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David Gaukrodger

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The future of investment treaties – possible directions

by

David Gaukrodger*

As our societies face new challenges and make new demands from policies addressing international investment, there is a new urgency to profoundly reconsider treaties addressing investment. This paper was prepared originally as background for initial inter-governmental and public discussions at the OECD about future investment treaties as well as possible alternatives. The paper surveys potential roles for treaties addressing investment in (i) contributing to sustainable development and responsible business conduct; (ii) preserving and improving investment market access and liberalisation of investment, and facilitating FDI; (iii) regulating subsidised state-owned enterprises, competition in subsidies for investment, and digitalisation; and (iv) addressing the interests of treaty-covered and other investors in reasonable legal predictability and a level playing field, together with the need for policy space and public support for treaty policy. It considers potential use of more flexible and varied remedies and implementation mechanisms. A final section briefly considers treaty policies as governments and societies confront the urgent challenge of climate change.

Authorised for release by Greg Medcraft, Director, OECD Directorate for Financial and Enterprise Affairs

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* Senior Legal Adviser, Investment Division, Directorate for Financial and Enterprise Affairs, OECD. An earlier version of the paper served as a background paper for the 2021 OECD Investment Treaty Conference on The Future of Investment Treaties, held on 29 March 2021.

Contact: david.gaukrodger@oecd.org

Table of contents

Introduction - A new social and economic environment, a new globalisation and new potential roles for investment treaties

The environment for international economic policies has been transformed in recent years. Most recently, the impact of the COVID-19 crisis has been profound, with tragic consequences for millions of people. Economic growth, trade and FDI are down sharply. Over the medium term, a 2020 report generated out of work at the OECD on New Approaches to Economic Challenges (NAEC) notes that the aftermath of 2008 global financial crisis has seen stagnant productivity and continued financial risk in advanced economies.[1] Their 'financialisation' has continued, with higher levels of private debt, higher returns to holders of financial assets, and in some cases larger financial sectors relative to the rest of the economy. The global financial crisis was addressed through massive government and central bank action including a transfer of private losses and risk to the public sector; the policy responses to address it, while necessary to avoid collapse of the financial system, have exacerbated inequalities in most advanced economies. Before the COVID-19 crisis economic growth had been restored. But it was generally fragile, relying on ultra-low interest rates and other central bank support resulting in expanded central bank balance sheets.

The NAEC report also notes political consequences from a decade of economic underperformance and accompanying global pressures, alongside other more directly political causes. Popular discontent with politicians and the political system has been rising in many countries. There is declining trust in established institutions, experts and 'elites'. Many societies are more fragmented, prone to cultural as well as economic polarisation. Concurrently, there are stronger demands for politics and business to address gender, racial and other discrimination in order to be more inclusive.

Rapid technological change and digitalisation have been transforming both economies and societies. In phenomena described as the Great Convergence by Richard Baldwin, new possibilities to combine advanced technology with low wages have transformed the international economy. A number of developing nations have rapidly industrialised while many advanced economies have deindustrialized.[2] As outsourcing expands, "domestic labour no longer has a monopoly on the use of the know-how of national firms", and the interests of a nation and its firms are less well aligned. At the same time, efforts to resist unbundling when it is embraced by others may be futile or counterproductive.

Government competition for investment has become intense, as illustrated for example by the growth and professionalisation of investment promotion agencies in numerous economies in recent years. Tax breaks and subsidies for significant investment have become widespread, creating power for some businesses and investors to negotiate favourable arrangements with governments as jurisdictions compete in so-called "beauty contests" or bidding wars.[3] In some traditional capital exporters, there is a new emphasis on the importance of government support for domestic investment.

The full social and economic consequences of the COVID-19 pandemic and resulting recession remain uncertain but will be profound. Vulnerable individuals and countries are often the most severely affected in major crises and economic downturns. Addressing the increased financial strain on governments resulting from the crisis will also be essential as budgets to address climate change and other pressing issues may be affected. At the same time, the crisis has demonstrated the critical role of governments and

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1 OECD, [Beyond growth: Towards a new economic approach]() (2020). The report was produced by an Advisory Group on a New Growth Narrative, composed of experts from a wide variety of fields, that was brought together on behalf of the Secretary-General of the OECD in 2018. It was published under the responsibility of the Secretary-General of the OECD and the opinions expressed and arguments employed do not necessarily reflect the official views of OECD member countries.

2 Richard Baldwin, The Great Convergence: Information Technology and the New Globalization (2016).

3 Tavares Lehmann, Ana Teresa et al, Rethinking Investment Incentives: Trends and Policy Options (2016). Commercial database suppliers provide comparative data on subsidies available to encourage such negotiations, with one having recorded USD 220 billion in government subsidies to foreign investors since 2010. See [Wavteq IncentivesFlow.]()

their capacity to take vigorous action in many jurisdictions, disproving suggestions that governments have become incapable of dynamic action to address major social and economic challenges.

Along with the need to address the COVID-19 pandemic and its aftermath, accelerating environmental crisis is widely seen as the most urgent challenge faced by our societies. The 2018 report of the Intergovernmental Panel on Climate Change makes clear that, to achieve the international goal of holding the average surface temperature rise to 1.5 degrees Celsius, global emissions of greenhouse gases must be approximately halved by 2030, and reach net zero by around 2050. Biodiversity loss, soil degradation, and air and marine pollution constitute additional inter-related environmental challenges.

A global climate politics has recently been forged in part by children emerging as political actors, followed by increased action from business and governments. Climate change denial is in retreat. The world's four largest economies have announced targets for net-zero carbon emissions: the EU, Japan and US by 2050, China by 2060 – several of these commitments, and interim commitments for 2030, have been made in the last six months. Other important economies have also recently made similar pledges and governments that have opposed important climate actions in recent years are under pressure to reform. Commitments need to be accompanied by more detailed plans and need to become more ambitious to meet necessary targets, but political momentum is building, as emphasised by recent declarations by the OECD Secretary-General and the UN Secretary-General.[4]

With new challenges and a profoundly different environment for international investment, social demands from treaties addressing international investment have changed. There is a new emphasis on ensuring that treaties generate broad benefits, notably for the middle class and workers, amid concerns that some models have principally benefitted multinational corporations or lawyers. Traditional interests in post-entry investment protection remain on the agenda, but profound reconsideration has begun and is necessary in light of interaction with vital social interests and growing political opposition. A number of efforts to include investment protection with ISDS in treaties between large advanced economies, at times advocated as necessary to convince other governments of its merits, have faced serious obstacles or have been suspended, postponed or abandoned. Interest in investment liberalisation has grown with market access appearing to outstrip post-establishment protection in importance in some recent treaties amid concerns about a lack of reciprocity or protectionism. Traditional interests are also evolving with the increased competition for investment and growing attention in capital exporting jurisdictions to risks and costs of excessive delocalisation.

While traditional interests evolve, the scope of interests under consideration for potential inclusion in treaties has broadened to include many issues long addressed at the OECD in the Policy Framework for Investment (PFI) as part of its comprehensive approach to achieving an attractive climate for investment. Rarely seen by governments as suited to ISDS, these issues have notably emerged in the investment treaty field in conjunction with rethinking about overall treaty approaches.

As additional issues have emerged in international business and society, such as large state-owned enterprises (SOEs) subsidised in business activities at home and abroad, or the digital economy, debates are underway about how treaties or other tools could help facilitate business and address concerns in these areas as well. More broadly, the conditions under which investment abroad should be encouraged by governments beyond market factors are being reconsidered.

The adjustment and expansion of possible benefits for business and investment that is under consideration, including in new treaty models, have been accompanied by increased concern about the lack of attention to the impact of international investment in traditional treaty models. While more investment can be beneficial, there are no automatic benefits. A recent OECD Secretariat scoping paper notes traditional

4 See, e.g., Fiona Harvey, "Put a big fat price on carbon": OECD Chief bows out with climate cry, The Guardian, (17 Feb. 2021); Damian Carrington, Cancel all planned coal projects globally to end 'deadly addiction', says UN chief, The Guardian (2 Mar. 2021); Michael E. Mann, The new climate war: The fight to take back our planet (2021; Kindle ed.).

aversion to using investment treaties to strengthen regulation, improve business conduct or address adverse impacts from business activities.[5] But it notes significantly greater interest and increased action in recent years.

Debates in many of these areas are intensifying. Longer ratification processes and uncertainties in parliaments are giving rise to further treaty negotiations, side agreements or joint interpretations to address issues of balance in an effort to reach entry into force. Broader policy considerations are also being integrated into parliamentary grants of treaty negotiating authority. For some global issues such as climate change or tax policy, the centre of negotiating gravity may shift away from trade and investment, with expertise in these areas nonetheless remaining important to provide input to parts of treaties primarily focused on other subjects. Moreover, with investment policy makers potentially working on a much broader range of issues, more flexible approaches to remedies and implementation mechanisms appears to be likely.

The benefits that properly regulated international investment can bring are not in doubt. International investment can contribute to prosperity, create employment and help overcome challenges such as the climate crisis. Both solid regulatory frameworks and substantial regulatory change are needed to put investment and international investment to best use to address current and future challenges.

In short, there is a new urgency to reconsider treaties addressing investment. Governments at the OECD-hosted Freedom of Investment Roundtable (Roundtable) have accordingly decided to engage in a broad discussion about the future of investment treaties as well as possible alternatives.[6] There is a common understanding that an inclusive debate is needed to address mounting societal demands that international investment positively contribute to sustainable development and better lives. Government, business and civil society participation at the OECD, and its broad policy expertise across the full range of sustainable development issues, make it a valuable centre for the consideration of renewed policies.

Reflecting the long-standing Roundtable interest in regular engagement with stakeholders and the public, the 2021 allowed an early opportunity for dialogue between governments and interested constituencies on these issues. This paper sets outs several possible overlapping future directions for purposes of preliminary discussion between governments, stakeholders and experts. It surveys a range of potential roles for investment treaties, while not neglecting existing components. While a few jurisdictions and treaties have addressed most of the issues identified here, attention is rare in the overall pool of treaties.

The balance of the paper first addresses a potential growing role of investment treaties in contributing to sustainable development and responsible business conduct, notably through treaty provisions that buttress the domestic law regulation of business or that directly address business conduct. It then notes the likely growing use of treaties to preserve and improve investment market access and liberalisation of investment, and to facilitate FDI. It considers potential for greater future extension of treaty provisions to address issues that have emerged in recent years including subsidised SOEs, competition in subsidies for investment and foreign investment, and digitalisation. While re-examining the traditional focus on investment protection is not the principal goal of this initial exploration of the future of investment treaties, a few potential avenues and developments in that area are also identified. As treaty makers grapple with a wider range of

5 See OECD, Public consultation on Business responsibilities and investment treaties.

6 The following economies are invited to participate in the Roundtable: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United Kingdom, United States, Uruguay, and the European Union. Participation may vary depending on the issues being discussed.

interests, the potential for more flexible and varied remedies and implementation mechanisms is surveyed. A final section briefly considers future treaty policies in context, as they confront the challenge of climate change.

1. Contributing to sustainable development and responsible business conduct including human rights

This section addresses two inter-related approaches to promote sustainable development and responsible business conduct (RBC) – using treaties to strengthen domestic regulation of business activities and speaking to business in investment treaties.

1.1. Government treaty commitments to strengthen domestic regulation

Sustainable development requires a strong regulatory framework for business including for purposes of addressing externalities and distributional issues. Domestic law and policy are essential to address these issues, but future trade and investment agreements may play a growing role in improving regulatory policies. In a competitive market for trade and investment, governments may have an incentive to maintain weak regulatory standards or enforcement, or resist improved regulation, if they consider that this may help attract or keep certain business activities. Depending on the regulations at issue, this can affect local populations or global interests, in areas such as health, biodiversity, climate change or labour standards. It can also generate concerns about unfair competition, undermining support for free trade or open investment markets.

Future investment treaties could help address these issues. They could for example increasingly include government commitments to accede to key international treaties and basic standards on the environment, health, human rights or labour, and to their implementation in practice. Commitments to accede to important ILO conventions and to enforce relevant domestic law are growing in importance. Some treaty models help fight business-related crime by including commitments to strengthen domestic law on anti-corruption, anti-money laundering, the transparency of beneficial ownership or mutual legal assistance. Commitments to implement major treaties such as the Paris Agreement on climate change have become important components of some recent treaties and negotiations.[7]

In many of these areas, intensively negotiated basic standards have been developed in specialised fora and can be incorporated by reference. For other relevant provisions in this area, such as commitments not to lower regulatory standards in order to attract investment -- which exist in a small but growing number of investment treaties – both greater use and greater attention to implementation may be likely. The visible and effective use of trade and investment treaties to strengthen valuable regulation as well as to facilitate business could help address public concerns that trade and investment treaties result in a loss of regulatory autonomy or a lowering of standards.

Negotiations in this area can be challenging, but collective efforts may be valuable where interests converge. Where international treaties and standards represent minimum standards, they can be agreed to without concern about unduly undercutting the ability of less-developed countries to compete or about

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[7] Linkages between investment treaties and important treaties for sustainable development may be reinforced in areas of particular importance. The EU-UK Trade and Cooperation Agreement (TCA) is the first trade and investment agreement to make explicit that withdrawal from the Paris Agreement by one Party would permit the other Party to partially or completely suspend or terminate the treaty. See European Commission, EU-UK Trade and Cooperation Agreement – Questions and Answers, p. 15, available at Questions & Answers: EU-UK Trade and Cooperation Agreement (europa.eu).

protectionism.[8] As more countries require them, there may be fewer concerns about whether insisting on them constitutes a loss of negotiating leverage for traditional goals favouring business. Developing countries can use them to signal their intent to compete based on a solid regulatory framework that meets basic standards, attracting a business community that is increasingly aware of reputational risks in contexts of regulatory failure. In treaties between advanced or closely linked economies, governments can include stronger commitments on regulation for sustainable development including to address competition and level playing field concerns.

1.2. Responsible business conduct and sustainable development – addressing business and adverse impacts

As governments consider a smart mix of policies to strengthen sustainable development and RBC, the possible positive role for treaties is attracting more attention. In regulatory reforms, some governments are imposing and developing due diligence or reporting obligations for companies with regard to environmental or human rights issues. Governments are mandating consideration of the quality of corporate due diligence in decisions on corporate liability or sanctions for bribery. They are also conditioning access to government procurement contracts or benefits on due diligence. Strong and growing investor and public interest in companies' environmental, social and governance (ESG) performance may suggest further developments.

In light of these and other developments, future investment treaties may more actively explore the incorporation of policies to advance RBC. Treaties could include government commitments to adopt and apply due diligence regimes, as one of the provisions buttressing domestic regulation as discussed above. Treaty provisions involving government commitments and provisions directed at business, such as references to the OECD Guidelines for Multinational Enterprises, can be complementary. For example, treaty provisions prohibiting governments from lowering regulatory standards to attract or retain investment are mirrored by the OECD Guidelines recommendation that business should "[r]efrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues".[9] Effective business-focused approaches take on greater importance where government commitments are weaker in order to ensure that trade and investment agreements do not undermine core values.

The interest in sustainable and inclusive development and RBC could give rise to more targeted investment treaty policies based on qualitative requirements or sectoral approaches. Where future treaties offer direct access to dispute settlement for business, some may consider that sustainable development goals could be furthered by conditioning access to dispute settlement -- or to certain benefits -- to claimant or operating company or beneficial owner satisfaction of RBC standards, possibly subject to audit or as certified in advance of disputes by a neutral expert body. Possible conditions based on international standards could be compared with conditions based on domestic law compliance. Expanded availability of counterclaims by governments against businesses in cases of alleged misconduct is another possible option. As outlined below, a range of major economies have provided for state-to-state dispute settlement (SSDS) for both investment and trade claims in recent treaties (see section 5); SSDS could allow governments to filter claims based on whether potential business beneficiaries have conducted themselves responsibly. Some governments may wish to allow redress for victims of adverse effects from business activities; while multilateral efforts in this area face obstacles, the decentralised nature of investment treaty making could allow space for the testing of innovative approaches.

8 Report of Panel of Experts, Proceeding Constituted Under Article 13.15 of The EU-Korea Free Trade Agreement, para. 82 (Jan. 2021) (the FTA should not be understood as seeking to harmonise labour protection. Rather these provisions set basic core rights, the "rules of the game" and do not seek to regulate the domestic labour regime as a whole).

9 OECD Guidelines, II.A.5.

Sectoral targeting could incorporate for example recent efforts to identify green trade and investment; it could form the basis for targeting of treaties or of certain advantageous provisions for those sectors, with appropriate flexibility to modify in the future as scientific knowledge and priorities change. As elsewhere, decentralised treaty making could facilitate innovations with possible broader influence over time.

Treaties are of course merely one possible element in a growing arsenal of tools to address sustainable development and RBC. Governments may adopt different approaches to the distribution of roles between treaties, domestic legislation and other tools. RBC due diligence legislation applicable to corporate groups and activities abroad, investment screening incorporating RBC considerations, border measures blocking imports of products made in violation of human rights, provisions permitting the sanctioning of individuals or companies engaging in violations and many other human rights policies could all be employed, with trade and investment treaty provisions as an additional element in a broad arsenal of measures. The modest role of treaties to date can be expected to grow while remaining limited.

2. Liberalisation of investment, market access and investment facilitation

Liberalisation for foreign investment and in particular FDI appears likely to play a greater role in the future of investment treaties. Through the elimination of regulatory barriers to investment based on nationality, it generates more potential investment primarily based on market considerations. Increased potential investment can provide many benefits in terms of greater competition and the transfer of know-how. It is essential to addressing the sustainable development goals.

Governments may re-evaluate the relative importance of openness and investor protection in future negotiations. Empirical studies have found that greater openness generates increased investment flows. There are few substitutes available to business if market access is blocked, making gains in this area valuable for potential investors as well as economic efficiency. While negotiators may seek new openings, commitments to preserve existing and future openness can also be valuable. The recent volatility of portfolio investment may suggest that opening to FDI can be more beneficial from some perspectives than opening limited to portfolio investment and some recent treaties apply specifically to FDI.

Investment liberalisation negotiations often require intensive trade-style sector by sector negotiations with schedules; for some partners with different economies and interests, success may require trade-offs between trade and investment access. The growing prevalence of integrated trade and investment agreements increases opportunities in this area.

Investment liberalisation and market access for investments in services involves the interaction and articulation of multiple regimes including treaty chapters on trade in services and on investment, the WTO General Agreement on Trade in Services (GATS), the WTO Agreement on Trade-Related Investment Measures (TRIMs) and OECD instruments. In addition to seeking more ambitious market access outcomes or commitments to preserve existing access, future integrated treaties and work in this area could seek to reduce complexity in order to make the available opportunities more visible for business including small and medium sized enterprises (SMEs).

In addition to market access barriers, business can face a myriad of other obstacles to effective entry and success of its FDI in foreign markets. Many of these issues are day-to-day problems such as transfers and visas for personnel, addressing different environmental and technical standards, a lack of transparency in regulatory procedures, or logistics issues. As noted above, many of these issues have been traditionally addressed as part of a healthy investment climate in the PFI.

Recent years have seen increased interest in incorporating these types of provisions into a new treaty form. Brazil has developed a new treaty model focused on facilitation of FDI, omitting portfolio investment. It seeks to promote active inter-governmental coordination to facilitate FDI, including by SMEs, and to prevent and resolve possible disputes. SSDS is available when preventive mechanisms fail, but ISDS is excluded. The recent Brazil-India treaty between major economies reflects a mix of inputs from both government's recent model treaties and substantial attention to investment facilitation. Recent WTO-hosted plurilateral negotiations over possible greater treaty attention to traditional PFI issues for FDI have attracted participation from over 100 countries; they have been characterised by clear intent to insulate such broader provisions from investment protection treaties and ISDS, and also to exclude market access from the discussions.[10]

3. Addressing new or more pressing investment issues more precisely to achieve non-discriminatory openness and treatment

Business has a vital role to play in achieving sustainable development outcomes. Regulation to address externalities and ensure proper incentives is one key to successful outcomes in this area and investment treaties may have a growing role in this area, as addressed above. But future investment treaties could also help achieve sustainable development by for example strengthening competition on a level playing field or promoting innovations and their rapid dissemination. Provisions can set out clear and agreed limits on government action or regulatory powers in certain areas; the impact on the right to regulate is clearer than for provisions allowing for uncertain ex post adjudication of whether future regulatory actions are fair. Treaty provisions in this area can also apply to all investors or to the economy generally rather than only to covered investors, helping address concerns about the impact of investment treaties on a level playing field. Negotiations can of course be intensive and quid pro quos in other areas may be necessary for proponents of these provisions to obtain agreement.

A first area of likely growing attention involves efforts to ensure that private enterprises can compete on a level playing field with SOEs. There is intense concern about subsidies for SOEs active in commercial markets; efforts to achieve transparency and operation in accordance with commercial considerations as a general principle have been made in a few major recent treaties. Subsidized SOEs active abroad are of particular concern and policy space is needed to address market distortions. For countries with substantial domestic markets, interests in a level playing field in SOE home markets are also likely to attract greater attention. The benefits of SOE disciplines are widely distributed without regard to nationality because unjustified preferences for SOEs affect all businesses in the relevant sectors.

Competing government subsidies for foreign investors have been identified as a serious policy issue requiring attention, including by free market advocates as well as NGOs.[11] The increased competition between governments for foreign investment post-COVID may exacerbate trends towards excessive and inefficient subsidies; tight government budgets, public demands for a rebalancing of tax burdens and interests in a level playing field may prompt future investment treaties to address this area. Ongoing OECD joint work involving tax and investment specialists could contribute to future investment treaty policy thinking.

[10] See Joint Ministerial Statement on Investment Facilitation For Development (Revision), WT/L/1072/Rev.1 (22 Nov. 2019) (approving an earlier 2017 Joint Ministerial Statement aiming at developing a multilateral framework on Investment Facilitation for Development and noting that the discussions shall not address market access, investment protection, and ISDS).

[11] See, e.g., Simon Lester, Reforming the International Investment Law System, 30 Maryland Journal of International Law 70, 74-75 (2015) ("In reality, the biggest problem in the world of foreign investment may not be *bad* treatment, but treatment that is too *good* to these investors: subsidies. As noted, subsidies to attract foreign investors have proliferated. If there is a problem with foreign investment that needs to be addressed, it is this one. When governments use subsidies to compete for investment, no new investment is created. The only impact is to shift investment around from location to location, in a way that benefits the large corporations who receive these subsidies.") (emphasis in original).

The digital transformation also presents challenges and opportunities for investment policy makers. International investment can accelerate the digital transformation. Investment policies in turn also need to adapt and respond to new challenges posed by the new ways of conducting business using new technologies. Future treaties can offer both opportunities for commitments as well as ensure that governments have the necessary policy space to regulate on issues like data protection, cybersecurity, localisation requirements, online consumer protections, e-government services or prohibitions on forced transfers of technology or source code. Investment agreements can address domestic laws and international cooperation, and can build on existing and future work on digital trade.

4. Investment protection – explicit attention to transition policies and targeted preferences where desired

As noted in the introduction, there is today a broad debate over the traditional use of treaties to protect post-establishment investment in a new economic environment. The Roundtable has engaged in and encouraged multiple facets of the debate. A range of future investment treaties will likely address the interests of treaty-covered and other investors in a reasonable degree of legal predictability and in a level playing field, together with the need for public support for treaty policy in this area.

Many governments have expressed particular interest in strengthening the right to regulate in investment treaties in the future. Work on policies in this area can build on Roundtable discussions on the substantive law aspects of the right of regulate including (i) a scoping analysis of the balance between investor protection and the right to regulate[12]; and (ii) a detailed examination of the comparatively narrow approach to the fair and equitable treatment (FET) provision in the NAFTA as interpreted by the NAFTA governments, as an example of a treaty approach and sustained governmental interpretive action.[13] Dispute settlement and implementation mechanisms for treaties also affect the right to regulate; reform of ISDS is under negotiation at UNCITRAL and the discussion below of increasing flexibility in the use of implementation mechanisms for treaty provisions may also be relevant.[14]

Several issues that have attracted only tangential attention may also need greater detailed and express policy attention. Two are addressed here: transition policies applicable to regulatory change; and preferential rights for covered investors.

4.1. Specific attention to good transition policies and issues of regulatory change

Transition policy is ripe for government attention. Very few investment treaties explicitly state that they are designed to compensate for costs imposed by non-discriminatory regulatory change. While some

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12 See Roundtables 23 (Oct. 2015) and 24 (Mar. 2016), discussing the initial version of Gaukrodger, D. (2017), The balance between investor protection and the right to regulate in investment treaties: a scoping paper, OECD Working Papers on International Investment 2017/02, https://doi.org/10.1787/82786801-en.

13 See Roundtables 23 (Oct. 2015) and 24 (Mar. 2016), discussing the initial version of Gaukrodger, D. (2017), Addressing the balance of interests in investment treaties: The limitation of fair and equitable treatment provisions to the minimum standard of treatment under customary international law, OECD Working Papers on International Investment 2017/03, https://doi.org/10.1787/0a62034b-en. The express limitation of the FET provision to the minimum standard of treatment under customary international law (referred to as an MST-FET provision in the paper) has been the most frequent approach used in recent treaties with FET provisions, as reflected in ongoing OECD statistical work on a broad sample of investment treaties.

14 The 2016 OECD Investment Treaty Conference on The Quest for Balance addressed both substantive law and dispute settlement aspects of balancing interests. [A few more recent and significant government treaty policies to address the interest in the right to regulate have been considered by the Roundtable in work on business responsibilities. See Gaukrodger, D. (2021), Business responsibilities and investment treaties, OECD Working Papers on International Investment, 2021/02, pp. __ (https://doi.org/10.1787/4a6f4f17-en).]

treaties and their interpretations by governments leave relatively little scope for such claims in the absence of direct expropriation or discrimination, they have been accepted under a number of interpretive theories applied in ISDS. Claims and awards of that nature have become a significant component of ISDS and are among its most controversial aspects.

The issue of whether and when to mitigate the costs associated with policy changes, whether through explicit government compensation, grandfathering, phased or postponed implementation, is hardly unique to investment treaties. It has been described as ubiquitous throughout the domestic and international policy landscape. Indeed, it is often easier to identify problems with current regulation and a preferable approach than to get from one to the other.[15]

As Trebilcock notes, some experts argue that efficiency considerations support excluding relief and requiring people and business to integrate the risk of regulatory change: the expectation of relief from regulatory change notably creates moral hazard and consequential over-investment in the pre-reform activity in question. Conversely, others are of the view that all policy changes that significantly impair the value of private property rights or interests presumptively warrant relief. Trebilcock observes that "[a] major irony of these two sharply antithetical views of the case for mitigating transition costs from policy changes is that they yield a common policy implication: policy reforms will be difficult to effectuate on both views". Under one view, losers are not taken seriously enough, and they can block reforms. The other vests certain classes of losers (and the courts and tribunals) with something close to a veto power over policy changes. On both views, "policy stasis becomes the default option".[16]

The evolution of ISDS towards a strong focus on claims for compensation for non-discriminatory regulatory change by covered investors but not others has occurred in a manner largely divorced from political economy analysis or domestic law and policy on the issue. Providing foreign investors are protected from direct expropriation and discrimination, there may be few grounds to single them out from others that lose as a result of regulatory change. If domestic interests/groups are politically strong enough to generate risks of bias against foreign interests (and even if they are not), they can be expected to block valuable regulatory change if it is seen as likely to generate special compensation for foreign investors alone. The widely-recognised need for major regulatory changes to address current policy challenges such as climate change invites explicit reflection on transition policies.

While the main focus on transition policy is on the need for changes in domestic law and how to address those who lose out from them, transition policies out of excessive, undesirable or illegal investment treaties, provisions, claims or awards have become an important element of investment policy. Recent examples include negotiation of the three-year legacy period in the USMCA, the unilateral Spanish offer on renewable energy or the German settlement with individual coal companies as part of a broad package of transition measures for workers, affected regions and companies.[17] The treatment of existing investments and pending claims in the EU member state treaty terminating intra-EU bilateral investment

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[15] Trebilcock, Michael J., Dealing with Losers: The Political Economy of Policy Transitions (OUP 2014; Kindle ed.), p. 1 ("diagnosing the ills of the status quo, and imagining better policy alternatives, at least in their broad contours, are often not especially controversial. However, the real challenges, in many cases, relate to getting from "here" to "there." Over time, existing policies develop their own encrustations of institutions, vested interests, adaptive preferences, and expectations that render the trajectory of getting from here to there a major part of the policy challenge.")

[16] Id.. p. 158.

[17] USMCA, Annex 14-C. The original USMCA signed on 30 November 2018 and the Protocol of Amendment signed on 10 December 2019 are available on the USTR website. The Parties (Canada, Mexico and United States) have named the treaty differently; USMCA is used for convenience; Client Earth, The German lignite phase-out contract and investment arbitration (Sept. 2020); Deutsche Welle, Germany to pay energy firms billions in coal phaseout plan (16 Jan. 2020) (detailing broader plan); Spain, Royal Decree-Law 17/2019 (offering specific rates of return in exchange for agreements to terminate or not commence ISDS claims, or to relinquish ISDS awards).

treaties also includes transition policies.[18] The ongoing discussions and negotiations on the Energy Charter Treaty (ECT), which have been affected by the existence of the traditional long survival period used in older treaties, may also raise issues of transition policy for past and future treaties.

4.2. Express attention to preferential interpretations and rights

Protection for direct expropriation and from discrimination generally attracts broad support. Business statements of their core interests in the context of debates over treaties have also focused on these interests. In contrast, there is little open advocacy for preferential treatment for covered investors over the treatment of investors in advanced economies. The OECD has pointed to the risks in vague investment treaty provisions applicable to an uncertain range of non-discriminatory government action; they make it difficult to evaluate whether measures will generate government liability for damages, reducing governments' regulatory policy space.[19]

Nonetheless, the evidence of preferences in current ISDS is strong. It includes for example extensive ISDS claimant use of provisions not requiring discrimination findings and frequent use in awards; express arbitral decisions stating that investment treaties provide preferential rights over those of investors in advanced economies; different outcomes in national court and ISDS cases in the same disputes; or constitutional court decisions finding treaties to be inconsistent with equal rights clauses due to broad scope for preferential readings of treaties under vague provisions. In light of these developments and in the absence of relevant treaty text, general assurances that investment treaties provide for only equal treatment for covered investors are being met with increasing scepticism, undermining the legitimacy of investment treaties.

It may become increasingly important to squarely address the issue of whether nationality-based preferences are desirable in future investment treaties. As a general matter, they are considered to distort competition and to be presumptively inefficient for overall social welfare.[20] Governments seeking to eliminate or limit preferential interpretations have a range of options. Some recent treaties have refocused on direct expropriation or discrimination without recourse to additional absolute standards that are used in challenges to non-discriminatory regulation. Other treaties provide for SSDS which gives governments both control and responsibility for interpretations advanced by claimants.[21] Decisions about whether to include [fair and equitable treatment (FET)-type] absolute protection provisions, their nature where applicable and the governing dispute settlement regimes for such claims are key decisions in this area.

Where preferences are desired, expressly setting out the policy intent to provide preferences for covered investment over other investment, the criteria for coverage and the expected duration of the preferences could provide more efficient outcomes, better targeting and improved coherence with other policies. It could align with broader efforts to make subsidies more transparent. The costs and benefits of preferences could be more easily compared with other possible subsidies for desired investment.

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18 EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties | European Commission (europa.eu) (May 2020).

19 See OECD, COVID-19 and Responsible Business Conduct (2020); OECD, OECD investment policy responses to COVID-19 (2020).

20 The inefficiency of preferences based on corporate nationality lies behind the broad support for national treatment and most-favoured nation provisions. Only a tiny proportion of decided ISDS cases have found nationality-based bias against foreign investors.

21 Claimant governments are discouraged from advancing overly expansive interpretations that could be used by other governments in claims in later cases.

5. A more flexible range of remedies and implementation mechanisms for a broader canvas of interests

The current remedy and implementation structure for integrated agreements is in evolution with multiple currents in play and this may continue to characterise future treaties. Governments are using a wider range of implementation and enforcement mechanisms, and more flexible approaches as they embrace a broader range of issues. Oversight of the implementation of new commitments in areas such as SOEs and greater transparency on subsidies will present additional challenging issues, and further innovative remedies and implementation may be needed. Some convergence between trade, investment and sustainable development chapter remedies and implementation is possible as special regimes for particular constituencies are increasingly questioned.

A number of characteristics have emerged from approaches in a number of recent treaties between major economies. A first characteristic is growing interest in using SSDS for investment disputes as well as trade disputes. As noted above, Brazil's investment facilitation model adopts this approach. More recently, the 2019 USMCA, also subjects most investment market access and protection disputes to the general SSDS regime applicable to trade cases rather than to ISDS. Recent EU treaties that include both market opening and protection from post-establishment discrimination provide that claims in both these areas are also subject only to SSDS.[22] The 2020 UK-Canada Trade Continuity Agreement incorporates the investment protection and SSDS provisions from the Canada-EU Comprehensive Economic and Trade Agreement (CETA), but not ISDS.

Second, recent major treaties have also given governments a greater role in deciding on remedies (and a lesser one for adjudicators). In the EU-Japan EPA and the 2020 Regional Comprehensive Economic Partnership (RCEP) for example, SSDS dispute settlement panels for trade, investment market access and investment protection cases are tasked with determining the facts and liability, but not remedies.[23] The USMCA SSDS regime also provides for government negotiations over an appropriate remedy in cases where a panel report finds a breach.[24] There is growing use of inter-governmental cooperation and committees to manage the relationship and its evolution. The RCEP provides for creation of a permanent Secretariat. Other treaties create a range of committees with regular meetings to address issues in particular areas.

Third, some recent major treaties reflect an apparent preference for non-pecuniary forward-looking trade remedies rather than damages, for investment as well as trade cases. The contemplated remedies in the event of a failure to rectify a non-conforming measure are framed as the suspension of benefits by the

22 See 2018 EU-Japan Economic Partnership Agreement (EPA), arts. 8.9(2), 8.9(2), 21(2); 2020 EU-China Comprehensive Agreement on Investment (CAI) (draft text following agreement in principle), Section II, arts. 4(1), 5(1), Section V, art. 2. The preliminary review here focuses on treaties between major economies, but some of the trends appear to be broader. Among the 17 known investment treaties concluded in 2020, two include investor-state arbitration while many others provide for SSDS. In some cases, further negotiations to attempt to achieve agreement on ISDS or investment protection are foreseen. See UNCTAD, International Investment Agreements Navigator.

23 EU-Japan EPA, arts. 21.13 (default terms of reference for panel are to "decide on conformity of the measure" with relevant provisions and to issue a report); RCEP, arts. 19.12(3) & (4). The panel under RCEP "may suggest ways in which the Responding Party could implement the findings and determinations".

24 If the governments cannot agree on a remedy within 45 days of the final report, a complaining government can unilaterally define retaliatory measures, subject to an equivalent effect constraint, through the suspension of benefits. The responding party can request the reconvening of the panel to consider whether the suspension of benefits is manifestly excessive or if the responding party has eliminated the non-conformity. USMCA, art. 31.19.

complaining Party. Damages do not appear to be at issue and would in any event result only from agreement between governments.[25]

Fourth, there is also a degree of convergence in the growing attention to the implementation in practice of sustainable development chapters.[26] Both the US and the EU have recently made clear that more effective enforcement of these chapters is a high priority. For example, the new EU Chief Trade Enforcement Officer is tasked with strengthening the enforcement of EU trade agreements including their sustainable development commitments. Some differences in approach remain.[27]

These varying developments bear some resemblance to the approaches to remedies and implementation for investment disputes that require adjudication in the Brazilian model and other treaties focused on investment facilitation. Both emulation of major treaties and the attractiveness of new models may lead to greater flexibility and innovation in remedies and implementation procedures as governments address a broader range of interests in future treaties.

6. Future investment treaty policy thinking in context – the challenge of climate change

Climate change is a defining challenge for government policy makers and our societies. As Michael Mann notes, "[w]hat was once largely perceived as an environmental threat is now viewed as an economic and national security threat".[28] Humans are currently generating the equivalent of roughly 55 billion tons per year of carbon dioxide.[29] Over 185 jurisdictions have now submitted their policies for climate action in their jurisdictions following the 2015 Paris Agreement[30]; overall, more than 110 have pledged carbon

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25 The narrower focus and SSDS structure can allow for faster proceedings. See, e.g., EU-China CAI, Section V, art. 7 (selection of tribunal members within 20 days from request for tribunal, using selection by lot from pre-existing government-designated rosters as necessary); id. Section V, art. 12(3) (tribunal to rule within maximum of 180 days from its constitution); USMCA, arts. 31.9, 31.17 (panel selected within 35-40 days; panel to issue final report within 210 days from its constitution unless disputing parties agree otherwise).

26 This term is used for convenience to refer to environment, labour, anti-corruption, gender, human rights and sustainable development provisions and chapters. Governments use different terminology. Governments and others have also underlined that more general provisions can also promote sustainable development.

27 Since 2007, the US has generally applied the general SSDS regime applicable to the chapters on trade issues to its chapters on the environment, labour and anti-corruption; it also seeks to permit public submissions to governments on compliance issues. EU sustainable development chapters provide for a softer implementation mechanism with consultations and expert reports to provide a neutral evaluation of claims, without provisions for the suspension of trade benefits, but with substantial public input.

28 See, e.g., Michael E. Mann, The new climate war: The fight to take back our planet (2021; Kindle ed.), p. 44; Michael Mann on the Politics of Global Warming, Financial Times (interview, 25 Feb. 2021).

29 Mann, The new climate war, supra, p. 166 (citation omitted).

30 The 2015 Paris Agreement was adopted by 196 Parties at COP 21 of the UNFCCC and it entered into force on 4 November 2016. It has been ratified or acceded to by 191 Parties. Its goal is to limit global warming to well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels. To achieve this long-term temperature goal, countries aim to reach global peaking of greenhouse gas emissions as soon as possible to achieve a climate neutral world by mid-century.

Implementation of the Paris Agreement requires economic and social transformation, based on the best available science. It works on a 5-year cycle of increasingly ambitious climate action carried out by countries. By 2020, countries are to submit their plans for climate action -- known as nationally determined contributions (NDCs) – that set out actions they will take (i) to reduce their Greenhouse Gas emissions in order to reach the goals of the Paris Agreement; and (ii) to build resilience to adapt to the impacts of rising temperatures. Countries are also invited to formulate and submit longer term strategies. There are important additional provisions on finance, technology and capacity-building among other issues. See The Paris Agreement | UNFCCC.

neutrality by 2050.[31] With the widely-accepted need to approximately halve emissions by 2030, and reach net zero by around the middle of the century, as noted above, there is growing momentum for action.

Recent events have accentuated the need for policy attention to climate change throughout government including in foreign and trade policy. Government support for fossil fuel investments abroad, for example, is subject today to intense scrutiny including in the business press and the international community. Policies are changing. For example, in July 2020, Japan's Environment Minister underlined that a government decision to rein in official support for coal-fired power plants in developing countries would mark a "turning point" in the country's climate change policy following earlier criticism.[32]

Major economies are now integrating climate action across all their foreign, security and trade policies. In January 2021, the Council of the EU (composed of all EU Member State Foreign Ministers) stressed that EU energy diplomacy will discourage further investments into fossil-fuel-based infrastructure projects in third countries, unless they are aligned with an ambitious climate neutrality pathway, and will support international efforts to reduce the environmental and greenhouse gas impact of existing fossil fuel infrastructure. The EU "will ensure that its trade policy and its trade agreements are consistent with its climate ambition,"; the coherent pursuit of external policy goals is identified as crucial for the success of the European Green Deal.[33] The new EU Trade Policy released in February 2021 makes sustainability an explicit and central pillar of its trade policy for the first time.[34]

In the United States, President Biden has announced a "whole-of-government approach to put climate change at the center of our domestic, national security, and foreign policy".[35] In an Executive Order aimed at tackling the climate crisis in the US and abroad, he committed the US government "to identify steps through which the United States can promote ending international financing of carbon-intensive fossil fuel-based energy while simultaneously advancing sustainable development and a green recovery".[36] Both the EU and the US will also continue to contribute to positive financial investments overseas, helping accelerate decarbonisation.

31 United Nations, The race to zero emissions, and why the world depends on it (Dec. 2020).

32 See, e.g., Toru Ishii and Mutsumi Mitobe, Koizumi: No new state funding for coal-fired plant technology, Asahi Shimbun (25 July 2020); Robin Harding, "Japan vows to slash financing of coal power in developing world: Environment minister says change of policy marks 'turning point' after years of criticism", Financial Times (13 July 2020).

Government action to promote the dissemination of green technologies abroad is also widely noted and evaluated. A Jan. 2019 report criticised China's support for coal plant projects abroad; more recently, green investment in the Belt and Road Initiative has expanded significantly even as support for coal projects also continues to grow. See, e.g., Christine Shearer, Melissa Brown & Tim Buckley, China at a Crossroads: Continued Support for Coal Power Erodes Country's Clean Energy Leadership (Institute for Energy Economics and Financial Analysis) (Jan. 2019) (noting up to US$35.9 billion in Chinese funding for 102GW of coal plant projects over 27 countries in total, accounting for over one-quarter of global coal-fired capacity under development outside China); Financial Times editorial board, "Japan takes a welcome step away from coal: It is time for China to follow suit and turn its rhetoric into action", Financial Times (20 July 2020); Christian Shepherd, China pours money into green Belt and Road projects: Renewables account for half of Beijing's energy investments in 2020 but coal share also grows, Financial Times (26 Jan. 2021).

33 See Council adopts conclusions on climate and energy diplomacy (25 Jan. 2021) (press release); Climate and Energy Diplomacy - Delivering on the external dimension of the European Green Deal (Jan 2021) (Council conclusions); see also Bruegel, The Geopolitics of the EU Green Deal (Jan. 2021) (report arguing that the EU Green Deal will "change the relationships between the EU and its neighbourhood and it will redefine Europe′s global policy priorities").

34 European Commission, An open, sustainable and assertive trade policy (europa.eu) (Feb. 2021). The European Commission has also proposed an "transatlantic green trade agenda" and suggested an EU-US summit in the first half of 2021.

35 Remarks by President Biden Before Signing Executive Actions on Tackling Climate Change, Creating Jobs, and Restoring Scientific Integrity (27 Jan. 2021).

36 Executive Order on Tackling the Climate Crisis at Home and Abroad | The White House, s. 102(h) (27 Jan. 2021).

The integration of climate policy into trade policies presents important opportunities and challenges for future investment treaties. The specialisation and fragmentation of international law in recent decades has meant that there has been relatively little express overlap between agreements on climate change and trade and investment agreements. There are now a range of proposals including in work commissioned by business groups.

For example, a recent Economist Intelligence Unit report commissioned by the International Chamber of Commerce addresses "Climate change and trade agreements: Friends or foes?[37] The report considers that "[d]espite the potential for trade-climate synergies, the weight of historical evidence is heavy in the other direction". The report reviews older and more recent regional and bilateral trade agreement practice on seven important potential policies to address climate change: a mix of market opening and facilitating measures, removal of harmful market distortions and protection of policy space including to facilitate national and regional "first movers". Most of the issues are relevant to investment policy[38]; at the same time, there is limited attention in the report to existing investment-specific treaty provisions.

The report notes that recent treaties such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) or CETA have paid more attention to climate and environmental issues, but concludes that "even recent agreements largely fail to support the seven opportunities. Most clauses are based on cooperation, consultation, and best endeavour. Specific or immediate actions are lacking. Transformative policies, such as border adjustment carbon taxes, are largely ignored".[39]

A recent report from the International Institute for Environment and Development (IIED) focuses more specifically on investment protection treaties, ISDS and climate policy.[40] The IIED report is the first to quantify the proportion and value of the fossil fuel industry and associated infrastructure that is covered by investment treaties providing for ISDS. It includes in particular a new data set on 257 foreign-owned coal-fired power stations, finding that at least three-quarters of them are covered by ISDS provisions, including 51 under the ECT.[41] As The Economist notes in a recent article discussing the report, "the value of stranded assets in the global power sector alone between 2016 and 2050 could be as much as $1.8trn,

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37 Economist Intelligence Unit, Climate change and trade agreements: Friends or foes? (2019). The ICC commissioned it as part of the ICC World Trade Agenda, an initiative in partnership with Qatar Chamber of Commerce and Industry. The EIU bears sole responsibility for the content of the report. The findings and views expressed do not necessarily reflect the views of ICC or Qatar Chamber of Commerce and Industry. The report reflects input from trade and environmental experts. (listed at p. 2).

38 See, e.g., CETA art. 24.9 (noting that the Parties' efforts to reduce non-tariff barriers on environment goods and services facilitate both trade and investment, and requiring special attention to climate change mitigation and renewable energy in this area).

39 See Economist Intelligence Unit, Climate change and trade agreements: Friends or foes?, supra, p. 6.

A 2020 non-paper by France and the Netherlands calls for the Paris Agreement and its legally binding obligations to be included as an "essential element" in comprehensive and future trade and political agreements, including those being currently negotiated and those that are renegotiated. (In EU practice, qualification as an "essential element" generally explicitly allows the Parties to suspend the trade agreement in the event of breach of that element.) They also call for more ambitious trade and sustainable development chapters including commitments by the Parties to cooperate on climate policies such as carbon markets. Non-paper from the Netherlands and France on trade, social economic effects and sustainable development (2020).

40 See Lorenzo Cotula and Kyla Tienhaara, "Raising the cost of climate action: ISDS and compensation for stranded fossil-fuel assets" (IIED 2020).

41 The report refers to the foreign parent of the plant in evaluating ISDS coverage. The coverage analysis is based on the assumption that where a treaty-covered parent holds its interest in the plant through a local subsidiary, an ISDS tribunal would permit the parent to claim for reflective loss (e.g. injury to a shareholder due to the termination of operating company coal operations). Actual coverage of claims for reflective loss by such parent entities and other covered shareholders would generally depend on treaty interpretation. The paper notes that expansive reflective loss interpretations could also generate additional ISDS coverage, such as for higher-tier indirect shareholder entities.

and $3trn-7trn in the upstream oil-and-gas business".[42] The IIED report indicates that proper investment treaty approaches will be of key importance to creating the necessary incentives for the energy transition.

NDCs under the Paris Agreement primarily focus on policies to reduce emissions in the domestic sphere. But decisions by leaders to integrate climate action across foreign and trade policy – and the necessity to do so if global emissions are to decline as necessary – means that it is urgent to consider how treaties addressing investment can contribute to and reinforce climate policies. Conversely, it is vital to identify aspects of existing treaties and interpretations that may unduly interfere with such policies, and to promptly address them in effective reforms.[43]

The OECD has helped governments integrate environmental and other policies for many years and the work has accelerated recently. For example, governments, stakeholders and experts are developing an FDI Qualities Policy Toolkit at the OECD, drawing on a broad range of expertise. The Toolkit will assist governments in better combining investment policies and institutions with other sustainable policies. Together with extensive OECD work on green growth, new approaches to economic challenges and transitions to low-carbon, it provides valuable inputs for consideration of future investment treaties and climate policies.

7. Conclusion

The broadening of interests potentially at issue in investment treaty policies in the future make it important for policy makers to consider a wider range on inputs in making policy. The long-standing work at the OECD by governments, stakeholders and experts on the full range of interests at issue makes it a valuable forum for wide-ranging discussions about current and future opportunities and challenges, and how best to address them in treaties and other policies. Investment policy makers can benefit from access to broad expertise across practically all areas of government policy.

Further discussions at the OECD on future investment treaties can consider the varying policy challenges and approaches outlined above in more detail in an inclusive dialogue. They can offer governments, stakeholders and experts an opportunity to consider how best to ensure that treaties addressing investment and other policies reinforce each other and contribute to sustainable development.

42 The Economist, How some international treaties threaten the environment: Investor-state dispute-settlement provisions are blamed for impeding government action (5 Oct. 2020).

43 In the trade field, governments at the WTO launched structured discussions in November 2020 on trade and environmental sustainability, underlying the urgent need for action including on climate change and biodiversity. See Communication on Trade and Environmental Sustainability, WT/CTE/W/249 (17 Nov. 2020).

Annex A. OECD Working Papers on International Investment

www.oecd.org/investment/working-papers.htm

2021

2021/2 Business responsibilities and investment treaties

2021/1 Assessing the effectiveness of currency-differentiated tools: The case of reserve requirements

2020

2020/1 The Most Favoured Nation and Non-Discrimination Provisions in international trade law and the OECD Codes of Liberalisation

2019

2019/2 The broad policy toolkit for financial stability: Foundations, fences, and fire doors

2019/1 The determinants of Foreign Direct Investment: Do statutory restrictions matter?

2018

2018/1 Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence

2017

2017/5 Adjudicator Compensation Systems and Investor-State Dispute Settlement

2017/4 Have currency-based capital flow management measures curbed international banking flows?

2017/3 Addressing the balance of interests in investment treaties: The limitation of fair and equitable treatment provisions to the minimum standard of treatment under customary international law

2017/2 The balance between investor protection and the right to regulate in investment treaties: A scoping paper

2017/1 Foreign direct investment, corruption and the OECD Anti-Bribery Convention

2016

2016/3 State-to-State dispute settlement and the interpretation of investment treaties

2016/2 Investment policies related to national security

2016/1 The legal framework applicable to joint interpretive agreements of investment treaties

2015

2015/3 Currency-based measures targeting banks - Balancing national regulation of risk and financial openness

2015/2 Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World

2015/1 The Policy Landscape for International Investment by Government-controlled Investors: A Fact Finding Survey

2014

2014/3 Investment Treaties and Shareholder Claims: Analysis of Treaty Practice

2014/2 Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law

2014/1 Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey

2013

2013/4 Temporal validity of international investment agreements: a large sample survey of treaty provisions

2013/3 Investment treaties as corporate law: Shareholder claims and issues of consistency

2013/2 Lessons from Investment Policy Reform in Korea 2013/1 China Investment Policy: an Update

2012

2012/3 Investor-state dispute settlement: A scoping paper for the investment policy community

2012/2 Dispute settlement provisions in international investment agreements: A large sample survey

2012/1 Corporate greenhouse gas emission reporting: A stocktaking of government schemes

2011

2011/2 Defining and measuring green FDI: An exploratory review of existing work and evidence

2011/1 Environmental concerns in international investment agreements: a survey

2010

2010/3 OECD's FDI Restrictiveness Index: 2010 Update

2010/2 Foreign state immunity and foreign government controlled investors

2010/1 Intellectual property rights in international investment agreements

2006

2006/4 OECD's FDI regulatory restrictiveness index: Revision and extension to more economies

2006/3 Interpretation of the Umbrella Clause in Investment Agreements

2006/2 Investor-State Dispute Settlement in Infrastructure Projects

2006/1 Improving the System of Investor-State Dispute Settlement: An Overview

2005

2005/3 Corporate Responsibility Practices of Emerging Market Companies - A Fact-Finding Study

2005/2 Multilateral Influences on the OECD Guidelines for Multinational Enterprises

2005/1 Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures

2004

2004/6 Mobilising Investment for Development: Role of ODA - The 1993-2003 Experience in Vietnam

2004/5 ODA and Investment for Development: What Guidance can be drawn from Investment Climate Scoreboards?

2004/4 Indirect Expropriation and the Right to Regulate in International Investment Law

2004/3 Fair and Equitable Treatment Standard in International Investment Law

2004/2 Most-Favoured-Nation Treatment in International Investment Law

2004/1 Relationships between International Investment Agreements

2003

2003/2 Business Approaches to Combating Corrupt Practices

2003/1 Incentives-based Competition for Foreign Direct Investment: The Case of Brazil

2002

2002/2 Managing Working Conditions in the Supply Chain: A Fact-Finding Study of Corporate Practices

2002/1 Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses

2001

2001/6 Codes of Corporate Conduct: Expanded review of their contents

2001/5 The OECD Guidelines for Multinational Enterprises and other corporate responsibility instruments
2001/4 Public policy and voluntary initiatives: What roles have governments played?

2001/3 Making codes of corporate conduct work: Management control systems and corporate responsibility

2001/2 Corporate Responsibility: Results of a fact-finding mission on private initiatives

2001/1 Private Initiatives for Corporate Responsibility: An Analysis

2000

2000/5 Recent trends, policies and challenges in South East European countries

2000/4 Main determinants and impacts of FDI on China's economy

2000/3 Lithuania: Foreign Direct Investment Impact and Policy Analysis

2000/2 Investment Patterns in a Longer-Term Perspective

2000/1 Bribery and the business sector: Managing the relationship

1999

1999/3 Rules for the Global Economy: Synergies between Voluntary and Binding Approaches

1999/2 Deciphering Codes of Corporate Conduct: A Review of their Contents

1999/1 Southeast Asia: the Role of FDI Policies in Development 1998 1998/1 Survey of OECD work on international investment