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INTERNATIONAL INVESTMENT AGREEMENTS 2018

A Review of Trends and New Approaches

*Jesse Coleman, Lise J. Johnson, Nathan Lobel, and Lisa E. Sachs**

A. Introduction

7.01 At least forty new bilateral investment treaties (BITs) and treaties with investment provisions (TIPs), referred to collectively in this chapter as international investment agreements (IIAs), were signed in 2018, roughly on pace with the thirty-five, forty-one, and forty-two IIAs signed in 2017, 2016, and 2015, respectively.[1] Thirty-three of these agreements were concluded bilaterally, while seven were concluded among three or more parties, bringing the total number of concluded IIAs by the end of 2018 to 3,319 (2,659, or 80 per cent, of which were in force). Nine treaties were concluded by Turkey, six concluded by the United Arab Emirates, five concluded by Singapore, and four concluded by both Brazil and Japan. The European Union (EU) and the United States concluded three treaties between them, but each exclusively (for the United States) or largely (for the EU's Member States) replaced pre-existing investment agreements, as opposed to forming entirely new treaty relationships. In total, at least seventy-nine states were parties to 2018 IIAs. Nine IIAs also came into force in 2018, and twenty-four treaties were terminated.[2] Ecuador and India led the termination charge; Ecuador followed through

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[1] BITs and TIPs are defined herein as bilateral and multilateral instruments for the protection and/or promotion of foreign investments. A complete list of the treaties concluded in 2018 is provided in Table 7.1 at the end of this chapter. Some agreements do not include investment protection provisions, and instead include investment liberalization and/or promotion provisions. United Nations Conference on Trade and Development (UNCTAD), 'International Investment Agreements Navigator' Investment Policy Hub https://investmentpolicyhub.unctad.org/IIA accessed 11 April 2019.

[2] ibid.

on termination announcements made in 2017, terminating twelve of its agreements in 2018, while India terminated five.[3] Burkina Faso and Tanzania also announced their intention to terminate two BITs each.[4]

7.02 While discontent with the international investment regime as currently functioning continues to simmer, driving various multilateral and unilateral reform efforts,[5] consensus about the nature of the discontent and the direction that these efforts should take remains remote. While some states began to advance preferred reforms on issues of substance and procedure that departed from previous paths in 2018, many new agreements continue to leave core obligations and access to standard investor–state dispute settlement (ISDS) largely intact.

7.03 In the EU, the focus of reform efforts remains the creation of a multilateral investment court system to determine investor–state cases, replacing the existing method of adjudication by a tribunal of party-appointed arbitrators. The multilateral investment court system, which the EU has been working to establish since 2015,[6] seeks to address deficiencies in ISDS regarding arbitrator impartiality and expertise, lack of transparency in and consistency of decisions, and the absence of an appellate mechanism to correct errors in ISDS awards. It also aims to ease some of the concerns about investment treaty adjudicators' overreach in their relationships with domestic legal institutions.[7] In addition to advocating for the creation of a multilateral investment court system in multilateral fora, the EU has included provisions for negotiation of such a two-tier multilateral investment court system in its agreements with Singapore,[8] Vietnam,[9] and Mexico, and contemplates (or, in the case of the EU–Mexico text, requires) replacing all or some of those treaties' individual two-tier systems with the multilateral one, if and when that multilateral mechanism is established.[10]

[3] ibid. India also terminated forty-nine treaties in 2017.

[4] See ch 16 in this volume by Mouhamadou Madana Kane.

[5] See ch 3 in this volume by Jane Kelsey.

[6] European Commission, 'The Multilateral Investment Court Project' *News Archive* (21 December 2016) http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608 accessed 12 April 2019.

[7] European Parliament, 'A Balanced and Progressive Approach to Harness Globalisation: Multilateral Investment Court' Legislative Train Schedule (20 March 2019) http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-multilateral-investment-court-(mic) accessed 12 April 2019.

[8] Investment Protection Agreement between the European Union and Its Members, of the One Part, and the Republic of Singapore, of the Other Part (signed 15 October 2018) (hereafter EU–Singapore IPA).

[9] European Commission, 'Commission Presents EU-Vietnam Trade and Investment Agreements for Signature and Conclusion' *News Archive* (17 October 2018) http://trade.ec.europa.eu/doclib/press/index.cfm?id=1921 accessed 12 April 2019; European Union–Vietnam Investment Protection Agreement (signed 30 June 2019) (EU–Vietnam IPA); European Commission, 'EU-Vietnam Trade and Investment Agreements' *News Archive* (24 September 2018) http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 accessed 25 June 2019.

[10] European Commission, 'EU and Mexico Reach New Agreement on Trade' *News Archive* (21 April 2018) http://trade.ec.europa.eu/doclib/press/index.cfm?id=1830 accessed 12 April 2019; Modernisation of the Trade Part of the EU–Mexico Global Agreement, Agreement in Principle, Investment Chapter: European Commission, 'New EU-Mexico Agreement: The Agreement in Principle and Its Texts' *News Archive* (26 April 2018) http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833 accessed 20 June 2019) (EU–Mexico Agreement in Principle), Resolution of Investment Disputes, art 14; EU–Vietnam IPA (n 9) art 3.41; EU–Singapore IPA (n 8) art 3.12.

7.04 Alongside the EU's push for a standing investment court system, the Court of Justice of the European Union (CJEU) decided in March 2018 that the ISDS provision in the Netherlands–Slovakia BIT was incompatible with the Treaty on the Functioning of the European Union (TFEU).[11] More generally, its ruling implied that determination of investment disputes on the basis of ISDS provisions contained in intra-EU IIAs is incompatible with EU law.[12] However, a number of ISDS tribunals have determined that they are not bound by this ruling, proceeding with intra-EU cases undeterred.[13] In the interim, the European Commission is working to organize its Member States to terminate intra-EU treaties multilaterally, which by July 2018 had been used in nearly 20 per cent of all ISDS cases.[14] Thus, although none of the 2018 IIA terminations was between or among EU states, those intra-EU treaties may form a significant share of terminations in 2019.[15]

7.05 Developments in the EU therefore signal significant challenges to ISDS, with the EU pushing against the traditional arbitration model in its relationship with third states, and its Member States also trying to extract themselves from those treaties that, to date, have been a, if not the, major source of claims against them.

7.06 The future of ISDS is similarly uncertain in the United States, as illustrated in the renegotiation of the North American Free Trade Agreement (NAFTA), which began in

[11] Treaty on the Functioning of the European Union, formerly the European Economic Community Treaty (signed 25 March 1957, entered into force 1 January 1958), and amended by the Lisbon Treaty (signed 17 December 2007, entered into force 1 December 2009).

[12] *Slovak Republic v Achmea BV* ECLI:EU:C:2018:158 (6 March 2018) http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=404057 accessed 15 April 2019.

[13] See eg *Eskosol v Italy*, Decision on Termination Request and Intra-EU Objection, ICSID Case No ARB/15/50 (7 May 2019) (relating to a case under the Energy Charter Treaty); *NovEnergia II v Italy*, Award, SCC Arbitration V (2015/095) (23 December 2018); Luke Eric Peterson, 'An Update on Under-the-Radar Arbitral Rulings that Address Achmea Objection' *IAReporter* (13 January 2019) https://www.iareporter.com/articles/an-update-on-under-the-radar-arbitral-rulings-that-address-achmea-objection/ accessed 1 June 2019.

[14] Joel Dahlquist, 'Investigation: European Commission's Push for Termination of Intra-EU Investment Treaties Shifts to Multilateral Plane, but Member-States at Odds over Scope of Effort' *IAReporter* (15 November 2018) https://www.iareporter.com/articles/investigation-european-commissions-push-for-termination-of-intra-eu-investment-treaties-shifts-to-multilateral-plane-but-member-states-at-odds-over-scope-of-effort/ accessed 15 April 2019.

[15] In January 2019, twenty-two EU Member States announced their intention to terminate intra-EU BITs by 6 December 2019, declaring that all investor–state dispute clauses in intra-EU BITs, including the ECT as it applies to EU Member States, are 'contrary to Union law and thus inapplicable'. European Commission, 'Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union' (2019) https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en accessed 7 June 2019. Five Member States (Finland, Luxembourg, Malta, Slovenia, and Sweden) issued a subsequent separate declaration reaffirming the content of the larger group's declaration, while avoiding any specific pronouncement on the ECT and its consequences for future applicability amongst EU Member States. See Government Offices of Sweden, 'Declaration of the Representatives of the Governments of the Member States of 16 January on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union' (2019) https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf accessed 7 June 2019. Hungary also issued a separate declaration. See Hungarian Government, 'Declaration of the Representative of the Government of Hungary of 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* on Investment Protection in the European Union' (2019) https://www.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf accessed 7 June 2019. For more on investment policy developments in the EU see ch 18 in this volume by Catharine Titi.

2017[16] and concluded with a revised US–Canada–Mexico Agreement (USMCA) in November of 2018.[17] Notably, the USMCA included a number of limitations on use of ISDS by investors, including phasing out ISDS between Canada and both the United States and Mexico after the termination of NAFTA (although Mexican and Canadian investors into the other treaty party will still have access to ISDS under the CPTPP).[18] The USMCA also limited the substantive provisions that most investors from the United States and Mexico into the other party can enforce through ISDS, providing ISDS access only for claims of direct expropriation and breaches of the national treatment (NT) or most-favoured-nation (MFN) treatment provisions, and limiting broader ISDS access to cases involving to investor–state contracts in certain sectors.[19]

7.07 After President Trump withdrew the United States from the Trans-Pacific Partnership Agreement, the remaining eleven parties concluded the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) in December of 2018.[20] The mega treaty leaves many core IIA provisions intact, but allows states to deny access to ISDS for 'claims challenging a tobacco control measure'.[21] However, New Zealand, one of the CPTPP states, appeared to evince a more fundamental skepticism of ISDS, signing side letters with the governments of Australia, Brunei Darussalam, Malaysia, Peru, and Vietnam to either exclude arbitration by ISDS entirely or require government consent to ISDS disputes.[22] This followed a 2017 directive from the Prime Minister directing negotiators 'to ensure that no further free-trade agreements include ISDS clauses'.[23]

[16] North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (hereafter NAFTA).

[17] Agreement between the United States of America, the United Mexican States, and Canada (signed 30 November 2018) (hereafter USMCA).

[18] ibid annexes 14-D and 14-E. For more on the USMCA see ch 20 in this volume by Manuel Perez Rocha.

[19] ibid.

[20] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018) (hereafter CPTPP).

[21] ibid art 29.5.

[22] David Parker, 'Letter to Minister Steven Ciobo in Connection with the Signing on this Date of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership' (8 March 2018) https://www.mfat.govt.nz/assets/CPTPP/New-Zealand-Australia-ISDS-Trade-Remedies-and-Relationship-with-Other-Agreements.pdf accessed 15 April 2019 (Parker, 'Letter to Minister Steven Ciobo'); David Parker, 'Letter to Minister Erywan Pehin Yusof in Connection with the Signing on 8 March 2019 in Santiago, Chile, of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership' (8 March 2018) https://www.mfat.govt.nz/assets/CPTPP/New-Zealand-Brunei-ISDS.pdf accessed 15 April 2019 (Parker, 'Letter to Minister Erywan Pehin Yusof'); David Parker, 'Letter to Secretary General J Jayasiri in Connection with the Signing on 8 March 2019 in Santiago, Chile, of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership' (8 March 2018) https://www.mfat.govt.nz/assets/CPTPP/New-Zealand-Malaysia-ISDS.pdf accessed 15 April 2019 (Parker, 'Letter to Secretary General J Jayasiri'); David Parker, 'Letter to Minister Eduardo Ferreyros Küppers in Connection with the Signing on this Date of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership' (8 March 2018) https://www.mfat.govt.nz/assets/CPTPP/New-Zealand-Peru-ISDS.pdf accessed 15 April 2019 (Parker, 'Letter to Minister Eduardo Ferreyros Küppers'); David Parker, 'Letter to Minister Tran Tuan Anh in Connection with the Signing on this Date in Santiago, Chile, of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership' (8 March 2018) https://www.mfat.govt.nz/assets/CPTPP/New-Zealand-Viet-Nam-ISDS.pdf accessed 15 April 2019 (Parker, 'Letter to Minister Tran Tuan Anh').

[23] Government of New Zealand, 'Post-Cabinet Press Conference: Monday, 31 October 2017' (31 October 2017) https://www.beehive.govt.nz/sites/default/files/2017-11/PM%20Press%20Conference%2031%20October%202017_0.pdf accessed 4 May 2019.

7.08 These developments reflect states' uncertain and varied relationships with IIAs and ISDS, and different perspectives on ways forward. Those ambiguities are promoting experimentation at national levels with new models, and at international levels with reform proposals. At the domestic level, for instance, the Netherlands published the draft text of a new model BIT in 2018 (finalized in 2019),[24] which seems to respond to some concerns about its prior treaty practice, including that its agreements unduly permitted investors to route investments through Dutch shell companies in order to gain Dutch treaty coverage.[25] While the new model does not completely bar corporate structuring for the purpose of gaining access to investment protection, it specifies that tribunals 'shall decline jurisdiction' in the specific event that an investor 'has changed its corporate structure with a main purpose to gain the protection of this Agreement at a point in time where a dispute had arisen or was foreseeable'.[26]

7.09 At the international level, the contours of reform agendas in the ongoing multilateral reform negotiations have also begun to take shape. While the scope of the discussions, degree of formality, inclusivity, and potential for producing meaningful change differ among the various processes and institutions, relevant developments include work on reform facilitated by the UN Conference on Trade and Development (UNCTAD), the UN Commission on International Trade Law (UNCITRAL), the Organisation for Economic Co-operation and Development (OECD), and the International Centre for Settlement of Investment Disputes (ICSID). At UNCITRAL, for example, discussions have focused on a series of concerns regarding the ISDS mechanism falling into four broad categories: (1) lack of consistency, coherence, predictability, and correctness of arbitral decisions; (2) selection and conduct of arbitrators and decision-makers; (3) cost and duration of proceedings; and (4) third-party funding of investment disputes.[27]

7.10 This chapter seeks to capture trends and new approaches in IIA treaty-making in 2018. It reviews select developments in treaties signed or agreed upon in 2018 and publicly available by 15 April 2019, as well as the Netherlands Model Investment Agreement, which appears to be the only revised model BIT made publicly available in 2018. In line with previous *Yearbook on International Investment Law & Policy* chapters on treaty developments, this chapter focuses on certain core issues. Section B covers trends in the substantive standards included in 2018 IIAs, focusing on developments related

[24] Netherlands Model Investment Agreement (22 March 2019). The text of the Model was largely finalized and released in October 2018. It is therefore covered by this chapter. However, a subsequent version was released in March 2019 following approval by the Dutch Parliament. Some modifications were included in that agreement. Where those modifications are relevant to this chapter's review, they have been noted in the text.

[25] See eg Roeline Knottnerus and Roos van Os, 'The Netherlands: A Gateway to "Treaty Shopping" for Investment Protection' International Institute for Sustainable Development (12 January 2012) https://www.iisd.org/itn/2012/01/12/the-netherlands-treaty-shopping/ accessed 5 June 2019.

[26] Netherlands Model Investment Agreement (n 24) art 16.3.

[27] See Lise J Johnson, 'What Happened at UNCITRAL's April WG III Session? What Will Happen Next?' Columbia Center on Sustainable Investment (3 May 2019) http://ccsi.columbia.edu/2019/05/03/what-happened-at-uncitral-april-1-5-what-will-happen-next/ accessed 4 May 2019; see also ch 3 on institutional developments in 2018 by Jane Kelsey in this volume. At the April 2019 UNCITRAL session, members of Working Group III decided that the issue of third-party funding deserved attention as its own concern. Prior to that session, the UNCITRAL discussions had tended to group concerns into three broad categories.

to fair and equitable treatment (FET) provisions, expropriation protections, non-discrimination requirements, and restrictions on performance requirements. Section C examines developments in 2018 treaties related to attempts to limit access to ISDS, including through use of treaty exclusions, ISDS exceptions, filter mechanisms, and omission of ISDS provisions altogether. Section D addresses IIA inclusion of investor responsibility provisions and, in more limited cases, mandatory obligations related to compliance with host state law, anti-corruption, and corporate social responsibility. Finally, section E focuses on efforts to create IIAs that promote investors' respect for human, gender, and indigenous rights.

B. Substantive Standards

7.11 IIAs typically contain a set of state obligations, which often include those relating to FET, expropriation, non-discrimination, and free transfers of capital across borders. While these obligations have dominated the existing treaty landscape, and continue to do so in 2018, there is nevertheless considerable nuance and variation in treaty practice. The treaties concluded in 2018 illustrate how different approaches to these core and other obligations (and exceptions thereto) continue to percolate across countries, especially after those countries have engaged in treaty talks and shared knowledge, expertise, and insights and spreading particular treaty practices. The group of treaties concluded in 2018 also illustrates how the rise of new treaty *demandeurs* and innovators, and continued experiences with ISDS cases, have generated diversity across texts. This section covers some key aspects of recent practices, focusing on trends and deviations relating to FET (and similar provisions), expropriation, non-discrimination, and performance requirements.

1. FET and similar provisions

7.12 The treaties covered in this review adopt three main approaches to FET. These approaches, which relate to both the content of the obligation and how that content is determined, are: (1) linking FET to customary international law; (2) including an 'autonomous' FET standard; and (3) excluding 'FET' as such from the treaty.

7.13 As was the case for agreements concluded in 2017, the most common approach of the three general categories in 2018 is to link the FET standard to customary international law (CIL).[28] The 2018 treaties expressing the FET obligation by linking it to CIL do

[28] This is based on a review of 27 agreements publicly available as of 15 April 2019. Thirteen out of twenty-five linked FET to CIL. Five adopt an autonomous FET standard and nine either exclude the absolute treatment obligation entirely or exclude a specific reference to 'FET'. The approach to deciphering the contents the FET obligation differs depending on whether it is based on customary international law (where the task is to identify the contents of the law based on state practice and opinio juris), and the autonomous approach, which gives the tribunal the task of interpreting the words 'fair and equitable' and any articulated elements and qualifiers (such as 'manifestly arbitrary') based on the rules of treaty interpretation articulated by the Vienna Convention on the Law of Treaties (or other rules specified by the treaty). Linked to this difference in approach, there is also

so by stating that they require covered investments to be treated in accordance with 'customary international law, *including* fair and equitable treatment'.[29] Most of the treaties in this subset then elaborate further,[30] clarifying that the FET concept does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens, and does 'not create additional substantive rights',[31] and/or articulating how customary international law is established.[32]

7.14 Some IIAs with the CIL-linked FET obligation also indicate what the states parties consider FET to require and not require in the context of their treaties. The treaties that specify what the CIL-linked FET standard requires clarify that the standard 'includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings'.[33] Notably, while the use of the word 'includes' suggests that there may be other elements of

an apparent difference in content. States have contended, for instance, that customary international law on the treatment of aliens does not contain general guarantees of due process, nor of protections against manifestly arbitrary treatment, two components tribunals have identified as being a part of the autonomous standard. See eg *Apotex Holdings Inc. and Apotex Inc. v United States of America*, US Rejoinder on Merits, ICSID Case No ARB(AF)/12/1 (27 September 2013) paras 290–321; David Gaukrodger, 'Addressing the Balance of Interests in Investment Treaties: The Limitation of Fair and Equitable Treatment Provisions to the Minimum Standard of Treatment under Customary International Law' (2017) (OECD Working Papers on International Investment 2017/03) https://www.oecd-ilibrary.org/finance-and-investment/addressing-the-balance-of-interests-in-investment-treaties_0a62034b-en accessed 20 June 2019.

[29] See eg Agreement between the Government of the Republic of Kazakhstan and the Government of the Republic of Singapore on the Promotion and Mutual Protection of Investments (signed 21 November 2018) art 3(2) (emphasis added) (hereafter Kazakhstan–Singapore BIT); Free Trade Agreement between the Republic of Korea and the Republics of Central America (signed 21 February 2018) art 9.5(1) (hereafter Korea–Central America FTA); Agreement Between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of Investments (signed 12 June 2018) art 6(1) (hereafter Canada–Moldova BIT). Some treaties refer to minimum standards of protection under international law, without clearly specifying customary international law. The relevance of the word 'including' was discussed in last year's *Yearbook* chapter on this topic. See Jesse Coleman, Lise J Johnson, Lisa E Sachs, and Nathan Lobel, 'International Investment Agreements 2017: A Review of Trends and Approaches' in Lisa E Sachs, Lise J Johnson, and Jesse Coleman (eds), *Yearbook on International Investment Law & Policy 2017* (OUP 2019) (hereafter Coleman, Johnson, Sachs, and Lobel 'International Investment Agreements 2017').

[30] But see Agreement Between Japan and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investment (signed 27 November 2018) art 5 (hereafter Japan–Jordan BIT); Agreement between Japan and the Republic of Armenia for the Liberalisation, Promotion and Protection of Investment (signed 14 February 2018) (hereafter Japan–Armenia BIT) art 4; Agreement between the Government of the Republic of Mali and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (signed 2 March 2018) art 3(3) (hereafter Mali–Turkey BIT).

[31] These treaties include Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment (signed 1 December 2018) art 4(2) (hereafter Argentina–Japan BIT); USMCA (n 17) art 14.6(2); Sri Lanka–Singapore Free Trade Agreement (signed 23 January 2018, entered into force 1 May 2018) art 10(3)(2) (hereafter Sri Lanka–Singapore FTA); Kazakhstan–Singapore BIT (n 29) art 3(2); Peru–Australia Free Trade Agreement (signed 2 February 2018) (hereafter Peru–Australia FTA); CPTPP (n 20); Korea–Central America FTA (n 29) art 9.5(2); Agreement between Japan and the United Arab Emirates for the Promotion and Protection of Investment (signed 30 April 2018) art 5(1) (hereafter Japan–United Arab Emirates BIT); Canada–Moldova BIT (n 29) art 6(2). Some agreements' language varies slightly. The Canada–Moldova and Japan–United Arab Emirates BITs do not contain the language stating that it the concept of FET does not create additional substantive rights.

[32] See eg Sri Lanka–Singapore FTA (n 31); Korea–Central America FTA (n 29) annex 9-A; Agreement between the United Arab Emirates and the Eastern Republic of Uruguay for the Reciprocal Promotion and Protection of Investments (signed 24 October 2018) art 3(2) (hereafter United Arab Emirates–Uruguay BIT); USMCA (n 17) annex 14-A; Peru–Australia FTA (n 31) annex 8-A.

[33] Argentina–Japan BIT (n 31) art 4(2); USMCA (n 17) art 14.6(2)(a); Peru–Australia FTA (n 31) art 8.6(2)(a); Kazakhstan–Singapore BIT (n 29) art 3(2).

the FET obligation, these IIAs only reference denials of justice, and do not articulate any other elements they consider to be part of the FET standard. Those treaties that add language defining the standard in the negative specify that a breach of FET is *not* established based on breach of another provision of the treaty or other international agreement,[34] based on the 'mere' fact that an investor's expectations have been breached,[35] or based on modifications to or cessations of subsidies.[36]

7.15 Other treaties containing an FET obligation incorporate an 'autonomous' FET standard rather than one tied to CIL. Older treaties following this approach often stated the FET provision simply, setting forth the states parties' duties to treat covered investments fairly and equitably.[37] Treaties concluded in 2018, however, indicate that such practice is now rare.[38] Dominant practice for autonomous provisions is now more specifically to elaborate on the contents of the FET standard, and the severity or egregiousness of the conduct that can give rise to breach. Treaties using this elaborated autonomous approach include the Mali– United Arab Emirates BIT, as well as agreements negotiated by the EU.[39] While the EU has generally held fast to this elaborated autonomous approach in each of the treaties it has negotiated, other countries, such as Singapore, Mexico, the UAE, and Mali, are all also still concluding treaties using the CIL and/or the no-FET approach, emphasizing some flexibility in treaty practice depending on the identity and interests of their treaty parties.

7.16 In terms of the elaborated lists of what breaches of the FET standard constitute, the EU's agreements and the Netherlands Model Investment Agreement seem to have crystallized around the following elements: (i) denial of justice in criminal, civil, and administrative proceedings; (ii) a fundamental breach of due process; (iii) manifestly arbitrary conduct; and (iv) harassment, coercion, abuse of power, or similar bad faith conduct.[40] The EU agreement with Singapore and draft agreement with Mexico also include footnotes and additional provisions explaining some of these concepts and

[34] Argentina–Japan BIT (n 31) art 4(3); CPTPP (n 20) art 9.6(3); Canada–Moldova BIT (n 29) art 6(3); USMCA (n 17) art 14.6(3); Korea–Central America FTA (n 29) art 9.5(3); Kazakhstan–Singapore BIT (n 29) art 3(3); Peru–Australia FTA (n 31) art 8.6(3).

[35] Argentina–Japan BIT (n 31) art 4(4); CPTPP (n 20) art 9.6(4); USMCA (n 17) art 14.6(4); Peru–Australia FTA (n 31) 8.6(4).

[36] Peru–Australia FTA (n 31) art 8.6(5).

[37] The FET obligation is typically expressed as one towards investments, and not specifically toward investors. The investment chapter of the EU–Mexico Agreement in Principle, however, also covers investors, and the EU–Singapore IPA adds a footnote indicating that it also governs 'treatment of covered investors which directly or indirectly interferes with the covered investors' operation, management, conduct, maintenance, use, enjoyment and sale or other disposal of their covered investments'. EU–Mexico Agreement in Principle (n 10) art 15(1); EU–Singapore IPA (n 8) ch 2, fn 8.

[38] An exception is the Agreement between the Government of the Kingdom of Morocco and the Government of the Republic of Congo for the Reciprocal Promotion and Protection of Investment (signed 30 April 2018) art 2(2) (hereafter Morocco–Congo BIT).

[39] Agreement Relative to the Reciprocal Promotion and Protection of Investments between the Government of the Republic of Mali and the Government of the United Arab Emirates (signed 6 March 2018) art 3(3) (hereafter Mali–United Arab Emirates BIT); EU–Singapore IPA (n 8) art 2.4(1)–(2); EU–Mexico Agreement in Principle (n 10) Treatment of Investors and Covered Investments.

[40] EU–Singapore IPA (n 8) art 2.4(1)–(2). The Netherlands Model Investment Agreement is similar, but also adds a category regarding 'direct or targeted indirect discrimination on wrongful grounds' (n 24) art 9(2).

how they should be interpreted. The text with Singapore, for instance, adds the unsurprising note that a 'denial of justice' is not established by the 'sole fact that the covered investor's claim has been rejected, dismissed or unsuccessful'.[41] The agreement with Mexico contains additional clarifications. On the meaning of 'manifest arbitrariness', for instance, it states:

> The mere illegality, or a merely inconsistent or questionable application of a policy or procedure, does not in itself constitute manifest arbitrariness . . . while a total and unjustified repudiation of a law or regulation, or a measure without reason, or a conduct that is specifically targeted to the investor or its covered investment with the purpose of causing damage are likely to constitute manifest arbitrariness . . .[42]

7.17 This language elaborating on the meaning of 'manifest arbitrariness' is relatively exceptional in investment treaties; and the examples provided of conduct that is likely (but not certain) to meet the 'manifestly arbitrary' conduct standard appear to set the threshold for liability relatively high. The EU–Mexico text also clarifies that neither a breach of international treaty law nor domestic law will necessarily establish an FET breach.[43]

7.18 Both the EU–Singapore IPA and EU–Mexico FTA Draft add provisions indicating that, when determining whether there has been a breach of the FET obligation, a tribunal may take into account whether the host state induced the investment through specific or unambiguous representations to a covered investor, creating legitimate expectations that were relied upon by that investor, and that the government subsequently frustrated.[44]

7.19 Notably, the Mali–UAE BIT has a considerably different, and far more limited, view of the autonomous FET obligation, likening it to an access to justice-type provision. It states:

> Pour plus de certitude, un traitement juste et équitable signifie que chaque Partie Contractante doit, autant que possible, mettre à la disposition du public ses lois, règlements relatifs aux investissements et donner à l'investisseur le droit d'accéder à ses cours de justice, tribunaux administratifs et agences et toutes les autres autorités judiciaires.[45]

7.20 The third group of treaties, including the Belarus–India BIT, Kazakhstan–UAE BIT, Indonesia–European Free Trade Association (EFTA) Comprehensive Economic

[41] EU–Singapore IPA (n 8) fn 9.
[42] EU–Mexico Agreement in Principle (n 10) fn 4.
[43] ibid; Treatment of Investors and Covered Investments (5) and (6).
[44] ibid; Treatment of Investors and Covered Investments (4); EU–Singapore IPA (n 8) art 2.4(3). See also Netherlands Model Investment Agreement (n 24) art 9(2).
[45] Mali–United Arab Emirates BIT (n 39) art 3(3). Translating to: 'For greater certainty, fair and equitable treatment means that each Contracting Party shall, as far as possible, make available to the public its laws and regulations relating to investments, and give the investor the right of access to its courts of law, administrative courts, agencies and all other judicial authorities'.

Partnership Agreement (CEPA), Ecuador–EFTA CEPA, EU–Japan EPA, and Brazilian agreements with Chile, Guyana, Suriname, and Ethiopia, do not provide FET protections at all.[46]

7.21 Instead of including FET protections, the Belarus–India BIT, for instance, provides that the states parties shall not subject covered investments to measures that constitute a violation of customary international law through denials of justice, fundamental breaches of due process, targeted discrimination on manifestly unjustified grounds, and manifestly abusive treatment.[47] It also specifies that, when determining whether there has been a breach, tribunals must take account of whether the claimant 'pursued action for remedies before domestic courts or tribunals prior to initiating' an ISDS claim.[48]

7.22 The Brazilian CFIAs approach the obligation differently from the Belarus–India BIT. Those CFIAs that mention the FET standard do so specifically to exclude that standard, stating that FET as such 'shall not be used or raised . . . as a ground for any dispute settlement procedure in relation to the application or the interpretation' of the treaty.[49] Instead of using FET, Brazil's agreements with Guyana, Suriname, and Ethiopia provide that the states parties are to 'ensure that all measures that affect investment are administered in a reasonable, objective and impartial manner', in accordance with due process and their respective laws and regulations.[50] The Brazil–Guyana CFIA also provides that, '[b]ased on the applicable rules of international law as recognized by each of the Parties and their respective national law', the states are not to subject covered investments to measures that constitute denials of justice, fundamental breaches of due process, targeted discrimination on wrongful grounds, manifestly abusive treatment, and discrimination in ensuring law enforcement and protection of public security.[51] The list of prohibited treatment in that CFIA is similar to the language used in

[46] Some of these agreements, such as the EU–Japan EPA and the EFTA CEPAs with Ecuador and Indonesia do not contain standards of investment protection. (Comprehensive Economic Partnership Agreement between the Republic of Indonesia and the EFTA States (signed 16 December 2018) art 4.1(2) (hereafter Indonesia–EFTA CEPA); Comprehensive Economic Partnership Agreement between the EFTA States and the Republic of Ecuador (signed 25 June 2018) (hereafter Ecuador–EFTA CEPA). European Commission, 'Key Elements of the EU-Japan Economic Partnership Agreement-Memo' (12 December 2018) http://trade.ec.europa.eu/doclib/press/index.cfm?id=1955). The other agreements include absolute standards of protection, but do not contain an 'FET' obligation per se. Treaty between the Republic of Belarus and the Republic of India on Investments (signed 24 September 2018) art 3(1) (hereafter Belarus–India BIT); Agreement between the Government of the Republic of Kazakhstan and the Government of the United Arab Emirates on Promotion and Reciprocal Protection of Investments (signed 24 March 2018) art 3 (hereafter Kazakhstan–UAE BIT); Brazil–Chile Free Trade Agreement (signed 12 November 2018) (hereafter Brazil–Chile FTA); Cooperation and Investment Facilitation Agreement between the Federative Republic of Brazil and the Co-operative Republic of Guyana (signed 13 December 2018) art 4(4) (hereafter Brazil–Guyana CFIA); Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the Republic of Suriname (signed 2 May 2018) art 4(3) (hereafter Brazil–Suriname CFIA); Agreement Between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation (signed 11 April 2018) art 4(2)–(3) (hereafter Brazil–Ethiopia CFIA).

[47] Belarus–India BIT (n 46) art 3(1).

[48] ibid art 3(4).

[49] Brazil–Guyana CFIA (n 46) art 4(4); Brazil–Suriname CFIA (n 46) art 4(3).

[50] Brazil–Guyana CFIA (n 46) art 4(3); Brazil–Suriname CFIA (n 46) art 4(2); Brazil–Ethiopia CFIA (n 46) art 4(2)–(3).

[51] Brazil–Guyana CFIA (n 46) art 4(1).

other agreements described above, such as the EU's texts and the Netherlands Model Investment Agreement, but rejects the arguably loaded 'FET' concept.

7.23 That the Belarus–India BIT refers to customary international law as the standard, but does not reference FET specifically, and the Brazil–Guyana CFIA mandates protection in accordance with 'applicable rules of international law' but similarly excludes reliance on the FET standard, suggests some tension with other treaties in the first group stating that they require treatment in accordance with customary international law *including* FET. These diverging practices indicate potential disagreement regarding the place of FET in relation to customary international law.

7.24 While it is useful to catalogue whether and how countries are incorporating the FET obligation, it is as important to consider the provision in context. For instance, some of the treaties that contain a customary international law-linked FET obligation have added separate provisions imposing potentially broad liability for impairment or interference due to arbitrary, discriminatory, or unreasonable measures.[52] Any narrowing in exposure to claims and liability that might be achieved by tethering FET to the minimum standard of treatment may be undone by including these types of provisions. Similarly, some of the particularly narrow autonomous provisions, like the one in the Mali–UAE BIT linking the FET obligation to access to domestic legal systems, are also accompanied by separate obligations against impairment through arbitrary, discriminatory, or unjustified measures.[53]

7.25 Relatedly, it is also important to consider how substantive obligations relate to dispute settlement provisions. Although some standards are arguably vague, open-ended, and potentially easily invoked, such as the commitment in Brazilian CFIAs to ensure that all relevant measures are administered in an objective, impartial, and reasonable manner, those standards may pose less of a litigation and liability risk when actionable only through state-to-state proceedings.[54] Thus, when reviewing treaty practice, it is essential to consider how each provision fits in context in order to understand the deal states struck and the obligations they were willing to assume.

2. Expropriation

7.26 Another core provision found across concluded treaties historically and in 2018 is that on expropriation. Variations in practice relate to the issues of (1) what is included (ie direct or indirect expropriation); (2) what is protected; (3) whether any factors are

[52] Mali–Turkey BIT (n 30) art 3(3); Japan–United Arab Emirates BIT (n 31) art 5(2). See also Kazakhstan–UAE BIT (n 46) art 3 (not including the FET obligation but containing a 'non-impairment' obligation).

[53] Mali–United Arab Emirates BIT (n 39) art 3(2); Morocco–Congo BIT (n 38) art 2(2).

[54] The reduced risk under IIAs with state-to-state dispute settlement is likely due to the fact that states, which are also bound to the treaty's obligations, are less likely to make maximalist arguments regarding the meaning of treaty protections than investors, which are only beneficiaries of, and not duty-bearers under, the standards. Relatedly, while states, like investors, can also bring claims for breach of IIA provisions, they rarely do.

provided to assist in determining whether there has been an indirect expropriation and, if so, which ones; and (4), whether there are any other notable features, such as specific rules relating to compensation.

7.27 In terms of the first issue, except for the Brazilian CFIAs, which only address direct expropriation,[55] and the EFTA and EU–Japan IIAs, which do not contain investment protection provisions, each of the other treaties covered in this review contains rules on direct and indirect expropriation.

7.28 With respect to the second issue, some treaties specify that only property *rights* can be expropriated. The Korea–Central America FTA clarifies that: '[a]n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment'.[56] This reflects positions taken in cases by states and arbitral tribunals in a number of ISDS cases.[57] More commonly, treaties contain language with more ambiguous effects. For instance, the USMCA states that: '[a]n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or *property interest* in an investment'.[58] A footnote to the phrase 'property right' clarifies that 'the existence of a property right is determined with reference to a Party's law',[59] but there is no similar narrowing language after the phrase 'property interest', or other indication of what is intended to be captured by the term 'property interest' as distinct from property 'rights'.

7.29 Another recurring feature in the 2018 treaties is language setting forth an illustrative list of factors the tribunal should consider when undertaking the difficult task of distinguishing between expropriatory government measures that require compensation, and non-expropriatory measures that do not require such relief.[60] The most common phrasing looks similar to the approach developed in domestic US law and subsequently diffused through US and now other states' treaty practice. This approach examines (1) the economic impact of the measure or series of measures, although the treaties specify that a negative economic impact, alone, would not establish an expropriation; (2) the extent to which the measure interferes with the investor's reasonable and distinct investment-backed expectations; and (3) the character of the government action.[61] Some treaties modify these factors, for instance by adding an examination of

[55] Brazil–Guyana CFIA (n 46) art 7; Brazil–Chile FTA (n 46) art 8.7(5); Brazil–Ethiopia CFIA (n 46) art 7(5); Brazil–Suriname CFIA (n 46) art 7(5).

[56] Korea–Central America FTA (n 29) annex 9-C.

[57] See eg *Eli Lilly v Canada*, Post-hearing Submission of Canada, UNCITRAL, ICSID Case No UNCT/14/2 (25 July 2016) paras 23–25 (and sources cited therein).

[58] USMCA (n 17) annex 14-B(1) (emphasis added). See also EU–Mexico Agreement in Principle (n 10) annex on expropriation, (1); United Arab Emirates–Uruguay BIT (n 32) annex, (2); Peru–Australia FTA (n 31) annex 8-B(1); Sri Lanka–Singapore FTA (n 31) annex 10-A(1).

[59] USMCA (n 17) annex 14-B, fn 14.

[60] But see eg Kazakhstan–Singapore BIT (n 29) art 6 (no clarifying factors except for taxation, in art 21(3)); Japan–Jordan BIT (n 30) art 11 (no clarifying factors); Japan–Armenia BIT (n 30) art 12 (no clarifying factors).

[61] See eg United Arab Emirates–Uruguay BIT (n 32) annex, (4); Korea–Central America FTA (n 29) annex 9-C; Sri Lanka–Singapore FTA (n 31) annex 10-A; EU–Mexico Agreement in Principle (n 10) annex on

duration,[62] and/or substituting the 'investment-backed expectations' prong with one that looks at whether the measure breached a 'prior binding written commitment to the investor',[63] or whether it interfered with use, enjoyment, or disposal of the property.[64] Some 2018 treaties, such as the Korea–Central America FTA, also include additional text further explaining the states parties' understanding of these prongs, or, as is done by the Singapore–Kazakhstan BIT, only add prongs for certain types of measures (in that case, tax measures).[65]

7.30 Also common, although not universal, in this group of 2018 treaties is to include a 'police powers' exception. Most of the treaties including this language state, generally, that except in rare circumstances, measures designed and applied for legitimate public welfare purposes do not constitute indirect expropriations.[66] Some treaties add that, to be covered by the police powers doctrine, the measure must be non-discriminatory and/or non-arbitrary;[67] some also suggest what the 'rare circumstances' are that would cause the measure to be expropriatory. The EU's texts with Mexico and Singapore, the Korea–Central America FTA, and the Netherlands Model Investment Agreement each employ proportionality tests that look at the severity of the measure in light of its purpose.[68] Notably, the Belarus–India BIT does not contain the 'except in rare circumstances' qualifier.

7.31 These aspects of the police powers doctrine raise a number of questions for further interpretation and application, including whether the test is to be applied before or after the three-pronged analysis;[69] what the test is for 'discriminatory' and/or 'arbitrary'

expropriation; USMCA (n 17) annex 14-B, (3); Argentina–Japan BIT (n 31) art 11(3); CPTPP (n 20) annex 9-B; Peru–Australia FTA (n 31) annex 8-B. For a discussion of these provisions and their diffusion see also Lorenzo Cotula, 'Expropriation Clauses and Environmental Regulation: Diffusion of Law in the Era of Investment Treaties' (2015) 24 Review of European, Comparative and International Law 278.

[62] Belarus–India BIT (n 46); EU–Mexico Agreement in Principle (n 10); EU–Singapore IPA (n 8) annex 1(2)(a).

[63] Belarus–India BIT (n 46) (iv). See also eg USMCA (n 17) annex 14-B, fn 19. ('For greater certainty, whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector'.)

[64] EU–Singapore IPA (n 8) annex 1(2)(b).

[65] Korea–Central America FTA (n 29) annex 9(c); USMCA (n 17) annex 14-B, fn. 19; Kazakhstan–Singapore BIT (n 29) art 6, art 21(3)

[66] United Arab Emirates–Uruguay BIT (n 32) annex (4)(b); CPTPP (n 20) annex 9-B. A number of these texts also then provide illustrative lists of what constitutes legitimate aims. See eg Netherlands Model Investment Agreement (n 24) art 12(8) (referring to protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity); Kazakhstan–Singapore BIT (n 29) art 6 (referring to public health, safety, and the environment). Notably, economic objectives such as reducing economic inequality or advancing economic development do not feature in these lists.

[67] United Arab Emirates–Uruguay BIT (n 32) annex (4)(b) (indicating that to be covered, the measures should be non-discriminatory and non-arbitrary); Korea–Central America FTA (n 29) (indicating that the measures should be non-discriminatory); Belarus–India BIT (n 46) art 5.5 (referring to non-discriminatory government measures); Sri Lanka–Singapore FTA (n 31) (referring neither to discriminatory nor arbitrary conduct); CPTPP (n 20) annex 9-B, 3(b) (referring neither to discriminatory nor arbitrary conduct).

[68] EU–Singapore IPA (n 8) annex 1(2); EU–Mexico Agreement in Principle (n 10) expropriation annex, (3); Netherlands Model Investment Agreement (n 24).

[69] In *Bear Creek v Peru*, the police powers provision was not applied at all. The tribunal quoted but did not discuss the specific clause, saying instead that the police powers 'exceptions' had been supplanted by the treaty's express exceptions provisions. *Bear Creek v Peru*, Award, ICSID Case No ARB/14/21 (30 November 2017) paras 371, 471–74 (hereafter *Bear Creek v Peru*).

conduct; how to determine whether a policy purpose is 'legitimate';[70] and, as noted above, what types of measures or conduct fall into the 'rare circumstances' category.

7.32 Other notable aspects of a few of the 2018 treaties are their specific approaches to compensation. Several provide that for cases involving expropriation of land, compensation shall be in accordance with the domestic law of the host state.[71] On issues of timing, the Japan–Armenia treaty states that Armenia must pay compensation prior to expropriating property, while Japan's duty is to pay compensation promptly after the expropriation.[72] The timeliness of payment can have important implications for the amount of damages awarded, and can raise particular challenges for governments when they contest that there has been an expropriation warranting compensation in the first place.

3. Non-discrimination

7.33 While non-discrimination IIA provisions have only rarely been a direct source of liability,[73] their use has prompted reactions and treaty refinements. With respect to the national treatment standard, for instance, the *Bilcon* award, in which the tribunal held Canada liable for disparate treatment of different mining projects but declined to find any nationality-based discrimination, apparently raised concerns that the national treatment standard was being used to discipline conduct that it should not, and that the burdens of production and proof relevant for determining liability were being improperly shifted to the respondent to justify disparate treatment, as opposed to the claimant to establish improper discrimination.[74] The MFN provision, for its part, has been a

[70] Several treaties provide illustrative lists of the types of policy aims are legitimate, referring, for instance, to public health, safety, and environmental objectives. See eg Korea–Central America FTA (n 29) annex 9-C, fn 17; Belarus–India BIT (n 46) art 5.5. Economic objectives are not typically included in these lists. This is arguably significant in light of tribunal statements that (although the objective of attracting investment is undoubtedly legitimate), the aim of retaining profits from such investment is not. (*UP and CD Holding International v Hungary*, Award, ICSID Case No ARB/13/35 para 414). This perspective may correspond with broad free-transfer provisions in investment treaties, but raises policy questions in an era when, inter alia, restrictions on capital flows are now seen as useful policy tools, and when home governments such as the United States are using tax policies to pull foreign-earned profits back home.

[71] Kazakhstan–Singapore BIT (n 29) art 6(3); EU–Singapore IPA (n 8) annex 2; Belarus–India BIT (n 46) art 5; CPTPP (n 20) annex 9-C.

[72] Japan–Armenia BIT (n 30) art 12(1)(c).

[73] The most favoured nation provision has, however, more commonly been an indirect source of liability owing to its use as a tool to import more favorable procedural and substantive provisions from other treaties.

[74] See eg reactions to aspects of the *Bilcon* award dealing with the national treatment obligations in submissions made by the NAFTA parties to the *Mesa* tribunal. *Mesa Power Group LLC v Canada*, United States Submission on the *Bilcon* Award, UNCITRAL, PCA Case No 2012-17 (12 June 2015) paras 1–4; *Mesa Power Group LLC v Canada*, Mexico Submission on the *Bilcon* Award, UNCITRAL, PCA Case No 2012-17 (12 June 2015) paras 4–7; *Mesa Power Group LLC v Canada*, Canada Submission on the *Bilcon* Award, UNCITRAL, PCA Case No 2012-17 (14 May 2015) paras 20–26. For a recent elaboration of the meaning of the national treatment standard by the respondent and non-disputing party states see eg *Resolute Forest Products v Canada*, Canada's Counter-Memorial on Merits and Damages, PCA Case No 2016-13 (17 April 2019) paras 248–52 and associated footnotes. See also *Mercer Int'l v Canada*, Submission of Mexico Pursuant to art 1128 of NAFTA, ICSID Case No ARB(AF)/12/3 (8 May 2015) paras 10–15. In a 2018 award, the tribunal in *Mercer v Canada* generally accorded with these points, though indicated that the respondent state retains the 'evidential burden of proof' and the burden to prove its allegations. In this regard, the tribunal also commented that it was influenced by Canada's *Mercer v Canada*, Award (6 March 2018) paras 7.11–7.16, 7.41–7.46.

source of controversy for roughly twenty years, since the issuance of the *Maffezini* decision,[75] as investors have primarily used it not to protect against actual nationality-based discrimination, but to import (sometimes successfully) more favourable procedural, jurisdictional, and substantive protections from other treaties.

7.34 Many 2018 treaties seek to address some of these issues. Treaties are increasingly clarifying that national treatment and MFN provisions permit disparate treatment when there are legitimate reasons for distinguishing between different investors and/or investments,[76] and that claimants bear the burden of proving each element of their cases (which presumably includes establishing that the grounds and means for differentiation are not legitimate).[77]

7.35 With respect to the issue of importation, a significant share of the IIAs covered clarify that the MFN provision is not to be used to import procedural or jurisdictional provisions from other treaties.[78] Fewer agreements, but still several, clarify that the MFN provision is not meant to be used to import substantive provisions from any other IIAs,[79] or from previously concluded IIAs[80] and/or particular regional IIAs.[81]

4. Restrictions on performance requirements

7.36 While modern investment treaties are often thought to clarify and narrow state obligations toward foreign investors and investments, some of the relatively newer provisions being added persist without much in the way of qualification. For example, the treaties

[75] *Emilio Agustín Maffezini v Spain*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No ARB/97/7 (25 January 2000) paras 38–64.

[76] See eg Sri Lanka–Singapore FTA (n 31) art 10.4; Peru–Australia FTA (n 31) art 8.4, fn 7; USMCA (n 17) arts 14.4(4) and 14.5(4); Argentina–Japan BIT (n 31) arts 2(3) and 3(3); Brazil–Guyana CFIA (n 46) art 5(4); Brazil–Chile FTA (n 46) art 8.5(3). The Belarus–India BIT in article 4.1, identifies some of the objectives that are deemed legitimate, including those relevant to the '(a) the goods or services produced or consumed by the investment, (b) the actual and potential impact of the investment on third persons, the local community, or the environment, and (c) the practical challenges of regulating the investment'. Belarus–India BIT (n 46). Additionally, a 'Drafters' Note' attached to the CPTPP includes several paragraphs elaborating on the parties' understanding of the non-discrimination provisions, and the ISDS cases that align with their understanding. Notably, this text reinforces the notion that the standards 'seek to ensure that foreign investors or their investments are not treated less favourably on the basis of their nationality'. The impact of this clarifying language, attributable in particular to the method in which it is appended to the agreement is, however, uncertain. See CPTPP (n 20) Drafters' Note on Interpretation of 'In Like Circumstances' under art 9.4 (National Treatment) and art 9.5 (Most Favoured Nation Treatment).

[77] See eg Peru–Australia FTA (n 31) art 8.24(7); USMCA (n 17) art 14.D.7(7); Belarus–India BIT (n 46) art 23.2; CPTPP (n 20) art 9.23(7).

[78] See eg Brazil–Guyana CFIA (n 46) art 6(3)(i); Brazil–Chile FTA (n 46) art 8.6(3)(a); Argentina–Japan BIT (n 31) art 3(3); USMCA (n 17) annex 14.D.3, fn 22, annex 14-E, fn 30; Japan–Jordan BIT (n 30) art 4; Kazakhstan–Singapore BIT (n 29) art 5(4); EU–Mexico Agreement in Principle (n 10) art 4; Peru–Australia FTA (n 31) art 8.5(3); Sri Lanka–Singapore FTA (n 31) art 10.5(3); Japan–Armenia BIT (n 30) art 3; Korea–Central America FTA (n 29) fn 1; United Arab Emirates–Uruguay BIT (n 32) art 5(3); Mali–United Arab Emirates BIT (n 39) art 4(4); Netherlands Model Investment Agreement (n 24) art 8(3).

[79] USMCA (n 17) annex 14-D.3, fn 22, annex 14.E, fn 30; EU–Mexico Agreement in Principle (n 10) art 4; Netherlands Model Investment Agreement (n 24) art 8(3).

[80] Argentina–Japan BIT (n 31) art 3(3); Kazakhstan–Singapore BIT (n 29) art 5(3)(b); Sri Lanka–Singapore FTA (n 31) art 10.5(4)(a); Brazil–Chile FTA (n 46) art 8.6(3)(b).

[81] Kazakhstan–Singapore BIT (n 29) art 5(3)(c)–(d); Sri Lanka–Singapore FTA (n 31) art 10.5(4)(b)–(c).

concluded in 2018 continue to include standard restrictions on performance requirements, a pattern that we identified in previous editions of this *Yearbook*.[82]

7.37 The treaties including these types of provisions typically do so by referring to and incorporating the WTO's TRIMs Agreement,[83] or by inserting TRIMs+ provisions directly into treaty text.[84] For those treaties that have included TRIMs+ restrictions on performance requirements, they typically state that the restrictions apply not only to covered investors from the home state, but any investor regardless of nationality.[85] The treaties also often enable investors to pursue allegations of breach directly through ISDS as opposed to, as is done under the TRIMs agreement, confining these disputes to the state-to-state level.[86]

7.38 These types of restrictions are particularly notable, given the fact that performance requirements—which can encompass a broad suite of mandatory and incentive-based contractual terms and government measures—are often employed as ways of capturing some of the promised (but not always realized) benefits of foreign direct investment.[87] They are also cited as measures that could be used to facilitate transitions to a green economy.[88] While different types of performance requirements have been subject to critique on a number of important and compelling theoretical and practical grounds, it is nevertheless unclear that broad, static, and easily enforced prohibitions on such measures, especially the TRIMs+ types of restrictions, are warranted given the roles that performance requirements can potentially play in harnessing investment for sustainable development when designed and implemented well.[89] These issues are important to highlight, given the narrative that modern treaties are more protective of host policy space than their predecessors. While that may be true when considering some aspects of these agreements, it is not necessarily true as a general statement of the treaties' trajectories.

C. Restricting Access to ISDS

7.39 Given many states' growing concerns over arbitral tribunals' overreach into matters of domestic governance and sovereignty, states have continued the trend, as documented

[82] Lise Johnson and Lisa Sachs, International Investment Agreements, '2013: A Review of Trends and New Approaches' in Andrea Bjorklund (ed), *Yearbook on International Investment Law & Policy 2013-14* (OUP 2015) 25, 54–56 (hereafter Johnson and Sachs, '2013: A Review of Trends and New Approaches'). See also Lorenzo Cotula, 'Do Investment Treaties Unduly Constrain Regulatory Space?' (2014) 9 Questions of International Law 19.

[83] See eg Sri Lanka–Singapore FTA (n 31) art 10.7.

[84] See eg Peru–Australia FTA (n 31) art 8.10; USMCA (n 17) art 14.10; CPTPP (n 20) art 9.10; Korea–Central America FTA (n 29) art 9.9; Japan–Armenia BIT (n 30) art 6.

[85] See eg Peru–Australia FTA (n 31) art 8.10(1); USMCA (n 17) art 14.2(1)(c); CPTPP (n 20) art 9.2(1)(c); Korea–Central America FTA (n 29) art 9.1(1)(c); Japan–Armenia BIT (n 30) 6(2).

[86] But see eg Sri Lanka–Singapore FTA (n 31) art 10.13(1) (not including the chapter on performance requirements as part of the obligations subject to ISDS); USMCA (n 17) (not permitting ISDS claims for alleged breach of the restrictions on performance requirements, except for covered investors with qualifying government contracts).

[87] See eg Lise Johnson, 'Local Content Policies and Strategies: A Crucial Time to Revisit an Old Debate' *GiZ* (18 January 2017) (hereafter Johnson 'Local Content Policies and Strategies').

[88] See ch 23 in this volume by Rachel Denae Thrasher.

[89] Johnson 'Local Content Policies and Strategies' (n 87).

in past years,[90] of narrowing access to ISDS. The vast majority of the twenty-seven 2018 IIAs and one model BIT under review in this chapter included at least one element that narrowed or limited access to ISDS.[91] This chapter discusses four ways in which 2018 treaties limit access to ISDS: by excluding ISDS altogether; by excluding certain sectors or types of government measures from treaty coverage; by precluding treaty-based investor protections from being enforced through ISDS for certain sectors, measures, or claims; and by filtering certain disputes first to domestic authorities for binding determinations.

7.40 In addition to these mechanisms, there are a number of other ways that states are limiting access to ISDS. As covered in last year's *Yearbook on International Investment Law & Policy*,[92] parties can narrow the scope of covered investments or investors, limiting coverage to investments or investors that meet certain criteria and, in some cases, denying access to ISDS to investors who have structured their investments solely to benefit from treaty protections.[93] Several treaties include statutes of limitations, limiting the amount of time after the investor should reasonably have been aware of a potential treaty breach that a dispute can be filed.[94] Section D, below, also discusses provisions that condition access to ISDS upon specified investor conduct,[95] in the context of broader efforts by states parties to promote investor responsibility.

[90] See eg Coleman, Johnson, Sachs, and Lobel 'International Investment Agreements 2017' (n 29); Jesse Coleman, Lise J Johnson, Lisa E Sachs, and Kanika Gupta, 'International Investment Agreements 2015-2016: A Review of Trends and New Approaches' in Lisa E Sachs and Lise J Johnson (eds), *Yearbook on International Investment Law & Policy 2015–2016* (OUP 2018) (hereafter Coleman, Johnson, Sachs, and Gupta 'International Investment Agreements 2015–2016').

[91] This trend is also covered in United Nations Conference on Trade and Development (UNCTAD), 'Reforming Investment Dispute Settlement: A Stocktaking' (March 2019) IIAs Issues Note (hereafter UNCTAD 'Reforming Investment Dispute Settlement').

[92] Coleman, Johnson, Sachs, and Lobel 'International Investment Agreements 2017' (n 29) 103–09.

[93] See eg Netherlands Model Investment Agreement (n 24) art 16(3): 'The Tribunal shall decline jurisdiction if an investor within the meaning of Article 1(b) of this Agreement, which has changed its corporate structure with a main purpose to gain the protection of this Agreement at a point in time where a dispute had arisen or was foreseeable. This particularly includes situations where an investor has changed its corporate structure with a main purpose to submit a claim to its original home state' or Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates (signed 16 April 2018) art 10 (hereafter Argentina–United Arab Emirates BIT) art 1: 'The term "investment" means any asset owned or controlled by an investor of a Party, either directly or indirectly, established in the territory of the other Party, in accordance with its laws and regulations and with characteristics such as: assumption of business risk, introduction of capital or other resources into the territory of the host Party and contribution to the economic development of that Party' and that: 'The term "investment" does not include: (a) sovereign debt of a Party or debt of a State enterprise, which shall be subject to the applicable law, jurisdiction, and terms and conditions established in each relevant instrument; (b) debt securities such as bonds, debentures and any other financial instrument; (e) monetary claims exclusively arising from commercial contracts for the sale of goods or services; (d) judicial or administrative resolutions; (e) in the case of the Argentine Republic, concessions to search for, explore, extract or exploit natural resources, and natural resources, which shall be subject to the laws and regulations of the Argentine Republic; (f) in the case of the United Arab Emirates, concessions to search for, explore, extractor exploit natural resources, and natural resources, which shall not be covered by this Agreement'.

[94] See eg USMCA (n 17) annex 14-D.5(1)(c): 'No claim shall be submitted to arbitration under this Annex unless. . . no more than four years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 14.D.3.1 (Submission of a Claim to Arbitration) and knowledge that the claimant (for claims brought under Article 14.D.3.1(a)) or the enterprise (for claims brought under Article 14.D.3.1(b)) has incurred loss or damage'.

[95] See eg Netherlands Model Investment Agreement (n 24) art 16(2): 'The Tribunal shall decline jurisdiction if the investment has been made through fraudulent misrepresentation, concealment, corruption, or similar bad faith conduct amounting to an abuse of process'.

Finally, treaties are increasingly incorporating requirements that investors exhaust local remedies.[96] These provisions allow for domestic institutions to consider the merits of the dispute before a claim is submitted to a tribunal, although after exhausting local remedies or attempting to do so for a specific amount of time, investors still have access to tribunals to challenge either the underlying dispute or the result of the judicial process. A notable exception is the Belarus–India BIT, which precludes ISDS tribunals from 'review[ing] the merits of a decision made by a judicial authority of the Parties',[97] effectively limiting the scope of arbitral review to arguable lack of due process.

1. No inclusion of ISDS

7.41 At least six IIAs signed in 2018 did not provide access to ISDS for alleged breaches of treaty protections, and two additional multilateral IIAs excluded ISDS coverage between two or more treaty parties. In keeping with its practice in past IIAs, Brazil's new treaties with Suriname, Guyana, Chile, and Ethiopia provide only for state–state dispute settlement.[98] The EFTA, comprised of Iceland, Liechtenstein, Norway, and Switzerland, similarly only provides for state–state dispute settlement in its investment treaties, including its 2018 agreements with Indonesia and Ecuador.[99]

7.42 Two other treaties allowed for dispute settlement through ISDS among some parties but not others. The CPTPP, concluded among Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam, included ISDS in treaty text, providing that: '[e]ach Party consents to the submission of a claim to arbitration under this [Investor–State Dispute Settlement] Section in accordance with this Agreement'.[100] However, in side letters to the agreement, New Zealand mutually denied access to ISDS in disputes with investors from New Zealand into Australia and Peru and vice versa,[101] and required states parties to consent to ISDS arbitration for disputes involving New Zealand and Brunei Darussalam, Malaysia, and Vietnam.[102] However, New Zealand is party to the Agreement Establishing the

[96] See USMCA (n 17) art 14-D.5(1)(a) and (b); Sri Lanka–Singapore FTA (n 31) art 10.14(3); Belarus–India BIT (n 46) art 15(1).

[97] Belarus–India BIT (n 46) art 13.4(i).

[98] Brazil–Suriname CFIA (n 46) art 25; Brazil–Guyana CFIA (n 46) art 25; Brazil–Chile FTA (n 46) art 22; Brazil–Ethiopia CFIA (n 46) art 24.

[99] Indonesia–EFTA CEPA (n 46) ch 11; Comprehensive Economic Partnership Agreement Between the EFTA States and the Republic of Ecuador (signed 25 June 2018) ch 11 (hereafter EFTA–Ecuador CEPA). The text of the EU–Japan Economic Partnership Agreement does not yet include investor protections or a dispute settlement, the negotiation of which is ongoing. European Commission, 'Key elements of the EU-Japan Economic Partnership Agreement-Memo' (12 December 2018) http://trade.ec.europa.eu/doclib/press/index.cfm?id=1955.

[100] CPTPP (n 20) art 9(20)(1).

[101] Parker, 'Letter to Minister Steven Ciobo' (n 22) Parker, 'Letter to Minister Eduardo Ferreyros Küppers' (n 22).

[102] Parker, 'Letter to Minister Erywan Pehin Yusof' (n 22); Parker, 'Letter to Secretary General J Jayasiri' (n 22); Parker, 'Letter to Minister Tran Tuan Anh' (n 22).

ASEAN–Australia–New Zealand Free Trade Area with Australia, Brunei, Malaysia, and Vietnam, which still provides for investment dispute adjudication by ISDS.[103]

7.43 The USMCA, meanwhile, removed access to ISDS between the United States and Canada, and between Canada and Mexico, although access to ISDS between the latter two countries still exists under the CPTPP. For investors from the United States and Canada into the other party, access to ISDS will expire three years after the termination of NAFTA.[104] The USMCA retains ISDS only between investors from the United States and Mexico into the other party,[105] although with other limitations on access and substantive standards of protection, as discussed below.

2. Exclusions

7.44 A greater number of 2018 IIAs than those excluding ISDS entirely provide for ISDS but carve out certain types of conduct from treaty coverage, meaning that investor protections do not apply and ISDS is not available. These exclusions can take a number of forms: where some exclude treaty coverage based on the types of measures that governments can adopt (ie in relation to changes in tax or subsidy policies) or the purpose of those measures (ie to protect public health), others exclude treaty coverage based on the type of government actor enacting a given measure (for example, a local government or state-owned enterprise) or based on investor types or sectors affected.

7.45 Provisions that excluded specific types of measures or categories of disputes, namely on taxation, subsidies, and prudential measures, remain the most popular exclusions among the 2018 treaties under review. The Belarus–India BIT, Argentina–United Arab Emirates BIT, Singapore–Sri Lanka FTA, and Indonesia–EFTA CEPA all explicitly carved out taxation-related measures from treaty coverage.[106] The Kazakhstan–Singapore BIT excludes taxation measures from treaty coverage except in relation to expropriation protections, the Argentina–Japan BIT excludes coverage except for expropriation and access to Courts of Justice protections, and the Canada–Moldova BIT excludes taxation measures from treaty coverage except in relation NT, MFN, and expropriation protections.[107] Japan's BITs with Jordan and Armenia, meanwhile, partially invert these provisions, excluding only NT and MFN coverage for taxation measures (as well as performance requirement protections in the case of the Japan–Armenia BIT).[108]

[103] Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area, ch 10 s B.
[104] USMCA (n 17) annex 14-C(3).
[105] ibid annex 14-D.
[106] Belarus–India BIT (n 46) art 2(4)(ii); Argentina–United Arab Emirates BIT (n 93) art 10; Sri Lanka–Singapore FTA (n 31) art 10.2(2)(e); Indonesia–EFTA CEPA (n 46) art 1.8.
[107] Kazakhstan–Singapore BIT (n 29) arts 2(3)(c) and 21(1); Argentina–Japan BIT (n 31) art 19(3); Canada–Moldova BIT (n 29) art 14.
[108] Japan–Jordan BIT (n 30) art 19(2); Japan–Armenia BIT (n 30) art 20(2).

7.46 These exclusions differ from language increasingly used in treaties that reserve policy space with respect to certain types of measures, including the ability to adopt taxation measures. For example, the Ecuador–EFTA CEPA clarifies that '[t]his Agreement shall not restrict a Party's fiscal sovereignty to adopt measures related to taxes', except as they relate to NT and MFN provisions.[109] Japan's treaties with Jordan, Armenia, and the United Arab Emirates similarly each clarify that: '[n]othing in this Agreement shall affect the rights and obligations of either Contracting Party under any tax convention'.[110] Notably, that a treaty does not prevent a state from taking a given measure does not necessarily mean that an ISDS tribunal might nevertheless find that measure to breach an IIA and award damages to an investor to compensate for its impacts.[111] Similar 'right to regulate' provisions, for example, have not precluded tribunals from determining that such allowable measures nevertheless breached a treaty protection, or that such a measure, while allowable, nevertheless required investor compensation.[112]

7.47 Exclusions for subsidies and prudential measures were also prevalent in the 2018 treaties under review. The Belarus–India BIT, Argentina–United Arab Emirates BIT, Singapore–Sri Lanka FTA, Kazakhstan–Singapore BIT, and EU–Mexico draft agreement all exclude subsidies from treaty application,[113] while the Korea–Central America FTA, Japan–United Arab Emirates BIT, EU–Vietnam IPA, and Japan–Argentina BIT exclude subsidies coverage from NT and MFN provisions only,[114] and the EU–Singapore IPA from NT provisions only.[115] The EU–Singapore Investment Protection Agreement (IPA) and the Netherlands Model Investment Agreement further affirm that nothing in the respective treaties 'shall be construed as preventing' a party 'from discontinuing the granting of a subsidy'.[116] None of the 2018 treaties provide full exclusions for prudential measures, but the EU–Japan EPA, the EU–Singapore IPA, and the Canada–Moldova BIT clarify that their respective IIAs shall not prevent states from adopting measures for prudential reasons.[117]

[109] EFTA–Ecuador CEPA (n 99) art 1.7.

[110] Japan–Jordan BIT (n 30) art 19(1); Japan–Armenia BIT (n 30) art 20(1); Japan–United Arab Emirates BIT (n 31) art 22.

[111] See eg Robert Stumberg, 'Safeguards for Tobacco Control: Options for the TPPA' (2013) 39 American Journal of Law and Medicine 382, 403: 'The vagueness of [exceptions'] terms (like 'measures necessary' to protect health) requires interpretation, and the factual context will change with every measure that a country or investor decides to challenge'.

[112] See eg Vera Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs' (2016) 50 Vanderbilt Journal of Transnational Law 355, 391–393.

[113] Belarus–India BIT (n 46) art 2(4)(v); Argentina–United Arab Emirates BIT (n 93) art 2(a); Sri Lanka–Singapore FTA (n 31) art 10.2(2); and Kazakhstan–Singapore BIT (n 29) art 2(3)(a); EU–Mexico Agreement in Principle (n 10) art 14.3. The EU–Mexico Agreement in Principle subsidy exclusions only applies, however, in the absence of legal or contractual commitments to provide or renew subsidies.

[114] Korea–Central America FTA (n 29) art 9.13(5)(b); Japan–United Arab Emirates BIT (n 31) art 3(3) and 4(3)(ii); Argentina–Japan BIT (n 31) art 7(8)(b), EU–Vietnam IPA (n 9) art 2.1.3.

[115] EU–Singapore IPA (n 8) art 2.1(2).

[116] Netherlands Model Investment Agreement (n 24) art 2(4); EU–Singapore IPA (n 8) art 2.2(4).

[117] Agreement between the European Union and Japan for an Economic Partnership (signed 17 July 2018) art 8.65 (hereafter EU–Japan EPA); EU–Singapore IPA (n 8) art 4.4; Canada–Moldova BIT (n 29) art 17(2).

7.48 Other treaties exclude coverage based on the sector or the government actor responsible for the challenged measure. The United Arab Emirates' agreements with Kazakhstan, Argentina, Mali, and Japan exclude natural resource-based investments from treaty application in their investment definitions.[118] The Singapore–Sri Lanka FTA also limits protections, including NT, MFN, and performance requirements, for the agriculture, fisheries, forestry, mining and quarrying, real estate, arms and explosives, and traditional handicrafts sectors.[119] Singapore, for its part, excludes investments related to 'the collection, purification, treatment, disposal and distribution of water, including waste water, in Singapore', real estate, the arms and explosives sector, and broadcasting from NT and MFN protection.[120]

7.49 Singapore's list of exclusions overlaps with the one used in its Investment Protection Agreement with the EU, which clarifies that NT protections 'shall not apply to any measure relating to: (a) the supply of potable water in Singapore; (b) the ownership, purchase, development, management, maintenance, use, enjoyment, sale or other disposal of residential property or to any public housing scheme in Singapore'.[121] The EU–Vietnam IPA excludes NT and MFN coverage for audio-visual services, mining and processing of nuclear materials, production or trade in war materials, national maritime cabotage, and air transport services.[122] It also excludes mining, oil and gas, forestry and hunting, fisheries and aquaculture, recreational and cultural services, and communications services (except telecommunications and postal services) from MFN coverage for both parties, and a number of sectors including natural resources, education, power distribution and transmission, and education services, among others, from NT coverage for Vietnam only.[123]

7.50 Finally, the Belarus–India BIT and EU–Singapore IPA exclude measures taken by specific government actors from treaty coverage. The Belarus–India BIT excludes treaty application to 'any measure by a local government',[124] as well as 'non-discriminatory measures of general application taken by a central bank or monetary authority of a Party in pursuit of monetary and related credit policies or exchange rate policies'.[125] The EU–Singapore IPA applies a similar exclusion, exempting treaty coverage for 'activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies'.[126]

[118] Agreement between the Government of the Republic of Kazakhstan and the Government of the United Arab Emirates on Promotion and Reciprocal Protection of Investments (signed 24 March 2018) art 1.1(d) (hereafter Kazakhstan–United Arab Emirates BIT); Argentina–United Arab Emirates BIT (n 93) art 1(e); Mali–United Arab Emirates BIT (n 39) art 1.2; Japan–United Arab Emirates BIT (n 31) art 1(a).
[119] Sri Lanka–Singapore FTA (n 31) annex 10-B.
[120] ibid annex 10-C.
[121] EU–Singapore IPA (n 8) Understanding 1.
[122] EU–Vietnam IPA (n 9) art 2.1.2.
[123] EU–Vietnam IPA (n 9) art 2.4 and annex 2.1.
[124] Belarus–India BIT (n 46) art 2.4.
[125] ibid art 32.2.
[126] EU–Singapore IPA (n 8) art 4.4.

7.51 The types of exclusions discussed in this section carve out space from relevant treaties for states to promulgate specific types of measures, or measures that affect certain types of investors. They function by altering the substantive requirements of the treaty as opposed to the procedural application of the treaty's dispute settlement mechanisms. The following subsection on treaty exceptions discusses efforts by states to carve out space through application of those dispute settlement provisions.

3. Exceptions

7.52 The third category of narrowed access to ISDS involves limiting the availability of ISDS while leaving treaty protections generally in place. For instance, following the high profile (and controversial) disputes filed by Philip Morris in 2010 and 2011 challenging Australian and Uruguayan tobacco-related measures,[127] several treaties signed in 2018 preclude ISDS access for tobacco-related measures. Singapore's FTA with Sri Lanka and BIT with Kazakhstan both include in their ISDS sections: 'This Section shall not apply to any dispute concerning any measure adopted or maintained or any treatment accorded to investors or investments by a Party in respect of tobacco or tobacco-related products that is aimed at protecting or promoting human health.'[128]

7.53 The CPTPP, for its part, allows parties to 'elect to deny the benefits' of its ISDS chapter 'with respect to claims challenging a tobacco measure of the Party'.[129] The exception goes on to clarify that:

> Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed.[130]

7.54 Australia's FTA with Peru takes a third approach: it does not explicitly carve out tobacco measures from arbitration by ISDS, but seems to attempt to protect measures like the one challenged by Philip Morris by providing that:

> No claim may be brought under this [Investor–State Dispute Settlement] Section in relation to a measure that is designed and implemented to protect or promote public health. For greater certainty, for Australia, such measures include: measures

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

[128] Sri Lanka–Singapore FTA (n 31) art 10.13; Kazakhstan–Singapore BIT (n 29) art 2.

[129] CPTPP (n 20) art 29.5.

[130] ibid.

comprising or related to the Pharmaceutical Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration and Office of the Gene Technology Regulator.[131]

7.55 Other treaties limit access to ISDS more narrowly in relation to specific existing domestic legislation. The Canada–Moldova BIT and the CPTPP, for example, limit ISDS claims 'following a review under the Investment Canada Act',[132] which 'provide[s] for the review of significant investments in Canada by non-Canadians' and prohibits investments by non-Canadians 'unless the investment has been reviewed under this Part and the [relevant] Minister is satisfied or is deemed to be satisfied that the investment is likely to be of net benefit to Canada', except for when such a 'delay in implementing the investment would result in undue hardship to the non-Canadian or would jeopardize the operations of the Canadian business that is the subject of the investment'.[133]

7.56 Similarly, under the CPTPP, Mexico withholds consent to submission of a claim to arbitration 'if the submission to arbitration of that claim would be inconsistent with' a number of laws and 'acts of authority', including its:[134]

(a) Hydrocarbons Law, Articles 20 and 21;
(b) Law on Public Works and Related Services, Article 98, paragraph 2;
(c) Public Private Partnerships Law, Article 139, paragraph 3;
(d) Law on Roads, Bridges, and Federal Motor Carriers, Article 80;
(e) Ports Law, Article 3, paragraph 2;
(f) Airports Law, Article 3, paragraph 2;
(g) Regulatory Law of the Railway Service, Article 4, paragraph 2;
(h) Commercial and Navigation Maritimes Law, Article 264, paragraph 2;
(i) Civil Aviation Law, Article 3, paragraph 2; and
(j) Political Constitution of the United Mexican States, Article 28, paragraph 20, subparagraph VII, and Federal Telecommunications and Broadcasting Law, Article 312.

7.57 The Belarus–India BIT precludes certain types of claims, by specifying that tribunals 'shall not decide' disputes 'arising solely from an alleged breach of a contract between a Party and an investor . . .[s]uch disputes shall only be resolved by the domestic courts or in accordance with the dispute resolution provisions set out in the relevant contract'.[135] Furthermore, in addition to excluding local governments and monetary authorities from treaty application, the Belarus–India BIT also limits tribunal authority to review 'the merits of a decision made by a judicial authority of the Parties' or to review 'any

[131] Peru–Australia FTA (n 31) ch 8 fn 17.
[132] Canada–Moldova BIT (n 29) annex III; CPTPP (n 20) annex 9-H.2.
[133] Investment Canada Act RSC (1985) c. 28 (1st Supp) arts 2, 16.1, and 16.2.a.
[134] CPTPP (n 20) annex 9-L.C.
[135] Belarus–India BIT (n 46) art 13.2.

claim that is or has been subject of an arbitration under Chapter V [State–State Dispute Settlement]'.[136]

7.58 The USMCA also effectively precludes access to ISDS for certain claims based on actor-type, although it does so on the basis of the investor rather than government actor. Under the USMCA, Mexican and US investors into the other party in the oil and gas, electricity, telecommunications, and transportation services and infrastructure sectors can challenge treaty breaches before ISDS provided that they are party to government contracts.[137] Other US or Mexican investors, in contrast, are permitted to submit ISDS claims only for breaches of NT, MFN, and direct (but not indirect) expropriation protections.[138]

4. Filter mechanisms

7.59 In general, determinations of whether the above exclusions and exceptions apply if they arise in particular claims are left to tribunals. This subsection, in contrast, notes the continued trend in a selection of 2018 treaties to filter determinations about the legitimacy of a policy measure to relevant state officials, limiting the ability of ISDS tribunals to make such determinations.[139] For instance, the Argentina–Japan BIT and Canada–Moldova BIT allow for taxation-based expropriation claims to proceed to arbitration by ISDS only after (1) investors alleging taxation-related expropriations refer the dispute to the relevant authorities of the respondent and claimant states, and (2) those authorities fail to agree that the measure is *not* an expropriation within 180 days.[140] The Kazakhstan–Singapore BIT and CPTPP also include substantively identical taxation-related expropriation filter mechanisms; the CPTPP's reads:

> An investor that seeks to invoke Article 9.8 (Expropriation and Compensation) with respect to a taxation measure must first refer to the designated authorities of the Party of the investor and the respondent Party, at the time that it gives its notice of intent under Article 9.19 (Submission of a Claim to Arbitration), the issue of whether that taxation measure is not an expropriation.[141]

7.60 Like the Argentina–Japan and Canada–Moldova BITs, these treaties then only allow investors to raise taxation-based expropriation claims before ISDS tribunals '[i]f

[136] ibid art 13.4.
[137] USMCA (n 17) annexes 14-E.2(a)(i)(A) and 14-E.6(b).
[138] ibid annex 14-D.1(a)(i).
[139] Coleman, Johnson, Sachs, and Gupta, 'International Investment Agreements 2015-2016' (n 90) 65–69. 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* (OUP 2016) 44–47 (hereafter Johnson, Sachs, and Coleman 'Trends in International Investment Agreements, 2014').
[140] Argentina–Japan BIT (n 31) art 19.4; Canada–Moldova BIT (n 29) art 14.7.
[141] CPTPP (n 20) art 29.4.

the designated authorities do not agree to consider the issue' or 'fail to agree that the measure is not an expropriation within a period of six months of the referral'.[142]

7.61 Other treaty provisions do not require investors to notify domestic officials of disputes for binding judgments prior to filing ISDS claims, but allow respondent states to refer determinations about whether challenged measures fall into categories covered by relevant exclusions. The Belarus–India BIT and Canada–Moldova BIT, for instance, allow for respondent states to make judgments as to whether challenged measures are taxation measures in connection to taxation-measure exclusions. The Belarus–India BIT provides:

> This Treaty shall not apply to. . . any law or measure regarding taxation, including measures taken to enforce taxation obligations. For greater certainty, it is clarified that where the State in which investment is made, decides that conduct alleged to be a breach of its obligations under this Treaty is a subject matter of taxation, such decision of that State, whether before or after the commencement of arbitral proceedings, shall be non-justiciable and it shall not be open to any arbitration tribunal to review such decision.[143]

7.62 Canada has also included substantially similar filter mechanisms related to exceptions in financial services provisions in its 2018 treaties;[144] similar Canadian filter mechanisms were also discussed in past *Yearbook* chapters.[145] For example, the Canada–Moldova BIT provides that, if respondents invoke a General Exceptions defence in response to claims related to financial services, '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', and '[t]he Tribunal may not proceed pending receipt of a report under this Article'.[146] If the parties cannot agree on a report, the issue is submitted to an arbitral panel under the state-to-state dispute settlement procedures of the treaty. Whether submitted by the parties or the arbitral panel, such a report is binding upon the ISDS tribunal.[147] Moreover, the Canada–Moldova BIT allows respondents to request that tribunals request 'a joint interpretation' on defences related to treaty exceptions or Annexes, which binds tribunal judgment.[148] Parties can also otherwise issue binding joint interpretations of treaty provisions in the absence of tribunal request.[149] The Korea–Central America FTA and the Peru–Australia FTA also provide for joint interpretations of treaty provisions to be binding on tribunals.[150]

[142] ibid; the corresponding filter mechanism under the Kazakhstan–Singapore BIT (n 29) is included in art 21.
[143] Belarus–India BIT (n 46) art 2.4(ii).
[144] CPTPP (n 20) art 11.22.2; Canada–Moldova BIT (n 29) art 22.3 and 22.4; USMCA (n 17) annex 17-C.5.
[145] See Coleman, Johnson, Sachs, and Gupta, 'International Investment Agreements 2015-2016' (n 90) 65; Johnson, Sachs, and Coleman, 'Trends in International Investment Agreements, 2014' (n 139) 44–45.
[146] Canada–Moldova BIT (n 29) art 22.3 and 22.4.
[147] ibid art 22.4.
[148] ibid art 32.2.
[149] ibid art 32.1.
[150] Korea–Central America FTA (n 29) art 9.23.2; Peru–Australia FTA (n 31) art 8.26.

D. Investor Conduct

7.63 Inclusion of investor responsibilities and, in more limited instances, mandatory obligations has emerged as one of the options proposed to rebalance the recognized asymmetry inherent in the current iteration of the international investment regime.[151] Previous *Yearbook* chapters have noted that the scope and, in particular, consequences of provisions couched as 'investor obligations' have varied in recently concluded treaties and published models.[152]

7.64 This section highlights select developments in treaty drafting practice regarding the inclusion of voluntary and mandatory investor responsibilities and obligations. Where relevant, clauses with consequences for treaty coverage are noted. This section focuses on provisions concerning: (a) compliance with host state laws; (b) anti-corruption; and (c) corporate social responsibility. These provisions do not provide an exhaustive review of relevant provisions concerning investor conduct; rather, they highlight developments concerning provisions often referred to in the discussion on addressing the asymmetry in international investment law.

1. Compliance with host state laws

7.65 A number of agreements concluded in 2018 require investors to comply with host state laws in order to benefit from treaty coverage in general or access to the dispute settlement mechanism provided for by the treaty. While many treaties include clauses that implicitly or explicitly require compliance with domestic laws limit compliance to the establishment phase of the investment,[153] some texts concluded in 2018 extend application to subsequent phases of the investment life cycle. In some cases, this requirement is found in the definition of a covered 'investment'.[154] In others, it is found in a specific clause covering compliance with host and, in some cases, home state laws.

7.66 The Netherlands Model Investment Agreement provides an example of the latter (specific clause) approach. Article 7(1) provides that: '[i]nvestors and their investments

[151] For further discussion of asymmetry in international investment law see ch 22 in this volume by Alessandra Arcuri.

[152] Coleman, Johnson, Sachs, and Lobel 'International Investment Agreements 2017' (n 29) 99–129, 123–27; Coleman, Johnson, Sachs, and Gupta 'International Investment Agreements 2015-2016' (n 90) 90–96; Johnson, Sachs, and Coleman 'Trends in International Investment Agreements, 2014' (n 139) 15–64, 50–60. See also Lorenzo Cotula, 'Raising the Bar on Responsible Investment: What Role for Investment Treaties?' (2018) International Institute on Environment and Development http://pubs.iied.org/17454IIED/ accessed 10 June 2019.

[153] For a general discussion of these provisions see Nathalie Bernasconi-Osterwalder and others, 'Harnessing Investment for Sustainable Development: Inclusion of Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements' International Institute for Sustainable Development (January 2018) 9–10 https://www.iisd.org/sites/default/files/meterial/harnessing-investment-sustainable-development.pdf accessed 22 May 2019 (hereafter Bernasconi-Osterwalder and others, 'Harnessing Investment for Sustainable Development').

[154] Developments in arbitral jurisprudence in 2018 included noteworthy developments concerning the definition of a covered 'investment' and related legality requirements. These developments are, however, beyond the scope of this chapter's review.

shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labor laws'.[155] Notably, the Model refers explicitly to compliance with human rights laws, in addition to environmental and labour laws, which is unusual in the context of compliance with domestic law provisions. The Belarus–India BIT also contains a specific provision concerning compliance with laws, requiring investors and their investments to 'comply with all laws of a Party concerning the establishment, acquisition, management, operation and disposition of investments',[156] and to comply with the laws of both states parties concerning taxation.[157] A specific compliance with host state laws provision is also included in Argentina's BIT with the UAE.[158] In Article 14, states parties acknowledge that investors and their investments must comply with the laws, regulations, and policies of the host Party with respect to the management, operation, and disposition of investments.[159]

7.67 Brazil's CFIAs with Guyana[160] and Suriname[161] contain the same provision requiring compliance with domestic legislation. The texts require compliance with the 'laws, regulations, administrative guidelines and policies of a Party concerning the establishment, acquisition, management, operation and disposition of investments'.[162] This provision was absent from Brazil's Model CFIA.[163] Notably, Brazil's CFIA with Ethiopia does not contain a similar provision. Instead, the agreement deals with compliance with domestic legislation under its definition of a covered 'investment'[164] and under 'scope of the agreement', which addresses compliance with domestic legislation only at the time of making the investment, and not throughout the investment process.[165]

7.68 The BIT concluded between Argentina and Japan provides another example of a treaty that addresses compliance with host state laws within the definition of a covered 'investment': that treaty's definition includes a footnote in which the parties note that the agreement 'shall not apply to investments made by investors of a Contracting Party in violation of the applicable laws and regulations of *either or both* of the Contracting Parties'.[166] This clarification is noteworthy, as it requires investments in the host state to comply with applicable laws and regulations in both the home and host state, enabling application of higher home state standards where relevant. The Japan–Jordan BIT also adopts the approach of addressing compliance with host state laws in the definition of

[155] Netherlands Model Investment Agreement (n 24) art 7(1).
[156] Belarus–India BIT (n 46) art 11(i).
[157] ibid art 11(iii).
[158] Argentina–United Arab Emirates BIT (n 93) art 14.
[159] ibid art 14(a).
[160] Brazil–Guyana CFIA (n 46) art 14.
[161] Brazil–Suriname CFIA (n 46) art 14.
[162] Brazil–Guyana CFIA (n 46) art 14(1)(a); Brazil–Suriname CFIA (n 46) art 14(a).
[163] Federative Republic of Brazil, Model Cooperation and Facilitation Investment Agreement (2015) https://investmentpolicyhubold.unctad.org/Download/TreatyFile/4786 accessed 22 May 2019 (hereafter Brazil Model CFIA).
[164] Brazil–Ethiopia CFIA (n 46) art 1.3.
[165] ibid art 3.4.
[166] Argentina–Japan BIT (n 31) art 1(a), fn 1 (emphasis added).

a covered investment, defining an 'investment' under the agreement as 'every kind of asset made in accordance with applicable laws and regulations, owned or controlled, directly or indirectly, by an investor'.[167]

2. Anti-corruption obligations

7.69 Bilateral agreements with Brazil as one state party (with Chile, Ethiopia, Guyana, and Suriname as the other state party) each contain provisions concerning anti-corruption measures. The Brazil–Ethiopia,[168] Brazil–Guyana,[169] and Brazil–Suriname[170] CFIAs contain provisions that mirror Article 15 (Investment Measures and Combatting Corruption and Illegality) of Brazil's 2015 Model CFIA.[171] An almost identical provision has been included in the Brazil–Chile FTA.[172] The first part provides that states parties must adopt or maintain measures to prevent and combat corruption, money laundering, and terrorist activities in relation to matters covered by Chapter 8 (Cooperation and Facilitation of Investment).[173] The second part of the provision provides that nothing in Chapter 8 requires the parties to protect investments *made* with capital or activities of illicit origin, and that nothing in the chapter will require any party to protect investments made with illicit capital or assets.[174] All of the anti-corruption provisions included in agreements to which Brazil is a party are drafted with the state, rather than the investor, as the duty-bearer.

7.70 Mirroring the model provision included in India's December 2015 Model BIT,[175] the Belarus–India BIT provides that investors and their investments must not 'either prior to *or after the establishment* of an investment' give, offer, or promise any form of financial advantage or gift to a government official in return for an act or advantage, and must not be complicit in such conduct.[176] The Argentina–UAE BIT contains a similar provision.[177]

7.71 Following an approach already adopted in past years, the Netherlands Model Investment Agreement provides that a tribunal determining an investor–state claim 'shall decline jurisdiction if the investment has been *made* through fraudulent misrepresentation, concealment, corruption, or similar bad faith conduct amounting to an abuse of process'.[178] The Model is silent on the implications of bad faith conduct by the

[167] Japan–Jordan BIT (n 30) art 1(a). The provision includes an open-ended asset-based definition.
[168] Brazil–Ethiopia CFIA (n 46) art 15.
[169] Brazil–Guyana CFIA (n 46) art 16.
[170] Brazil–Suriname CFIA (n 46) art 16.
[171] Brazil Model CFIA (n 163) art 15.
[172] Brazil–Chile FTA (n 46) art 8.16.
[173] ibid art 8.16(1).
[174] ibid art 8.16(2).
[175] Model Text for the Indian Bilateral Investment Treaty (December 2015) art 11(ii) https://investmentpolicyhubold.unctad.org/Download/TreatyFile/3560 accessed 25 June 2019 (hereafter India December 2015 Model BIT).
[176] Belarus–India BIT (n 46) art 11(ii) (emphasis added).
[177] Argentina–United Arab Emirates BIT (n 93) art 14(b).
[178] Netherlands Model Investment Agreement (n 24) art 16(2) (emphasis added).

investor for jurisdiction over a dispute where that conduct relates to the operation of an investment, rather than the establishment phase.[179] Similarly, the Peru–Australia FTA precludes claims from being brought under section B (Investor–State Dispute Settlement) in relation to investments *established* through illegal conduct.[180] Of note, the FTA clarifies that the exclusion 'does not apply to investments established through minor or technical breaches of the law'.[181] Determination of the nature of the breach and extent to which it falls within the scope of 'illegal conduct' is, it seems, left up to the tribunal.

7.72 While not covered in detail in this chapter, a number of provisions addressing anti-corruption measures include language concerning provision of information by investors.[182] The Belarus–India BIT, for example, requires that investors provide 'information as the Parties may require concerning the investment in question and the corporate history and practices of the investor, for purposes of decision making in relation to that investment or solely for statistical purposes'.[183] Similar provisions are included in the Argentina–UAE BIT,[184] the Brazil–Suriname CFIA,[185] and the Brazil–Guyana CFIA.[186]

3. Corporate social responsibility

7.73 Going beyond compliance with host state laws and anti-corruption measures, a handful of agreements include voluntary provisions seeking to encourage investors to behave more responsibly. An even smaller set of agreements include mandatory provisions requiring compliance with certain measures regarding, for example, liability for damage or harm in the host state. As reported in previous *Yearbook* chapters,[187] these provisions are often included in agreements under the banner of 'corporate social responsibility' (CSR); where they are included, they are generally voluntary in nature, and at times aimed at the state rather than the investor and its investment; only a fraction of treaties include CSR provisions that are binding and include clear consequences in the case of breach.

7.74 A number of treaties concluded in 2018 include CSR provisions where the states parties form the subject of the provisions, rather than investors and their investments. This

[179] See, however, ibid art 16(3) regarding corporate structure.
[180] Peru–Australia FTA (n 31) art 8.20(2) (emphasis added).
[181] ibid.
[182] For background regarding development of these provisions and further discussion of recent treaty practice see Bernasconi-Osterwalder and others, 'Harnessing Investment for Sustainable Development' (n 153) 10–11.
[183] Belarus–India BIT (n 46) art 11(iv).
[184] Argentina–United Arab Emirates BIT (n 93) art 14(c).
[185] Brazil–Suriname CFIA (n 46) art 14(c).
[186] Brazil–Guyana CFIA (n 46) art 14(1)(c).
[187] See Coleman, Johnson, Sachs, and Lobel, 'International Investment Agreements 2017' (n 29) 123–27; Coleman, Johnson, Sachs, and Gupta, 'International Investment Agreements 2015-2016' (n 90) 90–96; Johnson, Sachs, and Coleman, 'Trends in International Investment Agreements, 2014' (n 139) 50–60.

follows a trend highlighted in a previous *Yearbook* chapter.[188] In the Argentina–Japan BIT, for example, states parties reaffirm the importance of encouraging investors operating in their jurisdiction to voluntarily incorporate 'internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by' that state party.[189] Argentina's BIT with the UAE also contains a CSR provision, wherein the parties commit to endeavouring to encourage investors to voluntarily incorporate relevant standards, including the OECD Guidelines on Multinational Enterprises.[190]

7.75 Similarly, states parties to the CPTPP have reaffirmed 'the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party'.[191] This provision mirrors the approach taken in some agreements concluded by Canada following its publicly declared intention in 2013 to include CSR provisions in all foreign investment protection agreements (FIPAs) concluded from that date onwards.[192] Despite this declared intention, the BIT concluded between Canada and Moldova does not contain a CSR provision.[193] It also appears to lack several other clauses relevant to promoting responsible investor conduct, including explicit requirements to comply with domestic laws. A similar approach to investor conduct has been adopted in the USMCA: the agreement includes a CSR clause that mirrors the approach adopted by Canada in several of its FIPAs,[194] and does not appear to include explicit provisions concerning investor compliance with host and/or home state laws in order to benefit from treaty coverage.

7.76 The Belarus–India BIT also focuses on voluntary incorporation of relevant standards concerning responsible investor conduct. However, 'investors and their enterprises' are the subjects of the agreement's CSR provision.[195] The Belarus–India agreement does not clarify the consequences of non-compliance with this (voluntary) CSR provision.

7.77 All of the three CFIAs concluded by Brazil in 2018 contain a 'best efforts' CSR provision. The Brazil–Ethiopia CFIA includes the following text:

> Investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the post State and the local community, through the adoption of a high degree of socially responsible practices, based

[188] Coleman, Johnson, Sachs, and Gupta 'International Investment Agreements 2015-2016' (n 90) 90–96.
[189] Argentina–Japan BIT (n 31) art 17.
[190] Argentina–United Arab Emirates BIT (n 93) art 17.
[191] CPTPP (n 20) art 9.17.
[192] Government of Canada, Office of the Prime Minister, Press Release, 'Canada-Bénin Foreign Investment Promotion and Protection Agreement (FIPA)' (8 January 2013). See also Johnson and Sachs, '2013: A Review of Trends and New Approaches' (n 82) 25–68, 59. For a discussion of some of the CSR provisions included in FIPAs concluded by Canada in 2014 see Johnson, Sachs, and Coleman, 'Trends in International Investment Agreements, 2014' (n 139) 56.
[193] Canada–Moldova BIT (n 29).
[194] USMCA (n 17) art 14.17.
[195] Belarus–India BIT (n 46) art 12.

> on the principles and standards set out in this Article and the OECD Guidelines for Multinational Enterprises (MNEs) as may be applicable on the State Parties.[196]

7.78 Use of the term 'shall' strengthens this provision; however, it ultimately remains a 'best efforts' clause without clarity regarding the consequences for non-compliance.[197] This provision generally follows the approach adopted in Brazil's Model CFIA,[198] although it includes an explicit reference to adoption of principles and standards set out in the OECD Guidelines on Multinational Enterprises, which goes beyond the Model provision and departs from the approach in other 2018 CFIAs. Reference to contribution by investors and their investments to sustainable development of 'the local community' is rare amongst investment agreements, though a regular feature in Brazil's CFIA CSR provisions. The Brazil–Ethiopia CFIA also provides that '[i]nvestors and their investments shall endeavour to comply with' a number of principles and standards concerning responsible business conduct.[199] This clause mirrors Brazil's Model and explicitly lists a number of principles and standards with which investors must make their best efforts to comply.[200] The principles include: contributing to sustainable development; respect for human rights of those involved in the investors' activities; encouraging development of local capacity through close cooperation with the local community; and refraining from seeking or accepting exemptions not established in the existing domestic framework.[201] The Brazil–Guyana and Brazil–Suriname CFIAs contains similar CSR provisions.[202] In all three CFIAs, the CSR provision (along with several others)[203] are excluded from the scope of state–state dispute settlement.[204]

[196] Brazil–Ethiopia CFIA (n 46) art 14(1).

[197] See Lorenzo Cotula and Terrence Neal, 'UNCITRAL Working Group III: Can Reforming Procedures Rebalance Investor Rights and Obligations?' (March 2019) South Center and International Institute for Environment and Development 2 https://www.southcentre.int/wp-content/uploads/2019/03/IPB15_UNCITRAL-Working-Group-III-Can-Reforming-Procedures-Rebalance-Investor-Rights-and-Obligations_EN-1.pdf accessed 22 May 2019 (hereafter Cotula and Neal, 'UNCITRAL Working Group III). See also Coleman, Johnson, Sachs, and Lobel, 'International Investment Agreements 2017' (n 29) 123.

[198] Brazil Model CFIA (n 163) art 14(1).

[199] Brazil–Ethiopia CFIA (n 46) art 14(2).

[200] ibid art 14(2).

[201] ibid art 14(2).

[202] Brazil–Guyana CFIA (n 46) art 15; Brazil–Suriname CFIA (n 46) art 15. Article 15(1) in both the Brazil–Guyana and Brazil–Suriname CFIAs does not contain a reference to the OECD Guidelines on Multinational Enterprises. The text of art 15(2) in both the Brazil–Guyana and Brazil–Suriname CFIAs differs in some places from the Brazil–Ethiopia CFIA (n 46). Notably, while CFIAs with Guyana and Suriname follow the Model CFIA approach in referring to the listed principles and standards for responsible business conduct as 'voluntary', Brazil–Ethiopia CFIA art 14(2) does not include this qualifying term. Brazil Model CFIA (n 163).

[203] The Brazil–Ethiopia CFIA excludes the following provisions from state–state disputing settlement: art 13 (Security Exception); art 14 (Corporate Social Responsibility); art 15(1) (Investment Measures and Combating Corruption and lllegality); and art 16(2) (Provisions on Investment and Environment, Labor Affairs and Health). See Brazil–Ethiopia CFIA (n 46) art 24(3). The Brazil–Guyana CFIA excludes the following provisions from state–state dispute settlement: art 13 (Security Exceptions); art 14 (Compliance with Domestic Legislation); art 15 (Corporate Social Responsibility); art 16(1) (Investment Measures and Combating Corruption and lllegality); and art 17(2) (Provisions on Investment and Environment, Labour Affairs and Health). See Brazil–Guyana CFIA (n 46) art 25(3). The Brazil–Suriname CFIA excludes the following provisions from state–state dispute settlement: art 13 (Security Exceptions); art 14 (Domestic Legislation); art 15 (Corporate Social Responsibility); art 16(1) (Investment Measures and Combating Corruption and Illegality); art 17(2) (Provisions on Investment and Environment, Labour Affairs and Health). See Brazil–Suriname CFIA (n 46) art 25(3).

[204] Brazil–Ethiopia CFIA (n 46) art 24(3); Brazil–Guyana CFIA (n 46) art 25(3); Brazil–Suriname CFIA (n 46) art 25(3).

7.79 A majority of the CSR provisions found in treaties concluded in 2018 do not clarify the consequences for breaching those provisions. Remaining silent on this issue reduces the effectiveness of these voluntary responsibilities and, in a handful of cases, binding investor obligations.[205] The implications for breaching CSR and other obligations concerning investor conduct can be addressed in a number of ways, including by: (1) denying investors treaty coverage; (2) precluding access to ISDS; (3) allowing access to ISDS, but requiring that breach of CSR provisions or other investor obligations contained in the agreement be considered by the tribunal when assessing damages to be awarded to the investor in a claim before the tribunal; or (4) making investors liable for breach of CSR or other obligations in the home state or in some cases on the basis of a counterclaim.

7.80 The Netherlands Model Investment Agreement is the only text reviewed that deals explicitly with liability for irresponsible investor conduct. It provides that '[i]investors shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state'.[206] The practical effects of this provision will be determined by the content of domestic law in the home state of the investor. The treaty does not include a mechanism for monitoring or reporting on enforcement of this provision. Other sub-clauses within the CSR provision in which this home state liability clause is contained focus on reaffirming states parties' commitments to the international human rights legal framework applicable to the activities of international investors and other business entities.[207] These provisions are highlighted in Section E below.

7.81 The same Model also explicitly provides that, in determining the amount of compensation owed to an investor, an arbitral tribunal 'is expected to take into account non-compliance by the investor with its commitments under'[208] the UN Guiding Principles on Business and Human Rights[209] and the OECD Guidelines for Multinational Enterprises.[210] While the final March 2019 version of the Model contains this more assertive wording, a previous (October 2018) version of the model provided that the tribunal 'may' take non-compliance into account.[211] The text eventually included in the approved March 2019 version is admittedly stronger, and the provision itself is noteworthy as perhaps one of the first model provisions to create an expectation that a tribunal consider these guidelines in assessing investor conduct. Moreover, the provision

[205] As noted by Cotula and Neal, '[e]nsuring that any RBC [responsible business conduct] provisions are effective would require clarifying the consequences of non-compliance in the context of dispute settlement. In other words, ISDS procedure is largely determinative of the enforceability of RBC requirements'. See Cotula and Neal, 'UNCITRAL Working Group III' (n 197) 2.

[206] Netherlands Model Investment Agreement (n 24) art 7(4).

[207] ibid art 7(2), 7(3), 7(5).

[208] ibid art 23.

[209] United Nations, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) (hereafter UN Guiding Principles on Business and Human Rights).

[210] OECD, OECD Guidelines for Multinational Enterprises (OECD Publishing 2011) ISBN 978-92-64-11541-5 (hereafter OECD Guidelines for Multinational Enterprises).

[211] Netherlands Model Investment Agreement (October 2018 Draft) art 23.

does not require causation to be established for damages to be reduced. However, it stops short of explicitly *requiring* a tribunal to take these guidelines into account when assessing investor conduct in the context of compensation owed. Whether and to what extent a tribunal will reduce damages is ultimately at the discretion of the tribunal. This provision also allows an investor who has failed to meet its commitments under the cited guidelines to nevertheless bring a claim and recover compensation, albeit at a reduced rate. Questions arise as to whether it is appropriate or desirable for breaches of human rights obligations or responsibilities to be addressed at the damages stage, rather than as matters going to the jurisdiction of the tribunal or admissibility of the case.[212] A handful of tribunals and arbitrators in dissenting opinions have recently sought to reduce compensation on the basis of investor conduct.[213] This provision takes a further step in the direction of assessing investor conduct at this (late) stage in ISDS proceedings.

7.82 In addition to these provisions, the Netherlands Model Investment Agreement also includes two CSR provisions where prospective states parties are the subjects. In Article 7(2), states parties 'reaffirm the importance' of encouraging investors to voluntarily incorporate internationally recognized CSR standards,[214] and in Article 7(3) they 'reaffirm the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for the environmental and social risks and impacts' of their investments.[215] In their current formulation, these provisions are reaffirmations of obligations that states may bear under other agreements or laws; they do not create new obligations for states or mandatory obligations for investors. A binding provision aimed at investors regarding due diligence and requiring investors to carry out environmental, social, and human rights impact assessments in order to benefit from or maintain treaty coverage would represent a notable development.

7.83 At least one treaty concluded in 2018 explicitly provides a basis for respondent states to bring a counterclaim against claimant investors. The CPTPP provides that, where a claimant submits a claim pursuant to an investment authorization[216] or an investment contract, 'the respondent may make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant'.[217] Given that the treaty does not include a binding CSR obligation for investors,[218] the extent to which this provides a useful 'hook' for promoting compliance with responsible investment standards referred to in that provision is uncertain, unless

[212] Cotula and Neal, 'UNCITRAL Working Group III (n 197) 3.

[213] See eg *Copper Mesa Mining Corporation v Republic of Ecuador*, Award (Redacted), PCA Case No 2012-2 (15 March 2016); *Bear Creek v Peru* (n 69).

[214] Netherlands Model Investment Agreement (n 24) art 7(2).

[215] ibid art 7(3).

[216] Article 9.12(2) contains a footnote regarding 'investment authorizations', which notes that the provision 'shall apply only to the extent that the investment authorisation, including instruments executed after the date the authorisation was granted, creates rights and obligations for the disputing parties'. CPTPP (n 20) art 9.12(2), fn 32.

[217] ibid art 9.12(2).

[218] In art 9.17, the parties 'reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party'. ibid art 9.17.

those standards are otherwise enshrined in applicable law. In some counterclaims that have been pursued, states have raised relevant claims of investor non-compliance with obligations under contract and domestic law.[219]

E. Human, Gender, and Indigenous Rights

7.84 At UNCTAD's World Investment Forum in October 2018,[220] newly appointed UN High Commissioner for Human Rights Michelle Bachelet recognized the importance of investment for delivering on the objectives enshrined in Agenda 2030,[221] while emphasizing that states' human rights obligations 'cannot be suspended for the purposes of securing investment'.[222] The High Commissioner's speech reaffirmed acknowledgement amongst UN mandate holders, civil society, academia, and some states of the needto more effectively address the interlinkage between human rights law and investment governance as part of the ongoing reform of the investment treaty regime.[223] In March 2019, a group of UN mandate holders published a letter highlighting previously expressed concerns regarding the risks posed by the investment regime for 'the regulatory space required by States to comply with their international human rights obligations as well as to achieve the Sustainable Development Goals',[224] and recalled that UNCITRAL Working Group III's mandate 'lies in contributing to the development of international trade law in pursuit of greater international co-operation in economic and social fields and respect for human rights'.[225] The letter noted 'that all States, including Member States of the Working Group III, have an obligation to reform the ISDS system in line with their international human rights obligations',[226] and outlined a series of specific concerns relating to the Working Group's agenda that the mandate holders sought to draw attention to in this regard.[227]

[219] See eg *Burlington v The Republic of Ecuador*, Decision on Ecuador's Counterclaims, ICSID Case No ARB/08/5 (7 February 2017); *David R. Aven and Others v Republic of Costa Rica*, Award, ICSID Case No UNCT/15/3 (18 September 2018) [689]–[747].

[220] UNCTAD 'World Investment Forum 2018' (22–26 October 2018) https://worldinvestmentforum.unctad.org/2018-program/ accessed 22 May 2019.

[221] United Nations General Assembly, 'Transforming Our World: the 2030 Agenda for Sustainable Development' A/RES/70/1 (25 September 2015).

[222] Michelle Bachelet, 'World Investment Forum Ministerial Round Table on 21st Century Global Investment Policy Making: Statement by UN High Commissioner for Human Rights Michelle Bachelet' (25 October 2018) https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23773&LangID=E accessed 5 May 2019.

[223] ibid.

[224] UN Mandate Holders, 'Letter Regarding the Ongoing Work of the Working Group III on Investor-State Dispute Settlement (ISDS) Reform' Reference OL ARM 1/2019 (7 March 2019) 2 https://www.ohchr.org/Documents/Issues/Development/IEDebt/OL_ARM_07.03.19_1.2019.pdf accessed 5 May 2019 (hereafter UN Mandate Holders' Letter). See fn 2 in the letter for examples of past letters and reports published by mandate holders expressing such concerns.

[225] ibid 3.

[226] ibid.

[227] ibid. The concerns outlined include: (1) need for systemic reform of ISDS; and (2) concerns identified as desirable for reform within the existing framework, including: (a) concerns pertaining to the lack of consistency, coherence, predictability, and correctness of arbitral decisions by ISDS tribunals; (b) concerns pertaining to arbitrators and decision-makers; (c) concerns pertaining to cost and duration of ISDS cases; and (d) other concerns regarding access to remedy and participation of affected third parties.

7.85 At the 7th UN Forum on Business and Human Rights, proposals for designing a 'human rights-compatible' investment treaty advanced the UN Working Group on Business and Human Rights' project on the implications of Principle 9 of the UN Guiding Principles on Business and Human Rights for investment governance.[228] The UN Working Group on Business and Human Rights also published, together with the Columbia Center on Sustainable Investment, an outcome document drawing attention to the impact of investment treaties and investor–state arbitration on access to justice for investment-affected rights holders.[229] And while the 'zero draft' of the legally binding instrument to regulate the activities of transnational corporations and other business enterprises contained more limited provisions than anticipated regarding trade and investment agreements specifically,[230] discussions around the draft text continued to highlight the entwined nature of international human rights and investment law. These and other developments were noted by UNCTAD in a recent stock-taking of IIA reform efforts, wherein UNCTAD summarized 'the general emphasis of these developments' as being 'on ensuring effective access to justice for those affected' by international investments.[231]

7.86 Despite these developments in the discourse on human rights law and investment governance, developments in treaty drafting practice in 2018 are largely comparable to agreements reviewed in previous *Yearbook* chapters covering texts concluded or models published in 2015, 2016, and 2017.[232] The handful of texts that contain explicit references to the human rights obligations of states in the context of investment governance, or to related human rights issues, represent a step forward as compared to the dearth of references to such obligations in texts reviewed by the OECD in its 2014 study.[233] Nevertheless, explicit references within the texts of investment treaties to

[228] 7th UN Forum on Business and Human Rights, Geneva, Session on 'Designing a Human Rights-Compatible International Investment Agreement' (27 November 2018) https://2018unforumbhr.sched.com/event/GZ6d/crowd-drafting-designing-a-human-rights-compatible-international-investment-agreement accessed 22 May 2019. For details regarding the UN Working Group on Business and Human rights project regarding the implications of Principle 9 of the UN Guiding Principles for international investment governance see UN Working Group on Business and Human Rights, *International Investment Agreements (IIAs) and Human Rights* https://www.ohchr.org/EN/Issues/Business/Pages/IIAs.aspx accessed 22 May 2019.

[229] Columbia Center on Sustainable Investment and UN Working Group on Business and Human Rights, 'Outcome Report: Roundtable on Impacts of the International Investment Regime on Access to Justice' (September 2018) http://ccsi.columbia.edu/2018/09/27/ccsi-and-unwgbhr-international-investment-regime-and-access-to-justice/ accessed 22 May 2019.

[230] The zero draft contains some provisions concerning trade and investment agreements (see, for example, arts 13(6) and 13(7)). However, the zero draft walked back the commitments proposed in the elements paper. Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero Draft (16 July 2018) https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx accessed 22 May 2019.

[231] UNCTAD 'Reforming Investment Dispute Settlement' (n 91).

[232] See Coleman, Johnson, Sachs, and Lobel, 'International Investment Agreements 2017' (n 29) 123–27; Coleman, Johnson, Sachs, and Gupta 'International Investment Agreements 2015-2016' (n 90) 50–53, 72–96; Johnson, Sachs, and Coleman, 'Trends in International Investment Agreements, 2014' (n 139) 57–60. See also Jesse Coleman, Kaitlin Y Cordes, and Lise Johnson, 'Human Rights Law and the Investment Treaty Regime' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing Ltd, forthcoming). A draft version of this chapter is available on the Columbia Center on Sustainable Investment's website, <http://ccsi.columbia.edu/2019/06/05/working-paper-human-rights-law-and-the-investment-treaty-regime/> accessed 24 June 2019.

[233] OECD, 'International Investment Agreements: A Survey of Environmental, Labour and Anti-Corruption Issues' (2008) 147 http://www.oecd.org/daf/inv/investment-policy/40471550.pdf (finding only one example of an

human rights (as the obligations of states or the human rights of investment-affected rights holders) remained rare in 2018. Recent developments are thus falling short of the expectation set by the discourse on alignment of the investment treaty regime with human rights law and sustainable development objectives.

7.87 The Netherlands Model Investment Agreement includes a unique provision with an explicit reference to the state's duty to protect human rights under the heading 'Rule of Law', which provides:

> As part of their duty to protect against business-related human rights abuse, the Contracting Parties must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. These mechanisms should be fair, impartial, independent, transparent and based on the rule of law.[234]

7.88 This provision mirrors the wording of Principle 25 (regarding access to remedy) of the UN Guiding Principles of Business and Human Rights.[235] While Principle 25 reflects human rights obligations that are otherwise enshrined in binding international and regional human rights treaties, explicitly including this obligation in an investment treaty helps to clarify (for state and disputing parties, and for arbitral tribunals) the link between state obligations concerning remedy and investment-related human rights abuses. The barriers to remedy faced by those affected by business-related human rights harms and abuses are well-documented,[236] and availability of ISDS to investors may undermine access to justice for investment-affected rights holders.[237] Inclusion of this binding commitment is noteworthy, if only for illustrating how an investment treaty can be used to reinforce existing obligations under human rights law that are applicable to investment governance. The Model does not include mechanisms for monitoring compliance with this provision.

explicit acknowledgement of the human rights obligations of states in an existing investment treaty; a second example mentioned in the study is contained in an agreement that is not considered an investment treaty for the purposes of this review). See also Howard Mann, 'International Investment Agreements, Business and Human Rights: Key Issues and Opportunities' International Institute for Sustainable Development (2008) 10 https://www.iisd.org/pdf/2008/iia_business_human_rights.pdf accessed 5 June 2019; J Anthony Van Duzer, Penelope Simons, and Graham Mayeda, 'Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries' Commonwealth Secretariat (2012) 296.

[234] Netherlands Model Investment Agreement (n 24) art 5(3).

[235] UN Guiding Principles on Business and Human Rights (n 209) principle 25.

[236] See eg UN Office of the High Commissioner for Human Rights, *Accountability and Remedy Project* https://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx accessed 22 May 2019; Gwynne Skinner, Robert McCorquodale, and Olivier De Schutter, with case studies by Andie Lambe, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Businesses' (December 2013) ICAR, CORE, and ECCJ https://www.icar.ngo/publications/2017/1/4/the-third-pillar-access-to-judicial-remedies-for-human-rights-violations-by-transnational-business accessed 5 June 2019.

[237] To access a forthcoming report on this topic when published see Columbia Center on Sustainable Investment, *Access to Justice* http://ccsi.columbia.edu/work/projects/access-to-justice/ accessed 22 May 2019.

7.89 The Netherlands Model Investment Agreement also includes a provision that reaffirms states parties' obligations under multilateral agreements concerning the protection of human rights.[238] While provisions that reaffirm multilateral environmental obligations are often found in economic partnership agreements (EPAs) involving the EU, as well as in some other trade agreements,[239] reference to human rights obligations within such a provision is novel. The same provision also commits states parties to making 'sustained efforts towards ratifying the fundamental ILO Conventions' that they have yet to ratify.[240] Under its 'Corporate Social Responsibility' provision, the Netherlands Model Investment Agreement includes a provision wherein states parties 'express their commitment to the international framework on Business and Human Rights, such as the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, and commit to strengthen this framework'.[241] As with Article 5(3) regarding access to effective remedy, the Model does not currently include mechanisms for monitoring compliance with this commitment.

7.90 Lastly, the Netherlands Model Investment Agreement explicitly provides that all members of arbitral tribunals charged with determining investor–state disputes under the agreement must be appointed by an appointing authority,[242] and that such an authority 'shall make every effort to ensure that the members of the Tribunal, either individually or together, possess the necessary expertise in public international law, which includes environmental and human rights law'.[243] While this stops short of requiring arbitrators to have human rights experience in cases where human rights issues arise, or requiring an expert in human rights law to provide an expert opinion on those matters where they arise, this provision stands out by at least recognizing the relevance of human rights law to the determination of investment disputes and the backgrounds of those charged with decision-making in this context.[244]

7.91 Overall, the Netherlands Model Investment Agreement includes several noteworthy provisions that seek explicitly to reaffirm prospective states parties' obligations under human rights law in the context of international investment governance. What may be considered a gap in references to these obligations can be found in the right to regulate provision, which explicitly mentions the right of states parties to regulate to achieve a number of legitimate public policy objectives (including health, safety, the environment, labour rights, and consumer protection), but does not mention human rights.[245]

[238] Netherlands Model Investment Agreement (n 24) art 6(6).
[239] Coleman, Johnson, Sachs, and Lobel, 'International Investment Agreements 2017' (n 29) 119–21.
[240] Netherlands Model Investment Agreement (n 24) art 6(6).
[241] ibid art 7(5).
[242] ibid art 20(1). The Netherlands Model Investment Agreement provides for ISDS, but notes that, should an international agreement providing for a multilateral investment court applicable to disputes under an agreement between the states parties enter into force, the provisions concerning ISDS will cease to apply. See ibid art 15(1).
[243] ibid art 20(5).
[244] While beyond the scope of this section, the provision also seeks to curtail double-hatting, stating that: 'Members of the Tribunal shall not act as legal counsel or shall not have acted as legal counsel for the last five years in investment disputes under this or any other international agreement'. See ibid art 20(5).
[245] ibid art 2(2).

More generally, the extent to which this Model will influence future treaty practice is uncertain given that matters of foreign direct investment come within the purview of the European Commission.[246]

7.92 The FTA concluded by Brazil and Chile includes a number of provisions worth highlighting. Article 16.3 includes a number of *compromisos compartidos* agreed by the parties, including: (1) a reaffirmation of states parties obligations under the ILO Declarations to which they are party;[247] (2) a binding 'best efforts' provision providing that each party will endeavour to ensure that its domestic labour standards are consistent with internationally recognized labour rights;[248] (3) a binding commitment to promote implementation of the UN Guiding Principles on Business and Human Rights;[249] and (4) a commitment to make efforts to adopt policies that eliminate systemic barriers to the full participation of women and vulnerable groups in the labour market.[250] Chile has been promoting the integration of gender provisions and chapters into trade agreements.[251] The addition of this provision regarding the UN Guiding Principles on Business and Human Rights appears to be a new development, and a noteworthy one amongst recently concluded treaties with investment provisions.

7.93 Following Chile's approach to inclusion of gender chapters in its recently concluded trade and investment agreements, the Brazil–Chile FTA also includes a gender chapter (Chapter 18), which reaffirms and incorporates a number of international human rights obligations.[252] In Article 18.2, for example, the parties reaffirm their commitment to implement their obligations under the Convention on the Elimination of all Forms of Discrimination against Women[253] (CEDAW),[254] along with their commitment to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women[255] (Belém do Pará Convention)[256] and commitment to

[246] For discussion of competence of the EU over matters concerning foreign direct investment and, in particular, conclusion of investment treaties by Member States with third countries see Stefanie Schacherer, 'Can EU Member States Still Negotiate BITs with Third Countries?' *Investment Treaty News* (10 August 2016) https://www.iisd.org/itn/2016/08/10/can-eu-member-states-still-negotiate-bits-with-third-countries-stefanie-schacherer/ accessed 10 June 2019.

[247] Brazil–Chile FTA (n 46) art 16.3(1).

[248] ibid art 16.3(2).

[249] ibid art 16.3(3).

[250] ibid art 16.3(4).

[251] See eg Ministerio de Relaciones Exteriores de Chile, 'Chile and Argentina Sign a Trade Agreement: "There Are Many Countries in Our Region that Talk about integration, We Are Achieving Integration"' (2 November 2017) https://minrel.gob.cl/chile-and-argentina-sign-a-tradeagreement-there-are-many-countries-in/minrel/2017-11-03/152244.html accessed 22 May 2019; Government of Canada, 'Canada Chile FTA' http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/background-contexte.aspx?lang=eng accessed 4 June 2018; Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile (signed 5 December 1996, entered into force 5 July 1997) appendix II, ch N bis (Trade and Gender).

[252] Brazil–Chile FTA (n 46) ch 8.

[253] Convention on the Elimination of All Forms of Discrimination against Women (opened for signature 1 March 1980, entered into force 3 September 1981) 1249 UNTS 13 (hereafter CEDAW).

[254] Brazil–Chile FTA (n 46) art 18.2(1).

[255] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para) (opened for signature 9 June 1994, entered into force 5 March 1995).

[256] ibid art 18.2(2).

implement their obligations regarding gender equality and women's rights under other international agreements to which they are party.[257] While the dispute settlement chapter does not apply to Chapter 18,[258] Article 18.4 provides for review of implementation of Chapter 18 by the Committee on Trade and Gender within two years of the Committee's first meeting.[259] National contact points are also established by the chapter to facilitate communication regarding its implementation.[260]

7.94 Last year's *Yearbook* chapter highlighted the general exception included in Colombia's Model BIT,[261] which explicitly lists measures deemed necessary to protect human rights as being covered by the exception.[262] Treaties concluded, and the Netherlands Model Investment Agreement published, in 2018 appear not to include such an explicit reference in general or security exceptions. However, the Brazil–Guyana CFIA's security exception refers to 'measures aimed at preserving its national security or public order, or to apply the provisions of their criminal laws or comply with its obligations regarding the maintenance of international peace and security in accordance with the provisions of the United Nations Charter and other relevant international agreements to which the Parties are members'.[263] The CFIA does not clarify the meaning of 'international peace and security' under the agreement. The parties to CETA included a noteworthy clarification in their Joint Declaration concerning that agreement,[264] explicitly clarifying that their understanding of 'international peace and security' with respect to specific provisions included measures relating to 'the protection of human rights'.[265] A joint interpretative statement made by states parties to the Brazil–Guyana CFIA would help to clarify the scope of this exception. Two other CFIAs concluded in 2018 include security exceptions that refer to measures adopted to maintain international peace and security in accordance with UN Charter provisions.[266] Canada's BIT with Moldova also includes a general exception that makes reference to international peace and security and related obligations under the UN Charter.[267]

7.95 Some agreements concluded in 2018 include specific exceptions or reservations concerning the rights of indigenous peoples. The Argentina–Japan BIT, for example, includes a reservation concerning the national treatment standard enshrined in the treaty, wherein Argentina 'reserves the right to adopt or maintain any measure to grant rights or preference to indigenous peoples, minorities, vulnerable groups or groups at a

[257] ibid art 18.2(3).
[258] ibid art 18.7. The dispute settlement chapter is ch 22 of the Brazil–Chile FTA.
[259] ibid art 18.4(9).
[260] ibid art 18.5.
[261] Colombia Model BIT General Exceptions. The Colombia Model BIT is on file with the authors.
[262] Coleman, Johnson, Sachs, and Lobel, 'International Investment Agreements 2017' (n 29) 124.
[263] Brazil–Guyana CFIA (n 46) art 13(1).
[264] Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States (signed 30 October 2016, parts of the agreement provisionally applied from 21 September 2017) (hereafter CETA).
[265] ibid annex 8-E, Joint Declaration on arts 8.16, 9.8, and 28.6 (Investment Chapter).
[266] See eg Brazil–Ethiopia CFIA (n 46) art 13(1); Brazil–Suriname CFIA (n 46) art 13.
[267] Canada–Moldova BIT (n 29) art 17(4)(d).

social or economic disadvantage'.[268] This applies to all sectors. In the Canada–Moldova BIT, Canada makes a number of reservations regarding indigenous peoples, socially and economically disadvantaged minorities, ownership of ocean-front land, and a number of other issues.[269] With respect to each group of rights holders or issue area, 'Canada reserves the right to adopt or maintain any measure that does not conform to the obligations set out below with respect to the following sectors or matters'.[270]

7.96 Two treaties with investment provisions also contain provisions concerning indigenous peoples. Article 32.5 of the USMCA contains an exception regarding the measures a state party 'deems *necessary* to fulfill its legal obligations to indigenous peoples'.[271] For Canada, the 'legal obligations' referred to in that provision include the rights of indigenous peoples covered by section 35 of the Constitution Act of 1982[272] and those set out in self-government agreements.[273] The provisions ultimately included in the USMCA did not meet expectations set out in Canada's public negotiating objectives for the revised NAFTA,[274] which included specific chapters dedicated to the rights of indigenous peoples and gender equality.[275]

7.97 Article 29.6 of the CPTPP provides as follows:

> Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord *more favourable treatment* to Maori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.[276]

7.98 The same Article provides that interpretation of the Treaty of Waitangi[277] will not be subject to the state–state dispute settlement provisions of Chapter 28 of the CPTPP, although other dispute settlement provisions of the CPTPP will otherwise apply to Article 29.6.[278] While this form of exception is rare amongst investment treaties, the extent to which the provision can effectively guard the policy space necessary to protect

[268] Argentina–Japan BIT (n 31) annex II (Non-Conforming Measures, Schedule of the Argentine Republic).
[269] Canada–Moldova BIT (n 29) annex I (Reservation for Future Measures, Schedule of Canada).
[270] Canada–Moldova BIT (n 29) annex I (Reservation for Future Measures, Schedule of Canada).
[271] USMCA (n 17) art 32.5 (emphasis added).
[272] Rights of the Aboriginal Peoples of Canada, s 35, Part I of the Constitution Act 1982 (Canada), being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[273] USMCA (n 17) art 32.5, fn 7.
[274] NAFTA (n 16).
[275] Government of Canada, 'Address by Foreign Affairs Minister on the Modernization of the North American Free Trade Agreement (NAFTA)' (14 August 2017) https://www.canada.ca/en/global-affairs/news/2017/08/address_by_foreignaffairsministeronthemodernizationofthenorthame.html accessed 22 May 2019. For commentary see: Stuart Thomson, 'How Many of Canada's Key Demands Mande it Into the New North American Trade Deal?' *National Post* (1 October 2018) https://nationalpost.com/news/canada/usmca-canada accessed 22 May 2019; Stuart Thomson, 'Liberals' Hopes Stymied for Indigenous and Gender-Rights Chapters in Renegotiated NAFTA' *National Post* (1 October 2018) https://nationalpost.com/news/politics/liberals-hopes-stymied-for-indigenous-and-gender-rights-chapters-in-renegotiated-nafta accessed 22 May 2019.
[276] CPTPP (n 20) art 29.6(1) (emphasis added).
[277] Treaty of Waitangi (1840) http://www.treatyofwaitangi.maori.nz/ accessed 5 June 2019.
[278] CPTPP (n 20) art 29.6(2).

the rights and interests of Māori, and guard against the chilling measures designed to implement obligations owed to Māori, is limited by the restraining language included in Article 29.6. Although Article 29.6(1) is self-judging, the exception requires the measures to be '*necessary* to accord *more favourable* treatment to Māori in respect of matters covered by this Agreement' rather than sufficient, appropriate, or desirable, and therefore maintains a strict nexus requirement.[279] The exception applies only to measures that give *more favourable* treatment to Māori, rather than measures sought by Māori that may impact a broader group but carry specific consequences or benefits for the rights and interests of Māori, such as measures that seek to protect the environment and natural resources more generally. Lastly, while the exception is in theory self-judging, the entity making the determination on measures that fall within the scope of the exception is New Zealand rather than Māori; this enables New Zealand to put forward its own interpretations of its obligations under the Treaty of Waitangi and the extent to which they give rise to measures covered by the exception.

7.99 In 2018, following a report by the Waitangi Tribunal,[280] New Zealand's Ministry of Foreign Affairs and Trade began to explore a protocol on ISDS that would be activated in the event that an investor brought a claim against New Zealand that could trigger the Treaty of Waitangi exception.[281] Amongst many recommendations, the Waitangi Tribunal suggested that the Crown adopt a dispute settlement protocol, to be developed in conjunction with Māori, and that such a protocol cover a number of specific commitments, including:[282]

- To invoke the Waitangi exception where a case concerning Māori arises;
- To dialogue and consult during the case where it raises issues of concern to Māori;
- To include Māori representation as part of the New Zealand legal team;
- To select an arbitrator with knowledge of Waitangi Treaty principles and tikanga; and
- Where necessary, to cooperate with the home state of the investor to make a joint submission regarding interpretation of the Waitangi exception.

7.100 A process regarding the ISDS protocol was launched in 2018.[283] An elements paper was subsequently published by the Ministry of Foreign Affairs and Trade for comment.[284]

[279] CPTPP (n 20) art 29.6(1) (emphases added). The Colombia–United Arab Emirates BIT concluded in 2017, for example, includes a more flexible nexus requirement that referred to measures appropriate 'to protect human, animal, or plant life, health, or the environment'. Bilateral Investment Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the United Arab Emirates (signed 12 November 2017) art 11(b).

[280] Waitangi Tribunal, 'Report on the Trans-Pacific Partnership Agreement WAI-2522' (2016) https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_104833137/Report%20on%20the%20Trans-Pacific%20Partnership%20Agreement%20W.pdf accessed 21 May 2019.

[281] New Zealand Ministry of Foreign Affairs and Trade, 'Possible Elements of an ISDS Protocol' https://www.mfat.govt.nz/en/trade/trade-law-and-dispute-settlement/possible-elements-of-an-isds-protocol/ accessed 21 May 2019 (New Zealand Ministry of Foreign Affairs and Trade, 'Possible Elements of an ISDS Protocol').

[282] This is a select list of the recommendations. For a complete list see Waitangi Tribunal, 'Report on the Trans-Pacific Partnership' (n 280) 42.

[283] New Zealand Ministry of Foreign Affairs and Trade, 'Possible Elements of an ISDS Protocol' (n 281).

[284] New Zealand Ministry of Foreign Affairs and Trade, 'Possible Elements of an ISDS Protocol: For Consultation' (2018) https://www.mfat.govt.nz/assets/Trade/MFAT957_ISDS-elements-paper-88650-v4.pdf accessed 21 May

The paper centres on the following elements: (1) appointment of a legal expert on Waitangi Treaty issues and tikanga that 'could work as an integral part of the New Zealand government legal team defending the ISDS case';[285] (2) a process for selecting this legal expert, which ultimately defers to the New Zealand government regarding selection of the expert; (3) qualifications of the legal expert; (4) role of the legal expert; and (5) transparency of proceedings.[286] The elements paper is silent on several crucial commitments recommended for inclusion in the ISDS protocol by the Waitangi Tribunal in its report. The status of the ISDS protocol remains unclear; the authors understand that a challenge to the process and the protocol's content were part of ongoing proceedings before the Waitangi Tribunal at the time of writing this chapter.

F. Conclusion

7.101 This year's chapter surveyed agreements by focusing on developments in four main areas: substantive obligations; restrictions on access to ISDS; investor responsibilities; and provisions concerning human, gender, and indigenous rights. It highlights both a degree of convergence across countries, as well as notable areas of divergence and experimentation in each of the four issues. Putting the components together, one can see the diverse ways states try to achieve their varying policy goals, and how states may be more or less inclined to shift aspects of those policies depending on their treaty counterparties' identities and aims.

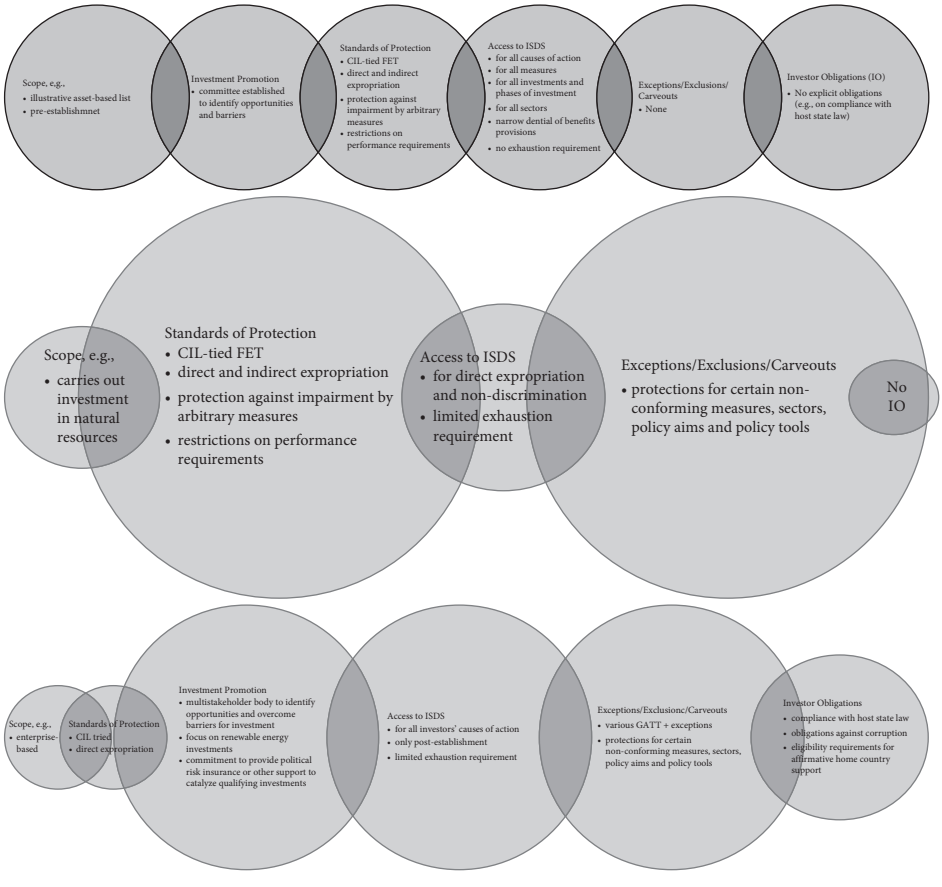
7.102 In some, such as the UAE's agreement with Japan, the treaty adopts at the outset an arguably significant exclusion for all investments in natural resources, but then includes investment protections that are broad as compared to other 2018 and even older generation treaties, as well as relatively liberal access to ISDS. In contrast, in other texts, such as the USMCA, the definition of covered investments is relatively broad, but access to ISDS for all of the treaty's substantive protections is narrowed or excluded except for in certain categories of investments, such as contracts US firms hold to develop natural resources in Mexico. Some agreements, such as the BIT between India and Belarus, and the Brazilian CFIAs, limit their scope (eg by excluding portfolio investment), the standards of investor/investment protection guaranteed in the treaties (eg by preventing invocation of the FET standard), and access to ISDS (eg by excluding it in the Brazilian texts and requiring time-bound exhaustion in the Belarus–India BIT). Treaty parties are, in short, utilizing diverse treaty levers to shape the protections they are willing to

2019 (hereafter New Zealand Ministry of Foreign Affairs and Trade, 'Possible Elements of an ISDS Protocol: For Consultation').

[285] The consultation paper does not provide clarity on how the legal expert would work as part of the New Zealand government's legal team. For example, it does not clarify what weight would be given to Māori rights and interests in the defense of investment disputes.

[286] New Zealand Ministry of Foreign Affairs and Trade, 'Possible Elements of an ISDS Protocol: For Consultation' (n 284).

provide foreign investors or are intent on securing for their investors, and the exposure they are willing to assume. The figures below aim to roughly illustrate some of the approaches that countries have taken.



As these figures suggest, while there are some agreements, such as Brazil's CFIAs and last year's MERCOSUR Cooperation and Investment Facilitation Protocol that clearly stand apart from the IIA universe due to their distinct approaches, it is generally challenging to categorize or rank most treaties by the strength of their protections, or the balance they strike between providing those protections and other policy aims, especially as the real-world implications of these different approaches will also vary based on characteristics of the treaty parties (eg the sectors in which they receive or may receive foreign investment) and their investors (eg the industries in which the investors are likely to invest, the investors' governance and strategies for managing risk, and their ESG policies). Experimentation in some areas of an agreement is accompanied by arguable path dependency in others; and innovations adopted by a country in one treaty (eg in the EU–Mexico FTA Draft) may be abandoned or take a very different form in the next (eg the USMCA). This fluidity makes finding consensus on reforms both plausible and challenging as discussions on ways forward intensify within and across countries. **7.103**

Table 7.1 2018 International Investment Agreements

Sequence number	Full Treaty Name (when available)	Short name (* denotes agreement is publicly available as of 15 April 2019)	Date Signed	Date entered into force (status as of 15 April 2019)
1.	Comprehensive Economic Partnership Agreement between the Republic of Indonesia and the EFTA States	EFTA States–Indonesia EPA*	Signed 16 December 2018	Not in force
2.	Cooperation and Investment Facilitation Agreement between the Federative Republic of Brazil and the Co-operative Republic of Guyana	Brazil–Guyana CFIA*	Signed 13 December 2018	Not in force
3.	Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment	Argentina- Japan BIT*	Signed 1 December 2018	Not in force
4.	Agreement between the United States of America, the United Mexican States, and Canada	USMCA*	Signed 30 November 2018	Not in force
5.	Agreement between Japan and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investment	Japan–Jordan BIT*	Signed 27 November 2018	Not in force
6.	Bilateral Investment Treaty between Azerbaijan and Turkmenistan BIT	Azerbaijan–Turkmenistan BIT	Signed 22 November 2018	Not in force
7.	Agreement between the Government of the Republic of Kazakhstan and the Government of the Republic of Singapore on the Promotion and Mutual Protection of Investments	Kazakhstan–Singapore BIT*	Signed 21 November 2018	Not in force
8.	Free Trade Agreement between Brazil and Chile	Brazil–Chile FTA*	Signed 21 November 2018	Not in force
9.	Bilateral Investment Treaty between Rwanda and Qatar	Rwanda–Qatar BIT	Signed 15 November 2018	Not in force
10.	European Union–Vietnam Investment Protection Agreement	EU–Vietnam IPA	Negotiations concluded August 2018	Not in force
11.	Acuerdo entre los Emiratos Árabes Unidos y la República Oriental del Uruguay para la Promoción y Protección Recíprocas de Inversiones	United Arab Emirates–Uruguay BIT	Signed 24 October 2018	Not in force
12.	Bilateral Investment Treaty between Cambodia and Turkey	Cambodia–Turkey BIT	Signed 21 October 2018	Not in force

Table 7.1 *Continued*

Sequence number	Full Treaty Name (when available)	Short name (* denotes agreement is publicly available as of 15 April 2019)	Date Signed	Date entered into force (status as of 15 April 2019)
13.	Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part	EU–Singapore IPA*	Signed 19 October 2018	Not in force
14.	Bilateral Investment Treaty between Indonesia and Singapore	Indonesia–Singapore BIT	Signed 11 October 2018	Not in force
15.	Treaty between the Republic of Belarus and the Republic of India on Investments	Belarus–India BIT*	Signed 24 September 2018	Not in force
16.	Bilateral Investment Treaty between the State of Palestine and Turkey	Palestine–Turkey BIT	Signed 5 September 2018	Not in force
17.	Bilateral Investment Treaty between Lithuania and Turkey	Lithuania–Turkey BIT	Signed 28 August 2018	Not in force
18.	Bilateral Investment Treaty between Turkey and Zambia	Turkey–Zambia BIT	Signed 28 July 2018	Not in force
19.	Agreement between the European Union and Japan for an Economic Partnership	EU–Japan EPA*	Signed 17 July 2018	1 February 2019
20.	Comprehensive Economic Partnership Agreement between the EFTA States and the Republic of Ecuador	Ecuador–EFTA FTA*	Signed 25 June 2018	Not in force
21.	Agreement between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of Investments	Canada–Republic of Moldova BIT*	Signed 12 June 2018	Not in force
22.	Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the Republic of Suriname	Brazil–Suriname CFIA*	Signed 2 May 2018	Not in force
23.	Agreement between Japan and the United Arab Emirates for the Promotion and Protection of Investment	Japan–United Arab Emirates BIT*	Signed 30 April 2018	Not in force
24.	Accord entre le Gouvernement du Royaume du Maroc et le Gouvernement de la République du Congo sur la Promotion et la Protection Réciproques des Investissements	Morocco–Congo BIT*	Signed 30 April 2018	Not in force

Continued

Table 7.1 *Continued*

Sequence number	Full Treaty Name (when available)	Short name (* denotes agreement is publicly available as of 15 April 2019)	Date Signed	Date entered into force (status as of 15 April 2019)
25.	Modernisation of the Trade Part of the EU–Mexico Global Agreement, Agreement in Principle	EU–Mexico Agreement in Principle	Agreement in Principle reached 21 April 2018	Not in force
26.	Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates	Argentina – United Arab Emirates BIT*	Signed 16 April 2018	Not in force
27.	Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation	Brazil–Ethiopia CFIA*	Signed 11 April 2018	Not in force
28.	Bilateral Investment Treaty between Kyrgyzstan and Turkey	Kyrgyzstan–Turkey BIT	Signed 9 April 2018	Not in force
29.	Agreement between the Government of the Republic of Kazakhstan and the Government of the United Arab Emirates on Promotion and Reciprocal Protection of Investments	Kazakhstan–United Arab Emirates BIT*	Signed 24 March 2018	Not in force
30.	Bilateral Investment Treaty between Ukraine and Qatar	Ukraine–Qatar BIT	Signed 20 March 2018	Not in force
31.	Comprehensive and Progressive Agreement for Trans-Pacific Partnership	CPTPP*	Signed 8 March 2018	30 December 2018
32.	Accord relative à la Promotion et la Protection réciproques des Investissements entre le Gouvernement de la République du Mali et le Gouvernement des Emirats Arabes Unis	Mali–United Arab Emirates BIT*	Signed 6 March 2018	Not in force
33.	Accord entre le Gouvernement de la République du Mali et le Gouvernement de la République de Turquie relatif à la Promotion et la Protection réciproques des Investissements	Mali–Turkey BIT*	Signed 2 March 2018	Not in force
34.	Bilateral Investment Treaty between Mauritania and Turkey	Mauritania–Turkey BIT	Signed 28 February 2018	Not in force
35.	Bilateral Investment Treaty between Panama and the United Arab Emirates	Panama–United Arab Emirates BIT	Signed 28 February 2018	Not in force
36.	Free Trade Agreement between the Republic of Korea and the Republics of Central America	Central America–Republic of Korea FTA*	Signed 21 February 2018	Not in force

Table 7.1 *Continued*

Sequence number	Full Treaty Name (when available)	Short name (* denotes agreement is publicly available as of 15 April 2019)	Date Signed	Date entered into force (status as of 15 April 2019)
37.	Bilateral Investment Treaty between Belarus and Turkey	Belarus–Turkey BIT	Signed 14 February 2018	Not in force
38.	Agreement between Japan and the Republic of Armenia for the Liberalisation, Promotion and Protection of Investment	Armenia–Japan BIT*	Signed 14 February 2018	Not in force
39.	Free Trade Agreement between Australia and Peru	Australia–Peru FTA*	Signed 12 February 2018	Not in force
40.	Bilateral Investment Treaty between Paraguay and Qatar	Paraguay–Qatar BIT	Signed 11 February 2018	Not in force
41.	Bilateral Investment Treaty between Serbia and Turkey	Serbia–Turkey BIT	Signed 31 January 2018	Not in force
42.	Free Trade Agreement between Singapore and Sri Lanka	Singapore–Sri Lanka FTA*	Signed 23 January 2018	1 May 2018