'Delayed Ratification: the Domestic Fate of Bilateral Investment Treaties' (2013) 67 International Organization 355, 360).

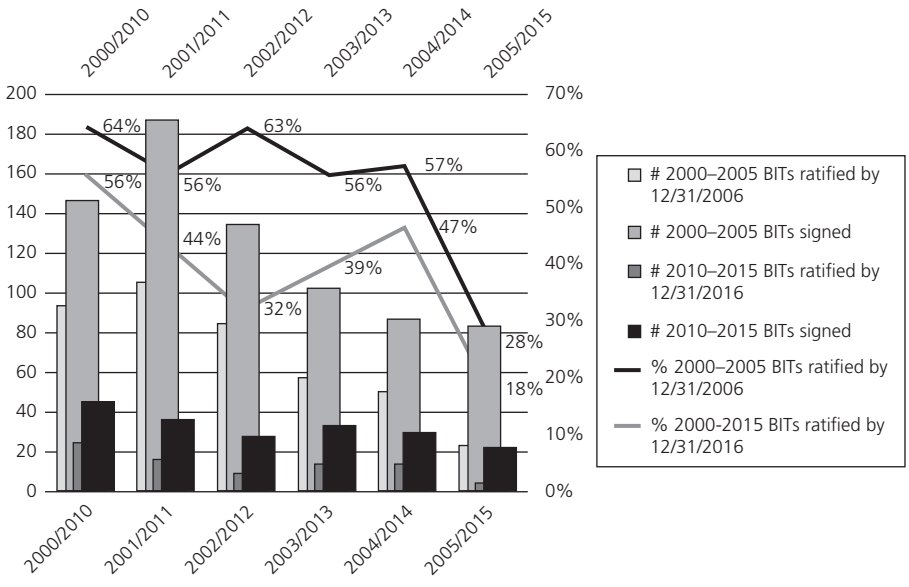

Figure 2.1 BIT Ratification Rates—2000–05 and 2010–15.

Source: authors, compiled from UNCTAD's investmentpolicyhub.unctad.org/IIA.

had been ratified by the end of 2006;[61] with (2) (a) the number of treaties signed each year from 2010 to 2015, and (b) the number of those treaties that had been ratified by the end of 2016.

2.23 In both timespans, the share of each year's ratified treaties generally drops as the years pass. This reflects the fact that, as noted above, most treaties take at least one year to be ratified. Yet ratification seems to have slowed in more recent years: roughly 56 per cent of the treaties signed between 2000 and the end of 2005 had entered into force by the end of 2006 (413 out of 739); in comparison, only 42 per cent of the treaties signed between 2010 and the end of 2015 had entered into force by the end of 2016 (81 out of 194).

2.24 These figures and apparent trends prompt the next question: What factors influence whether a treaty will or will not be ratified? While research on ratification rates of BITs is limited,[62] some studies have been conducted at a macro- and

[61] In 2006, UNCTAD produced a study on rates of treaty ratification and their implications. The data in that report differ from the data on UNCTAD's website as of May 15, 2017, regarding pre-2006 signature and ratification. Rather than using data from UNCTAD's 2006 report, this chapter uses data on treaties signed and ratified from UNCTAD's website. This is done based on the assumption that the website contains more accurate information than the 2006 report. UNCTAD, 'The Entry into Force of Bilateral Investment Treaties (BITs)' (2006) IIA Monitor, No 3.

[62] The literature on factors shaping whether treaties are ratified and how they are implemented is rich and outside the scope of this short review. This section focuses specifically on literature examining ratification of BITs.

micro-scale. The few studies that have been done using empirical data on BIT signing and ratification indicate that—perhaps not surprisingly—key hurdles to ratification arise from the domestic context of the signing states including, in particular, the ratification process that is required:

> In some countries, no legislative approval is required. When approval is required, some executives must achieve assent from only one house of the legislature while others must achieve it from two … The voting threshold also varies across countries, with some legislatures approving by a simple majority and others requiring variations of a supermajority.[63]

Other factors being equal, data indicates that the more onerous the ratification requirement is, the less likely it is that the treaty will enter into force, and the longer it will take to do so.[64]

2.25 Governments can take steps to overcome these legislative hurdles prior to, during, and after negotiating the treaty by ensuring the executive effectively engages with lawmakers and (given the lawmakers' responsibilities to their constituents) the general public regarding the objective and content of the agreements. In the United States, for example, executive-congressional engagement arguably takes place through 'Trade Promotion Authority' (TPA), also known as 'fast track authority'. The TPA is a legislation through which the United States Congress provides the executive branch substantive direction on negotiating mandates and priorities. TPA legislation also includes procedural mechanisms meant to ensure the executive branch consults with Congress throughout the negotiation process in order to enable Congress to play an informational and oversight role. In exchange, Congress commits to approve or disapprove of agreements negotiated in accordance with the TPA in a simple yes or no vote, without the possibility of amending the agreement.

2.26 First adopted in 1974,[65] modern TPA was renewed in 2002[66] and, most recently, again in 2015.[67] The TPA, however, has long prompted controversy.[68] One reason for that reaction is concern that the TPA is too great a delegation of power to the executive.[69] Relatedly, there are questions about whether it effectively ensures

[63] Yoram Z Haftel and Alexander Thompson, 'Delayed Ratification: the Domestic Fate of Bilateral Investment Treaties' (2013) 67 International Organization 355, 360 (hereafter Haftel and Thompson, 'Delayed Ratification').

[64] ibid.

[65] A narrower precursor was the Trade Expansion Act of 1962, 19 USC § 1801, which granted President Kennedy certain powers relevant to conducting negotiation of the General Agreement on Tariffs and Trade. That authority expired in 1967.

[66] Trade Act of 2002, 19 USC §§ 3801–13 (2002).

[67] Bipartisan Congressional Trade Priorities and Accountability, Pub L 114–26 (19 USC §§ 4201–10 (2016)).

[68] See Margaret M Kim, 'Trade Promotion Authority: Evaluating the Necessity of Congressional Oversight and Accountability' (2016) 40 Seton Hall Legislative Journal 317, 327–28 (providing examples of some early opposition to the TPA and its precursor).

[69] ibid.

Congress has a meaningful role as an agenda-setter and oversight body.[70] Indeed, the TPA was only renewed as negotiations of the TPP were coming to a close, raising doubts about whether the legislation guaranteed Congress any meaningful role in those negotiations.[71] Moreover, as experience has shown, the TPA is no guarantor of smooth passage of the agreements it covers. Side agreements may still need to be entered into between or among the treaty signatories in order to secure required support.

2.27 The US–Colombia FTA is a key example of the limits of the TPA's ability to guarantee Congressional approval, and how domestic processes can continue, even post signature, to attempt to shape treaty outcomes. Although negotiations of the US–Colombia FTA were closed in 2006, ratification stalled due, in part, to opposition among members of the United States Congress and their constituents regarding potential impacts on labour rights.[72] In 2011, the governments of the United States and Colombia agreed to a 'Labor Action Plan', which addressed such issues as reducing violence against union members, prosecuting those who had committed crimes against union members, and protecting workers' rights. It also set out certain steps that the government of Colombia had to take before the President of the United States would submit the treaty to Congress for ratification.[73]

2.28 In addition to formal legal hurdles to ratification, executive branch officials that signed a treaty may face a wider range of political or institutional constraints at home.[74] Those constraints, in turn, can require officials supporting the treaty to expend significant political capital to secure the agreement's passage—capital they may, in the end, be unwilling or unable to part with for the purpose of a BIT. The implication, which evidence seems to support, is 'that executives who are relatively unconstrained politically and institutionally should be able to achieve ratification more quickly and with a higher probability overall'.[75]

2.29 A micro-level study of Brazil's experience with BIT signing and non-ratification reveals the need for further nuance in analysis of these issues. Not only does Brazil's BIT ratification rate of 0 per cent sit well below the global average, it sits

[70] ibid.

[71] K William Watson, 'United States–Colombia Free Trade Agreement' in Lester et al (eds), *Bilateral and Regional Trade Agreements: Case Studies* (2nd edn, Cambridge University Press 2015) 60.

[72] See eg Graciela Rodriguez-Ferrand, 'Colombia, United States: Free Trade Agreement and Labor Issues' *Global Legal Monitor* (4 August 2011) http://www.loc.gov/law/foreign-news/article/colombia-united-states-free-trade-agreement-and-labor-issues/ accessed 15 February 2017.

[73] ibid.

[74] ibid.

[75] Haftel and Thompson, 'Delayed Ratification' (n 63) 361, 373–74 (finding support for that hypothesis).

well below the ratification rate of treaties in general in Brazil: over the period between 1988 and 2006, 98 per cent of other treaties signed by Brazil entered into force in less than eighteen months.[76] As Campello and Lemos explain:

> Since the promulgation of the Brazilian Constitution in October 1988, only 3 out of the 812 treaties sent to the Congress until 2006 were rejected, and 12 others were withdrawn by the president less than 2% of the total … Moreover, 75% of these treaties were approved within three years of being presented to the Congress, a spell comparable to the 2.5 years that BITs have taken on average to enter into force in South America.
>
> The presidential success in ratifying foreign policy in Brazil since the 1988 Constitution is such that scholars and even politicians have frequently considered the Congress irrelevant or a mere 'rubber stamper'. The challenge, thus, is to explain why such distinct pattern emerges in the case of BITs.[77]

Studying Brazil's treatment of BITs, Campello and Lemos highlight that, based on the theories and findings noted above, and given:

(1) Brazil's relatively relaxed formal requirements for treaty ratification, and
(2) the strength of the Brazil's executive branch within the Brazilian political system (which is often 'referred to as a 'hyper-presidentialism,' for the wide range of powers amassed by the presidency'),[78]

one might have expected that the country would have ratified all of its BITs. The reality was, in fact, very different. Based on interviews, legislative documents, and media accounts, Campello and Lemos conclude that although some members of the Brazilian Congress opposed the BITs, such opposition could have been overcome by pressure from the executive as had been done for other similarly contentious executive priorities relevant for international investment, such as widespread privatizations and grants of equal rights to foreign businesses.[79] Some of those measures not only faced strong opposition, but also required supermajority votes to pass.[80] Campello and Lemos contend that, ultimately, non-ratification of BITs in Brazil was not due entirely to legislative resistance, but to an 'unresolved executive, which was never fully committed [to] the treaties in the first place, and became less and less so as their costs and benefits became clearer over time.'[81] While diplomats saw the agreements as being important, other ' "hard" areas' of the executive—the 'Finance Ministry, the Central Bank, [and] the Office of the Presidency'—simply did not view the agreements as a

[76] Daniela Campello and Leany Lemos, 'The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation' (2015) 22 (5) Review of International Political Economy (hereafter Campello and Lemos, 'Non-Ratification of BITs in Brazil').
[77] ibid 10–11 (footnotes and citations omitted).
[78] ibid 5.
[79] ibid 11–12.
[80] ibid 22.
[81] ibid 12.

priority and did not want to spend the political capital fighting for the agreements' approval.[82] This, they highlight, illustrates the need to 'open the black box of the executive branch rather than treating it as a unitary actor' when considering determinants of ratification.[83]

2.30 Lacklustre executive enthusiasm might also help explain the low ratification rate of agreements among developing country governments. Of all of the BITs that have been signed as of June 1, 2017, 28 per cent have been between developing countries; treaties between developing countries, however, make up roughly 58 per cent of the BITs that remain to be ratified. Even more strikingly, of the 170 BITs signed between African countries, 127—nearly 75 per cent—never entered into force.[84]

2.31 Many of these BITs between developing countries were signed through 'facilitation rounds' organized by UNCTAD in the late 1990s through the early and mid-2000s.[85] These facilitation rounds brought country officials together to sign template agreements. As Poulsen reports:

> UNCTAD promoted the process by bearing the costs of travel, full board, and lodging for developing country officials as well as organizing the necessary facilities and substantive support. The process began in 1999, when UNCTAD organized a negotiation round after G-15 governments had encouraged UNCTAD to help them conclude BITs to 'further promote economic cooperation and FDI'. The round was sponsored by the Swiss government and the United Nations Development Programme (UNDP) and held at the four-star Hotel Victoria on the shores of Lake Geneva.[86]

According to one participant in the facilitation rounds, 'The OECD model was actively promoted during this session, and no real negotiations actually took place. Treaties were just signed off in a rush in two or three hours.'[87]

2.32 The costs to governments of participating in the negotiations and concluding the treaties was therefore reduced, which might have minimized drivers for governments to have first made the internal case that these were instruments worth spending the resources to pursue. After signing the treaties, the executors may not have seen the need or felt the desire to actually push for their ratification back home.

2.33 The fact that a disproportionate share of South–South agreements has not yet entered into force may also be due to a relatively greater sensitivity between

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[82] ibid 19–20.

[83] ibid 3.

[84] These figures are the authors' calculation using UNCTAD data as of June 1, 2017. UNCTAD's data is available from the section on International Investment agreements included within UNCTAD's online Investment Policy Hub http://investmentpolicyhub.unctad.org/IIA.

[85] Lauge Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press 2015) (hereafter Poulsen, *Bounded Rationality*) 91–99.

[86] ibid 92.

[87] ibid 96.

signatories to the costs of the treaties or greater ambivalence about their benefits. However, given research on the relative lack of awareness among developing country officials of the legal significance of BITs in the 1990s and early to mid-2000s in particular, this explanation seems doubtful.[88] Another factor could reflect capacity constraints: as research by Haftel and Thompson suggests, the executives negotiating the agreements may have been unable to effectively understand and predict whether the texts would be ratified at home or in the contracting state, and so negotiated agreements with a lower chance of ultimate success.[89]

2.34 International factors are also relevant to ratification patterns. A recent doctoral dissertation builds on the work of Haftel and Thompson, using similar macro-level empirical analysis to examine whether and how certain post-signature events impact ratification.[90] The author finds that ratification of BITs slows when ICSID claims are filed against peer countries that are either geographically close or may have similar vulnerabilities to ISDS claims as the BIT signer.[91] The slowed ratification may be due to increased awareness by the BIT signer (or among the country's constituents) of the risks of those treaties. In contrast, the study also finds that a country is more likely to ratify its BITs if ratification activity by the country's economic competitors increases.[92]

2. Implications for future outcomes

2.35 While many investment treaties have been negotiated and, ultimately, approved without much public oversight or scrutiny, that picture appears to be changing. In the EU, for instance:

> [a]fter the Lisbon Treaty came into effect, the European Parliament has leveraged its greater say in economic treaty making to provide specific guidance on investment treaty policy, and on individual treaty negotiations, upstream of the actual negotiations. The integration of investment issues into wider economic partnership agreements has arguably fostered parliamentary interest, because of the more wide-ranging policy issues at stake: in Europe, the negotiation of the proposed TTIP with the US was accompanied by a flurry of parliamentary activity, both at the EU level and in EU member states, with investment protection proving a significant sticking point. Several parliamentary inquiries offered opportunities for input by external experts and organized citizens.[93]

[88] ibid.
[89] Haftel and Thompson, 'Delayed Ratification' (n 63) 355, 376.
[90] Fangjin Ye, Bilateral Investment Treaties: Consequences on Human Rights and Labor Protection and Determinants of Ratification (Michigan State University, ProQuest Dissertations Publishing 2016).
[91] ibid.
[92] ibid.
[93] Lorenzo Cotula, 'Democracy and International Investment Law' (2017) Leiden Journal of International Law 371, 372 (internal citations omitted).

These developments make the future of EU agreements such as the CETA and TTIP uncertain. Similar trends can also be seen in other developed nations as well as, increasingly, in developing countries.[94] While citizens and even legislators may lack the formal power to block treaty ratification, their engagement may, at least, prompt changes in the legal rules governing the process—the rules governing the extent to which different stakeholders can follow and shape negotiations and, ultimately, their ability to impact whether and in what form the treaty enters into force.[95]

D. Addressing Asymmetries?

2.36 The narrative on reform of the international investment regime has been frequently framed in terms of the need for a 'rebalancing' of IIAs to address the asymmetries present in the current regime. This need for rebalancing stems in part from serious concerns regarding encroachment of the international investment regime on the ability of states to regulate in the public interest and meet obligations that compete with those enshrined in IIAs.[96] Moreover, the argument that IIAs cause investment flows to increase has increasingly been challenged: while some authors have indicated a correlation between IIAs signed and levels of inward investment, the overall conclusion of studies to date indicates that IIAs play—at best—an enabling role, and that economic factors have more of an impact on decisions to invest.[97] These and other developments in the discourse on IIAs have encouraged further consideration of alternatives that may be better suited to achieving the objectives of the international investment regime.[98]

2.37 States have adopted divergent strategies in responding to the asymmetries and challenges created by IIAs. Some have responded by withdrawing from the international investment regime,[99] while others are developing revised model

[94] ibid 374–75.

[95] ibid.

[96] Regarding conflicting state obligations under IIAs and other bodies of law, see eg Kaitlin Y Cordes, Lise Johnson, and Sam Szoke-Burke, 'Land Deal Dilemmas: Grievances, Human Rights, and Investor Protections' (Columbia Center on Sustainable Investment, March 2016), <http://ccsi.columbia.edu/2016/03/10/land-deal-dilemmas-grievances-human-rights-and-investor-protections/>.

[97] For a brief discussion of studies assessing the extent to which IIAs and ISDS increase investment flows, see Columbia Center on Sustainable Investment, 'Developing Alternatives to Investor–State Dispute Settlement: What are the Options?' (forthcoming 2017).

[98] See eg Columbia Center on Sustainable Investment, 'Developing Alternatives to Investor-State Dispute Settlement: What are the Options?' (forthcoming 2017); International Institute for Sustainable Development, 'Investment-Related Dispute Settlement: Towards a Comprehensive Multilateral Approach' (2016) <http://www.iisd.org/sites/default/files/publications/investment-related-dispute-settlement-montreux-expert-meeting.pdf>.

[99] States continued to terminate their IIAs in 2015: Indonesia, for example, sent notices of termination for more than ten of its BITs. Also in 2015, Ecuador's Citizen Audit Commission

agreements:[100] in 2015 and 2016, Brazil negotiated several new Cooperation and Facilitation Investment Agreements (CFIAs) on the basis of its new model,[101] and India published a revised version of its model BIT.[102] Also at the national level, Turkey and Slovakia both published draft revised models in 2016,[103] and Azerbaijan published its revised model BIT.[104] At the regional level, the South African Development Community (SADC) approved a revision to Annex 1 of the SADC Finance and Investment Protocol (FIP),[105] and the SADC model BIT Template was in the process of being reviewed.[106]

2.38 Where states have continued to engage with the international investment regime, attempts have been made to rebalance the contents of these agreements. While the notion of 'rebalancing' encompasses a range of issues in the context of investment treaty reform,[107] the present chapter uses the term to refer to efforts and mechanisms in the context of investment treaty drafting that seek to strike a balance between investment promotion and protection on the one hand, and the broader needs and interests of society on the other.[108] In this vein, some of the

recommended the termination of its BITs to facilitate the negotiation of new agreements on the basis of a revised model. Italy's withdrawal from the Energy Charter Treaty took effect in January 2016. See UNCTAD World Investment Report 2016 (n 33) 102–03 (internal citations omitted).

[100] Johnson, Sachs, and Coleman (n 37).

[101] Brazil model Cooperation and Facilitation Investment Agreement (2015), English version <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4786> (Brazil model CFIA).

[102] Model Text for the Indian Bilateral Investment Treaty (December 2015) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560> (India model BIT).

[103] UNCTAD World Investment Report 2016 (n 33) 110–11. UNCTAD refers to these models as 'draft' models on the basis that they have 'not been adopted by the country yet' or 'are being continuously updated'. UNCTAD World Investment Report 2016 (n 33) 110–11.

[104] Azerbaijan model BIT (2016) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4787> (hereafter Azerbaijan model BIT).

[105] Note that a partially signed version of the SADC's FIP, dated 31 August 2016, is available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/5527. According to Investment Policy Hub, the agreement entered into force on 1 January 2016. See <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3383>.See also Luke Eric Peterson, 'Investigation: In the Aftermath of Investor Arbitration Against Lesotho, SADC Member-States Amend Investment Treaty so as to Remove ISDS and Limit Investor Protections' *IA Reporter* (20 February 2017).

[106] UNCTAD World Investment Report 2016 (n 33) 112.

[107] Paparinskis, for example, notes that 'balancing' can applied to a range of issues, including balancing of 'interests … rights, values, policies, interpretative materials, tensions between obligations, regimes or systems'. Martins Paparinskis, 'International Investment Law and the European Union: A Reply to Catharine Titi' (2015) 26(3) European Journal of International Law 663, 666, footnote 20.

[108] Markus Wagner, 'Regulatory Space in International Trade and Investment Law' (2014) 36(1) University of Pennsylvania Journal of International Law 1, 26 (internal citations omitted). See also Catharine Titi, *The Right to Regulate in International Investment Law* (Hart Publishing 2014) (hereinafter Titi, *The Right to Regulate*) 72 (refers to balancing as 'one between private and public interests, in other words the balance between the interests of investors and host states'); Suzanne Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13(4) Journal of International Economic Law 1037, 1037 ('One of the most important challenges facing the international investment law regime today is how to strike a balance between principles regarding the protection and promotion of foreign investment on the

efforts undertaken by negotiating states in 2015 and 2016 include: (1) placing constraints on investor access to dispute settlement, and limiting arbitral discretion; (2) including treaty language referring to, or recognizing, the right of states to regulate; and (3) including limited investor 'obligations'. This section examines each area of purported rebalancing in turn.

2.39 Before proceeding, it is important to note that meaningful rebalancing of the international investment regime will require far greater steps than the limited developments discussed in this year's *Yearbook* chapter, and that this chapter does not provide an exhaustive account of all relevant developments that took place in 2015 and 2016. A state's ability to regulate, for example, will be directly and indirectly affected by the substance of a range of provisions within an agreement, including provisions concerning indirect expropriation, fair and equitable treatment (FET), and general exceptions. Inclusion of an explicit or implicit clause recognizing a state's inherent right to regulate will likely be ineffective where the rest of a treaty's text reflects traditional standards of investment protection.[109] This section does not provide an exhaustive discussion of developments concerning all options for rebalancing IIAs; rather, it focuses on a narrow set of issues indicative of the extent to which rhetoric regarding reform of the investment regime has resulted in tangible developments in investment treaty drafting during the period under review.[110]

1. Access to dispute settlement

2.40 A continuing concern for a number of governments and observers is the growing number of ISDS cases that challenge judicial or administrative determinations, new regulations or the enforcement of existing regulations, and other core government functions. In such cases, some governments see an overreach by arbitrators into the policy space of governments. Accordingly, as documented in last year's *Yearbook*, new treaties concluded over the past several years have included measures to limit the scope and power of arbitral tribunals.[111] Treaties concluded

one hand and principles regarding the protection of society and the environment on the other.'); and Steffen Hindelang and Markus Krajewski, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press 2016) 5 (the authors note that some commentators refer to this rebalancing (or 'recalibration') as one that more firmly secures the right to regulate in the public interest, while others have 'chosen to coin this recalibration attempt as a shift towards 'sustainable development', most prominently UNCTAD').

[109] Markus Krajewski, 'Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model clauses for a UN Treaty on Transnational Corporations, Other Businesses and Human Rights' (CIDSE Study March 2017) <http://www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html> 20.

[110] This chapter covers IIAs and models concluded and published during the course of 2015 and 2016. The chapter focuses on agreements and models published in English; more limited consideration is also given to agreements and models published in Spanish and Portuguese.

[111] Johnson, Sachs, and Coleman (n 37) 15–64.

in 2015 and 2016 continued many of the approaches seen in the 2014 treaties and models, including filter mechanisms, exclusions, exhaustion requirements, exceptions, clarifications, and in some cases, excluding ISDS altogether; this section briefly reviews examples from 2015 and 2016 treaties of the continuation of those approaches.

a. Filter mechanisms

2.41 Canada has notably continued to incorporate filter mechanisms in its 2015 and 2016 treaties, specifying that certain types of claims and defences must first be routed to party-designated state officials for binding determinations of the legitimacy of the policy measure in question. Last year's *Yearbook* looked more extensively at CETA's carve-out for claims related to financial services measures,[112] and noted that for such claims, the respondents may refer the binding determination of whether the measure 'allowing the Parties to take measures for prudential reasons'[113] is a valid defence to the claim to CETA's Financial Services Committee.[114] Canada's agreements in 2015 and 2016 included the substantially similar (or identical) mechanism for Financial Services as many of its bilateral agreements in 2014 (with Cameroon, Côte d'Ivoire, Mali, Nigeria, Serbia, and Senegal). For instance, under Article 24(3) of the Canada–Burkina Faso BIT on 'Special Rules Regarding Financial Services,' if an investor submits a claim that the respondent party has breached an obligation related to expropriation, transfers, or denial of benefits, and the respondent party invokes its right to apply a good faith measure with respect to transfers[115] relating to safety, soundness, integrity of financial institution; or invokes provisions of general exceptions[116] (which include the respondent's right to adopt or maintain reasonable measures for prudential reasons or measures taken in pursuit of monetary and related credit or exchange rate policies), then 'at the request of that Party, the Tribunal shall request a report in writing from the Parties on the issue of whether and to what extent the invoked paragraph is a valid defence to the claim of the investor. The Tribunal may not proceed pending receipt of a report under this Article'.[117] If the parties cannot agree at that stage, the issue is submitted to an arbitration panel established according to the State–State Dispute Settlement Procedure. That

[112] ibid 44–45.

[113] CETA (n 7) chapter 13 (Financial Services), annex 13-B (Understanding on the application of arts 13.16.1 and 13.21).

[114] And if the Committee fails to make a determination within sixty days of the referral, the question is then referred to CETA's Joint Committee for a binding determination.

[115] Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments (signed 20 April 2015) art 11(6) (hereafter Burkina Faso–Canada BIT).

[116] ibid art 18.2 and art 18.3.

[117] ibid art 24.3.

panel's determination is binding on the ISDS tribunal.[118] The same procedure is included in Canada's BITs with Guinea, Hong Kong SAR, and Mongolia.[119]

2.42 As with many 2014 agreements, several agreements concluded in 2015 and 2016 contain a similar filter mechanism for the determination of whether a specific measure constitutes a taxation measure, and if so, whether the measure in question violates specific obligations under the treaty. As with the matters above, the respondent party can refer the matter to the parties, and the parties' joint determination is binding on the tribunal. Mirroring the filter mechanism in the 2014 Japan–Kazakhstan BIT,[120] the Japan–Uruguay BIT provides that 'a disputing investor that asserts that a taxation measure involves an expropriation may submit an investment dispute to arbitration' only after first referring the matter to the designated authorities for both parties, who have 180 days to make a binding decision.[121]

2.43 Canada's agreements with Burkina Faso, Guinea, and Hong Kong refer all claims related to taxation measures to the respective taxation authorities of the parties to reach a joint binding determination that the measure does 'not contravene that agreement, or … the measure in question is not an expropriation'.[122] Even the determination of whether a measure is a taxation measure may be referred by a party to the taxation authorities, who have six months to issue a binding determination.[123] As described in last year's

[118] ibid art 24.4. Only in the event that the Parties do not agree on a determination and the matter is not referred to state–state dispute settlement within seventy days, then the ISDS tribunal may decide (art 24.5). As noted in last year's *Yearbook,* this filter mechanism for prudential measures related to financial services was also included in the Canada–China 2012 BIT and in the 2012 US model BIT, which both refer the matter first to domestic authorities. (See Johnson, Sachs, and Coleman (n 37) 45, footnote 184.)

[119] Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the Republic of Guinea (signed 27 May 2015) art 23 (hereafter Canada–Guinea BIT); Agreement between the Government of Canada and the Government of Hong Kong, Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments (entered into force 6 September 2016) art 22 (hereafter Canada–Hong Kong SAR BIT); Agreement Between Canada and Mongolia for the Promotion and Protection of Investments (entered into force 24 February 2017) art 22 (hereafter Canada–Mongolia BIT).

[120] Agreement between Japan and the Republic of Kazakhstan for the Promotion and Protection of Investment (signed 23 October 2014) art 22.5 (b) (hereafter Japan–Kazakhstan BIT).

[121] Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment (signed 26 January 2015) art 25 (hereafter Japan–Uruguay BIT).

[122] Burkina Faso–Canada BIT (n 115) art 14.6; Canada–Guinea BIT (n 119) art 14.6; Canada—Hong Kong SAR BIT (n 119) art 14.5; Canada–Mongolia BIT (n 119) art 21.4 refer claims with respect to taxation measure to taxation authorities for joint binding determination that the measure does 'not breach the relevant provisions of this agreement'.

[123] Burkina Faso–Canada BIT (n 115) art 14.7; Canada–Guinea BIT (n 119) art 14.7; Canada—Hong Kong SAR BIT (n 119) art 14.6; Canada–Mongolia BIT (n 119) art 21.5; In the Canada–Mongolia BIT, as per art 21.6, the taxation authorities can 'agree to modify the time period allowed for their consideration of the issue'.

Yearbook,[124] CETA also includes a filter mechanism for the determination of whether a specific measure constitutes a taxation measure, and if so, whether it breaches an obligation under the agreement's sections on non-discrimination or investment protection.[125]

2.44 The Australia–China FTA has perhaps the broadest filter mechanism. The agreement stipulates that non-discriminatory measures taken for 'the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject' of an ISDS claim.[126] Within thirty days of receiving a request for consultation, a respondent party may deliver a 'public welfare notice' to the investor and the non-disputing party, stating its position and triggering a ninety-day consultation period between the two treaty parties, during which time the proceeding is suspended.[127] Moreover, a joint decision of the parties, through the Committee on Investment, that 'declar[es] their interpretation of a provision' of the agreement is binding on the tribunal of any ongoing or subsequent dispute.[128]

2.45 As discussed in last year's *Yearbook*,[129] an important and notable trend is the continued inclusion of provisions reserving to the parties the right to make binding interpretations of the treaty provisions, which can have similar effect to filter mechanisms and across a broader swath of issues. Recently, Russia published guidelines for negotiation of future investment treaties[130] that recommend inclusion of an express provision on state parties' right to issue binding interpretations of the treaty; the guidelines further provide for freezing new or pending arbitrations under the relevant treaty while the interpretative mechanism is engaged.[131]

2.46 Canada and Korea's provisions were highlighted last year,[132] and both continued the practice with their 2015 and 2016 treaties. In CETA, the Joint Committee has the right to issue binding interpretations[133] and the non-disputing parties

[124] Johnson, Sachs, and Coleman, (n 37) 45.
[125] CETA (n 7) Exceptions Chapter, art 28.7(7).
[126] Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (entered into force 20 December 2015) art 9.11(4) (hereafter Australia–China FTA).
[127] ibid arts 9.11 (5) and 9.11(6)
[128] ibid. art 9.18(2).
[129] Johnson, Sachs, and Coleman, (n 37) 46.
[130] Adopted by the government of the Russian Federation on 30 September 2016. These Guidelines supersede the 1992 and 2001 model BITs; Joel Dahlquist, 'Russia Sets Out New Guidelines for Contents of Future Investment Treaties' *Investment Arbitration Reporter* (26 October 2016), <https://www.iareporter.com/articles/russia-sets-out-new-guidelines-for-negotiation-of-future-investment-treaties/>.
[131] Similar freezing of arbitration is provided in art 9.11(6) of the China–Australia FTA but the suspension of dispute resolution procedure applies only for scrutiny of measures that are purportedly 'public welfare' measures, and not for joint interpretation of any substantive treaty obligation.
[132] Johnson, Sachs, and Coleman (n 37) 46–47.
[133] CETA (n 7), Administrative and Institutional Provisions Chapter, art 26.1(e).

have the right to make submissions on the interpretation of the agreement,[134] and in Canada's agreements with Guinea, Burkina Faso, Hong Kong, and Mongolia, as in previous Canadian agreements, 'a joint interpretation by the Parties of a provision of this Agreement shall bind a Tribunal established under this Section'. Moreover, when 'the respondent Party asserts as a defence that the measure alleged to be a breach is within the scope of a reservation or exception … the Tribunal shall, at the request of that Party, request the joint interpretation of the Parties on the issue,' to be delivered within sixty days, which is then binding on the panel.[135]

2.47 Similarly, mirroring the 2014 Australia–Republic of Korea FTA, the Korea–New Zealand FTA requires the tribunal, at the request of the respondent, to request the Joint Commission to interpret 'any provision of this Agreement that is in issue in a dispute', and the joint decision shall be binding on the tribunal.[136] Likewise, the Korea–Turkey Investment Agreement states that an 'interpretation jointly formulated and agreed upon by the Parties with regard to any provision of this Agreement shall be binding on any tribunal established'.[137] In addition to providing that any interpretation of the Joint Committee is binding on a tribunal, the Korea–Vietnam FTA further provides that if 'the disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a reservation or exception … the Tribunal shall, upon request of that disputing Party, request the Joint Committee to interpret the issue', within 60 days.[138] A general requirement that a joint interpretation of the treaty parties interpreting a provision of the agreement is binding on the tribunal was also included in the China-Australia FTA, the Slovakia–Iran BIT, the India model BIT, and the Norway model BIT.[139] In contrast, Japan's agreements with Iran, Uruguay, Ukraine, Oman and Kenya, and the Argentina–Qatar BIT, the China–Korea FTA, and the Mauritius–UAE do not include a feature allowing for binding joint interpretations of the parties.

[134] CETA (n 7), Investment Chapter, art 8.38(2).

[135] Canada–Guinea BIT (n 119) art 33; Burkina Faso–Canada BIT (n 115) art 34; Canada–Hong Kong SAR BIT (n 119) art 30, Canada–Mongolia BIT (n 119) art 32.

[136] Free Trade Agreement between New Zealand and the Republic of Korea (entered into force 20 December 2015) art 10.25(1) and art 10.28(2) (hereafter Korea–New Zealand FTA).

[137] Agreement on Investment under the Framework Agreement Establishing a Free Trade Area between the Republic of Korea and the Republic of Turkey (signed 26 February 2015) art 1.17(16) (hereafter Korea–Turkey Investment Agreement).

[138] Free Trade Agreement between the Government of the Socialist Republic of Viet Nam and the Government of the Republic of Korea (entered into force 20 December 2015) art 9.24 (hereafter Korea–Vietnam FTA).

[139] China–Australia FTA (n 126) art 9.18(2); Slovakia–Iran BIT art 19.2; India model BIT (n 102) art 24; Norway Draft Model Agreement for the Promotion and Protection of Investments (2015) art 13 (hereafter Norway Model BIT (2015)). The EU–Vietnam agreement (art 16.4) and the TTIP (art 13.5) both specify that where 'serious concerns arise as regards issues of interpretation,' the joint commissions may issue binding interpretations of the relevant sections of the investment chapter.

b. Other limitations on arbitral power

2.48 In addition to filter mechanisms and binding state interpretations, states continue to use other procedural mechanisms, carve-outs,[140] exclusions,[141] exceptions,[142] and self-judging clauses[143] to circumscribe the authority of arbitral tribunals.[144] Filter mechanisms give designated state officials of both or all parties the first right to make a binding interpretation of a certain claim or defence but also allow the claims to proceed if the treaty parties are unwilling or unable to agree. Other mechanisms further prevent certain claims from ever reaching tribunals. For instance, in the treaty between Oman and Japan, the state parties require the host state's consent before an investor can pursue a claim for breach of the treaty's 'umbrella clause'.[145] And, in Japan's agreement with Iran, if an investment dispute is referred first to the courts of the host party and a final judgment is rendered, then the dispute may not subsequently be referred to arbitration.[146] Similarly, under the 2015 Indian model BIT, the arbitral tribunal does not have jurisdiction to review the merits of a decision made by judicial authorities of the state parties.[147]

[140] See eg TPP (nn 4, 5) art 29.5 includes a specific carve-out concerning tobacco control measures.

[141] See eg Free Trade Agreement between European Union and Vietnam (agreed text as of January 2016, signed 1 February 2016) Investment Chapter art 4.3 (hereafter EU–Vietnam FTA) excludes sectors such as fisheries, forestry, mining, and oil and gas, from application of Most Favoured Nation Treatment.

[142] See eg The Reciprocal Promotion and Protection of Investments Between the Argentine Republic and the State of Qatar (signed 6 November 2016) art 13 (hereafter Argentina–Qatar BIT) provides for self-judging security exception where the Contracting Part can apply 'measures that it considers necessary for the protection of its essential security interests'. Similar self-judging security exception clauses are provided in Japan–Uruguay BIT (n 121) art 22(2); Agreement between Japan and Ukraine for the Promotion and Protection of Investment (entered into force 26 November 2015) art 19 (hereafter Japan–Ukraine BIT); Agreement between Japan and the Sultanate of Oman for the Reciprocal Promotion and Protection of Investment (signed 19 June 2015) (hereafter Japan–Oman BIT) art 16; Agreement between Japan and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investment (signed 5 February 2016) art 18(3) (hereafter Japan–Iran BIT) art 13.2; India model BIT (n 102) art 33; Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part (signed 21 December 2015) art 274 (EU–Kazakhstan EPCA).

[143] See eg the self-judging essential security clause (art 13) in Argentina–Qatar BIT (n 142).

[144] This chapter does not discuss general treaty exceptions, although those, too, reflect states' efforts to preserve policy space, effectively liming certain measures from arbitral review. For instance, in the Agreement between the Government of the United Arab Emirates and the Government of the Republic of Mauritius for the Promotion and Reciprocal Protection of Investments (signed 20 September 2015) art 1.2(f) (hereafter Mauritius–UAE BIT), the treaty indicates in the definitions that natural resources are not covered by the treaty in the case of the UAE.

[145] The Japan–Oman BIT (n 142) art 5.3 provides that '[E]ach Contracting Party shall observe any obligation it may have entered into with regard to investments and investment activities of investors of the other Contracting Party,' and art 15.5(b) states that '[f]or investment disputes regarding the obligation of the disputing Party under paragraph 3 of Article 5, the disputing Party may give necessary consent for the submission to the arbitration on a case-by-case basis'.

[146] Japan–Iran BIT (n 142).

[147] India model BIT (n 102) art 13.5.

2.49 In Canada's 2015 and 2016 BITs, as in Canada's past agreements, a decision 'following a review under the Investment Canada Act, with respect to whether or not to permit an investment that is subject to review, is not subject to the dispute settlement provisions' of the treaty.[148] Brazil's 2015 model and its agreements with Mexico and Colombia exclude application of the dispute settlement mechanism to measures adopted pursuant to the security exception clause.[149] Brazil's agreement with Colombia, Chile, and Peru also exclude measures related to corporate social responsibility, anti-corruption, and health, environment and labour from state–state arbitration.[150]

2.50 Finally, an increasing number of treaties preclude access to ISDS when the relevant investment was made illegally, fraudulently or not in good faith. For instance, the Slovakia–Iran BIT seeks to prevent submission of a claim to arbitration if the investor or the investment has violated the host state law in the making or operation of an investment. If the violation is sufficiently serious or material, then the tribunal shall dismiss such a claim. According to the treaty, certain violations such as fraud, tax evasion, corruption, and bribery, shall always be considered sufficiently serious or material for dismissal of a claim.[151] The Norway model BIT, Indian model BIT, CETA, and the EU–Vietnam FTA similarly seek to prevent claims from being submitted to arbitration if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.[152]

2.51 The EU–Vietnam FTA also includes a specific provision excluding claims 'in the name of a class composed of a number of unidentified claimants';[153] another provision excludes claims if 'the claimant has acquired ownership or control of the investment for the main purpose of submitting the claim' under the investment

[148] Burkina Faso–Canada BIT (n 115) Annex V; Canada–Guinea BIT (n 119) Annex III; Canada–Hong Kong BIT (n 119) Annex IV; Canada–Mongolia BIT (n 119) Annex III (In the Canada–Mongolia BIT, a decision by Mongolia 'to prohibit or restrict the acquisition of an investment in its territory by an investor of Canada' is likewise excluded from dispute settlement).

[149] Brazil model CFIA (n 101) art 13.2; Agreement on Cooperation and Facilitation of Investments between the Federal Republic of Brazil and the United States of Mexico (signed 26 May 2015) art 12.2 (hereafter Brazil–Mexico CFIA), Agreement on Cooperation and Facilitation of Investments between the Federal Republic of Brazil and the Republic of Colombia (signed 9 October 2015) art 12.2 (hereafter Brazil–Colombia CFIA).

[150] Brazil–Colombia CFIA (n 149) art 23.3; Agreement on Cooperation and Investment Facilitation between the Federal Republic of Brazil and the Republic of Chile (signed 24 November 2015) Annex I, art 1.2 (hereafter Brazil–Chile CFIA); Brazil–Peru Economic and Trade Expansion Agreement (signed 29 April 2016) art 2.21(3) (hereafter Brazil–Peru ETEA).

[151] Slovakia–Iran BIT (n 21) art 14(2).

[152] Norway model BIT 2015 (n 139) art 14.5; India model BIT (n 102) art 13.4; CETA (n 7) art 8.18(3); EU—Vietnam FTA (n 141) Chapter II Investments, section 3.1, art 1.2.

[153] EU—Vietnam FTA (n 141), Chapter II Investments, section 3.3, art 6.6.

tribunal system.[154] Accordingly, these states seek to preclude access to ISDS in the case of investments that were made fraudulently or have abused the treaty process.

c. Alternatives to ISDS

2.52 As with prior years, there is indication that some states are continuing to reject ISDS entirely in their treaties. Brazil, most notable for rejecting ISDS, continued its treaty-making in 2015 and 2016, in each case following the approach described in last year's *Yearbook*. Brazil's treaties with Malawi, Mozambique, Angola, Mexico, Colombia, Chile, and Peru all include some version of establishing Ombudsmen and a Joint Committee to resolve disputes between the parties.[155] If the dispute remains unresolved, these treaties further provide for the option of arbitration between the contracting states.[156] In 2016, Brazil also concluded an investment agreement with India that provides for similar alternative dispute mechanisms to ISDS, including a Joint Committee, Ombudsman, state–state arbitration and 'dispute prevention procedures'.[157] There are also further indications that regional agreements and protocols are similarly moving away from ISDS. The amended version of SADC FIP removed ISDS which had appeared in the previous version, and provides only for state–state dispute settlement before the region's permanent tribunal.[158]

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[154] ibid Chapter II Investments, section 3.5, art 17.

[155] For instance, the Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Malawi (signed 25 June 2015) art 13 (hereafter Brazil–Malawi CFIA) states '1. The National Focal Points, or 'Ombudsmen', shall act in coordination with each other and with the Joint Committee in order to resolve any disputes between the Parties. 2. Before initiating an arbitration procedure, any dispute between the Parties shall be assessed through consultations and negotiations between the Parties and previously examined by the Joint Committee … 6. If the dispute cannot be resolved, the Parties to the exclusion of the investors may resort to arbitration mechanisms between States, which are to be agreed upon by the Joint Committee, whenever the Parties find it appropriate.'; Agreement on Cooperation and Facilitation of Investment between the Federal Republic of Brazil and the Republic of Mozambique (signed 30 March 2015) art 15 (hereafter Brazil–Mozambique CFIA); Agreement on Cooperation and Facilitation of Investment between the Federal Republic of Brazil and the Republic of Angola (signed 1 April 2015) art 15 (hereafter Brazil–Angola CFIA); Brazil–Mexico CFIA (n 149) art 18; Brazil–Colombia CFIA (n 149) art 22; Brazil–Chile CFIA (n 150) art 24; Brazil–Peru ETEA (n 150) art 2.20.

[156] Brazil–Mexico CFIA (n 149) art 19; Brazil–Colombia CFIA (n 149) art 23; Brazil–Chile CFIA (n 150) art 25 and Annex I; Brazil–Peru ETEA (n 150) art 2.21; Brazil–Mozambique CFIA (n 155) art 15.6; Brazil–Angola CFIA (n 156) art 15.6; Brazil–Malawi CFIA (n 155) art 13.6; Brazil's agreement with Mexico, Colombia, and Chile provide elaborate provisions and procedures for the state–state arbitration mechanism.

[157] Joel Dahlquist, 'Brazil and India conclude bilateral investment treaty' *Investment Arbitration Reporter* (28 November 2016), <https://www.iareporter.com/articles/brazil-and-india-conclude-bilateral-investment-treaty/>.

[158] South African Development Community, Agreement Amending Annex 1 (Cooperation on Investment) of The Protocol on Finance and Investment, (signed 31 August 2016) (hereafter SADC FIP 2016) art 26.

2. Right to regulate

2.53 The 'right to regulate' is broadly recognized as a 'basic attribute of sovereignty under international law',[159] which embodies the freedom to regulate in the public interest with respect to, for example, protection of health, the environment, and human rights.[160] IIAs thus do not grant or establish a state's right to regulate; rather, these agreements often restrict the *inherent* right of states to regulate.

2.54 In recent years, references to the 'right to regulate' have appeared more frequently in the policy positions and public statements of negotiating states,[161] in the texts of IIAs and new models, and more generally in the debate on reform of the international investment regime.[162] Several factors are likely to have encouraged this development. First, concerns regarding the potential for 'regulatory chill' in host states due to the real or perceived implications of investor–state claims continue to play a prominent role in the narrative on investment treaty reform.[163] Critics of the present regime have questioned its legitimacy on this basis, arguing that IIAs and enforcement through investor–state arbitration may constrain or undermine states' abilities to regulate in the public interest, whether by dis-incentivizing regulatory action, rendering illegal under international law conduct that is taken in good faith and in the public interest, or by requiring states to compensate investors for the potential or actual implications of pursuing legitimate public policy objectives.[164] The chilling effects of

[159] Titi, *The Right to Regulate* (n 108) 32, citing Howard Mann, 'The Right of States to Regulate and International Investment Law', Comment by Howard Mann during an Expert Meeting on the Development Dimension of FDI: Policies to Enhance the Role of FDI in Support of the Competitiveness of the Enterprise Sector and the Economic Performance of Host Economies, Taking into Account the Trade/Investment Interface, in the National and International Context (Geneva 6–8 November 2002) <http://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf> 5. See also M Sornarajah, 'The Right to Regulate and Safeguards', in *The Development Dimensions of FDI: Policy and Rule-Making Perspectives* (UNCTAD 2003) <http://unctad.org/en/Docs/iteiia20034_en.pdf> 205–09.

[160] Spears (n 108) 1037, 1045–46; Steffen Hindelang and Carl-Philipp Sassenrath, The Investment Chapters of the EU's International Trade and Investment Agreements in a Comparative Perspective (European Parliament Directorate-General for External Policies Policy Department 2015) 18.

[161] See (n 53) above for examples of public statements and policy documents referring to the right to regulate.

[162] See eg UNCTAD, World Investment Report 2015 (n 53), which refers to safeguarding the right to regulate in the public interest as one of the five main challenges that IIA reform should seek to address.

[163] Measuring the impact of the 'regulatory chill' is challenging for a number of reasons; however, empirical evidence recently published suggests that some governments may refrain from adopting regulatory measures in the public interest due to the real or perceived threat of investment arbitration. See Hindelang and Sassenrath (n 160) 18, who point to Lauge Poulsen, 'Bounded Rationality and the Diffusion of Modern Investment Treaties' (2013) 58 International Studies Quarterly 1.

[164] See section B (Expanded Awareness).

investor–state arbitration have been highlighted by several recent claims where investors sought to challenge measures adopted in pursuit of public welfare objectives.[165] Concerns regarding the potential for regulatory chill have been advanced not only on the basis of the outcomes of specific claims, but also due to the uncertainty generated by the varying, and often inconsistent, approaches adopted by investment tribunals in the interpretation and application of treaty standards.[166]

2.55 A second, related factor likely to underpin increased reference to the right to regulate is the growing public debate regarding IIAs, fuelled—at least in part—by opposition to the encroachment of regulatory space considered critical for addressing global challenges, including climate change. In Sweden, for example, public debate regarding TTIP centred on the issue of regulating matters of particular public importance, including the environment.[167] In Belgium, regional parliaments momentarily blocked the federal government's consent to signature of CETA until a declaration was made to address their concerns regarding inter alia the agreement's impact on social and environmental standards, in addition to its impact on Belgian agriculture.[168] The Belgian federal government also agreed to seek an opinion from the Court of Justice of the European Union regarding the compatibility with the laws of the European Union of CETA's provisions on investor–state dispute settlement.[169] Public debate has been encouraged by the increase in known treaty-based disputes challenging domestic regulatory actions and measures concerning matters of public interest.[170] Moreover, public discourse

[165] For commentary, see eg Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP' (2016) 19 Journal of International Economic Law 27, 28; Wagner (n 108) 7–9.

[166] Spears (n 108) 1040.

[167] Swedish National Board of Trade, 'The Right to Regulate in the Trade Agreement between the EU and Canada—and its Implications for the Agreement with the USA' (September 2015) <http://www.kommers.se/Documents/dokumentarkiv/publikationer/2015/Publ-The-right-to-regulate.pdf> 8.

[168] See eg Barrie McKenna (n 8); Jennifer Rankin (n 8); Peter Zimonjic, 'Canada–EU Trade Deal not Dead Yet, says Belgium's Ambassador' *CBC News* (21 October 2016), <http://www.cbc.ca/news/politics/ceta-raoul-delcorde-deal-1.3816902>.

[169] See eg Council of the European Union, Statements to the Council Minutes (27 October 2016), <http://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf>; Laurens Ankersmit, 'Investment Court System in CETA to be Judged by the ECJ' *European Law Blog* (31 October 2016), <http://europeanlawblog.eu/2016/10/31/investment-court-system-in-ceta-to-be-judged-by-the-ecj/>.

[170] See Spears (n 108) 5 for examples. For examples of claims where measures were adopted to regulate the extractive industries sector, see Lise Johnson and Jesse Coleman, 'International Investment Law and the Extractive Industries Sector' (January 2016) Columbia Center on Sustainable Investment Briefing Note <http://ccsi.columbia.edu/2016/01/12/international-investment-law-and-the-extractive-industries-sector/>. See also CCSI's Submission in *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/2 (Bear Creek), <http://ccsi.columbia.edu/work/projects/participation-in-investor-state-disputes/>.

in the United States and in several Member States of the European Union has been further fuelled by election campaign rhetoric.[171]

2.56 Lastly, some commentators suggest that the interests and distribution of power at the negotiating table have changed in recent years: as IIAs are increasingly being negotiated between developed economies, the typical role purportedly played by these agreements of protecting investors of developed capital exporting states against egregious conduct by developing country governments is being challenged.[172] Furthermore, investment chapters are now frequently being concluded as part of broader FTAs, bringing a range of additional issues to the negotiating table that may not have been present during negotiations of stand-alone, traditional BITs between developed and developing economies.[173] More generally, some have suggested a shift away from the 'fundamentalist version of economic liberalism' that has underpinned the investment policies of capital-exporting states for decades:[174] negotiating states and other stakeholders are recognizing that IIAs do not necessarily increase FDI, and that FDI does not automatically fulfil the sustainable development objectives of host states.[175]

2.57 Perhaps as a result of these and other factors, several treaties and models concluded or published in 2015 and 2016 indicate an effort by states to expressly recognize their inherent right to regulate. This development goes beyond inclusion of provisions that indirectly concern the right to regulate.[176] As discussed below, several agreements include more explicit references to the right to regulate in addition to, or aside from, the inclusion of general exception clauses, non-lowering of standards provisions, or clarifications of specific treaty standards that strongly impact regulatory space. However, the implications of these developments are unclear; indeed, many of the examples discussed below may fall short of providing sufficient protection of states' right to regulate in practice. In addition to these more explicit references to the state's right to regulate, states have also narrowed the scope of certain agreements, which may constitute a further effort to preserve regulatory space.

[171] Discussion of the TPP featured prominently throughout the presidential election campaign in the United States. Public debate also prompted the European Commission to launch public consultations on, inter alia, the investment provisions of the TTIP and its multilateral court proposal. See also Johnson and Sachs (n 59) 25–68, 28–29, who note that debate in Europe and the United States has prompted the European Commission and USTR to issue 'statements seeking to ease some of the concerns about the treaties'.

[172] Titi (n 108) 20–21.

[173] ibid 21–23.

[174] Spears (n 108) 1064–65.

[175] For a brief discussion of studies assessing the extent to which IIAs and ISDS increase investment flows, see Columbia Center on Sustainable Investment, 'Developing Alternatives to Investor–State Dispute Settlement: What are the Options?' (forthcoming 2017).

[176] Hindelang and Sassenrath (n 160) 19.

a. Preambular texts

2.58 Of the agreements reviewed herein,[177] at least ten contain explicit or implicit references to the right to regulate within their preambular texts. Brazil's CFIA with Mexico, for example, includes the following text:

> Reconociendo el derecho de las Partes a legislar en materia de inversiones y a adoptar nuevas reglamentaciones al respecto, con el fin de cumplir con los objetivos de su política nacional[.][178]

The preamble contained in the Brazil–Chile CFIA differs slightly, referring to the adoption of regulations with respect to investments in order to achieve legitimate public policy objectives:

> Reconociendo el derecho de las Partes a adoptar regulaciones relativas a las inversiones realizadas en su territorio, para lograr objetivos legítimos de política pública[.][179]

The Slovakia–Iran BIT goes one step further, acknowledging both the right and responsibility of states to regulate investment:

> Acknowledging the rights *and responsibilities* of the Contracting Parties to regulate investment within their territories in order to meet own policy objectives[.][180]

Azerbaijan and India's model BITs, published in September and December 2015 respectively, also include preambles that 'maintain' or 'reaffirm' the right of contracting parties to regulate investment.[181] The Morocco–Nigeria BIT, concluded in December 2016, also reaffirms 'the right of State Parties to regulate and to introduce new measures relating to investments in their territories' and refers specifically to 'the particular need of developing countries to exercise this right'.[182]

2.59 While the examples cited above refer to the right to regulate *investment*, four other preambular texts contain references to the right of states to regulate in the public interest more generally. The TPP's preamble includes an explicit recognition of states parties' 'inherent right to regulate' in the public interest.[183] CETA's preamble includes two references to the right to regulate: a positive recognition of the 'right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives', and a negative provision recognizing

[177] As noted above (n 3), agreements and models reviewed herein include all publicly available agreements and models signed or published in 2015 and 2016. The chapter focuses on agreements and models published in English; more limited consideration is also given to agreements and models published in Spanish and Portuguese.

[178] Brazil–Mexico CFIA (n 149) preamble.

[179] Brazil–Chile CFIA (n 150) preamble.

[180] Slovakia-Iran BIT (n 21) preamble.

[181] Azerbaijan model BIT (2016) (n 104) preamble; India model BIT (n 102) preamble.

[182] Morocco-Nigeria BIT (n 24) preamble.

[183] TPP (nn 4, 5) preamble.

that the agreement is 'intended to stimulate mutually-beneficial business activity, *without undermining* the right of the Parties to regulate in the public interest'.[184] This explicit recognition of the potential for IIAs to undermine the right to regulate in the public interest is unique among IIAs. Notably, reference to the right to regulate is absent from the European Union–Vietnam FTA's preamble.

2.60 Brazil's model CFIA includes an implicit reference to the right to regulate, wherein the parties reassure 'their regulatory autonomy and policy space'.[185] The Burkina Faso–Canada BIT also contains the following notable, though implicit, preambular reference to the right to regulate:

> Recognizing the right of each Party to adopt or maintain any measures that are consistent with this Agreement and that relate to health, safety, the environment, or public welfare, as well as the difference in the Parties' respective economies[.][186]

This reference is unique among the preambles of other BITs negotiated by Canada and Burkina Faso in 2015 and 2016.[187], [188]

b. Other provisions on the right to regulate

2.61 Among the agreements signed in 2015 and 2016, at least four contain a provision in the operative portion of the text that explicitly recognizes the inherent right of states to regulate. Three of these agreements are FTAs, with the relevant provisions therein referring to regulation in the public interest (or in pursuit of legitimate public policy objectives) as the object of the provision, rather than focusing exclusively on the regulation of investment activities.

2.62 The European Union and its Member States are signatories to two of the three relevant FTAs. Following the shift in competence over the conclusion of IIAs to the European Union, both the Commission and Parliament have stated that, going forward, a better balance should be achieved between investment protection and states' right to regulate.[189] For example, in an April 2011 resolution

[184] CETA (n 7) preamble (emphasis added).

[185] See Brazil's model CFIA (n 101).

[186] Burkina Faso–Canada BIT (n 115).

[187] Similar preambular text is not present in the following agreements signed by Canada in 2015 and 2016: Canada–Mongolia BIT (n 119); Canada–Hong Kong, China SAR BIT (n 119); Canada–Guinea BIT (n 115). Burkina Faso signed only one agreement (the Burkina Faso–Canada BIT (n 115) during this period.

[188] Note, however, that general exceptions can be found in all four of the agreements signed by Canada during the review period: Canada–Hong Kong, China SAR BIT (n 119) art 17; Canada–Guinea BIT (n 119) art 18; Burkina Faso–Canada BIT (n 115) art 18; Canada–Mongolia BIT (n 119) art 17. Such provisions are now commonly found in Canada's agreements.

[189] See Catharine Titi, 'International investment Law and the European Union: Towards a New Generation of International Investment Agreements' (2015) 26(3) The European Journal of International Law 639, 654. See also (n 53) above for examples of references by the European Commission and Parliament to the need to protect the right to regulate.

concerning the future of European investment policy, the European Parliament dedicated several paragraphs to the right to regulate,[190] wherein the Parliament called on the Commission 'to include in *all future agreements specific clauses laying down the right of the parties to the agreement to regulate*'.[191] The April 2012 Statement of the European Union and United States on 'Shared Principles for International Investment' also highlighted that these principles can be fully implemented 'while still preserving the authority [of states] to adopt and maintain measures necessary to regulate in the public interest to pursue certain public policies'.[192] Similarly, the Council's directive for the negotiation of TTIP provides that the objectives of the agreement 'should be without prejudice to the right of the EU and the Member States to adopt and enforce, in accordance with their respective competences, measures necessary to pursue legitimate public policy objectives such as social, environmental, security, stability of the financial system, public health and safety in a non-discriminatory manner'.[193] Other negotiating directives have also referred to the need to protect the right to regulate in the context of trade and investment.[194] Given the relative frequency with which right to regulate references have been made in these and other policy documents,[195] some have suggested that protection of this right has emerged as a core feature of the investment policy of the European Union.[196]

[190] European Parliament Resolution 2010/2203 (INI) of 6 April 2011 on the future of European international investment policy (hereafter European Parliament Resolution 2010/2203) paras 23–26. See also paras 27–30 and 37 regarding social and environmental standards, and investor obligations concerning human rights and corruption.

[191] ibid para 25, emphasis added. The Parliament also expressed 'its deep concern regarding the level of discretion of international arbitrators to make a broad interpretation of investor protection clauses, thereby leading to the ruling out of legitimate public regulations'. See also ibid para 24.

[192] Statement of the European Union and the United States on Shared Principles for International Investment (2012) 1 <http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf> (hereafter Statement on Shared Principles for International Investment).

[193] Council of the European Union, Directives for the Negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America (17 June 2013) para 23. See also para 25.

[194] See Titi, *The Right to Regulate* (n 108) 64–65; Titi, 'International Investment Law' (n 189) 654.

[195] See (n 53) above. See also Henckels (n 165) footnote 6.

[196] See eg Titi, *The Right to Regulate* (n 108) 66; Henckels (n 165) 29. However, see also Paparinskis, who argues that while the European Union 'has moved beyond the models of the traditional home states of Western Europe … the more important point may be that the sui generis elements of the European constitutional and political order have not yet translated into qualitatively new contributions to international investment policy' and '[w]hatever new faces may be lurking around the corner, the black letter of the existing EU practice is an update of the US practice of the last decade, better on some points than others'. Martins Paparinskis, 'International Investment Law and the European Union: A Reply to Catharine Titi' (2015) 26(3) The European Journal of International Law 663, 670.

2.63 The European Union's heightened focus on the right to regulate within operative provisions is reflected in the text of CETA and the European Union–Vietnam FTA. CETA's Article 8.9 provides:

> 1. For the purpose of this Chapter, the Parties *reaffirm their right to regulate* within their territories to achieve *legitimate policy objectives*, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.
> 2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, *does not amount to a breach of an obligation under this Section*.[197]

Article 8.9 thus explicitly recognizes the right to regulate, and seeks to clarify the consequences of regulation by the parties that may affect an investment or interfere with an investor's expectations.[198] The European Union–Vietnam FTA[199] contains a similar affirmation of the parties' right to regulate, though the consequences of this provision are not as clearly articulated. Article 13bis provides:

> 1. The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity.
> 2. For greater certainty, the provisions of this section shall not be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor's expectations of profits.[200]

CETA's signature was accompanied by a Joint Interpretative Instrument (JII),[201] which, as noted elsewhere in this chapter, helped states parties to surmount opposition to signature and provisional application of portions of the agreement.[202] The text of the JII makes explicit its adoption in the context of extensive public debate and opposition to the conclusion of CETA and, more generally, to increased public opposition to the conclusion of 'mega-regional' trade agreements

[197] CETA (n 7) art 8.9(1) and (2) (emphases added).

[198] Two additional sub-clauses within art 8.9 refer to the right to regulate in the context of subsidies. See also arts 23.2 and 24.3, which refer to the right to regulate in the context of trade and labour, and trade and the environment respectively.

[199] EU–Vietnam FTA (n 141).

[200] ibid art 13bis.

[201] Joint Interpretative Instrument CETA (n 12).

[202] See Section B (Negotiation and Ratification). Regarding the impact of the Joint Interpretative Instrument, see eg Simon Lester, 'Interpreting the CETA Joint Interpretative Instrument' *International Economic Law and Policy Blog* (1 November 2016), <http://worldtradelaw.typepad.com/ielpblog/2016/11/the-ceta-joint-interpretative-instrument.html>.

with investment provisions.[203] With respect to the right to regulate, the JII's preamble again recognizes 'the importance of the right to regulate in the public interest', and further emphasizes that the European Union, its Member States, and Canada will 'continue to have the ability to achieve the legitimate public policy objectives that their democratic institutions set', and that CETA 'will also not lower our respective standards and regulations' related to specific policy areas affected by the agreement.[204] In addition to these preambular reaffirmations, the JII also provides:

> CETA preserves the ability of the European Union and its Member States and Canada to adopt and apply their own laws and regulations *that regulate economic activity* in the public interest, to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and data protection and the promotion and protection of cultural diversity.[205]

2.64 This language largely mirrors CETA's Article 8.9; however, it focuses specifically on regulation of *economic activity* in the public interest, rather than regulation in pursuit of legitimate public policy objectives more generally.[206] While an assessment of the instrument's impact is premature, inclusion of this additional statement regarding the right to regulate may serve to further inform or strengthen understanding of the motivation underpinning CETA's Article 8.9(2), which provides that regulation in a manner that 'negatively affects an investment or interferes with an investor's expectations … *does not amount to a breach of an obligation under this Section*'.[207] Other relevant references to protection of regulatory space, which may also serve to inform interpretations of CETA's provisions that achieve a better balance between investment protection and the broader needs and interests of society more generally, can be found elsewhere in the JII.[208]

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[203] The preamble provides:

> This interpretative instrument, provides, in the sense of Article 31 of the Vienna Convention on the Law of Treaties, a clear and unambiguous statement of what Canada and the European Union and its Member States agreed in a number of CETA provisions that have been the object of public debate and concerns and provides an agreed interpretation thereof. This includes, in particular, the impact of CETA on the ability of governments to regulate in the public interest, as well as the provisions on investment protection and dispute resolution, and on sustainable development, labour rights and environmental protection.

See Joint Interpretative Instrument CETA (n 12) preamble, para 1(e) (emphases added).

[204] ibid para 1(c) and 1(d).

[205] ibid para 2 (emphasis added).

[206] Compare Joint Interpretative Instrument CETA (n 12) para 2 with CETA (n 7) art 8.9(1).

[207] CETA (n 7) art 8.9(2).

[208] See eg Joint Interpretative Instrument CETA (n 12) para 4(b); regarding regulation of the provision of public services; para 6(a) and (b) regarding regulation in the public interest that affects foreign investments; para 9(b) and (c) regarding environmental protection; para 11 regarding the use and protection of water sources; and para 14 regarding preferences for Canada's Aboriginal peoples.

2.65 Beyond agreements to which European Member States are party, the Korea–New Zealand FTA is the only other FTA reviewed in this chapter that includes an explicit recognition of the inherent right to regulate in the public interest within the operative portion of the agreement. The relevant provision is included within Article 10, which seeks to clarify the objectives of the Investment Chapter. It provides as follows:

> The objectives of this Chapter are to encourage and promote the flow of investment between the Parties on a mutually advantageous basis, under conditions of transparency within a stable framework of rules to ensure the protection and security of investments by investors of the other Party within each Party's territory, *while recognising the right of the Parties to regulate and the responsibility of governments to protect public health, safety and the environment*.[209]

This provision is unique among the agreements reviewed in this chapter. Notably, it seeks to recognize both the inherent right *and* responsibility of parties to regulate in pursuit of specific objectives, namely protection of public health, safety, and the environment. Specifically referring to this right and responsibility of states within the context of a provision that defines the objectives of an agreement's investment chapter may help to inform the interpretation and application of other provisions contained in the chapter, and may thus encourage interpretations that are more balanced in nature (rather than erring on the side of investor protection).

2.66 By contrast, other agreements and models have incorporated a quasi-general exception provision that implicitly refers to or recognizes the right to regulate. Regulation of investment, rather than the public interest or in pursuit of legitimate public policy objectives more generally, forms the object of these provisions; thus, at least in this regard, these provisions do not reflect the wording of general exception provisions modelled on the basis of GATT Article XX or GATS Article XIV. For example, in addition to the TPP's preambular reference to the right to regulate, Article 9.16 of the TPP provides as follows:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *otherwise consistent with* this Chapter *that it considers appropriate* to ensure that *investment activity* in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.[210]

Inclusion of this self-judging provision follows prior statements by the USTR that the TPP would 'protect the rights of the TPP countries to regulate in the public interest'.[211] However, as discussed in Section D.2.(c) below, the extent to which this provision provides any real protection is subject to debate.

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[209] Korea-New Zealand FTA (n 136) art 10.

[210] TPP (nn 4, 5) art 9.16 (emphases added).

[211] Titi, *The Right to Regulate* (n 108) 62, citing 'Outlines of the Trans-Pacific Partnership Agreement', *Office of the United States Trade Representative* (section under Legal Texts, Investment) <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>.

2.67 In addition to this general provision recognizing the parties' right to regulate, the TPP also includes a specific carve-out concerning tobacco control measures.[212] This provision, which allows for unilateral denial of benefits concerning investor–state dispute settlement under Section B of Chapter 9 (Investment), was adopted in the shadow of claims brought by Philip Morris against Uruguay and Australia following the enactment of plain packaging regulations.[213] In contrast to more general right to regulate provisions, the consequences of this specific carve-out are quite clear; however, important questions remain regarding whether inclusion of specific carve-outs for certain public policy measures risks undermining protection of other public policy measures of equal importance, and whether inclusion of this specific carve-out suggests that the TPP states did not consider Article 9.16 to sufficiently provide for protection of their inherent right to regulate.[214]

2.68 Self-judging provisions similar to Article 9.16 of the TPP can also be found in Brazil's model CFIA and Norway's draft model BIT.[215] Norway's 2015 draft model follows the withdrawal in 2007 of a previous revised model, a draft that attracted criticism from both business and civil society.[216] The 2015 version contains an explicit right to regulate provision that mirrors the language of the TPP's Article 9.16, while making reference to additional public policy objectives:

> Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety, human rights, labour rights, resource management or environmental concerns.[217]

As compared to the 2007 version, the explicit references to human rights, labour rights, and resource management are a new addition to the 2015 draft.[218] The specific reference to human rights is noteworthy: as was reported in last year's

[212] TPP (nn 4, 5) art 29.5.

[213] *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7 (hereafter *Philip Morris v Uruguay*); *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12 (hereafter *Philip Morris v Australia*).

[214] See Lise Johnson and Lisa Sachs, 'The TPP's Investment Chapter: Entrenching, Rather than Reforming, a Flawed System' (November 2015) Columbia Center on Sustainable Investment (CCSI) Policy Paper, <http:// ccsi.columbia.edu/ files/ 2015/ 11/ TPP- entrenching- flaws- 21-Nov- FINAL.pdf>.

[215] See Brazil model CFIA (n 101) art 16(1); Norway draft model BIT (n 139) art 12.

[216] Titi, *The Right to Regulate* (n 108) 61, citing Damon Vis-Dunbar, 'Norway Shelves its Draft Model Bilateral Investment Treaty' *Investment Treaty News* (8 June 2009), <https://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/>. See also Spears (n 108) 1043, footnote 27.

[217] Norway draft model BIT (2015) (n 139) art 12 (emphases added).

[218] Norway draft model BIT (2007) art 12 provides: 'Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns'.

Yearbook chapter, references to human rights within the texts of IIAs remain rare.[219]

2.69 As compared to the TPP's Article 9.16, the language used in Norway's Article 12 raises the question of whether it is an exhaustive (though admittedly broad) provision, given that it does not include the qualifying 'or other regulatory objectives' language. Slightly broader language that seeks to protect states parties' right to regulate is included in two footnotes to Articles 3 and 4 regarding non-discrimination and expropriation respectively. With respect to national and most-favoured nation treatment,[220] the revised Norwegian draft model includes a footnote that seeks to clarify that measures adopted in pursuit of 'legitimate policy objectives of public interest' (including the objectives listed in Article 12 above) that have 'a different effect on an investment or an investor of another Party' are not inherently inconsistent with national treatment and most-favoured nation obligations, provided that the relevant state party can show that the measures adopted bear 'a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investment'.[221] This qualification appears to be quite unique among IIAs and models,[222] though the TPP's national treatment provision contains a provision with a similar aim, providing that assessments of whether treatment is accorded in 'like circumstances' under Articles 9.4 and 9.5 'depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives'.[223] While these qualifications may have been included in Norway's draft model and the TPP with the goal of protecting regulatory space, the extent to which they achieve this objective is again questionable. For example, neither the TPP nor Norway's draft model specify that this protection concerns nationality-based discrimination *only*; instead, both texts adopt qualifications that are unlikely to deter broad interpretations of non-discrimination standards.[224]

2.70 While Articles 9.16 and 12 of the TPP and Norway's draft model BIT respectively both require measures adopted in pursuit of public policy objectives to be 'otherwise consistent' with the agreement (or, in the case of the TPP, with the Investment Chapter), Article 16(1) of Brazil's model CFIA does not include this restrictive language. Instead, it provides that nothing in the agreement precludes the adoption,

[219] Johnson, Sachs, and Coleman (n 37) 57–60.

[220] Norway draft model BIT (2015) (n 139) arts 3 and 4.

[221] Norway draft model BIT (2015) (n 139) footnotes 1 and 2.

[222] See Spears (n 108) 1059, who notes that the COMESA CIAA includes a provision with a similar aim (ie of clarifying non-discrimination standards), though adopts a different approach.

[223] TPP (nn 4, 5) chapter 9 (Investment) footnote 14.

[224] See eg Johnson and Sachs (n 214) 9–11 regarding the TPP's qualification in footnote 14 concerning non-discrimination, where the authors note:

> This new language will not be effective in preventing future Bilcon- and Apotex II-30 type cases. Instead of requiring investors to establish nationality-based discrimination,

maintenance or enforcement of measures to ensure that investment activities are carried out in accordance with health, labour and environmental legislation, provided that such measures are not 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction'.[225] However, Brazil's model also contains the following provision:

> This agreement shall not prevent the adoption or implementation of *new legal requirements or restrictions* to investors and their investments, *as long as they are consistent* with this Agreement.[226]

This provision arguably suggests that new requirements or restrictions inconsistent with the agreement are not permitted. It is not immediately clear from the two provisions whether Article 16(1) and its broad recognition of the state parties' rights to regulate would save such new measures from being considered a beach of the agreement; or whether Article 2(4) operates as an exception to the general recognition of the right to regulate, permitting increased scrutiny of new measures.

2.71 In addition to (i) explicit recognitions of the right to regulate in the public interest contained in operative portions of the agreements reviewed in this chapter, and (ii) quasi-general exception provisions that refer to the regulation of *investment* (rather than regulation in the public interest generally) and contain implicit references to the right to regulate, a third type of right to regulate provision that appears in at least one agreement concluded during the course of 2015 and 2016 is a mixed provision that combines wording commonly found in general exception provisions with an explicit recognition of the inherent right to regulate in the public interest. In November 2016, Argentina's foray back into the negotiation of BITs was formalized with the signature of the Argentina–Qatar BIT.[227] Article 10 (Right to Regulate) of this agreement provides as follows:

> None of the provisions of this Agreement shall affect the *inherent right* of the Contracting Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, the environment, public morals, social and consumer protection.[228]

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this language invites foreign investors to pressure governments by bringing speculative claims through ISDS and asking tribunals for a second opinion on whether they agree that government actions or policies differentiating between investors (on grounds other than nationality) were 'legitimate'.

[225] Brazil model CFIA (n 101) art 16(1). A similar provision is contained in art VIII of the Colombia–UK BIT (Investment and the Environment).

[226] Brazil model CFIA (n 101) art 2(4) (emphases added). See also Brazil–Chile CFIA (n 150) art 3(2)(c), which contains a similar provision. The Brazil–Chile CFIA does not contain a provision comparable to Article 16(1) of the Brazil model CFIA.

[227] Facundo Pérez-Aznar, 'Argentina is Back in the BIT Negotiation Arena', *Investment Claims* (14 November 2016) <http://oxia.ouplaw.com/page/argentina-bit>.

[228] Argentina-Qatar BIT (n 142) art 10 (emphasis added).

This is a unique provision, in that it is neither limited by 'otherwise compliant with' language, nor exhaustive in nature. However, Article 10 imposes a necessity test, and thereby appears to afford considerable discretion to arbitral tribunals charged with interpreting and applying this provision. Moreover, its specific implications are unclear: while its formulation somewhat follows that of now more common general exception clauses,[229] implying that the consequences of this provision may follow those associated with the application of general exceptions, limited jurisprudence exists in the investment law sphere regarding application of these clauses. While an assessment of general exception provisions is beyond the scope of this chapter, it is useful to note that, of the agreements reviewed for the purposes of this chapter, at least seventeen contain a general exception provision.[230] Many of these provisions mirror the language of GATT Article XX or GATS Article XIV.[231]

2.72 Lastly, the Morocco–Nigeria BIT contains several references to states parties' right to regulate. For the most part, these provisions fall within the first and second categories of right to regulate provisions discussed above, that is, (i) explicit recognitions of the right to regulate in the public interest contained in operative portions of the agreements reviewed in this chapter, and (ii) quasi-general exception provisions that refer to the regulation of investment (rather than regulation in the public interest generally) and contain implicit references to the right to regulate:

- Article 13 (Investment and Environment) includes several provisions that seek to protect states parties' right to regulate with respect to the environment,[232] including a quasi-general exception provision that refers to the regulation of

[229] For further discussion of general exception provisions as mechanisms for protecting the state's right to regulate, see eg Titi, *The Right to Regulate* (n 108) chapter VII; Spears (n 108) 1059–64; Barnali Choudhury, 'Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements' (2010) Society of International Economic Law Working Paper No 2010/13, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1632437>.

[230] See eg Japan–Uruguay BIT (n 121) art 22(1); Agreement between Japan and Mongolia for an Economic Partnership (entered into force on 7 June 2016) art 1.10 (Japan–Mongolia EPA); Korea–New Zealand FTA (n 136) ch 20; Burkina Faso–Canada (n 115) art 18; Korea-Vietnam FTA (n 138) art 16.1(2); Canada–Guinea BIT (n 119) art 18; Agreement between the Government of Kingdom of Morocco and the Government of the Republic of Guinea Bissau on Promotion and Protection of Investments (signed 28 May 2015) art 2(3) (Guinea Bissau–Morocco BIT); European Union–Vietnam FTA (n 141) chapter 8 (Investment) section VII; Australia-China FTA (n 126) art 9.8; Slovakia–Iran BIT (n 21) art 11; Japan–Iran BIT (n 142) art 13(1); Canada–Hong Kong, China SAR BIT (n 119) art 17(1); Canada–Mongolia (n 119) art 17; India model BIT (n 102) art 32.1; Norway draft model BIT (2015) (n 139) art 24; CETA (n 7) art 28.3; Azerbaijan model BIT (n 104) art 5(2).

[231] Note that the formulation Article 5(2) of the Azerbaijan model BIT differs from most of the other general exception clauses cited in (n 230) above.

[232] Morocco-Nigeria BIT (n 24) art 13.

investment activity, is self-judging in nature, and applies to both environmental and social concerns.[233] This quasi-general exception provision includes the 'otherwise consistent with' language found in several other provisions discussed above.

- Article 23 (Right of State to Regulate) includes an explicit reference to the host state's right to regulate. It provides: 'in accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives'.[234] Notably, the same Article also explicitly provides that 'non-discriminatory measures taken by a State Party to comply with its international obligations *under other treaties shall not constitute a breach of this Agreement*'.[235] Article 23(2), however, then underscores that the host state's right to regulate should not in general be understood as an exception to the obligations contained within the BIT itself.[236]
- In addition, Article 15 (Investment, Labour and Human Rights Protection) includes non-lowering of standards provisions,[237] and specifically provides that 'all parties shall ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party'.[238]

Overall, the Morocco–Nigeria BIT contains a mix of progressive and traditional components: on the one hand, the treaty's substantive standards largely mirror those typically found in traditional BITs and its approach to investor–state dispute settlement is also generally consistent with the dominant model.[239] Yet on the other hand, the BIT contains a series of right to regulate references arguably softening the substantive provisions and preconditions to ISDS narrowing investors' access to that mechanism (namely, that investment disputes may be required

[233] ibid art 13(4)

[234] ibid art 23(1).

[235] ibid art 23(3).

[236] The drafting of Article 23(2) could be improved: it first seeks to establish that states parties' right to regulate should not be understood as an exception to obligations contained in the BIT itself; however, it then characterizes a host state's 'pursuit of its right to regulate' as 'embodied within a balance of the rights and obligations of Investors and Investments and Host States, *as set out in the Agreement*' (Morocco–Nigeria BIT (n 24) art 23(2), emphasis added). This could perhaps be taken to suggest that the right is derived from the agreement, rather than being inherent; *or* the language 'as set out in the Agreement' could be referring to the notion of a balance between the rights and obligations of investors, investments, and states. The language is not entirely clear, and could be improved.

[237] Morocco–Nigeria BIT (n 24) arts 15(2) and 15(3).

[238] Morocco–Nigeria BIT (n 24) arts 15(6).

[239] Tarcisio Gazzini, 'Nigeria and Morocco Move Towards a 'New Generation' of Bilateral Investment Treaties' *EJIL: Talk!* (8 May 2017) <https://www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties/>.

to first be referred for consultation and negotiation by a Joint Committee,[240] and investors must exhaust domestic remedies[241]). Moreover, as discussed in Section C(3) below, the agreement's provisions regarding investor obligations and liability for civil claims in the host state are noteworthy.[242]

c. Implications

2.73 Despite the greater presence of right to regulate language in more recent IIAs and models, the implications of this development are unclear. For example, the consequences of right to regulate provisions found in the operative portions of agreements reviewed in this chapter have in most cases been articulated with insufficient detail. Will these provisions exclude actions or policies from coming within the ambit of the relevant investment chapter or agreement, or will they act as a form of defence, operating similarly to general exception clauses? If the former, who determines whether specific measures fall within the category excluded from the scope of the agreement? If the latter, how much discretion will be and should be afforded to arbitral tribunals in the interpretation and application of these provisions, and which tests are most appropriate for obtaining a balance between investment and non-investment interests? As of yet, these questions remain unanswered. Even in the case of CETA's Article 8.9(2), which provides that regulation does not amount to a breach of states parties' obligations under Section D (Investment Protection) of Chapter 8, the concrete consequences that might flow from this provision are unclear. Moreover, Article 8.9(2) indicates that the 'mere fact' that a regulation negatively impacts an investment or an investor's expectations will not mean that the regulation constitutes a breach; however, that language leaves open the possibility that the 'mere fact', when combined with something more, such as 'manifest arbitrariness' or de facto discrimination, may constitute a breach.

2.74 While some uncertainty persists with respect to the consequences of CETA's Article 8.9, it is at least noteworthy that the provision does not adopt the more commonly found 'nothing in this agreement shall prevent the adoption or enforcement of measures to protect the public interest' type of language; the 'nothing prevents' language is considerably weaker, as IIAs do not in themselves prohibit or bar conduct. By clearly articulating that regulation through modification of laws 'in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount

[240] Morocco–Nigeria BIT (n 24) art 26(1) and (2). This is the presumed intention of the provision; however, the drafting of this provision is not clear: art 26(1) refers to 'any dispute between the Parties', and art 26(2)(c) refers to 'a solution between the Parties', rather than referring to 'parties' to an investor-state dispute. See Gazzini (n 239).

[241] Morocco–Nigeria BIT (n 24) art 26 (5).

[242] See section D. 3. in this chapter (Investor Obligations).

to a breach of an obligation' under Section D of the agreement, CETA adopts an approach that more clearly protects the right to regulate than the 'nothing prevents' type of provision.[243]

2.75 In addition to the uncertain implications of right to regulate provisions discussed in this chapter, several such provisions are also limited by 'otherwise consistent with' language, which undermines the potential for these provisions to shield states from liability for measures adopted in pursuit of public interest objectives. The TPP's Article 9.16 and Norway's model BIT Article 12, for example, both contain this restrictive qualification. Indeed, this 'otherwise consistent with' language has been criticized for arguably seeking to establish the primacy of the IIA over other host state obligations, thereby placing a constraint on regulatory freedom needed to comply with these obligations.[244] Right to regulate provisions curbed by the 'otherwise consistent with' language thus risk creating an 'illusion of retaining regulatory space',[245] while failing to meet that objective. For these and other reasons, Titi has characterized most explicit references to the right to regulate in the operative portions of recently negotiated IIAs and models as 'positive language' that likely fails to effectively guard regulatory freedom.[246] Most existing right to regulate provisions may therefore be no more than 'declaratory' in nature, reaffirming a right that already exists, while falling short of shielding host states from liability for exercising their inherent right to regulate.[247]

2.76 Moreover, some right to regulate provisions, including Norway's model BIT Article 12, appear to be exhaustive in nature and thereby risk excluding certain public interest measures from coming within the ambit of these provisions. Many of the provisions discussed in this chapter also concern the regulation of *investment*, rather than the right to regulate in the public interest more generally. Other components of the right to regulate, including for example 'the flexibility to introduce new regulations to promote and protect human rights', are not addressed by these provisions.[248] Further questions arise regarding the implications of including general right to regulate provisions alongside policy-specific carve-outs. The TPP, for example, carves out taxation measures from the FET obligation, yet '[e]nvironmental, health and safety measures—while similarly complex and important matters of law and policy—are not safeguarded from the

[243] CETA (n 7) art 8.9(2).
[244] Titi, *The Right to Regulate* (n 108) 113–15; Mann (n 159) 7.
[245] UNCTAD, World Investment Report 2015 (n 53) 131.
[246] Titi, *The Right to Regulate* (n 108) 104–07.
[247] ibid 111–15.
[248] For a human-rights perspective on the components of the state's right to regulate, see UN Commission on Human Rights (now the UN Human Rights Council), report of the High Commissioner for Human Rights on 'Human Rights, Trade and Investment' UN Doc E/CN.4/Sub.2/2003/9 (2 July 2003) 3.

uncertainty of ISDS decisions'.[249] This approach arguably leaves measures that address environmental, human rights, health, and safety concerns or obligations 'vulnerable to challenge'.[250]

2.77 The uncertain implications of right to regulate provisions discussed in this chapter raise the question of why negotiating states are drafting provisions that are likely to fall short of protecting regulatory freedom in practice. Inclusion of explicit, though largely inoperative, right to regulate language may help to encourage investor–state tribunals to look beyond investment promotion and protection as the commonly cited objectives of investment treaties, or to at least 'take into consideration' the contracting parties' commitment to regulating in the public interest as part of the broader treaty context.[251] However, achieving clear and predictable protection of regulatory space will require far more meaningful procedural and substantive reforms.

d. Retaining regulatory space through narrowed jurisdiction

2.78 In addition to the added provisions that explicitly seek to preserve policy space, states have also increasingly sought to retain policy space by narrowing the scope for certain investors to challenge government actions. Several newer treaties, for instance, include more narrowed definitions of 'investments' or 'investors' that qualify for investor protections. A two-page definition of 'investment' and 'investor' in the Slovakia–Iran BIT reflects a growing trend to expressly limit treaty protections to investments that contribute capital or other resources, assume risk, anticipate a 'reasonable duration' of time, and expect profits or other gains.[252] In some cases, including the Slovakia–Iran BIT, the definition also requires 'an effective contribution to the Host State's economy' and that the 'investor perform[] via its investment substantial business activities in the Host State'.[253] The Argentina–Qatar BIT similarly requires an investment to involve commitment of resources into the host state and the investor to conduct substantial business activities in the host state.[254] The Indian model BIT, as discussed in last year's *Yearbook* chapter,[255] uses an enterprise-based investment definition with an exhaustive set of inclusions and exclusions and requires characteristics such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk, and a significance for the development of the party in whose territory the investment is made.[256] In August

[249] Johnson and Sachs (n 214) 2–3.
[250] ibid 2.
[251] Titi, *The Right to Regulate* (n 108) 107.
[252] Slovakia–Iran BIT (n 21) art 1.2; See also Canada–Burkina Faso BIT (n 115) art 1 and CETA (n 7) art 8.1 which sets out similar characteristics of investment.
[253] Slovakia–Iran BIT (n 21) art 1.2.
[254] Argentina–Qatar BIT (n 142) art 1.2 and art 1.1(d).
[255] Johnson, Sachs, and Coleman (n 37) 26.
[256] India model BIT (n 102) art 1.4.

2016, the member states of the SADC approved a revision to Annex 1 of the SADC FIP, subject to state ratification. The revised FIP adopts a narrower enterprise-based definition of investment instead of a broader asset-based approach.[257] In these cases, states are narrowing the limitations of their sovereign flexibilities to investments that are more likely to be contributing positively to the nation's development.

2.79 With respect to which 'investors' can bring claims, several agreements expressly limit the ability of nationals of both contracting states to bring a claim against one of the state parties.[258] For instance, Korea's agreements specify that a national 'possessing the nationality or citizenship of a Party shall not pursue a claim against that Party'.[259] In the absence of express limitations on dual nationality in the investment agreement, a tribunal may infer the opposite, as was seen in a recent case under the Spain–Venezuela BIT. In *Serafín García Armas and Karina García Gruber v Venezuela,* the tribunal found that a dual-national Spanish–Venezuelan claimant could sue Venezuela under the BIT, as the BIT formed a *lex specialis* that overrode the customary international law approach in this context.[260] To prevent such potential for dual citizens to bring UNCITRAL claims against one of its countries of citizenship, the new Russian guidelines recommend inclusion of an express provision in future treaties excluding application of the treaty to investors who are also citizens of the host state.[261]

[257] SADC FIP 2016 (n 158) art 1.2. The revised FIP also includes investors only from SADC member states who have invested in another SADC member state.

[258] The ICSID Convention also precludes claims by a national against its own state. International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) art 25.2 (hereafter ICSID Convention).

[259] Korea–Turkey Investment Agreement (n 137) (art 1.17(2)); Korea–New Zealand FTA (n 136) (art 10.18(3)); Korea–Vietnam FTA (n 138) art 9.15(2). The Korea–New Zealand FTA further adds that 'If a national also possesses the nationality or citizenship of a non-Party, he or she shall be deemed to be exclusively a national of the state of his or her dominant and effective nationality.' (art 10.18 (3)).

[260] *Serafín García Armas and Karina García Gruber v Venezuela* (Decision on Jurisdiction, 2014) UNCITRAL, PCA Case No 2013-3; See Clovis Trevino and Luke Eric Peterson, 'UNCITRAL Tribunal Allows Dual National to Sue Venezuela; Surprise Development Highlights Unintended Consequence of Recent ICSID Denunciation', *Investment Arbitration Reporter* (8 February 2015), <https://www.iareporter.com/articles/uncitral-tribunal-allows-dual-national-to-sue-venezuela-surprise-development-highlights-unintended-consequence-of-recent-icsid-denunciation/>; See also Joel Dahlquist and Luke Eric Peterson, 'Analysis: $12 Billion Arbitration vs. Russia by Exiled Oligarch May Be Next Test Case of Arbitrators' Willingness to Let Dual Nationals Sue their own State', *Investment Arbitration Reporter* (23 September 2015) <https://www.iareporter.com/articles/analysis-arbitration-against-russia-by-exiled-oligarch-claiming-12-billion-in-damages-may-be-next-test-case-of-arbitrators-willingness-to-let-dual-nationals-sue-their-own-state/>.

[261] Joel Dahlquist, 'Russia Sets out New Guidelines for Contents of Future Investment Treaties' *Investment Arbitration Reporter* (26 October 2016) <https://www.iareporter.com/articles/russia-sets-out-new-guidelines-for-negotiation-of-future-investment-treaties/>.

2.80 Other treaties allow dual citizens to bring a claim against a party if their 'dominant' citizenship is of the other party; for instance, the Azerbaijan model provides that 'in cases of double nationality, a person shall be considered to be a national exclusively of the State in which it has a dominant and effective nationality. Dominant and effective nationality refers to the place in which the physical person pays its taxes, receives its social security, exercises its voting rights and/or can hold public office'.[262] India's 2015 model BIT also provides that dual nationals shall be 'deemed to be exclusively a national or citizen of the country of her or his dominant and effective nationality/citizenship, where she/he ordinarily or permanently resides'.[263] The Japan–Iran BIT's definition of an investor's nationality specifies that the 'headquarters [or] … real economic activities are located in the Territory of that Contracting Party'.[264]

3. Investor obligations

2.81 Following a review of agreements and models negotiated or published in 2014, the authors previously reported that a handful of these texts included provisions regarding investor 'obligations' with respect to corruption, corporate social responsibility (CSR), and human rights.[265] A majority of these provisions were found to be voluntary in nature: they encouraged compliance with best practice standards, rather than binding investors to specific obligations. The March 2015 draft of India's model BIT was highlighted as a noteworthy exception to this emerging trend of soft investor obligations, one which sought to strengthen investors' duties and condition treaty benefits on compliance with them.[266] This draft version of India's model featured both positive and negative investor obligations concerning inter alia: corruption, disclosures, taxation, and compliance with host state laws.[267] Moreover, Article 8 of the March 2015 draft clearly established the consequences of any breach of investor obligations included in that text, namely that: (i) investors could be denied the benefits of treaty protection where they failed to comply with their obligations thereunder, including the obligation to comply with host state laws; and (ii) the relevant state party would be entitled to 'at its sole discretion … seek suitable enforcement, regulatory or other legal action in response to that breach'.[268] Articles 13.1 and 13.2 also sought to

[262] Azerbaijan model BIT (n 104) art 1.3.
[263] India model BIT (n 102) art 1.9.
[264] Japan–Iran BIT (n 142) art 1.2(b).
[265] Johnson, Sachs, and Coleman (n 37) 50–60.
[266] ibid.
[267] India model BIT (March 2015 version) ch III ('Investor, Investment and Home State Obligations').
[268] Article 8 of the March 2015 of India's revised model BIT version provides inter alia:

> 8.3 The Parties further agree that compliance with Articles 9, 10, 11 and 12 of this Chapter is compulsory and is fundamental to the operation of this Treaty. Investors

strengthen enforcement of investor obligations by requiring states parties to allow for submission in the home state of civil claims concerning covered investments made in the host state.[269] For these and other reasons, last year's *Yearbook* chapter noted that the March 2015 draft adopted 'a promising approach to investor obligations in IIAs, evident only to a similar extent in the SADC and IISD model agreements'.[270]

2.82 In December 2015, India published a further revised version of its new model BIT. This version, which was ultimately approved by the Indian government,[271] contains only two provisions concerning investor obligations: Article 11 requires compliance with host state laws, and Article 12 includes a non-binding CSR provision similar to the non-binding CSR provisions found in several other recently concluded IIAs.[272] The December 2015 version of India's model thus represents a return to emerging trends of including non-binding investor 'obligations' in the form of voluntary standards rather than binding obligations.[273] Looking ahead, India may be in a position to reintroduce some of the March 2015 provisions on investor obligations where it negotiates with more like-minded states.[274] In November 2016, it was reported that Brazil and India had concluded negotiations

and their Investments must comply with the obligations in Articles 9, 10, 11, and 12 to benefit from the provisions of this Treaty.

8.4 A breach by Investors and their Investments of the obligations set forth in Articles 9, 10, 11 and 12 shall entitle the Party, at its sole discretion and in accordance with its Law and Article 14 to seek suitable enforcement, regulatory or other legal action in response to that breach.

[269] India model BIT (March 2015 version) arts 13.1–2. See Johnson, Sachs, and Coleman (n 37) 52.

[270] Johnson, Sachs, and Coleman (n 37) 52. For further examples and discussion of binding investor obligations, see International Institute for Sustainable Development, 'Investment-Related Dispute Settlement: Towards a Comprehensive Multilateral Approach' (2016) <http://www.iisd.org/sites/default/files/publications/investment-related-dispute-settlement-montreux-expert-meeting.pdf>; IISD Model International Agreement on Investment for Sustainable Development (April 2005) <https:// www.iisd.org/pdf/2005/investment_model_int_agreement.pdf> (IISD Model). See also the ongoing work of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate is 'to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises' <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx>.

[271] See eg Hanessian and Duggal (n 34) 729; Pieter Bekker, Kushal Gandhi, and Jessica Foley, 'India Approves Model Bilateral Investment Treaty' *Bloomberg BNA News* (11 February 2016), <https://www.bna.com/india-approves-model-n57982067216>.

[272] See eg Canada–Guinea BIT (n 119) art 16; Canada–Mongolia BIT (n 119) art 14. See notes 290 and 295 below for further examples.

[273] The authors understand that revisions were made to India's model during the course of negotiations with Canada and the United States. Both states continue to negotiate investment agreements on the basis of models that differ considerably from the March 2015 version of India's model BIT. See Hanessian and Duggal (n 271) 731; Johnson, Sachs, and Coleman (n 37) 25.

[274] ibid.

on a BIT.[275] While the text had yet to be released at the time of writing, 'language on investor obligations' reportedly features in the treaty text.[276]

2.83 One of the most notable agreement concluded during the course of 2015 and 2016 in terms of its departure from general trends regarding investor obligations is the Morocco–Nigeria BIT. This agreement, also discussed above with respect to developments concerning the right to regulate, explicitly provides for direct pre- and post-establishment investor obligations, including with respect to: environmental and social impact assessments;[277] anti-corruption;[278] and environmental management, labour standards, and human rights.[279] While the agreement includes a voluntary corporate social responsibility provision, which uses 'should strive to' language,[280] a majority of the agreement's provisions concerning investor obligations appear binding rather than non-binding in nature:

- Article 14 (Impact Assessment) places a pre-establishment obligation on investors to comply with environmental assessment and screening processes applicable to proposed investments, 'as required by the laws of the host state for such an investment *or* the laws of the home state for such an investment, *whichever is more rigorous in relation to the investment in question*'.[281] The same provision also requires investors to carry out a social impact assessment of their proposed investments, and provides that states parties 'shall adopt standards for this purpose'.[282]
- Article 17 (Anti-Corruption) largely mirrors the approach adopted in IISD's model IIA,[283] and similarly provides that a breach of the anti-corruption obligations established by Article 17 will be 'deemed to constitute a breach of the domestic law of the Host State … concerning the establishment and operation of an investment'.[284]
- Article 18 (Post-Establishment Obligations) is particularly unique due to its explicit placing of human rights obligations on investors.[285] It provides that investors

[275] Joel Dahlquist, 'Brazil and India Conclude Bilateral Investment Treaty' *Investment Arbitration Reporter* (28 November 2016), http://tinyurl.com/j9ng9o3</I BT>.
[276] ibid.
[277] Morocco–Nigeria BIT (n 24) art 14.
[278] ibid art 17.
[279] ibid art 18.
[280] ibid art 24.
[281] ibid art 14(1) (emphasis added).
[282] ibid art 14(2).
[283] IISD model (n 270).
[284] Morocco–Nigeria BIT (n 24) art 17(4).
[285] For a discussion of the extent to which the Morocco–Nigeria BIT may pave the way toward increased recognition of human rights obligations for businesses in the context of international investment, see Anil Yilmaz-Vastardis, 'Is International Investment Law Moving the Ball Forward on IHRL Obligations for Business Enterprises?' *EJIL: Talk!* (15 May 2017), <https://www.ejiltalk.org/is-international-investment-law-moving-the-ball-forward-on-ihrl-obligations-for-business-enterprises/>.

'shall uphold human rights in the host state' and *'shall act in accordance with core labor standards* as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998'.[286] Moreover, Article 18(4) provides that investments shall not be managed or operated 'in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties'.[287] Article 18 thus establishes both positive and negative investor obligations, requiring investors to both uphold human rights in the host state, and not to undermine human rights obligations of the host and home states. While these provisions undoubtedly represent a noteworthy step forward, their content is vague, leaving questions about the specific nature of obligations they place on investors, and how affected individuals and communities may obtain redress for harms caused by investment activities.

- Article 20 (Investor Liability) of the Morocco–Nigeria BIT requires states parties to allow for civil claims to be brought against an investor in the investor's home state for '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'.[288] This noteworthy provision mirrors Article 13 of the March 2015 draft version of India's model BIT; this language on civil liability in the home state was removed from the final December 2015 version of India's revised model.[289]

2.84 A number of other agreements and models concluded in 2015 and 2016 include voluntary rather than binding CSR 'obligations'. CSR provisions were present in at least sixteen agreements and models concluded during the period under review, though several such provisions (as in the case of agreements concluded in 2014) establish or reaffirm a commitment of *states parties* to encourage compliance with CSR standards.[290] CETA does not contain a CSR provision, though the preamble encourages enterprises operating within, or subject to the jurisdiction of, states parties 'to respect internationally recognised guidelines and principles of corporate social responsibility, including the OECD Guidelines for Multinational

[286] Morocco–Nigeria BIT (n 24) arts 18(2) and 18 (3).
[287] ibid art 18(3).
[288] ibid art 20.
[289] See Johnson, Sachs, and Coleman (n 37) 52.
[290] Investors form the subject of CSR provisions in the following agreements and models: Argentina–Qatar BIT (n 142) art 12; Brazil–Angola CFIA (n 155) art 10; Brazil–Chile CFIA (n 150) art 15; Brazil–Malawi CFIA (n 155) art 9; Brazil–Mexico CFIA (n 149) art 13; Brazil–Mozambique (n 155) CFIA art 12; Brazil–Peru ETEA (n 150) art 2.13; Slovakia–Iran BIT (n 21) art 10(3); Brazil model CFIA (n 101) art 14; India model BIT (n 102) art 12. States parties form the subject of the CSR provisions in the following agreements and models: Brazil–Colombia CFIA (n 149) art 13; Burkina Faso–Canada BIT (n 115) art 16; Canada–Guinea (n 119) art 16; Canada–Mongolia BIT (n 119) art 14; TPP (nn 4, 5) art 9.16; Norway draft model BIT (n 139) art 31. Note that the Argentina–Qatar BIT also contains a provision on compliance with host state laws that refers to investors but nonetheless includes states parties as the subject of the provision. Article 11 provides: 'The Contracting Parties acknowledge that investors and their

Enterprises, and to pursue best practices of responsible business conduct'.[291] As noted in last year's *Yearbook* chapter, reference to issues that come within the ambit of CSR are made elsewhere within CETA, though these are quite limited in nature.[292]

2.85 Failure to include a specific CSR provision within the operative portion of CETA's text is difficult to reconcile with the Canadian government's January 2013 public statement regarding its intention to include such provisions in all future BITs: while CETA is not a BIT, this is arguably a distinction of form, not substance, and one that does not warrant a different approach to CSR provisions.[293] Moreover, the BIT concluded between Canada and Hong Kong does not include a CSR provision.[294] However, three other BITs concluded by Canada during the period under review include voluntary CSR provisions, all of which refer to a commitment by states parties to encourage enterprises to voluntarily incorporate CSR provisions (rather than a voluntary or binding commitment directly applicable to investors or investments).[295]

2.86 By contrast, investors and their investments (rather than states parties) tend to form the subject of CSR provisions contained in agreements concluded by Brazil.[296] The Slovakia–Iran BIT also adopts this approach.[297] Notably, Brazil's model CFIA includes stronger wording than that commonly found in CSR provisions (using 'shall' rather than 'should').[298] This approach is mirrored in

investments shall comply with the laws of the host Contracting Party with respect to the management and operation of an investment' (Argentina–Qatar BIT (n 142) art 11).

[291] CETA (n 7) preamble.

[292] See CETA's chapters on Trade and Sustainable Development and Trade and the Environment.

[293] Regarding Canada's January 2013 statement regarding CSR provisions, see: Johnson, Sachs, and Coleman (n 37) 56; Johnson and Sachs (n 214) 59 (internal citations omitted).

[294] Canada–Hong Kong, China SAR BIT (n 119).

[295] Burkina Faso–Canada BIT (n 115) art 16; Canada–Guinea BIT (n 119) art 16; Canada–Mongolia BIT (n 119) art 14. Note, however, that these refer to states parties encouraging enterprises to incorporate CSR standards, rather than to investors, as the subject of the provision.

[296] Five of the six publicly available CFIAs concluded by Brazil during the course of 2015–2016 include investors, rather than states parties, as the subjects of their respective CSR provisions. The Brazil–Colombia CFIA provides the only exception to this general approach (though the Brazil–India BIT has yet to be published).

[297] Article 10(3) of the Slovakia–Iran BIT provides:

> Investors and investments should apply national, and internationally accepted, standards of corporate governance for the sector involved, in particular for transparency and accounting practices. Investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through appropriate levels of socially responsible practices.

[298] Article 14.1 of Brazil's model CFIA (n 101) provides inter alia that 'investors and their investments shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article'. Article 14.2 goes on to list the voluntary principles and standards with which investors 'shall develop their best efforts to comply'.

Article 9 of the Brazil–Malawi CFIA, and also to a lesser extent in Article 13 of the Brazil–Mexico CFIA.[299] However, four of the six publicly available CFIAs concluded by Brazil during the period under review depart from this approach, adopting weaker language in their respective CSR provisions.[300]

2.87 With respect to corruption, commitments found in agreements reviewed for the purposes of this chapter are quite limited in nature, focusing either on states parties' anti-corruption commitments,[301] or to limitations on access to investor–state dispute settlement where investments are made through, inter alia, corruption. The December 2015 version of India's model BIT does not include the investor 'obligation against corruption' that had been included in Article 9 of the March 2015 draft.[302] Part of this provision has been included within Article 11 of the December 2015 version, which provides that investors and their investments shall not offer or give any gift whatsoever 'to a public servant or official of a Party as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage nor shall be complicit in inciting, aiding, abetting, or conspiring to commit such acts'.[303] As discussed above, several treaties, including the Indian model BIT, CETA, Norway's model BIT, and the Slovakia–Iran BIT, preclude access to ISDS when an investment has been made fraudulently or has violated host state laws.[304] Article 14(3) of the Slovakia–Iran BIT also provides for the submission of counterclaims by a respondent state where it is alleged that 'the claimant has not fulfilled its obligations under this Agreement to comply with the Host State law or that it has not taken all reasonable steps to mitigate possible damages'.[305]

2.88 Lastly, inclusion of operative provisions concerning human rights in the texts of agreements and models remains limited. Where references to human rights in the context of investor obligations have been included, these references have

[299] Brazil–Malawi CFIA (n 155) art 9; Brazil–Mexico CFIA (n 149) art 13.

[300] Three of the six publicly available CFIAs concluded by Brazil during the course of 2015–16 provide that investors 'should strive' or 'should make their best efforts' to comply with voluntary standards: Brazil–Angola CFIA (n 155) art 10; Brazil–Chile CFIA (n 150) art 15; Brazil–Mozambique CFIA (n 155) art 10. Article 15 of the Brazil–Colombia CFIA adopts an approach similar to agreements negotiated by Canada, in that states parties form of the subject of Article 15, which provides that states parties will seek to ensure that companies follow voluntary standards and principles for responsible business conduct.

[301] For example, at least three Brazilian CFIAs refer to states parties' obligations with respect to corruption, rather than to investor obligations: Brazil model CFIA (n 101) art 15; Brazil–Chile BIT (n 150) art 16; Brazil–Colombia BIT (n 149) art 14.

[302] For a discussion of Article 9 of the March 2015 draft of India's model BIT, see Johnson, Sachs, and Coleman (n 37) 53–54.

[303] India model BIT (December 2015 version) (n 102) art 11(ii). This provision is similar to art 9.1 of the March 2015 draft. The remainder of Article 9 has not been transferred to the December 2015 draft.

[304] See s 1(ii) above on Other Limits on Arbitral Power. India model BIT art 13(4); CETA (n 7) art 8.183(3); Norway draft model BIT (2015) (n 139) art 14(5); Slovakia–Iran BIT (n 21) art 14(2).

[305] Slovakia–Iran BIT (n 21) art 14(3).

continued to be superficial in nature.[306] Brazil's model CFIA, and several agreements negotiated on the basis of this model, provide somewhat of an exception to this general trend. Article 14.2 of Brazil's model CFIA provides that 'investors and their investment shall endeavour to' inter alia 'respect the internationally recognized human rights of those involved in the companies' activities'.[307] A similar provision can be found in the Brazil–Malawi CFIA,[308] Brazil–Angola CFIA,[309] Brazil–Chile CFIA,[310] Brazil–Colombia CFIA,[311] Brazil–Mexico CFIA,[312] and the Brazil–Mozambique CFIA.[313] India's March 2015 draft model BIT also provided an exception to the general trend of superficial human rights references by providing the investors must comply with host state laws, including those concerning human rights, and that they 'should recognise the rights, traditions and customs of local communities and indigenous peoples of the Host State and carry out their operations with respect and regard for such rights, traditions and customs'.[314] However, these stronger references to human rights have been removed from the December 2015 version.[315]

E. Conduct of Arbitrators

2.89 A core component of the growing legitimacy concerns about ISDS relates to the qualifications, independence, and accountability of the arbitrators.[316]

[306] This general trend was discussed in last year's *Yearbook* chapter. See Johnson, Sachs, and Coleman (n 37) 57–59.

[307] Brazil model CFIA (n 101) art 14.2.

[308] Brazil–Malawi CFIA (n 155) art 9.2.

[309] Brazil–Angola CFIA (n 155) annex II. However, see (n 296) above regarding the nature of the CSR provision in this agreement.

[310] Brazil–Chile CFIA (n 150) art 15.2. However, see (n 296) above regarding the nature of the CSR provision in this agreement.

[311] Brazil–Colombia CFIA (n 149) art 13. However, see (n 296) above regarding the nature of the CSR provision in this agreement.

[312] Brazil–Mexico CFIA (n 149) art 13.

[313] Brazil–Mozambique CFIA (n 155) annex II. However, see (n 296) above regarding the nature of the CSR provision in this agreement.

[314] Article 12 of India's model BIT (March 2015 draft) referred to compliance with host state laws concerning human rights, and included a particularly noteworthy clause that provided as follows:

> … Investors and their Investments should recognise the rights, traditions and customs of local communities and indigenous peoples of the Host State and carry out their operations with respect and regard for such rights, traditions and customs.

See India model BIT (March 2015 draft) art 12.2.

[315] The only reference to human rights in the December 2015 version of India's model BIT is found in art 12 (CSR).

[316] Laurence Boisson De Chazournes, John R Crook, and International Council for Commercial Arbitration (ICCA), *Report of the ASIL–ICCA Joint Task Force on Issue Conflicts in Investor–State Arbitration* (International Council for Commercial Arbitration, 2016) 2 <https://www.asil.org/sites/default/files/ASIL_ICCA.pdf>, (noting 'the increasing public debate surrounding arbitrator ethics in connection with the negotiation of new trade agreements').

Unlike the adjudicators for trade or other international disputes in institutional fora, ISDS is in part founded on the practice of party-appointment arbitrators, whereby each party appoints one of the three arbitrators, with the party-appointed arbitrators, or the parties themselves, jointly selecting the third. This practice exacerbates the potential for bias or other concerns.[317] Indeed, parties are increasingly challenging the ability of the other party's nominated arbitrator to be an effective and independent adjudicator.[318] Addressing arbitrator qualifications and conflicts has been the subject of many discussions about investment regime reform, in response to both public concern about the public nature of investment disputes as well as states' efforts to 'reassert control' over investment arbitration by limiting, in this case, 'the traditional party autonomy in selecting arbitrators.'[319] As a result, we see several recent treaties prescribe certain qualifications and limitations for ISDS adjudicators. Three notable trends in 2015–16 treaties include: a) codes of conduct for ISDS arbitrators, including limitations on the ability of arbitrators to act as counsel and/or experts in simultaneous or future disputes; b) express qualifications for ISDS arbitrators; and c) proposals for permanent investment courts, in which adjudicators would be more akin to judges in international courts.

[317] Michael Waibel, 'Arbitrator Selection—Towards Greater State Control' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press, Forthcoming), University of Cambridge Faculty of Law Research Paper No 30/2016, 12 <SSRN: https://ssrn.com/abstract=2807015 or http://dx.doi.org/10.2139/ssrn.2807015>(hereafter Waibel, 'Arbitrator Selection'). As Waibel explains, 'The risk is that such arbitrators assume the role of advocates for their appointing party. In extreme cases, party-appointed arbitrators may seek to engineer results favourable to their appointing party. According to one critique, the persistence of party appointed arbitrators casts doubt on the legitimacy and perceived neutrality of arbitration as an institution for resolving investment disputes impartially.'; See also Boisson De Chazournes and Crook (n 315) 12 noting that 'disputing parties enter the arbitral process with the expectation (not found in litigation) that they can shape the profile of the decision maker through their choice of arbitrator and any participation in the appointment of the chair'.

[318] See eg *Blue Bank International & Trust (Barbados) Ltd. v Bolivarian Republic of Venezuela* ICSID Case No ARB 12/20; *Burlington Resources, Inc. v Republic of Ecuador* ICSID Case No ARB/08/5; *Repsol S.A. & Repsol Butano S.A. v Republic of Argentina* ICSID Case No ARB/12/38; and *Abaclat & Others v Argentine Republic* ICSID Case No ARB/07/5; John Hay and Kristen Weil, 'ICSID Should Fix Rules On Who Decides Arbitrator Challenges' *Law360* (6 March 2017), https://www.law360.com/articles/898393/icsid-should-fix-rules-on-who-decides-arbitrator-challenges (hereafter Hay and Weil, 'Arbitrator Challenges'), citing Chiara Giorgetti, 'Challenges of Arbitrators in International Disputes: Two Tribunals Reject the "Appearance of Bias" Standard' (2012) 16(20) The American Society of International Law Insights <https://www.asil.org/insights/volume/16/issue/20/challengesarbitrators-international-disputes-two-tribunals-reject-#_edn1> (noting that all but two challenges filed at ICSID were filed after 2001). See also, ICSID Annual Report, (ICSID 2016) 36 <https://icsid.worldbank.org/en/Documents/resources/ICSID_AR16_English_CRA_bl2_spreads.pdf> (noting that parties in the ICSID proceedings proposed the disqualification of eleven arbitrators in 2016).

[319] Waibel, 'Arbitrator Selection' (n 317) 3.

1. Impartiality, independence, and avoiding conflicts

2.90 Existing arbitration rules generally prevent persons having current conflict of interests—such as being counsel to the parties—from serving as arbitrators. For instance, under the 2013 UNCITRAL Rules, 'any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence,'[320] and arbitrators shall 'disclose any circumstances likely to give rise to [such] justifiable doubts'.[321] The disclosure obligation continues even after an arbitrator is appointed. The ICSID Rules similarly require arbitrators to disclose 'past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause [his/her] reliability for independent judgment to be questioned by a party'.[322] The ICSID Convention requires that arbitrators be 'persons of high moral character … who may be relied upon to exercise independent judgment'.[323]

2.91 The IBA Guidelines on Conflicts of Interest in International Arbitration,[324] which are referenced in, for instance, CETA[325] and the draft Norway model BIT,[326] provide that 'every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until a final award has been rendered or the proceeding has otherwise finally terminated'.[327]

2.92 Despite that general norm, however, it is standard practice in ISDS for individuals to serve, over the course of multiple arbitrations, as counsel, expert, and arbitrator, at times advocating or deciding on issues for or against parties they previously addressed in other contexts.[328] Even without the potential conflict of serving in various capacities, there is a perception in a party-appointed system that arbitrators are 'incentivized to rule in favor of a particular party in order to obtain appointments in future cases'.[329] Accordingly, the standard rules

[320] UNCITRAL Rules, 2010 (revised in 2013) art 12.1.

[321] ibid art 11.

[322] ICSID Arbitration Rules, Rule 6.2.

[323] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), available at www.worldbank.org/icsid/, art 14.1.

[324] International Bar Association Guidelines on Conflicts of Interest in International Arbitration (hereafter 'IBA Guidelines'), adopted by resolution of the IBA Council on 23 October 2014, i <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>.

[325] CETA (n 7) art 8.30(1).

[326] Norway model BIT (draft) 2015 (n 139) art 15.

[327] Part I, 7, IBA Guidelines (n 324).

[328] According to a 2012 OECD report, over 50 percent of ISDS arbitrators have acted as counsel for investors in other ISDS cases. David Gaukrodger and Kathryn Gordon, 'Investor–State Dispute Settlement: A Scoping Paper for the Investment Policy Community' (OECD 2012) 44, <http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf>.

[329] Hay and Weil, 'Arbitrator Challenges' (n 318). See also Waibel, 'Arbitrator Selection' (n 317) 2: '[T]he central role of the disputing parties in selecting arbitrators has fueled a debate on

have been criticized as inadequate to guarantee effective independence of all arbitrators.[330]

2.93 The effectiveness of the standards that do exist is also debated. At ICSID, ethical challenges to arbitrators are often decided by their fellow arbitrators on the panel,[331] which one observer has called 'probably one of ISDS' most problematic practices in the ICSID context',[332] as 'there is a perception among practitioners that arbitrators are reluctant to disqualify their colleagues'.[333]

2.94 Case law is also divergent on the appropriate standard to determine arbitrator independence and impartiality under ICSID and UNCITRAL Rules. While ICSID adopts a 'manifest lack of independent judgment' standard,[334] UNCITRAL has a standard of 'appearance of bias', 'justifiable doubt', and 'a reasonable third person test'.[335] The 'manifest lack of independent judgment' as a

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the legitimacy of arbitrators deciding investment disputes … Arbitrator selection, particularly by the disputing parties, may feed the perception that investment treaty arbitration—despite the prominence of the public interest in at least some cases—is at heart a purely private system of dispute resolution, designed to benefit only the disputing parties.'

[330] See James D Fry and Juan Ignacio Stampalija, 'Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes' (2014) 30(2) Arbitration Int'l 189–264.

[331] ICSID Convention (n 258) art 58.

[332] Sophie Nappert, 'Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism', The 2015 EFILA Inaugural Lecture (26 November 2015) 11, <http://efila.org/wp-content/uploads/2015/11/Annual_lecture_Sophie_Nappert_full_text.pdf>.

[333] Hay and Weil, 'Arbitrator Challenges' (n 318) (suggesting that reasons that arbitrator challenges often fail include that 'when vested with the authority to rule upon their own potential conflicts of interest, [arbitrators] are reluctant to concede an appearance of impartiality exists. Although an arbitrator may not be wholly dependent, financially or otherwise, upon a particular party for repeat appointments, an arbitrator may nonetheless be somewhat reliant upon or wish for continued appointments. Members of a tribunal may have worked with each other for some time on a case before a challenge is raised, and may therefore be reluctant to acknowledge bias. Given the small circle of arbitrators, they may have long-standing personal relationships which influence decision-making. The small community of arbitrators discourages any given arbitrator to disqualify their colleagues for fear that the arbitrator may be subject to a challenge being made against them.'); Of the eleven arbitrator challenges at ICSID in 2016, nine were declined. ICSID Annual Report 2016, p. 37, available at https://icsid.worldbank.org/en/Documents/resources/ICSID_AR16_English_CRA_bl2_spreads.pdf.

[334] *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic* (Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 2007), ICSID Case No ARB/03/19, [34]; *Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela* (Decision on Claimant's Proposal to Disqualify Mr Gabriel Bottini, 2013), ICSID Case No ARB/12/13, [59]; ICSID Art 57 notes: '*A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14*.'

[335] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v Republic of India* (Decision on the Respondent's Challenge to the Hon. Mark Lalonde as Presiding Arbitrator and Prof Francisco Orrego Vicuna as Co-Arbitrator, 2013) UNCITRAL, [40]; *Vitto G. Gallo v Canada* (Decision on the Challenge to Mr J Christopher Thomas, QC, 2009) UNCITRAL, PCA Case No 55798, [36] (noting that 'from the point of view of a 'reasonable and informed third party' (General Standard 2(c) of the IBA Guidelines on

standard of independence is said to be lower than the 'appearance of bias' standard that applies in other international arbitration fora.[336] Certain cases, however, have read an 'objective standard based on a reasonable evaluation of the evidence by a third party' and 'appearance of bias' standard into the ICSID convention, as well.[337]

2.95 In recent investment treaties, some states have included detailed codes of conduct for arbitrators that go beyond those included in standard arbitration rules. Each of the EU's recent agreements, for instance, as well as the Australia–China FTA, includes a code of conduct for arbitrators of investor–state disputes, including, inter alia, provisions relating to direct or indirect conflict of interests, disclosure obligations, independence, and arbitrator impartiality.[338] The code of conduct requires arbitrators to avoid impropriety and the appearance of impropriety,[339] and to avoid relationships or financial interests that might reasonably create an appearance of impropriety or bias.[340] Importantly, departing from standard arbitration rules, the code extends the obligations to former arbitrators, who must 'avoid actions that may create the appearance that they were biased in carrying

Conflicts of Interest in International Arbitration) ie a 'fair minded, rational, objective observer' (Challenge Decision of 11 January 1995, op cit at 236), there would be justifiable doubts about Mr Thomas' impartiality and independence as an arbitrator if he were not to discontinue his advisory services to Mexico for the remainder of this arbitration').

[336] Georgios Dimitropoulos, 'Constructing the Independence of International Investment Arbitrators: Past, Present and Future' (2016) 36(2) Northwestern Journal of International Law and Business 371, 377.

[337] *Caratube Int'l Oil Co. LLP and Devincci Salah Hourani v Republic of Kazakhstan* (Decision on the Proposal for Disqualification of Mr Bruno Boesch, 2014) ICSID Case No ARB/13/13, [54]–[56] (quoting *Blue Bank International & Trust (Barbados) Ltd* v *Bolivarian Republic of Venezuela* (Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal, 2013) ICSID Case No ARB/12/20, [60]). For further discussion on case law see Dimitropoulos (n 336) 385 (noting that 'The first relevant ICSID case was *Blue Bank International & Trust (Barbados) Ltd. v Bolivarian Republic of Venezuela*, which was followed as precedent by *Burlington Resources, Inc. v Republic of Ecuador, Repsol S.A. & Repsol Butano S.A. v Republic of Argentina, & Abaclat & Others v Argentine Republic*. In these cases, the Chairman of the ICSID Administrative Council found that 'Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.').

[338] Free Trade Agreement between European Union and Republic of Korea (entered into force 1 July 2011) Annex 14-C (hereafter EU-Korea FTA); EU–Singapore FTA Annex 9-F; EU-Vietnam FTA (n 141) Annex II; TTIP Annex II; Australia–China FTA (n 126) Annex 9-A; CETA (n 7) Annex 29-B. CETA also requires arbitrators to comply with International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted by the Committee on Services and Investment. Art 8.30(1).

[339] CETA (n 7) annex 29-B, art 2; EU–Korea FTA (n 338) Annex 14-C, art 2; TTIP Annex II, art 2; EU-Vietnam FTA (n 141) Annex II, art 2; EU–Singapore FTA Annex 9-F, art 2; Australia–China FTA (n 126) Annex 9-A art 1.

[340] CETA (n 7) annex 29-B, art 15, EU–Korea FTA (n 338) Annex 14-C, art 5(5); TTIP Annex II, art 5.5; EU–Vietnam FTA (n 141) Annex II, art 5.5; EU–Singapore FTA Annex 9-F, art 14; Australia–China FTA (n 126) Annex 9-A, art 16.

out their duties or *derived advantage from*' their arbitral rulings.[341] Extending obligations to former arbitrators may limit the extent to which arbitrators may rely on their own arbitral decisions when subsequently representing clients before a panel of their peers.

2.96 Several 2015 and 2016 treaties require arbitrators to be independent and/or impartial and not affiliated with either party's (or any) government and not to participate in the consideration of any disputes that would create a direct or indirect conflict of interest.[342] A few of the treaties have gone further, expressly proscribing the often-criticized practice of arbitrators serving as counsel or expert in other parallel or future investment disputes. To address the apparent or real conflicts that such parallel or sequential appointments may present, CETA, for instance, requires that members of the tribunal 'shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement'.[343] The European Union's proposal for Investment Protection and Resolution of Investment Disputes in TTIP, the EU–Vietnam FTA, and the Iran–Slovakia BIT have a similar obligation but extend the prohibition to pending or new disputes under domestic law as well.[344]

2.97 The revised Indian model BIT of 2015 includes innovative provisions to prevent arbitrator conflicts of interest. As with other agreements, the Indian model BIT requires arbitrators to be 'impartial, independent and free of any actual or potential conflict of interest',[345] and provides detailed provisions on the means and content of disclosure obligations, which continue throughout the proceedings.[346]

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[341] CETA (n 7) Annex 29-B, art 16 (emphasis added); see also EU–Korea FTA (n 338) Annex 14-C, art 6; TTIP Annex II, art 6; EU–Vietnam FTA (n 141) Annex II, art 6; EU–Singapore FTA Annex 9-F, art 15; Australia–China FTA (n 126) Annex 9-A, art 17.

[342] Eg CETA (n 7) Art 8.30(1); EU–Singapore FTA art 9.18(7); EU–Vietnam FTA (n 141) s 3, sub-s 4, art 14; Iran–Slovakia BIT (n 21) art 18.5; Australia–China FTA (n 126) art 9.15(8); India model BIT (n 102) art 18.1; Brazil model CFIA (n 101) art 24.8(c) (in the context of the treaty's state–state dispute settlement mechanism).

[343] CETA (n 7) art 8.30(1).

[344] TTIP art 11; EU–Vietnam FTA (n 141) s 3, sub-s 4, art 14; Iran–Slovakia BIT (n 21) art 18.5.

[345] India model BIT (n 102) art 19.1.

[346] India model BIT (n 102) art 19.2 states: 'Upon nomination and, if appointed, every arbitrator shall, on an ongoing basis, disclose in writing any circumstances that may, in the eyes of the disputing parties, give rise to doubts as to her/his independence, impartiality, or freedom from conflicts of interest. This includes any items listed in Article 19.10 and any other relevant circumstances pertaining to the subject matter of the dispute, and to existing or past, direct or indirect, financial, personal, business, or professional relationships with any of the parties, legal counsel, representatives, witnesses, or co-arbitrators. Such disclosure shall be made immediately upon the arbitrator acquiring knowledge of such circumstances, and shall be made to the co-arbitrators, the parties to the arbitration and the appointing authority, if any, making an appointment. Neither the ability of those individuals or entities to access this information independently, nor the availability of that information in the public domain, will relieve any arbitrator of his or her affirmative duty to make these disclosures. Doubts regarding whether disclosure is required shall be resolved in favour of such disclosure.'

The India model BIT further specifies that the appointing authority shall accept a challenge 'if, even in the absence of actual bias, there are circumstances that would give rise to justifiable doubts as to the arbitrator's lack of independence, impartiality, freedom from conflicts of interest, or ability to perform his or her role, in the eyes of an objective third party'.[347]

2.98 The Indian model BIT provides for the adoption of a code of conduct by the treaty parties' mutual agreement, which may replace or supplement otherwise applicable rules and which may address topics such as disclosure obligations, the independence and impartiality of arbitrators, and confidentiality.[348] The Brazil agreements, requiring arbitrators to comply with the WTO 'Rules of conduct for the understanding on rules and procedures governing the settlement of disputes', and the Norway model BIT, requiring arbitrators to comply with the IBA Guidelines, also leave the door open for the treaty parties' Joint Committees to establish a further standard of conduct for arbitrators.[349]

2. Arbitrator qualifications

2.99 In addition to potential conflicts of interest, another factor relevant to the legitimacy of ISDS arbitrators has been arbitrator qualifications for determining matters of public policy. Unlike commercial disputes, investment disputes involve complex controversies related to government policymaking, competing obligations under international law, the rights of impacted communities and stakeholders, public finances, and perspectives and interests of government policymakers and regulators, as opposed to purely commercial interests. Despite having been modelled on

[347] India model BIT (n 102) art 19.7; The India model further provides a non-exhaustive list of factors for determining a 'justifiable doubt as to an arbitrator's independence or impartiality or freedom from conflicts of interest,' including circumstances in which:

a. The arbitrator or her/his associates or relatives have an interest in the outcome of the particular arbitration;
b. The arbitrator is or has been a legal representative/advisor of the appointing party or an affiliate of the appointing party in the preceding three (3) years prior to the commencement of arbitration;
c. The arbitrator is a lawyer in the same law firm as the counsel to one of the parties;
d. The arbitrator is acting concurrently with the lawyer or law firm of one of the parties in another dispute;
e. The arbitrator's law firm is currently rendering or has rendered services to one of the parties or to an affiliate of one of the parties out of which such law firm derives financial interest;
f. The arbitrator has received a full briefing of the merits or procedural aspects of the dispute from the appointing party or her/his counsel prior to her/his appointment;
g. The arbitrator is a manager, director or member of the governing body, or has a similar controlling influence by virtue of shareholding or otherwise in one of the parties;
h. The arbitrator has publicly advocated a fixed position regarding an issue on the case that is being arbitrated. (Indian Model BIT, art 19.10)

[348] India model BIT (n 102) art 19.11.

[349] Brazil model CFIA (n 101) art 24.8(c); Brazil–Mexico CFIA, art 19.7(c); Norway model BIT (draft 2015) (n 139).

commercial arbitration, ISDS in fact plays a major role in public governance; in particular, arbitrators are 'able to serve as important law-makers in international economic law and contribute to shaping the behavior of states, including the manner in which they regulate in the public interest, as well as that of other actors, such as traders, investors, workers, and the population more generally'.[350] Arbitrators from private or commercial law backgrounds may lack the public law training and expertise to navigate these complexities.

2.100 Indeed, several scholars have studied the effect of various arbitrator attributes, such as background, nationality, and expertise, on the outcome of the arbitrations. Pauwelyn compares the backgrounds of WTO adjudicators with ISDS arbitrators, and finds the fact that WTO adjudicators are not private sector lawyers as in ISDS but rather relatively 'low-key' diplomats from developing jurisdictions has resulted in their greater respect for rule of law, whereas ICSID is often criticized for rule of law deficiencies.[351] More generally, Michael Waibel and Yanhui Wu suggest that arbitrators' policy preferences, particularly those of presiding arbitrators, have a strong influence on tribunals' decisions.[352] Strezhnev finds that when tribunal presidents were nationals of advanced economies and had worked in government, they were more likely to favour the claimant.[353] Irrespective of empirical findings, given the existing legitimacy debates around investor–state dispute settlement as a means of adjudicating matters of critical public importance, exacerbated by the aforementioned concern with potential biases of party-appointed arbitrators, the backgrounds and qualifications of party-appointed arbitrators are important for the legitimacy of the regime.[354]

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[350] Stephan W Schill, 'Authority, Legitimacy, and Fragmentation in the (Envisaged) Dispute Settlement Disciplines in Mega-Regionals' in Stefan Griller, Walter Obwexer, and Erich Vranes (eds), 'Mega-Regional Agreements: TTIP, CETA, TiSA. New Orientations for EU External Economic Relations' (Oxford University Press, 2017); Amsterdam Law School Research Paper No 2017-05; Amsterdam Center for International Law No 2017-04. Available at SSRN: https://ssrn.com/abstract=2932810 3.

[351] Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus,' (2015) 109(4) Am J of Int'l L 761–805. But see Giorgio Sacerdoti, 'Panelists, Arbitrators, Judges: A Response to Joost Pauwelyn' *ASIL Blog* (13 April 2016) <https://www.asil.org/blogs/panelists-arbitrators-judges-response-joost-pauwelyn>. The article criticizes Pauwelyn's article, arguing that the profile and selection of a WTO panel is 'one of the most criticized features of the system today,' and disagrees with the position that 'investment arbitration, specifically the ICSID, is suffering from such criticism as to imperil its existence.' It is Sacerdoti's position that the systems are inherently different, and that Pauwelyn's assessment of WTO panellists as 'low-level diplomats from developing countries' is inaccurate.

[352] Michael Waibel and Yanhui Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration', (2017) 24 University of Southern California, <http://www-bcf.usc.edu/~yanhuiwu/arbitrator.pdf>.

[353] Anton Strezhnev, 'Detecting Bias in International Investment Arbitration', Draft presented at the 57th Convention of the International Studies Association (2016) 4, <http://scholar.harvard.edu/files/astrezhnev/files/are_investment_arbitrators_biased.pdf>.

[354] Waibel and Wu (n 352), citing Pauwelyn: 'Who the parties select as arbitrators is important for how the investment treaty tribunals operate and for the investment treaty regime's legitimacy (Pauwelyn 2015).'

2.101 In general, parties have broad latitude in appointing arbitrators in investment law disputes. The ICSID Convention, for instance, only requires arbitrators to be 'persons of high moral character and recognized competence in the fields of law, commerce, industry or finance',[355] noting that 'competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.'[356] A proposal to require arbitrators to be lawyers was discussed and rejected during the negotiations of the ICSID Convention, as it was deemed to be excessively restrictive.[357] Several investment treaties similarly provide that appointed arbitrators 'shall have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements'.[358]

2.102 In response to the frequent criticism that arbitration is overly dominated by commercial interests and that arbitrators are often not well equipped to appreciate issues relating to government regulation in public interest or the perspectives of regulators, recent EU treaties such as the EU–Vietnam FTA, the EU's proposed text for the TTIP, and CETA[359] have taken a novel step, requiring members of the tribunal to 'possess the qualifications required in their respective countries for appointment to judicial office [the "highest" judicial offices, for the Appeals Tribunal], or be jurists of recognised competence'.[360] The Canada–EU discussion paper on establishment of a multilateral investment dispute settlement system discusses the importance of an adequate level of qualifications and credentials in order to confer the highest degree of competence and credibility to the multilateral investment dispute resolution mechanism. The paper notes that 'recognised institutions such as the International Court of Justice (ICJ) require that its

[355] ICSID Convention (n 258) art 14(1).

[356] ibid: Art 57 of the ICSID Convention states that '*A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.*'

[357] C Giorgetti, 'Who Decides Who Decides in International Investment Arbitration?' (2014) 35 University of Pennsylvania Journal of International Law at 453, citing Karel Daele, *Challenge and Disqualification of Arbitrators in International Arbitration* (Wolters Kluwer 2012) 84 (noting that the rules reflect a compromise: arbitrators do not have to be lawyers, but must be reasonably competent in the field of law).

[358] Australia–China FTA (n 126) art 9.15(8). See also EU–Singapore FTA art 9.18(6); EU–Vietnam FTA (n 141) s 3, sub-s 4, arts 12.4 and 13.7; TTIP arts 9.4 and 10.7; CETA (n 7) arts 8.27(4) and 8.28(4); Slovakia–Iran BIT (n 21) art 18.4; India model BIT (n 102) art 18.1, and Brazil–Mexico CFIA art 19.7(a), based on art 24.8(a) of Brazil model CFIA (n 101), containing similar language; TPP (nn 4, 5) art 9.22(5) provides, '*each disputing party shall take into account the expertise or relevant experience of particular candidates with respect to the relevant governing law under Article 9.25.2 (Governing Law)*'.

[359] CETA (n 7) art 8.27(4) states: '*The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence.*' CETA (n 7) art 8.28(4) provides similar requirement for the Members of the Appellate Tribunal; TTIP arts 9.4 and 10.7; EU–Vietnam FTA (n 141) s 3, sub-s 4, arts 12.4 and 13.7.

[360] TTIP arts 9.4 and 10.7.

members be qualified to hold the judicial office in their country or be recognised jurists' and expertise in public international law is desirable.[361]

3. Multilateral investment court

2.103 In its 2015 and 2016 treaties, the EU notably proposed replacing the traditional ad hoc ISDS system with an investment court system.[362] The proposed court is meant to address both objectives discussed above: members of the tribunal are to be appointed by the state parties (rather than the parties to the dispute)[363] for fixed appointments to avoid the dual problems of 'double hatting' and conflicts of interests, and the adjudicators are to be qualified in public international law and have judicial competence to hear disputes involving matters of public concern.

2.104 As proposed by the EU, the investment court system is composed of a tribunal and an appellate tribunal,[364] with an equal number of members from each state party,[365] and the same number from third countries, serving for a fixed

[361] European Commission and Government of Canada, 'Discussion Paper on Establishment of a multilateral investment dispute settlement system', (13, 14 December 2016) 5, <http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf>.

[362] EU–Vietnam FTA (n 141) s 3, sub-s 4, art 15; TTIP art 12; CETA (n 7) art 8.29; See also European Commission and Government of Canada, 'Discussion Paper on Establishment of a Multilateral Investment Dispute Settlement system' (13, 14 December 2016) 5, <http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf>

[363] Some critics suggest that alternatives to party-appointed arbitrators would 'mean that the international investment system would lose many of its positive aspects,' and that '[l]osing the power to appoint an arbitrator, the actors may moreover stop resorting to arbitration overall.' Georgios Dimitropoulos, 'Constructing the Independence of International Investment Arbitrators: Past, Present and Future' (2016) 36(2) Northwestern Journal of International Law and Business 371, 422.

[364] European Commission, 'Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations', Press Release of 16 September 2015. As per CETA (n 7) art 8.27(2) and TTIP art 9.2, the Tribunal will consist of fifteen members (judges in the case of TTIP), with five members each of the contracting parties and third country nationality. As per art 12.2 of EU–Vietnam FTA, the Tribunal will consist of nine members, with three members each of the contracting parties and third country nationality. As per TTIP art 10.2 and EU–Vietnam FTA (n 141) art 13.2, the Appeal Tribunal would consist of six members with two members each of the contracting parties and third country nationality. As per CETA (n 7) art 8.28(7)(f), the CETA joint Committee will adopt a decision on the number of members of the Appellate Tribunal.

[365] Note, however, that some critics suggest that having arbitrators that are the same nationality as one or both parties risks exacerbating bias. See eg Omar E Garcia-Bolivar, 'Comparing Arbitrator Standards of Conduct in International Commercial, Trade and Investment Disputes' in *AAA/ICDR Handbook on International Arbitration Practice* (American Arbitration Association 2010) 12 http://bg-consulting.com/docs/DocsFeb01.pdf: 'In arbitration involving sovereign States and governmental entities, the need for a clearly unbiased panel is paramount. For this reason, the nationality of the arbitrator, if the same as a party, is enough to disqualify the arbitrator from service because of a presumed lack of independence.'

term.[366] A panel of three members consisting of a national of each party and one of a third party will be randomly selected to hear each case, departing from the traditional practice of party-appointed arbitrators.[367] The EU's recent agreements include the core elements of this investment court system on a bilateral basis, with an agreement between the parties to work toward its adoption on a multilateral basis.

2.105 The EU court proposal has not yet been adopted expressly in non-EU treaties. However, in addition to the EU treaties, the Iran–Slovakia agreement leaves open the possibility of the parties' ascension to a multilateral dispute settlement mechanism. That agreement indicates that '[u]pon the entry into force between the Contracting Parties of an international agreement providing for a multilateral investment tribunal and/or a multilateral appellate mechanism applicable to disputes under this Agreement, the relevant parts of this Agreement shall cease to apply'.[368]

2.106 Other agreements, while not referencing directly a multilateral tribunal, provide for the possible establishment of an appellate mechanism. For example, the Indian model BIT notes that the parties 'may establish an institutional mechanism to develop an appellate body or similar mechanism to review awards rendered by tribunals under this chapter. Such appellate body or similar mechanism may be designed to provide coherence to the interpretation of provisions in this Treaty.'[369] A similar provision in Korea–New Zealand FTA states that if a 'separate multilateral agreement … that establishes an appellate body' comes into force between the Parties, the parties shall strive to reach an agreement to apply such a mechanism to the awards rendered under the FTA,[370] and the TPP provided for such a possibility as well.[371]

2.107 These new developments regarding the establishment of an investment court with a fixed roster of tribunal members, all state-appointed, reflect states' efforts to 'maintain more control over central features of this regime'.[372] And the inclusion

[366] Himaloya Saha, 'A Critical Analysis of the Commonly Recommended Reforms of Investor–State Dispute Settlement (ISDS)', (2016) 4(1) Legal Issues Journal 39, 45 (by contrast, in standard ISDS proceedings, arbitrators are paid by the hour 'making them interpret treaties expansively and giving them little incentive to adjudicate matter swiftly').

[367] DG for Trade's 'Reading Guide to the Draft Text on Investment Protection and Investment Court System in the TTIP', 16 September 2015. TTIP art 9.6 and 10.8; EU–Vietnam FTA (n 141) section 3, sub-section 4, art 12.6 and 13.8; CETA (n 7) art 8.27(6) and 8.28(5).

[368] Iran–Slovakia BIT (n 21) art 24.4.

[369] India model BIT (n 102) art 29.

[370] Korea—New Zealand FTA (n 136) art 10.26(9) '*If a separate multilateral agreement enters into force between the Parties that establishes an appellate body for the purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review decisions and awards rendered under this Article and Article 10.30 in arbitrations commenced after the multilateral agreement enters into force between the Parties*.'

[371] TPP (nn 4, 5) art 9.22(11).

[372] Waibel, 'Arbitrator Selection' (n 319) 21.

of stricter ethics, conflict, and disclosure rules may help alleviate the criticism that arbitrators lack independence, are influenced by other professional roles such as serving as counsel in similar cases, or by their relationships with other arbitrators. While the EU multilateral court proposal ostensibly seeks to address these concerns, its success in quelling concerns is to be determined. Narrowing the pool of arbitrators to a fixed roster of state-appointed tribunal members may face vehement opposition from investors and their representatives, who have viewed the ability of the parties to appoint arbitrators as a fundamental feature of ISDS. And from states' perspective, a fixed tribunal could 'lead to a further loss of control by states as a result of the higher degree of delegation of decision-making authority to such a permanent tribunal, as compared to ad hoc arbitral tribunals'.[373] Moreover, there is 'no guarantee that permanently appointed judges will not have an issue of politicization,' particularly under the current proposals in which tribunal members are specifically chosen on the basis of their nationality with respect to the parties of the dispute.[374] Nevertheless, the bold proposals for multilateral courts and/or for appellate mechanisms in the 2015 and 2016 treaties suggest that states either share and/or are responding to the growing public cries for ISDS reform.

F. Conclusion

2.108 It is difficult to summarize developments in investment treaty drafting that took place in 2015 and 2016, an eventful period for debate regarding the merits of the investment regime. Major upheavals took place, including the apparent downfall of the TPP. When the TPP was being negotiated, many considered that it might set the template for future treaty models; however, approximately one year after negotiations closed in 2015, the future of the agreement and its vision for investment protection became cloudy. Nevertheless, despite the collapse of this mega-regional agreement, we have witnessed many other states (and groups of states) pushing ahead with their own distinct approaches to IIAs, illustrating an unprecedented diversity of and experimentation in approaches to both issues of substance and procedure. The landscape is shifting rapidly, making its future difficult to predict.

2.109 One issue to watch is the extent to which factors outside the relatively narrow field of investment law ultimately help shape IIAs. In the review period, for example, countries adopted the Sustainable Development Goals and signed the Paris Agreement, bringing the agreement quickly into force. These instruments reflect an awareness by governments of the need to strategically catalyse and harness international investment for sustainable development, but leave the mechanisms for doing so up to further national and international action. A question this raises is what role IIAs will play in that process.

[373] ibid 19.
[374] Himaloya Saha (n 366) 39, 50.

2.110 General interest in, and awareness of, investment law and policy also increased in 2015 and 2016: as public debate around the international investment regime has increased, so have calls for greater and more honest consideration of the costs and benefits of these agreements for host states, home states, and their citizenries. In concluding last year's *Yearbook* chapter, we noted that the scale and scope of mega-regional agreements would bring increased attention to the negotiation and conclusion of IIAs: indeed, this was the case during the period under review, particularly across Europe and in the United States. Yet, while debate has increased significantly, reform of the substance of these agreements, and of the processes that govern their negotiation and enforcement, has been incremental in nature, at least in texts negotiated between developed economies. By contrast, some of the more progressive developments in 2015 and 2016 are evident in agreements or models negotiated or published by lower- and middle-income economies. Looking ahead, it will be interesting to follow and compare new approaches to investment treaty drafting and policy developed by lower versus higher income countries, and to assess whether emerging differences in respective approaches and policies foretell a sea change in the longer-term trajectory of the international investment regime.

Table 2.1 2015–16 International Investment Agreements

S. No.	Full Treaty Name (when available)	Short name (* denotes agreement is publicly available as of December 2016)	Date Signed	Date entered into force (status as of December 2016)
1.	Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment	Japan–Uruguay BIT*	Signed 26 January 2015	Not in force
2.	Agreement between Japan and Ukraine for the Promotion and Protection of Investment	Japan–Ukraine BIT*	Signed 5 February 2015	26 November 2015
3.	Agreement between Japan and Mongolia for an Economic Partnership	Japan–Mongolia EPA*	Signed 10 February 2015	7 June 2016
4.	Agreement on Investment under the Framework Agreement Establishing a Free Trade Area between the Republic of Korea and the Republic of Turkey	Republic of Korea–Turkey BIT*	Signed 26 February 2015	Not in force

Table 2.1 Continued

S. No.	Full Treaty Name (when available)	Short name (* denotes agreement is publicly available as of December 2016)	Date Signed	Date entered into force (status as of December 2016)
5.	Agreement between the Government of the Russian Federation and the Government of the Kingdom of Cambodia on Promotion and Reciprocal Protection of Investments	Cambodia–Russian Federation BIT*	Signed 3 March 2015	7 March 2016
6.	Free Trade Agreement between New Zealand and the Republic of Korea	Republic of Korea–New Zealand FTA*	Signed 23 March 2015	20 December 2015
7.	Agreement on Cooperation and Facilitation of Investment between the Federal Republic of Brazil and the Republic of Mozambique	Brazil–Mozambique CFIA*	Signed 30 March 2015	Not in force
8.	Agreement on Cooperation and Facilitation of Investment between the Federal Republic of Brazil and the Republic of Angola	Angola–Brazil CFIA*	Signed 1 April 2015	Not in force
9.	Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments	Burkina Faso–Canada BIT*	Signed 20 April 2015	Not in force
10.	Free Trade Agreement between the Government of the Socialist Republic of Viet Nam and the Government of the Republic of Korea	Republic of Korea–Viet Nam FTA*	Signed 5 May 2015	20 December 2015
11.	Trade and Investment Framework Agreement between Armenia and the United States	Armenia–United States TIFA	Signed 7 May 2015	Not in force
12.	Bilateral Investment Treaty between Haiti and Mexico	Haiti–Mexico BIT	Signed 7 May 2015	Not in force
13.	Agreement Between the Macedonian Government and the Government of the Kingdom of Denmark for the Promotion and Reciprocal Protection of Investments	Denmark–Macedonia BIT*	Signed 8 May 2015	30 June 2016
14.	Agreement on Cooperation and Facilitation of Investments between the Federal Republic of Brazil and the United States of Mexico	Brazil–Mexico CFIA*	Signed 26 May 2015	Not in force

(*continued*)

Table 2.1 Continued

S. No.	Full Treaty Name (when available)	Short name (* denotes agreement is publicly available as of December 2016)	Date Signed	Date entered into force (status as of December 2016)
15.	Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the Republic of Guinea	Canada–Guinea BIT*	Signed 27 May 2015	Not in force
16.	Agreement between the Government of Kingdom of Morocco and the Government of the Republic of Guinea Bissau on Promotion and Protection of Investments	Guinea Bissau–Morocco BIT*	Signed 28 May 2015	Not in force
17.	Free Trade Agreement between the Eurasian Economic Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part	Eurasian Economic Union–Viet Nam FTA*	Signed 29 May 2015	5 October 2016
18.	Free Trade Agreement between Honduras and Peru	Honduras–Peru FTA*	Signed 29 May 2015	1 January 2017
19.	Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea	China–Republic of Korea FTA*	Signed 1 June 2015	20 December 2015
20.	Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China	Australia–China FTA*	Signed 17 June 2015	20 December 2015
21.	Agreement between Japan and the Sultanate of Oman for the Reciprocal Promotion and Protection of Investment	Japan–Oman BIT*	Signed 19 June 2015	Not in force
22.	Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Malawi	Brazil–Malawi CFIA*	Signed 25 June 2015	Not in force
23.	Bilateral Investment Treaty between Mauritius and Zambia	Mauritius–Zambia BIT	Signed 14 July 2015	6 May 2016
24.	Bilateral Investment Treaty between China and Turkey	China–Turkey BIT	Signed 29 July 2015	Not in force
25.	Agreement between the Government of the United Arab Emirates and the Government of the Republic of Mauritius for the Promotion and Reciprocal Protection of Investments	Mauritius–United Arab Emirates BIT*	Signed 20 September 2015	Not in force

Table 2.1 Continued

S. No.	Full Treaty Name (when available)	Short name (* denotes agreement is publicly available as of December 2016)	Date Signed	Date entered into force (status as of December 2016)
26.	Agreement between the Government of the Republic of San Marino and the Government of the Republic of Azerbaijan on the Promotion and Reciprocal Protection of Investments	Azerbaijan–San Marino BIT*	Signed 25 September 2015	Not in force
27.	Agreement on Cooperation and Facilitation of Investments between the Federal Republic of Brazil and the Republic of Colombia	Brazil–Colombia CFIA*	Signed 9 October 2015	Not in force
28.	Free Trade Agreement between Singapore and Turkey	Singapore–Turkey FTA	Signed 14 November 2015	Not in force
29.	Agreement on Cooperation and Investment Facilitation between the Federal Republic of Brazil and the Republic of Chile	Brazil–Chile CFIA*	Signed 24 November 2015	Not in force
30.	Mainland and Macao Closer Economic Partnership Arrangement	China–Macao Agreement on Trade in Services*	Signed 28 November 2015	28 November 2015[375]
31.	Agreement between the Government of the Kyrgyz Republic and the Government of the State of Kuwait for the encouragement and reciprocal protection of investments	Kuwait–Kyrgyzstan BIT*	Signed 13 December 2015	Not in force
32.	Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part	European Union–Kazakhstan EPCA*	Signed 21 December 2015	Not in force[376]
33.	Bilateral Investment Treaty between Guatemala and Turkey	Guatemala–Turkey BIT	Signed 21 December 2015	Not in force

(*continued*)

[375] Article 16 provides: 'This Agreement shall come into effect on the day of signature by the representatives of the two sides, and shall be implemented on 1 June 2016'.

[376] Provisional application of this agreement commenced on 1 May 2016.

Table 2.1 Continued

S. No.	Full Treaty Name (when available)	Short name (* denotes agreement is publicly available as of December 2016)	Date Signed	Date entered into force (status as of December 2016)
34.	Agreement between The Government of the Russian Federation and the Government of the Islamic Republic of Iran on the Promotion and Protection of Investments	Iran–Russian Federation BIT*	Signed 23 December 2015	Not in force
35.	Bilateral Investment Treaty between Cambodia and Hungary	Cambodia–Hungary BIT	Signed 14 January 2016	Not in force
36.	Agreement between The Government of the Federal Republic of Nigeria and the Government of the United Arab Emirates on the Reciprocal Promotion and Protection of Investments	Nigeria–United Arab Emirates BIT*	Signed 18 January 2016	Not in force
37.	Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments	Slovakia–Iran BIT*	Signed 19 January 2016	Not in force
38.	Agreement between the Government of the United Arab Emirates and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments	Mexico–United Arab Emirates BIT*	Signed 19 January 2016	Not in force
39.	European Union–Vietnam Free Trade Agreement	EU–Vietnam FTA*	Signed 1 February 2016	Not in force
40.	Trans-Pacific Partnership Agreement	TPP*	Signed 4 February 2016	Not in force
41.	Agreement between Japan and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investment	Japan–Iran BIT*	Signed 5 February 2016	Not in force
42.	Agreement between the Government of Canada and the Government of Hong Kong, Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments	Canada–Hong Kong, China SAR BIT*	Signed 10 February 2016	6 September 2016

Table 2.1 Continued

S. No.	Full Treaty Name (when available)	Short name (* denotes agreement is publicly available as of December 2016)	Date Signed	Date entered into force (status as of December 2016)
43.	Agreement on Reciprocal Promotion and Protection of Investments between Islamic Republic of Iran and Singapore	Iran–Singapore BIT	Signed 26 February 2016	Not in force
44.	Bilateral Investment Treaty between Cote d'Ivoire and Turkey	Cote d'Ivoire–Turkey BIT	Signed 29 February 2016	Not in force
45.	Bilateral Investment Treaty between Ghana and Turkey	Ghana–Turkey BIT	Signed 1 March 2016	Not in force
46.	Bilateral Investment Treaty between Morocco and Russian Federation	Morocco–Russian Federation BIT *	Signed 15 March 2016	Not in force
47.	Trade and Investment Framework Agreement between the United States of America and the Government of the Argentine Republic	USA–Argentina TIFA*	Signed 23 March 2016	23 March 2016
48.	Bilateral Investment Treaty between Jordan and Turkey	Jordan–Turkey BIT	Signed 27 March 2016	Not in force
49.	Bilateral Investment Treaty between Côte d'Ivoire and Mauritius	Côte d'Ivoire–Mauritius BIT	Signed 20 April 2016	Not in force
50.	Bilateral Investment Treaty between Austria–Kyrgyzstan BIT	Austria–Kyrgyzstan BIT*	Signed 22 April 2016	Not in force
51.	Brazil–Peru Economic and Trade Expansion Agreement	Brazil–Peru ETEA*	Signed 29 April 2016	Not in force
52.	Bilateral Investment Treaty between Mauritius and Sao Tome and Principe	Mauritius–Sao Tome and Principe BIT	Signed 6 May 2016	Not in force
53.	Bilateral Investment Treaty between Somalia and Turkey	Somalia–Turkey BIT	Signed 1 June 2016	Not in force
54.	Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part	EU–SADC EPA*	Signed 10 June 2016	10 October 2016
55.	Free Trade Agreement between the EFTA States and Georgia	EFTA–Georgia FTA*	Signed 27 June 2016	Not in force
56.	Bilateral Investment Treaty between Georgia and Turkey	Georgia–Turkey BIT	Signed 19 July 2016	Not in force

(*continued*)

Table 2.1 Continued

S. No.	Full Treaty Name (when available)	Short name (* denotes agreement is publicly available as of December 2016)	Date Signed	Date entered into force (status as of December 2016)
57.	Agreement between the Government of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment	Japan–Kenya BIT*	Signed 28 August 2016	Not in force
58.	Agreement Between Canada and Mongolia for the Promotion and Protection of Investments	Canada–Mongolia BIT*	Signed 8 September 2016	24 February 2017
59.	Bilateral Investment Treaty between Slovakia and United Arab Emirates	Slovakia–United Arab Emirates BIT	Signed 22 September 2016	Not in force
60.	Free Trade Agreement between the Republic of Chile and the Eastern Republic of Uruguay	Chile–Uruguay FTA*	Signed 4 October 2016	Not in force
61.	Agreement between the Government of the Republic of Rwanda and the Government Kingdom of Morocco on the Reciprocal Promotion and Protection of Investments	Morocco–Rwanda BIT*	Signed 19 October 2016	Not in force
62.	Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States	Canada–EU CETA*	Signed 30 October 2016	Not in force[377]
63.	Bilateral Investment Treaty between Ethiopia and Morocco	Ethiopia–Morocco BIT	Signed 1 November 2016	Not in force
64.	Agreement between the Government of the Republic of Rwanda and the Government of the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments	Rwanda–Turkey BIT*	Signed 3 November 2016	Not in force
65.	Investment Promotion and Protection Agreement between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore	Nigeria–Singapore BIT*	Signed 4 November 2016	Not in force

[377] Certain portions of the agreement will come into force on a provisional basis following approval by the European Parliament, which took place in February 2017, and ratification by Canada.

Table 2.1 Continued

S. No.	Full Treaty Name (when available)	Short name (* denotes agreement is publicly available as of December 2016)	Date Signed	Date entered into force (status as of December 2016)
66.	The Reciprocal Promotion and Protection of Investments Between the Argentine Republic and the State of Qatar	Argentina–Qatar BIT*	Signed 6 November 2016	Not in force
67.	Bilateral Investment Treaty between Gambia and Mauritius	Gambia–Mauritius BIT	Signed 10 November 2016	Not in force
68.	Investment Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Republic of Chile	Chile–Hong Kong, China SAR BIT*	Signed 18 November 2016	Not in force
69.	Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria	Morocco–Nigeria BIT[378]	Signed 3 December 2016	Not in force
70.	Bilateral Investment Treaty between Ethiopia and United Arab Emirates	Ethiopia–United Arab Emirates BIT	Signed 3 December 2016	Not in force
71.	Bilateral Investment Treaty between Moldova and Turkey	Moldova–Turkey BIT	Signed 16 December 2016	Not in force

[378] While this agreement was not publicly available as of December 2016, it was subsequently published in 2017.