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Comparative Law**

Investment Promotion and Protection in the Canada-UK Trade Relationship

Final Report

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Investment Promotion and Protection in the Canada-UK Trade Relationship

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Executive Summary

Background

The strong investment relationship between Canada and the United Kingdom (UK) suggests that a free trade agreement (FTA) between the two states will address the promotion and the protection of foreign investment. International investment agreements (IIAs), whether as stand-alone agreements or as chapters in FTAs, are adopted by states with a view to protecting foreign investment and addressing potential disputes between an investor and the host state.

The likely nature and content of any such investment agreement between Canada and the UK is nevertheless highly uncertain, for at least three reasons. First, the protection of investment has become the subject of considerable controversy, with opponents of the regime seriously questioning its legitimacy. Second, calls for reform regarding IIAs and investment dispute settlement have already been reflected in the recent drafting practice of several states. Third, the absence of any IIA signed by the UK since the entry into force of the *Treaty of Lisbon* in 2009 complexifies the anticipation of the approach that will be taken by the UK in the eventual negotiation process.

A new investment agreement between Canada and the UK constitutes a crucial opportunity to include innovative provisions from recent international agreements and to explore new possibilities to construct a more legitimate regime. In order to support evidence-based decision-making in the negotiation of such an agreement, a comprehensive review of the range of opportunities must be provided. What are the provisions that can be included in an investment agreement between the two states to address controversial issues and support the reform of the international investment regime?

Objectives

The objectives underlying the final report are to allow policy-makers to undertake the negotiation process with a clear sense of the various provisions that are available to address the most controversial issues of international investment law and their legal implications. The report demonstrates that an investment agreement can respond to legitimacy concerns raised by a variety of stakeholders. More specifically, it provides a side-by-side comparison of provisions that have already been included in IIAs and model agreements for three specific themes: 1) dispute settlement possibilities; 2) the breadth of investment protection; and 3) obligations imposed on foreign investors.

Methodology

The knowledge synthesis report relies on a scoping study. Rather than making specific recommendations regarding the content of an investment agreement between Canada and the UK, it represents a broad collection of data and exposes an overview of provisions that can be addressed by negotiators. The forms of knowledge that have been considered for this synthesis are threefold. First, the report identifies innovative provisions from previous treaty practice by relying upon search tools elaborated by the United

Conference on Trade and Development (*i.e.* the IIA Mapping Project and an advanced search tool) that cover 2,572 IIAs and 75 model agreements. For each theme identified above (*i.e.* dispute settlement possibilities, breadth of investment protection and obligations imposed on foreign investors), these provisions were collated and clustered according to distinctive characteristics. Second, the final report draws on 34 reports published by intergovernmental organizations between 2008 and 2018. The content of these reports has been examined to identify additional provisions and to address their legal implications. Third, 146 peer-reviewed publications that were selected based on criteria related to the three themes of research have also been considered. The inclusion of peer-reviewed publications ensures the consideration of the opinion of experts in international investment law (*i.e.* academics and practitioners) with respect to innovative provisions.

Results

For each theme of the knowledge synthesis, the material that has been collected and analyzed is synthesized through a side-by-side comparison of provisions and their legal implications.

1. Dispute settlement possibilities: The mechanism allowing private investors to submit investment claims to international arbitration has come under increasing public scrutiny, with several actors criticizing its lack of legitimacy. Some policy-makers and negotiators have responded to these criticisms through various means. The report focuses particularly on six approaches that have been included in IIAs and model agreements. These approaches range from a reformed investor-state dispute settlement mechanism through the inclusion of new provisions, a return to diplomatic protection and state-to-state arbitration, reliance on domestic courts, alternative dispute resolution mechanisms, hybrid approaches, and an investment court system.

2. Breadth of investment protection: Addressing concerns raised by stakeholders can also be achieved by further clarifying the content of standards of protection that are traditionally included in IIAs. An enhanced level of precision is especially visible with respect to fair and equitable treatment (FET) and expropriation. Various options have been used by states to qualify FET provisions and to list the elements included in this standard of protection. Other provisions include a limiting definition of indirect expropriation or various forms of carve-outs, including for general regulatory measures.

3. Obligations imposed on foreign investors: With a view to countering the generally asymmetric nature of IIAs, some states have chosen to address foreign investors' responsibilities in various ways. Some examples refer to these responsibilities in the preamble of an IIA or in provisions referring to the concept of corporate social responsibility. More constraining provisions impose direct obligations on foreign investors, call for an explicit consideration of the investment's negative impact or deny substantive protection for investment made through corruption or other fraudulent means.

Key Messages

The legitimacy of investment arbitration, the broad protections granted to foreign investment and the general dearth of obligations imposed on investors are often questioned in international investment law. A wide range of provisions could be included in an investment agreement between Canada and the UK to tackle these controversial aspects of the regime and to contribute to its reform. While future research is needed to address the political dimensions underlying the inclusion of these provisions, addressing these controversial issues is far from being unprecedented in treaty practice.

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Background

The promotion and protection of international investment must be an integral part of the negotiations regarding the future trade relationship between Canada and the United Kingdom (UK). In 2017, Canadian direct investment stock in the UK reached CAN\$ 102.63 billion, representing 9.2% of all Canadian direct investment abroad.¹ Direct investment from the UK in Canada amounted to CAN\$ 47.4 billion (5.8% of all foreign direct investment in Canada).² These numbers indicate the strong need to explicitly address investment protection in any eventual bilateral free trade agreement between Canada and the UK.

From a legal perspective, any such agreement will likely include various standards of protection for investment pertaining to non-discrimination, fair and equitable treatment, and safeguards against unlawful expropriation. It will also have to address dispute settlement mechanisms to ensure that inconsistent measures can be challenged under international law. These matters will need to be considered whether investment protection is addressed in a stand-alone agreement or as a chapter in a free trade agreement.

The content of international investment regulation between Canada and the UK is nevertheless highly uncertain, for at least three reasons. First, the protection of investment has become the subject of considerable controversy. The perceived illegitimacy³ of investment arbitration reached its zenith when investor-state arbitration was included in recent mega-regional agreements such as the *Transatlantic Trade and Partnership Agreement* and the *Comprehensive Economic and Trade Agreement* (CETA). This inclusion triggered an important opposition movement in Canada and the European Union (EU) and has led to an unprecedented uprising of citizens, civil society organizations, and even some states. Opponents of the regime often refer to a “legitimacy crisis” as swiftly as proponents discard the criticism.⁴

Second, the international law of foreign investment has come under increasing scrutiny by states and civil society that emphasize the potential damaging impact of the regime, thus leading to several calls to reform it. For example, the United Nations Conference on Trade and Development (UNCTAD) has addressed options to reform investor-state dispute settlement⁵ and provided a roadmap to reform IIAs.⁶ In parallel to efforts deployed by UNCTAD, in 2017 the United Nations Commission on International Trade Law (UNCITRAL) entrusted Working Group III with the task of addressing the potential reform of investor-state dispute settlement.⁷ Various aspects put forward in these calls for reform have already been reflected in recent drafting practices.⁸

¹ Global Affairs Canada, *2018 Canada's State of Trade: Trade and Investment Update* (Ottawa: Government of Canada, 2018) at 133.

² *Ibid* at 126.

³ See e.g. Andrea K. Bjorklund, “The Legitimacy of ICSID” in Nienke Grossman et al, eds, *Legitimacy and International Courts* (Cambridge: Cambridge University Press, 2018) 234; Barnali Choudhury, “Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?” (2008) 41 *Van J Trans L* 775; Charles N Brower & Stephan W Schill, “Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?” (2009) 9 *Chicago J Int’l L* 471; Daniel Behn, “Legitimacy, Evolution and Growth in Investment Treaty Arbitration: Empirically Evaluating the State of the Art” (2015) 46 *Georgetown J Int’l L* 363.

⁴ See e.g. Susan D. Franck, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions” (2005) 73 *Forham L Rev* 1521; Krishan, Devashish. “Thinking about BITs and BIT Arbitration: The Legitimacy Crisis that Never Was” in Todd Weiler & Freya Baetens, eds, *New Directions in International Economic Law: In Memoriam Thomas Wälde* (Boston: Martinus Nijhoff Publishers, 2011) 107.

⁵ UNCTAD, *World Investment Report 2013 – Global Value Chains: Investment and Trade for Development* (Geneva: United Nations, 2013) at 110-116.

⁶ UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (Geneva: United Nations, 2015) at Chapter IV [UNCTAD, *World Investment Report 2015*].

⁷ *Report of the United Nations Commission on International Trade Law, Fiftieth Session (3-21 July 2017)*, UNGAOR, 72nd Sess, Supp No 17, UN Doc A/72/17, (2017) para 264.

⁸ See e.g. UNCTAD, *World Investment Report 2016 – Investor Nationality: Policy Challenges* (Geneva: United Nations, 2016) at 108-116 [UNCTAD, *World Investment Report 2016*]; UNCTAD, *IIA Issues Notes: Taking Stock of IIA Reform* (Geneva: United Nations, 2016).

Third, Canada is one of the most active and innovative negotiators of international investment agreements (IIAs), while the UK has not signed an IIA of its own since the entry into force of the *Treaty of Lisbon* in 2009, though it retains the right to do so as long as it follows the provisions established in EU Regulation No 1219/2012 of 12 December 2012. Prior to that time the UK investment treaties were succinct agreements of some six pages, whereas Canada's approach is to spell out both substantive and procedural provisions in such detail that its agreements total more than three dozen pages. How the UK's preferences might have changed in the intervening years is unknown.

In light of the strong investment relationship between Canada and the UK, a new international agreement represents an opportunity to include promising provisions from recent international agreements and to explore new possibilities to construct a more legitimate regime. In order to support evidence-based decision-making in the negotiation of such an agreement, a comprehensive review of relevant provisions must be provided. What are the provisions that can be included in an investment agreement between the two states to address controversial issues and support the reform of the international investment regime?

Objectives

The knowledge synthesis builds on several strengths in the field of international investment law. Previous reports have surveyed IIAs to document those that include provisions reaching beyond a strict protection of foreign investment.⁹ Recent work has also proposed provisions that could be included in IIAs to promote sustainable development.¹⁰ However, new types of provisions that reflect those calls for reform can be found in recent treaty practice that has received less attention.

This report provides an analysis of several options regarding the protection of investment to policy-makers and negotiators in Canada and the UK. While IIAs are often concluded by minimally modifying an existing model, the shifting landscape regarding the regulation of investment opens up a wide range of possibilities and calls for creative innovations. The objective underlying the report is to allow policy-makers to undertake the negotiation of an agreement between Canada and the UK with a clear sense of the potential provisions that can effectively address the most controversial issues in international investment law. The report is expected to demonstrate that an investment agreement can respond to legitimacy concerns raised by a variety of stakeholders. The synthesized results presented below thus suggest that explicitly engaging with these concerns in an IIA is not unprecedented and remains entirely feasible.

More specifically, the synthesized results provide a side-by-side comparison of provisions that have already been included in IIAs and model agreements. In light of the controversy that has emerged with respect to the legitimacy of investor-state dispute settlement and the protections they accord to foreign investments, the report focuses on three specific themes: 1) dispute settlement possibilities; 2) the breadth of investment protection; and 3) obligations imposed on foreign investors. With a view to shedding light on the legal implications underlying these provisions, their presentation is supplemented by considerations articulated by intergovernmental organizations and experts in international investment law over the last 10 years.

⁹ For example, some reports have been prepared under the auspices of the Organisation for Economic Co-operation and Development to analyze the occurrence of provisions addressing issues related to the environment, labour, anti-corruption, sustainable development, and responsible business conduct in IIAs. See OECD, *International Investment Law: Understandings Concepts and Tracking Innovations* (Paris: OECD, 2008) [OECD, *International Investment Law*]; Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey*, OECD Working Paper on International Investment No 2011/1 (Paris, 2011); Kathryn Gordon et al, *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey*, OECD Working Paper on International Investment No 2014/1 (Paris, 2014).

¹⁰ See e.g. Anthony J VanDuzer et al, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (London: Commonwealth Secretariat, 2013).

Of course, it is impossible to provide an exhaustive examination of all provisions that have been developed by states in IIAs and model agreements within the limits of the present report. There are now more than 3,300 IIAs,¹¹ with many of them extending beyond forty pages. The synthesis of existing forms of knowledge that is provided in this report thus primarily focuses on innovative provisions and salient options allowing negotiators to creatively engage with particularly controversial issues.

Methodology

Among the various forms of approaches to reviewing the literature that could have been considered to conduct the research at hand, the knowledge synthesis report relies on a *scoping study*.¹² This approach is particularly appropriate to map key concepts and sources of evidence available with respect to a research area, without imposing strict limitations on the criteria to identify relevant material. Once relevant data have been collected, a scoping study articulates an overview of the material rather than seeking to assess the quality of evidence for each source.

A scoping study offers a suitable approach to provide an overview of a wide range of relevant provisions that could be included in an investment agreement and to address their legal implications. Rather than making any recommendations with respect to the specific provisions that should be included in an agreement between Canada and the UK, the knowledge synthesis report exposes provisions related to key themes that will have to be considered by negotiators. The forms of knowledge that have been included for this project nevertheless reaches beyond academic literature. In fact, the present scoping study draws upon three distinct forms of knowledge. By using search tools elaborated by UNCTAD, provisions included in IIAs and model agreements constitute the primary source of evidence for this research project (A). With a view to identifying additional provisions and analyzing their legal implications, relevant material was also found in reports from intergovernmental organizations (B) and peer-reviewed publications by experts in international investment law (C).

A. Provisions from IIAs and Model Agreements

Considering the high number of IIAs and model agreements that have been elaborated by states so far, the identification of relevant provisions can easily become a challenging task. Two robust search tools elaborated by UNCTAD are particularly useful in this regard. First, through its IIA Mapping Project, UNCTAD has mapped the content of 2,572 agreements and consolidated the results in a searchable database that includes 100 parameters.¹³ When users select one or more parameters that have been established, the database provides a list of IIAs that meet these specific parameters. Users can then access the text of the agreement and identify the provisions that reflect the parameters in question. Second, UNCTAD elaborated an advanced search tool that includes 75 model agreements.¹⁴ Among the various options that it offers, the advanced search tool allows users to conduct a full-text search of IIAs and model agreements.

¹¹ UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* (United Nations: Geneva, 2018) at 89 [UNCTAD, *World Investment Report 2018*].

¹² See generally Hilary Arksey & Lisa O'Malley, "Scoping Studies: Towards a Methodological Framework" (2005) 8 *Int'l J Social Research Metho* 19.

¹³ See UNCTAD, "IIA Mapping Project", online: UNCTAD <<http://investmentpolicyhub.unctad.org/IIA/mappedContent#iaInnerMenu>> (accessed 15 November 2018) [UNCTAD, "IIA Mapping Project"]. For more information on the methodology of the IIA Mapping Project, see UNCTAD, "UNCTAD IIA Mapping Project", online: UNCTAD <<http://investmentpolicyhub.unctad.org/Upload/Documents/Mapping%20Project%20Description%20and%20Methodology.pdf>> (accessed 15 November 2018).

¹⁴ UNCTAD, "Advanced Search", online: UNCTAD <<http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBIT>> (accessed 15 November 2018).

The parameters of the IIA Mapping Project that have been used for each theme of the knowledge synthesis are the following:

Theme 1: Dispute settlement possibilities

- “State-State Dispute Settlement (SSDS) – SSDS included”
- “Investor-State Dispute Settlement (ISDS) – ISDS included”
- “Investor-State Dispute Settlement (ISDS) – Alternatives to arbitration”
- “Investor-State Dispute Settlement (ISDS) – Other specific ISDS features – Transparency in arbitral proceedings – Requires documents to be made publicly available”
- “Investor-State Dispute Settlement (ISDS) – Other specific ISDS features – Transparency in arbitral proceedings – Requires hearings to be open to the public”
- “Investor-State Dispute Settlement (ISDS) – Other specific ISDS features – Transparency in arbitral proceedings – Regulates amicus curiae submissions by third (non-disputing) parties”

Theme 2: Breadth of investment protection

- “Standards of Treatment – Fair and equitable treatment (FET) – Type of FET clause”
- “Standards of Treatment – Fair and equitable treatment (FET) – FET qualified – By reference to international law”
- “Standards of Treatment – Fair and equitable treatment (FET) – FET qualified – By listing FET elements (exhaustive or indicative list)”
- “Standards of Treatment – Fair and equitable treatment (FET) – FET modifiers”
- “Standards of Treatment – Expropriation – Scope of measure covered”
- “Standards of Treatment – Expropriation – Refining expropriation clause – Indirect expropriation defined”
- “Standards of Treatment – Expropriation – Refining expropriation clause – Carve-out for general regulatory measures”
- “Standards of Treatment – Expropriation – Refining expropriation clause – Carve-out for compulsory licenses in conformity with WTO”

Theme 3: Obligations imposed on investors

- “Preamble – References to sustainable development”
- “Preamble – Reference to social investment aspects (e.g. human rights, labour, health, CSR, poverty reduction)”
- “Preamble – References to environmental aspects (e.g. plant or animal life, biodiversity, climate change)”
- “Other clauses – Health and Environment (any mentioning in the text, except preamble)”
- “Other clauses – Labour standards (any mentioning in the text, except preamble)”
- “Other clauses – Corporate social responsibility (any mentioning in the text, except preamble)”
- “Other clauses – Corruption (any mentioning in the text, except preamble)”

This search has been complemented with results from relevant model agreements that were found by using keywords in the advanced search tool. For each parameter and keyword used, IIAs and model agreements that have surfaced have been analyzed with a view to identifying relevant provisions. The provisions have been collated and clustered according to distinctive characteristics for each theme.

Of course, the IIA Mapping Project has some inherent lacunae. First, it does not cover the entirety of IIAs adopted by states. The numbers mentioned in the results presented below should thus be considered as reflecting only the IIAs that have been mapped rather than the entirety of IIAs. Second, the database is subject to diverging interpretations from the individuals who were initially responsible for the analysis of each agreement. It is thus possible that an IIA has not been properly mapped according to the parameters established by UNCTAD. While these weaknesses must be acknowledged, they do not jeopardize the results presented in the report. Far from pretending to offer an exhaustive portrait of the provisions that have been adopted in IIAs, the knowledge synthesis aims to provide an overview of provisions that could be included in an international agreement regulating investment between Canada and the UK. A sufficient number of relevant provisions can be identified even when considering these shortcomings.

B. Reports from Intergovernmental Organizations

Reports published by intergovernmental organizations constitute another relevant source of knowledge with respect to provisions that could be included in an investment agreement between Canada and the UK. The identification of reports to include in the scoping study has been completed by browsing the publications section on the website of three intergovernmental organizations particularly active in international investment law (*i.e.* the Organisation for Economic Co-operation and Development (OECD)¹⁵, UNCTAD¹⁶ and UNCITRAL¹⁷).

When limiting the search to reports published in the last ten years, 34 publications have been identified. The reports have been analyzed with a view to identifying additional provisions that were not captured by relying on UNCTAD's search tools. The content of reports from intergovernmental organizations has also been examined to identify the legal implications of various provisions found in IIAs and model agreements.

C. Peer-Reviewed Publications

Peer-reviewed publications have also been considered as a form of knowledge to include in the scoping study. More specifically, relevant material has been identified by using the advanced search tool of Peace Palace Library.¹⁸ For each search, "investment treaties" was used as a validated keyword. The following terms were also included in the title words to limit the number of results for each theme of the knowledge synthesis:

Theme 1: Dispute settlement possibilities

"State-State"
 "Investor-State"
 "Appellate", "appeal"
 "Mediation"
 "Investment court", "multilateral court"
 "Reform"

Theme 2: Breadth of investment protection

"Expropriation"
 "Fair and equitable treatment"
 "FET"
 "General exceptions"

Theme 3: Obligations imposed on investors

"Human rights"
 "Environment", "environmental"
 "Labour", "labor"

¹⁵ OECD, "Finance and Investment", online: OECD iLibrary <<https://www.oecd-ilibrary.org/finance-and-investment>> (accessed 15 November 2018).

¹⁶ UNCTAD, "International Investment Agreements – Issues Notes", online: UNCTAD <<https://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx>> (accessed 15 November 2018); UNCTAD, "World Investment Reports", online: UNCTAD <[https://unctad.org/en/Pages/Publications/WorldInvestmentReports\(1991-2009\).aspx](https://unctad.org/en/Pages/Publications/WorldInvestmentReports(1991-2009).aspx)> (accessed 15 November 2018); UNCTAD, "Issues in International Investment Agreements (Second Series)", online: UNCTAD <[https://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issue-Series-II-\(Revised-Editions---Sequels\).aspx](https://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issue-Series-II-(Revised-Editions---Sequels).aspx)> (accessed 15 November 2018); UNCTAD, "International Investment Policies for Development (Issues Series)", online: UNCTAD <[https://unctad.org/en/pages/publications/Intl-Investment-Policies-for-Development-\(Issue-Series\).aspx](https://unctad.org/en/pages/publications/Intl-Investment-Policies-for-Development-(Issue-Series).aspx)> (accessed 15 November 2018).

¹⁷ UNCITRAL, "Working Group Documents – Working Group III", online: UNCITRAL <http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html> (accessed 15 November 2018).

¹⁸ Peace Palace Library, "Catalogue", online: Peace Palace Library <http://catalogue.ppl.nl/xslt/DB=1/ADVANCED_SEARCHFILTER> (accessed 15 November 2018).

“Corruption”
 “Bribery”
 “Corporate social responsibility”, “CSR”

The results of this search were complemented by considering other peer-reviewed publications that were identified by the members of the research team in previous research projects.

When considering results published since 2008, a total of 146 publications have been included for the purpose of the scoping study. In a way that echoes the approach adopted for the reports from intergovernmental organizations, the content of peer-reviewed publications has been examined to identify additional provisions and to include the opinion of experts in international investment law with respect to the legal implications of these provisions.

Results

The controversy surrounding international investment law and the possibility of fostering the ongoing reform process is strongly related to three themes that pertain to the negotiation of IIAs: dispute resolution possibilities, the breadth of investment protections and obligations imposed on investors. In order to negotiate an investment agreement that engages with these controversial issues and promotes the reform of the international investment regime, negotiators of an investment agreement between Canada and the UK must have access to a succinct overview of the wide range of possibilities for each of these three themes. This section synthesizes findings with respect to provisions that can be considered by negotiators and their legal implications. It also includes a consideration of strengths and gaps in the current state of knowledge regarding these themes.

Theme 1: Dispute Resolution Possibilities

The mechanism for the resolution of disputes between foreign investors and host states provided under investment treaties (*i.e.* investor-state arbitration (ISA)), has come under increasing public scrutiny. Concerns that are often raised in the particular context of ISA center around the real or perceived lack of legitimacy in the dispute resolution process. Recent treaty-making practice demonstrates that policy makers and treaty drafters are aware of the critiques directed at ISA, and the surrounding controversy has led to a process that involves rethinking the way that investment disputes between foreign investors and host states should be settled. This process can be witnessed on the global scene as the reform and alternative initiatives have been taken both at the domestic and regional levels.

This section of the report identifies these initiatives and explores what they seek to achieve. The approaches adopted by these initiatives range from suggesting a reformed ISA regime to proposing alternatives to this traditional means of dispute settlement, such as the creation of a standing investment court. This section focuses particularly on six approaches that have been considered and elaborated by treaty drafters and policy makers in order to address the legitimacy concerns expressed in current debates about ISA. These approaches are reformed ISA through the inclusion of new provisions (A), diplomatic protection and state-to-state arbitration (B), domestic courts (C), alternative dispute resolution (D), hybrid approaches (E) and an investment court system (F).

A. Reformed Investor-State Arbitration

States and other stakeholders have recently expressed their interest in considering options for the reform of ISA in different forums.¹⁹ The UNCITRAL Working Group III, which has recently agreed to proceed with

¹⁹ See e.g. UNCTAD, *Report of the Expert Meeting on the Transformation of the International Investment Agreement Regime: The Path Ahead*, 17 April 2015, UN Doc TD/B/C.II/EM.4/3.

investor-state dispute settlement (ISDS) reform, recognized this development while noting the concerns about the system, including the lack of transparency both in the process and in the appointment of arbitrators.²⁰ UNCTAD suggested a number of policy options to limit the use of ISA, which include introduction of a limitation period for bringing claims, prevention of treaty abuse through forum shopping via mailbox companies, provision of state consent on a case-by-case basis, and a local litigation requirement.²¹ The International Centre for Settlement of Investment Disputes (ICSID) is in the process of reforming its Arbitration Rules,²² in part responding to the concerns expressed by states and other arbitration users.²³

The most notable attempts to enhance the legitimacy of the ISA regime and to respond to the expressed concerns manifest themselves in three main types of provisions included in IIAs: provisions granting greater control over the conduct and selection of arbitrators, provisions that prevent abuse of process by investors' bringing claims manifestly without legal merit, and provisions pertaining to the transparency of ISA proceedings and *amicus curiae* participation.

Examples of provisions addressing arbitrators' independence, impartiality, diversity and expertise:

A frequent criticism directed at ISA focuses on adjudicators and on the lack of control over their conduct and risks of bias in favour of the party that appointed them.²⁴ The numbers provided by UNCTAD demonstrate that between 1987 and 2017, 13 arbitrators in total were appointed in more than 30 cases and only three arbitrators among them were repeatedly appointed in more than 50 cases.²⁵ All 13 of these arbitrators are from European or North American countries; only two of them are women.

At its 35th session held in Spring 2018, UNCITRAL Working Group III identified several key concerns: (i) the lack of precise definition of the ethical requirements and their scope, (ii) the lack or perceived lack of transparency and diversity in the appointment mechanisms and processes, (iii) the method of remuneration, (iv) the qualifications, powers, and duties of arbitrators, and (v) the impact of third-party funding on independence and impartiality of arbitrators.²⁶ Recent agreements attempt to offer solutions to some of these concerns.

India Model BIT, 2015, arts 18.1 and 19.1:

Article 18(1):

The arbitral Tribunal shall consist of three arbitrators with relevant expertise or experience in public international law, international trade and international investment law, or the resolution of disputes arising under international trade or international investment agreements. They shall be independent of, and not be affiliated with or take instructions from a disputing party or the government of a Party with regard to trade and investment matters.

²⁰ See UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fifth Session (New York, 23-27 April 2018)*, 14 May 2018, UN Doc A/CN.9/935 [UNCITRAL Working Group III Report – 35th Session].

²¹ See UNCTAD, *Investor-State Dispute Settlement: A Sequel* (Geneva: United Nations, 2014).

²² See ICSID, “ICSID Rules and Regulations Amendment Process”, online: ICSID <<https://icsid.worldbank.org/en/amendments>> (accessed 21 November 2018).

²³ See e.g. Yarik Kryvoi, “ICSID Arbitration Reform: Mapping Concerns of Users and How to Address Them”, online: SSRN <<https://ssrn.com/abstract=3280782>> (accessed 21 November 2018).

²⁴ See e.g. European Commission, *Report: Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)* (13 January 2015), online: European Commission <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf> (accessed 14 November 2018) at 101-106.

²⁵ UNCTAD, *World Investment Report 2018*, *supra* note 11 at 95.

²⁶ UNCITRAL Working Group III Report – 35th Session, *supra* note 20 at 8-14. Further reflections on these identified concerns can be found in the UNCITRAL Secretariat's note prepared to assist the Working Group in its reform efforts. See UNCITRAL, UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Arbitrators and Decision Makers: Appointment Mechanisms and Related Issues – Note by the Secretariat*, 30 August 2018, UN Doc. A/CN.9/WG.III/WP.152.

Arbitrators shall not take instructions from any organisation, government or disputing party with regard to matters related to the dispute.

...

Article 19(1):

Every arbitrator appointed to resolve disputes under this Treaty shall during the entire arbitration proceedings be impartial, independent and free of any actual or potential conflict of interest.

The Netherlands Model BIT, 2018, art 20:

1. All Members of the Tribunal under this Agreement shall be appointed by an appointing authority. In the event that the claimant chooses arbitration pursuant to the ICSID Convention or the Additional Facility in accordance with Article 19, paragraph 1, subparagraph a, the Secretary-General of ICSID shall serve as appointing authority for arbitration under this Agreement. In the event that the claimant chooses arbitration pursuant to the UNCITRAL Arbitration Rules in accordance with Article 19, paragraph 1, subparagraph b, the Secretary-General of the Permanent Court of Arbitration shall serve as appointing authority for arbitration under this Agreement.

2. The appointing authority shall appoint Members of the Tribunal that fulfil the conditions set out in paragraphs 5 and 6 of this Article, after thoroughly consulting the disputing parties.

...

5. The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence. The appointing authority shall make every effort to ensure that the members of the Tribunal, either individually or together, possess the necessary expertise in public international law, international investment and international trade law as well as in the resolution of disputes arising under international agreements. In addition, Members of the Tribunal shall not act as legal counsel or shall not have acted as legal counsel for the last five years in investment disputes under this or any other international agreement.

6. Arbitrators and their staff shall be independent of, and not be affiliated with or take instructions from, either disputing party or Contracting Party with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. Arbitrators shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration and any supplemental rules agreed upon by the Contracting Parties.

Some agreements take a step further and provide Codes of Conduct by which arbitrators are required to abide. For instance, the Code of Conduct that is annexed to the Australia–China free trade agreement’s (FTA) investment chapter includes detailed provisions on the responsibilities and duties of arbitrators, disclosure obligations, and independence and impartiality of arbitrators.²⁷

Examples of provisions addressing abuse of process through claims manifestly without legal merit

There have been concerns with respect to the use of ISA by foreign investors as an intimidation tool and a form of threat in order to force host states into regulatory chill.²⁸ In the context of reforms to the ISA regime, these concerns have led to the introduction of clauses that aim to limit abuse of process. Such clauses, which allow tribunals to dismiss frivolous claims or to take this kind of attempts into account in the allocation of costs, are increasingly being included in recent IIAs and model agreements.

Canada – European Union CETA, 2016, arts 8.32 and 8.33:

Article 8.32:

1. The respondent may, no later than 30 days after the constitution of the division of the Tribunal, and in any event before its first session, file an objection that a claim is manifestly without legal merit.

2. An objection shall not be submitted under paragraph 1 if the respondent has filed an objection pursuant to Article 8.33.

3. The respondent shall specify as precisely as possible the basis for the objection.

²⁷ Australia – China FTA, 2015, Annex 9-A.

²⁸ See e.g. David Gaukrodger, *The Balance Between Investor Protection and the Right to Regulate in Investment Treaties: A Scoping Paper*, OECD Working Papers on International Investment No 2017/02 (Paris, 2017). The risk of chilling effect of IIAs on governments in policy-making is also acknowledged by UNCTAD as among challenges resulting from the interaction of the IIA regime with other bodies of international law. See UNCTAD, *World Investment Report 2018*, *supra* note 11 at 112.

4. On receipt of an objection pursuant to this Article, the Tribunal shall suspend the proceedings on the merits and establish a schedule for considering such an objection consistent with its schedule for considering any other preliminary question.
5. The Tribunal, after giving the disputing parties an opportunity to present their observations, shall at its first session or promptly thereafter, issue a decision or award stating the grounds therefor. In doing so, the Tribunal shall assume the alleged facts to be true.
6. This Article shall be without prejudice to the Tribunal's authority to address other objections as a preliminary question or to the right of the respondent to object, in the course of the proceeding, that a claim lacks legal merit.

Article 8.33:

1. Without prejudice to the Tribunal's authority to address other objections as a preliminary question or to a respondent's right to raise any such objections at an appropriate time, the Tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted pursuant to Article 8.23 is not a claim for which an award in favour of the claimant may be made under this Section, even if the facts alleged were assumed to be true.
2. An objection under paragraph 1 shall be submitted to the Tribunal no later than the date the Tribunal fixes for the respondent to submit its counter-memorial.
3. If an objection has been submitted pursuant to Article 8.32, the Tribunal may, taking into account the circumstances of that objection, decline to address, under the procedures set out in this Article, an objection submitted pursuant to paragraph 1.
4. On receipt of an objection under paragraph 1, and, if appropriate, after rendering a decision pursuant to paragraph 3, the Tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection stating the grounds therefor.

India Model BIT, 2015, art 21:

- 21.1 Without prejudice to a Tribunal's authority to address other objections, a Tribunal shall address and decide as a preliminary question any objection by the Defending Party that a claim submitted by the investor is: (a) not within the scope of the Tribunal's jurisdiction, or (b) manifestly without legal merit or unfounded as a matter of law.
- 21.2 Such objection shall be submitted to the Tribunal as soon as possible after the Tribunal is constituted, and in no event later than the date the Tribunal fixes for the Defending Party to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the Tribunal fixes for the Defending Party to submit its response to the amendment).

The Netherlands Model BIT, 2018, arts 21(2) and 22(5):

Article 21(2)

The respondent may, no later than 30 days after the constitution of the division of the Tribunal, and in any event before its first session, file an objection that a claim is manifestly without legal merit. The respondent shall specify as precisely as possible the basis for the objection. On receipt of such an objection the Tribunal shall suspend the proceedings on the merits and establish a schedule for considering such an objection consistent with its schedule for considering any other preliminary question.

...

Article 22(5)

The Tribunal shall order that reasonable costs incurred by the successful disputing party shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such allocation is unreasonable in the circumstances of the case. Such a determination may take into account whether the successful disputing party has acted improperly, for example by raising manifestly frivolous objections or improperly invoking preliminary objections, and whether the unsuccessful disputing party is a small or medium sized enterprise. If only some parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims.

Examples of provisions regarding increased transparency and the participation of *amicus curiae*:

The efforts to achieve improvement in the legitimacy of the current ISA regime have resulted in the inclusion of provisions in recent agreements providing for enhanced transparency in arbitration proceedings and allowing for *amicus curiae* submissions. According to the IIA Mapping Project, 49 IIAs contain explicit

provisions on the transparency of proceedings requiring documents to be made publicly available, while 39 IIAs require hearings to be open to the public.²⁹

Canada – European Union CETA, 2016, art 8.36:

1. The UNCITRAL Transparency Rules, as modified by this Chapter, shall apply in connection with proceedings under this Section.
2. The request for consultations, the notice requesting a determination of the respondent, the notice of determination of the respondent, the agreement to mediate, the notice of intent to challenge a Member of the Tribunal, the decision on challenge to a Member of the Tribunal and the request for consolidation shall be included in the list of documents to be made available to the public under Article 3(1) of the UNCITRAL Transparency Rules.
3. Exhibits shall be included in the list of documents to be made available to the public under Article 3(2) of the UNCITRAL Transparency Rules.
4. Notwithstanding Article 2 of the UNCITRAL Transparency Rules, prior to the constitution of the Tribunal, Canada or the European Union as the case may be shall make publicly available in a timely manner relevant documents pursuant to paragraph 2, subject to the redaction of confidential or protected information. Such documents may be made publicly available by communication to the repository.
5. Hearings shall be open to the public. The Tribunal shall determine, in consultation with the disputing parties, the appropriate logistical arrangements to facilitate public access to such hearings. If the Tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection.
6. Nothing in this Chapter requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should apply those laws in a manner sensitive to protecting from disclosure information that has been designated as confidential or protected information.

Canada – Mongolia BIT, 2016, art 30:

1. Any Tribunal award under this Section shall be publicly available, subject to the redaction of confidential information. All other documents submitted to, or issued by, the Tribunal shall be publicly available unless the disputing parties otherwise agree, subject to the redaction of confidential information.
2. Hearings held under this Section shall be open to the public. The Tribunal may hold portions of hearings in camera to the extent necessary to ensure the protection of confidential information, including business confidential information.
3. A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.
4. The Parties may share with officials of their respective central and sub-national governments all relevant unredacted documents in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents.
5. To the extent that a Tribunal's confidentiality order designates information as confidential and a Party's law on access to information requires public access to that information, the Party's law on access to information shall prevail. However, a Party should endeavour to apply its law on access to information so as to protect information designated confidential by the Tribunal.

Allowing for *amicus curiae* submissions is another way to enhance the legitimacy of the ISA regime because it enables relevant stakeholders to have a say in arbitration proceedings. This development has been considered as a positive trend towards more transparency in the system.³⁰ According to the IIA Mapping Project, *amicus curiae* submissions by non-disputing parties are addressed in 39 IIAs.³¹

Australia – China FTA, 2015, art 9.16:

3. With the written agreement of the disputing parties, the tribunal may allow a party or entity that is not a disputing party to file a written *amicus curiae* submission with the tribunal regarding a matter within the scope

²⁹ UNCTAD, "IIA Mapping Project", *supra* note 13.

³⁰ See e.g. Jan Asmus Bischoff, "Initial Hiccups or More? Efforts of the EU to Find its Future Role in International Investment Law" in Jean E. Kalicki and Anna Joubin-Bret, eds, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Leiden: Brill Nijhoff, 2015) 531 at 557.

³¹ UNCTAD, "IIA Mapping Project", *supra* note 13.

of the dispute. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:

- (a) the amicus curiae submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties;
- (b) the amicus curiae submission would address a matter within the scope of the dispute; and
- (c) the amicus curiae has a significant interest in the proceeding.

4. Each submission in accordance with paragraph 3 of this Article shall identify the author, disclose any affiliation, direct or indirect, with any disputing party, and identify any person, government, or other entity that has provided, or will provide, any financial or other assistance in preparing the submission. Each submission shall be in a language of the arbitration, and comply with any page limits and deadlines set by the tribunal. The tribunal shall ensure that the amicus curiae submission does not disrupt the proceeding or unduly burden or unfairly prejudice either disputing party, and that the disputing parties are given an opportunity to present their observations on the amicus curiae submission.

B. Diplomatic Protection and State-to-State Arbitration

There has been a trend towards limiting investors' access to ISA through making various refinements to the ISDS clauses.³² These refinements may take the form of subtle reforms, such as limiting treaty provisions subject to dispute settlement, excluding policy areas from the scope of dispute settlement, or limiting time period to submit claims. A more radical approach, however, reveals itself in the IIAs that omit ISDS-type international arbitration altogether and opt for other alternatives, have been called "paradigmatic" reforms.³³

One of these alternatives is to revert to diplomatic protection, which was used as the means of resolving disputes between foreign investors and host states before the era of IIAs and ISA. Diplomatic protection in the realm of investment disputes would require the foreign investor to approach its home state, after having exhausted the local remedies available in the host state, to ask its home state to espouse its claim against the host state. If the investor's home state decides to espouse the claim of its national, the dispute between the home state and the host state can be resolved through different channels, such as negotiation, mediation, arbitration or judicial proceedings, once the parties agree on a process.

Diplomatic protection is not an ideal alternative to ISA in the context of international investment law due to the political nature of the process involved. Indeed, it is the political nature of diplomatic protection that led to the conclusion of the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* with an effort to depoliticise investment dispute settlement. To be more precise, the home state of the foreign investor has no obligation to exercise diplomatic protection for the injury suffered by its national, and thus the home state may refuse to proceed with the foreign investor's claim against the host state subject to its own political goals.³⁴ Avoiding political frictions and maintaining good relations with the host state, for instance, might be more important for the home state than protecting the interests of its national. In such cases, the foreign investor would be left without any remedy even if it is entitled to it as a result of the injury it suffered because of a clear breach by the host state of its obligations.

³² According to the data provided by UNCTAD, 12 IIAs out of 13 IIAs concluded in 2017 limited access to ISDS and 13 IIAs out of 18 IIAs concluded in 2016 limited access to ISDS. See UNCTAD, *World Investment Report 2018*, *supra* note 11 at 97; UNCTAD, *World Investment Report 2017: Investment and the Digital Economy* (Geneva: United Nations, 2017) at 121 [UNCTAD, *World Investment Report 2017*]. The new model BITs tend to follow this trend as well. See UNCTAD, *World Investment Report 2016*, *supra* note 8 at 111.

³³ See Anthea Roberts, "Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration" (2018) 112 AJIL 410, at 410-414.

³⁴ Peter Muchlinski, "The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution" in Christina Binder et al, eds, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009) 341 at 343.

While diplomatic protection might not be considered a favourable alternative to ISA from the foreign investor's perspective, it can offer certain advantages to the host state. One of the advantages would be that diplomatic protection may provide a screening mechanism for the investors' frivolous claims as it is the home state that has to decide to espouse the investor's claim. In principle, the exhaustion of local remedies is a precondition to the state's right to assert a claim as a form of diplomatic protection. This requirement would give the host state an opportunity to have the conflict resolved in its national courts before the claim is elevated to the international level.

Another alternative to ISA is state-to-state arbitration (SSA), which can be described as a modern variant of diplomatic protection. As far as the protection of the foreign investor's interests is concerned, SSA has essentially similar drawbacks to those identified with respect to diplomatic protection. That is to say that in the event of a dispute between the foreign investor and the host state, the former would need to convince its home state to espouse its claim in order to seek remedies for an alleged breach of the applicable investment agreement.³⁵

Although SSA is far from being the predominant method of settling disputes between foreign investors and host states, this mechanism is not unknown to the field of international investment law. In fact, early "modern" IIAs provided exclusively for SSA for the settlement of disputes concerning the interpretation or application of the treaty. Such SSA clauses are available, alongside the dispute settlement clauses providing for ISA, in a significant number of the IIAs, including recent ones as well. According to the IIA Mapping Project, there are currently 129 IIAs, including investment chapters of the broader trade agreements, that provide for SSA only.³⁶ It has been observed in the literature that despite the common availability of SSA clauses in IIAs, these clauses have only been invoked in a limited number of cases.³⁷

Canada – Mongolia BIT, 2016, art 37:

1. Either Party may request consultations on the interpretation or application of this Agreement. The other Party shall give sympathetic consideration to the request. Any dispute between the Parties concerning the interpretation or application of this Agreement shall, whenever possible, be settled amicably through consultations.
2. If a dispute cannot be settled through consultations, it shall, at the request of either Party, be submitted to an arbitral panel for decision.
3. An arbitral panel shall be constituted for each dispute. Within two months after receipt through diplomatic channels of the request for arbitration, each Party shall appoint one member to the arbitral panel. The two members shall then select a national of a third State who, upon approval by the two Parties, shall be appointed Chair of the arbitral panel. The Chair shall be appointed within two months from the date of appointment of the other two members of the arbitral panel.

Dispute settlement clauses that include SSA have made a reappearance in the context of investment chapters of the recent FTAs as a reaction to the criticisms directed at ISA.³⁸ To clarify, such FTAs are structured in a way that their investment chapter does not address the issue of dispute settlement, thereby letting the investment disputes arising from that chapter fall within the ambit of the general chapter on dispute settlement. The use of SSA for settlement of investment disputes resembles the model in diplomatic

³⁵ For a discussion about whether the requirement of exhaustion of local remedies should apply to the cases where the home state of the investor decides to expose the claim of its national against the host state through SSA, see Michele Potestà, "State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential?" in Nerina Boschiero et al, eds, *International Courts and the Development of International Law: Essays in Honour Tullio Treves* (Dordrecht: Springer, 2013) 753 at 756-761.

³⁶ *Ibid.*

³⁷ Clovis J. Trevino, "State-to-State Investment Treaty Arbitration and the Interplay with Investor-State Arbitration Under the Same Treaty" (2014) 5 *JIDS* 199 at 200.

³⁸ See e.g. Australia – Malaysia FTA, 2012; EU – Ukraine Association Agreement, 2014; EU – Georgia Association Agreement, 2014; EU – Moldova Association Agreement, 2014; Australia – Japan EPA, 2014.

protection claims, and thus differs from its use in other types of inter-state claims, namely inter-state treaty violation claims and abstract interpretation claims.³⁹

C. Domestic Courts

Recourse to domestic courts to adjudicate disputes brought under investment treaties could present several advantages. Domestic courts are part of – and operate in – a long-established legal system made of rules and procedures that aim to ensure consistency and predictability in the adjudicative process.⁴⁰ Another important advantage of domestic courts as compared with ISA is that erroneous court decisions can generally be corrected by a higher domestic court through an appeal mechanism that is, to this day, largely absent in the realm of international investment law.⁴¹

Employing domestic courts as an alternative to ISA responds to other concerns associated with the current regime, namely, the lack of legitimacy arising from the fact that an international body composed of private arbitrators can hold sovereign states liable, and the perceived discrimination between foreign investors that have access to ISA and domestic investors that do not. In response to the former concern, this alternative might result in broader acceptance from civil society of the decisions as domestic courts echo the societal values of the host state. As to the concern about the perception of discrimination between foreign and domestic investors, entrusting domestic courts with the adjudication of investment disputes ensures that all investors, whether foreign or domestic, have access to the same forum and legal remedies.

Despite its advantages, the domestic courts alternative poses certain challenges. To exemplify, judges sitting in domestic courts might have no expertise or knowledge of international investment law. This lack of expertise can be mitigated, for instance, through the creation of specialized courts. Some countries, especially common-law countries, frequently restrict cases in which individuals can submit international claims in domestic courts; that legal culture would have to change. The real challenge, however, is the real or perceived bias of domestic courts. The common perception that domestic courts might fail to be impartial in the adjudication of claims between foreign investors and the host state would be difficult to overcome.

As far as treaty practice is concerned, investment agreements generally provide either for ISA or SSA. According to the IIA Mapping Project, the only treaty in force that provides for neither of these mechanisms, or, for that matter, any other procedural arrangement, is the Liberia–Switzerland bilateral investment treaty (BIT).⁴² Investment disputes under this treaty are thus presumably adjudicated by default by domestic courts or resolved through diplomatic channels. Although this BIT seems to be exceptional in terms of numbers, it does not mean that domestic courts are not considered to be an alternative by other states. In fact, leaving aside the requirement of exhaustion of local remedies, the preference for domestic courts is usually not expressed in IIAs. Such a preference could be implied in \ states' withdrawal from or refusal to ratify IIAs including ISA or the ICSID Convention.⁴³

D. Alternative Dispute Resolution: Consultation, Mediation and Conciliation

Alternative modes of dispute resolution encompass a number of different methods including consultation (or negotiation), mediation, and conciliation. Although these three methods are sometimes conflated under

³⁹ For the typology of inter-state claims that can be subject of SSA adopted by Kulick, see Andreas Kulick, “State-State Investment Arbitration as a Means of Reassertion of Control: From Antagonism to Dialogue” in Andreas Kulick, ed, *Reassertion of Control over the Investment Treaty Regime* (Cambridge: Cambridge University Press, 2017) 128.

⁴⁰ Steffen Hindelang, “Study on Investor-State Dispute Settlement (ISDS) and Alternatives to Dispute Resolution in International Investment Law” (2016) 13:1 TDM at 46.

⁴¹ *Ibid.*

⁴² UNCTAD, “IIA Mapping Project”, *supra* note 13.

⁴³ See e.g. Leon E. Trakman, “Investor State Arbitration or Local Courts: Will Australia Set a New Trend?” (2012) 46 J World Trade 83; Leon E. Trakman, “Investor-State Arbitration: Evaluating Australia’s Evolving Position” (2014) 15 JWIT 152.

the term “alternative dispute resolution” (ADR), they refer to three distinct mechanisms. *Consultation* allows for a dialogue between the host state and the investor which aims at the settlement of a given dispute in a mutually satisfactory and amicable way without having recourse to adversarial means of dispute resolution. *Mediation*, which pursues the same goal as consultation, involves the participation of a third party in the process. The role of this third party, the mediator, is to assist the parties at different stages of the dispute settlement process, including the stage of the evaluation of the legal merits of a dispute or the definition of issues. *Conciliation* also involves the participation of a third party, the conciliator, but the conciliator’s role is not limited to assisting the parties in understanding the issues in dispute. Unlike the mediator, the conciliator actively participates in the resolution of a given dispute by suggesting possible solutions.

Two main advantages of ADR methods are worthy of note. The first advantage is the cost-effective process that they offer when compared with ISA procedures.⁴⁴ The second advantage is that ADR methods are better suited to preserving a good relationship between the parties as recourse to these methods is based upon the common will of the participants to reach an amicable solution. The major weakness of ADR methods results, however, from their very characteristics which by definition never lead to a decision imposed on the parties. There is a vast literature on the question of whether ADR methods, mediation and conciliation in particular, could prove to be viable alternative to ISA.⁴⁵ UNCTAD has also included the strategy of building in effective ADR mechanisms among the policy options it suggests in its effort to provide guidance on the ISDS reforms.⁴⁶

Considering the weakness inherent in the amicable nature of ADR methods, however, a complementary mechanism like ISA is still necessary in cases where parties fail to reach an amicable solution. Put differently, ADR methods, the operation of which is predicated upon the common will of the parties to reach a mutually satisfactory and amicable solution to the dispute, are not the best practicable option unless they are supported with other dispute resolution mechanisms. This is the reason why a large number of treaties provide for ADR methods either as a precondition to ISA or as a voluntary means of dispute resolution along with ISA. According to the IIA Mapping Project, 624 IIAs provide for recourse to voluntary or compulsory ADR in addition to ISA and SSA.⁴⁷ CETA provides a recent example of how ADR methods are introduced in IIAs:

Canada – European Union CETA, 2016, arts 8.19(1), 9.20(1)-(2) and 8.22(1)(d):

Article 8.19(1):

1. A dispute should as far as possible be settled amicably. Such a settlement may be agreed at any time, including after the claim has been submitted pursuant to Article 8.23. Unless the disputing parties agree to a longer period,

⁴⁴ The cost-and-time effective nature of amicable settlement mechanisms, such as conciliation and mediation, was acknowledged by UNCITRAL Working Group III in the context of its deliberations on the ISDS reform, but it was decided that the focus of the Group’s current work should be kept limited to arbitration only. See UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session (Vienna, 27 November-1 December 2017)*, 19 December 2017, UN Doc A/CN.9/930/Rev.1 at 6.

⁴⁵ See e.g. Anna Joubin-Bret, “Investor-State Mediation (ISM): A Comparison of Recent Treaties and Rules” in Arthur W. Rovine, ed, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014* (Boston: Martinus Nijhoff Publishers, 2015) 152; “Mediation of Investor-State Conflicts” (2014) 127 *Harvard L Rev* 2543; Nancy A. Welsh & Andrea Kupfer Schneider, “The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration” (2013) 18 *Harvard Neg L Rev* 71; Ximena Bustamante, “Investor-State Mediation: Reflections on its Feasibility from a Process Perspective” in Todd Weiler & Freya Baetens, eds, *New Directions in International Economic Law* (Boston: Martinus Nijhoff Publishers, 2011) 275; Tillmann Rudolf Braun, “Investor-State Mediation: Is There a Future?” in Arthur W. Rovine, ed, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009* (Boston: Martinus Nijhoff Publishers, 2010) 374; Gabriel Bottini & Veronica Lavista, “Conciliation and BITs” in Arthur W. Rovine, ed, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009* (Boston: Martinus Nijhoff Publishers, 2010) 358.

⁴⁶ UNCTAD, *World Investment Report 2015*, *supra* note 6 at 151-152. See also, UNCTAD, *IIA Issues Note – Improving Investment Dispute Settlement: UNCTAD Policy Tools* (Geneva: United Nations, 2017) at 7 and 10.

⁴⁷ UNCTAD, “IIA Mapping Project”, *supra* note 13.

consultations shall be held within 60 days of the submission of the request for consultations pursuant to paragraph 4.

...

Article 8.20:

1. The disputing parties may at any time agree to have recourse to mediation.
2. Recourse to mediation is without prejudice to the legal position or rights of either disputing party under this Chapter and is governed by the rules agreed to by the disputing parties including, if available, the rules for mediation adopted by the Committee on Services and Investment pursuant to Article 8.44.3(c).

...

Article 8.22:

1. An investor may only submit a claim pursuant to Article 8.23 if the investor:
 - ...
 - d. has fulfilled the requirements related to the request for consultations.

E. Hybrid Approaches

“Hybrid” options involving the interaction of different means of dispute settlement have also emerged. These developments are in line with the view expressed in the literature that reforms to the current ISA regime should benefit from the complementarity between domestic and international institutions in the sense that international processes should be structured as complements to, rather than as substitutes for, domestic processes.⁴⁸

Brazil introduced a Cooperation and Facilitation Investment Agreement (CFIA), which has an innovative model for the resolution of investment disputes.⁴⁹ The model CFIA creates two entities (*i.e.* a Joint committee and a National Focal Point or an Ombudsman) and provides for a three-step dispute prevention and resolution mechanism. The first step involves the Ombudsman of the host state to which both the foreign investor and its home state have access and before which complaints can be brought. The second step provides for a dispute prevention procedure that involves the Joint Committee and a mandatory consultations process as a precondition to access to arbitration.

The participation of all relevant stakeholders in the consultations is ensured as well in order to maximize the efficiency of the process. It is only in cases where there is a failure to reach a positive outcome or where the parties do not agree with the Joint Committee’s recommendation(s) that the parties can trigger the dispute settlement mechanism as a third step, which includes SSA. Accordingly, either state party may submit the dispute to an *ad hoc* arbitral tribunal or to a permanent arbitration institution for settlement of investment disputes, the rules of which are set out in the model CFIA itself.⁵⁰

⁴⁸ Sergio Puig & Gregory Shaffer, “Imperfect Alternatives: Institutional Choice and the Reform of Investment Law” (2018) 112 AJIL 361. *Contra* Wenhua Shan & Yunya Feng, “A Trinity Analytical Framework for ISDS Reform” (2018) 112 AJIL 244 at 246-248.

⁴⁹ See José Henrique Vieira Martins, “Brazil’s Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments” *Investment Treaty News* (June 12, 2017), online: International Institute for Sustainable Development <<https://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/>> (accessed 20 November 2018).

⁵⁰ In addition to Brazil, the India Model BIT (2015) follows a similar trend. Although it provides for ISA in Chapter IV, the new India Model BIT has introduced a nuanced approach and subjected recourse to this mechanism on a number of strict conditions (*e.g.* the investor is required to exhaust all judicial and administrative remedies for at least a period of five years). There are views in recent literature suggesting that the strenuous qualifications on the ISDS mechanism are reflective of an abolitionist approach and effectively make it very difficult for a foreign investor to have recourse to ISA. See *e.g.* Prabhash Ranjan & Pushkar Anand, “Investor State Dispute Settlement in the 2016 Indian Model Bilateral Investment Treaty: Does it Go Too Far?” in Julien Chaisse & Luke Nottage, eds, *International Investment Treaties and Arbitration Across Asia* (Leiden: Brill Nijhoff, 2017) 579 at 606-609.

Brazil Model CFIA, 2015, arts 17, 18, 23 and 24:

Article 17:

1. For the purpose of this Agreement, the Parties hereby establish a Joint Committee for the administration of this Agreement (hereinafter referred as “Joint Committee”).
2. This Joint Committee shall be composed of government representatives of both Parties designated by their respective Governments.
3. The Joint Committee shall meet at such times, in such places and through such means as the Parties may agree. Meetings shall be held at least once a year, with alternating chairmanships between the Parties.
4. The Joint Committee shall have the following functions and responsibilities:

...

- e) Seek to resolve any issues or disputes concerning investments of investors of a Party in an amicable manner; and

...

Article 18:

1. Each Party shall designate a National Focal Point, or “Ombudsman”, which shall have as its main responsibility the support for investor from the other Party in its territory.

...

4. The National Focal Point, among other responsibilities, shall:

- a) Endeavour to follow the recommendations of the Joint Committee and interact with the National Focal Point of the other Party, in accordance with this Agreement;
- b) Follow up on requests and enquiries of the other Party or of investors of the other Party with the competent authorities and inform the stakeholders on the results of its actions;
- c) to [sic] assess, in consultation with relevant government authorities, suggestions and complaints received from the other Party or investors of the other Party and recommend, as appropriate, actions to improve the investment environment;
- d) seek to prevent differences in investment matters, in collaboration with government authorities and relevant private entities;
- e) Provide timely and useful information on regulatory issues on general investment or on specific projects; and
- f) Report its activities and actions to the Joint Committee, when appropriate.

...

Article 23:

1. The National Focal Points, or “Ombudsmen”, shall act in coordination with each other and with the Joint Committee in order to prevent, manage and resolve any disputes between the Parties.
2. Before initiating an arbitration procedure, in accordance with Article 24 of this Agreement, any dispute between the Parties shall be the object of consultations and negotiations between the Parties and be previously examined by the Joint Committee.
3. A Party may submit a specific question and call a meeting of the Joint Committee according to the following rules:

- a) to initiate the procedure, the interested Party must submit a written request to the other Party, specifying the name of the affected investors, the specific measure in question, and the findings of fact and law underlying the request. The Joint Committee shall meet within sixty (60) days from the date of the request;
- b) The Joint Committee shall have 60 days, extendable by mutual agreement by 60 additional days, upon justification, to evaluate the relevant information about the presented case and to submit a report.

The report shall include:

- i) Identification of the Party;
- ii) Identification of the affected investors, as presented by the Parties;
- iii) Description of the measure under consultation; and
- iv) Conclusions of the consultations between the Parties.
- c) In order to facilitate the search for a solution between the Parties, whenever possible, the following persons shall participate in the bilateral meeting:
 - i) Representatives of the affected investors;
 - ii) Representatives of the governmental or non-governmental entities involved in the measure or situation under consultation.
- d) The procedure for dialogue and bilateral consultations may be concluded by any Party, after the sixty (60) days referred to in subparagraph b). The Joint Committee shall present its report in the subsequent meeting of the Joint Committee, which shall be held no later than fifteen (15) days after

the date of the submission of the request of a Party to conclude the procedure for dialogue and bilateral consultations.

e) The Joint Committee shall, whenever possible, call for special meetings to review matters that have been submitted.

f) In the event that a Party does not attend the meeting of the Joint Committee described in subparagraph (d) of this article, the dispute may be submitted to arbitration by the other Party in accordance with Article 24 of the Agreement.

...

Article 24:

1. Once the procedure under paragraph 3 of Article 23 has been exhausted and the dispute has not been resolved, either Party may submit the dispute to an ad hoc Arbitral Tribunal, in accordance with the provisions of this Article. Alternatively, the Parties may choose, by mutual agreement, to submit the dispute to a permanent arbitration institution for settlement of investment disputes. Unless the Parties decide otherwise, such institution shall apply the provisions of this Section.

F. An Investment Court System

Another innovative alternative to ISA supported by the European Commission⁵¹ is the creation of an investment court system. At present this proposal has taken the form of providing for an investment court in each IIA the EU has negotiated, which include the ones concluded with Canada (CETA), Singapore (EUSFTA), Vietnam (EU-Vietnam FTA), and Mexico (EU-Mexico FTA). The Commission has made clear that in the longer term it would like to see the establishment of a multilateral investment court which would replace the individual courts and would also be available to replace ISA in individual treaties. This is one of the options for reform that UNCITRAL Working Group III will consider.

Unlike the traditional ISA model which involves party-appointed arbitral tribunals for each case, the investment court system would introduce a permanent body composed of a first instance tribunal and an appeal tribunal. The panels deciding the disputes are appointed by the President on a rotational basis and consist either of a panel of three judges or a sole judge chosen among the third-country nationals.⁵²

Canada – European Union CETA, 2016, art 8.27:

1. The Tribunal established under this Section shall decide claims submitted pursuant to Article 8.23.

2. The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries.

...

4. The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements.

...

6. The Tribunal shall hear cases in divisions consisting of three Members of the Tribunal, of whom one shall be a national of a Member State of the European Union, one a national of Canada and one a national of a third country. The division shall be chaired by the Member of the Tribunal who is a national of a third country.

7. Within 90 days of the submission of a claim pursuant to Article 8.23, the President of the Tribunal shall appoint the Members of the Tribunal composing the division of the Tribunal hearing the case on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Members of the Tribunal to serve.

...

⁵¹ See European Commission, *State of the Union 2017: A Multilateral Investment Court* (2017), online: European Commission <http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf> (accessed 21 November 2018).

⁵² The preference for judges rather than arbitrators would be welcome for a number of commentators in the literature. See e.g. Gus Van Harten, “Reforming the System of International Investment Dispute Settlement” in C. L. Lim, ed, *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* (Cambridge: Cambridge University Press, 2016) 103 at 113.

9. Notwithstanding paragraph 6, the disputing parties may agree that a case be heard by a sole Member of the Tribunal to be appointed at random from the third country nationals. The respondent shall give sympathetic consideration to a request from the claimant to have the case heard by a sole Member of the Tribunal, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low. Such a request shall be made before the constitution of the division of the Tribunal.

The investment court proposed in the current EU IIAs includes an appellate mechanism.

Canada – European Union CETA, 2016, art 8.28:

1. An Appellate Tribunal is hereby established to review awards rendered under this Section.
2. The Appellate Tribunal may uphold, modify or reverse the Tribunal's award based on:
 - (a) errors in the application or interpretation of applicable law;
 - (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law;
 - (c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).
3. The Members of the Appellate Tribunal shall be appointed by a decision of the CETA Joint Committee at the same time as the decision referred to in paragraph 7.

It appears that these individual courts are intended to last until a multilateral court option is available. In addition to establishing an investment court for each specific IIA, the Council of the EU has recently adopted negotiating directives for the establishment of a multilateral investment court, which it plans to pursue in conjunction with the UNCITRAL reform process.⁵³ Some existing treaty provisions already refer to this multilateral option.

Canada – European Union CETA, 2016, art 8.29:

The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.

Although this innovative response to the concerns triggered by the ISA regime may solve some of the perceived issues with the current system, the investment court system has not been implemented yet, and it remains to be tested in practice.⁵⁴

Theme 2: Breadth of Investment Protection

Early IIAs totalled an average of a dozen pages. By contrast, recent IIAs often run well beyond 40 pages. Several reasons explain this change in the format of IIAs: the inclusion of new provisions⁵⁵ but also the enhanced precision with which the traditional standards of protection are being drafted. This enhanced level of precision can be witnessed in a general manner for all of the traditional standards of protection but it is especially visible with respect to the fair and equitable treatment (FET) principle (A) and the protection against unlawful expropriation (B). This trend is particularly well illustrated by the investment treaty-making policy of Canada, the United States, and now the EU⁵⁶ and is often explained by the will to balance

⁵³ Council of the European Union, *Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes* (20 March 2018), online: EU <<http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>> (accessed 21 November 2018).

⁵⁴ On the challenges posed by court-like model of ISDS and its compatibility with the ICSID Convention, see N. Jansen Calamita, “The Challenge of Establishing a Multilateral Investment Tribunal at ICSID” (2017) 32 ICSID Rev 611.

⁵⁵ See Theme 3 on obligations imposed on foreign investors below.

⁵⁶ Mark A. Clodfelter, “The Future Direction of Investment Agreements in the European Union” (2013) 12 Santa Clara J Int’l L 159 at 171; Eric de Brabandere, “States’ Reassertion of Control over International Investment Law: (Re) Defining ‘Fair and Equitable Treatment’ and ‘Indirect Expropriation’” in Andreas Kulick, ed, *Reasserting of Control over the Investment Treaty Regime* (Cambridge: Cambridge University Press, 2016) 285 at 308.

the rights and obligations of states and investors. State regulatory authority has also been enhanced by the broader use of exception clauses.⁵⁷

A. Fair and Equitable Treatment

The FET standard of protection is non-relational because it is not contingent on the treatment given another person, unlike relative obligations such as national or most-favoured-nation treatment. The FET principle is a key standard of protection in international investment law. It has been invoked numerous times in investment arbitration cases and analyzed by investment tribunals and scholars alike. However, its contours remain unclear. It is generally accepted that it includes elements associated with the minimum standard of treatment at customary international law. It has been construed to extend non-discrimination, transparency, the protection against bad faith, coercion, threats, harassment, the protection of legitimate expectations, due process, the prohibition of arbitrary conduct, and denials of justice. There has been a great deal of controversy over whether FET is a subset of the international minimum standard of treatment at customary international law. Without entering into that debate, we note that it exists and that precision in treaty drafting can avoid the ambiguity.

The FET standard of protection can be expressed in terms such as “equitable and reasonable treatment and protection”⁵⁸ and often appears as a stand-alone provision. Alternatively, it can be combined with other standards of protection such as full protection and security or prohibitions on discriminatory treatment. Furthermore, FET can either be unqualified by any other terms or qualified by making an explicit reference to international law. Listing specific situations that constitute a violation of FET treatment or a list of factors that explicitly depart from the concept defined in current case law is a potential way to constrain tribunals’ current broad discretion to develop the concept.⁵⁹

According to the IIA Mapping Project, there are currently 2,441 IIAs that provide for the FET standard of protection⁶⁰: 1,988 IIAs containing unqualified FET and 453 IIAs with qualified FET.⁶¹ Among the IIAs with qualified FET, 348 make a reference to international law or principles of international law, 17 make a reference to customary international law, and 80 make a reference to the customary international law minimum standard of treatment.⁶² In addition, 97 IIAs provide for a qualified FET provision by listing (exhaustively or indicatively) FET elements.⁶³

⁵⁷ Barnali Choudhury, “Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements” (2011) 49 *Colombia J of Trans L* 670 at 714; David Collins, “The Line of Equilibrium: Improving the Legitimacy of Investment Treaty Arbitration through the Application of the WTO’s General Exceptions” (2016) 32 *Arb Int’l* 575 at 580; Lorenzo Cotula, “Expropriation Clauses and Environmental Regulation: Diffusion of Law in the Era of Investment Treaties” (2015) 24 *Rev European Community & Int’l Env L* 278; Roland Kläger, “Revising Treatment Standards—Fair and Equitable Treatment in Light of Sustainable Development” in Steffen Hindelang and Markus Krajewski, eds, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford: Oxford University Press, 2016) 65 at 80; Ursula Kriebaum, “FET and Expropriation in the Comprehensive Economic Trade Agreement between the European Union and Canada (CETA)” (2016) 13:1 *TDM* 26.

⁵⁸ See e.g. Lithuania – Norway BIT, 1992, art III.

⁵⁹ Nathalie Bernasconi-Osterwalder, “Giving Arbitrators *Carte Blanche*—Fair and Equitable Treatment in Investment Treaties” in C L Lim, ed, *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* (Cambridge: Cambridge University Press, 2016) 324 at 345; Flavien Jadeau & Fabien Gélinas, “CETA’s Definition of the Fair and Equitable Treatment Standard: Toward a Guided and Constrained Interpretation” (2016) 13:1 *TDM* 1; Kläger, *supra* note 57 at 80.

⁶⁰ UNCTAD, “IIA Mapping Project”, *supra* note 13.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

Example of an unqualified FET provision:

Japan – Kazakhstan BIT, 2014, art 5(1):

Each Contracting Party shall in its Area accord to investments of investors of the other Contracting Party fair and equitable treatment as well as full protection and security.

Examples of an FET provision qualified by reference to international law or principles of international law:

Japan – Oman BIT, 2015, art 5(1):

Each Contracting Party shall in its Area accord to investments of investors of the other Contracting Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

Kuwait – Mauritius BIT, 2013, art 3(2):

Investments of investors of a Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party in a manner consistent with recognized principles of International Law and the provisions of this Agreement.

Examples of an FET provision qualified by reference to customary international law and to the customary international law minimum standard of treatment:

China – Republic of Korea FTA, 2015, art 12.5:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.

Canada – Mongolia BIT, 2016, art 6(1):

Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.

Examples of an FET provision qualified by reference to a list of elements:

Islamic Republic of Iran – Slovakia BIT, 2016, art 3:

1. Each Contracting Party shall accord to investments of investors of the other Contracting Party, and to investors with respect to their investments, fair treatment and full protection and security in accordance with paragraphs 2 to 4.
2. A breach of the obligation of fair treatment referenced in paragraph 1 may be found only 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; or
 - d) Targeted discrimination on the grounds of nationality.
3. For greater certainty, ‘full protection and security’ refers to the Contracting Party’s obligations relating to physical security of investors and investments.
4. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

India Model BIT, 2015, art 3.1:

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

- (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.

Example of an FET qualified provision by reference to a list of elements, including “legitimate expectations”:

Canada – European Union CETA, 2016, art 8.10:

1. 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 through 6.
2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if 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 in accordance with paragraph 3 of this Article.
3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.
4. 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.
- ...
6. For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article.
7. For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, a Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1.

Agreements which include a list of what can constitute a violation of FET limit potentials for abuse in litigation⁶⁴ and reduce the leeway that tribunals have to develop and expand the scope of the FET standard.⁶⁵ These lists provide important guidance to tribunals regarding the interpretation of FET.⁶⁶ However, they still give some flexibility to arbitrators⁶⁷ because the terms “fairness” and “equity” remain undefined.⁶⁸

Addressing the role to be played by legitimate expectations constitutes an interesting development. In fact, the concept of legitimate expectations has been developed through arbitral case law and was not included in early IIAs. Despite the fact that they are explicitly mentioned in the CETA’s FET provision, a failure to meet legitimate expectations is not an explicit ground for breach. CETA also does not specify whether the “specific representation” which gives rise to the “legitimate expectations” must have a particular form.⁶⁹

⁶⁴ Makane Moïse Mbengue & Stefanie Schacherer, “The ‘Africanization’ of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime” (2017) 18 JWIT 414 at 430.

⁶⁵ Bernasconi-Osterwalder, *supra* note 59 at 345; Jadeau & Gélinas, *supra* note 59 at 1; Kläger, *supra* note 57 at 80.

⁶⁶ Kendra Leite, “The Fair and Equitable Treatment Standard: A Search for a Better Balance in International Investment Agreements” (2016) 32 Am U Int’l L 363 at 390.

⁶⁷ Bernasconi-Osterwalder, *supra* note 59 at 343.

⁶⁸ *Ibid* at 397-399.

⁶⁹ Ursula Kriebaum, “FET and Expropriation in the (Invisible) EU Model BIT” (2014) 15 JWIT 454 at 478 [Kriebaum, “EU Model BIT”].

Another interesting component of CETA's FET provision is the periodic review of the FET clause that is provided at Article 8.10(3) and that permits revision of it. Although the provision does not say whether recommendation about the FET clause could amount to an amendment and thus whether it requires the approval of the parties, it explicitly addresses the revision of the content of the FET standard.⁷⁰

B. The Protection Against Unlawful Expropriation

The protection of foreign investors against unlawful expropriation is one of the main guarantees found in IIAs. The overwhelming majority⁷¹ of IIAs provide that expropriation by host states is allowed only if the taking of the property is justified by a public purpose, is not tainted by discrimination, is done in accordance with due process, and is accompanied by the payment of compensation. There are generally two categories of expropriation: direct and indirect. While the former involves physical takings and outright nationalization, the latter entails measures that have effects equivalent to a direct expropriation. According to the IIA Mapping Project, 2,489 IIAs explicitly refer to indirect expropriation.⁷²

Investment tribunals have had many opportunities to interpret and apply expropriation provisions, and in particular those on indirect expropriation. The body of case law on that issue demonstrates the difficulty of reaching a consistent interpretation, especially with respect to the delimitation between the legitimate exercise of regulatory power and unlawful expropriation. The lack of express guidelines regarding what exactly constitutes an indirect expropriation as well as the inconsistent case law have led to concerns about both the predictability and fairness of investment arbitration for host States⁷³ and prompted developments in treaty practice. These developments have taken the form of more precise indirect expropriation provisions, which are increasingly accompanied by carve-outs to preserve the host states' ability to exercise their police powers. According to the IIA Mapping Project, 97 IIAs include a carve-out for general regulatory measures and 87 IIAs have a carve-out for compulsory licenses consistent with WTO law.⁷⁴

Examples of an expropriation provision without any mention of indirect expropriation:

Morocco – Rwanda BIT, 2016, art 4(1):

Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalized or subjected to any other measures of dispossession (hereinafter referred to as “expropriation”), except for a public purpose, in accordance with due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation.

Brazil – Peru ETEA, 2016, art 2.7(1)⁷⁵

The Parties may not nationalize or expropriate the investments covered by this Agreement Chapter, unless it is:

- (a) in the case of Brazil, by necessity or public utility or social interest; in the case of Peru, for national security or public need;
- (b) in a non-discriminatory manner;
- (c) upon payment of an effective compensation in accordance with paragraphs 2, 3 and 4;
- (d) in accordance with due process of law.

⁷⁰ *Ibid* at 479-481.

⁷¹ According to the IIA Mapping Project, of the 2,572 IIAs that have been mapped, only eight do not have an expropriation provision. See UNCTAD, “IIA Mapping Project”, *supra* note 13.

⁷² *Ibid*.

⁷³ Anne K. Hoffmann, “Indirect Expropriation” in August Reinisch, ed, *Standards of Investment Protection* (Oxford: Oxford University Press, 2008) 151 at 166-167.

⁷⁴ *Ibid*.

⁷⁵ The original language of this article is in Portuguese:

Artigo 2.7: Expropriação

1. As Partes não poderão nacionalizar ou expropriar os investimentos cobertos por este Capítulo, salvo que seja: (a) no caso do Brasil, por necessidade ou utilidade pública ou interesse social; no caso do Peru, por segurança nacional ou necessidade pública; (b) de forma não discriminatória; (c) mediante o pagamento de uma compensação efetiva, de acordo com os parágrafos 2, 3 e 4; (d) de conformidade com o devido processo legal.

Examples of an expropriation provision with a definition of indirect expropriation:

Morocco – Nigeria BIT, 2016, art 8(2):

For the purpose of this Agreement,

- a) Indirect expropriation results from a series of measures of a Party having an equivalent effect of direct expropriation without formal transfer of title or outright seizure.
- b) The determination of whether a measure or series of measures of a Party constitute indirect expropriation requires a case-to-case, fact-based inquiry into various factors including, but not limited to the scope of the measures or series of measures and their interference with the reasonable and distinguishable concerning the investment.

Japan – Kenya BIT, 2016, art 10(2):

For the purposes of this Agreement, the determination of whether a measure or a series of measures by a Contracting Party have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, and evidence that includes:

- (a) permanent and complete or near complete deprivation of the value of investment;
- (b) permanent and complete or near complete deprivation of the investor’s right of management and control over the investment; or
- (c) an appropriation of the investment by the Contracting Party which results in transfer of the complete or near complete value of that investment to that Contracting Party, to an agency of that Contracting Party or to a third party.

Recent treaties increasingly include a clarifying definition of “indirect expropriation” given the frequency with which that claim is invoked and the relatively rare cases of direct expropriation.⁷⁶

Example of a comprehensive and detailed expropriation provision:

Canada – EU CETA, 2016, art 8.12 and Annex 8-A:

1. A Party shall not nationalise or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation (“expropriation”), except:

- (a) for a public purpose;
- (b) under due process of law;
- (c) in a non-discriminatory manner; and
- (d) on payment of prompt, adequate and effective compensation. For greater certainty, this paragraph shall be interpreted in accordance with Annex 8-A.

2. The compensation referred to in paragraph 1 shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. The compensation shall also include interest at a normal commercial rate from the date of expropriation until the date of payment and shall, in order to be effective for the investor, be paid and made transferable, without delay, to the country designated by the investor and in the currency of the country of which the investor is a national or in any freely convertible currency accepted by the investor.

4. The affected investor shall have the right, under the law of the expropriating Party, to a prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Party, in accordance with the principles set out in this Article.

5. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights, to the extent that such issuance is consistent with the TRIPS Agreement.

6. For greater certainty, the revocation, limitation or creation of intellectual property rights, to the extent that these measures are consistent with the TRIPS Agreement and Chapter Twenty (Intellectual Property), do not constitute expropriation. Moreover, a determination that these measures are inconsistent with the TRIPS Agreement or Chapter Twenty (Intellectual Property) does not establish an expropriation.

...

Annex 8-A:

The Parties confirm their shared understanding that:

⁷⁶ Yvette Anthony, “The Evolution of Indirect Expropriation Clauses: Lessons from Singapore’s BITs/FTAs” (2017) 7 Asian J Int’l L 319 at 325.

1. Expropriation may be direct or indirect:
 - (a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and
 - (b) indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.
2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that takes into consideration, among other factors:
 - (a) 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;
 - (b) the duration of the measure or series of measures of a Party;
 - (c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and
 - (d) the character of the measure or series of measures, notably their object, context and intent.
3. For greater certainty, except in the rare circumstance when the impact of a 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.

These provisions and their annexes limit the scope of indirect expropriation by providing a redefinition of the scope of protection and of the way the occurrence of an indirect expropriation must be established. Furthermore, these provisions and their annexes include the criteria for establishing an indirect expropriation developed by the US Supreme Court in the case *Penn Central Station v. New York City* (i.e. the economic impact of a measure, the interference with investment backed expectations, and the character of the governmental action).⁷⁷

However, despite the enhanced clarity provided by these annexes, they also raise new issues. For instance, the reference to the notion of intent to determine the “character” of a measure in Annex 8-A of CETA is problematic because it imposes an almost impossible burden of proof on the investor, which would have to demonstrate the intent behind the government action.⁷⁸

Another interesting characteristic of recent expropriation provisions such as the one provided in CETA is the increasing emphasis on the states’ regulatory power. These provisions explicitly provide that if a measure is taken for legitimate policy objectives, it can amount to an indirect expropriation only in “rare circumstances”. Furthermore, recent provisions introduce an implicit proportionality test in cases where the measure is taken for public policy objectives in order to determine whether it is expropriatory or not.⁷⁹

Theme 3: Obligations Imposed on Investors

The controversy surrounding the international investment regime can be partly linked to the asymmetric character of IIAs. Given their primary focus on investment promotion and protection, the majority of these agreements do not explicitly impose obligations pertaining to the conduct of foreign investors, which is expected to be addressed by municipal law. There is nevertheless an increasing interest in linking investment protection with the impact that investors can have on issues of human rights, environmental protection, labour rights, and corruption. For example, UNCTAD considers that ensuring responsible

⁷⁷ Kriebaum, “EU Model BIT”, *supra* note 69 at 463-464.

⁷⁸ *Ibid* at 465.

⁷⁹ Amelia Keene, “The Incorporation and Interpretation of WTO-Style Environmental Exceptions in International Investment Agreements” (2017) 18 *JWIT* 62 at 85; Anthony, *supra* note 76 at 334; Kriebaum, “EU Model BIT”, *supra* note 69 at 466-467.

investment is an objective of IIA reform.⁸⁰ Experts have also addressed various options that could be considered by negotiators to impose obligations on foreign investors in IIAs,⁸¹ even proposing model texts to accomplish this objective.⁸²

Some provisions found in IIAs relate to foreign investors' responsibilities, without explicitly imposing obligations that would apply to the operations of the investment. For example, provisions requiring that investments must be "made in accordance with" the laws of the host state do not expressly address investor misconduct during the operation phase of the investment.⁸³ Other provisions establish the inappropriate character for a state to lower existing standards to attract foreign investment⁸⁴ or simply recall the states' right to regulate to protect the environment, health, safety or other regulatory objectives.⁸⁵

This section of the report focuses on less-common examples that specifically relate to the negative impact that foreign investors can have on the environment or local communities when managing and operating an investment. Addressing investors' responsibilities in IIAs is not a practice that has been widely adopted by states so far.⁸⁶ Several provisions that relate to foreign investors' responsibilities and even impose various degrees of obligations can nevertheless be identified. Some IIAs and model agreements adopted by states address investors' responsibilities through preambular language (A), references to corporate social responsibility (B), direct obligations for various areas of responsibilities (C), instructions to consider the investment's negative impact, (D) and provisions denying substantive protection (E).

A. Preambular Language

One option that has been adopted by some states to signal a general consideration of foreign investors' responsibilities can be found in the preamble of IIAs. These preambles broadly refer to responsible corporate behavior, corporate social responsibility or international guidelines elaborated by intergovernmental organizations.

⁸⁰ UNCTAD, *World Investment Report 2015*, *supra* note 6 at 128. See also Elisabeth Tuerk & Diana Rosert, "The Roads Towards Reform of the International Investment Agreement Regime: A Perspective from UNCTAD" in Marc Bugenberg et al, eds, *European Yearbook of International Economic Law 2016* (Dordrecht: Springer, 2016) 769 at 785.

⁸¹ See e.g. Mahnaz Malik, "The IISD Model International Agreement on Investment for Sustainable Development" in Marie-Claire Cordonier Segger et al, eds, *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer Law International, 2011) 565; Peter Muchlinski, "Towards a Coherent International Investment System: Key Issues in the Reform of International Investment Law" in Roberto Echandi & Pierre Sauvé, eds, *Prospects in International Investment Law and Policy* (Cambridge: Cambridge University Press, 2013) 411; Patrick Dumberry & Gabrielle Dumas-Aubin, "How to Impose Human Rights Obligations on Corporations under Investment Treaties? Pragmatic Guidelines for the Amendments of BITs" in Karl P. Sauvant, ed, *Yearbook on International Investment Law & Policy* (Oxford: Oxford University Press, 2013) 569 [Dumberry & Dumas-Aubin, "How to Impose"]; Sharon Hang, "Investing in Human Rights: Using Bilateral Investment Treaties to Hold Multinational Corporations Liable for Labor Rights Violations" (2014) 37 *Fordham Int'l LJ* 1215; Patrick Dumberry & Gabrielle Dumas-Aubin, "A Few Pragmatic Observations on How BITs Should be Modified to Incorporate Human Rights Obligations" (2014) 11 *TDM* [Dumberry & Dumas-Aubin, "A Few Pragmatic Observations"]; Yulia Leshova, "The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law" (2018) 14 *Utrecht L Rev* 40.

⁸² See e.g. Jason Webb Yackee, "Investment Treaties and Investor Corruption: An Emerging Defense for Host States?" (2012) 52 *Virginia J Int'l L* 723; VanDuzer et al, *supra* note 10; Elizabeth Boomer, "Rethinking Rights and Responsibilities in Investor-State Dispute Settlement: Some Model International Investment Agreement Provisions" in Jean E. Kalicki & Anna Joubin Bret, eds, *Reshaping the Investor-State Dispute Settlement System* (Leiden: Brill Nijhoff, 2015) 183; Jose Daniel Amado et al, *Arbitrating the Conduct of International Investors* (Cambridge: Cambridge University Press, 2017).

⁸³ According to the IIA Mapping Project, 1,642 IIAs include such a provision. See UNCTAD, "IIA Mapping Project", *supra* note 13. See also Andrew Newcombe, "Investor Misconduct" in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (London: Routledge, 2013) 195 at 207-208.

⁸⁴ UNCTAD, "IIA Mapping Project", *ibid*. According to the IIA Mapping Project, 115 IIAs include such a provision.

⁸⁵ *Ibid*. According to the IIA Mapping Project, 132 IIAs include such a provision.

⁸⁶ For example, a study conducted in 2014 has shown that language encouraging respect of responsible business conduct standards was found in only 9 agreements out of a sample of 2,107 IIAs. See Gordon et al, *supra* note 9 at 17.

Austria – Kyrgyzstan BIT, 2016, Preamble:

EXPRESSING their belief that responsible corporate behaviour can contribute to mutual confidence between enterprises and host countries.

Bosnia and Herzegovina – European Free Trade Association FTA, 2013, Preamble:

ACKNOWLEDGING the importance of good corporate governance and corporate social responsibility for sustainable development, and affirming their aim to encourage enterprises to observe internationally recognised guidelines and principles in this respect, such as the OECD Guidelines for Multinational Enterprises, the OECD Principles of Corporate Governance and the UN Global Compact.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 2018, Preamble:

REAFFIRM the importance of promoting corporate social responsibility, cultural identity and diversity, environmental protection and conservation, gender equality, indigenous rights, labour rights, inclusive trade, sustainable development and traditional knowledge, as well as the importance of preserving their right to regulate in the public interest.

Ethiopia – South Africa BIT, 2008, Preamble:

SECURING an overall balance of rights and obligations between and among investors and host countries.

While the preamble sheds light on the object and the purpose of an international agreement, it does not create any substantive obligations for investors.⁸⁷ The inclusion of issues related to foreign investors' responsibilities in preambles can nevertheless send a signal regarding the importance of adopting a more balanced approach to interpreting the agreement.⁸⁸

B. Corporate Social Responsibility

According to the IIA Mapping Project, 39 IIAs explicitly refer to the concept of corporate social responsibility in a separate provision.⁸⁹ This concept has thus been included among standards of protection that are typically found in these agreements.⁹⁰ While some provisions focus on the voluntary nature of the concept, others require investors to adopt socially responsible practices in stronger terms. Another practice that has been adopted by some states is to explicitly refer to initiatives pertaining to responsible business conduct elaborated under the auspices of intergovernmental organizations.

⁸⁷ See e.g. Patrick Dumberry, "Corporate Investors' International Legal Personality and their Accountability for Human Rights Violations under IIAs" in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (London: Routledge, 2013) 179 at 191; Dumberry & Dumas-Aubin, "How to Impose", *supra* note 81 at 579; Dumberry & Dumas-Aubin, "A Few Pragmatic Observations", *supra* note 81 at 4-5.

⁸⁸ See e.g. Jan Wouters & Nicolas Hachez, "When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights Be Ensured?" (2009) 3 *Hum Rights & Int'l Leg Discourse* 301 at 336; Megan Wells Sheffer, "Bilateral Investment Treaties: A Friend or Foe to Human Rights?" (2011) 39 *Denv J Int'l L & Pol'y* 483 at 503-504; Dumberry & Dumas-Aubin, "How to Impose", *ibid* at 579; Karsten Nowrot, "How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?" (2014) 15 *JWIT* 612 at 630; Dumberry & Dumas-Aubin, "A Few Pragmatic Observations", *ibid* at 4-5; Joshua Waleson, "Corporate Social Responsibility in EU Comprehensive Free Trade Agreements: Towards sustainable Trade and Investment" (2015) 42 *Leg Issues Econ Integration* 143 at 159; Barnali Choudhury, "Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements" (2017) 38 *U Pennsylvania J Int'l L* 425 at 465-467; Mbengue & Schacherer, *supra* note 64 at 420-421.

⁸⁹ See UNCTAD, "IIA Mapping Project", *supra* note 13.

⁹⁰ In addition to the examples provided below, see UNCTAD, *World Investment Report 2011: Non-Equity Modes of International Production and Development* (Geneva: United Nations, 2011) at 119-120; UNCTAD, *IIA Issues Note – Phase 2 of IIA Reform: Modernizing the Existing Stock of Old Generation Treaties* (Geneva: United Nations, 2017) at 16; UNCTAD, *World Investment Report 2017*, *supra* note 32 at 40; UNCTAD, *IIA Issues Note – Recent Developments in the International Investment Regime* (Geneva: United Nations, 2018) at 8; UNCTAD, *World Investment Report 2018*, *supra* note 11 at 100-101. Some authors have also documented the intent of the European Union to address issues of corporate social responsibility in its future agreements. See e.g. Eva van der Zee, "Incorporating the OECD Guidelines in International Investment Agreements: Turning a Soft Law Obligation into Hard Law?" (2013) 40 *Leg Issues Econ Integration* 33 at 35-36; Markus W. Gehring & Avidan Kent, "Sustainable Development and IIAs: From Objective to Practice" in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (London: Routledge, 2013) 284 at 300; Nowrot, *supra* note 88 at 614-616; Waleson, *supra* note 88 at 154.

Brazil Model CFIA, 2015, art 14:

1. Investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article.

2. The investors and their investment shall endeavour to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host State receiving the investment:

- (a) Contribute to the economic, social and environmental progress, aiming at achieving sustainable development;
- (b) Respect the internationally recognized human rights of those involved in the companies' activities;
- (c) Encourage local capacity building through close cooperation with the local community;
- (d) Encourage the creation of human capital, especially by creating employment opportunities and offering professional training to workers to;
- (e) Refrain from seeking or accepting exemptions that are not established in the legal or regulatory framework relating to human rights, environment, health, security, work, tax system, financial incentives, or other issues;
- (f) Support and advocate for good corporate governance principles, and develop and apply good practices of corporate governance;
- (g) Develop and implement effective self-regulatory practices and management systems that foster a relationship of mutual trust between the companies and the societies in which its operations are conducted;
- (h) Promote the knowledge of and the adherence to, by workers, [sic] the corporate policy, through appropriate dissemination of this policy, including programs for professional training;
- (i) Refrain from discriminatory or disciplinary action against employees who submit grave reports to the board or, whenever appropriate, to the competent public authorities, about practices that violate the law or corporate policy;
- (j) Encourage, whenever possible, business associates, including service providers and outsources [sic], to apply the principles of business conduct consistent with the principles provided for in this Article; and
- (k) Refrain from any undue interference in local political activities.

Canada – Côte d'Ivoire BIT, 2014, art 15(2):⁹¹

Each Party shall encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.

Morocco – Nigeria BIT, 2016, art 19(1):

In accordance with the size and nature of an investment,

- (a) Investments shall meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices.
- (b) Investments shall establish and maintain, where appropriate, local community liaison processes, in accordance with internationally accepted standards when available.
- (c) Where relevant internationally accepted standards of the type described in this Article are not available or have been developed without the participation of developing countries, the Joint Committees may establish such standards.

The Netherlands Model BIT, 2018, art 7(2):

The Contracting Parties reaffirm the importance of each Contracting Party to encourage investors operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party, such as the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, and the Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and business.

⁹¹ Several IIAs signed by Canada since 2008 include references to matters such as labour, the environment, human rights, community relations and anti-corruption under their corporate social responsibility clauses.

Norway Model BIT, 2015, art 31:

The Parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights and to participate in the United Nations Global Compact.

Depending upon the terms used by negotiators, several provisions addressing corporate social responsibility are aspirational and hortatory.⁹² This is particularly the case with provisions requiring states to “encourage” investors to consider standards that are “voluntary”.⁹³ However, other examples rely on corporate social responsibility with a view to imposing concrete obligations on investors and thus adopting a more binding approach.⁹⁴

C. Direct Obligations Imposed on Investors

In keeping with traditional treaty practice, most provisions in IIAs are addressed to states, even if they sometimes require states to take specific actions vis-à-vis individuals. Amidst provisions requiring states to protect foreign investment and foreign investors, however, some IIAs include distinct provisions whose addressees are private investors.⁹⁵ These provisions formulate obligations for foreign investors regarding compliance with legislation when operating an investment, conducting impact assessments, and establishing environmental management systems, for example. Others address, human rights, natural resources, social development, traditional knowledge, liability, and corruption.

Argentina – Qatar BIT, 2016, art 11:

The Contracting Parties acknowledge that investors and their investments shall comply with the laws of the host Contracting Party with respect to the management and operation of an investment.

Draft Pan-African Investment Code, 2016, arts 20, 21, 22 and 25(3):⁹⁶

Article 20:

1. Investors shall adhere to socio-political obligations including, but not exclusively, the following:
 - (a) respect for national sovereignty and observance of domestic laws, regulations and administrative practices;
 - (b) respect for socio-cultural values;
 - (c) non-interference in internal political affairs;
 - (d) non-interference in intergovernmental relations; and e. respect for labor rights.
2. Investors shall not influence the appointment of persons to public office or finance political parties.
3. Investors shall refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.

⁹² See e.g. Wouters & Hachez, *supra* note 88 at 342-343; Dumberry, *supra* note 87 at 191; Dumberry & Dumas-Aubin, “How to Impose”, *supra* note 81 at 580; VanDuzer et al, *supra* note 10 at 308; Céline Lévesque & Andrew Newcombe, “The Evolution of IIA Practice in Canada and the United States” in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (London: Routledge, 2013) 25 at 31; Dumberry & Dumas-Aubin, “A Few Pragmatic Observations”, *supra* note 81 at 5; Vid Prislán & Ruben Zandvliet, “Mainstreaming Sustainable Development into International Investment Agreements: What Role for Labor Provisions” in Stephan Schill et al, eds, *International Investment Law and Development: Bridging the Gap* (Northampton: Edward Elgar Publishing, 2015) 390 at 416; Waleson, *supra* note 88 at 163; Leshova, *supra* note 81 at 47.

⁹³ Some authors are, however, more optimistic regarding the relevance of including instruments elaborated by intergovernmental organizations in IIAs. See e.g. Mary E. Footer, “BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment” (2009) 18 *Michigan State J Int’l L* 33 at 61-63; Jarrod Hepburn & Vuyelwa Kuuya, “Corporate Social Responsibility and Investment Treaties” in Marie-Claire Cordonier Segger et al, eds, *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer Law International, 2011) 589 at 605-606; van der Zee, *supra* note 90 at 52.

⁹⁴ In addition to the examples mentioned above, see Leshova, *supra* note 81 at 45-47.

⁹⁵ In addition to the examples provided below, see UNCTAD, *World Investment Report 2017*, *supra* note 32 at 122. See also Sheffer, *supra* note 88 at 507-520; VanDuzer et al, *supra* note 10 at 292-293; Newcombe, *supra* note 83 at 208-209; Nowrot, *supra* note 88 at 635-636; Waleson, *supra* note 88 at 171-172; Leshova, *ibid* at 45-47.

⁹⁶ Several provisions of the Draft Pan-African Investment code are analyzed in Mbengue & Schacherer, *supra* note 64.

Article 21:

1. Investors shall not exploit or use local natural resources to the detriment of the rights and interests of the host State.
2. Investors shall respect rights of local populations, and avoid land grabbing practices vis-à-vis local communities

Article 22:

1. Investors shall abide by the laws, regulations, administrative guidelines and policies of the host State.
2. Investors shall, in pursuit of their economic objectives, ensure that they do not conflict with the social and economic development objectives of host States and shall be sensitive to such objectives.
3. Investors shall contribute to the economic, social and environmental progress with a view to achieving sustainable development of the host State.

...

Article 25(3):

Member States and investors shall, in accordance with generally accepted international legal standards and best practices, protect traditional knowledge systems and expressions of culture as well as genetic resources that are sought, used or exploited by investors, or are otherwise relevant to their contracts, practices and other operations in such Member States.

ECOWAS Community Rules on Investment, 2008, art 14:

1. Investors of investments shall, in keeping with best practice requirements relating to their activities [sic] the size of their investments, strive to comply with on [sic] hygiene, security, health and social welfare rules in force in the host country.
2. Investors shall uphold human rights in the workplace and the community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investors shall not manage or operate the investments in a manner that circumvents human rights obligations, labour standards as well as regional environmental and social obligations, to which the host State and/or home State are Parties.
3. Investors shall not by complicity with, or in assistance with others, including public authorities, violate human rights in times of peace or during socio-political upheavals.
4. Investors and investments shall act in accordance with fundamental labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights at Work, 1998

India Model BIT, 2015, art 11:

The parties reaffirm and recognize that:

- (i) Investors and their investments shall comply with all laws, regulations, administrative guidelines and policies of a Party concerning the establishment, acquisition, management, operation and disposition of investments.
- (ii) Investors and their investments 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 a Party as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage nor shall be complicit in inciting, aiding, abetting, or conspiring to commit such acts.
- (iii) Investors and their investments shall comply with the provisions of law of the Parties concerning taxation, including timely payment of their tax liabilities.

Morocco – Nigeria BIT, 2016, arts 14, 18(1), 18(4) and 20:

Article 14

1. Investors or the investment shall comply with environmental assessment screening and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host state for such an investment or the laws of the home state for such an investment, whichever is more rigorous in relation to the investment in question.
2. Investors or the investment shall conduct a social impact assessment of the potential investment. The Parties shall adopt standards for this purpose at the meeting of the Joint Committee.
3. Investors, their investment and host state authorities shall apply the precautionary principle to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigation or alternative approaches of the precautionary principle by investors and investments shall be described in the environmental impact assessment they undertake.

...

Article 18:

1. Investments shall, in keeping with good practice requirements relating to the size and nature of the investment, maintain an environmental management system. Companies in areas of resource exploitation and high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard.

...

4. Investors and investments shall not manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties.

...

Article 20:

Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.

Southern African Development Community Model BIT, 2012, art 15(1):

Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife.

Provisions that directly impose obligations on foreign investors drastically differ from a state-centric understanding of international law. In this regard, some authors emphasize that international law does not prevent the imposition of direct obligations upon private actors.⁹⁷ Others have highlighted the complexity of addressing these matters in IIAs⁹⁸ and raised concerns regarding the enforcement of these provisions.⁹⁹

D. Consideration of the Investment's Negative Impact

Some provisions of IIAs and model agreements include a reference to the negative impact of foreign investors' activities with a view to balancing the protection granted to the investment. Such provisions thus allow a state to receive compensation for damages to public health or the environment by an investor. Others call for the consideration of the investment's impact when assessing the existence of "like circumstances" or within provisions regarding free transfers of payments related to an investment. Some model agreements even include the consideration of the investment's negative impact as a potential mitigating factor when assessing damages due to the investor.¹⁰⁰

Bangladesh – Denmark BIT, 2009, art 2(2):

If the Contracting Party in whose territory the investment is made, suffers from a loss, destruction or damages with regard to its public health or life or the environment, including natural resources by the investor of the other Contracting Party, then the First contracting Party shall be accorded adequate and effective compensation as per its laws and regulations, and if necessary as per international law, by the investor of the other Contracting Party.

⁹⁷ See e.g. Dumberry, *supra* note 87 at 180-187; Dumberry & Dumas-Aubin, "How to Impose", *supra* note 81 at 573; Dumberry & Dumas-Aubin, "A Few Pragmatic Observations", *supra* note 81 at 2; Prislán & Zandvliet, *supra* note 92 at 417-419; Leshova, *supra* note 81 at 41.

⁹⁸ See e.g. Peter Muchlinski, "Corporate Social Responsibility" in Peter Muchlinski et al, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 638 at 681; Wouters & Hachez, *supra* note 88 at 343; Sheffer, *supra* note 88 at 507; Nowrot, *supra* note 88 at 636-637; Shyami Puvimanasinghe, "From a Divided Heritage to a Common Future? International Investment Law, Human Rights, and Sustainable Development" in Shawkat Alam et al, eds, *International Environmental Law and the Global South* (Cambridge: Cambridge University Press, 2015) 317 at 330.

⁹⁹ See e.g. Nowrot, *ibid* at 637; Leshova, *ibid* at 47-48; M. Sornarajah, "The Unworkability of 'Balanced Treaties' and the Importance of Diversity of Approach Among the BRICS" (2018) 112 AJIL 223 at 224-226.

¹⁰⁰ In addition to the examples mentioned below, see Dumberry, *supra* note 87 at 192; Dumberry & Dumas-Aubin, "How to Impose", *supra* note 81 at 594-595; Dumberry & Dumas-Aubin, "A Few Pragmatic Observations", *supra* note 81 at 15-16.

Draft Pan-African Investment Code, 2016, art 37(3):

Investors shall, in performing their activities, protect the environment and where such activities cause damages to the environment, take reasonable steps to restore it as far as possible.

ECOWAS Community Rules on Investment, 2008, art 5(4):

The concept of ‘in like circumstances’ requires an overall examination, on a case-by-case basis, of all the circumstances of an investment, including notably:

- (a) its effects on third persons and the local community;
- (b) its effects on the local, regional or national environment, the health of the populations or on the global commons;
- (c) the sector in which the investor is active;
- (d) the aim of the measure in question;
- (e) the regulatory process generally applied in relation to a measure in question; and
- (f) other factors directly relating to the investment or investor in relation to the measure in question.

India Model BIT, 2015, art 26(3):

A tribunal can only award monetary compensation for a breach of the obligations under Chapter II of the Treaty. Monetary damages shall not be greater than the loss suffered by the investor or, as applicable, the locally established enterprise, reduced by any prior damages or compensation already provided by a Party. For the calculation of monetary damages, the Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure, or other mitigating factors. [fn 4: 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].

The Netherlands Model BIT, 2018, art 23:

Without prejudice to national administrative or criminal law procedures, a Tribunal may, in deciding on the amount of compensation, take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Businesses and Human Rights, and the OECD Guidelines for Multinational Enterprises.

Norway Model BIT, 2015, art 9(3):

It is understood that paragraphs 1 and 2 of this Article are without prejudice to the equitable, non-discriminatory and good faith application of measures:

- ...
- ii. relating to or ensuring compliance with laws and regulations
- ...
- (d) concerning financial security or any other equivalent regarding the prevention and remedying of environmental damage.

Southern African Development Community Model BIT, 2012, art 19(1):

Subject to any other specific directions under this Agreement as to the consequences of a breach of an obligation, where an Investor or its Investment is alleged by a State Party in a dispute settlement proceeding under this Agreement to have failed to comply with its obligations under this Agreement, the tribunal hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.

E. Denying Substantive Protection

A number of IIAs deny substantive protection for investments made through corruption at the stage of establishment and/or operation of the investment. While reference to anti-corruption generally in IIAs is not a recent phenomenon,¹⁰¹ the inclusion of anti-corruption clauses that explicitly deprive corruption-contaminated investments of any protection is a relatively recent development in the IIA-making practice.

¹⁰¹ According to the IIA Mapping Project, 45 IIAs refer to corruption in a separate provision of the agreement. See UNCTAD, “IIA Mapping Project”, *supra* note 13. See also OECD, *International Investment Law*, *supra* note 9; VanDuzer et al, *supra* note 10 at 340, 343-344 and 375; Gordon et al, *supra* note 9; Amado et al, *supra* note 82 at 147-151.

Canada – European Union CETA, 2016, art 8.18(3):

For greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.

Brazil Model CFIA, 2015, art 15(2):

Nothing in this Agreement shall require any Party to protect investments made with capital or assets of illicit origin or investments in the establishment or operation of which illegal acts have been demonstrated to occur and for which national legislation provides asset forfeiture.

Iran – Slovakia BIT, 2016, art 14(2):

For avoidance of doubt, an investor may not submit a claim under this Agreement where the investor or the investment has violated the Host State law. The Tribunal shall dismiss such claim, if such violation is sufficiently serious or material. For avoidance of any doubt, the following violations shall always be considered sufficiently serious or material to require dismissal of the claim:

- (a) Fraud;
- (b) Tax evasion;
- (c) Corruption and bribery; or
- (d) Investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.

Research Strengths and Gaps

Research pertaining to the various options that can be considered in the negotiation of an investment agreement between Canada and the UK is vast and relies on multiple forms of knowledge. Thanks to the robust search tools that have been recently developed by UNCTAD, it has become relatively easy to navigate among the increasingly high number of IIAs and model agreements. The identification of innovative provisions is thus considerably facilitated.

The interest demonstrated by several intergovernmental organizations and experts in international investment law regarding the content of these provisions and their legal implications also thickens the state of knowledge. Previous reports and peer-reviewed publications have already demonstrated how various possibilities might address the most controversial issues surrounding international investment law. When combining these forms of knowledge, one can have a clear sense of what can be done to address these controversial issues and foster the ongoing reform of the international investment regime.

However, one aspect that is not fully captured in most of the forms of knowledge synthesized above is the political dimensions that are at play. The negotiation of an international agreement inevitably implies diverging interests and relations of power that reach beyond the terms used in provisions. While some aspects pertaining to the negotiation of these provisions have been tangentially addressed,¹⁰² there is room for interdisciplinary research that includes an explicit consideration of the political dimensions that support or impede the adoption of these provisions.

Implications

This synthesis of provisions that can be included in an investment agreement between Canada and the UK to address controversial aspects of the investment regime and to foster its reform has crucial implications from a *policy* perspective. By using provisions that have already been included in IIAs and model agreements as a starting point, the research is anchored in concrete treaty practice. While the themes that are addressed in this report have become particularly contentious in international investment law, using the practice of states as a starting point emphasizes that even the most innovative options are not unprecedented. Of course, political factors underlying the inclusion of these provisions in an investment agreement must

¹⁰² For example, see the references addressing the complexity of imposing direct obligations on foreign investors in an investment agreement.

be acknowledged. However, the wide range of options presented in this report to address concerns raised by a variety of stakeholders remains entirely feasible to implement.

From a *research* perspective and a *practice* perspective, ongoing developments with respect to Brexit and the reform of international investment law have triggered a lot of interest. Recent conferences in international law have addressed topics such as the process of economic disintegration, the rise of protectionism, and the role of international law in turbulent times. The synthesis of knowledge presented in this report is likely to be useful for academics and practitioners who are trying to assess the responses that have already been put forward by states to reform the international investment regime and to address controversial issues rather than opting for a more protectionist approach. Moreover, when tribunals convened under these agreements will have to interpret more innovative provisions, scholars and practitioners will be able to address the evolving judicial practice and the concrete impact that such provisions can have on the outcome of investment disputes. In this context, this knowledge synthesis lays the groundwork for further analyses by researchers and practitioners.

Knowledge Mobilization Activities

The primary research users of the knowledge synthesis are government officials involved in investment policy-making and the negotiation of international agreements, both in Canada and the UK. The synthesized results provide government officials with a range of possibilities regarding provisions addressing particularly controversial aspects of the international investment regime and which must be taken into account when drafting an IIA. Considering the various origins of the provisions identified in the results section above, treaty negotiators from other countries could benefit from the research as well. The knowledge synthesis is also likely to be of interest for other actors who are most likely to consider these provisions in their practice, namely private practitioners and representatives of civil society. Finally, the synthesis of knowledge presented in this report will likely be relevant for academics from various disciplines interested in the trade relationship between Canada and the UK and in international economic law more generally.

The dissemination of the results synthesized in this report will contribute to knowledge mobilization through both traditional and non-traditional channels. To ensure that target research users are effectively reached, four types of activities have been planned or already undertaken: policy briefings (A), a virtual seminar on the OGEMID mailing list (B), participation in specific conferences in international law (C), and continued engagement with policy-makers and future academic research (D).

A. Policy Briefings

The primary output of this knowledge synthesis is a policy brief for policy-makers and negotiators, both in Canada and the UK. Drawing upon the results synthesized in the section above, this policy brief will be tailored to the work of governmental officials and will be prepared in early 2019. The document will include four sections: 1) a summary of the international investment context emphasizing legitimacy concerns and current proposals for reforms; 2) a presentation of the wide range of provisions that can be considered when negotiating an investment agreement to effectively address the most controversial issues; 3) a feasibility analysis based on the various provisions identified and their implications from a legal perspective; and 4) a presentation of strategic implications that will position the recommendations in the broader international context.

Two seminars will be organized to discuss the content of the policy brief with policy-makers and treaty negotiators, both in Canada and the UK. While one of the seminars will be held in Ottawa, the second one will be held at the British Institute of International and Comparative Law (BIICL). The document will be directly sent to government officials prior to these seminars.

B. OGEMID Virtual Seminar

Private practitioners and members of civil society interested in international investment protection are based all around the world. Despite the physical distance between these actors, they interact on a daily basis via a mailing list named OGEMID. This virtual platform brings together experienced professionals in the field of international dispute management, with a particular focus on investment disputes. Drawing on the results of this knowledge synthesis, a virtual seminar entitled “Identifying Opportunities for Investment Protection in a Post-Brexit Era” was held between November 5th and November 9th, 2018. Eleven participants were recruited to help broaden the discussion on four distinct topics: 1) the current uncertainty regarding investment protection; 2) dispute settlement possibilities; 3) the breadth of investment protection; and 4) obligations imposed on investors. After a brief introductory post by the moderator and contributions by the participants, members of the mailing list were invited to post their reactions. This knowledge mobilization activity reached a vast international audience at very low cost. A report on the virtual seminar based on the interventions from participants and comments formulated by members of the mailing list will eventually be prepared and made available via the *Transnational Dispute Management* journal.

C. Conferences in International Law

Given ongoing developments pertaining to Brexit and the resurgence of protectionism, it is unsurprising to see that several conferences in international law provide an interesting forum to address issues that pertain to this knowledge synthesis. These conferences typically attract several target research users and constitute institutionalized ways to mobilize knowledge. In this context, preliminary results of the knowledge synthesis were presented at the *Joint North American Conference on International Economic Law* (Montreal, 21-22 September 2018) and the *47th Annual Conference of the Canadian Council on International Law* (Ottawa, 1-2 November 2018). These presentations involved representatives from both academia and public service. Results of the knowledge synthesis will also be presented at the Dickson Poon School of Law, King’s College London, on December 11th, 2018.

D. Continued Engagement and Future Academic Research

This knowledge synthesis also implies a continued engagement with government officials and knowledge mobilization within academia. The use of results gathered through this project in future academic research will ensure that this knowledge will be sustained beyond the span of the grant and will remain relevant for policy-makers. Considering the strategic choices that will have to be made by the UK and Canada with respect to the negotiation of IIAs, not to mention the many developments in the field, synthesising the various opportunities that can be considered in an agreement between Canada and the UK will form the basis of an ongoing, vibrant research agenda.

Academic papers and book chapters focusing on the possibility of addressing the most controversial aspects of the international investment regime will be considered in the future. An interdisciplinary collaboration with academics in political science is readily foreseeable, as well as with scholars focusing on other aspects of the trade relationship.

Conclusion

Uncertainties remain around the form Brexit will take, assuming that the UK’s withdrawal from the EU goes forward as currently anticipated. Even now, however, member states of the EU can negotiate investment agreements with third parties so long as they follow the guidelines in EU regulation No 1219/2012 of 12 December 2012. Decision-makers from Canada and the UK can engage in a negotiation process with a view to addressing controversial issues in international investment law and contributing to the ongoing reform of the regime. Provisions found in IIAs and model agreements elaborated by states,

reports from intergovernmental organizations, and ideas found in peer-reviewed publications constitute various sources of knowledge that must be considered to identify relevant opportunities for concluding a just agreement.

The scoping study presented in this report has thus synthesized current knowledge with respect to three key themes in international investment law, namely dispute settlement possibilities, breadth of protection and obligations imposed on investors. The side-by-side comparison of various provisions and their legal implications demonstrated a wide range of options from which negotiators can draw to address legitimate concerns raised by various stakeholders for each of these three themes. The knowledge synthesis report supports an evidence-based decision-making process by individuals involved in the negotiation of such an agreement that is anchored in the concrete practice of states. It also points toward future academic research to shed light on the political dimensions underlying these provisions and their interpretation by tribunals. In the meantime, the present report has paved the way to conduct innovative activities geared toward the mobilization of knowledge to ensure that target research users benefit from these findings.

Bibliography

A. Reports from Intergovernmental Organizations

- European Commission, *Report: Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)* (13 January 2015), online: European Commission <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf> (accessed 14 November 2018).
- Gaukrodger, David. *The Balance Between Investor Protection and the Right to Regulate in Investment Treaties: A Scoping Paper*, OECD Working Papers on International Investment No 2017/02 (Paris, 2017).
- Gordon, Kathryn & Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey*, OECD Working Paper on International Investment No 2011/1 (Paris, 2011).
- Gordon, Kathryn et al, *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey*, OECD Working Paper on International Investment No 2014/1 (Paris, 2014).
- OECD, *International Investment Law: Understandings Concepts and Tracking Innovations* (Paris: OECD, 2008).
- Report of the United Nations Commission on International Trade Law, Fiftieth Session (3-21 July 2017)*, UNGAOR, 72nd Sess, Supp No 17, UN Doc A/72/17, (2017).
- UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Arbitrators and Decision Makers: Appointment Mechanisms and Related Issues – Note by the Secretariat*, 30 August 2018, UN Doc. A/CN.9/WG.III/WP.152.
- UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session (Vienna, 27 November-1 December 2017)*, 19 December 2017, UN Doc A/CN.9/930/Rev.1.
- UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fifth Session (New York, 23-27 April 2018)*, 14 May 2018, UN Doc A/CN.9/935.
- UNCTAD, *IIA Issues Notes: Taking Stock of IIA Reform* (Geneva: United Nations, 2016).
- UNCTAD, *IIA Issues Note – Phase 2 of IIA Reform: Modernizing the Existing Stock of Old Generation Treaties* (Geneva: United Nations, 2017).
- UNCTAD, *IIA Issues Note – Improving Investment Dispute Settlement: UNCTAD Policy Tools* (Geneva: United Nations, 2017).
- UNCTAD, *IIA Issues Note – Recent Developments in the International Investment Regime* (Geneva: United Nations, 2018).
- UNCTAD, *Investor-State Dispute Settlement: A Sequel* (Geneva: United Nations, 2014).
- UNCTAD, *Report of the Expert Meeting on the Transformation of the International Investment Agreement Regime: The Path Ahead*, 17 April 2015, UN Doc TD/B/C.II/EM.4/3.
- UNCTAD, *World Investment Report 2011: Non-Equity Modes of International Production and Development* (Geneva: United Nations, 2011).
- UNCTAD, *World Investment Report 2013 – Global Value Chains: Investment and Trade for Development* (Geneva: United Nations, 2013).
- UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (Geneva: United Nations, 2015).
- UNCTAD, *World Investment Report 2016 – Investor Nationality: Policy Challenges* (Geneva: United Nations, 2016).
- UNCTAD, *World Investment Report 2017: Investment and the Digital Economy* (Geneva: United Nations, 2017).
- UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* (United Nations: Geneva, 2018).

B. Books

- Amado, Jose Daniel et al. *Arbitrating the Conduct of International Investors* (Cambridge: Cambridge University Press, 2017).
- Kinnear, Meg, et al. *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Alphen aan den Rijn: Kluwer, 2009 update).
- Marcoux, Jean-Michel, *International Investment Law and Globalization: Foreign Investment, Responsibilities and Intergovernmental Organizations* (Abingdon: Routledge, 2018).
- VanDuzer, Anthony J et al. *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (London: Commonwealth Secretariat, 2013).

C. *Collections of Essays*

- Bernasconi-Osterwalder, Nathalie. “Giving Arbitrators *Carte Blanche*—Fair and Equitable Treatment in Investment Treaties” in C L Lim, ed, *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* (Cambridge: Cambridge University Press, 2016) 324.
- Bischoff, Jan Asmus. “Initial Hiccups or More? Efforts of the EU to Find its Future Role in International Investment Law” in Jean E. Kalicki and Anna Joubin-Bret, eds, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Leiden: Brill Nijhoff, 2015) 531.
- Bjorklund, Andrea K. “The Legitimacy of ICSID”, in Nienke Grossman et al, eds, *Legitimacy and International Courts* (Cambridge: Cambridge University Press, 2018) 234.
- , “Improving the International Investment Law and Policy Regime: Report of the Rapporteur”, in José E. Alvarez et al, eds, *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford: Oxford University Press, 2013) 213.
- Boomer, Elizabeth. “Rethinking Rights and Responsibilities in Investor-State Dispute Settlement: Some Model International Investment Agreement Provisions” in Jean E. Kalicki & Anna Joubin Bret, eds, *Reshaping the Investor-State Dispute Settlement System* (Leiden: Brill Nijhoff, 2015) 183.
- Bottini, Gabriel & Veronica Lavista. “Conciliation and BITs” in Arthur W. Rovine, ed, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009* (Boston: Martinus Nijhoff Publishers, 2010) 358.
- Braun, Tillmann Rudolf. “Investor-State Mediation: Is There a Future?” in Arthur W. Rovine, ed, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009* (Boston: Martinus Nijhoff Publishers, 2010) 374.
- Bustamante, Ximena. “Investor-State Mediation: Reflections on its Feasibility from a Process Perspective” in Todd Weiler & Freya Baetens, eds, *New Directions in International Economic Law* (Boston: Martinus Nijhoff Publishers, 2011) 275.
- de Brabandere, Eric. “States’ Reassertion of Control over International Investment Law: (Re) Defining ‘Fair and Equitable Treatment’ and ‘Indirect Expropriation’” in Andreas Kulick, ed, *Reasserting of Control over the Investment Treaty Regime* (Cambridge: Cambridge University Press, 2016) 285.
- Devashish. Krishan. “Thinking about BITs and BIT Arbitration: The Legitimacy Crisis that Never Was” in Todd Weiler & Freya Baetens, eds, *New Directions in International Economic Law: In Memoriam Thomas Wälde* (Boston: Martinus Nijhoff Publishers, 2011) 107.
- Dumberry, Patrick. “Corporate Investors’ International Legal Personality and their Accountability for Human Rights Violations under IIAs” in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (London: Routledge, 2013) 179.
- Dumberry, Patrick & Gabrielle Dumas-Aubin. “How to Impose Human Rights Obligations on Corporations under Investment Treaties? Pragmatic Guidelines for the Amendments of BITs” in Karl P. Sauvant, ed, *Yearbook on International Investment Law & Policy* (Oxford: Oxford University Press, 2013) 569.
- Gehring, Markus W. & Avidan Kent. “Sustainable Development and IIAs: From Objective to Practice” in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (London: Routledge, 2013) 284.
- Hepburn, Jarrod & Vuyelwa Kuuya. “Corporate Social Responsibility and Investment Treaties” in Marie-Claire Cordonier Segger et al, eds, *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer Law International, 2011) 589.
- Hoffmann, Anne K. “Indirect Expropriation” in August Reinisch, ed, *Standards of Investment Protection* (Oxford: Oxford University Press, 2008) 151.
- Joubin-Bret, Anna. “Investor-State Mediation (ISM): A Comparison of Recent Treaties and Rules” in Arthur W. Rovine, ed, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014* (Boston: Martinus Nijhoff Publishers, 2015) 152.
- Kläger, Roland. “Revising Treatment Standards—Fair and Equitable Treatment in Light of Sustainable Development” in Steffen Hindelang and Marko Krajewski, eds, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford: Oxford University Press, 2016) 65.
- Kulick, Andreas. “State-State Investment Arbitration as a Means of Reassertion of Control: From Antagonism to Dialogue” in Andreas Kulick, ed, *Reassertion of Control over the Investment Treaty Regime* (Cambridge: Cambridge University Press, 2017) 128.
- Lévesque, Céline & Andrew Newcombe. “The Evolution of IIA Practice in Canada and the United States” in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (London: Routledge, 2013) 25.

- Malik, Mahnaz. "The IISD Model International Agreement on Investment for Sustainable Development" in Marie-Claire Cordonier Segger et al, eds, *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer Law International, 2011) 565.
- Muchlinski, Peter. "Corporate Social Responsibility" in Peter Muchlinski et al, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 638.
- . "The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution" in Christina Binder et al, eds, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009) 341.
- . "Towards a Coherent International Investment System: Key Issues in the Reform of International Investment Law" in Roberto Echandi & Pierre Sauvé, eds, *Prospects in International Investment Law and Policy* (Cambridge: Cambridge University Press, 2013) 411.
- Newcombe, Andrew. "Investor Misconduct" in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (London: Routledge, 2013) 195.
- Potestà, Michele. "State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential?" in Nerina Boschiero et al, eds, *International Courts and the Development of International Law: Essays in Honour Tullio Treves* (Dordrecht: Springer, 2013) 753.
- Prislan, Vid & Ruben Zandvliet. "Mainstreaming Sustainable Development into International Investment Agreements: What Role for Labor Provisions" in Stephan Schill et al, eds, *International Investment Law and Development: Bridging the Gap* (Northampton: Edward Elgar Publishing, 2015) 390.
- Puvimanasinghe, Shyami. "From a Divided Heritage to a Common Future? International Investment Law, Human Rights, and Sustainable Development" in Shawkat Alam et al, eds, *International Environmental Law and the Global South* (Cambridge: Cambridge University Press, 2015) 317.
- Ranjan, Prabhash & Pushkar Anand. "Investor State Dispute Settlement in the 2016 Indian Model Bilateral Investment Treaty: Does it Go Too Far?" in Julien Chaisse & Luke Nottage, eds, *International Investment Treaties and Arbitration Across Asia* (Leiden: Brill Nijhoff, 2017) 579.
- Tuerk, Elisabeth & Diana Rosert. "The Roads Towards Reform of the International Investment Agreement Regime: A Perspective from UNCTAD" in Marc Bugenberg et al, eds, *European Yearbook of International Economic Law 2016* (Dordrecht: Springer, 2016) 769.
- van Harten, Gus. "Reforming the System of International Investment Dispute Settlement" in C. L. Lim, ed, *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* (Cambridge: Cambridge University Press, 2016) 103 at 113.

D. Periodicals

- "Mediation of Investor-State Conflicts" (2014) 127 *Harvard L Rev* 2543.
- Anthony, Yvette. "The Evolution of Indirect Expropriation Clauses: Lessons from Singapore's BITs/FTAs" (2017) 7 *Asian J Int'l L* 319.
- Arksey, Hilary & Lisa O'Malley. "Scoping Studies: Towards a Methodological Framework" (2005) 8 *Int'l J Social Research Metho* 19.
- Behn, Daniel. "Legitimacy, Evolution and Growth in Investment Treaty Arbitration: Empirically Evaluating the State of the Art" (2015) 46 *Georgetown J Int'l L* 363.
- Bjorklund, Andrea K., "The Role of Counterclaims in Rebalancing Investment Law" (2013) 17 *Lewis & Clark Law Review* 461
- Brower, Charles N & Stephan W Schill. "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?" (2009) 9 *Chicago J Int'l L* 471.
- Calamita, N. Jansen. "The Challenge of Establishing a Multilateral Investment Tribunal at ICSID" (2017) 32 *ICSID Rev* 611.
- Choudhury, Barnali. "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?" (2008) 41 *Van J Trans L* 775.
- . "Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements" (2011) 49 *Colombia J of Trans L* 670 at 714.
- . "Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements" (2017) 38 *U Pennsylvania J Int'l L* 425.

- Clodfelter, Mark A. "The Future Direction of Investment Agreements in the European Union" (2013) 12 Santa Clara J Int'l L 159, 171.
- Collins, David. "The Line of Equilibrium: Improving the Legitimacy of Investment Treaty Arbitration through the Application of the WTO's General Exceptions" (2016) 32 Arb Int'l 575.
- Cotula, Lorenzo. "Expropriation Clauses and Environmental Regulation: Diffusion of Law in the Era of Investment Treaties" (2015) 24 Rev European Community & Int'l Env L 278.
- Dumberry, Patrick & Gabrielle Dumas-Aubin. "A Few Pragmatic Observations on How BITs Should be Modified to Incorporate Human Rights Obligations" (2014) 11 TDM.
- Footer, Mary E. "BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment" (2009) 18 Michigan State J Int'l L 33.
- Hang, Sharon. "Investing in Human Rights: Using Bilateral Investment Treaties to Hold Multinational Corporations Liable for Labor Rights Violations" (2014) 37 Fordham Int'l LJ 1215.
- Hindelang, Steffen. "Study on Investor-State Dispute Settlement (ISDS) and Alternatives to Dispute Resolution in International Investment Law" (2016) 13:1 TDM.
- Jadeau, Flavien & Fabien Gélinas. "CETA's Definition of the Fair and Equitable Treatment Standard: Toward a Guided and Constrained Interpretation" (2016) 13:1 TDM 1.
- Keene, Amelia. "The Incorporation and Interpretation of WTO-Style Environmental Exceptions in International Investment Agreements" (2017) 18 JWIT 62.
- Kriebaum, Ursula. "FET and Expropriation in the (Invisible) EU Model BIT" (2014) 15 JWIT 454.
- , "FET and Expropriation in the Comprehensive Economic Trade Agreement between the European Union and Canada (CETA)" (2016) 13:1 TDM 26.
- Kryvoi, Yarik. "ICSID Arbitration Reform: Mapping Concerns of Users and How to Address Them", online: SSRN <<https://ssrn.com/abstract=3280782>> (accessed 21 November 2018).
- , "Economic Crimes in International Investment Law" (2018) 67 ICLQ 577.
- Leite, Kendra. "The Fair and Equitable Treatment Standard: A Search for a Better Balance in International Investment Agreements" (2016) 32 Am U Int'l L 363.
- Leshova, Yulia. "The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law" (2018) 14 Utrecht L Rev 40.
- Mbengue, Makane Moïse & Stefanie Schacherer. "The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime" (2017) 18 JWIT 414.
- Nowrot, Karsten. "How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?" (2014) 15 JWIT 612 .
- Puig, Sergio & Gregory Shaffer. "Imperfect Alternatives: Institutional Choice and the Reform of Investment Law" (2018) 112 AJIL 361.
- Roberts, Anthea. "Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration" (2018) 112 AJIL 410.
- Shan, Wenhua & Yunya Feng. "A Trinity Analytical Framework for ISDS Reform" (2018) 112 AJIL 244.
- Sheffer, Megan Wells. "Bilateral Investment Treaties: A Friend or Foe to Human Rights?" (2011) 39 Denv J Int'l L & Pol'y 483.
- Sornarajah, M. "The Unworkability of 'Balanced Treaties' and the Importance of Diversity of Approach Among the BRICS" (2018) 112 AJIL 223.
- Trakman, Leon E. "Investor-State Arbitration: Evaluating Australia's Evolving Position" (2014) 15 JWIT 152.
- , "Investor State Arbitration or Local Courts: Will Australia Set a New Trend?" (2012) 46 J World Trade 83.
- Trevino, Clovis J. "State-to-State Investment Treaty Arbitration and the Interplay with Investor-State Arbitration Under the Same Treaty" (2014) 5 JIDS 199.
- van der Zee, Eva. "Incorporating the OECD Guidelines in International Investment Agreements: Turning a Soft Law Obligation into Hard Law?" (2013) 40 Leg Issues Econ Integration 33.
- Vieira Martins, José Henrique. "Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments" *Investment Treaty News* (June 12, 2017), online: International Institute for Sustainable Development

<<https://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/>> (accessed 20 November 2018).

Waleson, Joshua. “Corporate Social Responsibility in EU Comprehensive Free Trade Agreements: Towards sustainable Trade and Investment” (2015) 42 *Leg Issues Econ Integration* 143 .

Welsh, Nancy A. & Andrea Kupfer Schneider. “The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration” (2013) 18 *Harvard Neg L Rev* 71.

Wouters, Jan & Nicolas Hachez. “When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights Be Ensured?” (2009) 3 *Hum Rights & Int’l Leg Discourse* 301.

Yackee, Jason Webb. “Investment Treaties and Investor Corruption: An Emerging Defense for Host States?” (2012) 52 *Virginia J Int’l L* 723.

E. Official Documents

Council of the European Union, *Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes* (20 March 2018), online: EU <<http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>> (accessed 21 November 2018).

European Commission, *State of the Union 2017: A Multilateral Investment Court* (2017), online: European Commission <http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf> (accessed 21 November 2018).

Global Affairs Canada, *2018 Canada’s State of Trade: Trade and Investment Update* (Ottawa: Governmental of Canada, 2018).

F. Websites

ICSID, “ICSID Rules and Regulations Amendment Process”, online: ICSID <<https://icsid.worldbank.org/en/amendments>> (accessed 21 November 2018).

OECD, “Finance and Investment”, online: OECD iLibrary <<https://www.oecd-ilibrary.org/finance-and-investment>> (accessed 15 November 2018).

Peace Palace Library, “Catalogue”, online: Peace Palace Library <http://catalogue.ppl.nl/xslt/DB=1/ADVANCED_SEARCHFILTER> (accessed 15 November 2018).

UNCITRAL, “Working Group Documents – Working Group III”, online: UNCITRAL <http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html> (accessed 15 November 2018).

UNCTAD, “Advanced Search”, online: UNCTAD <<http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBIT>> (accessed 15 November 2018).

UNCTAD, “IIA Mapping Project”, online: UNCTAD <<http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu>> (accessed 15 November 2018).

UNCTAD, “International Investment Agreements – Issues Notes”, online: UNCTAD <<https://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx>> (accessed 15 November 2018).

UNCTAD, “International Investment Policies for Development (Issues Series)”, online: UNCTAD <[https://unctad.org/en/pages/publications/Intl-Investment-Policies-for-Development-\(Issue-Series\).aspx](https://unctad.org/en/pages/publications/Intl-Investment-Policies-for-Development-(Issue-Series).aspx)> (accessed 15 November 2018).

UNCTAD, “Issues in International Investment Agreements (Second Series)”, online: UNCTAD <[https://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issue-Series-II-\(Revised-Editions---Sequels\).aspx](https://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issue-Series-II-(Revised-Editions---Sequels).aspx)> (accessed 15 November 2018).

UNCTAD, “UNCTAD IIA Mapping Project”, online: UNCTAD <<http://investmentpolicyhub.unctad.org/Upload/Documents/Mapping%20Project%20Description%20and%20Methodology.pdf>> (accessed 15 November 2018).

UNCTAD, “World Investment Reports”, online: UNCTAD <[https://unctad.org/en/Pages/Publications/WorldInvestmentReports\(1991-2009\).aspx](https://unctad.org/en/Pages/Publications/WorldInvestmentReports(1991-2009).aspx)> (accessed 15 November 2018).