

## CHAPTER 2

---

# INTERNATIONAL INVESTMENT AGREEMENTS, 2014: A REVIEW OF TRENDS AND NEW APPROACHES

LISE JOHNSON, LISA SACHS, AND JESSE COLEMAN

In 2014, states continued to negotiate and sign international investment agreements (IIAs): at least 35 agreements were signed (five more than in 2013),<sup>1</sup> bringing the total number of IIAs to 3,303 by the end of the year.<sup>2</sup> Once again, Canada and Colombia were among the most active in concluding agreements, signing seven and three agreements, respectively. Canada signed bilateral investment treaties (BITs) with six countries—five from Africa (Cameroon, Côte d’Ivoire, Mali, Senegal, and Nigeria) and one from South Eastern Europe (Serbia)—in addition to a free trade agreement (FTA) with the Republic of Korea. Canada and the European Union concluded negotiations on the Comprehensive Economic and Trade Agreement (CETA),<sup>3</sup> a ‘mega-treaty’<sup>4</sup> on which the parties began

1. International investment agreements (IIAs) are defined herein as bilateral and multilateral instruments for the protection and/or promotion of foreign investment. Of the 35 agreements concluded in 2014, 23 were bilateral investment treaties (BITs) and 12 were other types of international agreements with investment chapters, or provisions that substantively address investment (‘other IIAs’). A complete list of the agreements concluded in 2014 is provided in Table 2.1 at the end of this chapter.

2. United Nations Conference on Trade and Development (UNCTAD), *International Investment Agreements Navigator*, <<http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBITResults>>.

3. European Union (EU)-Canada Comprehensive Economic and Trade Agreement (draft consolidated text published 26 September 2014) (CETA).

4. ‘Mega-treaties’ or ‘megaregionals’ are defined as ‘broad economic agreements among a group of countries that have a significant combined economic weight and in which investment is one of the key subject areas covered’. See UNCTAD, ‘Investment Policy Monitor No. 13’ (January 2015), <[http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d13\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d13_en.pdf)> (Investment Policy Monitor No. 13) 10.

working in 2009.<sup>5</sup> The European Union also concluded three association agreements with Georgia, Moldova, and Ukraine, respectively.<sup>6</sup> Colombia signed two BITs, one with Turkey and the other with France, in addition to the Protocol to the Pacific Alliance. Côte d'Ivoire also signed two BITs (with Canada and Singapore), in addition to the Trade and Investment Framework Agreement (TIFA) concluded between the Economic Community of West African States (ECOWAS) and the United States.

Alongside the negotiation and conclusion of new agreements, a growing number of countries are taking a critical look at their IIAs, motivated in part by the increasing number of investor claims challenging public policy and regulatory measures. According to the UN Conference on Trade and Development (UNCTAD), at least 50 countries or regions are currently revising or have recently revised their model IIAs,<sup>7</sup> looking in particular at whether these agreements are either necessary for or effective in attracting investment, and how the risks for and impacts on domestic policy space can be better addressed. Italy gave official notice to the Energy Charter Treaty<sup>8</sup> of its intent to withdraw, although the treaty will apply for another 20 years to investments made before or on the day of withdrawal.<sup>9</sup> In early 2014, Indonesia announced plans to terminate more than 60 BITs and to draft a new model agreement; in late 2014, it terminated its BIT with Egypt.<sup>10</sup> South Africa continued to unilaterally terminate its BITs: those with Germany and Austria were both terminated in 2014.<sup>11</sup> The Russia-Uzbekistan and Switzerland-Tunisia BITs were also terminated in 2014 and replaced by new agreements.

Finally, there were important developments in other treaties that will affect the existing stock of IIAs and their implementation. The UN Convention on Transparency in Treaty-Based Investor-State Arbitration,<sup>12</sup> under which parties to IIAs concluded prior to 1 April 2014 can agree to apply the UN Commission on International Trade Law (UNCITRAL) Rules on

5. See European Commission (EC), 'Overview of FTA and other trade negotiations' (December 2015), <[http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_118238.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf)>.

6. Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (signed 27 June 2014) (EU-Georgia Association Agreement); Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (signed 27 June 2014) (EU-Moldova Association Agreement); Association Agreement between the European Union its Member States, of the one part, and Ukraine, of the other part (signed 27 June 2014) (EU-Ukraine Association Agreement). These agreements do not at present contain investment chapters: however, the agreements provide that the parties may in the future include investment protection provisions and provisions concerning investor-state dispute settlement. See EU-Georgia Association Agreement, art 80; EU-Moldova Association Agreement, art 206; EU-Ukraine Association Agreement, art 89.

7. UNCTAD, 'World Investment Report 2015: Reforming International Investment Governance' (2015) Sales No. E.15.II.D.5, 108 (World Investment Report 2015). This was the topic of the Tenth Annual Columbia International Investment Conference, entitled 'Investment Treaty Reform: Reshaping Economic Governance in the Era of Sustainable Development' (held at Columbia University, New York, 10–11 November 2015).

8. Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998) (ECT).

9. World Investment Report 2015 (n 7) 107.

10. Agreement between the Government of the Republic of Indonesia and the Government of the Arab Republic of Egypt concerning the promotion and protection of investment (entered into force 29 November 1994, terminated 30 November 2014) (Egypt-Indonesia BIT).

11. Prior to the period under review, South Africa had also terminated its BITs with the Belgium-Luxembourg Economic Union, Switzerland, the Netherlands, and Spain.

12. UN Convention on Transparency in Treaty-based Investor-State Arbitration (opened for signature 17 March 2015) (UN Transparency Convention). The text was adopted at the 69th Session of the UN General Assembly on 10 December 2014 in New York (UNGA Res 69/116 (2014) UN Doc A/RES/69/116).

Transparency<sup>13</sup> to investor-state arbitrations arising under those agreements, was adopted by UN General Assembly Resolution 69/116 on 10 December 2014, and formally opened for signature.<sup>14</sup> The Rules themselves came into effect, along with the revised UNCITRAL Arbitration Rules, on 1 April 2014.<sup>15</sup> The Convention, discussed in depth in last year's edition of the *Yearbook*,<sup>16</sup> is noteworthy both for increasing the transparency of investor-state dispute settlement (ISDS)<sup>17</sup> and for demonstrating how such a multilateral convention, through the 'use of reciprocal commitments, unilateral offers and reservations',<sup>18</sup> could be used for other types of IIA reform.<sup>19</sup>

Public discourse among a broad group of stakeholders concerning the costs and benefits of IIAs, and the public policy implications of ISDS, continued and intensified in 2014,<sup>20</sup> particularly in the context of the Trans-Pacific Partnership (TPP)<sup>21</sup> and Transatlantic Trade and Investment Partnership (TTIP) negotiations. Mounting concerns about ISDS have been primarily advanced in response to agreements negotiated between or among *developed* countries; the continued conclusion between developed and *developing* countries of traditional IIAs that include ISDS seems to have raised considerably less public debate. This may be the result of reduced access to information among citizenries in developing countries (including about the potential impacts of ISDS on domestic policy space and domestic resources), or the narrative in the developed countries about the need to protect outward investors from those countries. This diverging trend in terms of the spheres in which critical evaluations of IIAs are taking place is important to consider, particularly in light of the fact that a majority of the treaties signed between March and December 2014 had as a party at least one developing country or economy in transition.<sup>22</sup>

The range of provisions and approaches developed or adopted in 2014 reflects the growing body of stakeholder experiences with international investment law, including in response to the ever-expanding number of investor-state claims. Increased recognition of the latter's

13. UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (adopted at UNCITRAL's 46th session, held 8–26 July 2013, came into effect 1 April 2014) (UNCITRAL Transparency Rules).

14. The UN Transparency Convention opened for signature in Port Louis, Mauritius, on 17 March 2015, and thereafter at the UN Headquarters in New York. The Convention will enter into force six months after the deposit of the third instrument of ratification, acceptance, approval, or accession.

15. Investment Policy Monitor No. 13 (n 4) 11.

16. Lise Johnson and Lisa Sachs, 'International investment agreements, 2013: A review of trends and new approaches' in Andrea K Bjorklund (ed), *Yearbook on International Investment Law & Policy 2013–2014* (Oxford University Press 2015) 25–68, 59–64.

17. See UN Transparency Convention (n 12) arts 2(1) and 2(2) in particular for details of the two options available for states seeking to apply the UNCITRAL Transparency Rules (n 13).

18. See Lise Johnson, 'The Transparency Rules and Transparency Convention: A good start and model for broader reform in investor-state arbitration' *Columbia FDI Perspectives* (No. 126) (21 July 2014), <<http://ccsi.columbia.edu/files/2013/10/No-126-Johnson-FINAL1.pdf>>.

19. See Johnson and Sachs (n 16) 62–64.

20. *ibid* 28–31.

21. TPP negotiations concluded in late 2015, with the text being made public in November 2015, placing the agreement beyond the scope of the review period for this chapter. For commentary on this agreement, see e.g., Lise Johnson and Lisa Sachs, 'The TPP's Investment Chapter: Entrenching, Rather than Reforming, a Flawed System' (November 2015) Columbia Center on Sustainable Investment (CCSI) Policy Paper, <<http://ccsi.columbia.edu/files/2015/11/TPP-entrenching-flaws-21-Nov-FINAL.pdf>>.

22. Investment Policy Monitor No. 13 (n 4) 5.

implications for domestic legal systems and policy space has led to the inclusion of new language clarifying (and in some cases circumscribing) investor protections, new approaches to the settlement of investment disputes, and a growing trend of seeking to rebalance IIAs through the inclusion of investor obligations. Three of the approaches developed or adopted in 2014 are especially illustrative of divergent trends in each of these areas: CETA, the new Brazilian approach of concluding ‘Cooperation and Facilitation Investment Agreements’ (CFIAs), and the revised India Model BIT made publicly available in early 2015.<sup>23</sup> In Section A, we introduce these three approaches in more detail, highlighting some of the noteworthy developments that each has introduced. In Section B, we look more closely at the three cross-cutting themes of: (1) diverse and evolving investor protections; (2) divergent approaches to ISDS; and (3) inclusion of investor obligations, focusing in each case on how the approaches adopted by Canada and the European Union, Brazil, and India address these issues.

This chapter focuses on select developments in 2014 that illustrate several key trends and features in IIA treaty policy; as such, it is not a comprehensive review of all developments in treaty policy in 2014. The issues highlighted were chosen based on the authors’ view that they have particular significance for contemporary discussions of IIA policy. Importantly, in some cases, this chapter provides a snapshot of the development of new approaches in 2014 that may have been modified in 2015; this is specifically the case, for example, with respect to India and Brazil’s respective model agreements, which were developed in 2014 but served as the basis for, and were modified in the context of, negotiations in 2015. In order to provide a more accurate picture of the events and policy climate of 2014, the latter revisions are not discussed in this chapter.

## A. OVERVIEW OF CETA, THE BRAZILIAN CFIAs, AND INDIA’S MODEL BIT

The divergent approaches adopted in CETA, the Brazilian CFIAs, and India’s Model BIT were developed within the broader context of ongoing debate concerning the merits and hazards of the existing international investment regime. As a result, each respective state (or, in the case of CETA, group of states) has seemingly sought to develop a form of investment agreement that protects both its own ‘defensive interests’, by inter alia protecting domestic policy space and the state’s ability to regulate in the public interest, while also protecting the interests of other groups. Most notable among these groups are the outward investors of treaty-drafting states: the influence of this interest group has clearly continued to play a role in shaping the approaches featured in this chapter. While the agreements all contain elements that are both novel and noteworthy, the approaches adopted by Canada and the European Union, Brazil, and India have also retained some of the more traditional IIA provisions.

Before discussing divergent trends in the three cross-cutting issue areas of (1) diverse and evolving investor protections; (2) divergent approaches to ISDS; and (3) inclusion of investor

23. This chapter focuses on the draft text of the new India Model BIT made publicly available in March 2015, which is reflective of an approach developed by India throughout 2013 and 2014. The draft has been subject to further revision in light of ongoing BIT negotiations with the United States and Canada, and a revised text was made public in December 2015 (referred to herein as the December 2015 Model). As the revised text was not publicly available or formally adopted at the time of writing, the revisions contained within it are beyond the scope of this chapter.

obligations in Section B, this section will provide a brief introduction to the background and key aspects of the approaches adopted by Canada and the European Union, Brazil, and India.

## 1. EU-CANADA COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA)

Following the conclusion of negotiations on 5 August 2014,<sup>24</sup> the consolidated text of CETA was published on 26 September 2014. The European Commission (EC) has referred to CETA as being ‘the first agreement to introduce important innovations to investment protection, ensuring a high level of protection while preserving the EU and Canada’s right to regulate and pursue legitimate public policy objectives such as the protection of health, safety, or the environment’.<sup>25</sup> With regard to ISDS, the EC considers CETA to provide for ‘the most progressive system to date’, one that constitutes a ‘significant break from the past’ owing to: (1) clearer and more precise investment protection standards, and (2) clearer rules on the conduct of procedures in investment arbitrations.<sup>26</sup>

Against the background of marked criticism and public scrutiny of ISDS,<sup>27</sup> it is no surprise that the EC has sought to draw attention to these purported innovations in CETA. However, at least with regard to ISDS, the investment chapter in CETA is more akin to the status quo than the EC’s statements suggest: much like traditional IIAs, CETA includes the use of ad hoc investment tribunals and does not encourage (or require) resort to domestic courts.<sup>28</sup> In addition, CETA only provides for the possible creation of an appeals mechanism in the form of a commitment to consult,<sup>29</sup> despite this investment policy objective being referred to by the EC as far back as 2010.<sup>30</sup> Given even more recent and pronounced calls from the European Parliament (EP) for a ‘new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny’, ‘where private interests cannot undermine public policy objectives’, and where ‘consistency of judicial decisions is ensured’, the extent to which CETA will influence future IIA drafting by the EU appears uncertain.<sup>31</sup>

In fact, the EU is already diverging from the approach adopted in CETA in its negotiation of new agreements. While an in-depth discussion of TTIP is beyond the scope of this

24. Government of Canada, *Free Trade Agreements*, <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng>>.

25. European Commission (EC), ‘Investment Provisions in the EU-Canada Free Trade Agreement (CETA)’ (26 September 2014) 1, <[http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151918.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf)>.

26. *ibid.*

27. See Johnson and Sachs (n 16).

28. Steffen Hindelang and Carl-Philipp Sassenrath, *The Investment Chapters of the EU’s International Trade and Investment Agreements in a Comparative Perspective* (European Parliament Directorate-General for External Policies Policy Department 2015) 112.

29. CETA (n 3) art X.42(1)(c). The EU-Singapore Free Trade Agreement (initialed text published May 2015) contains a similar provision regarding future consultations on the possible creation of an appellate mechanism: see art 9.30(1)(c).

30. See European Commission, ‘Towards a comprehensive European international investment policy’ (Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions) COM (2010) 343 final.

31. European Parliament (EP) Resolution 2014/2228 (INI) of 8 July 2015 containing the EP’s recommendations to the EC on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), [2(d)(xv)].

chapter, the most recent version of the EC's draft text for the agreement's investment chapter (released in September 2015)<sup>32</sup> departs in significant ways from CETA.<sup>33</sup> For example, the new text explicitly provides for the establishment of an investment court system, which the EC envisages as including both a tribunal of first instance<sup>34</sup> and a permanent appeals tribunal.<sup>35</sup> At the time of writing, the European Union had formally presented its proposal to the United States in TTIP negotiations.<sup>36</sup>

## a. Attempts to Restrict Discretion of Investment Tribunals

While certain aspects of CETA are less revolutionary than they may appear, the agreement does contain more comprehensive language (including a series of interpretative declarations) that seeks to clarify the scope of the agreement's provisions, preserve the regulatory powers of states parties, and thereby reduce the discretion of investment tribunals.<sup>37</sup> This approach of more comprehensive regulation has been noted as differing from that of 'light touch regulation' evident in more traditional IIAs, including the USA-Lithuania BIT, Germany-Jordan BIT, and the Energy Charter Treaty.<sup>38</sup>

In addition, CETA makes some advancements with regard to the conduct of arbitrators by requiring compliance with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines).<sup>39</sup> CETA's Committee on Services and Investment also has the discretion to adopt supplemental rules, to be applied in addition to the IBA Guidelines.<sup>40</sup> CETA also defines the process for the appointment of arbitrators in some detail, providing for selection of arbitrators from a list agreed upon by states parties.<sup>41</sup>

32. European Commission, 'Proposal on Investment Protection and Resolution of Investment Disputes and Investment Court System in TTIP' (16 September 2015), <[http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf)> (EC Proposal TTIP). See also European Commission Press Release, 'Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations' (Brussels, 16 September 2015), <[http://europa.eu/rapid/press-release\\_IP-15-5651\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5651_en.htm)>.

33. See Luke Eric Peterson, 'Analysis: European Commission's newly-released investment treaty model departs in significant ways from recently-concluded Canada Pact' *Investment Arbitration Reporter* (17 September 2015), <<https://www.iareporter.com/articles/analysis-european-commissions-newly-released-investment-treaty-model-departs-in-significant-ways-from-recently-concluded-canada-pact/>>.

34. EC Proposal TTIP (n 32) s 3, art 9.

35. *ibid* art 10.

36. European Commission Press Release, 'EU finalises proposal for investment protection and Court System for TTIP' (Brussels, 12 November 2015), <[http://europa.eu/rapid/press-release\\_IP-15-6059\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6059_en.htm)>. The final text of the EU's 'Proposal for Investment Protection and Resolution of Investment Disputes' was tabled for discussion with the United States and made public on 12 November 2015, <[http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf)> (EU November 2015 Proposal TTIP).

37. See e.g., CETA (n 3) Investment Chapter, s 5; Financial Services Chapter, art 16; Exceptions Chapter, art X.02 (lists several public policy exceptions) and arts X.02–X.09 (provide for specific exceptions concerning inter alia national security, taxation, and cultural industries); and Subsidies Chapter, art 7.

38. For an in-depth comparison of CETA, the EU-Singapore FTA and these traditional IIAs, see Hindelang and Sassenrath (n 28).

39. CETA (n 3) Investment Chapter, art X.25 (5)–(11). International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration, <[http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx)> (IBA Guidelines).

40. CETA (n 3) Investment Chapter, art X.42(2)(b).

41. *ibid* art X.25 (1)–(4).



CETA's approach to regulation of the conduct of arbitrators differs from that adopted in the EU-Singapore FTA, into which a treaty-specific code has been incorporated.<sup>42</sup>

## b. Transparency and Investor-State Dispute Settlement

CETA applies the UNCITRAL Transparency Rules to all investor-state disputes conducted under the agreement.<sup>43</sup> Article X.33 of CETA's investment chapter requires documents in addition to those listed in Article 3 of the UNCITRAL Transparency Rules to be disclosed, and provides that hearings must be open to the public. Where concerns regarding confidential information arise, Article X.33 makes the tribunal responsible for making appropriate arrangements to address these concerns.

The inclusion of transparency arrangements in CETA is noteworthy: of the investment agreements in existence, only those to which the United States or Canada is a party, in addition to the EU-Singapore FTA,<sup>44</sup> include such arrangements.<sup>45</sup>

## c. Additional Developments in EU Investment Policy

Other notable aspects of CETA that are beyond the scope of this chapter include: the adoption of a traditional non-exhaustive asset-based definition of 'investment', combined with a more tightly drafted definition of 'investor';<sup>46</sup> the introduction of some restrictions on parallel proceedings;<sup>47</sup> rules precluding fraudulent or manipulative claims;<sup>48</sup> rules allowing for quick dismissal of frivolous or unfounded claims;<sup>49</sup> provisions clarifying that investment arbitration

42. EU-Singapore FTA (n 29) Annex 9-B.

43. CETA (n 3) Investment Chapter, art X.33.

44. EU-Singapore FTA Annex 9-C establishes its own explicit rules regarding the transparency of arbitral proceedings, while CETA incorporates and slightly adapts the UNCITRAL Transparency Rules (n 13).

45. EC, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (n 25) 4.

46. CETA (n 3) Investment Chapter, art X.3 (Definitions). The definition of 'investment' mirrors that in the 2012 US Model BIT. However, it includes an additional 'characteristic' of an investment, namely 'a certain duration'. With regard to the definition of 'investor', in order to qualify for protection under CETA, an investor must have 'substantial business activities' in the territory of one of the parties. The definition seeks to preclude 'shell' or 'mailbox' companies from relying on CETA in order to submit claims to the ISDS mechanism established thereunder. For further discussion of these definitions, see Nathalie Bernasconi-Osterwalder and Howard Mann, 'A Response to the European Commission's December 2013 Document "Investment Provisions in the EU-Canada Free Trade Agreement (CETA)"' (International Institute for Sustainable Development 2014), <[http://www.iisd.org/pdf/2014/reponse\\_eu\\_ceta.pdf](http://www.iisd.org/pdf/2014/reponse_eu_ceta.pdf)>.

47. CETA (n 3) Investment Chapter, art X.21. While the EC has stated that CETA 'prohibits parallel proceedings', art X.21(5) provides that an investor's waiver of its right to submit claims to domestic courts under art X.21(1)(g) or art X.21(2) ceases where inter alia the claim is determined by the tribunal as being without merit, or where the investor withdraws its claim within a certain period of time. In such cases, the investor can make a 'U-turn' and submit its claim to the domestic courts. See EC, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (n 25); Hindelang and Sassenrath (n 28) 52–53.

48. CETA (n 3) Investment Chapter, art X.17.

49. *ibid* art X.29 and art X.30. The provisions are relatively vague and in themselves do not restrict access to investment arbitration; their effectiveness will likely depend on arbitral practice. See Hindelang and Sassenrath (n 28) 89; Steffen Hindelang, 'Study on investor-state dispute settlement ("ISDS") and alternatives of dispute resolution in international investment law' in *Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements (Volume 2)* (European Parliament Directorate-General for External Policies Policy Department 2014) 107.

under CETA cannot lead to the repeal of a measure adopted by member state parliaments or by Canada;<sup>50</sup> a 'losing party' approach to cost allocation, whereby both the costs of arbitration and any other reasonable costs must be borne by the unsuccessful party;<sup>51</sup> and inclusion of provisions concerning sustainable development in several chapters, including the chapter on 'Trade and Sustainable Development'.<sup>52</sup>

In July 2014, the European Union adopted a regulation to address the allocation of the financial costs of investment claims.<sup>53</sup> The need for such a regulation arose following the adoption of the Lisbon Treaty in 2009.<sup>54</sup> Prior to Lisbon, EU member states themselves negotiated and concluded investment agreements on their own behalf, while following Lisbon, such agreements are dealt with by the European Union on behalf of its member states.<sup>55</sup> The July 2014 regulation provides *inter alia* that: (1) the European Union will bear the financial costs of investment claims where the claim brought by the investor concerns a measure taken by an EU institution, body, or agency; (2) the EU member state concerned will bear the costs where the claim brought concerns a measure taken by the member state itself; (3) where a measure is taken by a member state on the basis that it is required by EU law, the European Union will be responsible for financial costs associated with a claim based on such a measure.<sup>56</sup>

## 2. BRAZIL'S COOPERATION AND FACILITATION INVESTMENT AGREEMENTS (CFIAs)

Brazil's engagement with the investment regime has been somewhat limited: it last signed a BIT in 1999, and not one of its 14 BITs has been ratified.<sup>57</sup> Concerns about national sovereignty are said to have underpinned Brazil's reluctance to engage: of the six BITs that were submitted to Congress for approval, all were rejected, as certain provisions (including those on indirect expropriation and ISDS) were considered to run contrary to the Brazilian Constitution.<sup>58</sup> In addition, such provisions were seen as imposing restrictions on the state's ability to adopt public policies crucial for the country's development.<sup>59</sup> Ultimately, this rejection of traditional IIAs

50. CETA (n 3) Investment Chapter, art X.36.

51. *ibid.*

52. CETA (n 3) art X.36. The EC has supported this approach on the basis that it may lead to cost relief for governments. See EC, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (n 25) 6. However, financially robust claimants are unlikely to be deterred from resorting to arbitration if it serves their strategic interests. See Hindelang and Sassenrath (n 28) 98; Hindelang (n 49) 110.

53. Regulation (EU) 912/2014 of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party (entered into force on 17 September 2014).

54. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (13 December 2007) OJ C306/01 (Lisbon Treaty).

55. *ibid* art 207(1).

56. Regulation (EU) 912/2014 (n 53).

57. Brazil has signed (but not ratified) BITs with the Belgium-Luxembourg Economic Union (1999), Chile (1994), Cuba (1997), Denmark (1995), Finland (1995), France (1995), Germany (1995), Italy (1995), Korea (1995), Netherlands (1998), Portugal (1994), Switzerland (1994), United Kingdom (1994), and Venezuela (1995).

58. Daniel Godinho, Secretary of Foreign Trade, Ministry of Development, Industry and Foreign Trade, Brazil, 'Speech delivered at the UNCTAD World Investment Forum 2014: Investing in Sustainable Development' (16 October 2014), <<http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Godinho.pdf>>.

59. *ibid.*



has not precluded Brazil from attracting investment.<sup>60</sup> Brazil is the largest recipient of foreign direct investment (FDI) in South America, and the fifth largest recipient in the world.<sup>61</sup>

Nonetheless, in 2012, the Brazilian Chamber of Foreign Trade (CAMEX) granted a mandate to a Technical Group for Strategic Studies in Foreign Trade (GTEX) to work on drafting a new investment agreement capable of catering to Brazil's specific needs and concerns.<sup>62</sup> A template for the new agreement was approved by CAMEX in 2013, after which it was proposed to states where Brazilian companies were consistently investing: Mozambique, Angola, and Mexico were among the first such states to react positively to Brazil's new approach.<sup>63</sup> Following the conclusion of agreements with these states, Brazil signed CFIA's with Malawi, Colombia, and (most recently) Chile.<sup>64</sup> Brazil is also said to be in negotiations with South Africa, Algeria, Morocco, and Tunisia.<sup>65</sup>

## a. Rationale behind Re-Engagement

Compared to traditional IIAs, Brazil's new approach<sup>66</sup> is based on a system of diplomatic (as opposed to direct) protection of investors,<sup>67</sup> aimed at restoring the prominence of intergovernmental dialogue and the role of states in the regulation of FDI.<sup>68</sup> The Secretary of Foreign Trade has stated that Brazil's model constitutes 'an innovative alternative to traditional IIAs' that:

recognizes the role of governments in fostering a positive environment for investment, takes into full consideration the interests of private investors, retain[s] policy space for pursuing the development needs of the parties, and adopts a constructive and proactive view aimed at bridging potential differences between investors and the host country.<sup>69</sup>

60. Nicolás M Perrone and Gustavo Rojas de Cerqueira César, 'Brazil's bilateral investment treaties: More than a new investment model?' *Columbia FDI Perspectives* (No. 159) (26 October 2015), <<http://ccsi.columbia.edu/files/2013/10/No-159-Perrone-and-C%C3%A9sar-FINAL.pdf>>.

61. Santander, *Santander Trade Portal*, <<https://en.santandertrade.com/establish-overseas/brazil/foreign-investment>>. See also World Bank (WB), 'World Development Indicators' (2013) 93, which indicates that in 2011 the largest recipients of FDI inflows were Brazil, China, India, and the Russian Federation (together accounting for more than half of inflows to developing economies).

62. Fabio Morosini and Michelle Ratton Sanchez Badin, 'The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A new formula for international investment agreements?' *IISD Investment Treaty News* (4 August 2015), <<https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/>>.

63. *ibid.*

64. In November 2015, Brazil also concluded a CFIA with Chile. As the text of this agreement was not publicly available at the time of writing, its provisions have not been analyzed for the purposes of this chapter.

65. Clovis Trevino, 'A closer look at Brazil's two new bilateral investment treaties' *Investment Arbitration Reporter* (10 April 2015), <<http://www.iareporter.com/articles/a-closer-look-at-brazils-two-new-bilateral-investment-treaties/>>.

66. While Brazil has yet to release a model CFIA text, similarities in the agreements concluded between January and October 2015 suggest that some form of model text has been used as the basis for negotiations. A consolidated English-language model text had yet to be released by the Brazilian government at the time of writing.

67. Pedro Martini, 'Brazil's new investment treaties: Outside looking . . . Out?' *Kluwer Arbitration Blog* (16 June 2015), <<http://kluwerarbitrationblog.com/2015/06/16/brazils-new-investment-treaties-outside-looking-out-2/>>.

68. Perrone and Rojas de Cerqueira César (n 60). See also Godinho (n 58).

69. Godinho (n 58).

## b. Key Aspects of the CFIA Model

The main pillars of Brazil's CFIAs are: (1) enhanced institutional governance through the establishment of Focal Points (Ombudsmen) and Joint Committees; (2) the use of thematic agendas for investment cooperation and facilitation; and (3) establishment of mechanisms for risk mitigation and dispute prevention.<sup>70</sup> Focal Points are intended to promote dialogue between investors and the host country, and to promote an investment-friendly environment in the host country.<sup>71</sup> Joint Committees have been designed to include representatives of both parties to the CFIA for the purpose of 'sharing opportunities for the expansion of mutual investment, monitoring the implementation of the Agreement, preventing disputes and solving possible agreements in an amicable manner'.<sup>72</sup> Such committees will also have the opportunity to establish working groups to discuss specific issues, and have the discretion to invite private sector representatives to participate in such groups.<sup>73</sup>

Thematic agendas are used to encourage and promote an investment-friendly environment.<sup>74</sup> They can cover a vast array of specific issues of interest to the parties and their investors regarding investment cooperation and facilitation, including business visas, corporate social responsibility (CSR), technical and environmental regulation, cooperation on currency remittance, and any other area deemed pertinent by the parties.<sup>75</sup> New thematic agendas can be proposed and added by agreement to the CFIA, allowing for a more dynamic agreement capable of being gradually expanded through continuous negotiations between the parties.<sup>76</sup>

In terms of investor protections (discussed further in Section B(1) below), the agreements negotiated on the basis of Brazil's new approach (all of which were actually concluded in 2015) generally contain some familiar provisions on direct expropriation, transfers, and national, and most-favored nation (MFN) treatment. The Brazil-Angola CFIA even contains an umbrella clause,<sup>77</sup> despite the marked reluctance of states to include such clauses in more recent IIAs.<sup>78</sup> However, the CFIAs do not include protections against indirect expropriations, nor do they establish an obligation to ensure that investors and investments receive fair and equitable treatment (FET).

Perhaps the most notable feature of these treaties is the absence of ISDS, and the return to a means of diplomatic protection for enforcement of substantive obligations. This noteworthy development is discussed in Section B(2)(c) below.

70. *ibid.*

71. *ibid.*

72. *ibid.*

73. *ibid.*

74. World Investment Report 2015 (n 7) 108.

75. Godinho (n 58).

76. *ibid.*

77. Investment Cooperation and Facilitation Agreement between the Government of the Federative Republic of Brazil and the Government of the Republic of Angola (signed 1 April 2015) art 11(8) (Brazil-Angola CFIA).

78. See Lise Johnson and Lisa Sachs, 'Trends in international investment agreements, 2011–2012: A review of trends and new approaches' in Andrea K Bjorklund (ed), *Yearbook on International Investment Law & Policy 2012–2013* (Oxford University Press 2014) 219–261, 227–229.

### 3. INDIA'S REVISED MODEL BIT

In contrast to Brazil, India has consistently engaged with the existing IIA regime since the early 1990s: to date, it has signed 86 BITs, of which 75 are in force.<sup>79</sup> Investment chapters are also included in several of India's FTAs, including those with Singapore, Japan, and South Korea.<sup>80</sup>

For many years, India did not face many investment treaty arbitration claims.<sup>81</sup> However, in 2012, India received an unfavorable decision in *White Industries v. India*,<sup>82</sup> and shortly thereafter received another 17 notices of dispute over claims arising from its IIAs.<sup>83</sup> This surge in disputes influenced the Indian government's decision to begin redrafting its Model BIT.<sup>84</sup> The new Model, which was developed in 2013–2014 and first made publicly available in early 2015,<sup>85</sup> differs in several aspects from its 1993 and 2003 counterparts, and has been described as constituting a 'paradigm shift in approach to substantive and procedural issues'.<sup>86</sup> In particular, the Model seeks to address: (1) the ambiguity of provisions contained in traditional IIAs, leaving them open to broad interpretation by investment tribunals; and (2) the need for host states to preserve their right to regulate.<sup>87</sup>

While India's new Model has been drafted in the shadow of increased investor-state claims, the text of the Model also reveals the importance placed on the promotion of sustainable investment. References to the importance of investment for inclusive growth and sustainable development are contained not only in the Model's preamble but also in the body of the Model text.<sup>88</sup>

The draft India Model, originally made public in early 2015, has been subject to further revision<sup>89</sup> in light of ongoing BIT negotiations with the United States and Canada.<sup>90</sup> As of

79. Ministry of Finance, Government of India, *Bilateral Investment Promotion and Protection Agreements*, <[http://finmin.nic.in/bipa/bipa\\_index.asp?pageid=1](http://finmin.nic.in/bipa/bipa_index.asp?pageid=1)>; Ministry of Commerce and Industry, Government of India, *International Trade Agreements*, <[http://commerce.nic.in/trade/international\\_ta.asp?id=2&trade=i](http://commerce.nic.in/trade/international_ta.asp?id=2&trade=i)>.

80. *ibid.*

81. Grant Hanessian and Kabir Duggal, 'The 2015 Indian Model BIT: Is this change the world wishes to see?' (2015) 30(3) ICSID Review 729, 731.

82. *White Industries Australia Limited v The Republic of India* (Final Award, 2011) UNCITRAL.

83. Hanessian and Duggal (n 81) 731.

84. *ibid.* The Model Bilateral Investment Agreement of the Government of the Republic and India (2003) is available at <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2871>>.

85. Draft Model Text for the Indian Bilateral Investment Treaty (March 2015), <[https://mygov.in/sites/default/files/master\\_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf](https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf)> (India Model BIT). This chapter focuses on the draft text of the new India Model BIT made publicly available in March 2015, which is reflective of an approach developed by India throughout 2013 and 2014. The draft has been subject to further revision in light of ongoing BIT negotiations with the United States and Canada, and a revised text was made public in December 2015 (referred to herein as the December 2015 Model). As the revised text was not publicly available or formally adopted at the time of writing, the revisions contained within it are beyond the scope of this chapter.

86. Department of Economic Affairs, Ministry of Finance, Government of India, *Transforming the international investment agreement regime: The Indian experience*, on file with the authors.

87. *ibid.*

88. See e.g., India Model BIT (n 85) preamble and arts 8.1 and 12. Note that significant revisions to the March 2015 draft, upon which this chapter is based, were made in the December 2015 Model (which is beyond the scope of this chapter).

89. See *ibid.* and (n 23).

90. Hanessian and Duggal (n 81) 731; Law Commission of India, 'Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty' (August 2015), <<http://lawcommissionofindia.nic.in/reports/Report260.pdf>> 1, [1.3].

August 2015, India was also engaged in negotiating FTAs containing investment chapters with Indonesia, Australia, Mauritius, New Zealand, and the European Union.<sup>91</sup>

## a. Key Aspects of India's New Model

The new Model includes several innovative provisions aimed at clarifying its scope of application and preserving the government's ability to regulate in the public interest. The Model adopts an enterprise-based definition of investment (as opposed to the traditional asset-based definition included in previous models),<sup>92</sup> which requires 'real and substantial business operations in the territory of the Host State' in order to attract protection under the treaty.<sup>93</sup> Furthermore, 'real and substantial business operations' are specifically defined, lending greater substance and clarity to the scope of the agreement's application,<sup>94</sup> and certain operations are specifically excluded from the scope of protection.<sup>95</sup> Emphasis in the definitions is also placed on compliance with the laws of the host state,<sup>96</sup> again bringing the regulation of investment within the purview of domestic policy objectives. In light of these and other provisions, strategies that may have been permissible under traditional BITs—such as reliance on 'mailbox companies'—would not qualify for protection under the new Model.<sup>97</sup>

An evolving approach to investor protections is also evident, as discussed in further detail in Section B(1) below. While the treaty provides for both direct and indirect expropriation (unlike Brazil's new model), it also provides that tribunals will not have the authority to review whether a measure was taken for a public purpose or in compliance with the law.<sup>98</sup> The Model does not include the standard FET provision, opting instead to provide protection against denials of justice, certain violations of due process, and 'manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment'.<sup>99</sup> In addition, the Model does not include an MFN clause.

With regard to dispute settlement, extensive procedural preconditions are included in the new Model to constrain investor access to ISDS.<sup>100</sup> Coupled with other aspects of the Model text, including the emphasis on investor compliance with host state laws<sup>101</sup> and the retention of interpretative authority with regard to the application of public policy exceptions,<sup>102</sup> scope for claims that infringe on the regulatory powers of host states appears to have been reduced.

91. Law Commission of India (n 90).

92. India Model BIT (n 85) art 1.6. Note that significant revisions to the March 2015 draft, upon which this chapter is based, were made in the December 2015 Model (which is beyond the scope of this chapter).

93. India Model BIT (n 85) art 1.2.

94. *ibid* arts 1.2.1, 1.2.2.

95. *ibid* art 1.2.2.

96. See e.g., the definition of 'Enterprise' under art 1.2 and 'Investment' under art 1.6, both of which include reference to an entity being 'constituted, organised and operated in compliance with the Law of the Host State'. See also (n 23).

97. Hanessian and Duggal (n 81) 733.

98. India Model BIT (n 85) art 5.5. See also (n 23).

99. *ibid* art 3.1.

100. See discussion in Section B(2)(c) below.

101. See e.g., India Model BIT (n 85) arts 8 and 12. See also (n 23).

102. Interpretative authority has been retained in two ways: art 18 provides for joint determinations with regard to the application of exceptions, which are binding on tribunals; art 5.5 precludes review by investment

One of the more striking features of India's approach is the inclusion of specific, binding investor obligations.<sup>103</sup> Discussed in more detail in Section B(3), inclusion of such obligations is rare and evident only to a similar extent in the Southern African Development Community (SADC)<sup>104</sup> and International Institute for Sustainable Development (IISD)<sup>105</sup> model agreements.

## B. DIVERGING TRENDS

In this section, we will look more closely at the three cross-cutting themes of: (1) evolving investor protections; (2) divergent approaches to ISDS; and (3) inclusion of investor obligations, focusing in each case on how the approaches adopted by Canada and the European Union, Brazil, and India address these issues.

### 1. INVESTOR PROTECTIONS

CETA, India's Model BIT, and Brazil's CFIA's adopt differing approaches to investment protection, with a number of significant differences among the three treaties and models. This section discusses how those texts approach three common features of IIAs—the fair and equitable treatment (FET) obligation, restrictions on unlawful expropriations, and the nondiscrimination obligations, which consist of the national treatment obligation and the most-favored nation (MFN) treatment obligation.

#### a. Fair and Equitable Treatment

The FET obligation has evolved over roughly the past 15 years into one of the most controversial, frequently invoked, and frequently successful bases for investor claims.<sup>106</sup> Its contents are notoriously difficult to pin down, as they have been described and applied in myriad ways by states, claimants, tribunals, and commentators. One categorization of the FET obligation breaks it down into two main types.

The first is a view of the FET obligation as being tied, and limited to, the obligations required of states under the customary international law minimum standard of treatment.

tribunals of host state determinations regarding whether a measure was adopted for a public purpose or in compliance with its law, and art 14.2 precludes review of certain decisions taken by domestic judicial authorities. See also art 2.6 (iv) re taxation measures. See also (n 23).

103. India Model BIT (n 85) ch III, discussed further in Section B(3) below.

104. Model Bilateral Investment Treaty Template of the Southern African Development Community (2012) (SADC Model BIT).

105. IISD Model International Agreement on Investment for Sustainable Development (April 2005), <[https://www.iisd.org/pdf/2005/investment\\_model\\_int\\_agreement.pdf](https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf)> (IISD Model).

106. Of eight publicly available awards on the merits issued in 2013, for example, seven found the states liable, and five of those determined that the government had violated the FET obligation. UNCTAD, 'IIA Issues Note: Recent Developments in Investor State Dispute Settlement (ISDS)' (2014) UNCTAD/WEB/DIAE/PCB/2014/3, 9–10. In 2014, of the 15 publicly available decisions on the merits, 10 found the state liable, and six of those 10 were based on a violation of the FET obligation. UNCTAD, 'IIA Issues Note: Investor-State Dispute Settlement: Recent Developments in 2014' (2015) UNCTAD/WEB/DIAE/PCB/2015/2, 8.

The method for identifying the contents of customary international law requires tribunals to identify, based on an assessment of state practice and *opinio juris*, whether there is a relevant rule of customary international law, and then to identify whether the state has breached that rule through its treatment of the foreign investor or investment.

The second considers the FET obligation to be an ‘autonomous’ standard capable of and, in fact, imposing a higher duty of care on states toward investors and their investments. In contrast to the method for identifying whether there is a relevant rule under the customary international law minimum standard of treatment, tribunals interpret the standard by applying the Vienna Convention on the Law of Treaties, and/or any other rule of interpretation specified in the treaty.

According to some tribunals and commentators, the two standards are now effectively one, as customary international law has evolved over time to enshrine the autonomous standard.<sup>107</sup>

The diverse approaches highlighted by the Brazilian CFIA, India’s Model BIT, and CETA illustrate states’ attempts to respond to these trends in interpretation and to more clearly identify the types of conduct that will trigger liability and the method for identifying whether there has been a breach.

#### i. Brazil

The Brazilian approach stands out as it completely excludes the obligation. Although the CFIA concluded on the basis of Brazil’s new approach do not contain the FET provision, Brazil remains subject to customary international law; alleged violations of customary international law arising out of treatment of foreign investors could, even without any specific treaty provision in the agreement, be addressed on a state-to-state level through diplomatic or, if the states consented, other channels such as through recourse to the International Court of Justice.<sup>108</sup> Nevertheless, no FET claim could be brought under the Brazilian agreements themselves.

#### ii. India

In its Model, India sought to clearly confine the treaty parties’ obligations to the standard of treatment required under customary international law. The Model states:

No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law through:

- (i) Denial of justice in any judicial or administrative proceedings; or
- (ii) fundamental breach of due process; or

107. See e.g., *Siemens AG v The Argentine Republic* (Award, 2007) ICSID Case No ARB/02/8, [292]–[300]; *Windstream Energy LLC v Government of Canada* (Counter-Memorial, 2015) UNCITRAL, [371]–[372] (discussing Rudolf Dolzer’s expert opinion, submitted in that dispute, that ‘there is no functional difference between FET provisions that are autonomous and FET provisions that provide for FET protection “in accordance with international law” or “in accordance with customary international law”’).

108. See Madeline Morris, ‘The United States and the International Criminal Court: High crimes and misconceptions: The ICC and non-party states’ (2001) 64(1) *Law and Contemporary Problems* 13, 16 (‘Despite a dramatic increase in the use of binding third-party adjudication at the international level in recent years, the use of such mechanisms to resolve international disputes remains minimal in comparison with the use of diplomatic means for addressing such disputes’).



- (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or
- (iv) manifestly abusive treatment, such as coercion, duress and harassment.<sup>109</sup>

The list of items in (i)–(iv) is used to identify items considered by the government to be part of customary international law; they aim to settle, in advance, at least some disputes regarding the scope of customary international law protections covered by the treaty. Disagreements are still likely to arise, however, regarding the precise contours of each of these elements.

To a certain extent, India's Model BIT is similar to the approach taken most commonly by Western Hemisphere states, which, in agreements concluded over the past ten years, tend to expressly link the FET obligation to the minimum standard of treatment under customary international law, and clarify that the former is not intended to impose obligations beyond those that exist under the latter. Yet India's Model BIT differs from the practices of those states in two important ways. As noted above, the first is that India's Model BIT states expressly what the government considers customary international law to include 'Arbitrary' (or 'manifestly arbitrary') conduct, conduct that is not proportionate, and conduct that frustrates investors' expectations—all of which are types of conduct that have been alleged by investors and found by some tribunals to form part of customary international law<sup>110</sup>—are conspicuously absent from India's list.

The second unique feature of this provision in the Indian Model is that it completely excludes the words 'fair and equitable treatment'. By excluding those terms, the Indian Model signals an intent to avoid the implications and uncertainty that now surround their use.

### iii. CETA

CETA represents a third, distinct approach. It includes an FET obligation that, in contrast to the approach taken by Canada over roughly the previous 15 years, eschews any reference to customary international law. Instead, CETA strives to define the FET obligation by identifying the types of conduct that will constitute a breach of that standard. It states:

Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 6.

109. India Model BIT (n 85) art 3.1. A footnote is also added to the text clarifying that "customary international law" only results from a general and consistent practice of States that they follow from a sense of legal obligation. The Indian Model also requires the state parties to provide investors 'full protection and security', but clarifies that "full protection and security" only refers to a Party's obligations relating to physical security of investors and to investments made by the investors of the other Party and not to any other obligation whatsoever' (ibid art 3.2).

110. See e.g., *Windstream Energy LLC v Government of Canada* (Claimants' Memorial, 2014) UNCITRAL, [591]–[603] (stating, inter alia, that customary international law protects investors' legitimate expectations and prohibits arbitrary government conduct); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador* (Award, 2012) ICSID Case No ARB/06/11, [452] (noting that the government's action was not a 'proportionate' response to the investor's misconduct and, 'accordingly', constituted a breach of customary international law) (upheld against an annulment challenge in the Decision on Annulment, 2 November 2015).

A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:

- (a) Denial of justice in criminal, civil or administrative proceedings;
- (b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
- (c) Manifest arbitrariness;
- (d) Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
- (e) Abusive treatment of investors, such as coercion, duress and harassment; or
- (f) A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties.<sup>111</sup>

The list of conduct that can constitute a violation of the FET obligation is exhaustive but, as noted in the text, can be expanded by agreement of the state parties and approval by a 'Trade Committee' established by CETA.<sup>112</sup>

### *(i) The Relevance of 'Manifest Arbitrariness'*

The list of conduct that will constitute a breach in CETA is similar to the types of conduct noted by India as constituting customary international law. But there is one significant difference: CETA includes 'manifest arbitrariness' as a ground while, as noted above, India's Model BIT does not. Recognizing 'manifest arbitrariness' as a ground for breach raises a number of questions about what types of conduct that standard prohibits, what is required to establish a breach, and what deference a tribunal should accord the state. As Paparinskis has noted:

[T]he modern investment protection law has dealt with arbitrariness in many different ways. At one end of the spectrum, the State's regulatory prerogatives provide the starting point, and reasonableness is accepted without scrutinizing the alternatives. An intermediate position accepts a high degree of deference in principle, even if the availability of less restrictive measures and excessive individual burden might lead to a finding of a breach (. . .). At the other end of the spectrum, an intrusive approach is adopted, rejecting the legitimacy of purpose and reviewing the appropriateness and necessity of particular measures.<sup>113</sup>

CETA does not elaborate on where in this spectrum a tribunal's analysis should fall, though the word 'manifestly' arguably suggests a deferential approach. In contrast, in other areas of CETA, the parties provided more specific instructions to the tribunal on the proper degree of scrutiny to apply to domestic regulatory decisions. In the Financial Services Chapter of CETA, for example, the parties to the treaty included language specifying how the tribunal should evaluate the respondent's claim that a 'prudential carve-out' constitutes a valid defense to investment claims challenging financial services measures. The text instructs:

Given the highly specialized nature of prudential regulation, those applying these principles [governing application of the prudential carve-out] shall defer to the highest degree possible to

111. CETA (n 3) Investment Chapter, art X.9.

112. *ibid.*

113. Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press 2013) 241 (internal citations omitted).

regulations and practices in the Parties' respective jurisdictions and to the decisions and factual determinations, including risk assessments, made by financial regulatory authorities.<sup>114</sup>

By including this rule requiring deference to the 'highest degree possible' in the specific context of prudential measures, it is arguable that such deference need not be accorded by the tribunal when evaluating conduct in other areas of law and policy, leaving the tribunals greater latitude to identify whether that challenged conduct is indeed 'manifestly arbitrary'.

### (ii) *The Relevance of 'Investor Expectations'*

CETA's FET obligation also specifies that investors' expectations can be relevant when determining whether there has been a breach of the standard. It provides:

When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.<sup>115</sup>

This reference to investors' 'legitimate expectations' codifies an approach taken by many tribunals when interpreting and applying the FET obligation. A common theme that has developed in arbitral decisions is that frustration of investors' 'legitimate expectations' is a consideration,<sup>116</sup> if not a determinative factor,<sup>117</sup> when determining whether there has been a breach of that treaty provision.

Under CETA's formulation, it is unclear whether and how investors' expectations would logically be relevant to establishing a claim for denial of justice, a fundamental breach of due process, or targeted discrimination. Nevertheless, those expectations may figure prominently in claims that the government's conduct was 'manifestly arbitrary'. Investors may be able to argue that frustration of their 'legitimate expectations' constitutes 'manifestly arbitrary' conduct in breach of the FET obligation. Because frustration of investors' legitimate expectations is not one of the grounds listed as an independent breach of the FET obligation, frustration of those expectations, standing alone, would presumably not constitute a breach of the FET obligation. Nevertheless, frustration of those expectations could presumably constitute a weighty factor in a tribunal's analysis.

This approach adopted by CETA specifically recognizing the potential relevance of investor expectations contrasts with positions taken by a number of states that have tethered the FET obligation to customary international law and that have directly questioned the role and relevance of investors' 'legitimate expectations' as a part of the FET obligation.

114. CETA (n 3) Financial Services Chapter, Annex XX, Understanding between Canada and the EU: Guidance on the application of Article 15.1 (Prudential-Carve-out) and Article 20 (Investment Disputes in Financial Services).

115. CETA (n 3) Investment Chapter, art X.9.

116. See e.g., *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada* (Award on Jurisdiction and Liability, 2015) PCA Case No 2009-04, [442]–[445] (Bilcon, Award on Jurisdiction and Liability).

117. See e.g., Rudolf Dolzer, 'Fair and equitable treatment: Today's contours' (2014) 12 *Santa Clara Journal of International Law* 7, 17 ('The protection of legitimate expectations by the FET standard will today properly be considered as the central pillar in the understanding and application of the FET standard').

The United States, for example, has stated that ‘neither the concepts of “good faith” nor “legitimate expectations” are component elements of “fair and equitable treatment” under customary international law that give rise to an independent host State obligation.’<sup>118</sup> Similarly, several other parties to the US-CAFTA-DR have stated that the FET obligation under that treaty, which is tied to customary international law, ‘does not include the protection of an investor’s legitimate expectations’.<sup>119</sup>

### (iii) *Narrowing the Scope of Protected Expectations?*

CETA adds some language clarifying the types of ‘expectations’ that may be protected. In decisions issued to date, tribunals have adopted various and often conflicting tests to determine what types of ‘expectations’ are covered.<sup>120</sup> This language in CETA should therefore at least help to resolve some open questions on that issue of the scope of protected ‘expectations’. Under CETA, those expectations need (1) to be based on a specific representation that was made by the government to induce a covered investment, (2) to be legitimate; and (3) to have been relied upon by the investor when making the investment. This conception of legitimate expectations is narrower than had been adopted by at least some tribunals in that it signals ‘legitimate expectations’ cannot be based on the general legal and business framework;<sup>121</sup> and that there must be evidence of investors’ reliance.<sup>122</sup>

118. *Spence International Investments, LLC, Bob F Spence, Joseph M Holsten, Brenda K Copher, Ronald E Copher, Brette E Berkowitz, Trevor B Berkowitz, Aaron C Berkowitz and Glen Gremillion v The Government of the Republic of Costa Rica* (Submission of the United States, 2015) UNCITRAL, [17]. The United States has also explained that even when the government frustrates investors’ legally binding rights that were granted under investor-state contracts (as opposed to mere expectations), ‘[t]o breach the minimum standard of treatment, something more is required, such as a complete repudiation of the contract or a denial of justice in the execution of the contract’. *Grand River Enterprises Six Nations, Ltd et al v United States of America* (Counter-Memorial, 2008) UNCITRAL, [96]–[97].

119. *Teco Guatemala Holdings, LLC v Republic of Guatemala* (Submission of El Salvador, 2012) ICSID Case No ARB/10/23, [16]–[17] (Teco). See also *Teco* (Submission of the Dominican Republic, 2012) ICSID Case No ARB/10/23, [10] (‘Tomando en cuenta que el enfoque debe ser la practica y conducta del Estado, la Republica Dominicana señala que resulta erroneo incluir las expectativas de los inversionista’); *Teco* (Non-disputing Party Submission of the Republic of Honduras) ICSID Case No ARB/10/23, [10] (‘[L]a Republica de Honduras no considera valido ni necesario hacer referencia a las expectativas de los inversionistas para decidir si se ha violado el nivel minimo de trato’).

120. See discussion of cases in Lise Johnson and Oleksandr Volkov, ‘Investor-state contracts, host-state “commitments” and the myth of stability in international law’ (2013) 24(3) *American Review of International Arbitration* 361, 376–380; Dolzer (n 117) 18–19.

121. cf. *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic* (Decision on Liability, 2010) ICSID Case No ARB/03/19, [226] (‘In examining the various cases that have justifiably considered the legitimate expectations of investors and the extent to which the host government has frustrated them, this Tribunal finds that an important element of such cases has not been sufficiently emphasized: that investors, deriving their expectations from the laws and regulations adopted by the host country, acted in reliance upon those laws and regulations and changed their economic position as a result. Thus, it was not the investor’s legitimate expectations alone that led tribunals to find a denial of fair and equitable treatment. It was the existence of such expectations created by host country laws, coupled with the act of investing their capital in reliance on them, and a subsequent, sudden change in those laws that led to a determination that the host country had not treated the investors fair and equitably’).

122. cf. *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania* (Award, 2013) ICSID Case No ARB/05/20, [718]–[723]. In this dispute, the tribunal found adequate reliance for the purpose of the FET obligation although it was ‘clear that (i) not all of the Claimants’ investments were predicated on the EGO 24 incentives; and (ii) even when the Claimants’ [sic] took the EGO 24 incentives into

Nevertheless, the text still leaves a number of questions open. It does not, for example, clarify whether the representations will need to have been made by those with authority to make them or in compliance with legal procedures, nor whether the representations even need to be legally binding and capable of giving rise to rights and obligations under domestic law. If the answer to those questions is 'no', treaty protection of 'expectations' can effectively give rise to new property rights that would not have been recognized as such under domestic law. The answers to those questions and others can therefore have significant implications for the effects that IIAs can have on the scope of property rights, and the scope of government obligations to protect those treaty-created rights.

#### *(iv) Relationship between CETA and Other Canadian Treaty Practice*

In CETA, Canada departs from its roughly 15-year practice of tying the FET obligation to customary international law. The question this raises is whether Canada aims in CETA to enshrine a new standard, or to effectively extend its North American Free Trade Agreement (NAFTA)—and NAFTA-progeny practices—to CETA, but to do so using different language. Based on submissions filed in *Bilcon v. Canada* and *Windstream v. Canada*, disputes pending while CETA was being negotiated, Canada appears to be following the latter approach by advancing an interpretation of customary international law that mirrors the standard set in CETA, thereby narrowing the gaps between Canada's two approaches. In those submissions, Canada cited *Waste Management v. Mexico* and certain NAFTA decisions with apparent approval, noting that the tribunals in those cases had concluded that treatment of certain investor expectations could be relevant to determining whether conduct was manifestly arbitrary in breach of the NAFTA's FET obligation.<sup>123</sup> Canada also argued that, to be relevant, any expectations had to (1) be objective and legitimate, (2) be based on a specific assurance or promise by the government to induce the investment, and (3) have existed at the time the investor decided to make its investment.<sup>124</sup>

In a decision issued in March 2015, after CETA was finalized, the *Bilcon* tribunal agreed that investors' expectations were relevant to a determination of whether there had been a breach of the FET obligation, and that manifestly arbitrary conduct could constitute such a breach.<sup>125</sup> It then held Canada liable for violating the FET obligation.<sup>126</sup> Subsequently, however, all three NAFTA states asserted that the *Bilcon* tribunal erred in its decision by abdicating its duty to examine state practice and *opinio juris* to determine the content of customary

account in making investment decisions, other factors also influenced the Claimants' decisions'. *ibid* [721]. The tribunal then concluded, however, that it was 'satisfied that a significant part of the Claimants' investments (from 2000 to 2004) were made in reliance on the incentives' (*ibid*).

123. *Bilcon* (n 116) (Counter-Memorial of Canada, 2011) PCA Case No 2009-04, [389]–[392] and fn 783 (*Bilcon*, Counter-Memorial of Canada); *Windstream Energy LLC v Government of Canada* (Counter-Memorial of Canada, 2015) UNCITRAL, [385], [406]–[409] and fn 824 (*Windstream*).

124. *Windstream* (n 123) [410]; *Bilcon*, Counter-Memorial of Canada (n 123) [392] ('In order for any of their expectations to be at all relevant context to assessing whether or not the conduct in question here rises to the level of a breach of Article 1105, the Claimants must prove that their expectations (1) arose from a specific assurance made by Canada, (2) made in order to induce their investment at Whites Point (i.e. it must have been made before the investment was made), and (3) that their expectations were objective rather than subjective').

125. *Bilcon*, Award on Jurisdiction and Liability (n 116) [442]–[446].

126. *ibid*.

international law.<sup>127</sup> The submissions by Canada and the United States' submission further specifically critique the *Bilcon* tribunal's failure to determine whether there was in fact any customary international law rule protecting investors' expectations.<sup>128</sup> The NAFTA parties have therefore emphasized the importance of the methodology to be employed by NAFTA tribunals in conducting their analysis.<sup>129</sup>

Significantly, if the dispute were under CETA and not the NAFTA, the state parties' arguments regarding the proper methodology to apply would be irrelevant. Rather, the *Bilcon* tribunal's approach—and finding of liability—would appear at least superficially consistent with CETA's text. As the *Bilcon* decision was issued after the text of CETA was negotiated, it is an open question whether that decision would have produced any drafting changes for CETA's FET obligation.

## b. Expropriation

The expropriation provision, like the FET obligation, is a key basis of investor claims and state liability; also like the FET obligation, its contours are not readily defined. In particular, the line between an indirect expropriation and a legitimate regulatory distinction is not obvious nor fixed, but depends on policy choices that are embedded in relatively vaguely worded treaty provisions, which are then interpreted and applied by arbitral tribunals on a case-by-case basis.

### i. Brazil

As with the FET obligation, Brazil takes the narrowest approach to investment protection. While its approach protects against *direct* expropriation, it does not protect against *indirect* expropriation. Instead of being provided under the investment treaty, legal protection for indirect expropriation will thus be subject to the legal framework in the host country, any applicable investor-state contract, any relevant political risk insurance, or any relevant human rights framework such as protection of property rights available under the Inter-American Convention on Human Rights.

### ii. India

India's Model BIT follows the dominant approach of modern IIAs by specifying that it covers both direct and indirect expropriation, and including language seeking to clarify what types of measures qualify as an indirect expropriation.

127. See *Mesa Power Group, LLC v Government of Canada* (Second Submission of the United States, 2015) PCA Case No 2012-17, [14]–[18]; *Mesa Power Group, LLC v Government of Canada* (Second Submission of Mexico Pursuant to NAFTA Article 1128, 2015) PCA Case No 2012-17, [10]–[11]; *Mesa Power Group, LLC v Government of Canada* (Canada's Observations on the Award on Jurisdiction and Merits in *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc v Canada*, 2015) PCA Case No 2012-17, [17].

128. *Mesa Power Group, LLC v Government of Canada* (Second Submission of the United States, 2015) PCA Case No 2012-17, [17]–[18]; *Mesa Power Group, LLC v Government of Canada* (Canada's Reply to 1128 Submissions, 2015) PCA Case No 2012-17, [12]–[13].

129. Canada subsequently filed an application with the Federal Court of Canada to set aside the *Bilcon* award (n 116). As of the writing of this chapter, no decision on that application had yet been issued.



*(i) What Constitutes an Indirect Expropriation?*

The language helping to define an indirect expropriation in the Indian text made public in March 2015 provides that:

The determination of whether a Measure or a series of Measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, and usually requires evidence that there has been:

- (i) permanent and complete or near complete deprivation of the value of Investment; and
- (ii) permanent and complete or near complete deprivation of the Investor's right of management and control over the Investment; and
- (iii) an appropriation of the Investment by the Host State which results in transfer of the complete or near complete value of the Investment to that Party or to an agency or instrumentality of the Party or a third party.<sup>130</sup>

This language emphasizes features that are to typify, but are not necessarily mandatory elements of, an indirect expropriation for the purposes of the Indian Model BIT.

The language differs from that used in other countries' models and recent agreements (including CETA, as discussed below) to attempt to distinguish between, on the one hand, legitimate regulatory measures that do not give rise to a duty to pay compensation and, on the other, expropriatory measures that do require such payment. Overall, India's Model BIT appears to adopt an approach toward the expropriation obligation that aligns with recommendations by a growing body of scholarship examining how to ensure investment treaty protection is calibrated to produce economically efficient outcomes.<sup>131</sup>

130. India Model BIT (n 85) art 5.2. Read in connection with Article 5.4, which is discussed below in the text of this chapter, the 'third party' referred to in Article 5.2(iii) appears to refer to particular individuals or entities as opposed to more general public beneficiaries of government measures.

After releasing its Model for comments, India revised it in order to more closely align it with the approaches adopted in agreements concluded by Canada and the United States. Art 5.3(b) of the December 2015 Model, which has replaced art 5.2 discussed above, states:

5.3 The Parties confirm their shared understanding that:

(...)

- b) The determination of whether a measure or a series of measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, that takes into consideration:
  - (i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
  - (ii) the duration of the measure or series of measures of a Party;
  - (iii) the character of the measure or series of measures, notably their object, context and intent; and
  - (iv) whether a measure by a Party breaches the Party's prior binding written commitment to the investor whether by contract, licence or other legal document.

131. See Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2014); Jonathan Bonnitcha and Emma Aisbett, 'An economic analysis of the substantive protections provided by investment treaties' in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2011–2012* (Oxford University Press 2013) 687–690. An economically efficient policy is that which maximizes net economic benefits. Bonnitcha and Aisbett (n 131) 684. Economic efficiency is

One notable feature of this clarifying language that is relatively unique among IIAs is the Indian Model's reference to the 'appropriation' element. By including this 'appropriation' element, the Model enshrines a standard that more narrowly focuses on the 'hold up' problems that are commonly cited as one of the key economic rationales for IIAs.<sup>132</sup> 'Hold up' problems, often also labeled as 'obsolescing bargains', can arise in situations in which the respective bargaining power of the investor and state are different before the investment has been made (or at an early stage of the investment) than at a later time.<sup>133</sup> The typical example cited involves an extractive industry investment in which the host state provides the investor favorable terms and conditions in order to induce investment in a long-term, complex, and capital-intensive project and then, after the investor has sunk costs in the project, the investor's bargaining power weakens, leaving the investor vulnerable to government demands to renegotiate the original deal and extract better terms.

By requiring governments to pay compensation for actions stripping investors of the benefits of their investments after those investors have sunk costs in the relevant project, IIAs either discourage states from exploiting these 'obsolescing bargains' or ensure that the investor is not harmed by such conduct. This provides investors protections against one of the most frequently cited risks foreign investors face, and therefore can reduce disincentives for investors to invest in major, long-term projects.

Relatedly, including the 'appropriation' element also reduces government exposure to liability in cases in which a challenged measure (e.g., a measure banning production of a certain chemical in order to prevent environmental harm, or a measure banning a certain line of business that results in harm to consumers or third parties) diminishes or destroys the value or use of an investment, but is not designed or applied in order to transfer that value or use to the state itself. As Bonnitcho and Aisbett highlight, this requirement of appropriation appears to reflect an economically efficient approach to treaty protection and domestic regulation:

Insofar as [investment treaty] protections—such as guarantees of fair and equitable treatment and of compensation for indirect expropriation—require countries to compensate foreign investors for losses caused by measures that create costs and benefits for actors other than the host state itself, they are likely to lead to inefficient under-regulation of foreign investments. The distinction between measures that affect only the interests of the host country and the foreign investor, and measures that also affect the interests of other actors is a matter of degree. The greater the impact of a prospective measure on the interests of other actors, the greater the risk that the existence of rules requiring compensation for the measure's impact on foreign investors would encourage inefficient under-regulation.<sup>134</sup>

improved if 'the gains of those who are better off as a result of the change would be sufficient to compensate those made worse off'. *ibid* 683 (describing Hicks-Kaldor efficiency).

132. See e.g., Natasha Ghichilnisky-Heal and Geoffrey Heal, 'Host-MNC relations in resource-rich countries' (2015) National Bureau of Economic Research Working Paper 21712; Bonnitcho (n 131); Bonnitcho and Aisbett (n 131); Andrew Guzman, 'Explaining the popularity of bilateral investment treaties' in Karl P. Sauvant and Lisa E. Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009) 81.

133. For more on hold-up problems, see e.g., Raymond Vernon, *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises* (Basic Books 1971); Oliver Hart, *Firms, Contracts and Financial Structure* (Oxford University Press 1995).

134. Bonnitcho and Aisbett (n 131) 687.

Further protecting regulation from indirect expropriation claims, the Model states:

For the avoidance of doubt, the parties also agree that, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives such as public health, safety and the environment shall not constitute expropriation.<sup>135</sup>

Again, this approach appears to be consistent with an efficiency-based approach to treaty protection. As Bonnitcho and Aisbett state:

There are strong economic arguments *against* compensating foreign investors for losses caused by [a wide range of government conduct beyond direct appropriation for the benefit of the government]. If states are to include indirect expropriation provisions in their [investment treaties], (...) they should be drafted in a way that ensures that such measures are exempt for [*sic*] the obligation to pay compensation. This would require a carve-out at least as broad as the one recognized by the *Methanex* Tribunal, which held that ‘non-discriminatory regulation for a public purpose, which is enacted in accordance with due process’ did not constitute indirect expropriation for which compensation was required.<sup>136</sup>

Notably, in contrast to a number of other texts, including CETA,<sup>137</sup> this provision in the Indian Model does not limit the scope of this protection for public interest measures by adding the qualifier that in certain ‘rare circumstances’, measures designed and applied to protect legitimate public interest objectives *can* constitute indirect expropriations.

## (ii) Compensation Owed

The Indian Model also includes a number of features regarding payment of compensation that are relatively unique among the existing stock of IIAs. For one, the Indian Model provides that compensation for expropriation shall be ‘adequate and reflect the fair market value’ of the expropriated investment,<sup>138</sup> and shall not include any ‘consequential or exemplary losses or speculative or windfall profits’.<sup>139</sup> This language departs from that of many other agreements, which require payment to be ‘prompt, adequate, and effective’.<sup>140</sup> A second distinguishing feature of the India Model is that it also specifies that the amount of compensation shall not be adjusted based on whether the expropriation was lawful or unlawful.<sup>141</sup> Most treaties are silent on the issue of compensation for *unlawful* expropriation, and, in that silence, some

135. India Model BIT (n 85) art 5.4.

136. Bonnitcho and Aisbett (n 131) 694–695 (quoting *Methanex Corporation v United States of America* (Final Award of the Tribunal on Jurisdiction and Merits, 2005) UNCITRAL, 7).

137. CETA (n 3) Annex X.11(3) (‘For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations’).

138. India Model BIT (n 85) art 5.6.

139. India Model BIT (n 85) art 5.7, Explanation I.

140. This reflects the so-called ‘Hull formula’, so named due to the formulation of that standard by US Secretary of State Cornell Hull in a 1938 note to the government of Mexico. The standard has since been incorporated in a significant number of IIAs.

141. India Model BIT (n 85) art 5.6.

tribunals have determined that the unlawful expropriations are to be compensated under the 'full reparation' standard of customary international law, which may result in higher awards than compensation for lawful expropriation pursuant to the treaty.<sup>142</sup> India's Model would prevent such outcomes.

A third novel feature is that the treaty specifies interest is to be simple interest,<sup>143</sup> not the compound interest that has increasingly been awarded by arbitral tribunals.<sup>144</sup>

A fourth distinguishing characteristic of the Indian Model is that it instructs that an award of 'adequate' compensation reflecting 'fair market value' should be 'reduced after application of relevant Mitigating Factors'.<sup>145</sup> Those 'Mitigating Factors' were listed as including:

- (a) current and past use of the Investment, including the history of its acquisition and purpose;
- (b) the duration of the Investment and previous profits made by the Investment; (c) compensation or insurance payouts received by the Investor or Investment from other sources; (d) the value of property that remains subject to the Investor or Investment's disposition or control,
- (e) options available to the Investor or Investment to mitigate its losses, including reasonable efforts made by the Investor or Investor towards such mitigation, if any; (f) conduct of the Investor that contributed to its damage; (g) any obligation the Investor or its Investment is relieved of due to the expropriation, (h) liabilities owed in the Host State to the government as a result of the Investment's activities, (i) any harm or damage that the Investor or its Investment has caused to the environment or local community that have not been remedied by the Investor or the Investment, and (j) any other relevant considerations regarding the need to balance the public interest and the interests of the Investment.<sup>146</sup>

Although rare in IIAs, some of these factors have been longstanding features of contracts for political risk insurance as bases for the insurer to deny or reduce coverage. The 1987 form insurance contract of the United States' Overseas Private Investment Corporation (OPIC), for example, provided that the government could reduce payment based on 'compensation received from other sources', the 'book value of commercially viable property which remain[ed] subject to the Investor's effective disposition and control after' the expropriation, and '[a]ny obligation the Investor [was] relieved of by the expropriation'.<sup>147</sup> The contract also provided that OPIC could deny coverage if unreasonable actions attributable to the investor were the preponderant cause of its loss.<sup>148</sup>

142. See e.g., *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia* (Award, 2015) ICSID Case No ARB/06/2, [326] (Quiborax); *Waguhi Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt* (Award, 2009) ICSID Case No ARB/05/15, [540]; *Siemens AG v The Argentine Republic* (Award, 2007) ICSID Case No ARB/02/8, [352]–[353]. But see *British Caribbean Bank Ltd v The Government of Belize* (Award, 19 December 2014) PCA Case No 2010-18, [260]–[262].

143. India Model BIT (n 85) art 5.8.

144. See e.g., *Quiborax* (n 142) [524] (citing *El Paso Energy International Company v The Argentine Republic* (Award, 2011) ICSID Case No ARB/03/15, [745]); *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina* (Award, 2007) ICSID Case No ARB/97/3, [9.2.6]; *Wena Hotels Ltd v Arab Republic of Egypt* (Award, 2000) ICSID Case No ARB/98/4, [129].

145. India Model BIT (n 85) art 5.6.

146. *ibid* art 5.7.

147. International Development Cooperation Agency, Overseas Private Investment Corporation, Insurance Contract Form, 51 Fed Reg 3438, 23 January 1986, [5.03] of Form Contract.

148. *ibid* [4.03] of Form Contract.

Given the similarities between government-sponsored political risk insurance schemes such as OPIC's program and IIAs, both of which aim to facilitate international investment by providing investors and investments added protection against harms in the host state, one might expect that such provisions in political risk insurance contracts would also be included in IIAs. Nevertheless, such clauses have been rare.<sup>149,150</sup>

### iii. CETA

CETA's article on expropriation, which expressly covers direct and indirect expropriations, and its interpretive annex, which seeks to help clarify the distinction between permissible regulatory measures not requiring compensation and expropriatory measures that do require such payment, align closely with texts used by Canada, the United States, and other countries over roughly the past decade. The interpretive annex largely parallels the (infamously vague) *Penn Central* test adopted by the US Supreme Court to identify whether there has been a regulatory taking under the US Constitution.<sup>151</sup>

This test, as set forth in CETA, specifies that, when assessing whether a government measure (or measures) has indirectly expropriated the investor's investment, the tribunal should examine (1) the 'economic impact' of the measure(s) (though the impact on the value of the investment, standing alone, will not establish that an indirect expropriation has occurred); (2) 'the duration of the measure or series of measures'; (3) the 'extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations'; and (4) the 'character of the measure or series of measures, notably their object, context and intent'.<sup>152</sup>

None of these prongs is straightforward in its meaning, mode of application, or weight. Moreover, decisions applying these criteria remain relatively limited, providing little insight on the question of how the factors will impact state liability in future disputes under CETA.<sup>153</sup>

149. CETA (n 3) Investment Chapter, art X.17 (3). Similar provisions are common in political risk insurance instruments.

150. The reference to mitigating factors that a tribunal may take into account in determining the amount of monetary compensation to be awarded has been modified in the December 2015 Model. See art 26.3, note 4, which states:

Mitigating factors can include, current and past use of the investment, the history of its acquisition and purpose, compensation received by the investor from other sources, any unremedied harm or damage that the investor has caused to the environment or local community or other relevant considerations regarding the need to balance public interest and the interests of the investor.

151. *Penn Central Transportation Co v City of New York*, 438 US [104], [124] (1978) (identifying three factors of 'particular significance' in regulatory takings cases: (1) the 'economic impact' of the government action, (2) the extent to which the action 'interferes with distinct investment-backed expectations,' and (3) the 'character' of the action). Articles noting its vagueness are numerous, and include: Steven J Eagle, 'Penn Central and its reluctant muftis' (2014) 66(1) *Baylor Law Review* 1; David Crump, 'Takings by regulation: How should courts weigh the balancing factors' (2012) 52 *Santa Clara Law Review* 1; John D Echeverria, 'Making sense of Penn Central' [2006] 23(2) *UCLA Journal of Environmental Law & Policy* 171.

152. CETA (n 3) Annex X.11(2).

153. Decisions in which tribunals have interpreted and applied such provisions are limited. They include the following: *Adel A Hamadi Al Tamini v Sultanate of Oman* (Award, 2015) ICSID Case No ARB/11/33, [345]–[376] (Tamini); *Railroad Development Corp (RDC) v Republic of Guatemala* (Award, 2012) ICSID Case No

As noted briefly above, CETA's annex on expropriation also contains text stating:

For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.<sup>154</sup>

This 'except in rare circumstances' language, although similar to text that can be found in a number of agreements concluded by the United States, Canada, and other countries over roughly the past decade, adopts a noteworthy new approach in that it appears to expressly incorporate a proportionality test in which the burden on the investor is weighed against the purpose of the public interest measure. In contrast, some agreements such as the US-CAFTA-DR do not specify what 'rare circumstances' will lead to a finding that a nondiscriminatory measure adopted for a public interest objective constitutes an indirect expropriation.<sup>155</sup> Other texts, such as Canada's 2003 Model and subsequent agreements concluded by Canada, state that the severity of the public interest measure relative to its purpose can help illuminate whether the measure constitutes a 'rare circumstance', but also indicate that proportionality is not the end of the inquiry; rather, a proportionality analysis is used as a means to assess whether the measure possesses an additional aggravating factor, such as whether the measure cannot 'reasonably [be] viewed as having been adopted and applied in good faith'.<sup>156</sup> The slightly different language used in CETA suggests that Canada and the European Union did not want to require any such additional indicator of bad faith or other form of wrongfulness. A lack of proportionality, alone, would seem to suffice.

### c. Nondiscrimination

The nondiscrimination provisions in IIAs affect a diverse range of issues, including: the ability of governments to restrict and govern the terms of market access; the extent to which states can accord (intentionally or not) foreign investors and foreign-owned investments in their territories different treatment than domestic investors and domestic-owned investments; and the ability of investors to 'import' procedural, jurisdictional, and substantive provisions from other IIAs.

ARB/07/23, [79]–[152] (RDC). In neither of those cases did the tribunal find that there had been an expropriation. *Tamini* (n 153) [376]; *RDC* (n 153) [152].

154. CETA (n 3) Annex X.11(3).

155. US-CAFTA-DR, Annex 10-C.

156. 2003 Canada Model Foreign Investment Protection and Promotion Agreement (FIPA), Annex B.13(1)(3); Canada-Burkina Faso FIPA, Annex I(c) (signed 20 April 2015); Canada-China FIPA, Annex B.10(3) (entered into force 1 October 2014); Canada-Czech Republic FIPA, Annex A(c) (entered into force 22 January 2012); Canada-Peru FIPA, Annex B.13(1)(c) (entered into force 20 June 2007). See also *Bear Creek Mining Corporation v Republic of Peru* (Respondent Counter-Memorial on the Merits and Memorial on Jurisdiction, 2015) ICSID Case No ARB/14/21, [253] ('Claimant's expropriation claim—which, as explained above, is an indirect expropriation claim—also fails because Claimant cannot identify any "rare circumstance" upon which to base its claim. Annex 812.1 of the FTA dictates that a claimant must demonstrate rare circumstances, such as a showing of bad faith, to support a claim of indirect expropriation').



### i. Market Access

On the first set of those issues—market access—the Brazilian approach, Indian Model, and CETA each limits their scope of pre-establishment protections against discrimination. Brazil does this by making pre-establishment national treatment protection subject to market access restrictions that may exist or subsequently be imposed under domestic law;<sup>157</sup> India's Model does this by excluding pre-establishment protection for national treatment and excluding MFN treatment protection in its entirety;<sup>158</sup> and CETA does this by providing pre-establishment protections, but excluding those protections from ISDS.<sup>159</sup> Thus, one common feature among the three agreements is that they do not as fully embrace the broad market liberalization model of a small but growing number of IIAs.<sup>160</sup>

### ii. Ability of Countries to Accord Disparate Treatment to Foreign Investors or Investments

On the second issue—the extent to which the nondiscrimination provisions prevent the host state from according disparate treatment to foreign investors and investments in its territory—the texts reflect different levels of concern about restricting their policy space in this area, and different approaches for addressing that concern.

For Brazil, its practice with respect to these issues appears to have evolved and/or to be particularly open to change on a case-by-case basis in the context of negotiations. Thus, identifying a 'Brazilian model' approach to treatment of established investors is not currently possible. To illustrate the range of approaches, the agreement with Mozambique, for example, allows discrimination between national and covered foreign investors/investment if permitted under the host state's domestic law; the host state is only required to grant foreign investors or investments in its territory MFN treatment.<sup>161</sup> The agreement with Angola requires national and MFN treatment 'with respect to the access to courts of law and administrative agencies, or to the defense of the rights of such investors'.<sup>162</sup> Brazil's agreement with Colombia expands the nondiscrimination obligations more broadly to require national and MFN treatment with respect to 'expansion, management, conduct, operation, sale or other disposition of investments in its territory'.<sup>163</sup> The evolution in Brazil's approach is therefore an interesting

157. See Investment Cooperation and Facilitation Agreement between the Government of the Federative Republic of Brazil and the Government of the Republic of Mozambique (signed 30 March 2015) art 11(2) (Brazil-Mozambique CFIA); Brazil-Angola CFIA (n 77) art 11(2). Those texts provide investors from the other treaty party MFN protection on a pre-establishment basis, but include an exception for benefits granted by virtue of membership in existing or future common markets, free trade areas, customs unions, and double taxation agreements. Brazil-Angola CFIA, art 11(4); Brazil-Mozambique CFIA, arts 11(4)–(5). There are, however, different approaches reflected in the various CFIAs that Brazil has negotiated.

158. India Model BIT (n 85) art 4 ('Each Party shall not apply to Investments, Measures that accord less favourable treatment than that it accords, in like circumstances, to domestic investments with respect to the management, conduct, operation, sale or other disposition of Investments in its territory').

159. CETA (n 3) Investment Chapter, art X.1(4).

160. One recent manifestation of this liberalization model is the TPP, on which the 12 negotiating parties reached agreement in October 2015.

161. Brazil-Mozambique CFIA (n 157) art 11(2)–(3).

162. Brazil-Angola CFIA (n 77) art 11(7).

163. Investment Cooperation and Facilitation Agreement between the Government of the Federative Republic of Brazil and the Government of the Republic of Colombia (signed 9 October 2015) art 5(1) (Brazil-Colombia CFIA).

development to watch, as it appears that the country's policy on these issues may be somewhat malleable.

India's Model BIT, in contrast, reflects an approach that responds more specifically to recent arbitral jurisprudence, and seeks to reduce the host state's vulnerability to claims and liability. Its national treatment obligation: (1) clarifies the meaning of 'like circumstances', specifying that governments may have various legitimate reasons for differentiating between investors and that tribunals should give 'substantial deference' to those policy reasons; (2) clarifies that a breach can only be found if the challenged measure 'constitutes *intentional* and *unlawful* discrimination against the Investment *on the basis of nationality*'; and (3) seeks to protect legitimate exercises of discretion by officials responsible for enforcing the law.<sup>164</sup>

These measures appear to respond to a growing number of investor claims alleging, and tribunal decisions finding, violations of the nondiscrimination obligations on the ground of *de facto* disparate treatment, and rejecting as irrelevant any requirement of proof of intentional or nationality-based discrimination.<sup>165</sup>

In order to further reduce exposure to claims and liability, India's Model also excludes any laws and measures of regional and local governments,<sup>166</sup> and protects the government's ability to provide domestic investors and their investments subsidies or other supports 'in pursuit of legitimate public purpose[s] including the protection of public health, safety and the environment'.<sup>167</sup> States often include similar carve-outs in their agreements,<sup>168</sup> or in annexes negotiated as part of their IIAs.<sup>169</sup>

CETA, similarly, contains carve-outs and exclusions from the nondiscrimination obligations, seeking to maintain prerogatives in certain policy areas, sectors, and activities. Nevertheless, unlike India's Model, the text does not reflect any changes to address or resolve broader questions regarding the scope of those provisions, such as questions regarding whether intentional and/or nationality-based discrimination is required to establish a breach. Rather, CETA phrases the national and MFN treatment obligations in a relatively standard fashion, stating that host states are to accord covered foreign investors and investments 'treatment no less favorable than the treatment it accords, in like situations' to its own investors and to their

164. India Model BIT (n 85) art 4.2 and fn 2 (emphasis added).

165. Briefs filed and decisions on the questions of intent and nationality-based discrimination that were issued before negotiation of India's Model BIT include: *Mesa Power Group, LLC v Government of Canada* (Memorial of the Investor, 2013) PCA Case No 2012-17, [271]–[288]; *Mesa Power Group, LLC v Government of Canada* (Reply Memorial of the Investors, 2014) PCA Case No 2012-17, [442]–[444]; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada* (Reply Memorial of the Investors, 2012) PCA Case No 2009-04, [369]–[387]; *Apotex Holdings Inc and Apotex Inc v United States of America* (Memorial of Claimants, 2012) ICSID Case No ARB(AF)/12/1, [429]; *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan* (Award, 2009) ICSID Case No ARB/03/29, [390]; *Occidental Exploration and Production Co v The Republic of Ecuador* (Final Award, 2004) LCIA Case No UN3467, [177]–[179].

166. India Model BIT (n 85) art 4.3.

167. *ibid* art 4.5.

168. Trans-Pacific Partnership (signed 4 February 2016), ch 9, art 9.4(6) ('Article 9.4 (National Treatment), Article 9.5 (Most-Favoured Nation Treatment) and Article 9.10 (Senior Management and Board of Directors) shall not apply to (a) government procurement; or (b) subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance').

169. TPP (n 168) Annex I (Non-Conforming Measures), I-US-14 (excluding from the nondiscrimination obligations '[a]ll existing non-conforming measures of all states of the United States, the District of Columbia, and Puerto Rico').

investments, and to investors of any third country, ‘with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory’.<sup>170</sup> Given that, while negotiating CETA, Canada was involved in disputes raising the issue of whether the investor had to prove intentional and/or nationality-based discrimination, it is interesting to note that CETA does not seek to clarify those issues.<sup>171</sup>

### iii. Importation of Provisions from Other Treaties

One new feature of IIAs that is reflected in both CETA and in some of the CFIAAs negotiated by Brazil is an effort to prevent states from importing substantive and procedural protections from other IIAs. Previously, express restrictions on importation had generally been limited to restrictions on importing dispute settlement provisions.<sup>172</sup> CETA and the Brazil-Colombia CFIA, in contrast, also clearly prevent importation of treaties’ substantive obligations.

CETA does this by stating:

For greater certainty, the ‘treatment’ referred to in Paragraph 1 and 2 does not include investor-to-state dispute settlement procedures provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute ‘treatment’, and thus cannot give rise to a breach of this article, absent measures adopted by a Party pursuant to such obligations.<sup>173</sup>

Using different language, the Brazil-Colombia CFIA contains two separate provisions, one seeking to bar investors from invoking dispute settlement provisions from other IIAs, and another seeking to bar investors from invoking substantive standards from other IIAs.<sup>174</sup>

Given states’ general dislike of efforts by investors to use the MFN obligation to bring in substantive standards from other treaties, it appears likely that provisions such as those found in CETA and the Brazil-Colombia CFIA will become more prevalent. Another approach, as adopted by India, is to exclude the MFN obligation entirely.

## 2. ISDS: SPECTRUM OF CONSTRAINTS ON INVESTOR ACCESS TO DISPUTE SETTLEMENT

As the number of investor-state disputes continues to grow, so too have the number of cases challenging government measures that relate to regulation, judicial enforcement, administrative determinations, and other core government functions. As a result, arbitrators are

170. CETA (n 3) Investment Chapter, arts X.6(1) and X.7(1).

171. Canada was involved in these issues as a respondent in *Mesa* and as a respondent in *Bilcon*.

172. See e.g., TPP (n 168) art 9.5(4); Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (entered into force 6 October 2009) art 4 [2(2)] (Colombia-Switzerland BIT); Andreas R Ziegler, ‘The nascent international law on most-favoured nation (MFN) clauses in bilateral investment treaties’ in Hermann and others (eds), *European Yearbook of International Economic Law* (Springer 2010) 77, 93.

173. CETA (n 3) Investment Chapter, art X.7(4).

174. Brazil-Colombia CFIA (n 163) art 5(3).

increasingly reviewing government actions to determine the legitimacy of these measures, and in particular whether they give rise to liability under the broad protections of various investment agreements. Over the past five years, there has been growing concern about the traditional ISDS mechanism, and the perceived expanding reach of arbitrators into the policy space of host jurisdictions.<sup>175</sup> Correspondingly, there has been a notable trend in newly concluded agreements of some states wresting control back from the tribunals over the interpretation of the various treaty standards, the evaluation of the legitimacy of government measures, and the determination of the appropriateness of certain remedies or damages in the case of liability.<sup>176</sup>

The growing number of countries that are undertaking reviews of their IIAs and taking measures to limit the scope and power of arbitral tribunals has resulted in a divergence of approaches, including those reflected in the 2014 treaties and models. States are using a combination of exhaustion requirements, exceptions, exclusions, filter mechanisms, clarifications, and other means of limiting the scope of arbitral review; in at least a few cases, states have excluded ISDS altogether. Drawing on the central approaches in CETA, the Brazilian CFIA, and India's Model BIT, this section takes a closer look at three means deployed by states to narrow the scope for tribunals to review and decide on the legitimacy of government measures, namely: the inclusion of filter mechanisms, exclusions from ISDS, and replacement of the ISDS mechanism altogether.

## a. Filter Mechanisms

Traditional ISDS provisions relegate to the party-appointed tribunal the role and responsibility of reviewing the alleged wrongful action of the state. In fact, one of the rationales for ISDS tribunals is specifically to 'de-politicize' disputes, by removing the determination of the legitimacy of a government's action from the political state-state level. However, as tribunals have increasingly reviewed the policies and actions of host states, including those considered to be politically sensitive, states have increasingly limited the scope for such arbitral review. One mechanism for reserving to the parties the right to determine the merits of certain claims and defenses raised in ISDS is the inclusion of filter mechanisms, which specify that certain types of claims and defenses must first be routed to designated state officials or a treaty-established body for a binding determination. The purpose of this filter mechanism is to reinforce the state parties' rights and ability to review the legitimacy of certain types of measures, rather than relying on the interpretation of tribunals. Only if the relevant state authorities do not or cannot resolve the issue does it revert back to the tribunal for determination.

For instance, recognizing that 'prudential measures strengthen domestic financial systems, encourage sound efficient and robust institutions, markets, and infrastructure; and promote international financial stability by facilitating better-informed lending and investment decisions, improving market integrity, and reducing the risks of financial distress and contagion', CETA includes an explicit carve-out in Article 15.1, 'allowing the Parties to take measures for prudential reasons'.<sup>177</sup> If a claim is filed with respect to a financial services measure, the respondent may refer the question of whether the prudential measures carve-out is a valid defense to the claim to CETA's Financial Services Committee. A decision by the Committee

175. See Johnson and Sachs 2014 (n 78).

176. *ibid* 222.

177. CETA (n 3) Financial Services Chapter, Annex XX (Guidance on the application of art 15.1).

is binding on the tribunal.<sup>178</sup> If the Committee fails to make a determination within 60 days of the referral, the matter is then referred to CETA's Trade Committee for a determination. If the Trade Committee fails to make a determination within three months of referral of the matter by the Financial Services Committee, the investor may proceed with its claim to the arbitral tribunal, and the tribunal may then decide whether Article 15.1 is a valid defense as a preliminary matter.<sup>179</sup>

The Canada-Cameroon BIT similarly provides that where an investor submits a claim related to financial services, and where a respondent party invokes one of several exceptions, that party can request that the tribunal seek a report in writing from the state parties on the issue of whether and to what extent the invoked exception is a valid defense to the claim.<sup>180,181</sup> The tribunal must wait for the receipt of this report, which is then binding on the tribunal.<sup>182</sup> If the parties fail to agree, the issue is submitted to a state-state arbitration panel, whose determination is then binding on the ISDS tribunal. The ISDS tribunal may only decide on the validity of the defense where, within 70 days of referral to the parties by the tribunal, no report has been received by the tribunal, and no request to establish a state-state panel has been made.<sup>183</sup> Canada's 2014 BITs with Côte d'Ivoire, Mali, Nigeria, Serbia, and Senegal contain substantially similar, if not identical, language.<sup>184</sup>

CETA also includes a filter mechanism for claims relating to taxation measures.<sup>185</sup> The determination of whether a specific measure constitutes a taxation measure, and if so, whether it breaches an obligation under the agreement's sections on nondiscrimination or investment protection, can be referred to the parties by a respondent state. The parties' joint determination is then binding on the tribunal; only if the parties fail to issue a joint determination may the tribunal determine those issues. The Japan-Kazakhstan BIT has a similar filter mechanism for taxation measures; it provides that investors shall refer the question of whether a taxation measure does not constitute an expropriation, and therefore cannot be the basis for an ISDS claim, to the 'competent authorities [defined in sub-paragraph c] of both Contracting Parties'.<sup>186</sup> Those authorities have 183 days to determine the issue, after which the investor may submit the claim to ISDS.

178. *ibid.*

179. CETA (n 3) Annex XX of the Financial Services Chapter.

180. Canada-Cameroon Foreign Investment Promotion and Protection Agreement (signed 3 March 2014) art 22.3 (Special Rules Regarding Financial Services) (Canada-Cameroon BIT).

181. In addition, Canada-Cameroon BIT art 11.6 protects the right of a party to impose 'a measure through the equitable, non-discriminatory and good faith application of its domestic law' with respect to Transfers; art 17.2 protects the right of a party to adopt or maintain 'reasonable measures for prudential reasons', including to maintain the safety, integrity and stability of a party's financial system and financial institutions; and art 17.3 exempts 'non-discriminatory measures of general application taken by a public entity in pursuit of monetary and related credit or exchange rate policies' from the obligations in the treaty.

182. *ibid* art 22.4.

183. *ibid* art 22.5.

184. This filter mechanism for prudential measures related to financial services was also included in the Canada-China 2012 BIT and in the 2012 US Model BIT, which both refer the matter first to domestic authorities. See Johnson and Sachs 2014 (n 78) 224.

185. CETA (n 3) Exceptions Chapter, art X.06(7).

186. Agreement between Japan and the Republic of Kazakhstan for the promotion and protection of investment (signed 23 October 2014) art 22.5 (b) (Japan-Kazakhstan BIT).

In addition to explicit filter mechanisms, there are other treaty mechanisms, including procedural requirements, that can have a similar effect to explicit filter mechanisms in limiting the scope for arbitral review. Requiring exhaustion of domestic remedies, for example, essentially gives a first review of the merits of the case to domestic authorities, although the extent to which the tribunal will critically review a domestic determination depends on the specific treaty and the specific arbitral panel. A 2012 OECD study found that only 8% of a sample selection of 1,660 IIAs required claimants to seek a remedy through the domestic court system as a precondition to international arbitration.<sup>187</sup>

This proportion may be increasing, as evidenced by the inclusion of exhaustion requirements (or similar) in recent treaties and new models.<sup>188</sup> For instance, the India Model BIT requires investors to exhaust domestic remedies prior to initiating ISDS, unless they can show that doing so would be futile.<sup>189</sup> The Colombia-Turkey BIT requires nonjudicial local administrative remedies to be initiated when required by the law of the state party prior to submitting a claim to ISDS.<sup>190</sup>

Even in cases in which the tribunal reviews a matter in the first instance, many treaties have expressly reserved the right of the parties to issue binding interpretations of treaty provisions. State guidance and binding interpretations can result in similar outcomes to filter mechanisms.<sup>191</sup> For instance, CETA includes a Joint Declaration attached by Canada and the European Union, which states that ‘the Parties may issue binding interpretations to ensure the proper interpretation of the scope of investment protection under this Agreement in accordance with the provisions of Article X.27: Applicable Law and Rules of Interpretation of Chapter X (Investment)’.<sup>192</sup> That article ‘gives the parties the right in an investor-State arbitral tribunal to adopt binding interpretations and to make submissions when they are not defendants’.<sup>193</sup> Likewise, Article 14.9 of the India Model provides that interpretations of provisions and decisions on application of the treaty issued by the parties shall be binding on tribunals.

Article 11.22.3 of the Australia-Republic of Korea FTA states that ‘a decision of the Joint Committee declaring its interpretation of a provision of this Agreement under Article 21.3.3(c) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision’.<sup>194</sup> A subsequent provision also provides that a respondent can direct a tribunal to request the interpretation of the Joint Committee on whether a defense is within the scope of an entry set out in Annex I or II (on measures, sectors, and activities that are not subject to the obligations imposed by the treaty).<sup>195</sup> The Joint Committee’s determination is

187. David Gaukrodger and Kathryn Gordon, ‘Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community’ (2012) OECD Working Paper on International Investment No. 2012/3, 15.

188. An exhaustion requirement is also included in the SADC Model BIT (n 104) art 28.4.

189. India Model BIT (n 85) art 14.3.

190. Agreement between the Government of the Republic of Colombia and the Government of the Republic of Turkey concerning the reciprocal promotion and protection of investments (signed 28 July 2014) art 12.1 (Colombia-Turkey BIT).

191. Bryan Mercurio, ‘Safeguarding public welfare? Intellectual property rights, health and the evolution of treaty drafting in international investment agreements’ (2015) 6(2) *Journal of International Dispute Settlement* 252, 267.

192. CETA (n 3) Declaration to art X.11(6) of the Investment Chapter.

193. Mercurio (n 191) 272; CETA (n 3) Investment Chapter, art X.27.

194. Free Trade Agreement between Australia and the Republic of Korea (entered into force 12 December 2014) art 11.22.3 (Australia-Korea FTA).

195. *ibid* art 11.23(1).



binding on the tribunal, and if the Joint Committee fails to decide the issue within 60 days, the authority to make the determination will revert back to the tribunal.<sup>196</sup>

## b. Exclusions from Dispute Settlement

Filter mechanisms limit the issues that tribunals may review, at least in the first instance; however, if the designated body or committee is unable to resolve the issue, it often reverts back to the tribunal for determination. Some states have gone a step further by excluding certain types of measures from review by arbitral tribunals altogether. These ISDS exclusions differ from filter mechanisms in that they preclude certain types of measures or actions from ever being reviewed by the tribunal. Exclusions are also distinct from exceptions: the latter carve out certain issues or measures from coverage by the treaty or its provisions altogether, whereas issues excluded from ISDS are still covered by other treaty provisions, such as investor protections, but cannot form the basis of a claim submitted to ISDS.<sup>197</sup>

CETA excludes several matters from ISDS. First, a Joint Declaration attached by the parties to CETA's Investment Chapter proclaims that 'domestic courts of each Party are responsible for the determination of the existence and validity of intellectual property rights', and that 'each Party shall be free to determine the appropriate method of implementing the provisions of this Agreement regarding intellectual property within their own legal system and practice'.<sup>198</sup> This language essentially excludes review of domestic court rulings relating to the existence and validity of intellectual property (IP) rights, and places a party's method of implementing their IP system beyond the reach of the agreement.<sup>199</sup> CETA also excludes from ISDS claims with respect to the establishment of investments<sup>200</sup> and with respect to the establishment or acquisition of a covered investment under Section 3 (Non-Discriminatory Treatment).<sup>201</sup> With respect to Canada's investment review process, CETA specifies that a 'decision by Canada following a review under the Investment Canada Act, with respect to whether or not to permit an investment that is subject to review', is also not subject to the dispute settlement provisions of the agreement.<sup>202</sup>

The India Model BIT contains a number of exclusions, in some cases drawing fire from critics for the extent of the exclusions.<sup>203</sup> For instance, Articles 14.2 (ii) (a) and (b) preclude a tribunal from reviewing 'any legal issue which has been finally settled by any judicial authority of the Host State' and the merits of a decision made by the judicial authority of the state. As Article 14.3 requires an exhaustion of all judicial and administrative remedies, unless the claimant can demonstrate that doing so would be futile, the Law Commission of India

196. *ibid.*

197. Although they are not discussed in this chapter, the growing number and scope of treaty exceptions similarly reflects states' efforts to preserve policy space and limit the review of certain issues or policy measures by arbitral tribunals.

198. CETA (n 3) Declaration to art X.11(6) of the Investment Chapter.

199. Mercurio (n 191) 271.

200. CETA (n 3) Investment Chapter, s 2 (Establishment of Investments).

201. *ibid* Investment Chapter, art X.1(4). See also Peng Wang, 'Political economy of China-US BIT negotiation: Whose decisive pursuit of leadership in institutional transformation?' (2015) *Transnational Dispute Management* 1, 19.

202. CETA (n 3) Investment Chapter, Annex X.43.1.

203. See e.g., Law Commission of India (n 90).

argues that '[i]t is hard to contemplate too many scenarios where an investor would comply with the provision for exhaustion of local remedies and yet overcome the jurisdictional bar imposed by Article 14.2(2)'.<sup>204</sup> While indeed this exclusion substantially narrows the grounds for ISDS review of domestic law and administrative determinations, it leaves open the possibility for: claims of denial of due process or denial of justice; claims for which there is no domestic cause of action, or similarly, where a domestic court determines that there has not been a violation under domestic law, but the claimants allege a violation under the international law treaty standard; or claims for a treaty violation if the futility exception to exhaustion applies.<sup>205</sup>

Article 2.6 (iv) of the India Model BIT further excludes any decision made by the host state with respect to taxation measures, and Article 5.5 provides that a tribunal may not review whether a measure was taken for public purpose or in compliance with the law for the purpose of expropriation claims.<sup>206</sup> In a less common exclusion, the Colombia-Turkey BIT excludes from ISDS disputes 'related to the property and real rights upon the real estate within the territory of the hosting Contracting Party'; those claims may only be submitted to the courts of the state party—they may not be submitted to investor-state arbitration.<sup>207</sup>

In addition to these types of exclusions, other agreements (concluded pre-2014) have excluded claims related to financial institutions (Canada-Jordan BIT); claims concerning specific treaty obligations such as national treatment and performance requirements (Malaysia-Pakistan Closer Economic Partnership Agreement); and claims arising out of measures to protect national security interests (India-Malaysia Comprehensive Economic Cooperation Agreement).<sup>208</sup>

There are also other treaty mechanisms, preconditions, and other provisions that appear in 2014 treaties and models that effectively circumscribe the scope of arbitral review. For instance, the India Model BIT excludes several categories from ISDS by excluding them from the scope of investment, e.g., goodwill, intangible rights, and orders or judgments from certain domestic proceedings.<sup>209</sup> A holding or investment company is also specifically excluded by specific requirements with regard to the definition of 'real and substantial business operations'.<sup>210</sup> Similarly, CETA excludes claims when the relevant investment 'has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process'.<sup>211</sup> Colombia-Turkey provides that 'only the disputes arising directly out of investment activities which have obtained necessary permission, if there is any permission required, in conformity with the relevant legislation of the hosting Contracting Party on foreign capital' shall be subject to ISDS.<sup>212</sup>

204. *ibid* 41, [5.3.2].

205. India Model BIT (n 85) art 3. See also Hanessian and Duggal (n 81).

206. See also (n 23).

207. Colombia-Turkey BIT (n 190) art 12.8(b).

208. See UNCTAD, 'Reform of investor-state dispute settlement: In search of a roadmap' (2013) *IIA Issues Note No 2*, <[http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf)>.

209. Hanessian and Duggal (n 81) 733.

210. India Model BIT (n 85) art 1.2.1; see also Hanessian and Duggal (n 81) 733.

211. CETA (n 3) Investment Chapter, art X.17.

212. Colombia-Turkey BIT (n 190) art 12.8.

Canada's 2014 BITs contain several exclusions, with each of the agreements containing similar (if not identical) provisions. In general, the agreements preclude claims in relation to the following provisions from being submitted to ISDS: provisions concerning senior management, boards of directors, and entry personnel; transparency requirements concerning states parties; provisions concerning nonlowering of health, safety, and environmental standards; and provisions encouraging investors to voluntarily comply with internationally recognized standards concerning corporate social responsibility.<sup>213</sup> The agreements also exclude from ISDS (and state-state arbitration) decisions taken by Canada following a review of the Investment Canada Act.<sup>214</sup>

### c. Alternatives to ISDS

To the extreme of the continuum of state efforts to limit the expansive power of arbitral tribunals are those states that have backed away from ISDS altogether, or have never included it in their IIAs. Most notable among the approaches adopted in 2014 is the Brazil model, which does not include an ISDS mechanism. Although each of the CFIAs concluded on the basis of Brazil's new approach has slight variation in language, the basic approach is similar: the agreements establish both Ombudsmen and a Joint Committee to facilitate the amicable resolution of disputes between state parties; if an issue is not resolved by the Ombudsmen and subsequent consultation and negotiation between the parties, then a party may submit an issue to the Joint Committee, which may develop a state-to-state arbitration mechanism to resolve the dispute, if the parties deem it appropriate.

So far, of the known treaties to have been concluded on the basis of this approach, three (with Mozambique, Angola, and Malawi) are similar in that there is no binding commitment by the parties to arbitrate and no further provisions in the treaty specifying the procedure or applicable law for a state-state arbitration.<sup>215</sup> In two of the other known agreements, with Mexico and Colombia, the treaties further specify that if the Ombudsmen and Joint Committee are unable to resolve the dispute, then either party may submit the dispute to state-state arbitration, within certain parameters laid out in the treaties. For instance, the Brazil-Mexico CFIA has a five-year statute of limitations from the date on which the investor acquired or should have acquired knowledge of the facts that gave rise to the disputes.<sup>216</sup> In all cases, while

213. See e.g., Canada-Cameroon BIT (n 180) art 20; Canada-Côte d'Ivoire Foreign Investment Promotion and Protection Agreement (signed 30 November 2014) art 20 (Canada-Côte d'Ivoire BIT); Canada-Mali Foreign Investment Promotion and Protection Agreement (signed 28 November 2014) art 20 (Canada-Mali BIT); Canada-Senegal Foreign Investment Promotion and Protection Agreement (signed 27 November 2014) art 21 (Canada-Senegal BIT); Canada-Serbia Foreign Investment Promotion and Protection Agreement (entered into force 27 April 2015) art 21 (Canada-Serbia BIT); and Canada-Nigeria Foreign Investment Promotion and Protection Agreement (signed 6 May 2014) art 21 (Canada-Nigeria BIT). See also Free Trade Agreement between Canada and the Republic of Korea (signed 22 September 2014) art 8 (Canada-Korea FTA), which again contains similar provisions regarding exclusions as Canada's 2014 BITs.

214. See e.g., Canada-Cameroon BIT (n 180) art 40, which excludes matters listed in Annex IV from dispute settlement. Annex IV provides: 'A decision by Canada following a review of the Investment Canada Act shall not be subject to the dispute settlement provisions under Section C (Settlement of Disputes between an Investor and the Host Party) or Section D (State-to-State Dispute Settlement Procedures) of this Agreement'. Similar provisions are contained in the other agreements listed at (n 213) above.

215. Martini (n 67).

216. Investment Cooperation and Facilitation Agreement between the Government of the Federative Republic of Brazil and the Government of the United Mexican States (signed 26 May 2015) art 2.3 (Brazil-Mexico CFIA).

state-state arbitration is referred to in the agreements, Brazilian public officials have noted that this will not be the primary mechanism for settling disputes.<sup>217</sup>

Although Australia has a handful of prior FTAs (with Malaysia and the United States, for instance) without ISDS, it seems since 2013 to be considering ISDS on a case-by-case basis. The FTA with Korea contains a dispute settlement provision, but the Australia-Japan EPA does not provide for ISDS; instead, it establishes, first, a Joint Committee to inter alia adopt necessary decisions,<sup>218</sup> and second, a subcommittee on investment for the purposes of inter alia ‘considering any issues raised by either Party concerning investment agreements between a Party and an investor of the other Party’ and reporting its findings to the Joint Committee.<sup>219</sup>

ISDS is still overwhelmingly included in IIAs—a 2012 OECD survey found only 7% of its sample did not provide for ISDS<sup>220</sup>—but this trend may be increasing, as countries continue to respond to perceived biases in ISDS mechanisms, as well as to the general costs of the mechanisms, especially when unsuccessful in defending against a claim. South Africa, after announcing the termination of a number of its BITs, published a draft Promotion and Protection of Investment Bill in 2013 for public comment.<sup>221</sup> The draft bill provides only for domestic litigation, arbitration or mediation; it does not include ISDS.<sup>222</sup>

### 3. INVESTOR OBLIGATIONS

Investment agreements tend to be asymmetrical in nature, establishing a range of protections for investors while placing significant obligations on states.<sup>223</sup> Reform of the traditional model to provide for inclusion of investor obligations has been highlighted as a means of correcting this asymmetry, promoting compliance with host state laws, and encouraging responsible investment that contributes to sustainable development.<sup>224</sup> Increased consensus on the responsibilities of investors to respect human rights and conduct business in a responsible manner is evident in the proliferation of soft law standards that address these issues.<sup>225</sup>

217. Morosini and Ratton Sanchez Badin (n 62).

218. Agreement between Australia and Japan for an Economic Partnership (entered into force 15 January 2015) art 1.13 (Australia-Japan EPA).

219. Australia-Japan EPA (n 218) art 14.18.

220. Gaukrodger and Gordon (n 187) 64.

221. Liang-Ying Tan and Amal Bouchenaki, ‘Limiting investor access to investment arbitration—A solution without a problem?’ (2015) *Transnational Dispute Management* 1, 10. While beyond the scope of the review period for this chapter, the finalized Promotion and Protection of Investment Bill (subsequently renamed the Protection of Investment Bill) was introduced to the National Assembly in July 2015.

222. *ibid* 10.

223. World Investment Report 2015 (n 7) 158. See also Patrick Dumberry and Gabrielle Dumas-Aubin, ‘How to impose human rights obligations on corporations under investment treaties? Pragmatic guidelines for the amendment of BITs’ in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2011–2012* (Oxford University Press 2013).

224. World Investment Report 2015 (n 7) 158–159. See also Johnson and Sachs 2014 (n 78).

225. See e.g., UN Human Rights Council (HRC), ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’, Annex I: ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (21 March 2011) UN Doc A/HRC/17/31 (UN Guiding Principles), endorsed by the UNHRC in Res 17/4 (16 June 2011) UN Doc HR/PUB/11/04; OECD, *OECD Guidelines for Multinational Enterprises* (2011) (OECD Guidelines). See also World Investment Report 2015 (n 7) 159–160.

Some improvements were made in 2014 with regard to the inclusion of investor obligations. Nonetheless, divergences are apparent in the extent to which states have chosen to bind investors by means of these obligations: inclusion of specific, binding obligations in IIAs remains uncommon,<sup>226</sup> and references to existing soft law standards continue to be made in the context of encouraged, voluntary compliance with these standards.<sup>227</sup>

The version of India's Model BIT made publicly available in March 2015 stands out for its inclusion of both positive and negative binding obligations on investors relating to corruption, CSR, and human rights. This version forms the basis of the analysis below concerning India's approach to investor obligations. However, in the context of ongoing negotiations with other states, the Indian Model was revised in late 2015. While these revisions were not made public at the time of writing and are beyond the scope of the review period for this chapter, it is important to note that the provisions establishing investor and home state obligations were significantly altered (and in most cases entirely removed from the text of the Model), thereby signaling a realignment of the Indian approach with more traditional texts. The March 2015 version of Chapter III, which focuses on investor obligations, contains six detailed, binding provisions; the text as it stood in late 2015 contained only two provisions concerning investor obligations, one requiring compliance with host state laws, and a second nonbinding CSR provision.<sup>228</sup>

The stated objective of India's Model BIT Chapter III ('Investor, Investment and Home State Obligations'), as developed in 2014 and first published in early 2015, is to both ensure investor compliance with the laws of the host state and to 'enhance the contribution of Investments to inclusive growth and sustainable development of the Host State'.<sup>229</sup> Perhaps most notably, Article 8 establishes in clear terms the consequences of any breach of the Model's investor obligations:

8.3 The Parties further agree that compliance with Articles 9, 10, 11 and 12 of this Chapter is compulsory and is fundamental to the operation of this Treaty. Investors and their Investments must comply with the obligations in Articles 9, 10, 11, and 12 to benefit from the provisions of this Treaty.

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

226. UNCTAD, 'Investment policy framework for sustainable development' (2012) 39, <[http://unctad.org/en/PublicationsLibrary/diaepcb2012d5\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf)> (UNCTAD Framework 2012). See also UNCTAD 'Social responsibility' (2001) UNCTAD Series on Issues in International Investment Agreements, 17, which found few examples of treaties that incorporated binding social obligations on investors, noting that a majority of these obligations could be found only in voluntary codes of conduct developed by industry and civil society groups.

227. See e.g., Canada-Cameroon BIT (n 180) art 15; Canada-Côte d'Ivoire BIT (n 213) art 15; Canada-Mali BIT (n 213) art 15; Canada-Senegal BIT (n 213) arts 15–16; Canada-Serbia BIT (n 213) arts 15–16; and Canada-Nigeria BIT (n 213) arts 15–16. See also Canada-Republic of Korea FTA (n 213) art 8.16.

228. This conclusion refers to the revisions made in late 2015, reflected in the December 2015 version of India's Model BIT.

229. India Model BIT (n 85) art 8.1. Note that all references to 'inclusive growth' were removed from the December 2015 Model. Other significant revisions to provisions concerning investor obligations were also made, including the deletion of Articles 8.1 and 12. These revisions are beyond the scope of this chapter—see (n 23).

Article 8.3 thus suggests that investors may be denied the benefits of the treaty where they fail to comply with their obligations thereunder and with the obligations prescribed by the laws of the host state (compliance with which is required by Article 12). Article 8.4 brings the enforcement of investor obligations explicitly within the purview and ‘sole discretion’ of states parties, enabling either the host or home state to pursue action in response to any breach by an investor.

An understanding of Articles 12 and 13 is also necessary to grasp the full weight of the provisions concerning investor obligations. Article 12 requires compliance by investors and their investments with the laws of the host state.<sup>230</sup> Article 13.1 removes jurisdictional constraints on the submission of civil claims in the host state for liability with regard to acts, decisions, or omissions made in the home state that lead to damage, personal injuries, or loss of life in the host state. Article 13.2 requires the home state to remove barriers to the submission of civil claims in the home state regarding acts, decisions, or omissions made in relation to investments in the territory of the host state.

Taken together with the provisions discussed below, India’s Model BIT proposes a promising approach to investor obligations in IIAs, evident only to a similar extent in the SADC and IISD model agreements. None of the other 2014 treaties or models adopts an approach that is as comprehensive or mandatory in nature.

While the focus in this chapter is on CETA, the Indian Model BIT, and Brazil’s CFIA, many of the agreements concluded in 2014 address (to varying extents) the issues of the environment, health, and safety. For example, a common provision found in many of Canada’s 2014 agreements is a nonlowering of standards provision,<sup>231</sup> which discourages states from relaxing domestic health, safety, or environmental measures and provides that states must not waive such measures in order to encourage investment. The Colombia-Turkey BIT also features such a provision,<sup>232</sup> in addition to Article 11.1, which provides:

Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in accordance with its environmental laws and regulations as well as its laws and regulations with regard to labor, provided that such measures are *proportional* to the objectives sought.<sup>233</sup>

Adoption of the proportionality approach, as opposed to the usual approach of requiring that measures comply with certain investor protections (including those relating to nondiscrimination), constitutes a novel means of rebalancing investor protections with the state’s right to regulate.<sup>234</sup>

230. India Model BIT (n 85) art 12. See also (n 23).

231. See e.g., Canada-Cameroon BIT (n 180) art 15.1; Canada-Côte d’Ivoire BIT (n 213) art 15.1; Canada-Mali BIT (n 213) art 15.1; Canada-Senegal BIT (n 213) art 15; Canada-Serbia BIT (n 213) art 15; and Canada-Nigeria BIT (n 213) art 15; Japan-Kazakhstan BIT (n 186) art 24. See also Canada-Republic of Korea FTA (n 213) art 8.10(2).

232. Colombia-Turkey BIT (n 190) art 11.2.

233. *ibid* art 11.1 (emphasis added).

234. See e.g., Canada-Cameroon BIT (n 180) art 10.6(c), which provides that the adoption of measures ‘designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation’ *provided* that they are nondiscriminatory in nature. Even where they are nondiscriminatory, such measures may still be determined to constitute an indirect expropriation in



## a. Corruption

While general references to the objective of combatting corruption are contained in many of the treaties concluded in 2014, they vary in the extent to which they place specific, binding obligations on investors themselves. India's Model BIT is the most explicit in this regard. Article 9.1, which mirrors Article 13 of the IISD Model,<sup>235</sup> provides:

Investors and their Investments in the Host State shall not, either prior to or after the establishment of an Investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of the Host State as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage.<sup>236</sup>

Article 9.2 adds that investors and their investments must not engage any individual or firm to interfere with the award of a contract or a particular right under the laws of the host state.<sup>237</sup> Article 9.3 precludes investors and their investments from making any illegal contributions to candidates for public office, or to political parties and other political organizations: any contributions and disclosures of such contributions must comply with the laws of the host state.<sup>238</sup> Finally, Article 9.4 provides:

Investors and their Investments shall not be complicit in any act described in this Article, including inciting, aiding, abetting, conspiring to commit, or authorizing such acts.<sup>239</sup>

Inclusion of these provisions is notable for several reasons: the obligations are explicitly aimed at investors; the language used ('shall not') is mandatory in nature, and thereby creates binding obligations; and the provisions refer to several types of specific behavior rather than the general concept of 'corruption', in addition to prohibiting both direct and indirect (complicit) engagement in corrupt behavior.

In addition to the specific obligations with regard to corruption, India's Model BIT mandates compliance by investors and their investments with disclosure requirements, as established by the laws of the home and host states.<sup>240</sup> Even where not required by the laws of the host state, Article 10.6 provides that investors and their investments 'should develop and comply with policies to ensure timely and accurate disclosure of material information' relating to specific matters included in a (nonexhaustive) list. Finally, with regard to taxation, Article 11 provides that investors and their investments must comply with host state law, 'including timely payment of their tax liabilities in accordance with the Law of the Host State'.<sup>241</sup>

certain 'rare circumstances', e.g., 'such as when a measure or series of measures is so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted in good faith'.

235. IISD Model (n 105) art 13 (a). See also SADC Model BIT (n 104) art 10.

236. India Model BIT (n 85) art 9.1. See also (n 23).

237. *ibid* art 9.2. See also (n 23).

238. *ibid* art 9.3. See also (n 23).

239. See similar language in IISD Model (n 105) art 13 (B).

240. India Model BIT (n 85) art 10. See also (n 23).

241. *ibid* art 11.1. See also (n 23).

The only reference to corruption in the context of investment contained in CETA is Article X.17 (3), which provides that investors may not submit claims to investor-state arbitration under CETA ‘where the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process’.<sup>242</sup> While this may motivate investors to comply with host state laws and avoid engagement in corrupt practices,<sup>243</sup> the provision falls far short of placing a specific, binding obligation on investors.

Of the five agreements concluded at the time of writing on the basis of Brazil’s new model, only the most recent contains a general reference to corruption. Article 14 (2) of the Brazil-Colombia CFIA provides that states parties are not required to protect investments established or operated through means of corruption.

With regard to other treaties concluded in 2014, references to corruption tend to be couched in terms of: (1) states parties’ obligations to prevent and combat corruption;<sup>244</sup> or (2) provisions encouraging compliance with voluntary CSR standards, including those addressing the issue of corruption.<sup>245</sup>

## b. Corporate Social Responsibility

To date, CSR standards as they relate to international investment have generally developed as soft law principles and guidelines.<sup>246</sup> Recent efforts to rebalance the asymmetric nature of investment agreements have seen the inclusion of provisions encouraging the voluntary adoption of these soft law standards, in addition to the inclusion of suggested bespoke CSR practices in the text of certain agreements. Among the 2014 treaties and models, a majority continue to adopt this ‘voluntary approach’ to CSR. India’s Model BIT again provides a notable exception to this trend.

All five agreements concluded between January and October 2015 on the basis of Brazil’s new approach include a specific CSR provision, and most of these provide that investors ‘should strive to achieve the highest possible level of contributions’ to the sustainable development of the host state and the local community, based on the adoption of voluntary principles and standards.<sup>247</sup> The Brazil-Malawi CFIA is notable in that it contains stronger language, providing that ‘investors and their investments *shall strive* to achieve the highest possible level of contribution to the sustainable development of the Host Party and the local community’, again by also referring to the adoption of ‘a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article’.<sup>248</sup> Given that the drafters retained ‘strive’, this still appears to require only a best efforts approach to investor obligations.

242. CETA (n 3) Investment Chapter, art X.17 (3).

243. Hindelang and Sassenrath (n 28) 35.

244. See e.g., Japan-Kazakhstan BIT (n 186) art 10.

245. Canada-Cameroon BIT (n 180) art 15.2. Similar provisions are included in other Canadian BITs concluded in 2014, listed in (n 227) above.

246. See e.g., UN Guiding Principles (n 225) and OECD Guidelines (n 225). Industry and/or resource-specific standards, such as the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (developed by the Food and Agriculture Organization of the UN), are also being developed with increasing frequency and consensus.

247. See e.g., Brazil-Mozambique CFIA (n 157) art 10; Brazil-Angola CFIA (n 77) art 10; Brazil-Mexico CFIA (n 216) art 13(1).

248. Investment Cooperation and Facilitation Agreement between the Government of the Federative Republic of Brazil and the Government of the Republic of Malawi (signed 25 June 2015) art 9 (emphasis added) (Brazil-Malawi CFIA).

Brazil's CFIA's also provide guidance with regard to the content of these voluntary principles by either including a list of general practices in an annex to the agreement,<sup>249</sup> or by including this list in the text of the CSR provision itself.<sup>250</sup> The list of practices addresses various areas where responsible investment can have a positive impact for citizens of the host state, including: fostering progress to achieve sustainable development<sup>251</sup> and encouraging capacity-building in cooperation with local communities.<sup>252</sup> Some divergence among the five agreements is evident in the practices listed.<sup>253</sup> The CSR provision is reinforced by recognition in the preamble of 'the essential role of investment in promoting sustainable development, economic growth, poverty reduction, job creation, and expansion of productive capacity and human development'.<sup>254</sup> Thus, while the language used to delimit the scope of investor obligations in Brazil's CFIA's is to date relatively weak (with the exception of the Brazil-Malawi CFIA, as discussed above), consistently including a specific CSR provision at the very least has the potential to highlight the interests of more diverse groups within the text of key investment policy instruments, thereby presenting a more complete picture of the social implications of investment.<sup>255</sup>

CETA similarly adopts a voluntary approach to CSR by encouraging investors 'to respect internationally recognized standards and principles of corporate social responsibility, notably the OECD Guidelines for multinational enterprises and to pursue best practices of responsible business conduct'.<sup>256</sup> Limited references to issues covered by the umbrella of CSR are also made elsewhere in the agreement, including in the Chapters on Trade and Sustainable Development and Trade and the Environment, both of which are also relevant to foreign investment.<sup>257</sup>

Interestingly, the approach in CETA represents a step backward from that adopted in the CARIFORUM-EU Economic Partnership Agreement (concluded in 2008),<sup>258</sup> Article 72 of which provides that EU member states and the signatory CARIFORUM states: '*shall cooperate and take, within their own respective territories, such measures as may be necessary, inter alia through domestic legislation, to ensure that*' investors: (1) do not engage in corrupt conduct; (2) act in accordance with labor standards as required by the International Labour Organization; (3) do not manage or operate their investments in a way that circumvents international environmental or labor obligations arising from agreements to which the relevant state is a party; and (4) establish and maintain local community liaison projects, particularly where investments concern extensive natural resource-based activities.<sup>259,260</sup>

249. Brazil-Mozambique CFIA (n 157) Annex II; Brazil-Angola CFIA (n 77) Annex II.

250. Brazil-Mexico CFIA (n 216) art 13(2); Brazil-Malawi CFIA (n 248) art 9(2); Brazil-Colombia CFIA (n 163) art 13.

251. See e.g., Brazil-Mozambique CFIA (n 157) Annex II, [(i)].

252. *ibid* [(iii)], [(iv)].

253. For the purposes of comparison, read Annex II of the Brazil-Mozambique and Brazil-Angola CFIA's against art 26 of the Brazil-Mexico CFIA.

254. See e.g., Brazil-Mozambique CFIA (n 157) Preamble. Similar references can be found in the preambles of the other four CFIA's concluded between January and October 2015.

255. Morosini and Ratton Sanchez Badin (n 62).

256. CETA (n 3) Preamble.

257. See e.g., CETA (n 3) Chapter on Trade and Sustainable Development, art 3; Chapter on Trade and Environment, art X.12.

258. Economic Partnership Agreement between the CARIFORUM States and the European Union (signed 15 October 2008) (CARIFORUM-EU EPA).

259. *ibid* art 72 (emphasis added).

260. For further discussion of this agreement and the nontrade interests considered therein, see Hans Morten Haugen, 'Trade and investment agreements: What role for human rights in international economic law?' in

In last year's *Yearbook* chapter, the authors noted that the Canadian government had publicly stated (in January 2013) its intention to include CSR provisions in all of its future BITs:<sup>261</sup> in 2013, this proved not to be the case.<sup>262</sup> However, practice in 2014 appears to have improved: all of the BITs concluded by Canada include a CSR provision. Nonetheless, the provision's content remains limited in terms of substance, providing only that states should encourage investors 'to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies', including those that address issues such as labor and the environment.<sup>263</sup>

India's Model BIT again stands out by adopting the most innovative approach to CSR obligations. While the term 'CSR' is not used in the Model, the investor obligations contained in Chapter III address many issues typically covered by the umbrella term. Apart from provisions regarding corruption (discussed above) and human rights (discussed below), the Model text requires that investors and their investments comply with the laws of the host state, including (but not limited to): labor laws;<sup>264</sup> information sharing requirements regarding the corporate history and practices of the investor and investment;<sup>265</sup> environmental and conservation laws;<sup>266</sup> consumer protection and competition laws;<sup>267</sup> and 'nationally and internationally accepted standards of corporate governance and accounting practices'.<sup>268</sup> Article 12.2 adds to this by providing that investors and their investments 'shall strive' to contribute to the development objectives of the host state. Responsible business conduct is also reinforced by Article 5.7, which provides that an investor or investment's harm or damage to the environment or to a local community is to be applied by investment tribunals as a mitigating factor in the determination of compensation for successful expropriation claims.<sup>269</sup>

It remains to be seen whether and to what extent these obligations will be incorporated into agreements negotiated on the basis of India's new Model. The outcome of ongoing negotiations with Canada may be particularly telling in this regard, as it will require reconciliation of two competing approaches (voluntary versus mandatory). Given developments in late 2015, it appears that India's attempt to emerge as a proponent of the mandatory approach was met with considerable resistance, and it is therefore unlikely that this approach will influence ongoing negotiations.<sup>270</sup>

Eibe Riedel, Gilles Giacca, and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014) 228–259.

261. See Johnson and Sachs 2015 (n 16) 59, citing Government of Canada, Office of the Prime Minister, Press Release, 'Canada-Bénin Foreign Investment Promotion and Protection Agreement (FIPA)' (8 January 2013).

262. See Johnson and Sachs 2015 (n 16) 59, who note that the Canada-Tanzania BIT concluded in 2013 did not contain a CSR provision.

263. See e.g., Canada-Cameroon BIT (n 180) art 15.2; Canada-Côte d'Ivoire BIT art 15.2; Canada-Mali BIT (n 213) art 15.2; Canada-Senegal BIT (n 213) art 16; Canada-Serbia BIT (n 213) art 16; and Canada-Nigeria BIT (n 213) art 16. See also Canada-Republic of Korea FTA (n 213) art 8.16.

264. India Model BIT (n 85) art 12.1 (i).

265. *ibid* 12.1 (ii).

266. *ibid* art 12.1 (iii), (iv).

267. *ibid* art 12.1 (vi).

268. *ibid* art 12.1 (vii).

269. *ibid* art 5.7. Note that the December 2015 Model does not contain a provision equivalent to art 5.7. See (n 23).

270. This conclusion refers to the revisions made in late 2015, reflected in the December 2015 version of India's Model BIT.

### c. Human Rights<sup>271</sup>

The now well-known UN Guiding Principles on Business and Human Rights<sup>272</sup> ('Guiding Principles') emphasize business enterprises' responsibility to respect human rights,<sup>273</sup> a duty that extends to investors engaged in FDI.<sup>274</sup> This responsibility to respect entails both positive and negative obligations. For example, Principle 11 provides that investors 'should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'. Principle 15 provides that investors 'should have in place policies and processes' to meet this responsibility, including 'a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights'. Unanimously adopted by the UN General Assembly in 2011,<sup>275</sup> the Guiding Principles represent a strong consensus among UN member states on the need to protect human rights from potential abuses that can stem from certain forms of economic activity.<sup>276</sup>

Despite this normative consensus, a divergence of views has emerged among states and other stakeholders regarding the extent to which the Guiding Principles (and other relevant standards) should bind investors. In 2014, this divergence was reflected in the adoption of two resolutions by the UN Human Rights Council (UNHRC), separated in their adoption only by one day. Resolution 26/9, adopted on 26 June 2014, calls for the establishment of an open-ended intergovernmental working group with a mandate to 'elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.<sup>277</sup> The resolution was co-sponsored by Bolivia, Cuba, Ecuador, South Africa, and Venezuela; of the 20 states that voted in favor, most are developing countries, while a significant majority of the 14 votes against came from developed countries.<sup>278</sup> Resolution 26/22, adopted on 27 June 2014, emphasizes the role of the state in promoting and protecting human rights, reaffirms the centrality of the Guiding Principles

271. This section examines the extent to which 2014 treaties directly provide for investor obligations to respect human rights. While consideration of the broader topic of investment and human rights is beyond the scope of the chapter, readers should bear in mind that other provisions contained in IIAs often address matters that relate to state obligations under international human rights law, without specifically using the term 'human rights'. Examples include provisions relating to labor, the environment, and public safety. See generally Johnson and Sachs 2014 (n 78) 229–237; Morten Haugen (n 260).

272. UN Guiding Principles (n 225).

273. The second of a three-pillar framework established by the UN Guiding Principles (n 225) to govern the relationship between business and human rights.

274. Some investment insurance programs, including that provided by the United States' Overseas Private Investment Corporation (OPIC), have incorporated respect for human rights into their eligibility requirements, thereby allowing the insurer to deny or reduce coverage on human rights grounds. See e.g., OPIC's Environmental and Social Policy Statement, 15 October 2010, 8, <[https://www.opic.gov/sites/default/files/consolidated\\_esps.pdf](https://www.opic.gov/sites/default/files/consolidated_esps.pdf)>, which provides: 'OPIC will decline support for a project when (. . .) the U.S. Department of State advises that OPIC decline support for a project based on the consultative human rights review (. . .)'.

275. UNHRC Res 17/4 (16 June 2011) UN Doc A/HRC/RES/17/4.

276. See generally Nicole R Tuttle, 'Human Rights Council Resolutions 26/9 and 26/22: Towards corporate accountability?' *American Society of International Law* (3 September 2015), <<https://www.asil.org/insights/volume/19/issue/20/human-rights-council-resolutions-269-and-2622-towards-corporate/h>>; Morten Haugen (n 260).

277. UNHRC Res 26/9 (26 June 2014) A/HRC/RES/26/9.

278. *ibid.*

in their current form, and encourages states to develop national action plans in order to implement the Principles at the domestic level.<sup>279</sup> The resolution was sponsored by Norway, and was adopted unanimously (without requiring a vote).<sup>280</sup>

These resolutions illustrate the ongoing dichotomy between voluntary and mandatory approaches to investor obligations with respect to human rights. With regard to IIA drafting, states have tended to either refrain from including any direct reference to human rights or (more recently) to favor the voluntary approach. A 2012 study found that, while several investment agreements had incorporated language on human rights, no existing agreement contained a binding obligation on investors to respect human rights.<sup>281</sup> Most of the IIAs concluded in 2014 conform to this trend: where references to human rights have been included, they have been cursory and nonbinding in nature.<sup>282</sup>

India's Model BIT constitutes something of an exception, with Article 12.1 requiring compliance with host state laws relating to human rights. Several other provisions, while not referring directly to the term 'human rights', address issues typically encompassed by human rights law. In addition, Article 12.2 provides:

... Investors and their Investments should recognise the rights, traditions and customs of local communities and indigenous peoples of the Host State and carry out their operations with respect and regard for such rights, traditions and customs.<sup>283</sup>

While expressed as a voluntary rather than binding provision, its inclusion and reference to communities other than indigenous groups is noteworthy, as most existing human rights instruments tend to specifically address the land and resource-related rights of indigenous peoples only,<sup>284</sup> without explicitly providing for other affected communities dependent on such resources for their survival.

279. UNHRC Res 26/22 (27 June 2014) A/HRC/RES/26/22. Note that only 10 states have adopted NAPs since the 2011 adoption of the UN Guiding Principles, namely the United Kingdom, the Netherlands, Italy, Denmark, Spain, Finland, Lithuania, Sweden, Norway, and Colombia. For further information, see the website of the Office of the UN High Commissioner for Human Rights (UNOHCHR), <<http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>>.

280. For further discussion of both resolutions, see Tuttle (n 276).

281. J Anthony VanDuzer, Penelope Simons, and Graham Mayeda, 'Integrating sustainable development into international investment agreements: A guide for developing countries' (Commonwealth Secretariat 2012) 296.

282. Brazil-Mozambique CFIA (n 157) Annex II, [(ii)]; Brazil-Angola CFIA (n 77) Annex II, [(ii)]; Brazil-Mexico CFIA (n 216) art 13.2 (b); Brazil-Malawi CFIA (n 248) art 9; Brazil-Colombia CFIA (n 163) art 13 (b), (e). In Canadian BITs, brief reference is made to human rights in the CSR provisions, which provide that states should encourage investors to 'voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies', including principles that address human rights. See e.g., Canada-Cameroon BIT (n 180) art 15.2; Canada-Côte d'Ivoire BIT (n 213) art 15.2; Canada-Mali BIT (n 213) art 15.2; Canada-Senegal BIT (n 213) art 16; Canada-Serbia BIT (n 213) art 16; and Canada-Nigeria BIT (n 213) art 16. See also Canada-Republic of Korea FTA (n 213) art 8.16.

283. India Model BIT (n 85) art 12.2.

284. See e.g., Convention concerning Indigenous and Tribal Peoples in Independent Countries (concluded 27 June 1989, entered into force 5 September 1991) (ILO No. 169), which is binding on states parties; UN Declaration on the Rights of Indigenous Peoples, adopted in UNGA Res 61/295 (13 September 2007) UN Doc A/RES/61/295 (UNDRIP).



With regard to CETA, the treaty includes a cryptic reference to the protection of human rights in its denial of benefits clause. Article X.15 of the investment chapter provides:

A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if:

- investors of a non-Party own or control the enterprise; *and* the denying Party adopts or maintains measures with respect to the non-Party that:
- are related to maintenance of international peace and security; *and* prohibit transactions with the enterprise or would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.<sup>285</sup>

A Joint Declaration attached by Canada and the European Union to this provision provides:

With respect to Article X.15 (Denial of Benefits—Investment), Article Y (Denial of Benefits—CBTS) and Article XX (National Security Exception—Exceptions), the Parties confirm their understanding that measures that are ‘related to the maintenance of international peace and security’ *include the protection of human rights*.<sup>286</sup>

While consideration of the protection of human rights in a denial of benefits clause certainly constitutes a new development in IIA drafting, the extent to which this provision will prove capable of being applied by the parties for the purpose of improving the protection of human rights appears limited. The structure of the provision implies that parties will only be able to deny the benefits of the investment chapter to an investor (and their investments) where all of *cumulative* conditions established by Article X.15 are met.<sup>287</sup> The policy objective of this provision is thus unclear.<sup>288</sup>

Despite the adoption by the UNHRC of arguably conflicting resolutions in 2014, an inter-governmental working group was nonetheless established for the purpose of elaborating a binding international human rights instrument on the responsibility of business enterprises to respect human rights.<sup>289</sup> The group held its first session in July 2015;<sup>290</sup> it will be interesting to

285. CETA (n 3) Investment Chapter, art X.15 (emphasis added).

286. CETA (n 3) Joint Declaration attached to art X.15 of the Investment Chapter (emphasis added).

287. The provision can be read to imply the following: State A and B are parties to CETA. State A seeks to adopt or maintain measures related to the protection of human rights. In order for State A to deny the benefits of Investment Chapter to an investor of State B (‘the enterprise’): (1) the enterprise must be owned or controlled by investors of State C (a non-party); (2) the measures must relate to State C; (3) the measures must relate to international peace and security (which, according to the Joint Declaration, includes protection of human rights); and (4) the measures must prohibit transactions with the enterprise, or would be violated or circumvented if the benefits of the Chapter were afforded to the enterprise.

288. Other provisions contained in CETA that address issues covered by international human rights law (but not specifically with regard to investment and investor obligations) include art 3 in the Trade and Labour Chapter, which requires the parties to ensure that their labor laws and practices ‘embody and provide protection for the fundamental principles and rights and work, and reaffirm its commitment to respecting, promoting and realising such principles and rights in accordance with its obligations as member of the ILO and its commitments under the ILO Declaration on Fundamental Principles and Rights at Work’. See International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, adopted by the General Conference of the ILO during its 86th Session in Geneva (18 June 1998).

289. UNHRC, ‘Open-ended intergovernmental working groups on transnational corporations and other business enterprises with respect to human rights’, <<http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx>>.

290. UNHRC, ‘First session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (IGWG)’, <<http://www.ohchr.org/EN/>>

see whether increased consensus on the enforcement of investor obligations will be achieved among participating states,<sup>291</sup> and whether this will influence future IIA drafting.

## CONCLUSION

A number of IIA negotiations taking place in 2014 continued into 2015, with Canada once again among the most active states.<sup>292</sup> Canada is negotiating BITs with at least 11 states (primarily developing and emerging economies),<sup>293</sup> in addition to engaging in ongoing FTA negotiations with a further 10 states, and exploratory discussions with several other states (or groups of states).<sup>294</sup> As many of the trends noted in previous years continued into Canada's 2014 treaty practice, it is likely that we will continue to see the inclusion of familiar provisions in the new treaties to come. It is noteworthy, though, that Canada adopted new approaches to certain elements in CETA, concluded with other developed countries; it will be interesting to see whether these novel features will be incorporated into Canada's IIAs with less developed countries.

2014 also saw the continued negotiation of several 'mega-treaties', including the 12-country TPP, the 26-country COMESA-EAC-SADC Tripartite Agreement (otherwise known as the Tripartite Free Trade Area), the 16-country Pacific Agreement on Closer Economic Relations (PACER Plus), the 16-country Regional Comprehensive Economic Partnership (RCEP),<sup>295</sup> TTIP, and the EU-Japan FTA. In total, 88 developed and developing countries were involved in the negotiation of seven mega-treaties in 2014, with only the negotiation of CETA coming to a conclusion during that period.<sup>296</sup> Given the number of states intertwined in these mega-treaties, there is perhaps a greater chance than we have seen previously for diverse states to coalesce around certain approaches to treaty drafting. The scale and scope of these mega-treaties has also meant that many traditional aspects of FTAs and BITs are increasingly coming to the fore in public debate, leading to a rich discussion about the evolution of certain trends in recent agreements and the extent to which greater evolution may be necessary or expected.

HRBodies/HRC/WGTransCorp/Pages/Session1.aspx>. A draft of the IGWG's first report was published in July 2015, <<http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Draftreport.pdf>>.

291. Following the adoption of UNHRC Res 26/22, the United States stated that it would not participate in the activities of the IGWG, and also encouraged others to do the same. See Statement by the Delegation of the United States of America, 'Proposed Working Group Would Undermine Efforts to Implement Guiding Principles on Business and Human Rights' (26 June 2014), <<https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/>>. See also Tuttle (n 276).

292. Investment Policy Monitor No. 13 (n 4) 9.

293. Ghana, Indonesia, Kazakhstan, Kenya, Kosovo, Macedonia, Mongolia, Pakistan, Tunisia, the United Arab Emirates, and Vietnam. See Government of Canada, *Foreign Investment Promotion and Protection*, <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng>>.

294. Guatemala, Nicaragua and El Salvador (collectively), CARICOM, the Dominican Republic, India, Japan, Morocco, and Singapore. Canada is also in the process of modernizing the Canada-Costa Rica FTA. See Government of Canada, *Free Trade Agreements*, <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng>>.

295. RCEP negotiations involve the 10 members of the Association of Southeast Asian Nations (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam) and the six countries with which ASEAN has existing FTAs, namely: Australia, China, India, Japan, Korea, and New Zealand.

296. Investment Policy Monitor No. 13 (n 4) 9, fn 97.

Table 2.1 2014 International Investment Agreements

	Full treaty name (when available)	Short name (* denotes agreement is publicly available as of December 2015)	Date signed	Date entered into force (status as of December 2015)
1	Bilateral Investment Treaty between Turkey and Viet Nam	Turkey-Viet Nam BIT	15 January 2014	Not in force
2	Additional Protocol to the Framework Agreement of the Pacific Alliance	Protocol Pacific Alliance*	10 February 2014	Not in force
3	Agreement Between Canada and the Republic of Cameroon for the Promotion and Protection of Investments	Cameroon-Canada BIT*	3 March 2014	Not in force
4	Free Trade Agreement between Mexico and Panama	Mexico-Panama FTA*	3 April 2014	1 July 2015
5	Free Trade Agreement between Australia and the Republic of Korea	Australia-Republic of Korea FTA*	8 April 2014	12 December 2014
6	Bilateral Investment Treaty between Turkey and Kenya	Turkey-Kenya BIT	8 April 2014	Not in force
7	Free Trade Agreement between the Government of Malaysia and the Government of the Republic of Turkey	Malaysia-Turkey FTA*	17 April 2014	1 August 2015
8	Bilateral Investment Treaty between Belarus and Cambodia	Belarus-Cambodia BIT	23 April 2014	Not in force
9	Bilateral Investment Treaty between Turkey and Sudan	Turkey-Sudan BIT	30 April 2014	Not in force
10	Agreement between Canada and the Federal Republic of Nigeria for the Promotion and Protection of Investments	Canada-Nigeria BIT*	6 May 2014	Not in force
11	Treaty on Eurasian Economic Union	Treaty on Eurasian Economic Union (2014)*	29 May 2014	1 January 2015
12	Accord concernant la promotion et la protection réciproque des investissements entre la Suisse et la Géorgie	Georgia-Switzerland BIT (2014)	3 June 2014	Not in force
13	Bilateral Investment Treaty between the Republic of Korea and Myanmar	Republic of Korea-Myanmar BIT	5 June 2014	Not in force
14	Bilateral Investment Treaty between the Republic of Moldova and Montenegro	Republic of Moldova-Montenegro BIT (2014)	20 June 2014	Not in force

*(Continued)*

	Full treaty name (when available)	Short name (* denotes agreement is publicly available as of December 2015)	Date signed	Date entered into force (status as of December 2015)
15	The Investment Promotion and Protection Agreement (Arab Republic of Egypt) Regulations 2014	Egypt-Mauritius BIT (2014)*	25 June 2014	Not in force
16	Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part	EU-Georgia Association Agreement*	27 June 2014	Not in force
17	Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part	EU-Moldova Association Agreement*	27 June 2014	Not in force
18	Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part	EU-Ukraine Association Agreement*	27 June 2014	Not in force
19	Agreement between Australia and Japan for an Economic Partnership	Australia-Japan EPA*	8 July 2014	15 January 2015
20	Agreement for the Reciprocal Promotion and Protection of Investments between Colombia and France	Colombia-France BIT*	10 July 2014	Not in force
21	Agreement between the Government of the Republic of Colombia and the Government of the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments	Colombia-Turkey BIT*	28 July 2014	Not in force
22	Trade and Investment Framework Agreement between the Government of the United States of America and the Economic Community of West African States	ECOWAS-USA TIFA*	5 August 2014	Not in force

	Full treaty name (when available)	Short name (* denotes agreement is publicly available as of December 2015)	Date signed	Date entered into force (status as of December 2015)
23	Bilateral Investment Treaty between Côte d'Ivoire and Singapore	Cote d'Ivoire-Singapore BIT (2014)	27 August 2014	Not in force
24	Bilateral Investment Treaty between Burkina Faso and Singapore	Burkina Faso-Singapore BIT (2014)	27 August 2014	Not in force
25	Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments	Canada-Serbia BIT (2014)*	1 September 2014	27 April 2015
26	Free Trade Agreement Between Canada and the Republic of Korea	Canada-Republic of Korea FTA*	22 September 2014	1 January 2015
27	Agreement between the Government of the Russian Federation and the Government of the Republic of Azerbaijan on the Promotion and Protection of Investments	Azerbaijan-Russian Federation BIT (2014)*	29 September 2014	Not in force
28	Agreement between the Government of the State of Israel and the Government of the Republic of the Union of Myanmar for the Reciprocal Promotion and Protection of Investments	Israel-Myanmar BIT (2014)*	5 October 2014	Not in force
29	Agreement Between Japan and the Republic of Kazakhstan for the Promotion and Protection of Investment	Japan-Kazakhstan BIT*	23 October 2014	Not in force
30	Bilateral Investment Treaty between Armenia and Jordan	Armenia-Jordan BIT	29 October 214	Not in force
31	Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India	ASEAN-India Investment Agreement (2014)*	12 November 2014	Not in force
32	Agreement between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments	Canada-Senegal BIT (2014)*	27 November 2014	Not in force

(Continued)

	Full treaty name (when available)	Short name (* denotes agreement is publicly available as of December 2015)	Date signed	Date entered into force (status as of December 2015)
33	Agreement between Canada and Mali for the Promotion and Protection of Investments	Canada-Mali BIT (2014)*	28 November 2014	Not in force
34	Canada-Côte d'Ivoire Foreign Investment Promotion and Protection Agreement	Canada-Côte d'Ivoire BIT (2014)*	30 November 2014	Not in force
35	Bilateral Investment Treaty between Kyrgyzstan and Qatar	Kyrgyzstan-Qatar BIT	8 December 2014	Not in force

Presently, therefore, there are two parallel and arguably conflicting phenomena in the IIA policy landscape: one is the rich innovation and diversity in approaches that have resulted from domestic IIA policy reviews and efforts to develop tailor-made strategies; and the other consists of multiple major ongoing multilateral treaty negotiations, initiatives which can potentially advance harmonization of certain IIA practices. In light of these two trends, it will be particularly interesting to track the developments in terms of investor protections, ISDS, and investor obligations in this next set of IIAs.