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Recent Trends and Future Developments with Regard to Foreign Investment in PTAs

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8.1 INTRODUCTION

The evolution of investment disciplines in preferential trade agreements (PTAs) is linked closely with the evolution of the wider world of international investment agreements (IIAs), in particular, bilateral investment treaties (BITs), that have been at the centre of the numerous and controversial disputes between foreign investors and host states brought before international arbitral tribunals in the last twenty years. The link is certainly stronger with regard to the core areas, including investment protection, investment liberalisation, and investor–state dispute settlement (ISDS). However, some of the more interesting innovations with regard to investment at the international level appear to have taken place in particular in the context of recent PTAs, as these have included a growing number of novel issues (at times found in distinct chapters) such as 'trade and development', 'regulatory coherence', 'corporate social responsibility' (CSR), and 'investment facilitation'. These novel issues have important implications for foreign investment and demonstrate a willingness to explore new ways to achieve more traditional objectives (such as promoting greater investment flows) as well as to pursue additional objectives (such as 'sustainable' development). As investment is still only marginally covered by the World Trade Organization (WTO), particularly in the Agreement on Trade-Related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS), PTAs thus offer a window on possible interesting developments regarding investment policymaking at the international level.

This chapter starts with an analysis of recent (i.e. last fifteen years) trends in the investment chapters of PTAs focusing in particular on some of the traditional investment disciplines such as protection, liberalisation, and dispute settlement (Section 8.1). The analysis then moves on to address a few specific issues with regard to each of the three traditional sets of investment disciplines that are likely to become central in future PTAs (Section 8.2). Finally, the chapter focuses on novel approaches aimed at strengthening investment flows in terms of both quantity and quality (Section 8.3).

8.2 RECENT TRENDS IN PTAS WITH REGARD TO FOREIGN INVESTMENT

The first PTA with an investment chapter is the North American Free Trade Agreement (NAFTA), signed in 1992. Writing in the aftermath of its conclusion, Dan Price, former United States NAFTA Investment chapter negotiator, identified 'protection', 'liberalisation', and 'dispute settlement' as the three key objectives of NAFTA Chapter 11 on investment.[1] This chapter would set a standard for further multilateral and bilateral investment accords in the hemisphere. Most PTAs signed since the NAFTA with an investment chapter adopted the core disciplines contained in Chapter 11.[2] However, twenty years of interpretation and application of IIAs in the context of several hundred investor–state arbitrations have led to some changes with regard to investment disciplines in PTAs. In this section, I focus on a few key recent (i.e. in the last fifteen years) trends concerning the traditional features of investment chapters in PTAs.[3]

8.2.1 *Scope of Application*

Like traditional BITs, investment chapters in PTAs have historically adopted a broad scope of application, as reflected in particular in the definitions of key terms such as 'investment' and 'investor'. Following the wave of investor–state disputes, many states have, to some extent, narrowed the scope of investment provisions. With regard to the definition of 'investment', recent treaties have required that protected investments need to meet certain typical 'characteristics' such as 'a certain duration', 'the commitment of capital or other resources', 'the expectation of gain or profit', or 'the assumption of risk'; the list of express characteristics of investment is often illustrative.

Similarly, recent treaties exclude certain specific investments from their scope, such as 'claims to money that arise solely from commercial contracts for the sale of

[1] 'The investment chapter [in NAFTA] has three objectives: establish a secure investment environment through the elaboration of clear rules of fair treatment of foreign investment and investors; remove barriers to investment by eliminating or liberalizing existing restrictions; and provide an effective means for the resolution of disputes between an investor and the host government.' (Price 1993).

[2] See Crawford and Kotschwar (2018) analysing a data set on the content of investment provisions in PTAs including a total of 111 PTAs that entered into force between 1960 and 2017 and include distinct investment provisions.

[3] I rely on the United Nations Conference on Trade and Development (UNCTAD) database (investmentpolicy.unctad.org), the WTO database (rtais.wto.org), and the Electronic Database of Investment Treaties (EDIT) database (edit.wti.org).

goods or services' or 'any order, judgment, or arbitral award related to such claims' (Article 8.1 of the 2016 European Union (EU)–Canada CETA). Exceptionally, a few treaties have also opted to expressly exclude 'portfolio investment' from the scope of the investment chapter (see Article 8.1 of the 2018 Brazil–Chile Free Trade Agreement, FTA).

With regard to the definition of 'investor', recent PTAs have also limited the legal persons who qualify as 'nationals' of one of the contracting parties and are thus protected by the investment chapter. Contrary to many earlier treaties, being incorporated in the home state is not enough to benefit from the protection granted by the treaty. Recent treaties require, in addition, that such legal persons have 'substantial business operations' in the country of incorporation (2022 United Kingdom (UK) –Australia; 2019 China–Mauritius). Comparing all PTAs concluded between 1990 and 2004 (147), only 18 per cent contained the additional condition of 'substantial business activities', while among those concluded between 2005 and 2020, the percentage of investment chapters including such condition is thirty. This stricter approach appears to have been adopted to address the practice of so-called mailbox companies, owned or controlled by nationals or companies not intended to be protected by the underlying agreement and having no real connection with the country concerned, to benefit from the protection offered by the agreement itself ('nationality planning' practice).[4]

8.2.2 *Investment Protection*

Like older BITs, investment chapters in PTAs focus on providing certain protection guarantees to foreign investments, for example, by setting conditions for the expropriation of assets by the host state, or by requiring the host state to treat foreign investments in a fair, non-discriminatory, and reasonable manner. Recent PTAs have mainly focused on (a) clarifying traditional investment protection standards and, at the same time, (b) narrowing the extent of the protections offered by such standards to foreign investment. For example, in the last fifteen years, most investment chapters have included a more detailed definition of 'indirect expropriation' (often included in a separate annex on Expropriation), emphasising that a determination of whether a measure or series of measures constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers various factors including both the 'economic impact' of the government action and the 'character' of the government action (including its object, context, and intent).

Similarly, many recent PTAs have clarified and narrowed some of the key standards of protection, such as 'fair and equitable treatment' (FET) and 'full

4 It should be pointed out that several older BITs adopted a similar, stricter approach to German and Swiss BITs, for example the Hungary-Switzerland BIT (1988).

protection and security' (FPS). The most common approach has been that of limiting both concepts by referring to the international customary minimum standard of treatment, which has historically provided for a more limited set of guarantees. For example, in line with United States and Canadian practice since the early 2000s, Article 14.6.1 of the United States–Mexico–Canada Agreement (USMCA) provides that 'Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security' and that '[t]he 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'.

A second approach, in particular with regard to FET, is to identify an exhaustive list of conducts that are in breach of the FET standard, without any express reference to customary law. For example, Article 8.10.2 of the 2016 Comprehensive and Economic Trade Agreement (CETA) between the EU and Canada identifies the following as constituting a violation of the FET obligation: '(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'. Furthermore, while the list does not refer to the frustration of investor's legitimate expectations, which has represented one of the key claims by investors based on FET, Article 8.10.4 does permit a tribunal, when applying the FET obligation, to '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'.

Interestingly, the difference between the two approaches may only be in form rather than in substance. While there is no express reference to customary law in Article 8.10 CETA, it can be argued that such provision does provide a list of the kinds of conduct that would be in breach of the customary minimum standard of treatment.[5] Even the reference to legitimate expectations appears to be in line with the way some investment tribunals have understood the customary minimum

[5] See *Waste Management Inc v. Mexico (II)*, ICSID Case No. ARB(AF)00/3, Award, 30 April 2004, para 98 ('the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process'). See (Newcombe and Paradell 2009, pp. 235–253).

standard of treatment (particularly as referred to in Article 1105 NAFTA).[6] However, compared with the approach adopted in USMCA, the exhaustive list found in Article 8.10 of the CETA formulation may be said to bring greater (but not absolute) clarity with regard to the scope of FET as the interpreter has much less leeway in identifying the contours of the applicable standard (as it may have when the treaty simply refers to the unwritten concept of the customary minimum standard of treatment).

Beyond FET and FPS, in recent years, the inclusion of provisions in investment treaties aimed at protecting the host state's contractual commitments through so-called umbrella clauses has increasingly dwindled. An UNCTAD survey of publicly available investment treaties concluded between 2011 and 2015 has found that out of seventy-two treaties, only seventeen contain an umbrella clause (and thirteen of those seventeen treaties involved Japan as one of the contracting parties)(UNCTAD 2016). This roughly adds up to three in every four new treaties that do not contain an umbrella clause and contrasts with the pre-2004 treaties statistic of one in every two treaties (Gill et al. 2004; Pereira de Souza Fleury 2015, 2017). Even United States' PTAs have, since 2004, omitted the umbrella clause. However, it should also be noted that United States' investment treaties often adopt a wide jurisdictional clause, including the investor's right to submit to arbitration a claim that the respondent has breached an 'investment authorisation' or an 'investment agreement'.[7] Interestingly, the EU's position on umbrella clauses appears more nuanced. While the agreement with Canada does not contain any umbrella clause (and no broad jurisdictional clause), the 2015 EU draft proposal, in the context of the negotiation with the United States for the Transatlantic Trade and Investment Partnership (TTIP),[8] did contain an umbrella clause. The wording was, however, different from the traditional umbrella clauses as it attempted to clarify the various issues that had led to several controversies in arbitral practice.[9]

[6] For example, having identified the conduct that will infringe the minimum standard of treatment, the tribunal in Waste *Management v. Mexico* famously stated that '[i]n applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant'. *Waste Management v Mexico II*, Award, 30 April 2004, para 98.

[7] See, for example, Article 11.16.1 of the 2007 US–Korea FTA.

[8] European Commission, Transatlantic Trade and Investment Partnership (TTIP) – Documents <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/united-states/eu-negotiating-texts-ttip_en> accessed 21 March 2023.

[9] Article 7 of the Chapter on Investment in the EU's draft proposal made public on 12 November 2015 reads as follows: 'Article 7 Observance of written commitments: Where a Party either itself or through any entity mentioned in Article X [Definition of 'measures adopted or maintained by a Party'] has entered into any contractual written commitment with investors of the other Party or with their covered investments, that Party shall not, either itself or through any such entity breach the said commitment through the exercise of governmental authority.' A footnote clarifies the meaning of 'contractual written commitment' as follows: 'For the purposes of this paragraph, a "contractual written commitment" means an agreement in writing, entered into by a Party, itself or through any entity mentioned in Article X [Definition

Furthermore, recent PTAs with investment protection have attempted to strengthen the contracting parties' right to regulate in the public interest in various ways. First, some recent treaties have excluded either expressly or implicitly the possibility of interpreting any of the traditional investment protection provisions (including the FET standard) as a guarantee of regulatory stability in the strict sense, which is perceived by several host states as representing a serious restraint on their ability to regulate. For an example of an implicit exclusion, the preamble of the 2015 Australia–China FTA refers to the 'rights of [the] governments to regulate in order to meet national policy objectives, and to preserve their flexibility to safeguard public welfare'. Arguably, reading an FET provision to include a guarantee of regulatory stability would contrast with an interpretation based on the customary rules of treaty interpretation that, in addition to the 'text', rely on the 'context' and 'object and purpose' of the treaty (Giannakopoulos 2019).

An example of an express, broad exclusion of legal stability *stricto sensu* is Article 8.9 CETA. While paragraph 1 reaffirms the contracting parties' 'right to regulate ... to achieve legitimate policy objectives', paragraph 2 expressly clarifies that the host State's regulation negatively affecting an investment or interfering with an investor's expectations is not per se prohibited by the investment treaty.

A second approach to strengthen the right to regulate has been to include 'general exception' clauses often styled on the basis of the general exception provision in Article XX of the General Agreement on Tariffs and Trade (GATT), which are meant to vest on contracting parties a margin of regulatory discretion in order to act in the public interest (see Sabanogullari 2018). For example, several Canadian PTAs concluded in the last fifteen years include broad general exception provisions.[10]

8.2.3 *Investment Liberalisation*

While traditional investment treaties focused on investment protection, recent treaties, including, in particular, PTAs, include liberalisation obligations or market access commitments with regard to foreign investment. These obligations include, first of all, non-discrimination obligations (national treatment and most-favoured-nation, MFN), which apply to the pre-establishment phase of the investment. Accordingly, any restriction/condition of entry needs to apply in a non-discriminatory manner so that domestic investors (national treatment) and

of "measures adopted or maintained by a Party"], with an investor or a covered investment, whether in a single instrument or multiple instruments, that creates an exchange of rights and obligations, binding on both Parties.'

[10] See, for example, 2008 Canada–Columbia and 2008 Canada–Peru FTAs. However, Canada's position seems to have changed as in its latest Model BIT, Canada has excluded the applicability of general exception clauses to traditional standards of investment protection. See 2021 Canada Model BIT.

third-party investors (MFN) in like circumstances are not treated more favourably than the foreign investors protected by the underlying treaty.[11]

In addition to such commitments, recent PTAs concluded by the EU include 'market access' commitments drafted on the basis of a similar provision included in the GATS (Article XVI), which expressly prohibits any measure that 'restricts or requires specific types of legal entity or joint venture through which an enterprise may carry out an economic activity' or that 'imposes limitations on:

- the number of enterprises that may carry out a specific economic activity whether in the form of numerical quotas, monopolies, exclusive suppliers or the requirement of an economic needs test;
- the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- the total number of operations or the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
- the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment; or
- the total number of natural persons that may be employed in a particular sector or that an enterprise may employ and who are necessary for, and directly related to, the performance of economic activity in the form of numerical quotas or the requirement of an economic needs test'.[12]

Furthermore, the investment chapters in several recent PTAs include provisions prohibiting so-called performance requirements: domestic provisions that condition the ability of foreign investors to make an investment only if they undertake various acts such as exporting a given amount of goods or services or using a certain amount of domestic goods or services in their investments. Preferential trade agreements concluded, for example by the United States, Canada, Chile, Japan, Singapore, Korea, and recently the EU, include such performance requirements disciplines, sometimes mirroring the commitments found in the WTO TRIMs Agreement (see India–Singapore Comprehensive Economic Cooperation Agreement, CECA) and sometimes going beyond the TRIMs Agreement, for example applying to services and adding additional limitations such as on forced technology transfer, the hiring of

[11] See Article 14.4: National Treatment, USMCA: '1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.' Article 14.5: Most-Favored-Nation Treatment: '1. Each Party shall accord to investors of another Party treatment no less favorable than the treatment it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.'

[12] Article 8.4.1 EU-Canada CETA.

a certain number or percentage of nationals, or acting as the exclusive supplier of the goods or services produced (for TRIMs+ examples, see US–Chile, US–Australia, the Dominican Republic–Central America FTA (CAFTA-DR), Korea–Chile, and Japan–Singapore).

All these liberalisation provisions in PTAs are subject to various exemptions, included in various annexes to the PTA, often on the basis of a negative-list approach, with regard to specific 'non-conforming measures' (and 'future measures') and 'excluded sectors'.

8.2.4 *ISDS*

In terms of dispute settlement, most recent PTAs with an investment chapter continue to include the ability of a protected investor to bring a claim directly against the host state before an ad hoc international arbitral tribunal (so-called investor–state dispute settlement). However, many of these most recent PTAs with ISDS specify in detail the arbitration procedures to be followed by an arbitral tribunal, including provisions on consolidation of claims, procedural mechanisms to avoid frivolous claims, transparency requirements, the appointment of experts, and the right of the tribunal to accept amicus briefs (Meltzer 2016).[13]

It is worth noting that a few recent PTAs have excluded ISDS altogether. See, for example, the 2018 USMCA, except between Mexico and the United States, and, in part, the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (with regard to Australia and New Zealand). Other agreements have provided for a permanent dispute settlement structure including both a first-instance tribunal and an appellate tribunal (see various recent PTAs and investment protection agreements concluded by the EU, e.g. with Canada, Viet Nam, and Singapore).

8.3 FUTURE CHALLENGES WITH REGARD TO MORE TRADITIONAL INVESTMENT DISCIPLINES IN PTAS

Looking ahead, future PTAs may need to address further issues when it comes to the three more traditional sets of investment disciplines: protection, liberalisation, and dispute settlement.

Regarding investment protection, two key issues will likely become more important in future policymaking/treaty-making: standards of review and available remedies.

To preserve the host state's right to regulate in the public interest, the current trend is to favour protection standards that consider the reasonableness (whether procedural or substantive) of the host state's conduct. This can be seen in the more

[13] See also Gáspár-Szilágyi and Usynin (2020).

detailed definition of an 'indirect expropriation' or in the reformulation of the FET standard. However, what has not yet been clarified, whether in the arbitral practice or recent investment treaties, is the nature and intensity of the review, which investment tribunals are called on to perform. For example, what is the nature of the case-by-case inquiry prescribed to determine the existence of an indirect expropriation in recent investment treaties? What relevance should be given to each of the various factors expressly identified in the recent annexes on expropriation? What kind of balancing does such inquiry require? These questions are linked with the concept of 'deference', which is 'a parameter of the relationship between international and domestic law and protects a state's domestic policy space against control by international law and international tribunals' (Schill 2012).

The second issue revolves around the question of the remedies that are available to a foreign investor in case the host state has breached any of the investment protection guarantees. Traditionally, investment treaties, including investment chapters in PTAs, do not specify what the available remedies (except for the case of a lawful expropriation) are. Only a few recent treaties (e.g. concluded by the United States and Canada) specify the applicable remedies (usually 'damages' and 'material restitution'). For example, Article 14.D.13 of USMCA specifies that 'the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution'. Where the treaty is silent on the issue of remedies, arbitral practice shows that the award of damages is the typical form of remedy for violations of investment treaties, despite the fact that under general international law, various forms of restitution are also, in principle, available (Sabahi 2011). Policymakers may, in the future, want to consider providing more detailed rules on what should be the available remedies, in part to ensure that the remedy granted by a tribunal is in the best interest of the host state (and not just the foreign investor). In some situations, the 'restoration of the legal situation at the *status quo ante*' or 'specific performance' may represent a better remedy (at least from the perspective of the host state) compared to the payment of compensation. Does it always make sense to pay billions in damages to a foreign investor for the unlawful termination of its oil concession (often calculated on the basis of the investor's lost future profits) when the host state will nevertheless have 'to pay for' extracting the same oil from the ground?

When it comes to investment liberalisation, the future key challenge will be to strengthen the effectiveness of these disciplines. While the demand for greater investment liberalisation is certainly there (from foreign investors and certain capital-exporting countries), there are several issues that need to be addressed to increase investment liberalisation in PTAs.

First, liberalisation commitments in PTAs tend to be limited to what countries have already managed to liberalise unilaterally. In other words, the level of ambition in liberalising investment flows may need to be improved. Furthermore, in those countries that have traditionally been very open to inward foreign investment (such as developed economies), there seems to be a growing trend in subjecting foreign investors to a greater number of restrictions.[14] As a consequence, there is a greater use of self-judging 'national security' or 'essential security' exceptions in PTAs. Article 17.13 of the EU–Viet Nam FTA provides for a general 'security exception', which provides that '[n]othing in this Agreement shall be construed as: ... (b) preventing either Party from taking any action which it considers necessary for the protection of its essential security interests: (iv) taken in time of war or other emergency in international relations'. At times these exceptions are specific to the obligations in the investment chapter. For example, Article 10.15 RCEP provides that 'nothing in this Chapter [on Investment] shall be construed to: ... (b) preclude a Party from applying measures that it considers necessary for: ... (ii) the protection of its own essential security interests'. In light of the increased number of claims attempting to justify various restrictions on the entry of FDI on the basis of national security, there will be a greater need to identify clearer limits on the use (and possible abuse) of such exception provisions, which appear to particularly affect investment liberalisation commitments.

Second, to fully appreciate the level of liberalisation commitments that have actually been undertaken in PTAs is often a complex operation. This is so whether the scheduling has occurred on the basis of a positive-list approach (identifying the sectors where the liberalisation commitments have been undertaken) or a negative-list approach (identifying the sectors or measures falling outside such commitments). Understanding which sectors or subsectors are included or excluded and which specific non-conforming measure is allowed or not allowed often entails quite a difficult assessment. For example, ratchet clauses are sometimes included in PTAs to ensure that any investment liberalisation taking place unilaterally is 'locked in', and thus there can be no step backwards. On paper, this is an instrument to increase the level of investment liberalisation in the context of a PTA. However, the operation of such clauses in practice is not always straightforward, and there appears to be little empirical evidence to show its liberalising effects in practice.

When it comes to ISDS, the key question in future policymaking/treaty-making will be whether to keep it centred on arbitration, to opt for a more permanent, institutionalised (quasi-judicial) structure, or to omit ISDS altogether. All these options are being explored in the context of the discussion in the United Nations Commission on International Trade Law (UNCITRAL) Working Group III and reflect the variety of positions expressed by participating states and various stakeholders in those discussions. Professor Anthea Roberts has captured these different

[14] See Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments (FDIs) into the Union.

positions by suggesting the following three camps: incrementalists, systemic reformers, and paradigm shifters (Roberts 2018, pp. 410–432). According to the former camp, criticisms of the current system are overall overblown; investor–state arbitration remains the best option available to settle disputes, although modest reforms will deal with many of the various concerns raised in the last ten years. On the other hand, the second camp views investor–state arbitration as seriously flawed, but they do want to retain investors' direct claims to an international tribunal. This group champions more significant and systemic reforms, in particular the establishment of a permanent international tribunal or at least a multilateral appellate mechanism. Lastly, the paradigm shifters believe that the existing system is irrevocably flawed and reject the utility of investors making international claims against states. This camp embraces a variety of alternatives, such as a greater reliance on domestic courts, ombudsmen, and state–state dispute settlement, rather than ISDS.

Future PTAs will definitely be influenced by the outcome of the UNCITRAL ISDS reform discussion, which is hoped to reach a conclusion in the next two to three years. While it is difficult to predict the outcome of the UNCITRAL discussions, at the moment, it is perhaps fair to predict that changes will be rather on the 'incrementalist' end of the reformers' spectrum. Despite the heavy criticism or backlash against ISDS over the last fifteen years, the level of actual change of ISDS has been so far very minimal (Ortino 2023). One area where one can predict consensus, and which is likely to influence future investment PTAs, is around identifying certain principles and provisions strengthening the independence and impartiality of arbitrators as well as the integrity, fairness, and efficiency of proceedings.[15]

8.4 NOVEL APPROACHES TO INVESTMENT DISCIPLINES IN FUTURE PTAS: THE TURN TO INVESTMENT FACILITATION

The push towards finding better approaches to promote foreign investment in IIAs, including PTAs, is growing, and not only with regard to reforms of ISDS. In this section, I want to highlight four specific features that have slowly been developed in the last decade in the context of IIAs, including PTAs: (1) streamlining administrative procedures, (2) regulatory coherence (or good regulatory practices), (3) dispute prevention, and (4) responsible business conduct (RBC).

Interestingly, many of these new features are also part of a new agreement that has been concluded among a large group of WTO Members on Investment Facilitation for Development (IFD).[16] Unsurprisingly, the IFD Agreement has expressly

[15] See the draft 'Code of Conduct for Adjudicators in International Investment Disputes' elaborated jointly by the International Centre for Settlement of Investment Disputes (ICSID) and UNCITRAL Secretariats (icsid.worldbank.org/resources/code-of-conduct).

[16] See Agreement on Investment Facilitation for Development, contained in Communication from Members Parties to the Investment Facilitation for Development Agreement (IFDA),

excluded from its scope the more traditional (and controversial) disciplines of investment protection, investment liberalisation, and ISDS (Article 2.2 IFDA).

8.4.1 *Streamlining Administrative Procedures*

First, a few recent PTAs include provisions focusing on enhancing the streamlining of administrative procedures to facilitate foreign investment. These provisions tend to be general and programmatic in nature, thus requiring further work by the contracting parties. For example, Article 10.17 of the 2020 Regional Comprehensive Economic Partnership (RCEP) provides that '[s]ubject to their laws and regulations, the Parties shall cooperate to facilitate investment amongst China and ASEAN through, among others: … (b) simplifying procedures for investment applications and approvals; …'.[17] These PTAs often specify that such work will be led by a new institutional structure provided for as part of the underlying PTAs. For example, Article 8.26 of the 2018 Brazil–Chile FTA specifies that a 'Joint Committee will develop and discuss an Agenda for Cooperation and Investment Facilitation in relevant issues for the promotion of bilateral investment'.[18]

A more detailed set of obligations has been included in the WTO IFD Agreement under Section III on 'Streamlining and speeding up administrative procedures'. For example, Article 14 sets out 'General Principles for Authorisation Procedures', which provides as follows:

> 14.1. Each Party shall ensure that authorisation procedures it adopts or maintains do not unduly complicate or delay investment activities.
> 14.2. If a Party adopts or maintains measures relating to the authorisation for an investment, the Party shall ensure that:
> a. such measures are based on objective and transparent criteria;
> b. the procedures are impartial, and that the procedures are adequate for applicants to demonstrate whether they meet the requirements, where such requirements exist; and
> c. the procedures do not in themselves unjustifiably prevent the fulfilment of requirements.
> 14.3. The assessment by a Party's relevant competent authorities of an application for authorisation shall be made on the basis of criteria set out in a measure in accordance with the Party's legal system.

requesting incorporation of IFDA into Annex 4 of the WTO Agreement, 8 March 2024, WT/GC/W/927.

17 See also 2018 Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between China and ASEAN (Article 21).

18 This follows Brazil's new approach with regard to investment treaties. See (Choer Moraes and Hees 2018).

To streamline 'authorisation procedures', the IFD Agreement sets out several specific parameters with regard to 'application periods', 'acceptance of authenticated copies', 'processing of applications', 'treatment of incomplete applications', and 'rejection of applications' (Article 15). Further provisions include the following obligations:

(1) 'Each Party shall, to the extent practicable, avoid requiring an applicant to approach more than one competent authority for each application for authorisation' (Article 16.1)
(2) 'If a Party requires authorisation for an investment, its competent authorities, taking into account their competing priorities and resource constraints, shall endeavour to accept electronic submission of applications, including in electronic format' (Article 18.1)
(3) 'If a Party adopts or maintains a measure relating to the authorisation for an investment, the Party shall ensure that the competent authority reaches and administers its decisions in a manner independent from any enterprise carrying out the economic activity for which authorisation is required' (Article 19.1).

While some of these obligations are not drafted as strictly binding commitments, their level of specificity is rarely seen in investment chapters of PTAs. Thus, this (for the moment, plurilateral) agreement represents a key step forward in terms of achieving greater foreign investment promotion without focusing on the more traditional strategies revolving around investment protection, liberalisation, and ISDS. As such, it will likely influence further developments in future PTAs with investment chapters.

8.4.2 *Regulatory Coherence*

Second, there is a growing trend in PTAs to rely on 'regulatory coherence' or 'good regulatory practices' to address 'behind-the-border' measures affecting international trade and investment.[19] While its exact definition is debated, 'regulatory coherence' disciplines in PTAs are principally aimed at improving the quality and effectiveness of regulatory measures of general application by identifying and encouraging best practices 'in the process of planning, designing, issuing, implementing and reviewing regulatory measures' (CPTPP, Article 25.2). Accordingly, rather than imposing general standards on the content of domestic regulation, these PTAs prescribe the regulatory processes that should be undertaken in developing regulation. In other words, rather than relying on content-based (or output-oriented) standards, these PTAs demonstrate a turn to process-based (or input-oriented) standards.[20]

[19] See also Chapter 17, Polanco 2024.
[20] See generally (Lin and Liu 2018).

Building on the work on 'regulatory reform' carried out by intergovernmental organisations, such as the Organisation for Economic Co-operation and Development (OECD), Asia-Pacific Economic Cooperation (APEC), and the World Bank,[21] the recent reliance on 'regulatory coherence' or 'good regulatory practices' may be observed in the 2016 CPTPP and 2018 USMCA. While Chapter 25 CPTPP is titled 'Regulatory Coherence' and Chapter 28 USMCA is titled 'Good Regulatory Practices', these two chapters are very much similar in terms of content and provide for several good regulatory practices. For example, Article 25.4 CPTPP on 'Coordination and Review Processes or Mechanisms' encourages each CPTPP party to establish internal processes or mechanisms to facilitate the effective inter-agency coordination and review of proposed regulatory measures. These processes and mechanisms should generally have the ability to (a) review proposed covered regulatory measures to determine the extent to which the development of such measures adheres to good regulatory practices and (b) strengthen consultation and cooperation among domestic agencies so as to identify potential overlap and duplication (Article 25.4, paragraph 2).

Moreover, Article 25.5 CPTPP on 'Implementation of Core Good Regulatory Practices' is aimed particularly at encouraging relevant regulatory agencies to conduct regulatory impact assessments when developing proposed regulatory measures. These impact assessments should, among other things, (a) assess the need for a regulatory proposal, (b) examine feasible alternatives, (c) explain the grounds for selecting a specific alternative, and (d) rely on the best reasonably obtainable existing information (Article 25.5, paragraph 2). Article 25.5 specifies other good regulatory practices, such as ensuring that:

(i) regulations are clearly and concisely written;
(ii) the public has access to information on new regulatory measures, if possible online;
(iii) existing regulatory measures are periodically reviewed to determine if they remain the most effective means of achieving the desired objective; and
(iv) CPTPP governments provide public notice annually of all regulatory measures they expect to take the following year. (Article 25.5, paragraphs 4–7).[22]

[21] See, for example, OECD *Recommendation of the Council on Regulatory Policy and Governance* (OECD 2012); World Bank *Regulatory Assessment Toolkit* (Molinuevo and Sáez 2014); APEC *2016 Final Report on Good Regulatory Practices in APEC Economies* (APEC 2017).

[22] Chapter 28 of USMCA includes many of the same good regulatory practices found in the CPTPP, including (1) adopting internal processes or mechanisms providing for consultation, coordination, and review in the development of regulations (Article 28.4 USMCA), (2) encouraging the use of regulatory impact assessments when developing proposed regulations

These disciplines are often found in separate chapters (not in the investment one) and apply to any 'measure of general application related to any matter covered by' the PTA, including trade in goods, services, and investment.[23] Despite this broad scope in principle, these chapters do provide for certain limitations. For example, Chapter 25 of CPTPP only applies to 'covered regulatory measures', which each party will notify no later than one year after the date of entry into force of the agreement (Ortino and Lydgate 2019).

The WTO Investment Facilitation Agreement includes a provision on 'Domestic regulatory coherence'. It encourages each member to carry out impact assessments when preparing major regulatory measures within the scope of the agreement, and offer reasonable opportunities for any interested person, on a non-discriminatory basis, to provide comments and take into consideration the potential impact of the proposed regulation on investors, including micro-, small, and medium enterprises (MSMEs) (Article 23).

8.4.3 *Dispute Prevention*

Third, some recent IIAs, including PTAs, attempt to provide for mechanisms capable of preventing investor–state disputes. Brazil has been at the forefront of strengthening dispute prevention through the inclusion of a number of institutions and procedures aimed at preventing differences between a foreign investor and the host state from escalating into litigious disputes (Bonnitcha and Williams 2022; Echandi 2013; Levashova 2020).

In addition to the establishment of Joint Committees (a political decision-making treaty organ, composed of both parties to the treaty acting jointly and responsible for administering the relevant agreement),[24] key institutions included in IIAs whose functions include dispute prevention are national 'focal points' (or 'ombudsman'). Focal points are inspired by the positive experience of South Korea's Office of the Foreign Investment Ombudsman (OFIO), which provides post-investment services for foreign investors and on-site consultations regarding issues of finance, taxation, accounting, intellectual property rights, construction issues, and labour issues. For example, Article 8.19 of the Brazil–Chile FTA requires each party to designate a National Focal Point, which shall have as its main responsibility the support for investors from the other party in its territory (in Brazil, a such focal point will be in the Chamber of Foreign Trade – CAMEX). Among other responsibilities, the

(Article 28.11), and (3) ensuring that those regulations are clear, concise, and easy for the public to understand (Article 28.8).

23 See, for example, the 2022 UK–Australia FTA (Chapter 26 Good Regulatory Practices).

24 See Article 8.18 'Joint Committee for the administration of the chapter' of the Brazil–Chile FTA. See also Article 815 of the 2008 Canada–Colombia FTA establishing the Committee on Investment.

National Focal Point will (i) manage inquiries from the other party or from investors of the other party, with the competent entities, and inform the interested parties about the results of their negotiations; (ii) evaluate, in dialogue with the competent government authorities, suggestions and claims received from the other party or from investors of the other party and recommend, when appropriate, actions to improve the environment of investments; (iii) seek to prevent investment disputes in collaboration with the government authorities and the competent private entities; and (iv) provide timely and useful information on investment regulation issues, in general, or on specific projects, when requested (Article 8.19.4).

These recent PTAs also provide a more formal dispute prevention procedure between the two contracting parties within the Joint Committee. Article 8.24 of the Brazil–Chile FTA provides a detailed procedure for this purpose, with specific strict deadlines (120 days from the date of the first meeting, extendable by mutual agreement, to evaluate the submission presented and to prepare a report) and the possibility of inviting any affected foreign investors as well as other stakeholders, including interested NGOs.

The WTO Investment Facilitation for Development Agreement also includes the establishment of one or more focal points or appropriate mechanisms in order to respond to enquiries from investors or persons seeking to invest regarding the measures covered by the agreement and assist investors or persons seeking to invest in obtaining relevant information from competent authorities (Article 22.1).

8.4.4 *Responsible Business Conduct (RBC)*

Fourth, a growing number of IIAs, including PTAs, include 'responsible business conduct' or 'corporate social responsibility' provisions. Responsible business conduct (RBC) can be defined as corporate practices making a positive contribution to economic, environmental, and social progress with a view to achieving sustainable development and avoiding and addressing adverse impacts related to an enterprise's direct and indirect operations, products, or services.[25] In international investment law and policy, RBC is used interchangeably with 'corporate social responsibility', which refers to the enterprise's responsibility 'to put in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders' (European Commission 2011). The growing emphasis on RBC or CSR in IIAs is linked with the growing realisation that the host state's policy goal should be 'sustainable development'. Accordingly, the focus of these international disciplines should not simply be maximising economic

[25] See the definition provided by the OECD, for example, in the context of its work on Responsible Business Conduct and the Sustainable Development Goals (available at mneguidelines.oecd.org).

development, but rather to ensure a wider set of parameters such as environmental protection and social development.

Most recent PTAs with an investment chapter include RBC or CSR provisions requiring contracting parties to encourage (foreign) investors to incorporate into their business practices and internal policies internationally recognised principles, standards, and guidelines of RBC, such as the 1976 OECD Guidelines for Multinational Enterprises, the 1978 International Labour Organization (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the 2011 United Nations (UN) Guiding Principles on Business and Human Rights.[26] For example, Article 9.17 on Corporate Social Responsibility of the 2018 CPTPP provides as follows: 'The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.'[27]

The WTO Investment Facilitation for Development (IFD) Agreement also contains an RBC provision. As the long-term objective of facilitating FDI flows is to foster sustainable development, one of the key components of promoting sustainable investment is RBC. The RBC provision in the WTO IFD Agreement focuses on three specific aspects. First, it requires parties to encourage investors operating within their territory to voluntarily incorporate into their business practices internationally recognised principles, standards, and guidelines of RBC, such as those referred to in international instruments like the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises and related Due Diligence guidance. These principles, standards, and guidelines address areas such as labour, environment, gender equality, human rights, community relations, and the rights of Indigenous peoples. Second, the RBC provision in the WTO IFD Agreement also requires parties to undertake due diligence in order to identify and address adverse impacts, such as on the environment and labour conditions, in their operations, their supply chains, and other business relationships. Third, it requires parties to undertake and maintain meaningful engagement and dialogue with Indigenous peoples, traditional communities, and local communities.

[26] 'Since 2016, the number of RTAs with CSR-related provisions and the average number of CSR-related provisions in those agreements have increased significantly.' (Monteiro 2021)

[27] See also Article 7.18 on Corporate Social Responsibility of the 2020 Indonesia–Korea Comprehensive Economic Partnership Agreement (CEPA): 'Each Party reaffirms the importance of encouraging enterprises operating within its territory 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.' See also Article 16.5 on *Trade and investment favouring sustainable development* of the 2018 EU–Japan Economic Partnership Agreement (EPA). However, the 2020 RCEP does not contain any reference or provision on RBC/CSR. See Romanin Jacur (2018, pp. 465–483).

8.5 CONCLUDING REMARKS

When it comes to IIAs, including investment chapters in PTAs, there are many challenges facing policymakers. On the one hand, the need to reform, or at least fine-tune, traditional disciplines on investment protection, investment liberalisation, and ISDS is increasingly growing. Continuing claims brought by foreign investors against both developed and developing states, as well as the need to ensure that international investment obligations do not restrain states' ability to address various emergencies, such as climate change, are increasing pressures on states to act.

On the other hand, scepticism (at least in some quarters) about the effectiveness of any such reform is also growing to leave two equally unsatisfactory options on the table: keeping the status quo or exiting the system altogether. One possible way out of the conundrum is to move the focus away from traditional investment disciplines and explore other mechanisms to encourage greater investment flows and maximise foreign investment's contribution to sustainable development. Streamlining administrative procedures, regulatory coherence, dispute prevention, and responsible business practices are some of the novel mechanisms that are currently being explored, in particular in the context of PTAs. These mechanisms are also reflected in the WTO Agreement on IFD.

Different from traditional investment disciplines, these various mechanisms require serious engagement (including technical and financial resources) from states to ensure their fruition. Has any of these mechanisms actually borne any fruit so far? If not, will any of them bear any fruit in the future? Empirical research is needed to shed light on these questions.

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